acre.[3] Another cause of the destruction of our forests, and the only one that is not due directly to man, is by insects. "It has been determined that in this country certain species of insects are the direct or primary cause of the death of trees of all ages, and that from time to time they multiply to such an extent as to take the character of a destructive invasion, resulting in the death of a large proportion of the timber of certain species over many square miles."[4] The different methods of working the forests for the products, exclusive of the timber itself, such as for turpentine, tar, and pitch, which are known as "naval stores,"[5] and the cutting down of trees solely for their bark to be used in tanning operations, have been the cause of the destruction of great forest areas. These wasteful methods are, to a certain extent, going on at the present time, but in many localities a more economical method is being pursued, as it has been ascertained that these products could be secured by the more modern scientific methods without felling the trees.[6]

[3] See A Primer of Forestry, Bulletin No. 24, Division of Forestry, U. S. Dept. of Agriculture.

See, also, Use Books issued each year by the Forest Service, of the same Department; Grazing and Floods, by Robert V. R. Reynolds, 1911, Forest Examiner, Bulletin No. 91, Forest Service, U. S. Dept. of Agriculture; Range Management, by J. S. Cotton, Assistant in Range Investigations, Yearbook of Dept. of Agriculture for 1906, pp. 225-238; Preliminary Report of the Inland Waterways Commission, 60th Congress, 1st Session, Document No. 325; Grazing on the Public Lands, Extracts from the Report of the Public Lands Commission, Senate Document No. 189, 58th Congress, 3d Session, Bulletin No. 62, Forest Service, U. S. Dept. of Agriculture.

[4] Waste and Reduction of Timber Supplies Caused by Insects, and Methods of Prevention and Control, by A. D. Hopkins, in charge of forest insect investigations, Bureau Entomology, U. S. Dept. of Agriculture, Vol. 2, pp. 469-497, Report National Conservation Commission, 1909, in which it is estimated that by the Southern pine beetle alone, in an area designated in the southeastern portion of the country, in over 75,000 square miles, a large percentage of the mature and small trees of the various species of pine and spruce were killed.

[5] Conservative Turpentining, by Geo. B. Sudworth, U. S. Forest Service, Vol. 2, pp. 498-511, Report National Conservation Commission, 1909; The Analysis of Turpentine by Fractional Distillation with Steam, by William C. Geer, Expert, Cir. No. 152, Forest Service, U. S. Dept. of Agriculture.

[6] Forest Products, by R. S. Kellogg, U. S. Forest Service, Vol. 2, p. 201, Report National Conservation Commission, 1909; Conservative Logging, by Earle N. Clapp, Chief of Management of Forest Service of U.

Another great cause of the destruction of the present forests in the United States is the annual clearing of forest lands for agricultural purposes. Other causes of destruction may be remedied or prevented to a certain degree, but this is a permanent destruction. "The greatest and most permanent factor in reducing the annual growth and future supply of timber in the United States has been the necessary clearing of forest producing lands for cultivation."[7] There are a number of other minor causes which contribute more or less to the annual destruction of our forests, which are unnecessary to discuss. And, from all causes taken together, it may be conservatively stated that wood amounting to four times the annual growth is being destroyed each year. There are various methods by which this can be remedied, and these must be taken advantage of at an early day to the fullest possible extent, and thus prevent the annual exhausting of our capital of wood material. It is not the purpose of this work to discuss these subjects, but they will be discussed in a subsequent work already largely written by the author, which work will be published at an early date.[8] In the meantime we will let this subject rest with the citation of some of the authorities upon the subject of rehabilitation of our forest area in our foot notes.[9]

S., Vol. 2, p. 517, same Report; Utilization of Wood Waste by Chemical and Other Means, by H. S. Bristol and L. F. Hawley, U. S. Forest Service, Vol. 2, p. 651, same Report.

[7] Reduction of Timber Supply Through the Abandonment or Clearing of Forest Lands, by W. B. Greeley, U. S. Forest Service, Vol. 2, pp. 633-644, Report National Conservation Commission, 1909.

[8] See Kinney on Forests, Forestry, and Forest Laws.

[9] See the authorities cited in the previous notes in this chapter.

See, also, Taxation of Timber Lands, by Fred Rogers Fairchild, Ph. D., Yale University, Vol. 2, pp. 581-632, Report National Conservation Commission, 1909; Wood Preservation, by W. F. Sherfesee and H. F. Weiss, U. S. Forest Service, Vol. 2, pp. 658-667, same Report; Forest Planting, by A. S. Peck, U. S. Forest Service, Vol. 2, pp. 668-686, same Report; Past and Present Prices of Forest Products, by H. S. Sackett, U. S. Forest Service, Vol. 2, pp. 748-758, same Report; Rate of Forest Growth, by E. A. Ziegler, U. S. Forest Service, Vol. 2, pp. 203-269, same Report; Methods of Increasing Forest Productivity, by E. Carter, U. S. Forest Service, Vol. 2, pp. 270-279, same Report; Economics of Forestry, Fernow, 1902; Aspects of the Earth, Shaler, 1890; The Earth as Modified by Human Action, Marsh, 1884; A Primer of Forestry, Parts 1 and 2, by Gifford Pinchot, Forester, Bulletin No. 24, Division of Forestry, U. S. Dept. of Agriculture; The Use of the National Forests, Forest Serv-

Many of the bulletins and articles cited in our notes were written by men of world wide renown, who have made a study of practical

ice of the U. S. Dept. of Agriculture; Forestry in the Public Schools, by Gifford Pinchot, 1907, Circular No. 130, Forest Service, U. S. Dept. of Agriculture; A Primer of Forestry, by Gifford Pinchot, 1903, Farmers' Bulletin No. 173, U. S. Dept. Agriculture; Arbor Day, by Gifford Pinchot, 1907, Circular No. 96, Forest Service, same Dept.; Practical Assistance to Tree Planters, by Gifford Pinchot, 1907, Circular No. 23, Forest Service, same Dept.; The Forest Service, by Gifford Pinchot, 1907, Circular No. 36, Forest Service, same Dept.; Forestry in the Public Schools, by Hugo A. Winkenwerder, Forest Assistant, 1907, Circular No. 130, Forest Service, same Dept.; The Practice of Forestry by Private Owners, by Henry S. Graves, Superintendent of Working Plans of the Division of Forestry, Yearbook Dept. of Agriculture for 1899, pp. 415-428; Notes on Forest Problems, by Gifford Pinchot, Yearbook of Dept. of Agriculture for 1898, pp. 181-192; The Relation of Forests to Stream Flow, by James W. Toumey, Collaborator, Bureau of Forestry, Yearbook of Dept. of Agriculture for 1903; Use of Dead Timber in the National Forests, by E. R. Hodson, Circular No. 113, Forest Service, same Dept.; Suggestions for Forest Planting on the Semi-Arid Plains, by Gifford Pinchot, Circular No. 99, Forest Service, same Dept.; Practical Forestry on a Spruce Tract in Maine, by Austin Cary, 1907, Circular No. 131, Forest Service, same Dept.; What Forestry Has Done, by Treadwell Cleveland, Jr., Expert, 1909, Circular No. 140, Forest Service, same Dept.; Suggestions to Woodlot Owners in the Ohio Valley Region, by Samuel J. Record, Forest Assistant, 1908, Circular No. 138, Forest Service, same Dept.; Forest Planting on the Northern Prairies, by James M. Fetherolf, Inspector, 1908, Circular No. 145, Forest Service, same Dept.; The Preservative Treatment of Loblolly Pine Cross-Arms, by W. F. Sherfesee, Chief, Office of Wood Preservation, 1908, Circular No. 151, Forest Service, same Dept.; Native and Planted Timber of Iowa, by Hugh P. Baker, Forest Assistant, 1908, Circular No. 154, Forest Service, same Dept.; What the National Forest Service Means, speech of Hon. Albert J. Beveridge of Indiana, in the Senate of the United States, Feb. 22, 1907, published by the U. S. Forest Service; Exhibit of Tree Planting on a Model Prairie Farm at the Louisiana Purchase Exposition, by Gifford Pinchot, Forester, Circular No. 29, Bureau of Forestry, U. S. Dept. of Agriculture; Exhibit of a Forest Nursery at the Louisiana Purchase Exposition, by Gifford Pinchot, Forester, Circular No. 31, same as last above; Progress Report on the Strength of Structural Timber, by W. Kendrick Hatt, Ph. D., Civil Engineer in the Bureau of Forestry, 1904; Forest Extension in the Middle West, by William L. Hall, Assistant Superintendent of Tree Planting, Division of Forestry, Yearbook Dept. of Agriculture for 1900, pp. 145-156; Forest Preservation and National Prosperity, portions of addresses delivered at the American Forest Congress, Washington, Jan. 2 to 6, 1905, by President Roosevelt, Ambassador Jusserand of France, U. S. Secretary of Agriculture Wilson, and others, Circular No. 35, Forest Service, U. S. Dept. of Agriculture; Forestry and the Lumber Supply, by

forestry in this and other countries; all write from practical experience and observation.[10]

§ 44. General physical effects of forests upon a country—Climate.—Climate is the general condition of a place in relation to the various phenomena of the atmosphere, as to temperature, moisture, etc., especially as they affect animal life or man. In order to ascertain the climate of any particular locality, we must determine: First, the distance of the place from the equator; second, its elevation above the sea; third, the distribution of the land and water of the locality; fourth, the protection of the land, whether flat, hilly, or mountainous, and the character of the surface covering; fifth, the prevailing winds of the locality; and, sixth, how the locality is affected by the moisture in the atmosphere. Then, again, in order to tell how the forests affect the climate of a particular locality, it is necessary to determine which, if any, of these elements the forests affect, and how many, if they affect more than one, and to what degree. It is not the intent of this work to go into an extended discussion of the intricate subject as to the exact physical effect that the forests of a country have upon its climate. A great deal has been written upon this subject that can not be sustained; and many of the writings seem to be based upon the fact as to whether or not the writers were for the protection of the forests, or were in favor of their denuda-

Theodore Roosevelt, R. L. McCormick, and Gifford Pinchot, 1903, Circular No. 25, Bureau of Forestry, same Dept.; The Report of the Forester for 1906, by Gifford Pinchot, Forester, Annual Report Dept. of Agriculture for 1906, pp. 5-43; Progress of Forestry in 1906, by Quincy R. Craft, Forest Service, Yearbook Dept. of Agriculture for 1906, appendix, pp. 3-13; Practicability of Forest Planting in the United States, by William L. Hall, Chief of Division of Forest Extension, Bureau of Forestry, Yearbook Dept. of Agriculture for 1902, pp. 133-144; Methods of Increasing Forest Productivity, by E. E. Carter, Assistant Forester, 1909, Circular No. 172, Forest Service, same Dept.; Practical Assistance to Tree Planters, Gifford Pinchot, Forester, Circular No. 22, Forest Service, same Dept.; Exhibit of Forest Planting in Woodlots at the Louisiana Purchase Exposition, by Gifford Pinchot, Forester, Circular No. 30, Bureau of Forestry, same Dept.; The Appalachian Forests, a National Question, by Hon. Curtis Guild, Jr., President of the American Forestry Association, 1910, Bulletin No. 1.

See, also, *American Forestry*, published monthly by the American Forestry Association, Washington, D. C.

[10] See also, authorities cited under the effects of forests and their denudation, Secs. 54-57.

tion, which is usually based upon some personal interest in cutting them down or otherwise destroying them. But from a somewhat careful study of the subject, we have come to the conclusion that the existence or non-existence of forests in a certain section of a country has a direct influence upon its climate in respect to the temperature and humidity of the atmosphere, the evaporation of water, and the rainfall. As to what that influence, in our opinion, is, without going into an elaborate discussion of the various phenomena causing the same, but leaving that question to those who have made a scientific study of the subject, we will simply state our conclusions, and make reference to some of the authorities, for the benefit of those who may desire to pursue the subject further.[1]

As to the effect of the forests upon the hot climate of India, it is said: "The influence of the forests on the climate of the country and the fertility of the soil is of special interest in India. As the forests are dependent for existence on the water supplied by the precipitation, by percolation, or by inundation, so are they locally responsible, in India even more than in the more temperate countries of the West, not only for the storage of rainfall in the soil, given off subsequently by gentle flow, but also for the supply, by transpiration from the foliage, of moisture to the air."[2] And, as we shall see, the influence of forests upon the climate of a country has more or less to do with their influence upon the stream flow of the country, either directly or indirectly, which is the main subject for discussion in this chapter.

§ 45. Influence of forests upon temperature.—The tendency of both the forest cover and the forest floor is to reduce the extremes of high and low temperature of the forest itself and the surrounding country in about the same manner as does a sheet of water. In

1 See following sections, Nos. 45-53.

2 Imperial Gazetteer of India, Simla, 1903, Vol. 3, Chap. 2, p. 3; data furnished to the author by Mr. L. M. Jacob, C. S. I., Secretary to the Government of India, Public Works Department.

One of the best works upon this subject that has come to the author's attention is that of "Notes on the Influence of Forests on the Storage and Regulation of the Water Supply," by S. Eardley-Wilmot, Inspector General of Forests to the Government of India, Calcutta, 1906, Forest Bulletin No. 9. In this work the subject is fully discussed from every phase.

other words, the extremes of heat and cold are modified by the influence of forests. Many observations and experiments have been made in Europe upon this point, especially in Austria, Bavaria, and Würtemberg, and some few have been made in this country.[1] The effect of forests on the temperature of the air which surrounds them is of importance in that a low temperature encourages the precipitation of moisture in the air. Distinguished scientists, such as Humboldt, held that forests reduced the temperature of the air by preventing the heating of the soil by the solar rays, by vapor given off by the leaves, and by the nocturnal radiation from the large extent of the foliage; but it is only in comparatively recent years, from 1866, that careful observations were commenced in France, Germany, Austria, Switzerland, and other countries and by these surmise was reduced to a certainty.[2] In Austria, a series of observations were made by a line of stations beginning in the center of a large forest and extending step by step into the open country. All of these observations tended to

1 Economics of Forestry, Fernow, 1902, pp. 63-70; The Earth as Modified by Human Action, Marsh, pp. 170-177; Becquerel, Des Climats et des Sols Boises, pp. 139-141; Die Physikalischen Einwirkungen des Waldes auf Luft, Ebermayer, Aschaffenberg, 1873; Wald, Klima und Waser, Lorenz, München, 1878; Die Klimen Die Erde, Woeickof, Jena, 1887; Die Beteutung und Wishtogkeit des Waldes, Loffelholz-Colburg, Leipzig, 1872; Etudes sur l'Economie Forestiere, Calve, p. 24; Country Life in Piedmont, Gallenga, p. 24: Der Wald, Bossmassler, p. 158 *et seq.;* Memoria sur Boschi del Lombardia, Meguscher, p. 45; Cours Elementaire de Culture des Bois, Lorenz; Le Alpi che cingono l'Italia, Torino; A Primer of Forestry, by Gifford Pinchot, Forester, 1905, Part 2, pp. 56-62, Bulletin No. 24, Division of Forestry, U. S. Dept. of Agriculture; The Timber of the Edwards Plateau of Texas: Its Relation to Climate, Water Supply, and Soil, by William L. Bray, Collaborator, Bureau of Forestry, 1904, Bulletin No. 49, Bureau of Forestry, U. S. Dept. of Agriculture; The Diminished Flow of the Rock River in Wisconsin and Illinois and Its Relation to the Surrounding Forests, by G. Frederick Schwarz, Field Assistant, Bureau of Forestry, Bulletin No. 44, Bureau of Forestry, same Dept.; Surface Conditions and Stream Flow, by Wm. L. Hall, Assistant Forester, and Hu Maxwell, Expert, 1910, Circular No. 176, Forest Service, same Dept.; The Relation of Forests to Stream Flow, by James W. Toumey, Collaborator, Bureau of Forestry, Yearbook of Dept. of Agriculture for 1903, pp. 279-288.

2 See Notes on the Influence of Forests on the Storage and Regulation of the Water Supply, by S. Eardley-Wilmot, Inspector General of Forests to the Government of India, 1906, Calcutta.

show that the influence of the forests upon the temperature was less and less the further they were made away from the forests. Therefore, should the forests of this country be destroyed, the complaint here will be similar to that of the Agricultural Society of France, after the forests of that country had been partially destroyed: "The winters have become severer, and the summers drier and hotter."[3]

As to their effect in the hot climate of India, it is said: "In those vast deciduous forests of Upper India where the leaf flush occurs in the early hot weather, the effect of the rapid unfolding of the new foliage in reducing the temperature is so marked as to be at once perceptible, and indeed these areas continue, so long as the leaves retain their vigor, cooler than the surrounding country."[4]

§ 46. **Influence of forests upon humidity.**—Humidity of the atmosphere is the amount of moisture contained in it. Relative humidity is the amount of vapor actually in the air, expressed as so much per cent of all the air can hold at the same temperature. It is greater in the forests and in the country in close proximity than it is further away. The amount of water that the air can hold changes when the temperature changes, and the cooler the air the less moisture it can hold.

According to observations made in different parts of Europe and in this country the average humidity is greater in the forest by from three to ten per cent than it is in sections where the influence of the forests is not felt. From the authorities upon the subject there seems to be a sort of reciprocal relation between the forests and humidity. Greater forests grow in climates where the humidity is great; and, upon the other hand, the forests themselves increase the humidity. With the loss of forest influence and with the rays of the sun pouring directly upon the earth the average humidity of the air is greatly lessened.[1] The effect of the

[3] Economics of Forestry, Fernow, p. 61.

[4] Imperial Gazetteer of India, 1903, Vol. 3, Chap. 2, p. 3.

[1] The Earth as Modified by Human Action, Marsh, 1885, pp. 177-179; Comptes rendus de L'Academie des Sciences, Mengotti, 1866; Etudes sur les Torrents des Hautes Alpes, Surell, 1884, p. 98; Economics of Forestry, Fernow, 1902, pp. 437-439; Aspects of the Earth, Shaler, 1890, pp. 271-295; The Diminished Flow of the Rock River in Wisconsin and Illinois,

forests upon the evaporation of the precipitation which falls upon the earth in the form of rain, hail, snow, and dew, is to detain more of it on those portions of the earth which are sheltered by trees. It does this partly by tending to increase the rainfall, but its effect in lessening the loss of water through evaporation is probably much more important.[2] In fact, the effect is similar to that of irrigated fields in tending to increase humidity, discussed in a previous section, only it is in a much larger degree.[3]

§ 47. Influence of forests upon the rainfall.—There have been a great many discussions by scientists as to whether or not forests have an influence upon the precipitation upon the forested area and the surrounding country. Many experiments have been made in various parts of Europe and in this country which have sought to solve this problem. From an examination of these authorities upon this subject, we have come to the conclusion that forests do increase the precipitation of a country; but to what extent, the authorities are in hopeless confusion. This increase in the precipitation is caused by forests in two ways: First, from moisture that comes from outside of the forested area, as from moisture-laden clouds from the sea coming in contact with the cooler atmosphere above the forests. There is no question but that

and Its Relation to the Surrounding Forests, by G. Frederick Schwarz, 1903, Bulletin No. 44, Bureau of Forestry, U. S. Dept. of Agriculture, pp. 15-17; The Timber of the Edwards Plateau of Texas: Its Relation to Climate, Water Supply, and Soil, by William L. Bray, Collaborator, Bureau of Forestry, 1904, Bulletin No. 49, Bureau of Forestry, same Dept.; The Relation of Forests to Stream Flow, by James W. Toumey, Collaborator, Bureau of Forestry, Yearbook of Dept. of Agriculture for 1903, pp. 281-283; The Relation of Rainfall to Run-off, Water-Supply and Irrigation Paper No. 80, U. S. Geological Survey; A Primer of Forestry, by Gifford Pinchot, Forester, 1905, Bulletin No. 24, Part 2, Bureau of Forestry, U. S. Dept. of Agriculture, pp. 62-66.

See, also, Economie Forestiere, by M. Huffel, Professor of the Ecole National des Eaux et Forets of France, 1904; Notes on the Influence of Forests on the Storage and Regulation of the Water Supply, by S. Eardley-Wilmot, Inspector General of Forests to the Government of India, Calcutta, 1906.

2 A Primer of Forestry, by Gifford Pinchot, Forester, Bulletin No. 24, Bureau of Forestry, U. S. Dept. of Agriculture, p. 63.

3 For the effect of irrigation upon climate, see Sec. 44.

See, also, Imperial Gazetteer of India, Simla, 1903, Vol. 3, Chap. 2, p. 3.

precipitation occurs when moisture-laden air is cooled to below dew point. Now, then, if the air in the woods is cooler than a saturated current sweeping over them from the outside, it must produce precipitation, which will fall upon the forests or at a greater or lesser distance from them. The second cause is from the moisture which rises from the inside of the forests until it reaches a cooler stratum of air, when it is precipitated back to the earth, in what is called the secondary rainfall. This latter is similar to, but in a larger degree, the effect of irrigated fields upon the rainfall of that particular section of the country.[1] By the destruction of the forests the two causes of the rainfall mentioned above will be removed. The moisture-laden clouds from the sea may pass on to other parts of the country. And the moist air from the woods will not exist, because there are no woods.

§ 48. **Influence of forests upon fallen precipitation.**—Whatever doubt there may be in the minds of some about the influence of forests upon the climate, discussed in the previous sections,[1] there can be no doubt in the minds of those who have investigated the subject with any degree of intelligence as to the influence of forests upon the precipitation, either in the form of rain, snow,

1 For the effect of irrigation upon the rainfall, see Secs. 48-53.

See, also, the authorities cited in the two preceding Secs., Nos. 45, 46.

See, also, The Earth as Modified by Human Action, Marsh, 1885, pp. 189-195; Economics of Forestry, Fernow, 1902, pp. 69, 70, 281, 438, 439; Aspects of the Earth, Shaler, 1890, pp. 273, 274, 295; The Relation of Rainfall to Run-off, by George W. Rafter, 1903, Water-Supply and Irrigation Paper No. 80, U. S. Geol. Survey.

It is said by Mr. Wilson that: "The British officials (in India) generally hold that the effect on forest denudation on rainfall is doubtful and much disputed." From Irrigation in India, 2d Ed. 1903, by Herbert M. Wilson, Water-Supply and Irrigation Paper No. 87, U. S. Geol. Survey, p. 45.

See, also, W. T. Thornton in Journal of Society of Arts, London, 1876, Vol. 26, p. 249.

But see for the report of the Government of India upon the effect of forests upon the climate generally, as contained in the Imperial Gazetteer of India, Simla, 1903, Vol. 3, Chap. 2, p. 3.

"Other observations undertaken in other countries serve to show that the rainfall increases with the extension of the forest area."—Notes on the Influence of Forests on the Storage and Regulation of the Water Supply, by S. Eardley-Wilmot, Inspector General of Forests to the Government of India, Forest Bulletin No. 9, Calcutta, 1906, p. 12.

1 See Secs. 44-47.

hail, or dew, after it has fallen upon the earth. The rainfall, and by this we mean all four kinds of precipitation mentioned, under natural conditions, escapes in five different ways, and by a combination of all five, as follows: Evaporation, transpiration, surface run-off, seepage run-off, and deep seepage run-off. The most effective natural agent in regulating the disposition of the precipitation after it has fallen upon the earth is the forest. With the loss of the forest not only is this influence in this respect lost, but it is also followed by many disastrous results to the immediate section of the country where they have been destroyed, and also to the portions lying along the lower reaches of the rivers and streams of the country. The preservation of our forests have, therefore, become a great National economic question, that either directly or indirectly affects every portion of the country.

As we shall see in the following sections, the fact as to whether or not these forests in a country exercise their influence upon the fallen precipitation, has everything to do with the flow of the streams of that country. In the following sections we will first discuss the influence which the forests have upon the fallen precipitation in the order named above,[2] and then discuss some of the results of forest denudation.[3]

§ 49. Influence of forests upon fallen precipitation—Evaporation.—Evaporation and transpiration are frequently classed together as evaporation. In the irrigated portions of the West they are sometimes known as the "fly-off."[1] To be sure the moisture from the transpiration of plants is evaporated from their leaves. But, as far as these subjects apply to plant life, there is a distinction between them. In the case of transpiration, the moisture is received from the ground and is evaporated from the leaves only after it has passed through the fibrous growth of the plants. While evaporation, as far as our discussion is concerned, is that moisture which is taken from the surface of the leaves and plants having in some form been precipitated thereon from the clouds.[2]

[2] See Secs. 49-53.

See the subject of Precipitation in article on Water Circulation and Its Control, by Bailey Willis of the U. S. Geol. Survey, Vol. 2, p. 688, Report National Conservation Commission, 1909.

[3] See Secs. 54-57.

[1] See Secs. 2, 26-28.

[2] For transpiration, see Sec. 50.

For transpiration and evaporation from irrigated fields, see Secs. 26-28.

By evaporation then is meant the moisture which passes into the atmosphere in the form of vapor from water or soil surfaces, and the objects resting upon such surfaces, including forests and other forms of vegetation. Under the best of conditions, a very large portion of the rainfall upon the earth is returned to the atmosphere through evaporation. The direct effect of the forests upon this great movement of water is to detain more of it on those portions of the earth which are sheltered by the trees. The colder and moister air of the forest has less capacity for taking up water vapor than has that of the open country. Evaporation is caused by the direct rays of the sun and by the winds. The crowns of the trees of a forest catch some of the rainfall without its touching the ground. This is almost immediately evaporated. Many observations have been made in Europe and in this country, the result of which is not less than 8 per cent of the total precipitation is held back from the ground by the tops of the trees, and this is almost immediately returned to the atmosphere after the rainfall has ceased.[3]

Upon the other hand, evaporation from the soil, both in the open and in the forest, takes a longer period of time than from the leaves of the trees or the forest cover. Then, again, the period of evaporation is much longer from under the forest cover and from their soil than in the open. This is so because the trees and the forest floor protect the moisture from both the wind and the sun. This protection is from the trees acting both as a shade and a wind-break, and from the loose, porous material which enters into the composition of the forest floor itself and permits the moisture to sink into the earth. The moisture evaporates

[3] Economics of Forestry, Fernow, pp. 434-439; A Primer of Forestry, by Gifford Pinchot, Part 2, Bulletin No. 24, Bureau of Forestry, U. S. Dept. of Agriculture, pp. 63-66; The Relation of Forests to Stream Flow, by James W. Toumey, Collaborator, Bureau of Forestry, Yearbook of Dept. of Agriculture for 1903, pp. 281, 282; Surface Conditions and Stream Flow, by W. L. Hall, Assistant Forester, and Hu Maxwell, Expert, Circular No. 176, Forest Service, same Dept.

See subject on Evaporation in article on Water Circulation and Its Control, by Bailey Willis of the U. S. Geol. Survey, Vol. 2, p. 690, Report National Conservation Commission, 1909; Studies in the Movement of Soil Moisture, by Edgar Buckingham, Bulletin No. 38, Bureau of Soils, U. S. Dept. of Agriculture, 1907.

slowly from the matted leaves lying closely together, packed in horizontal layers, and these leaves also protect the under soil. Upon this subject, also, many observations and experiments have been made both in Europe and in this country. And, although the results as to the amount of the saving of the moisture in the soil, by the forests preventing evaporation, vary somewhat, there is no dispute but that a vast amount of it is saved from passing off in vapor by this means. From the most authoritative observations, it has been determined that the percentage of rainfall, evaporated from the surface of the ground, is about 40 per cent for the whole year in the open fields, and about 12 per cent from the forests, and that it is greater from under deciduous trees than it is from under those of the conifer class. It has also been determined that the evaporation from a saturated bare soil in the forest is about the same as from a water surface in the forest, other conditions being the same; and that the presence of forest litter, or the forest floor as it is termed, further hinders the evaporation from the soil to a remarkable extent, and that it saves at least 50 per cent of what would otherwise be evaporated.[4] It has also been ascertained that the evaporation from snowfall is much greater than from rain. The greater the altitude above the sea, the greater the snowfall, and the greater is the effect of forests preventing evaporation. This is a powerful reason for preserving the forests in the mountains at the headwaters of the rivers and streams. Measures made in the mountains show that the evaporation from snow surfaces is four or five times as great as from water surfaces under similar exposure. In so far as the forests check the winter winds and provide shade from the sun, they lessen the evaporation from

4 See Economics of Forestry, Fernow, pp. 437-439; The Earth as Modified by Human Action, Marsh, pp. 187, 226 and note; Observation de Meterologie, by Raoul de Drouin de Bouville, from experiments carried on in connection with the National Forest School of France; A Primer of Forestry, by Gifford Pinchot, Forester, 1905, Bulletin No. 24, Bureau of Forestry, U. S. Dept. of Agriculture, Part 2, pp. 63-66; The Relation of Forests to Stream Flow, cited *supra;* The Timber of the Edwards Plateau of Texas, by William L. Bray, Bulletin No. 49, Bureau of Forestry, U. S. Dept. of Agriculture; The Diminished Flow of the Rock River in Wisconsin and Illinois, by G. Frederick Schwarz, Bulletin No. 44, same Dept.; The Relation of Rainfall to Run-off, by George Rafter, 1903, Water-Supply and Irrigation Paper No. 80, U. S. Geol. Survey.

snow. And that the forests do lessen the evaporation from snow surfaces is proved by the fact that snows remain much longer in the spring in well wooded regions than in the open country.[5] All of this saving of moisture from evaporation, by the direct influence of forests, as we shall see in the subsequent sections, eventually finds its way into the streams and thus directly adds to their flow.[6]

§ 50. Influence of forests upon fallen precipitation—Transpiration.—The second means of escape of the water from the locality where it is precipitated is by transpiration.[1] With this subject we have less to do than with the others in the same connection, having less to do with the stream flow.

Transpiration is that portion of the rainfall which sinks into the soil and which is later taken up by the vegetation through the roots and given off to the atmosphere through the stems and foliage of the trees or other plants. It is sometimes classed in our Western States with evaporation as the "fly-off." Transpiration undoubtedly benefits the climate of forested areas by increasing the humidity of the atmosphere. And, as the atmosphere can only hold a certain amount of moisture before precipitation is caused, if it is partially saturated by the moisture from transpiration, it can take up less water by evaporation. Thus there is an indirect saving for stream flow of the moisture of the soil that would otherwise be evaporated, and, perhaps pass off to other sections of the country.[2] It has been determined

[5] See the authorities cited in last note.

See, also, The Earth as Modified by Human Action, Marsh, pp. 206-213; Economics of Forestry, Fernow, pp. 74, 439, 444; Forests and Snow, by Professor L. G. Carpenter, 1901, Colorado Agricultural Experiment Station, Bulletin No. 55.

[6] For the influence of forests upon seepage, see Secs. 52, 53.

[1] For the distribution of the rainfall, see Sec. 2.

[2] See Influence of Forests on Humidity, Sec. 46.

See, also, articles in Archives des Sciences (Bibliotheque Universelle de Geneve), 1869, 1870, 1871; Economics of Forestry, Fernow, pp. 121, 437, 438; The Earth as Modified by Human Action, Marsh, pp. 183-188; How Plants Grow, Gray, Sec. 273; Fur Baum und Wald, Schlieden, pp. 46, 47 and notes; Die Physikalischen Einwirkungen des Waldes, Ebermayer, Vol. 1, pp. 150 *et seq.*; Final Report of the State Geologist of New Jersey for 1894, Vol. 3, p. 36; The Relation of Forests to Stream Flow, by James W.

that coniferous trees, especially pines, require only from one-sixth to one-tenth of the amount of moisture that the deciduous trees require for transpiration.[3] In all trees and plants a certain portion of the moisture, not counted as transpiration, is retained by the plants themselves, and through chemical change becomes a part of the organic structure. The amount, however, is but a small proportion of that which is transpired.

The subject of the relation of transpiration has been one of considerable study in Europe and in this country, and it still remains unsettled to a large degree. As was said by Mr. Schwarz: "The other element of loss, namely, the amount of water consumed and transpired by trees, has been repeatedly investigated, but the subject is extremely complicated. The consumption varies with the kind of soil and its physical condition, with the amount of rainfall, with the condition of the atmosphere, and, in still greater measure, with the species of the tree and character of the forest. The figures resulting from these investigations show very wide limits, and it still remains somewhat doubtful whether forests, as compared with field crops, require more water for their growth, or less."[4]

§ 51. Influence of forests upon fallen precipitation—Surface run-off.—By surface or superficial run-off is meant that portion of the precipitation which, from the time of its falling upon the earth until its exit from the drainage basin, passes over the surface of the earth without gaining access to the soil. Whatever may be said in regard to the influence of the forests upon evaporation and transpiration,[1] that influence is insignificant, comparatively speaking, with the influence that forests have upon the surface run-off; and upon this influence is closely related the subjects of seepage run-off and deep seepage run-off.[2]

The forests along the upper reaches of the rivers and their

Toumey, Yearbook Dept. of Agriculture for 1903, p. 283.

See, also, the Imperial Gazetteer, India, Simla, 1903, Vol. 3, Chap. 2, p. 3.

3 Economics of Forestry, Fernow, pp. 121, 437.

4 The Diminishing Flow of the Rock River in Wisconsin and Illinois, and Its Relation to the Surrounding Forests, by G. Frederick Schwarz, 1903, Bulletin No. 44, Bureau of Forestry, U. S. Dept. of Agriculture, p. 17.

1 See Secs. 49, 50.

2 See Secs. 52, 53.

tributaries regulate to an enormous extent the stream flow, by increasing the moisture-holding capacity of the soil, and by storing therein a large proportion of the water precipitated; and, for the time being retain it in the soil until it escapes through the earth by percolation, and thereby prevents to a large extent the surface run-off. The forests are, in effect, great natural reservoirs wherein the water is stored. In a feeble way, these have been imitated by man, by the construction of artificial reservoirs for the storage of water; and, regardless of the beneficial uses to which the water so stored may afterward be put, they have the same effect of regulating the stream flow, that is accomplished by Nature in a more simple way by means of the forests. And, by the reckless destruction of the forests, man is violating one of the first rules of Nature, which sooner or later, in some manner, will have to be recompensed for.[3] The causes of forests regulating stream flow is due to a number of physical conditions peculiar to them, which are as follows: First, the undecomposed litter, consisting of leaves, twigs, and brush, which forms the upper layer of the forest floor, will itself absorb much water, as well as delay its run-off; second, the thick mat of leaves holds the moisture and keeps wet at a considerable distance down, long after those on top have become thoroughly dry; third, still lower down, the half-decayed rubbish retains more moisture, and is like a sponge in its water-holding power; fourth, the humus, or the forest soil proper, with its loose texture and large proportion of organic matter, is peculiarly fitted to hold the moisture and to delay percolation. It is thus that the forests build up great storage reservoirs, and the absence of forests causes the precipitation to immediately rush over the surface of the ground, with but a small portion being absorbed, on its way to the sea. Land that

[3] For some of the results of forest destruction, see Secs. 54-57.

"The action of the forests on the flow of surface waters is so universally admitted that it serves no useful purpose to insist on it here. * * * In fact it may be stated that the flow of surface water *is completely arrested on forest slopes if these are clothed with healthy growth, so long as the leaf canopy is maintained.*" Notes on the Influence of Forests on the Storage and Regulation of the Water Supply, by S. Eardley-Wilmot, Inspector General of Forests to the Government of India, Forest Bulletin No. 9, Calcutta, 1906, p. 16; see, also, application of results of European research to Indian conditions, pp. 21-42, same Bulletin.

is destitute of forests sheds water like the roof of a house, breeding floods after any considerable rain, while in the forests the rain is but slowly yielded to the streams.[4] Artificial storage reservoirs

[4] The authorities upon this subject are numerous, and the following are some of the most important that we have found: Aspects of the Earth, Shaler, 1890, pp. 185, 186, 272-275, 293, 298, and note; The Earth, Reclus, pp. 223, 291; The Earth as Modified by Human Action, Marsh, 1884, pp. 199-204; Economics of Forestry, Fernow, 1902, pp. 74-76, 444-447; Irrigation, Newell, pp. 27-36; Rivers of North America, Russell, 1902, pp. 230-240; The Forester an Engineer, by Fernow, Journal Western Society Engineers, Vol. 6, No. 5, Oct. 1901; speech of the Hon. Francis G. Newlands of Nevada in the Senate of the United States, Dec. 17, 1907, Vol. 42 Cong. Record, No. 14, pp. 500 *et seq.*

See, also, the Imperial Gazetteer of India, Simla, 1903, Vol. 3, Chap. 2, p. 3; speech of the Hon. Albert J. Beveridge of Indiana in the Senate of the United States, Feb. 22, 1907, issued by the U. S. Forest Service, Dept. of Agriculture; Die Physikalischen Einwirkungen des Waldes auf Luft und Boden, und seine Klimatologische und Hygienische Bedeutung, Ebermayer, 1873; Journal of the Society of Arts, Thornton, London, 1878, Vol. 26, p. 270; Manual of Forestry, Schlich, 5 Vols., 2d Ed., London, 1896; Questionones Naturales, Books 2 and 3, Seneca; Natural History, Pliny, Chap. 80; The Relation of Rainfall to Run-off, by George W. Rafter, 1903, Water-Supply and Irrigation Paper No. 80, U. S, Geol. Survey; Water Circulation and Its Control, by Bailey Willis of the U. S. Geol. Survey, Vol. 2, pp. 687-710, Report of the National Conservation Commission, 1909; The Timber of the Edwards Plateau of Texas: Its Relation to Climate, Water Supply, and Soil, by William L. Bray, 1904, Bulletin No. 49, Bureau of Forestry, U. S. Dept. of Agriculture, pp. 26-29; A Primer of Forestry, by Gifford Pinchot, Forester, 1905, Bulletin No. 24, Bureau of Forestry, same Dept.; Surface Conditions and Stream Flow, by William L. Hall, Assistant Forester, and Hu Maxwell, Expert, Circular No. 176, Forest Service, same Dept.; The Diminished Flow of the Rock River in Wisconsin and Illinois, and Its Relation to the Surrounding Forests, by G. Frederick Schwarz, 1903, Bulletin No. 44, Bureau of Forestry, same Dept. pp. 18, 19; Grazing and Floods; a study of conditions in the Manti National Forest, Utah, by Robert V. R. Reynolds, Forest Examiner, 1911, Bulletin No. 91, Forest Service, same Dept.; Grazing on the Public Lands, extracts from the report of the Public Lands Commission, Bulletin No. 62, Forest Service, same Dept.; The Relation of the Southern Appalachian Mountains to Inland Water Navigation, by M. O. Leighton and A. H. Horton, U. S. Geol. Survey, Circular No. 143, Forest Service, same Dept.; Irrigation in India, 2d Ed., by Herbert M. Wilson, 1903, Water-Supply and Irrigation Paper No. 87, U. S. Geol. Survey, pp. 45, 46; Preliminary Report of the Inland Waterways Commission, Document No. 325, 60th Congress, 1st Session; The Relation of Forests to Stream Flow, by James W. Toumey, Yearbook of Dept. of Agriculture for 1903, pp. 283-287; Stream Flow in Relation to Forests, by Geo. W. Rafter, Vol. 22, Proc. Am. Forestry Assn.,

will partially compensate for this result; but these can be constructed only at enormous expense, while the forests not only do this work without expense, and at the same time they themselves are growing wood for the use of man.

§ 52. Influence of forests upon fallen precipitation—Seepage run-off.—Seepage run-off is that portion of the rainfall which sinks into the earth, but later reappears on the surface at lower elevations, and there uniting with the stream flow escapes from the drainage basins in the streams and rivers. This tends to give the streams and rivers a sustained flow during all portions of the year, and insures the permanency of springs, which in turn feed the streams. As there is but a certain amount of precipitation, it is evident that any factor which decreases the surface or superficial run-off must necessarily increase the seepage run-off. There are two principal factors that very materially influence the proportion of the precipitation to the seepage run-off, and these are: First, the rapidity of the rainfall; and, second, the condition of the soil as to its absorbent capacity receiving the rainfall. These factors as will be seen are somewhat blended together, and both can be, in a measure, regulated by man. Of course, no way has been devised for regulating the rainfall; but, after the rain has fallen on the earth, man can, in a measure, direct where it shall run.

It is well known from direct observation that a slowly falling, prolonged rain, even on comparatively naked slopes, is nearly all taken up by the soil. Upon the other hand, a heavy shower of short duration, falling on the same slope, may largely escape as surface run-off. Then again, when the soil has a large absorbent capacity, even the heaviest and most rapid rainfall may be all absorbed, and the surface flow reduced to a minimum.

1897, also reprint of same in an Annual Report, Fisheries, Game and Forest Commission, 1898; Natural and Artificial Forest Reservoirs of the State of New York, also by Rafter, Third Annual Report, Fisheries, Game and Forest Commission for 1897, Pub. 1899; Water Resources of the State of New York, also by Rafter, Parts 1 and 2, Water-Supply and Irrigation Papers Nos. 24 and 25, U. S. Geol. Survey; Data of Stream Flow in Relation to Forests, Trans. Association of Civil Engineers of Cornell University, Vol. 7, 1899; New Jersey Forests and Their Relation to Water Supply, by Vermeule, *The Engineering Record*, Vol. 42, No. 1, July, 1901.

There is nothing which exceeds the absorbent qualities of an old forest floor. The forest canopy also materially aids in breaking the force of the rainfall, and in perceptibly extending the period of time during which the rain reaches the ground, and in this way permits the water to soak into the soil, and thus lessens the surface run-off. [1]

It is a matter of history that in sections of the country where forests have been destroyed, that the greater proportion of the rainfall rushes off almost immediately as the surface run-off. It has also been observed that the springs on the lower lands which formerly flowed with great permanency have dried up, and the smaller water courses fed by them have diminished both in number and volume, and in many cases have disappeared altogether. [2]

§ 53. Influence of forests upon fallen precipitation—Deep seepage run-off.—Forests also have their influence in adding to what is known as the deep seepage run-off, from practically the same causes that they add to the ordinary seepage run-off. But as the deep seepage run-off does not tend to add to the stream flow, especially in the drainage basins where the water is originally precipitated, we have little to do with the subject in this connection. Deep seepage run-off undoubtedly adds to the water supply of artesian basins, which subject will be discussed in another portion of this work as a part of the discussion concerning subterranean waters.[1] Much of the deep seepage run-off is also

1 As the subjects of surface run-off and seepage run-off are closely related, see the authorities cited in the previous section, No. 51.

See, also, The Earth as Modified by Human Action, Marsh, 1884, pp. 215-234, and observations therein stated both in this country and in Europe; The Earth, Reclus, pp. 222-231, and observations there cited; Aspects of the Earth, Shaler, 1890, pp. 260, 261, 272, 273, 295; Rivers of North America, Russell, 1902, pp. 223-233; Economics of Forestry, Fernow, 1902, pp. 19, 20, 72-75, 77, 78, 444-447; Irrigation, Newell, 1906, pp. 27-36; Water Circulation and Its Control, by Bailey Willis, U. S. Geol. Survey, Vol. 2, pp. 687-710, Report of the National Conservation Commission, 1909; Water Resources, by W. J. McGee, Secretary, Section of Waters, Vol. 1, pp. 39-49, same report.

2 See authorities cited above.

See, also, Influence on Springs in Notes on the Influence of Forests on the Storage and Regulation of the Water Supply, by S. Eardley-Wilmot, Inspector General of Forests to the Government of India, Forest Bulletin No. 9, 1906, Calcutta, India, pp. 12-15.

1 For artesian waters and wells, see Chap. 61, Secs. 1166-1184.

undoubtedly lost to man by sinking to great depths in the earth, or in finding its way in subterraneous channels to the sea.

§ 54. Damages resulting from immediate surface run-off.—From the authorities cited under our notes in the previous sections, there can be no doubt but that the forests along the watersheds of our rivers and streams exert an enormous influence upon the regularity of their stream flow.[1] It is also settled beyond all controversy that, when large forested areas exist, the immediate surface run-off is decreased, and the seepage run-off increased; and, when these same areas have been denuded of their forests the exact reverse is the case—the immediate surface run-off is increased and the seepage run-off is decreased. As there is but a certain amount of precipitation in any one drainage basin during the course of a year, and the greater portion of that falling within a limited period of time, it therefore follows that, if this rushes off the land almost immediately after it has fallen into the streams and is carried into the lower rivers, it stands to reason that during the greater portion of the dry season of the year, in that particular section of the country, there will be left but a comparatively small amount of water for all uses. Also in the lower reaches of the rivers, great damages are liable to result.

There are three principal classes of resultant damages from the immediate surface run-off, which may be classified, as follows: First, floods;[2] second, the loss of water during the dry season of the year to the injury of the cultivation of land by irrigation,[3] navigation,[4] development of power,[5] and manufacturing purposes;[6] third, erosion or soil washing.[7] We will discuss these subjects briefly in the above order.[8]

§ 55. Damages from immediate surface run-off—Floods.—As we have seen in preceding sections, forests act in the capacity of

1 See Secs. 48-53, for the influence of forests upon fallen precipitation.

2 See Sec. 55.

See, also, for irrigation as a means of preventing floods, Sec. 11.

For irrigation as an aid in the reclamation of swamp lands, see Sec. 14.

3 See Sec. 56.

4 Sec. 56.

For irrigation as an aid to navigation, see Sec. 12.

5 See Sec. 56.

For irrigation as an aid to the development of power, see Sec. 15.

6 See Sec. 56.

7 See Sec. 57.

8 See Secs. 55-57.

great storage reservoirs, conserving the rainfall in flood time and giving it out gradually by means of the seepage run-off in the dry seasons.[1] By doing this, they are the greatest natural agencies in preventing floods. But where the forests have been destroyed along the watersheds of our rivers, the water from rains and melting snow rush off the land in torrential streams, and thereby increase the volume of the flood waters that are so destructive on the lower reaches of the rivers. The direct results of floods are of two classes: The damages caused by the temporary high waters; and, second, the damages caused by extending the area of swamp lands below.

In regard to the first class, it is noticed that in this country the floods are becoming worse as the years go by. This may not be true for each successive year upon any particular river, as it depends largely on the rainfall upon the drainage basin of that river. But nearly every spring on some river in this country, a new height is reached by the crest of the floods, new lands inundated that were formerly considered out of danger, and greater damage done to all kinds of property. It is generally conceded by the authorities that the destruction of the forests on the lands above are the primary cause of this increase in the volume of floods.[2]

1 See Secs. 51-53.

2 See upon the subject of floods caused by forest destruction, The Earth, Reclus, 1862, pp. 317-338, and authorities there cited; The Earth as Modified by Human Action, Marsh, pp. 227-338, cases and authorities there cited; Rivers of North America, Russell, pp. 229-233; Aspects of the Earth, Shaler, pp. 188, 189, 193; Economics of Forestry, Fernow, pp. 73-75, 276, 277, 318, 319, 363, 445, 446; Irrigation, Newell, pp. 30-33; A Primer of Forestry, by Gifford Pinchot, Part 2, pp. 67-73, Bulletin No. 24, Bureau of Forestry, U. S. Dept. of Agriculture; Grazing and Floods, by Robert V. R. Reynolds, 1911, Forest Examiner, Bulletin No. 91, Forest Service, same department; Surface Conditions and Stream Flow, by Wm. L. Hall, Assistant Forester, and Hu Maxwell, 1910, Cir. No. 176, Forest Service, same department; Same in Vol. 2, pp. 112-125, Report of the National Conservation Commission, 1909; Floods, by M. O. Leighton, Chief Hydrographer, U. S. Geol. Survey, Vol. 2, pp. 95-111, Report of the National Conservation Commission, 1909; Water Circulation and Its Control, by Bailey Willis, U. S. Geol. Survey, Vol. 2, pp. 687-710; Imperial Gazetteer of India, Simla, 1903, Vol. 3, Chap. 2, p. 3.

See, also, Influence of Forests on the Regulation of Torrents, in notes of the Influence of Forests on the Storage and Regulation of the Water Supply, by S. Eardley-Wilmot, In-

As to the second class of damages mentioned above, they are largely the result of the rivers being unable to carry off the flood waters, and, instead of temporary, the damages become permanent. The swamp and overflow lands of the United States are also annually being extended.[3]

As a remedy for the recurring and increasing floods, we can do no better than to quote from Elisee Reclus, who wrote in the year 1862, after having made a careful study of the causes of floods, especially in France and Italy, and in which he said: "Man should make it his task to watch the drop of rain as it falls from the clouds, to follow it in its course, to arrest it in its progress when it would help to swell the dreaded flood, and to employ it for the benefit of agriculture, navigation, and manufacture. On every mountainside and elevated plateau he may avail himself of the powerful remedy for the prevention of floods, by replanting them with trees."[4] The same method for preventing floods advocated by Reclus applies with equal force in this country to localities where the forests have been destroyed. But at this date, before our forests are entirely destroyed,[5] I can only add one thing to his statement, and that is, instead of imitating Nature by "replanting" forests, which will take decades to attain

spector General of Forests to the Government of India, 1906, Forest Bulletin No. 9, Calcutta, pp. 17-20.

See, also, Irrigation as a Means of Preventing Floods, Sec. 11.

[3] See Irrigation as a Means of the Reclamation of Swamp Lands, Sec. 14.

See, also, Vol. 1, p. 23, of the Report of the National Conservation Commission, 1909, where it is said: "Through imperfect control of the running waters lowlands are temporarily or permanently flooded. It is estimated that there are in the mainland United States about 75,000,000 acres of overflow and swamp lands requiring drainage."

See, also, report of W. J. McGee, Secretary of the Section of Waters, p. 42, same Vol. as last above.

See, also, Report of Geo. W. Woodruff, Secretary of the Section of Lands, pp. 83, 84, same Vol. as last above.

See, also, the many bulletins issued by the U. S. Dept. of Agriculture upon the subject of the reclamation of swamp lands.

[4] The Earth, Reclus, p. 328.

See, also, upon this subject Die Physikalischen Einwirkungen des Waldes auf Luft, etc., Ebermayer, 1873; Die Bedeutung und Wichtigkeit des Waldes, etc., Chrestomatic, Loffelholz-Colberg, 1872; Wald, Klima und Wasser, Lorenz, 1878; De Klimen Erde, Woeichof, 1887; Les Foret de la Gaule, Maury, 1867; Les forets et la reboisement dans les Pyrenees Orientales, De Boixo, 1894; Reboisement et Gazonnement des montagnes, 2d Ed., Demontzey, 1882.

[5] For the destruction of our forests, see Sec. 43.

any considerable growth, let us leave Nature alone and preserve her works by preventing, as far as possible, the forest from being destroyed.

§ 56. Damages from immediate surface run-off—Loss of water.—By the destruction of the forests, causing the greater portion of the precipitation to run off soon after it has fallen, it follows that the smaller proportion is not sufficient, in many instances, to keep the streams up to the point that they were wont to flow before such destruction, or to supply the demands that are made upon the water for irrigation, navigation, development of power, and manufacturing purposes. This causes the second class of resultant damages, under our classification.[1]

In modern India, irrigation is practiced to a greater extent than in any other country in the world, and upon the relation of the forests to irrigation, it is said: "In short, the forests form the head works of Nature's irrigation scheme in India, and if these are injured or destroyed, the advantages of a regular water supply may be replaced by the tempestuous action of sudden floods until such time as man, with the aid of costly appliances, intervenes to restore equilibrium."[2] The cultivation of lands by irrigation is mostly confined to the Western portion of the United States, and depends largely upon the waters of mountain streams, and that, too, upon the flow of those streams during the months of June to September. Instances are too numerous to cite, where by forest destruction, the water rushes down the steep mountainsides immediately after the storms, and where the flow of those streams at times has ceased entirely during the months named, and at the very time when the water was needed most. And, for this use, in order to hold back the water that rushes down toward the ocean in flood season, the construction of great reservoirs is necessary to perform the same functions that the forests

1 See Sec. 54.

"The destruction of the forest by fire results directly in an impairment of the regularity of stream-flow, tending to cause an alternation of flood and drought. Thus are brought about great losses to irrigation, water power, navigation, and other interests."—Forest Fires, by Clyde Leavitt, U. S. Forest Service, Vol. 2, p. 390, Report of National Conservation Commission, 1909.

2 Imperial Gazetteer of India, Simla, 1903, Vol. 3, Chap. 2, p. 3; Forestry and Irrigation, Elliott, 1906.

formerly performed, namely, to hold back the water until it is needed.[3] Then again, no matter with how great engineering skill these reservoirs are constructed, after a heavy rain or spring thaw, there being no forests to offer obstructions to the flow of the streams, they at times become mountain torrents, sometimes carrying everything before them, and there is always greater danger of dams and reservoirs going out, and thus adding to the disaster below.

It is the early history of this country that the most of our larger rivers were navigable to a far greater extent than is the fact at the present time. All of the great rivers have their headwaters in the mountains, and all of their drainage basins in their natural state were forested. And hence, while in that condition, the waters of the streams feeding these rivers were held back by the forests during the reavy rains and spring thaws, and were gradually let down during the later months. This natural regulation of the flow kept a fairly even volume in the greater rivers below, even during the dry portion of the year. Upon this subject Professor Shaler says: "With the removal of the forests, the winter floods increase in magnitude, and the summer droughts leave so little water in the streams that they are constantly becoming less serviceable for navigation."[4] And, as was said by Senator Newlands of Nevada, in a speech before the Senate of the United States, upon the Inland Waterway Commission Bill: "These waters rush down in torrential streams in the spring months and destroy property, and then during the summer and fall months, the waters having rushed down to the ocean and having been wasted, the river itself is reduced to an attenuated stream upon which boats can not float."[5] What we have said

[3] Irrigation, by Newell, pp. 57-71; Aspects of the Earth, Shaler, p. 189.

[4] Aspects of the Earth, Shaler, 1890, p. 293.

[5] Speech of Dec. 17, 1907, Cong. Record, Vol. 42, No. 14, p. 500.

See, also, Preliminary Report of the Inland Waterways Commission, Document No. 325, 60th Congress, 1st Session, 1908, p. 21; General Relations of Forests and Streams, by Raphael Zon, Chief, Office of Silvics, U. S. Forest Service, pp. 505-513, same Report as last above; Special Relations of Forests to Rivers in the United States, by W. W. Ashe, Forest Assistant, U. S. Forest Service, pp. 514-534, same Report as last above; Report of the Secretary of Agriculture of the Southern Appalachian and White Mountain Watersheds, Dec. 11, 1907, p. 18; The Relation of the Southern Appalachian Mountains to Inland Water Navigation, by M. O. Leighton and A. M.

in regard to damages from immediate surface run-off to navigation applies with equal force to all other uses of water such as that for the development of power and for manufacturing purposes. If the water is not in the streams when it is needed, it certainly can not be used. Many power plants have to shut down during the low water seasons, and many manufacturing establishments have to cease their operations, or change their motive power.[6] By the protection of existing forests and reforestation in places where they have been destroyed, many of these resultant damages from immediate surface run-off may be averted.

§ 57. **Damages from immediate surface run-off—Erosion.**—Our third and last class of resultant damages from immediate surface run-off is that of erosion or soil washing.[1] Erosion is the term given to weathering, corrosion, and transportation, which by their combined agencies lead to the removal of land upraised above the sea, and the production of a vast array of ever-changing topographical forms.[2] This erosion of land becomes a source of damage and expense in at least three distinct ways: First, the loss

Horton, U. S. Geol. Survey, 1908, Cir. No. 143, Forest Service, U. S. Dept. of Agriculture.

See, also, Irrigation as an Aid to Navigation, Sec. 12.

6 "In the degree that the forests are damaged on the high watersheds, then, inevitable damage results to water power and navigation through increased extremes of high and low water."—Secretary of Agriculture James Wilson, in his report of The Southern Appalachian and White Mountain Watersheds, Dec. 11, 1907, p. 19.

See, also, the Relation of the Southern Appalachian Mountains to the Development of Water Power, by M. O. Leighton, M. R. Hall, and R. H. Bolster of the Geological Survey, 1908, Cir. No. 144, Forest Service, U. S. Dept. of Agriculture.

"Nearly all the freshet and flood water runs to waste, and the low waters which limit the efficiency of power plants are increasing in frequency and duration with the increase of flood run-off."—Report of the National Conservation Commission, 1909, Vol. 1, p. 22.

See, also, Developed Water Power, compiled by the Bureau of the Census, under the direction of W. M. Steuart, Chief Statistician for Manufactures, Discussion by M. O. Leighton, Chief Hydrographer, U. S. Geol. Survey, Vol. 2, pp. 141-158, Report National Conservation Commission, 1909; Undeveloped Water Powers, by M. O. Leighton, Vol. 2, pp. 159-170, same report as last above.

See, also, Irrigation as an Aid to the Development of Power, Sec. 15.

1 For classification, see Sec. 54.

See, also, Irrigation as a Conserver of Soil, Sec. 13.

2 Rivers of North America, Russell, 1902, p. 46.

of the soil itself by its being washed away; second, the covering up of good land by sand, gravel, and rock; and, third, the filling up of the streams and rivers, and especially those that are navigable. These subjects will be discussed in the order named.

Erosion or soil washing is one of the most serious results of forest destruction, and has been so considered not only in this country, but in all parts of the world. In certain sections, where the forests have been destroyed, it has completely changed the topographical features of the country, by the washing away of immense quantities of soil from large areas of land. Not only is the soil carried down by the streams in flood time, but also great quantities of gravel, sand, and even rock. Some of us who have stood upon the banks of the Missouri River, or as it is sometimes called, the "Big Muddy," and have watched its turbid waters, have had little thought as to its cause or the results therefrom, and very little concern in the matter, except that in some form or other we would have to drink the stuff. We did not stop to consider that the "silt" in the water, which caused its turbidity, was composed of the most fertile portions of our richest lands, transferred from a blessing to a curse.[3] The action of the forests and other vegetation is not confined merely to imbibing water falling from the clouds; it also assists the superabundant moisture in penetrating the interior of the ground. Trees, after they have received the water upon their foliage, let it trickle, drop by drop, on the soft forest floor, and thus facilitate the gentle permeation of the moisture into the substratum; another part of the rainfall runs down the trunks of the trees and along the roots, and at once finds its way to the lower strata. At the same time, the roots, with their long, clinging tendrils, hold the earth together,

[3] For the estimated amount of soil that is annually washed toward the sea, see Sec. 13, and authorities cited.

"The freshets are attended by destructive soil erosion. The soil matter annually carried into the lower rivers and harbors or into the sea is computed at 783,000,000 tons."—Report of the National Conservation Commission, Vol. 1, p. 22, 1909.

See, also, Lands, by George W. Woodruff, Secretary, Section Lands, same report, 1909, Vol. 1, pp. 77-79; Water Circulation and Its Control, by Bailey Willis, U. S. Geol. Survey, Vol. 2, pp. 699, 707, same report as last above; Methods Which Should Be Adopted by Private Owners to Insure the Perpetuation of Our Timber Supply, by C. S. Chapman, U. S. Forest Service, Vol. 2, p. 727, same report as last above.

and with the aid of the forest floor prevent much of the soil from being washed away, even in the heaviest rainfall. With the destruction of the forests, the soil and other friable matter are washed away, especially from the steeper lands, and thus their destruction also destroys the ground upon which they stood. And, thereafter the water rushes off the hard clay or rock in torrential floods.[4] Of course, we can not attribute all of this loss of soil solely to the destruction of the forests. But by those who have made a study of the subject, and those who are best able to judge, it is counted as being the principal agency.

The covering up of good lands by the silt and debris from erosion is caused by such debris first filling the bottoms of the rivers and streams, and afterward being carried over the alluvial lands. When a torrent escapes from the lateral confinement of the bed of a stream, it spreads and divides itself into numerous smaller streams, which shoot out in different directions over the bottom lands, each carrying with it its quota of sand and gravel. When the floods subside this debris is left upon the top of the good soil, sometimes many feet in depth. In this way many millions of acres of good agricultural lands have been irretrievably ruined. Owing to the fact that the denudation of the forests

[4] See authorities cited above.

See, also, Secs. 11-13.

In 1906, Professor Shaler of Harvard, one of the greatest authorities upon this subject, estimated that in the upland regions of the States south of Pennsylvania, 3000 square miles of soil had been destroyed as the direct result of forest denudation, and that the destruction was going on at the rate of 100 square miles of fertile soil per year. Aspects of the Earth, Shaler, pp. 261, 290-299. See, also, pp. 337, 338.

In 1861, Messrs. Humphreys and Abbott, in the course of a notable survey of and report on the physics and hydraulics of the Mississippi River, estimated that the river transported and discharged into the Gulf of Mexico 406,250,000 tons of sediment annually. Report upon the Physics and Hydraulics of the Mississippi River, by Humphreys and Abbott, 1861, pp. 137-149.

See, also, The Earth, Reclus, p. 292; Economics of Forestry, Fernow, p. 76; The Earth as Modified by Human Action, Marsh, pp. 249, 250, 503, 523, and notes; Rivers of North America, Russell, pp. 70-75; Memoire sur les Populations des Hautes Alpes, in Memoires de l'Academie des Sciences, Morales et Politiques, 1843; Etudes sur l'Economie Forestiere, Calve, pp. 66, 67; Les Forets et la reboisement dans les Pyrenees orientales, De Boixo, Paris, 1894; Reboisement et Gazonnement des montagnes, 2d Ed., Demontzey, Paris, 1882; Forestry in Europe—Reports from the Consuls of the United States, Washington, 1887.

in this country has not yet proceeded to the extent that it has in many portions of the Old World, the loss from this cause has not been so great as there. But the experience of those countries will be the experience of this country, as surely as night follows day, if the forest destruction continues at the rate that it is progressing at the present time.[5] The enormous power of water

[5] As to the forest destruction in this country, see Sec. 43.

"The abuse of the right of pasturage and the felling of the woods have stripped the soil of all its grass and of all its trees, and the scorching sun bakes it to the consistency of porphyry. When moistened by the rain, as it has neither support nor cohesion, it rolls down to the valleys, sometimes in floods resembling black, yellow, or reddish lava, sometimes in streams of pebbles, and even huge blocks of stone. . . . Vast deposits of flinty pebbles, many feet in thickness, which have rolled down and spread far over the plains, surround large trees, bury even their tops, and rise above them, leaving the husbandman no longer a ray of hope."—From an address of Jerome Adolphe Blanqui, French Economist, before the French Academy of Moral and Political Science, on the 25th of November, 1843; see Memoires de l'Academie des Sciences, Morales et Politiques, of that date.

"The felling of the woods produces torrents which cover the cultivated soil with pebbles and fragments of rock, and they do not confine their ravages to the vicinity of the mountains, but extend them into the fertile fields of Provence and other Departments, to the extent of forty or fifty leagues."—Lorenz, quoting from Ueber die Entwaldung der Gebirge, Marchand, 1849, p. 17, in Cours Elementaire de Culture des Bois, Lorenz, 1878.

"It is estimated that the mass of solid matter that is annually washed down by the River Po is 822,000,000 cubic metres, and that out of this amount there are about twenty times as much left upon the lower lands as the river delivers into the Adriatic."—Delle Immediata Influenza delle Selve sul corso delle Acque, Castellani, Vol. 1, pp. 42, 43.

For the transporting power of water, see The Earth as Modified by Human Action, Marsh, 1894, pp. 263-269.

See, also, The Earth as Modified by Human Action, 1884, pp. 241-283; The Earth, Reclus, pp. 284-295; Economics of Forestry, Fernow, 1902, pp. 75, 76; Rivers of North America, Russell, pp. 44-51; A Primer of Forestry, by Gifford Pinchot, 1905, Bulletin No. 24, Bureau of Forestry, U. S. Dept. of Agriculture, pp. 69-71; Etude sur les Torrents des Hautes Alpes, Surrell, 1884, p. 152; La Provence au point de vue des Bois, des Torrents Inondations, De Ribbe, 1857; Travels in France, Young, Vol. 1, Chap. 1; Histoire, etc., des Hautes Alpes, Ladoucette, 1884, p. 354; Etudes sur l'Economie Forestiere, Calve, 1862, pp. 66, 67; Der Wald, Hohenstein, p. 177; Ses Climats, etc., les Sols boises et non boises, Becquerel, 1853, p. 314; Comptes rendus de l'Acadamie des Sciences, 1866, Mengotti; Giornale di Agricoltura, November 30, 1873; Progetto di Legge per la Vendita di beni incolti, Torelli, 1872; Des Travaux Publics dans leurs Rapports avec l'Agriculture, Dumont, 1847; Scientific Guide to Switzerland, Morell, p. 10.

in erosion is well illustrated by the hydraulic mining operations being carried on in many parts of the West, where, comparatively speaking, but a small stream is thrown and yet small mountains are washed away.[6] And both the power of water to tear away the earth and to carry it away, discussed above, is still further illustrated by the use that is made of it by ingenious engineers in the construction of dams and embankments. The material is torn from banks above by the action of water through hydraulic rams, and is washed along by the water through flumes to the place where the dam or embankment is being built, and there deposited, the only handling of the material being by water.[7] The results of these efforts, however, are insignificant, as compared with the results of a mountain torrent in wearing down a mountain and spreading it over the plains and valleys below. Another great source of damage from erosion is the filling up of the channels of the streams and rivers by the debris and material carried down. Because of this, rivers, formerly navigable, have become useless for such purpose; great damage has been done to the works constructed to improve navigation; lands have been permanently flooded, and the streams themselves have at times cut their way through tracts of land and made new channels for themselves.[8] If the streams and rivers of this country ran clear, as was usually the case before the extensive destruction of the forests, the control and regulation of their waters would be comparatively an easy matter. But sediment-laden as they are, they present some of the most difficult and complex engineering

See, also, Grazing and Floods, by Robert V. R. Reynolds, Forest Examiner, 1911, Bulletin No. 91, Forest Service, U. S. Dept. of Agriculture.

6 For hydraulic mining and the laws for the preventing of the washing of debris, see Secs. 1136-1147.

7 "A dam was constructed in this method near Santa Fe, New Mexico, and other works were constructed on the Turlock Canal in California and a number of other places in the West where irrigation works were constructed."—Newell, Irrigation, pp. 170-173.

8 See Irrigation as a means of Preventing Floods, as an Aid to Navigation, as a Conserver of the Soil, and as an Aid in the Reclamation of Swamp Lands, Secs. 11-15; The Earth as Modified by Human Action, Marsh, pp. 249-263, 269, 485-504; Economics of Forestry, Fernow, pp. 12, 74-76; Aspects of the Earth, Shaler, pp. 268, 269, 293-299; The Relation of the Southern Appalachian Mountains to Inland Navigation, by M. O. Leighton and A. H. Horton, U. S. Geol. Survey, Cir. No. 143, Forest Service, U. S. Dept. of Agriculture.

problems, to say nothing about the resulting damages and the enormous expense to the National Government and to the States in keeping the channels clear.

§ 58. **The perpetuation of our forests.**—From the discussion in the preceding sections of this chapter, and the great number of authorities there cited, some of whom were, and are, the most eminent students of the subject on earth, it must be evident that the perpetuation of our forests is one of the most important economic questions that today confronts the American people. Not only is this true in regard to the perpetuation of our timber and lumber supply, but it is also true in regard to the relation of the forests to stream flow, upon the uniform regularity of which depend many of the most important physical conditions and industries of the country.[1] Since the annual timber cut of the United States is from three to four times as great as the annual growth, not counting the destruction by other means,[2] it must be evident that the present situation can not be improved, unless all of the existing timber lands can be carefully protected; and, under strict forest management they can be made to grow at least from three to four times as great an amount as is now annually grown. This situation has been successfully met with in other countries, and undoubtedly can be in the United States.[3] In the

[1] See Secs. 44-57.

As was well summed up by Mr. J. Storr Lister, Chief Conservator of Forests, Cape Town, South Africa, in his report of March 21, 1908, for the fifteen months ending Dec. 31, 1907: "Without strict supervision these wooded areas will be considerably denuded, and apart from the mere question of timber supply, the subject of forestry in its bearing on climate, soils, rainfall, and water supply would not appear to have received sufficient consideration. The beneficial effects forest tracts have on climate by purifying the atmosphere, conserving and distributing moisture, and subduing aridity is well established, while another important part is played by these areas in the distribution of rainfall. Other uses are included in the action of forests in retarding evaporation of moisture, regulating the flow of water (rain after it has fallen) on water sheds, thereby preventing or minimizing floods, and in checking erosion of soils by action of wind and water."—Report of Chief Conservator of Forests, Cape Town, 1908, p. 1.

[2] See Secs. 41-43.

For the Destruction of Our Forests, see Sec. 43.

[3] See Forestry in Europe, Reports from the Consuls of the United States, Washington.

See, also, the great number of Bulletins issued by the Forest Bureau, and the Forest Service, U. S. Dept. of

following sections, we will discuss very briefly what has been done toward the preservation of our forests by the United States, by the States, and by the individual, reserving a longer discussion to a work which will be subsequently published, and which is already written, to a great extent, by the author of this.[4]

§ 59. The perpetuation of our forests—What has been done by the United States.—Under the impetus given by the messages of recent Presidents of the United States, and especially by those of President Roosevelt, within the last few years, Congress has practically re-enacted all of the laws of the general Government relating to the forests and to the public lands upon which they are grown. Under the authority granted by these laws large areas of forested public lands have been set aside and reserved as National forests, with the view of not only protecting the growing timber, but also the watersheds of our most important streams

Agriculture, many of which have been cited in the preceding notes.

See, also, Methods Which Should Be Adopted by Private Owners to Insure the Perpetuation of Our Timber Supply, by C. S. Chapman, U. S. Forest Service, Vol. 2, pp. 711-724, Report of the National Conservation Commission, 1909; What the States Should Do to Perpetuate the Forests, by Filibert Roth of the University of Michigan, Vol. 2, pp. 725-747, same Report as last above; What Forestry Has Done, by Treadwell Cleveland, Expert, 1908, Cir. No. 140, Forest Service, U. S. Dept. of Agriculture, especially as relating to foreign countries; Handbuch der Forst Politik, Max Endres; Manual of Forestry, W. Schlich.

See, also, the various text books upon forestry and forest economics cited in the preceding notes.

See, also, the annual Reports of the Superintendent of Forestry of the Dominion of Canada, issued by the Department of the Interior, Ottawa, giving full details as to how the forests are perpetuated in the Dominion.

See, also, Review of Forest Administration in British India for the year 1903-4; and same for the year 1905-6, by S. Eardley-Wilmot, Inspector General of the Forests to the Government of India, Calcutta, 1906-7.

See, for Italy, Legge Forestale, 20 giygno, 1877, Bollettino N. 3917; Bollettino Ufficiale per l'Amministrazione Forestale Italiana, 4, 31 dicembre, 1900; for Sweden, see Report on Forestry in Sweden, by Gen. C. C. Andrews, Minister to Sweden, 1900, Doc. No. 452, 56th Congress, 1st session; Berattelse ofver Nunnans Harjningar, 1892-1902, af C. G. Ramsted, Stockholm, 1904; for the Cape of Good Hope, see Act to Provide for the Betterment of Forests of August 17, 1888, and Act of November 14, 1902, amending the same; see, also, the various reports of the Chief Conservator of Forests, Cape Town.

4 See Kinney on Forests, Forestry, and Forest Laws. This work will be shortly published.

and rivers.[1] A National "Forest Service" has also been established as a branch of the Department of Agriculture.[2] Upon the Forest Service is devolved the duty of the absolute protection of the National forests from trespass of every kind, the prevention of forest fires as far as possible, the planting of new forests, and the replanting of old, and the regulation and sale of all timber taken from such forests. It was not without a struggle that these laws were originally enacted, and it is not without a constant struggle that they are preserved in the statutes. It has been hard to break those who were specially interested, for personal gain, in the destruction of the forests belonging to the United States and to every citizen therein, from their predatory habits. But, as far as the general Government is concerned, it now has the matter well in hand, by the more recent laws enacted upon the subject. And, in general, we will say, without going into the discussion of the subject, which would take far too much space as far as this work is concerned, these laws have been sustained and upheld by the courts. And, with the bare citation of the statutes upon the timber lands and forest reserves, for the present, we will leave the subject.[3] By the Act of March 11, 1911,[4] Congress took an advanced step toward the conservation of stream flow, for the purpose of maintaining the navigability of navigable streams, by providing for the purchase of lands along the watersheds of navigable streams, which lands are in the hands of private parties. And, for this purpose the "National

[1] Of the amount estimated by the U. S. Geol. Survey, there were on July 1, 1908, 156,082,756 acres in National Forests.—Vol. 2, p. 711, Report of the National Conservation Commission, 1909, by C. S. Chapman of the U. S. Forest Service.

[2] "Forest Service" has been the name since July 1, 1905, of that branch of the Department of Agriculture which was previously called the "Bureau of Forestry," and, earlier still, the "Division of Forestry."—The Forest Service: What It Is and How It Deals with Forest Problems, by Gifford Pinchot, Forester, Cir. No. 36, Forest Service, U. S. Dept. of Agriculture.

[3] For Statutes upon the subject of Timber Lands, and Forest Reserves, see 7 Fed. Stats. Ann., 1905, pp. 288-317; Vol. 10 *Id.*, pp. 404-407; Supp. *Id.* 1909, pp. 661-672; Supp. 1911, see part under the same title.

See, also, for Forest Reserves, Secs. 413-425, 954-962.

[4] Public, No. 435; 62d Congress, 1st session.

Forest Reservation Commission" was created.[5] In a later work we will discuss the subject thoroughly from all phases of the question.[6]

§ 60. The perpetuation of our forests—What is being done by the States.—It was estimated by the United States Geological Survey that, on July 1, 1908, the various States of the Union owned, in forest reserves set aside by them, 2,582,711 acres. There are forest laws found in the statutes of each State, of greater or lesser importance. State legislation in this country has followed four somewhat distinct lines, as follows: First, protection of forests against trespass; second, special statutes for protection against forest fires; third, the promotion of forests by various means; and, fourth, the establishment of State forests, and forest organizations charged with the entire care and control of such forests.[1]

Since the recent movement for the conservation of all natural resources, a number of the States have taken the matter up and have enacted laws for the protection and maintenance of their forests as complete, and in a number of instances far superior, to those of the National Government. Time and space forbid our discussion of these laws in this work, but they will be fully discussed by us later.[2] The general tendency of these laws has been for good, and for the protection not only of the timber supply, but also for the regulation of stream flow.

§ 61. The perpetuation of our forests—What has been done by municipalities.—Very many of the cities and other municipalities throughout the country have acquired, by purchase or condemnation, forest lands, particularly upon the watersheds of the streams from which they obtain their water supply for the use of such municipalities and their inhabitants. These lands were acquired primarily to secure a permanent water supply, and to protect the

5 For the provisions of the Act of March 11, 1911, see Disposal of Lands—Reservations, Sec. 422.

6 See Kinney on Forests, Forestry, and Forest Laws.

1 What the States Should Do to Perpetuate the Forests, by Filibert Roth of the University of Michigan, Vol. 2, pp. 725-747, Report National Conservation Commission, 1909.

Reports as to what each State is doing in the forestry line may usually be had by addressing the Secretary of each State.

2 See Kinney on Forests, Forestry, and Forest Laws.

same from pollution. And, for this purpose, a complete forestry system has been devised, and the forests managed and controlled by municipal officers. [1]

§ 62. The perpetuation of our forests—What has been done by the individual.—In round numbers, three-fourths of the growing timber in the United States is either upon private lands, or upon public lands, either of the United States or of the States, which are subject to entry or purchase.[1] It was estimated by the United States Geological Survey that on July 1, 1908, there were in this condition 541,334,533 acres, or over three times as great an area as is held by the National Government and the States combined. These lands have been broadly classified into three classes, as follows: First, those who purchase their lands for speculation and hold for a rise in stumpage prices; second, those who hold for game or pleasure preserve and not for profit; and, third, those who hold either to supply their mill, to furnish logs for market, or to furnish fuel, posts, and other timber either for home use or for sale. [2]

It is evident, that no matter what measures are taken by the Federal Government and by the States to protect and properly manage their forests, unless the great area which is held by individuals and companies is properly cared for, the great proportion of the existing forests in this country are liable to be destroyed in the near future. Right here is where the great danger lies. The individual, although owning the great proportion of our forest lands, has done less than either the Federal Government or the States toward their protection. Some of the great lumber and railway companies, however, have adopted a system of cutting only the ripe timber upon their lands, and of protecting the young trees as far as possible both from fire and from injury in cutting. By this means it is estimated that their land may be cut over once in about every twenty years, and thus they will have a perpetual timber supply. And, by the protection of these forests, the stream flow will also be protected. This system will

[1] See Kinney on Forests, Forestry, and Forest Laws.

[1] See Sec. 41.

[2] Methods Which Should Be Adopted by Private Owners to Insure the Perpetuation of Our Timber Supply, by C. S. Chapman, Vol. 2, pp. 711-724, Report National Conservation Commission, 1909.

undoubtedly be extended as it is better understood, and the forest lands become more scarce and harder to acquire. But this rule is only applied by those who have large holdings of sufficient forest land, so as to enable them to work over the same once in about every twenty years. The great mass of these private lands are owned in small holdings, and by those who are waiting for a good market for their timber. And, when they find this, it is for sale, and that, too, regardless of the destruction from fires or the injury to the young trees. This destructive cutting is especially true where the timber only is bought by companies. It is then cut and slashed regardless of all waste, fire, or the protection of the young growth. And, oftentimes, after such a cutting, the owner of the fee burns over the land, and turns it into other uses than that of growing timber.

There is another element, to which we will barely refer in this connection and save for future discussion, which is a great obstacle to the suppression of the reckless destruction of private forests, and that is the "personal liberty" element. It is generally conceded that the forest laws of this country as compared with those of Continental Europe are very defective in this respect. Here, it has been generally thought, that a man who owns a timber tract may do what he pleases with it. He may carefully preserve it; he may cut it over in accordance with the best scientific methods for the preservation of a perpetual timber supply; or, he may cut off the timber and burn it, and also burn over the land upon which it formerly grew; and, as long as he does not interfere with the property of his near neighbors, he can not be restrained from so doing. In Continental Europe, the interests of the State and communities are always safeguarded in these operations. In this country only recently has it dawned upon the people that the State and Nation have also an interest in the preservation of our remaining timber lands, even if they are owned by the individual. The reckless and useless cutting and destroying of the forest lands of this country by the individual owner, is a positive injury not only to that individual but also to the State. Not only does it uselessly deplete our timber supply, but also it results in many other injuries, discussed in the previous sections of this chapter, among which the most important question is the perpetuation and regulation of the flow of the waters in our streams and rivers.

PART II.

ANCIENT AND MODERN IRRIGATION.

CHAPTER 3.

THE HISTORY OF IRRIGATION.

§ 63. The first knowledge of the science.
§ 64. Civilization and irrigation.
§ 65. Ancient irrigation of biblical times.
§ 66. Ancient irrigation in Egypt as described by early historians.
§ 67. Ancient irrigation in Egypt as described by the writings of Plato.
§ 68. Ancient irrigation in Egypt as described by recent research.
§ 69. Ancient irrigation in China.
§ 70. Ancient irrigation in India.
§ 71. Other nations learned the science from Egypt.
§ 72. Ancient irrigation in Assyria.
§ 73. Ancient irrigation in Phoenicia.
§ 74. Ancient irrigation in Greece.
§ 75. Ancient irrigation by the Romans.
§ 76. Ancient irrigation in Spain.
§ 77. Ancient irrigation in the New World.
§ 78. Ancient irrigation in Peru.
§ 79. Ancient irrigation in Mexico.
§ 80. Ancient irrigation by the Nahua nations.
§ 81. Nahua nations—Arizona—Casa Grande.
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§ 83. Nahua nations (continued)—New Mexico.
§ 84. Nahua nations (continued)—Workings in other parts.
§ 85. A court opinion upon the history of irrigation.
§ 86. The skill and durability with which some of the ancient works were constructed.
§ 87. Ancient irrigation—A lost science revived.

§ 63. **The first knowledge of the science.**—That irrigation is a very ancient science, and that it was practiced by the earlier nations of the earth upon a most magnificent scale there can be no possible question. It is said in the book of Genesis that: "A

river went out of Eden to water the garden."[1] This has been interpreted by some to be the beginning of irrigation. But whether it was or not, certain it is that it was known and practiced many thousand years before the Christian era. Historians and archaeologists differ considerably as to where the science was first practiced. Some writers have placed its beginning in China, some in India, and some in Armenia; others have placed its first inception along the shores of the Mediterranean; and yet others upon the lost Island of the Atlantis. Again, coming to the New World, still others have traced early workings along these lines to the Nahua nations, which include the Toltecs and Aztecs in Central America, Mexico, New Mexico, and Arizona.[2]

In the great valley of Mesopotamia, where written history begins, were located the wonderful cities of Babylon and Nineveh, surrounded by a most perfect system of irrigation canals.[3] But, owing to the numerous inscriptions on monuments and ancient temples, and the sarcophagi, potsherds, and papyrus rolls, which have been discovered in the ages past and translated by archaeologists, modern research has been enabled to carry the clear and consecutive history of Egypt further back than that of any other country. Therefore, Egypt is generally considered the birthplace of irrigation. But the exact date has never been fixed upon, and probably never will be. And, as long as the leading Egyptologists disagree upon the question of dates by more than a thousand years, it is vain to attempt to fix the exact date of the origin of regulated irrigation, in that or any other country.[4] But certain it is that at least 2,000 years before Christ, irrigation was practiced extensively not only in Egypt, but in a number of other countries of the Old World.[5]

1 Genesis, Chap. 2, Verse 10.

2 For Ancient Irrigation in America, see Secs. 77-85.

3 See Secs. 71, 72.

4 For Ancient Irrigation in Egypt, see Secs. 65-68.

5 For those who desire to study the ancient history of irrigation, we refer them to the work of Professor F. H. King of the University of Wisconsin on Irrigation and Drainage; The Earth as Modified by Human Action, Marsh, subject, Irrigation; Irrigation Farming, by Lucius M. Wilcox, 1910, Chap. 1, pp. 1-12; Article in the Edinburgh Encyclopedia, subject, Irrigation; Article in the Encyclopedia Brittanica, both the 9th and 11th Editions, subject, Irrigation; Pumping Water for Irrigation, by Herbert M. Wilson, 1896, Water-Supply and Irrigation Paper No. 1, U. S. Geol. Survey.

In the following chapter, some of the traditions and facts stated by history and writers upon the subject of ancient irrigation in various countries will be briefly given.[6] And in the remaining chapters of this part we will relate something as to what is now being done in the way of the cultivation of lands by irrigation; first, in foreign countries, and afterwards in our own country.[7]

§ 64. **Civilization and irrigation.**—The coincidence of a high state of civilization with the practice of irrigation is not, in any sense, accidental. It has required the best thought of the best minds of either ancient or modern times to evolve and perfect the science; and improvements even now are constantly being made, both in the methods of diverting, storing, and conducting the water, and its actual application to the soil in the most economical manner for the best results in crop production. To be sure, countries in which irrigation is necessary usually possess dry and warm climates, fertile soils, and under the influence of which, a more satisfactory system of agriculture is made possible, and more certain as to its results, than can be developed in countries which depend entirely upon the rainfall. But this has always been the result of the ingenuity and engineering skill of man.[1] In the days of the ancients, the science of irrigation was undoubtedly developed to the highest degree commensurate with the best knowledge of those days; and also, the principles concerning the actual planting and tilling of the soil were no better understood, than were those relating to the application of water to soils for the production of crops. So history, both in ancient and modern times, show that it was not merely due to the accidents of a country having a good soil, a good climate, and an ample supply of water, that the highest form of civilization existed, but that the results were rather due to that civilization itself, rather than to Nature. The Nile at an early day undoubtedly overflowed its bottom lands, and by the wetting of the ground to a considerable depth afforded by natural irrigation the means to raise crops sufficient to sustain the life of the Fellahin. But it is due to the

6 See Secs. 65-85.

7 See Chaps. 3-12, Secs. 63-285.

1 For Irrigation and Its Many Methods, see Sec. 30. For Irrigation Methods, see Secs. 31-37.

ingenuity and engineering skill of man, under British rule, that it has been possible to harness and store the waters of the Nile, and to direct them to the best results.[2]

§ 65. **Ancient irrigation of biblical times.**—Irrigation is referred to in many places in the Old Testament. At the time that Moses appeared to lead the Children of Israel out of bondage from Egypt, it is certain that it was known and practiced in that country. And, as one of the inducements for their continuing their journey, it was promised them in the following language: "For the land, whither thou goest in to possess it, is not as the land of Egypt, from whence ye came out, where thou sowest thy seed, and wateredst it with thy foot, as a garden of herbs. But the land whither ye go to possess it, is a land of hills and valleys, and drinketh of the rain of heaven."[1] The watering of the land with the foot undoubtedly referred to some appliance for lifting the water from a stream or well to pour it into the ditches, and a similar contrivance worked by the Fellahin can be found in some parts of Egypt today.[2] It is evident that Moses did not think much of this method of cultivating the land.[3]

In Ecclesiastes we read: "I made me great works; I builded me houses; I planted me vineyards: I made me gardens and orchards, and I planted trees in them of all kinds of fruits: I made me pools of water, to water therewith the wood that bringeth forth the trees."[4] We also read of the hidden springs and sealed fountains of Solomon, from which the water was led to the plains below. The remains of reservoirs are found in the neighborhood of Hebron, which, according to recent archaeologists, the Jews constructed in the days of Solomon to supply the city of Jerusalem.

§ 66. **Ancient irrigation in Egypt as described by early historians.**—One of the oldest monuments at Thebes has a representation of a fellah drawing water with a shadoof, in the same method

[2] For the Effect of Irrigation Upon the Individual, see Sec. 9.

[1] Deuteronomy, Chap. 11, Verses 10, 11.

[2] For Irrigation and Its Many Methods, see Sec. 30.

[3] For Ancient Irrigation in Egypt, see Secs. 66-68.

For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.

[4] Ecclesiastes, Chap. 2, Verses 4-6.

that it is done today. And certain it is that today there are lands which have been cultivated by irrigation for the last 4,000 years, with no signs of wearing out. The muddy water of the Nile applied to the land keeps it fertilized and prevents it from wearing out.[1]

The first reservoir or artificial lake in Egypt of which there is authentic record was constructed, so it is claimed, in 2084 B. C., and was supposed to have been built for the purpose of regulating the floods of the Nile. Professor F. H. King of the University of Wisconsin has devoted considerable time to the study of ancient and modern irrigation, and in his work on "Irrigation and Drainage," relative to this first reservoir called Lake Moeris, says: "When the river rose to a height of twenty-four feet, and was likely to be disastrous to crops, the sluices were opened and the river relieved by sending the flood into this lake, which modern travelers give a circumference of fifty miles; but at the times of low water, when drought was threatened, the gates would be opened and the volume of the stream reinforced by the water stored in the reservoir." This reservoir is also described by the historians Herodotus, Diodorus, and Pliny, as one of the noblest works of the time from its great dimensions and its capacity for irrigation.

Sesostris, who reigned in Egypt in 1491 B. C., is said to have had a number of canals cut for the purpose of trade and irrigation, and to have designed the first canal to connect the Red Sea with the Mediterranean, which was continued by Darius but abandoned by him, and ultimately completed under the Ptolomies.[2]

§ 67. Ancient irrigation in Egypt as described by the writings of Plato.—It is not our intention in this work to go into the history in detail of the art of irrigation in all the ancient countries of the world, but only so far as it is necessary to show that it was known ages before the Christian era, and was practiced in those hot, arid countries upon a colossal scale. Our record of the history of irrigation in ancient Egypt would not be complete without

1 For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.
For Irrigation in Biblical Times, see Sec. 65.

2 See Modern Irrigation in Egypt, Secs. 88-102.

giving a sketch of that country as written by Plato, a Grecian who received his information from the writings and sayings of one of his ancestors, Solon, the great law giver of Athens, 600 years before Christ. According to ancient history, Solon visited Egypt and spent ten years there studying the philosophy and early history of that country. Here Plato relates that he learned from the high priest of Sais, at the delta of the Nile, the history and description of Atlantis, and became convinced that the Egyptians constituted one of the earliest and largest colonies which had gone out from the land of the Atlantidae. Now as to the ancient art of irrigation, let us quote from the record that Plato has left us: "And beginning from the sea, they dug a canal 300 feet in width and 100 feet in depth, and 50 stadia in length, which they carried through the outermost zone, making a passage from the sea up to this, which became a harbor, and leaving an opening sufficient to enable the largest vessels to find egress. Moreover, they divided the zones of land which parted the zones of sea, constructing bridges of such width as to leave a passage for a trireme to pass out of one into another, and roofed over them; and there was a way underneath for the ships, for the banks of the zones were raised considerably above the water. . . . In the next place they used fountains both of cold and hot springs. . . . They constructed buildings about them and planted suitable trees; also cisterns, some open to heaven, others roofed over. . . . The water which ran off they carried some to the grove of Poseidon, where were growing all manner of trees of wonderful height and beauty, owing to the excellence of the soil; the remainder was conveyed by aqueducts which passed over the bridges to the outer circles. I will describe the plain, which has been cultivated during many ages, by many generations of kings. It was rectangular, and for the most part, straight and oblong; and what it wanted of the straight line followed the line of the circular ditch. The depth and width and length of this ditch were incredible, and gave the impression that such a work in addition to so many other works, could hardly have been wrought by the hand of man. But I must say what I have heard. It was excavated to the depth of 100 feet, and its width was a stadium everywhere; it was carried around the whole of the plain, and was 10,000 stadia in length. It received the streams which came down from the mountains,

and winding round plains, touching cities at various points, was there let off into the sea. From above likewise, straight canals of 100 feet in width were in the plain, and again let off into the ditch, toward the sea; these canals were at intervals of 100 stadia, and by them brought down wood from the mountains to the city, and conveyed the fruits of the earth in ships, cutting transverse passage from one canal to another, and to the city. Twice in the year they gathered the fruits of the earth, in winter, having the benefits of the rains, and in summer introducing the waters of the canals."

From the foregoing it can be readily seen that irrigation was not only known and practiced at a very early date by the Egyptians, but also was at least known by the Grecians; that the ancient nations constructed underground conduits for bringing water from the heights which they allowed to gush forth at suitable points for irrigating purposes and for domestic use; that they built immense dams, canals, reservoirs, and aqueducts for the same purpose; and that whether the story of Plato of the lost Atlantis and its people is true or not we are sure that, long prior to the time Plato wrote, these stupendous feats had been accomplished and were not then considered beyond the possibility of human skill and engineering.[1]

§ 68. Ancient irrigation in Egypt as described by recent research.—In tracing back the history of the most ancient nations, however, we find that what is true as to other countries, is more especially so of Egypt. At the very earliest date to which historians have been able to trace them, their arts and industrial pursuits were as perfect and elaborate, and carried to as high a state of perfection as at the later periods, and almost inestimably higher than the civilization of the degenerate races of people who roam over these same lands today. In Egypt those public works for irrigation which have been decided to be the earliest are on a much greater scale and more perfect in details than the later ones, and as compared with those of today, with the exception of those constructed under recent British rule, may be truly classed, with its ancient civilization and literature, amongst the lost arts of that country. From ancient writings recently discov-

1 For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.

ered, and from recent examinations of the condition of the Nile above Cairo by scientists and explorers, the conclusion has been reached that the six cataracts from Assuan to near Khartoum, in the river Nile, were not, as has been supposed for ages, the work of Nature, but of ancient and scientific engineering for the purposes of both irrigation and navigation—engineering at once bold in its conception and colossal in its execution. That it had also been most successful in its results is evident from the remains of irrigating canals still stretching over many degrees of longitude on both sides of the river, as well as by the ancient records of flourishing cities, where now only barren wastes are to be found, inhabited by roving tribes of Arabs. These canals and these ruins are by no means confined to the valley of the Nile proper, but they reach to the very confines of the Great Desert. Gordon speaks of the ancient irrigation canals as pervading the whole Soudan, as well as what is now desert, on the northern side of the Nile from the Mediterranean to latitude 15 degrees north, if not further, and many degrees of longitude west, as well as east of the Nile Valley proper. Scientists were led to this belief that the cataracts were not the work of Nature by the fact that they were very nearly equidistant from each other along the course of the river. The total distance from the first cataract at Assuan to Khartoum is 720 miles, and the division of this space by six cataracts will give 120 miles between each, which is almost the exact distance between any two cataracts. The fall of the river being eight inches to the mile would give a needed height to each dam of 80 feet, exactly, in short, the calculation which would now be made, primarily, by any irrigation engineer. Last, but not least, the great square granite blocks, composed of a formation that can not be found in any other parts of the Nile except at the cataracts or rapids, stretching out for over 2,000 yards across the river are still visible at very low Nile. From these facts modern scientists and engineers have come to the conclusion that the cataracts or rapids were not the work of Nature, but were enormous dams constructed by man, for the purposes above described. But the proof of the dams having existed where the cataracts or rapids now are does not rest simply on the inference of experts upon the appearance of the river. Quite recently there have been found ancient writings which speak of this fact; and

among the various inscriptions found is one found at Sikilis to the effect that the Nile watered vast regions above Semnah, but that the rock gave way, and that ever after the river ceased to water the region above.[1]

§ 69. **Ancient irrigation in China.**—China is a rival of Egypt in its claims of the great antiquity of its numerous canals, reservoirs, and other works constructed for the purposes of both irrigation and navigation. Many of these works are still in existence and are used today.

Since the year 2627 B. C.—ten years after the accession to the throne of Hoangti—or 4,538 years ago, the Chinese are known to have irrigated their lands for agricultural purposes. From very ancient times the Chinese have been among the best irrigators in the world, producing the largest yield from a small acreage. Without the larger and surer product, which farming by irrigation has supplied and insured to that country during the past ages, China could not have begun to have fed her teeming millions; and the hive would have swarmed long ere this.

China has numerous canals of ancient origin, some of them of the most stupendous works of the kind ever undertaken. The Grand or Imperial Canal is a work of great magnitude. It was constructed in the seventh century and enlarged in the thirteenth century. It traverses the Great Plain and flows with but the slight current of two and one-half miles per hour for a distance of 700 miles. While built for the purposes of communication its waters are used largely for irrigation and thousands of drains and creeks have been made to connect with it along its route.[1] This canal connects the Hoang-Ho and the Yang-tse-Kiang Rivers; and, while it affords navigation between these points, with its numerous branches it also irrigates an immense territory.

1 See, also, Egyptian Irrigation; A Study of Irrigation Methods and Administration in Egypt, by Clarence T. Johnston, 1903, Bulletin No. 130, Office Experiment Stations, U. S. Dept. of Agriculture; Reclamation of Alkali Lands in Egypt, as Adapted to Similar Works in the United States, by Thos. H. Means, 1903, Bulletin No. 21, Bureau of Soils, U. S. Dept. of Agriculture; Pumping Water for Irrigation, by Herbert M. Wilson, 1896, Water-Supply and Irrigation Paper No. 1, U. S. Geological Survey.

For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.

1 See Modern Irrigation in China, Secs. 168-171.

§ 70. **Ancient irrigation in India.**—India, like Egypt and China, is another country having a dense population, and traces her irrigation works to very ancient times. Great "tanks," reservoirs, and canals were constructed many centuries before the Christian era. Some of these are in use at the present time.[1]

As far as has been discovered, however, the ancient works in India were of nowhere near the magnitude of the ancient systems that existed in other countries, or of the magnitude of the modern systems which have been constructed in that country under British rule.

§ 71. **Other nations learned the science from Egypt.**—It is not the purpose of this work to go into a lengthy discussion of the ancient history of this art, but we will briefly mention a few of the nations which were acquainted with the workings of the application of water, by artificial means, for the purpose of irrigating lands. To Egypt, as has been seen, is attributed the first knowledge and practice of the art of irrigation, and it is claimed by some authorities that it was the annual overflow of the Nile River which gave the inspiration and taught its value to that people. It is more than probable that Egypt, in her turn, taught irrigation to the people of Assyria, Babylonia, Carthage, to the Phoenicians and to the inhabitants of Italy. At any rate, at a later date we find records of these nations having knowledge of and practicing irrigation very extensively. A great many of the ancient writers of those countries speak of the canals and aqueducts. Cato and Calumella, amongst the Romans, speak of the formation and management of watered gardens. The Lombard kings, at a still later date, undoubtedly following the Roman practice, encouraged and extended the system in Italy. From Lombardy it was introduced into France; and the Moors encouraged it in Spain, Sicily, and Algeria. The early history of Persia and China also shows that these nations were acquainted with irrigation at a remote time. In India it was also practiced in very early days and continues in vogue to this day; and the mighty canals and aqueducts of that

1 See Irrigation in India, by Herbert M. Wilson, 1903, Water-Supply and Irrigation Paper No. 87, U. S. Geol. Survey. See, also, for Modern Irrigation in India, Chap. 5, Secs. 103-118.

country are wonders of the world, so far as engineering skill and construction are concerned. In fact, in all those countries where irrigation has been practiced we find it still in operation, though perhaps not so extensively, nor upon so large a scale as it was by the ancients.

§ 72. **Ancient irrigation in Assyria.**—The Assyrians appear to have attained equal skill and renown with the Egyptians, their teachers, in the science of the construction of great works, and the artificial application of water for irrigation. From history, as related by Herodotus and other early historians, we find that from very ancient times they were noted for their skill and ingenuity in developing extended irrigation systems, which converted by the use of water for irrigation the naturally fertile but arid valleys of the Euphrates and Tigris into productive fields. We are also told that the country below Hit, on the Euphrates, and Samarra, on the Tigris, was at one time intersected with numerous canals, one of the most ancient of which was the Nahr Malikah, connecting the Euphrates with the Tigris. The ancient city of Babylon was protected from the floods of the months of June, July, and August by a system of high cemented brick embankments on both banks of the Euphrates, and, to supplement the protection of these, and to store water for irrigation, a large reservoir was excavated 42 miles in circumference and 35 feet deep, into which the whole river might be turned through an artificial canal.

There were five principal canals of the system supplied from the Euphrates, besides several smaller ones; while the Tigris furnished water for two large canals and several small ones. Along the banks of these canals are now found the ruins of numerous towns and cities, which are silent witnesses of the high degree of civilization to which this people attained, and the great antiquity of the work. Some of these canals, with their numerous branches, led the water to broad, irrigated fields, while they carried along the main waterways the commerce of those far distant days; and they stand today as monuments of bold engineering hardly equaled by anything of their kind in modern times.

§ 73. **Ancient irrigation in Phoenicia.**—It is claimed that the Egyptians taught the art of irrigation to the Phoenicians. At any rate when they were at the height of their power, there were many

large canals that were used for supplying water for irrigation. At the time of the invasion of Phoenicia, the Syracusan general, Agathocles, wrote that "the African shore was covered with gardens and large plantations everywhere abounding in canals, by means of which they were plentifully watered." Fifty years later the Romans invaded the Carthaginian domain, and their historian, Polybius, also states that the country was in a high state of cultivation, and that canals were used both to conduct water for irrigating the gardens and plantations and also for commerce. A number of these historic works still remain. There are aqueducts hewed through mountains of solid granite still in use.

§ 74. **Ancient irrigation in Greece.**—The people of ancient Greece were also acquainted with and practiced the art of irrigation to a considerable extent. Great progress was made by this people in handling and conveying water by means of aqueducts and canals over long distances for domestic and irrigation purposes, especially for the watering of gardens. Herodotus tells us that at Patara the Greeks carried an aqueduct across a ravine 200 feet wide and 250 feet deep, by constructing a pipe line by drilling holes through cubic blocks three feet in diameter, fitting these blocks together by joints and laying them in cement and further held secure by means of iron bands. Another tunnel pierced a hill for nearly a mile, and conducted the water by means of an aqueduct for supplying the city of Samos. In fact today there are many ruined aqueducts scattered throughout the country which were originally constructed for the purpose of supplying water to cities and for irrigation. Some portions of these are in use at the present time. To the Greeks is also attributed the invention of the tympanum or Grecian water wheel. This is a device something on the order of our modern current water wheels, and also operated by the current of the stream.[1] Wheels upon this model have also been constructed in this country.

§ 75. **Ancient irrigation by the Romans.**—The Romans were another people who learned the art of irrigation from the Egyp-

[1] For a cut of a tympanum, see Pumping Water for Irrigation, by Herbert M. Wilson, 1896, Water-Supply and Irrigation Paper No. 1, U. S. Dept. of Interior, p. 40, plate 7.

tians, and laid the foundation for that mighty system of canals and aqueducts which we find in Italy today. Rome was supplied in Nero's time by nine separate aqueducts aggregating in length about 300 miles, and which delivered daily 173,000,000 gallons of water, which was later increased to 312,000,000 gallons. This water was used both for domestic purposes and for irrigating gardens of the villas of the Roman noblemen. One conduit, the Aqua Martia, was 40 miles long and 16 feet in diameter. The Aqua Claudia was 47 miles in length. A number of aqueducts are still used and are in good condition. "The golden house of Nero is a mass of ruins, but the Aqua Claudia still pours into the city of Rome its limpid stream."[1]

When Caesar invaded Great Britain, in his efforts to conquer the world, many miles of artificial water courses were constructed by his soldiers and the people there whom he had conquered. These canals can be readily traced at the present time, and some of which have been used in recent years.

Again, when Constantine was sent to the Bosphorus, and founded the great city which still bears his name, he caused to be constructed many permanent aqueducts and canals for the purpose of irrigation. A number of these works are used at the present day.

The first irrigation in France was also introduced by the Romans. Great systems of water works were also constructed for a number of cities of that country by the Romans at the time of their invasion. At the time of Augustus, 19 B. C., the Nismes conduit was constructed, which delivered 14,000,000 gallons per day.[2]

§ 76. **Ancient irrigation in Spain.**—Many of the irrigation works of Spain are very old, such as, for example, those of the plains of Taragona, date from the time of the Romans, and many others date from the Moorish period. In Valencia and Catalonia the water so used came from swift mountain streams, whence it was conveyed by long canals or acequias along the mountain sides

1 Quotation from an unknown author from an article published in the *Edinburgh Review*. For the whole quotation, see Sec. 86.

2 See Modern Irrigation in Italy, Secs. 144-159.

For the endurance of these ancient works, see Sec. 86.

where it was to be used. Some large storage reservoirs called pantanos were also constructed, feeding a dense network of canals distributed over broad plains. These ancient works are still in operation today, and the water is conveyed upon the lands by the same methods used in those early days. In many places the method of conveyance is small buckets, after the ancient Egyptian fashion.[1]

In the regulation of agriculture and the irrigation of lands, no nation of ancient times ever possessed more just and beneficent laws than the agrarian edicts of the Spanish-Arabs, or Moors. Evidence of this still exists in portions of Spain, especially in Valencia, where, when the Moors were driven out, King Jayme, who was wise enough to appreciate their great skill and progress in the art of irrigation, decreed that "water should be taken and used in the order that was established of old, and was customary in the times of the Saracens." Also in Granada, Ferdinand and Isabella recognized that it was good policy to preserve the admirable systems of irrigation established by their enemies, and those who consented to change their faith were guaranteed protection in the enjoyment of their estates and irrigation rights and customs, some of which are embraced in the present irrigation codes of Granada.[2]

§ 77. **Ancient irrigation in the New World.**—Respecting irrigation in America, the artificial watering of the soil to increase its fruitfulness is of origin so remote that its history is quite unknown, and is therefore truly prehistoric. At a period probably antedating the Christian era, the inhabitants of certain portions of the Western Hemisphere had adopted a scientific system of using the waters of the natural streams and lakes for this purpose. In Peru,[1] Central America,[2] Mexico,[3] Arizona,[4] New Mexico,[5] and in other States of our Southwest, are to be found today numerous remains of skillfully constructed canals, which tend to

1 See Modern Irrigation in Spain, Sec. 162.

2 Walton's Civil Law in Spain and Spanish-America, 1900, p. 63.

1 For Ancient Irrigation in Peru, see Sec. 78.

2 See Sec. 80.

3 For Ancient Irrigation in Mexico, see Sec. 79.

4 For Ancient Irrigation in Arizona, see Secs. 80-82.

5 For Ancient Irrigation in New Mexico, see Sec. 83.

show that the most prosperous of the ancient inhabitants of this continent were those who raised their crops by irrigation. But the art is a lost one, if we are to judge by a comparison of the irrigation works of the Indian tribes of those countries today with those of the past ages. Philologists and archaeologists think and claim that no conceivable simple case of deterioration of the races could have taken place which would have effected such a change as is apparent. They think the ancient peoples of the country became extinct, and that the present inhabitants are in no sense descendants of the former occupants of the land, but rather that they represent a later migration from another country. The study of the works of irrigation would confirm this theory. It is impossible to suppose that the present native inhabitants of Peru and Bolivia, practicing irrigation as they do today, in the crudest conceivable manner, could have sprung from a race which was at one time master of the art, by whom aqueducts, canals, and reservoirs were constructed on an immense scale, and in such an enduring manner that they have defied the changes of many centuries. When or by whom they were built can not be definitely ascertained, but there is ample proof that the people who planned and maintained them were in many ways highly civilized.

§ 78. **Ancient irrigation in Peru.**—The Peru of today is a small part of an ancient empire. At the time of the conquest, the Spaniards found the land in a high state of cultivation. While naturally in large part a desert, owing to a very scant or no rainfall between the mountains and the coast, the Incas had brought water immense distances and rendered arable vast stretches of country. The ancient irrigation of Peru was very wonderful.

Prescott, in his "Conquest of Peru," remarks: "Canals and aqueducts were seen crossing the lowlands in all directions, and spreading over the country like a vast network, diffusing fertility and beauty around them."

And again, Prescott, speaking of the use of water for irrigation, says: "Water was conveyed by means of canals and subterraneous aqueducts executed on a noble scale. They consisted of large slabs of freestone nicely fitted together without cement, and discharged a volume of water sufficient, by means of lateral ducts or sluices, to moisten the lands in the lower levels through which

they passed. Some of these aqueducts were of great length. One that traversed the district of Condesuyos, measured between four and five hundred miles. They brought water from some lake or natural reservoir in the heart of the mountains, and were fed at intervals by other basins which lay in their route along the slopes of the Sierra. In their descent a passage was sometimes opened through rocks, and this without the aid of iron tools; impracticable mountains were to be turned, rivers and marshes to be crossed—in short, the same obstacles were to be encountered as in their construction of their mighty roads."

That the ancient people of Peru understood the danger of floods and took steps to prevent them is shown by some of the works still extant. Notable is the still visible tunnel near Casmasca. While the waters of the lake were used for irrigation, the heavy rains and melting snows of the mountains would cause an overflow. To protect the irrigation works and settlements along the route, a tunnel was excavated in the mountains to give an outlet, in another direction, to the waters of the lake when they rose to a height to threaten inundation. At the coming of the Spaniards the land everywhere teemed with evidence of agricultural wealth. Today the greater part of the land has reverted to its original arid condition, except where by modern works it has been again reclaimed.

The most of these works of the Incas have been allowed by their Spanish conquerors to go to decay. In some spots the waters are still left to flow in their silent channels, whose windings and sources have been alike unexplored. Others, though partially dilapidated and closed with rubbish and rank vegetation, still betray their course by occasional patches of fertility. Such are the remains in the valley of the Narca, a fruitful spot lying between long tracts of desert, where the ancient water courses of the Incas, measuring four or five inches in depth by three feet in width, and formed by long blocks of granite, uncemented, are conducted from an unknown distance.

§ 79. **Ancient irrigation in Mexico.**—Without question, irrigation was practiced within the limits of the territory of what is now Mexico, during the early part of the Christian era. The early races, by whose efforts the earliest irrigation works were con-

structed, are as mythical as the "Little People in Green." Faint traces of their deeds and past glories still remain to make Mexico a land of interest to the antiquarian. Definite traces are still left in the country by that ancient people, by way of conduits and canals, running through portions of the land which are now desert and arid, and which tend to show that at some early date, that very land was cultivated to a high degree, and supported a large population. The result of the work of archaeologists tends to place the termination of this era at from 500 to 700 A. D. Evidences of their works, buildings, temples, and canals attracted the attention of the early Spaniards, and have ever since furnished subjects of interest to the archaeologists. The first race of which so little is known was followed in time by the Aztecs, one tribe of the Nahua nation, who were still a powerful people when the Spaniards first set foot in the land in 1591. The Aztecs also, in turn, cultivated the land by irrigation. And then a new era began with the coming of the Spanish conquistadores, who, for the glory of God, and incidentally the accumulation of gold, spread over the semi-civilized countries of the Western Hemisphere, as well as the savage ones, wherever there was gold, either in the mines or accumulated by trade. In a very short course of exchange, the Indians received from the pious padres a sufficient supply of religion, as an equivalent for the gold that might be had by enforced mining and the virtual seizure of all hoards. To accomplish this and continue the beneficent work, agricultural operations were necessary for subsistence; and as a portion of the land was arid, and required the assistance of irrigation in order to raise crops, we find the spread of irrigation by the Spaniards coincident, in the main, with the extent of mining and other allied industries.

§ 80. **Ancient irrigation by the Nahua nations.**—While upon the subject of the prehistoric nations of America, we will refer further to the works of the Nahua nations, especially of those early peoples known as the Aztecs and Toltecs, who formerly lived in Central America, Mexico, New Mexico, and Arizona. The present representatives of this nation or nations are to be found in the Zuni, Moqui, Pueblo, Yaqui, Acoma, Cochita, Isleta, Jemez, Laguna, Nambe, Picuris, and other tribes of Mexico, New Mexico,

and Arizona, and the Chihuahuas and Tequas, and others along the Rio Grande in Texas.

We are told in history, that when Cortes visited Mexico, the nations then living there utilized the waters of the rivers and mountain streams for the purpose of cultivating their crops, and that the network of canals by which the plantations were watered offered to Cortes's army very serious obstructions.[1] Probably the greatest souvenir left by the aboriginal races of North America is to be found in the maze of prehistoric canals found in the Salt River and Gila Valleys of Arizona. The age of these canals is entirely unknown, and purely a matter of conjecture. That they were constructed by a race of people who had attained a far higher degree of civilization than the aborigines who inhabit that part of the country goes without saying. There is but one tradition among the present Indian tribes concerning these canals, and that relates to their destruction. When Coronado, in 1542, was seeking, to the north of what is now Mexico, the seven cities of Cibola, he found several tribes of aborigines in what is now Arizona, supporting themselves wholly or in part by tilling the soil. These tribes themselves occupied but a limited area, but widely scattered groups of ruins prove that in early centuries the principal valleys were inhabited by a numerous people who had lived chiefly by agriculture, and today in many districts their irrigating canals are still to be seen. Coronado was astonished by the extent and size of these canals, but failed to learn aught of their age or builders, except a tradition of the hasty flight of that prehistoric people and the destruction of their works.[2] Whether the traditions, as related to the Spaniards under Coronado by the aborigines, and which have been handed down to the present time from both Spanish and native sources, is true as to the actual history of these canals and irrigation works, or whether it is a creation of a later day, it is hard to determine. But oftentimes what is considered to be mythology and tradition in one age is proved in the next to be fact. It is certainly true

1 2 H. H. Bancroft's History, p. 349.

2 H. H. Bancroft's History, Vol. 17, p. 539; Garces Diano in Doc. His., Mex. Series, 2 Tom. 1, pp. 235-237; "We were at once impressed with the beauty, order, and disposition of the arrangements for irrigating."—Emory in Fremont and Emory's Notes of Travel, pp. 47, 48; 1 *Irrigation Age*, p. 26.

that the tradition of the natives is corroborated to a great extent by still existing evidences. The ruins of these canals are plainly visible in the Gila and Salt River Valleys, running across to the Colorado River and into the States of Colorado and Utah. Everywhere are to be found the traces of an ancient civilization of a high order, evidences of hasty flight, as well as the ravages of fire—the salient features of war and pillage.

§ 81. **Nahua nations—Arizona—Casa Grande.**—In the heart of the Southwest, a region formerly forsaken by whites and little frequented by Indians, lie the traces of an ancient city buried by desert sands. In the Gila Valley, Arizona, this lone ruin, christened the Casa Grande by the Spaniards, has, since October, 1906, been the object of investigations, under a special appropriation of Congress, by the archaeological expedition of the Smithsonian Institute. The ruin has been brought three times to the attention of our National legislative body. It lies upon public lands and is therefore under National control, and several appropriations have been made by Congress for its preservation and excavation. As provided by the terms of the appropriation, made to cover the period ending June 30, 1908, the work was placed under the supervision of the Smithsonian Institute, and Dr. J. Walter Fewkes of the Bureau of American Ethnology was chosen as the most available member of the Smithsonian staff to undertake the excavations. He arrived upon the scene October 24, 1906, and since then has accomplished appreciable results. In regard to this ruin, Dr. Fewkes says: "The accounts of visitors to this particular town on the banks of the Gila River trickle along the course of time ever since white men landed in this 'new world.' . . . What sort of people were these first Americans who have left only silent evidence of their pre-Columbian life? It is established that they were ancestors of the Indians—that they bore little resemblance either to Asiatics or to Africans. Wherever they came from originally, they must have been Americans for a large total of generations. Closely allied to the Pima tribe of the present day, conservative estimates would place their number well up into the thousands in each city. It has been the pet theory of ethnologists to account for these vast western ruins by a series of many occupations of the same site, marking each return by the

construction of a 'temple' or 'gathering place' or a 'compound,'" as Dr. Fewkes has termed these large blocks of buildings. One relic, at least, he says, speaks of a vast population in words that are clear—the network of irrigation ditches constructed from the Gila and the Salt Rivers; dug, as they must have been, with crude stone implements, the dirt then laboriously carried away in baskets strung across the backs of women. Imaginiation will conjure up the number of workers necessary to complete in this manner a ditch found traceable, at least calculation, for thirty-eight miles.

§ 82. **Nahua nations—Mesa Canal.**—In Arizona are to be found remains of prehistoric canals which with their laterals must exceed a thousand miles in length, and the ruins of many of them give evidence of the expenditure of vast labor in their construction. One of the largest of these canals took the water from the south side of the Salt River, about twenty-five miles from the present city of Phoenix, and after leaving the river ran for several miles through a formation of hard volcanic rock. Thus, without explosives of any kind, and with the simple tools of the stone age, the aboriginal constructors of the ditch excavated a canal through solid rock of the hardest formation to a depth varying from twenty to thirty feet, and to a width of about twenty feet, and having a capacity of from ten thousand to fifteen thousand miner's inches when the river was at its ordinary stages. The evidence of the vast amount of labor expended in its construction by the chipping process is plain upon the face of the rock itself, while for miles on both sides of the canal can be found vast numbers of worn out stone axes and hammers. A party of Mormons have succeeded in clearing away the accumulated debris and restoring this ancient ditch to its original usefulness, and have thereby again converted a barren waste into fertile fields, now occupied by twenty thousand people. The canal is at present known as the Mesa Canal, and supplies Mesa City and vicinity with water for irrigating and other purposes. Two miles east of the above-mentioned canal, but on the other side of the river, is the head of the great Arizona Canal, one of the largest in the Southwest, if not on the Pacific Coast, carrying as it does nearly fifty thousand inches of water. Its construction was also suggested by the re-

mains of a prehistoric canal that could be traced for many miles, and the promoter of the new enterprise, in the firm belief that what had been done could be done again under like conditions, had the pleasure of seeing completed a waterway which reclaimed over one hundred thousand acres in and around the city of Phoenix. Forty miles west of the Arizona Canal, and a few miles below the junction of the Salt River, with the Gila on the north bank of the latter river, is the head of another ditch which, from the traces of prehistoric civilization found along its banks, is of even more interest. It is called the "Acequia of the painted rocks," and commences where it can take from the Gila not only the waters of that stream, but also the water of all the canals lying north and east of it as well. Portions of the canal have been reclaimed, but those parts which the hand of modern civilization has not touched are still so distinct that their remains may be traced without difficulty for fifty miles, while between it and the Gila River, in the lands which were formerly irrigated from it, can be found the relics of ancient civilization in profusion, not only in the shape of ruined buildings, but also of pottery, stone implements and weapons, ornaments, etc. But another curious feature of this canal, and the strongest evidence of the great length of time which has elapsed since the ancient system of irrigation was maintained, is that a few miles below the point where it crosses the Hassayamba Creek it traverses a mesa or bench for several miles, from which it falls abruptly into a valley some forty or fifty feet below. Where this fall takes place the waters of the canal have cut away for several feet the walls of the mesa, which are of the hardest volcanic character. As every evidence indicates that the erosion of the rock has been accomplished by the action of the water alone, centuries must have been required for the work. Upon the face of the rock thus cut away are to be found hieroglyphics of every description, of the meaning of which the present aborigines know nothing. From these inscriptions the white man has given them the name of "Painted Rocks."

§ 83. **Nahua nations (continued)—New Mexico** [1]—One of the most marvelous engineering accomplishments of ancient or modern times is shown in discoveries which were made during the years

1 See New Mexico, Part 14.

of 1899 and 1900 in the lava beds of New Mexico. Hundreds of years ago, the geologists and archaeologists tell us, a system of irrigation reservoirs and ditches was operated in this Territory, which is not paralleled by anything of this nature in the United States today. The builders of these works, a people older than the Pueblo race, the native occupants of this section of the country, cultivated thousands of acres of now arid territory. Ditches wound in and out at the base of the mountain ranges, following the sinuosities of the larger canals in such a manner as to catch all the storm water before it was absorbed by the loose sand at the mountain's base. Reservoirs constructed at convenient places stored the water, from which it was led in cemented ditches across loose soil to the various points where it was required for irrigation.

Lava flowed into some of these ditches, once filled with water in the centuries gone by. What can have been the history of this prehistoric race, or what can have caused their disappearance, can, as we have said, be only largely conjectured. Unlike the ancients of other lands, those people have not left a complete record of their glory and their downfall, and whether it was from climatic conditions, or great upheavals, or whether they were supplanted by more warlike and stronger races, is still uncertain; but the weight of archaeological authority tends to the latter belief. That they were highly developed, however, in agriculture, which is the mother of civilization, is shown by the evidences which they have left. Their canals wind in and around for miles, showing a superior engineering knowledge in securing an exact and uniform fall; remarkable viaducts were used in crossing canyons, while a network of distributing ditches brought every available acre into use for tillage. Here was no irrigation by wandering tribes, or individual owners, or diverters of water; but a great system covering large areas, and by a people who were permanently settled in that region, carefully thought out and operated by a central head for the greatest good of the many and the utilization of the greatest possible acreage.

§ 84. Nahua nations (continued)—Workings in other parts.—The remains of these ancient people are also found in California, Colorado, Texas, and Utah. Quite extensive systems of irrigating

canals of prehistoric origin are found along the Colorado and Rio Grande Rivers. Many of these have been utilized by modern civilization. It is related by Mr. Wilcox,[1] that: "Thirty-five years ago an engineer at field work, near Riverside, California, was running the level for a proposed ditch. He could not establish the grade satisfactorily, so he went again to the stream and reconnoitered for a new start. He was surprised to find an old acequia —so old, in fact, that its banks were scarcely discernible—and by carefully following its course he was still more astonished to discover that it brought him to his original objective point, and on these lines the new canal was laid. The grade was all that could have been wished for." This is not the only incident of this nature, but others have had practically the same experience.

§ 85. A court opinion upon the history of irrigation.—Mr. Justice Barnes, in rendering the decision of the Supreme Court of Arizona, in the case of Clough v. Wing, in the year 1888, went into the history of the subject, and in the course of his very able opinion, said: "The right to appropriate and use water for irrigation has been recognized longer than history, and since earlier than tradition. Evidences of it are to be found all over Arizona and New Mexico in the ancient canals of a prehistoric people, who once composed a dense and highly civilized population. These canals are now plainly marked, and some modern canals follow the track and use the work of this forgotten people. The native tribes, the Pimas and Papagoes, and other Pueblo Indians, now, as they for generations have done, appropriate and use the waters of these streams, in husbandry, and sacredly recognize the rights acquired by law and use, and no right of a riparian owner is thought of. The only right in water is found in the right to conduct the same through their canals to their fields, there to use the same in irrigation. The same was found to prevail in Mexico among the Aztecs, the Toltecs, the Yaquis, and other tribes at the time of conquest, and remained undisturbed in the jurisprudence of that country until now. It existed also in Peru, though there the appropriation was by the State, which constructed and maintained the canals for the use of the tillers of the soil. The Spanish conquerors brought the same

[1] Irrigation Farming, by Lucius M. Wilcox, 1910, p. 11.

idea with them from Spain, where they prevailed then as now. Escriche, tit. 'Agua,' Secs. III, IV, and 'Acequia.' 'The Lombard kings, following the Roman practice, encouraged and extended irrigation in Italy. From Lombardy the art extended to France; while the Moors encouraged it in Spain, Sicily, and Algeria.' Ency. Brit., 9th edition. 'Necessity required it in the districts which comprise parts of the south of Spain, Portugal, and Italy, including Sicily and Greece.' Id. 'Ruins of ancient irrigating works are found in Spain.' Id. In Egypt and in some parts of Persia, India, and some parts of China, this form of husbandry has been practiced from time immemorial and still continues. Under the civil law water was 'publici juris,' and by that law the 'first person who chooses to appropriate a natural stream to a useful purpose has title against the owner of the land below, and may deprive him of the benefit of the natural flow of the water.' Per Denman in Mason v. Hill.[1] Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such system; and a higher antiquity, a better reason, and more beneficent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil."[2]

§ 86. The skill and durability with which some of the ancient works were constructed.—The instances here cited of the use of natural streams and lakes for the purpose of irrigation by the ancients are but a few of the most prominent of those of the old and new worlds. Many of these ancient canals have been utilized for modern husbandry. But the very facility with which they have been thus utilized has been the means of obliterating the opportunities of tracing back their history and that of the people who constructed them. Once an old ditch is repaired or restored, it ceases to be of interest from an antiquarian standpoint, and soon even its prehistoric origin is forgotten. The question often arises, How great was the skill and ingenuity these prehistoric

[1] 5 Barn. & Adol. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692.

[2] Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453.

nations possessed in their day? Never has the skill of the best modern engineers been able to improve on the lines of the ruined canals which they left behind them. In the selection of locations at which to take the water from the rivers the prehistoric races have always exhibited the greatest skill and intelligence. It was these ruins left in Arizona that early in the seventies first gave the settlers of the Territory the idea of reclaiming the valleys where now are towns and cities surrounded by a large population of agriculturists. The first canals simply followed the line of the prehistoric ones. How extensive the system of irrigation in the Salt River Valley alone was, may be inferred from the fact that the amount of land practically covered by the canals was over a quarter of a million acres. The population supported must have been very great. And it is estimated that from the amount of ground probably cultivated, and the ruins of houses and remains of fragments of pottery, shell ornaments, and stone implements found everywhere over the lands, the population supported by the ditches would not fall short of 500,000 people—an estimate that the best authorities consider conservative.

In the Old World, the skill and durability with which these ancient works were constructed are even more remarkable. There are in active service today many aqueducts and canals which were constructed before the birth of Christ. Nations and governments have changed from various causes; they have been overturned by war and invasion; but many of these works have been permitted to remain, and, oftentimes, the conquering nation taking up the work where the conquered left off, and completing their construction, keeping them in repair, and thus handed them down to the present generation. And, in this connection, we can do no better than to quote from the Reply Brief [1] of Mr. David C. Beaman, in the famous case of Kansas v. Colorado, then pending in the Supreme Court of the United States,[2] in which he in turn quotes from an unnamed author a pertinent passage of dignified and majestic eloquence, published in the Edinburgh Review many

1 Pp. 38, 39.

2 Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. St. Rep. 552; *Id.* 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

years ago, which all of our readers will enjoy, and some of them may recognize:

"That although the tomb of Moses is unknown, the traveler of today slakes his thirst at the well of Jacob. The gorgeous palaces of the wisest and wealthiest of monarchs, with their cedar and gold and ivory, and even the great temple of Jerusalem, hallowed by the visible glory of the Deity Himself, are gone; but Solomon's reservoirs are as perfect as ever. Of the magnificent and costly architecture of the Holy City, not one stone is left upon another, but the pool of Bethesda commands the pilgrim's reverence at the present day. The columns of Persepolis are moldering into dust, but its cistern and aqueduct remain to challenge our admiration. The golden house of Nero is a mass of ruins, but the Aqua Claudia still pours into the city of Rome its limpid stream. The Temple of the Sun, at Tadmor in the wilderness, has fallen, but its fountain sparkles in the rays of the morning as when thousands of worshipers thronged its lofty colonnades. And if any work of this generation shall rise over the deep ocean of time, we may well believe that it will be neither a palace nor a temple, but some vast aqueduct or reservoir; and if any name shall hereafter flash brightest through the mist of antiquity, it will probably be that of the man who in his day sought the happiness of his fellow men and linked his memory to some such work of national utility or benevolence."

§ 87. **Ancient irrigation—A lost science revived.**—The learning of the ancients in the matter of irrigation, has been, in a large degree, lost to us. We know little more concerning the methods of agriculture and irrigation of antiquity than is indicated by the ruins of their magnificent irrigation works. With the loss of the earliest civilization, the art of agriculture was reduced to a practice based upon empirical rules, some of which were good, many of which were bad, and all of which had been formulated without special reference to the laws of Nature. In fact, during many centuries of the earth's history the condition of the art of agriculture has been such that it has attracted only those who were incapable or unable to follow the more developed and progressive professions or occupations. Nevertheless, the thinkers of all ages have clearly understood that the prosperity and happi-

ness of a nation have their foundation in the agriculture of the country, and that no country can be truly and permanently great which does not practice an intelligent system of soil cultivation, in which some of its best minds are enlisted. Within quite recent years the farmer has been looked down upon as an inferior being, and the tendency has been for the bright young men who were born upon the farm to drift to the city. Within the last few years the question of scientific farming has given that occupation a different aspect, and a more respectable character. Many of the brightest minds of the country, coming even from the city, now follow that occupation; and the time has come in this country that the great land owner is not the only one who can be a farmer, and at the same time command intellectual and social enjoyment. [1]

In the following chapters of this Part, we will relate what has been done, and is now being done, in modern times in some of these same countries, and also what is being done in our own country. [2]

[1] For the Effect of Irrigation Upon the Individual, see Sec. 9.

[2] See Chaps. 11, 12, Secs. 238-285.

CHAPTER 4.

MODERN IRRIGATION IN EGYPT.

§ 88. Peculiarities of the country.
§ 89. What irrigation means to Egypt.
§ 90. Area irrigated—Perennial and basin irrigation.
§ 91. Operations under the English.
§ 92. Methods of taking and applying the water.
§ 93. Repair and maintenance of ditches and canals—The corvée.
§ 94. Irrigation law—In general.
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§ 96. Irrigation laws and regulations—Powers and duties of officers.
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§ 100. Criticism of the Egyptian laws.
§ 101. The law of State control in Egypt, as compared with that of this country.
§ 102. The lessons to be derived from the Egyptian system.

§ 88. **Peculiarities of the country.**—In order to understand the subject of irrigation as practiced and applied in our own country, and the best laws and methods of the same, it is necessary to make a somewhat detailed study of the systems and laws of other countries. During recent years, our Government, with a view to itself taking a more active part in the development of the science of irrigation in this country, has sent to a number of the leading countries, where irrigation is practiced, some of our most expert irrigation engineers, for the express purpose of studying the subject at first hand in those countries. Elwood Mead, chief of the irrigation investigations of the Department of Agriculture, was sent to Italy; Herbert M. Wilson of the U. S. Geological Survey, was sent to India; Clarence T. Johnston and Thomas H. Means were sent to Egypt. The results of these investigations, covering as they did every phase of the subject, are of enormous interest to the irrigation engineers, practical irrigators, and those who are interested in the economic and legal sides of the question.

In the following chapters of this Part we will make a brief study of some of the most important features of the science of irriga-

tion of a few of the countries of the Old World, which lead in its practice; and, by way of comparison, we will compare their systems with our own.

Egypt proper extends from Assuan on the south to the Mediterranean Sea on the north, and lies along the River Nile. It has a length of something more than 700 miles. As far as its agricultural possibilities are concerned, it may be divided into three divisions: First, a narrow strip of arable land along the Nile; second, the portion lying within the delta of the river, consisting of a triangle of about 120 miles on the side; and, third, the Fayum, a province lying to the west of the Nile Valley in an oasis of the Libyan Desert. Outside of these divisions, the country, with the exception of a few isolated small oases, is absolutely desert. The Arabian Desert lies to the east, and the great Libyan Desert to the west of the Nile Valley. The climate of the country is arid in the extreme, and the temperature high, which increases as one proceeds south.

The valley of the Nile is very narrow, and between Assuan and Cairo varies from practically nothing to nine miles. The cultivated land is sometimes on one bank and sometimes on the other, and at times on both. At several points the desert touches the Nile on either bank. At a point about sixty miles above Cairo the valley reaches its greatest width of about nine miles, while the delta proper begins some twelve miles below Cairo, and is triangular in width, being nearly 120 miles on each side to the sea. The greater part of the irrigable land lies in the delta, but only about half of the land that is actually farmed is found there. An Egyptian winter compares favorably with a Utah summer. It is strictly a tropical climate, and during the winter months everything appears at its best, the vegetation being more attractive than it appears during the preceding hot months. Over the greater part of the country there is practically no rainfall, and in no part is there sufficient rainfall to produce crops without irrigation. The average precipitation at Alexandria is 8.26 inches. At Port Said it is 3.49 inches; at Cairo, 1.06 inches; in upper Egypt, south of Cairo, there have been no observations on the amount of rainfall taken, so that no exact figures can be given. There is, however, less rainfall than at Cairo. The whole of the water supply for irrigation comes from the Nile, and the

greater portion of this water comes in what is known as high Nile, when the river is in flood, deriving its supply from the heavy rains in the equatorial regions, where it has its source in Lake Victoria Nyanza, a distance of 3,300 miles from the Mediterranean. The high water season of both the Blue Nile and the Atbara, the two principal tributaries of the Nile, begins with July and ends with September. These two streams, rising as they do in the mountains of Abyssinia, furnish a vast supply of muddy water, nearly all of the sediment of which has built up the valley of the river in Egypt and has maintained the fertility of the soil. The thickness of the layer of the Nile mud, which forms the soil of lower Egypt, according to Captain Lyons, the Director-General of the surveys of Egypt, varies from forty to sixty feet. The Nile at Assuan, or the first cataract, where the stream enters Egypt proper, has a normal flow of 100,000 cubic feet per second, varying from a minimum of 7,000 cubic feet to a maximum of 475,000 cubic feet per second. The rise and fall of the river is usually very regular, and upon this regularity and the height of the annual rise depend to a large extent the success or failure of the crops of the country. A very low flood discharges but 210,000 cubic feet per second, and there is then a scarcity of water for irrigation, and consequently a failure of crops; a good flood discharges 350,000 cubic feet per second, while upon the other hand, a dangerously high flood, or one of 450,000 cubic feet per second, causes much damage. This latter condition, however, has been largely obviated by the storage reservoirs recently constructed by the British.

§ 89. **What irrigation means to Egypt.**—Irrigation in Egypt means now, as it always has, the very life of the country.[1] Although it is claimed that the science is not practiced at the present time to the extent that it was in the time of the Pharaohs, yet under British rule, in the more recent years, it is again approaching that extent. Irrigation in modern Egypt involves the security of the Mediterranean and the safety of the Suez Canal. And by this means the whole evil of a nomadic and uncivilized population is being now checked and will eventually be rooted out. The population of the Soudan is not more addicted

[1] For Ancient Irrigation in Egypt, see Secs. 65-68.

to wandering or war than any other of the inhabitants of Africa, but in that hot, dry climate, they are under the fatal necessity of moving in search of food, water, pasture, and shade. When these are permanently obtainable they settle down into civilized pursuits of life, own property, pay taxes, choose rulers, and buy from manufacturers. The ever-advancing boundary of irrigation has always been found in that country to be the boundary of civilization and comfort. The formerly ever-present famine of that region is passing away and the people are gradually becoming more and more contented, and in a few years extensive armies will no longer be required to keep them in order.

§ 90. **Area irrigated—Perennial and basin irrigation.**—There are in Egypt at the present time in the neighborhood of 7,000,000 acres of irrigated land, and about one-third of the irrigable and arable land is still uncultivated. The irrigated area is annually being extended under the modern works constructed by the English. At the time of the Pharaohs a much larger area was under cultivation. [1]

At the time of the Arabian conquest, in the seventh century A. D., a large portion of Egypt was devastated, the banks of the old basins were broken, and large areas were flooded with salt water, or left idle. Except for those small areas of land, too high to be reached by the ordinary floods of the Nile, from the time of the ancients down to 1865 A. D., only the basin system of irrigation was used. This method consists of flooding the land to a depth of from three to five feet at the season of high Nile—which occurs about September 1 each year—and of maintaining this depth of water for a period of about six weeks, when the water was drained back into the Nile, and the seed sown, without much

1 For Ancient Irrigation in Egypt, see Secs. 65-68.

See, also, Egyptian Irrigation; a Study of Irrigation and Methods and Administration in Egypt, by Clarence T. Johnston, 1903, Bulletin No. 130, Office Experiment Stations, U. S. Dept. of Agriculture; Reclamation of Alkali Lands in Egypt, as Adapted to Similar Works in the United States, by Thos. H. Means, 1903, Bulletin No. 21, Bureau of Soils, U. S. Dept. of Agriculture; Pumping Water for Irrigation, by Herbert M. Wilson, 1896, Water-Supply and Irrigation Paper No. 1, U. S. Geological Survey.

See, also, the Annual Reports of the Irrigation Department of Egypt.

plowing or other cultivation, on the surface of the newly deposited mud.

When Napoleon was in Egypt, in 1798 and 1799 A. D., he is said to have expressed the opinion that the time would come when a dam would be placed across the Nile at the point where the river divides into the Rosetta and Damietta branches, so that the water could be turned into either at will, thus doubling the inundation of the river. Mahommed Ali, who became viceroy in 1805 A. D., changed the method of irrigation in Egypt by cutting a number of deep canals, and thus permitting irrigation throughout the year. In 1833 A. D., Linant Pasha proposed to construct across the Nile at its point of division a regulating dam or barrage, which would allow the floods to pass unchecked, but which, by means of gates, would permit the water to be raised at low Nile to a sufficient height to fill canals running at such a level that irrigation could be practiced without pumping. The dam was completed in 1865, but was never entirely efficient until 1895, when the water was raised to the desired level. At the present time all of the land of lower Egypt is supplied with perennial irrigation,[2] the greater part of the water being taken out of the Nile at this barrage. The great advantage of the perennial irrigation, or where the land can be irrigated at all seasons of the year, and the basin method, which was only practiced at the season of high Nile, or once a year, can readily be seen. Under the basin method but one crop could be raised during any one year, while under the perennial method two and sometimes more crops could be produced. There is still a great deal of land under basin irrigation in upper Egypt, but gradually, under the English management, canals are being constructed and the system of perennial irrigation extended. When all of the dams now under construction are completed practically all of the land in Egypt will be under the improved system.

§ 91. **Operations under the English.**—The construction of reservoirs is a new departure on the part of the Egyptian Government, and it is only since the English have been in control that any

[2] Lands along deep canals which always carry water are irrigated throughout the year, hence the terms, "perennially irrigated," "perennial irrigation," etc.

effort has been made in that direction. The water supply afforded by the Nile is such that storage works can be extended almost indefinitely, or until all of the arable land of Egypt is served by perennial irrigation. The Assuan reservoir is only the first step in the construction of storage works. It is the plan of the Government to build a number of storage works at various places on the river similar to the Assuan reservoir. This is true as to both below and above Assuan.

The Assuan dam, which has just been completed, is 70 feet high, 6,400 feet long, 23 feet wide on top, and 82 feet wide on the bottom at the deepest part; it was originally planned to be 100 feet high, but it was found that a dam of this height would cause the submersion of the temples on the island of Philae, and in view of the protests of those interested in the preservation of this ruin, it was decided to reduce the height 30 feet. The depth of water at the dam when the reservoir is full is 65 feet. The estimated capacity of the reservoir is 863,400 acre-feet.

The first cost of the dam was $9,740,000, which, with interest, is to be paid in sixty semi-annual installments of $382,845.31 each, the first of which was paid July 1, 1903. This makes the total cost of the dam, including interest, $22,970,718.60. It is estimated that the water stored in the Assuan reservoir will add annually to the wealth of the country a total of $11,000,000.

About 370 miles down the river from Assuan, at Assiut, is another dam and reservoir, which was constructed for the purpose of raising the level of the water so that it would flow into large canals supplying water to land on the west side of the river. This dam has a length of 2,646 feet, and a height of 44.5 feet. This dam was constructed at a cost of $1,986,630. Other dams are also being constructed and are planned at various points along the river.

It is estimated by the engineers that if the reservoir system can be made large enough to maintain a uniform flow in the river throughout the year, it would at all times discharge about 257,230 acre-feet per day, or about 130,000 cubic feet per second. The Nile furnishes 926,000,000 acre-feet annually. Disregarding losses in storage and transit, it is estimated that 27,521,000 acre-feet of water would irrigate all of the agricultural land. This would leave 65,200,000 acre-feet in the river more than is neces-

sary to irrigate all the arable land in Egypt, or, in other words, a hot, dry, tropical country, with three times the amount of water in the river than is needed to irrigate the whole of the arable land in the country.

§ 92. **Methods of taking and applying the water.**—About the only thing that the people of the United States can learn in the matter of irrigation from Egypt is the success of its mighty engineering feats. When we come to taking the water from the canals and actually applying it to the land, and the laws and administration of those laws, we can learn but little. The methods of taking the water from the canals and applying it to the land are due partly to the physical condition of the country, and partly to the natives, who believe that the ancient methods in this regard are as good as the more modern. Owing to the fact that Egypt is almost a flat country, the farmers of that country seldom are able to secure enough fall to permit the delivery of water from the canals to the fields by gravity alone. The grade of the Nile varies from one-half to one-third of a foot per mile. Owing to this slight fall the canals have to be quite large, because in order to gain any elevation their grades must be less than that of the river. Even under the most favorable conditions they can not gain more than a small fraction of a foot per mile. Being unable to deliver the water by gravity, methods of lifting the water from the canals and river are resorted to. Almost every conceivable method is used. There can be found an immense steam pumping plant of the most modern construction operated alongside a "shaduf," or "shadoof,"[1] a "sakiyeh,"[2] an "Archimedean screw,"[3] or a "natali."[4]

[1] A crude representation of the well sweep, worked by hand, which lifts the water from one level to another by a bucket. A single shaduf can lift water only five or six feet, but it is the custom to install them in series of three or four, which, together, raise the water from 20 to 30 feet.

[2] This form of water lift is, according to the records on some of the temples, of very ancient origin, almost as old, in fact, as the Pyramids themselves, and can be worked by horses, oxen, cows, buffaloes or camels, going round and round, the big wheel being geared to another at right angles with it, and as many buckets being added as necessary, according to the depth of the water. The labor of one animal is about equal to the needs of an acre of land; a two-animal rig may do for three acres. It is estimated by Johnston that there are

The native Egyptians, or fellahin, have been most unchanging in their customs and habits. They still plow the ground with a wooden plow, or stir it with a hoe, or with an even more primitive wooden implement. They cultivate the growing crops with a hoe and harvest them with a sickle, or pull the stalks from the ground by hand. They still beat the grain out with a flail, or it is trodden and chopped out with rollers carrying disks and drawn by oxen. They do not readily take to either modern machinery or methods, but still follow the customs of their forefathers.

§ 93. Repair and maintenance of ditches and canals—The "corveé."—The expense of keeping in repair and cleaning the ditches and canals in Egypt is something that will astonish the average American irrigator. But, in Egypt, these must be borne each year, for otherwise the raising of crops would cease. If the same conditions existed in this country, with our present price of labor, the cost of cultivation by irrigation would be prohibitive.

In Egypt, after each "high Nile," the ditches and canals must be cleaned, and this requires an enormous amount of labor and expense. The river in flood brings down immense deposits and

probably 50,000 of these crude machines in Egypt.

[3] This is a screw inside of a cylinder, turned by two men. This machine is used for short lifts, high lifts being practically impossible on account of the difficulty of supporting a screw of great length. By this means one man can irrigate from one to two acres a day, provided the lift is not over two feet.

[4] By this the water is raised by two men, who operate a bucket, to which is attached four cords. These cords are held by the men, and the bucket is alternately filled and emptied with remarkable dexterity. By this means two men can raise about one hundred cubic feet of water per hour, to a height of three to four feet.

See, also, for Irrigation and Its Many Methods, Sec. 30.

See, also, Egyptian Irrigation: a Study of Irrigation Methods and Administration in Egypt, by Clarence T. Johnston, 1903, Bulletin No. 130, Office Experiment Stations, U. S. Dept. of Agriculture; Pumping Water for Irrigation, by Herbert M. Wilson, Water-Supply and Irrigation Paper No. 1, U. S. Geol. Survey.

For the law governing these pumping or lifting machines, see Décret et Règlement concernant les Machines Elevatoires, Avril, 1881, Fevrier, 1894, et Novembre, 1900, Le Caire, Imprimerie Nationale, 1907.

See, also, Loi sur les Digues et Canaux, 22 Fevrier, 1894, Le Caire, Imprimerie Nationale, 1905.

the canals are filled with mud, which has to be cleaned out before they can be used. It is estimated by Johnston that the cost of cleaning canals in Egypt amounts to nearly $2,000,000 per year. This is mostly performed by hand, one man being able to remove about one cubic yard per day, and he is paid the sum of 15 cents. Before the English took possession, the canals were cleaned by the "corvée" system, or forced free labor; but this has been done away with, and laborers are now paid as above.[1] At present the corvée system must be considered as an intermediate step between slavery and freedom. Although the fellah is not imposed upon as he was twenty-five years ago, yet he does not enjoy liberty as it is understood in this country. The work of watching the Nile levees during high water is placed upon the inhabitants, and the corvée is still in force to that extent.

[1] The system of forced and unpaid labor known as the corvée has always been an important factor in all kinds of public construction in Egypt. From building the Pyramids to digging the Suez Canal, or the excavation of a small drain, the corvée has been called into service. From the time of Joseph, some 1750 years B. C., to the early part of the nineteenth century the practice was recognized. The government owned the people and everything in it, and everything was worked, not from the standpoint of the benefit to the individual, but for the profit to the government, and incidentally to its rulers. Formerly the corvée was called upon for all kinds of public and private service, but during the latter part of the nineteenth century it was modified. In 1881, the first khedival decree relating to the corvée appeared, and provided:

Articles 1 to 4 of this decree prescribe what works shall be maintained by the corvée.

Article 5 provided that all male inhabitants of the country, of sound health, between the ages of 15 and 50 years, with the exception of those indicated in the following section, are subject to corvée duty.

Article 6 provided that the following persons are exempt from corvée duty: Teachers, students, persons attached to charitable institutions, shrines, convents, and hospitals; those in the service of the mosques, tombs, etc.; priests, monks, etc.; people having professions or trades who pay professional taxes; also fishermen, boatmen, and watchmen.

Article 7 provided that every person who is subject to corvée duty could redeem himself by furnishing a substitute, or by a payment in cash.

In 1889, the following decree was rendered:

Article 1. The corvée is suppressed throughout Egypt.

Article 2. The guardianship and charge over the dikes and other works, as well as all urgent measures in case of danger owing to the rise of the Nile, shall continue to be carried out at the *expense of the inhabitants.*

§ 94. **Irrigation laws—In general.**—In theory the Government of Egypt is one of the most complicated in the world; in practice it is comparatively simple. The British Minister plenipotentiary and his advisers are the real government. Native Egyptian officers have certain duties, but the English have all the authority. A decree of the Khedive has no weight unless sanctioned by the British Minister; neither can he veto a measure against the advice of that authority. Before a measure can become a law it is prepared in the shape of a decree by one of the seven ministers. The Minister of the Interior is the Prime Minister and president of the council of ministers. Under him are the Minister of Public Works and the ministers of six other departments. All laws are in the shape of decrees, passed by the council of ministers, subject to the approval of the British financial adviser. Egypt has no popular government. No elections are held, hence the public takes little interest in the affairs of the Government. About all the advantages enjoyed by the provinces or cities is that their local councils or assemblies may discuss measures affecting their communities. They can pass no laws relating to the same. The council of ministers considers their recommendations when it meets, and in this way become acquainted with the public needs. After the council of ministers have approved a decree it is transmitted to the Khedive. It makes little difference whether he signs it or not; his power of veto can not be exercised when it conflicts with the advice of the British Minister. The irrigation officials are under the Minister of Public Works and include an inspector general of irrigation, one inspector of irrigation for Upper Egypt and one for Lower Egypt, and an inspector general of reservoirs. These officials are all English, and all but the inspector general of reservoirs have permanent positions, and his will doubtless last until reservoir construction has been completed. In the same rank with these officials stand six heads of the irrigation administration, who are native Egyptians. The head of the technical service is an Egyptian, and this branch is closely allied with the irrigation administration. To him are referred all technical questions relating to the issuance of licenses for pumps and other lifting devices.

The country is divided into provinces. The chief officer of each province is the governor, who is an Egyptian, and, in most

respects, simply a figurehead. It is also divided into irrigation districts called circles, and at the head of each circle is an inspector. The inspectors of the circles have immediate charge of cleaning the canals, building the smaller diversion works, repairing masonry structures, keeping gauge heights on the Nile, and on the canals, and dividing the water among the canals.

Every canal which serves more than two villages is held to be public, and comes directly under the irrigation administration. There is nothing in the law which requires a certain discharge to be supplied in the canal during any part of the year. There is nothing to prevent an irrigation official closing one canal, or all, at his pleasure. When water is turned into the canal the farmer can use as much as he can lift and convey to his land. What he does not need he is free to waste, but having to lift it all from two to twenty feet, very little is wasted. If the canal supplies too much water and floods adjoining land, or if it fails to supply enough to irrigate the farms depending on it, the irrigator has no recourse except to apply for a remission of a part or all of the tax to the Government. This he sometimes gets and sometimes does not. During the seasons of scarcity rotations are enforced, over which the engineer has absolute control. The purpose of the administration is rather to save the more valuable crops than to protect the irrigators uniformly. The object of that is, it insures to the treasury a maximum return through taxation, but seldom affords an impartial and equitable division of the water among the farmers. Being for a period deprived of the water, the fellah who has planted certain crops is the sufferer, and, although his taxes may be remitted, he has no income from his land and must earn his living in some other way.

§ 95. **Land titles in Egypt.**—Mahommed Ali, while not granting permanent titles to agricultural lands, instituted many reforms in that respect. Among these was the distribution of from two and one-half to five or six acres to each person. This was made quite early in his reign; and in 1842 he permitted the holders to dispose of their lands to others as they pleased. At no time, however, did they hold any actual title to the land they farmed. Together with the lack of titles and the weight of taxation, which was made so heavy as to amount to practically confiscation, the

fellahin have been in many cases forced to dispose of their land, and much of this is now included in large estates owned by foreigners of various nationalities. Under Ismail, large tracts were confiscated by the Government, which now owns about one-fifth of all the agricultural land. The Government rents out to the farmers about 96 per cent of the tillable land owned by it. For this there is received by the Government an average of about $20 per acre in rentals, through a company called the Daira Sanieh, which company has a contract with the Government that stipulates that the land shall bring a fixed price when disposed of. The land sold prior to the year 1905 went largely to the small farmers. In this way a large area has returned again to the fellahin.

While Ismail Pasha inflicted many wrongs upon Egypt, one of his acts has resulted in benefit to the people. He was indirectly responsible for establishing the first titles to farming land in Egypt. He taxed the people to the limit, borrowed money with whatever credit he had, and without credit when this was exhausted. In an attempt to secure ready money he finally issued a decree providing that all persons who paid their taxes six years in advance would be given permanent titles to their lands. Those who could afford to do so took advantage of this offer, and the titles thus obtained have since been recognized. This law, however, was repealed in 1880, because it was not as good a financial measure as it had promised to be.

§ 96. Irrigation laws and regulations—Powers and duties of officers.—When the English engineers first undertook a study of Egyptian irrigation it was found that the laws of Egypt were fragmentary, and it was difficult for them to tell what provisions were in force. As early as 1885, the ministry issued decrees regulating and defining the respective powers of the governors of the provinces and the inspectors of irrigation. These regulations are still in force and are among the first reforms in irrigation law.[1]

[1] A free translation of these laws and regulations is as follows:

Section 1. It is the duty of the governor to see that a just distribution of the water is made in the various districts composing his province. He will make known at an opportune time to the irrigation inspectors ap-

In order to give the inspectors, who were English, the absolute power, their duties in the law quoted below are purposely not

pointed by the minister of public works the places where more water is needed and at what times, and hear the complaints on such subjects as may be addressed to him by the chiefs of the villages.

Sec. 2. It is the duty of the inspectors to satisfy all demands as far as possible, and where they can not for any reason carry out these instructions they shall report the matter to the governor and communicate with the minister of public works. The governor, on his part, shall inform the minister of the interior, and the two ministers shall together take the matter under consideration and, if necessary, report it to the council.

At the beginning of each year the governor, with the agricultural council, shall specify in the ordinary manner the various works which are to be executed.

In order that the governor may be able to undertake this work with full knowledge of the facts, the chief engineer shall report to him his estimates and calculations some days before the meeting of the agricultural council.

The governor shall put himself in direct communication with the chief engineer on all questions which may arise during the course of the year. If he does not obtain satisfaction he may appeal to the inspector, and, if necessary, to the minister of the interior.

Sec. 3. The technical control of the distribution of water, the partial or complete closing of gates, belong *wholly to the inspectors*, and nothing may be done without their *written orders*. Consequently, if the governor believes that it would be better to partially open or close any gate, he must address the chief engineer, and, if necessary, the inspector, giving his reasons and all possible evidence. The engineer and inspector may be able to approve and act accordingly. If not, they must explain to the governor what facts and evidence the minister of the interior and the minister of public works should have in case the question is appealed to them.

Sec. 4. During high water in the Nile, or whenever to avoid disaster, and when the governor does not have near him an engineer whom he may consult, it is the duty of the governor to do whatever in his judgment may be necessary, whether to throw stones in the water, or to use other means for adding to the security of irrigation works. In such cases the governor should telegraph to the inspector immediately, requesting the aid of the chief engineer.

If the engineer of the province be present, he, and not the governor, directs what measures to adopt, and he is held responsible for the same.

If, however, the governor gives orders contrary to those of the local engineer, the latter must obey, but at the same time give notice that discord exists, after which the governor is responsible for what takes place.

The inspector shall arrange matters so that the governor may be accompanied as often as possible in his journeys along the levees and canals during high water by the chief engineer or some one delegated by him.

Sec. 5. The engineers are under the minister of public works, but they owe the respect due to the principal representative of the government in the province. They should respond to

clearly defined. The governors of the provinces, being Egyptians, have but little authority over the regulation or use of waters. Section 1 provides that: "It is the duty of the governor to see that a just distribution of the water is made in the various districts composing his province." This is followed by a sentence which reduces his authority to the reporting of "the places where more water is needed and at what times, and to hearing the complaints on such subjects as may be addressed to him by the chiefs of the villages." After taking away all of the power of the governor, and giving full power to the engineers and inspectors, the

his demands and give him all the information he may desire. When the governor has reason to believe that the local engineer acts without or beyond the orders of the inspector in that which concerns the making of regulations relative to the use of water, which regulations must be communicated to the governor and published, he must study with care the conduct of the engineer, make full inquiries regarding his acts, as well as the acts of those under his orders, and shall make known to the inspector the result of these inquiries.

Sec. 6 provides: That no new work may be undertaken without the previous sanction of the council of ministers, and how the plans for the proposed work must be submitted.

Sec. 7 provides: That the governor is not called upon for the technical execution of the work; the chief engineer is alone answerable and bears all the responsibility for the completed work. The section also provides for the corvée, and how it shall be called out. (This portion has been repealed by decree of 1899.)

Sec. 8. When, for any reason, the inspector desires to close a canal for more than 14 days, he must inform the governor of his intention as soon as possible, so that the latter may present his objections, if he has any.

Sec. 9. *Irrigation works.*—Irrigation works may be divided into two classes. The first class includes those for which bids are advertised in the official journal, which bids are submitted under the prevailing rules of the minister of public works. These works comprise all excavation requiring more than a thousand men per day, all masonry work costing more than £200, and all work in which machinery is necessary.

In work of this class the governor will not be consulted as to the choice of the contractor, but he shall be informed regarding the nature of the contract. During the execution of the work he must, if he deems necessary, call the attention of the engineer to the manner in which the contractor is executing the work.

Sec. 10. The second class covers the excavation and cleaning of small canals, small works where masonry is not needed, and repair of masonry works. Contractors shall submit bids to the governor for work of this class. The inspector shall submit to the governor a copy of the specifications. The bids shall be opened and a contractor chosen to the satisfaction of *both the governor and inspector, or his assistant.* It is not necessary to accept the lowest bid. In work of this class the governor must always

regulations in Sec. 4 contain the somewhat ironic provision: "The engineers are under the ministers of public works, but they owe to the governor the respect due to the principal representative of the Government in the province."

The classification of improvement works provided for in Articles 9 and 10 is worthy of notice. The governor has nothing to do with awarding the larger contracts. The law, however, provides that "he shall be informed regarding the nature of the contract," and "during the execution of the work he must, if he deems necessary, call the attention of the engineer to the manner in which the contractor is executing the work." In the smaller improvement works the governor has greater authority.

This regulation not only prepared the way for the irrigation codes that were to follow, but made it much easier to introduce reform measure regarding the corvée. As soon as the contractors on large enterprises were brought directly under the Minister of Public Works, a solution of some of the labor problems could be undertaken. It was supposed at the time that the regulation went into force that the use of machinery would go a long way toward reducing the labor of the corvée, but experience has not proved this to be the case, owing to the fact that labor is so very cheap, the labor of a man for one day being worth about 15 cents.

§ 97. Irrigation laws—The water and irrigation code of 1894.—While the needs were evident to the English engineers and officers of the Egyptian Government, owing to the political and other conditions of the country, it was impossible or impracticable to bring about the enactment of better laws governing and controlling the distribution and use of waters until the year 1894, when a fairly comprehensive code was enacted. This code, of course, places the almost absolute control of all the waters and the works used in utilizing them in the various inspectors and other English officials. And, in order to compare the Egyptian law upon the subject with those of our own, we will give a free translation of an abstract of the same, which is as follows:[1]

judge as to the reliability of the bidders. The governor should, if possible, favor local contractors.

[1] Loi sur les Digues et Canaux, decret 22 fevrier 1894, Le Caire, Imprimerie Nationale, 1905.

Public Canals and Levees.

Article 1. The word "canal" refers to a water course which serves for the entire or partial irrigation of more than two villages. All canals of this kind are public property. They are generally constructed and maintained at Government expense and are a part of the public domain.

The use and occupation of banks and canals are permitted only with certain restrictions laid down in Article 21 of this decree.

Private Ditches.

Art. 2. By the word "rigole" is understood a water course which serves for the irrigation of the land of one or two villages, or of land belonging to one person or to a single family living in one community, even if belonging to several villages.

All rigoles are considered private property. The cost of construction and maintenance is borne by those who derive profit from the works.

In case of delay in cleaning these works, the Government may perform the work at the expense of the proprietors. The sum thus spent will be distributed by the governor in proportion to the taxes paid by each, and it will be collected in conformity with the provisions of the decree of March 25, 1880.

However, if a ditch serves for the irrigation of 1,000 acres belonging to one or several persons, it can always, upon request of the owners, be considered a public waterway.

Drains.

Art. 3. The word "drain" indicates a channel in the earth for carrying away rain water, drainage water, or water from irrigated fields.

A drain is public when it serves more than two villages; private, when it serves one or two only, unless it drains a surface of more than 2,000 acres in area, when it is considered a public work, although it may be situated in one village.

The public drains are maintained by the Government and the private drains by the parties interested. The provisions of the second paragraph of the preceding article are applicable to private drains.

Works for Protection Against Inundation.

Art. 4 provides that these works are levees, transverse and longitudinal dikes, and all structures serving to protect farms and villages from the overflow of water. These works are considered public property and wholly under Government control.

Private levees upon the banks of the Nile, or those which form the boundaries of basins and which are constructed by the owners, must be maintained at the expense of those benefited.

Powers of Irrigation Inspectors and Chief Engineers.

Art. 5. Irrigation inspectors are the representatives of the minister of public works and have under them the chief engineer and all of the irrigation administrative service. Their powers and their relations to the governor are fixed by the regulations of December 31, 1885.[2]

Public Works on Private Lands.

Art. 6. The owner of land crossed by a public ditch, drain, or other work destined to serve the lands of neighbors can not, without the written consent of the owners of the lands served, till the land occupied by such works in such a way as to destroy the usefulness of the works.

Stopping of Water-Raising Machines and Closing of Canals.

Art. 7. No indemnity can be claimed from the Government for loss occasioned by a reduction or stoppage of the flow of water in a canal resulting from extreme necessity or having for its object repairs or changes recognized to be necessary, or by any measure which the irrigation inspector may deem necessary, in order to maintain the volume or regulate the flow of water—such, as for example, the closing of a canal or the suspension of irrigation for a certain number of days on all or part of a canal, so that other places in greater need of water may receive it.

In case it may be necessary to clean or repair a canal the irrigation inspector, through his agent, the chief engineer of the province, shall determine when water may best be dispensed with for irrigation, that those operations may be carried on.

[2] See note to Sec. 96.

The section also provides that the inspector should act in accord with the governor as required by the decree of December 31, 1885; and that the governor should notify and consult those interested or their legal representatives.

Construction of Private Ditches.

Art. 8. If the citizens of a village desire to construct a canal on their own lands for their own use they shall apply to the governor. He will communicate the application to the inspector of irrigation, accompanying it with his recommendations and advice, and, if the inspector agrees, the governor will approve or reject the application as the circumstances may warrant.

It also provides that the expense shall be borne by the applicants, and that other parties may use the ditch even during low water, after the original applicants shall have received what they need for their lands, in which case such parties become contributors in the cost and maintenance in proportion to the extent to which their lands may be benefited by the ditch.

Ditches Through Lands of Persons Not Benefited.

Art. 9 provides for rights of way through the lands of others, by a land owner whose land will be benefited. He must make application to the governor, who will communicate the same to the inspector of irrigation, with his recommendation and advice. The latter will examine the situation, on the ground, and give his decision, after hearing the parties interested.

If the report is favorable to the applicant and the governor, after having acquainted himself with the facts, agrees with the inspector, a decision to this effect shall be rendered by the inspector. This decision shall be transmitted, as prescribed by law, to the opposing parties. The latter may, within fifteen days from such notice, appeal to the minister of public works, whose decision shall be final. If the governor and inspector of irrigation do not agree, the case shall be submitted to the minister of public works.

Insufficient Supply of Water in a Ditch.

Art. 10. An irrigator who believes that he does not have sufficient water for his purposes, should notify the governor, who should in turn communicate with the inspector of irrigation,

accompanying his report by his recommendation and such information as he may deem necessary, so that the inspector may determine whether or not the ditch which irrigates the cultivated land has sufficient capacity, and as to whether it should be enlarged. The inspector will base his judgment on the extent of irrigated land and the character of the irrigated crops. If the neighboring property holders object to the enlargement of the ditch, as may be recommended by the inspector, the provisions of the preceding article are to be observed, and if the enlargement is for the passage of summer irrigation water, the regulation set forth in Article 9 shall apply.

Exchange of Ditches.

Art. 11 provides for the exchange of ditches, but during low water no exchange of ditches is permitted without the consent of all parties interested.

Construction of Laterals, or Installation of Water-Raising Devices on Canals.

Art. 12 provides that application by the owner of land bordering upon a canal must be made to the governor, who will communicate it, accompanied by his recommendations and advice, to the inspector of irrigation; the latter will refer the matter to the chief engineer of the province, who, in the case of the sakiyeh, if he approves the request, will furnish the necessary authorization, but if it concerns a lateral will return the papers to the inspector for his approval.

In all cases a copy of the authorization shall be transmitted to the governor, together with a statement that the discharge of the canal is sufficient to supply the lateral or the land to be watered by the sakiyeh without injury to those using the water from the same canal below.

The applicant is required to pay all expenses necessary for the flow of the water into the lateral and the maintenance of the banks of the canal in good condition. A permit for water-raising devices must be obtained.

Closing a Ditch to Prevent Injury to Adjacent Lands.

Art. 13 provides how ditches may be closed where injury is done to adjacent lands, if it be shown that the land irrigated by

the ditch can be watered from another without injuring lands or agriculture in any way.

Art. 14 provides for the increasing or diminishing the size of the head gate of a ditch or changing the level of the bottom of the same.

Art. 15 provides how right of way for drains passing through the lands of parties not benefited may be obtained.

Art. 16 provides for the repairing of a ditch or drain so as to prevent damage.

Art. 17 provides for changing the location of a ditch which does not meet the demands of the irrigators under it.

Difficulties Which May Arise in Connection with the Repair of Ditches.

Art. 18. If any party disagrees with his associates as to whether or not a canal should be repaired, and so notifies the governor, the latter shall delegate the chief engineer to make investigation on the ground and ascertain the facts. If it is considered necessary to have the repairs made, the governor will notify the interested parties to do so.

But if the parties are found to be unable to perform the necessary work, either for want of labor or money, the government may defray the expenses necessary for making the repairs and reimburse itself for the money so expended by numerous payments from those benefited, the amounts of such payments to be fixed by the province according to the means of the parties. The Government may renounce all claims for reimbursement if the parties are recognized as being poor.

Art. 19 provides for the civil remedy for the destruction of dikes or filling in of ditches or drains. After the matter has been submitted to him, if it is found that the dikes have been destroyed or channels filled in, the inspector will make an estimate of the cost of re-establishing the works as they formerly stood, and the governor will require, according to law, the offender to restore the property he has damaged. In case he refuses he will be obliged to bear the expense of such repairs.

In case of the interception of the water, if it is found that the complainant actually irrigated his land from the same ditch where the water is intercepted, during the preceding year, the inspector

of irrigation having made an examination, will so inform the governor, who will take such lawful measures as may be necessary in order that the water may flow as formerly, all expenses being borne by the party or parties who intercepted the water.

Art. 20 provides for the removal of trees planted on levees and canal banks, where they are obstacles to the flow of the water, to navigation, or to travel on the banks.

Cultivation of the Banks or Bed of a Canal.

Art. 21. The customary practice of cultivating the sides of canals not reached by the water and the beds of Nili Canals (canals used only during high Nile) will be permitted, but the cultivator of such land can not claim any damage for injury occasioned by necessary repair or cleaning of canals. However, the inspectors will enjoin the agents in charge of the work to take all possible precautions to prevent loss to the growing crops.

A farmer of such government land will not be required to pay rent therefor when the crop shall have been damaged as a result of necessary public work executed before harvest time. He will, however, be obliged to bear the loss of the damaged crops.

Making a Road Along Cultivated Bank.

Art. 22. If it is necessary to use for a public highway the bank of a canal ordinarily cultivated, or if for any reason it is desired to stop cultivation thereon, the inspector of irrigation will request the governor to inform the farmer that cultivation will not be permitted after the crops then growing shall have been harvested. If, in spite of this notification, the farmer persists in using the bank for raising crops he will have no claim against the Government should the crops be destroyed by order of the governor. But if the land along the bank yields revenue through taxation, the Government must remit taxes thereon and declare it a public highway.

Art. 23 provides for the construction or repair of private head gates along the banks of the Nile or of a canal; this must be done at the expense of the owners.

Works for Protection Against Inundation.

Art. 24. When, to protect the country against inundation, it is necessary to occupy a tract of land belonging to individuals,

whether it be cultivated or not, or to destroy a building of any kind situated on said land, the area of the property so occupied will be measured, and the valuation will be fixed by the commission, as provided in Article 27. After having heard the owner and the inspector of irrigation the commission will inform the governor of the estimated damages resulting from these works.

The sum fixed by the commission will be paid by the minister of public works. No appeal can be taken from the decision of the commission.

In case of danger during high Nile, the governor may act immediately. He may occupy land, whether cultivated or not, destroy a house or any other structure in the building of works necessary for protection; in this case the estimate of damages will be made by the governor or his deputy, acting with the chief engineer of the district and four prominent persons, two of whom shall be chosen by the owners of the property and two by the governor. In case of a tie the governor or his deputy shall cast the deciding vote. The damages shall be paid by the minister of public works.

Change in the Course of the Nile.

Art. 25. If the Nile should form, owing to a change in its channel, an island or deposit of alluvial soil near a bank upon which is erected an elevating machine authorized by the Government, and the Government should deem it expedient to sell or rent this island or tract of land, the owner of the machine shall have a right to dig through the alluvial land to bring water to his machine without indemnification to the tenant or owner.

Art. 26 provides that boats will be allowed to load and unload their cargoes upon the banks of the Nile or canals, provided no damage be done.

Board of Appraisers.

Art. 27. A commission is hereby instituted to act where parties fail to agree on the amount of indemnity due, whether it be for lands necessary for the construction of ditches or drains or for any other case of indemnity provided for in this decree.

This commission shall be composed of the governor or his deputy as president, the chief engineer, and two prominent citizens of the province chosen by each of the interested parties.

In case of a tie the president shall cast the deciding vote.

If the chief engineer is absent or hindered from attending, the inspector of irrigation shall appoint the principal deputy engineer to take his place.

Art. 28 provides that the owners of boats can not claim indemnity against the Government for delay occasioned by the closing of a canal or by insufficient water in the canal or in the Nile.

Art. 29 provides for the removing of wrecked or grounded boats and their cargoes; the expense of removing the boat to be borne by the Government, but that the owner can have no claim against the Government for damages.

Art. 30 provides for the establishment of ferries on canals.

Art. 31 prohibits, under penalties, for any one to require or collect any payment whatsoever for the privileges which authorized boats have of loading or unloading their cargoes on the banks of the Nile, of a canal, or of a public drain.

Arts. 32-37 provide for offenses against public and private works and the penalties therefor.

How Offenders Are Tried.

Art. 38. Offenders will be tried before a commission composed of the governor, the chief engineer or his deputy, and three prominent citizens of the province, to be chosen by the minister of the interior.

A majority vote shall decide.

No appeal may taken if the sentence carries a fine only.

Where the offender is condemned to imprisonment, he may appeal to a special committee sitting at the ministry of the interior and composed of the under secretary of state as president, a khedival councilor, and a delegate from the ministry of public works.

The appeal must be lodged by a declaration to the province or to the Government within three days after the decision has been handed down.

The appeal will not be received unless the party condemned has at that time paid the fine imposed, subject to refund in case of acquittal.

Art. 39. Special regulations of the minister of the interior shall fix the procedure to be followed whether before the commission or before the special committee.

Art. 40 provides that the sheiks and watchmen of the towns and villages, the overseers of the government lands, will be held responsible for the safe keeping of the dikes and canals and all works of art which may be located in their respective jurisdictions and which have been consigned to their care. In case of offense they will be held personally liable for the expense of repairing the works should the offenders not be apprehended.

Art. 41 provides for the collection of fines and other expenses.

Art. 42. All previous acts in conflict with this decree are hereby repealed.

§ 98. **Regulations for machines for raising water.**—As nearly all of the water used for irrigation in Egypt has to be raised either from the river or from the canals to a height of from four to twenty-four feet, and many thousands of machines and water-raising devices are used for this purpose, it was found necessary to adopt some sort of regulations governing such machines. Therefore, on March 8, 1881, such a decree was promulgated, an abstract of which, freely translated, is as follows:[1]

Art. 1. Any person, before establishing a machine for elevating water either for irrigation or drainage, whether the machine be stationary or movable, or propelled by steam or by a current of water, or by wind, must receive permission from the public works ministry. The permit carries with it no right or title to the public or private lands traversed by pipes, conduits, aqueducts, head gates, or occupied by the pumping plant, in any way whatsoever. The Government remains neutral in all respects in all disputes between the people and the person receiving the permit and leaves to him all responsibility resulting from damages which may occur in the installation of the plant or in any other way.

Art. 2. The erection of stationary elevating machines will be authorized only upon the banks of the Nile. At the same time the minister of public works may make exception and authorize the establishment of such machines upon certain canals. The minister is to be the sole judge of the expediency of issuing a permit, and to him is left all questions regarding all agreements and conditions to which it will be subjected, as the case may demand.

1 From Decret et Reglement concernant les Machines Elevatoires, le 8 mars 1881, Le Caire, Imprimerie Nationale, 1907.

Art. 3. Travel along the banks or navigation must not be interfered with by such machines.

Art. 4. In case the applicant fails to comply with the conditions, his permit will be canceled.

Art. 5. The site for such machines can not be changed without a new permit.

Art. 6. The Government retains the right to cause any authorized pumping plant removed.

Art. 7. By the permit, the right to install the machine only is authorized. It carries with it no assurance of a supply of water for the machine. In order to conduct the water over the land of the Government, the applicant must secure a special permit.

Art. 8. The ditches for carrying the water from the machines to the land must be constructed in such a manner and be of such a kind as not to interfere with travel, the flow of water, or with irrigation.

Art. 9. For the general good, in case of low water, the Government may order the immediate closing down of such machines, or reduce the capacity of the same.

Art. 10. Under the provisions of Article 7, the ministry of public works is, under certain conditions, authorized to permit the use of Nili canals for carrying water from the machines to the land to be irrigated, under the following reservations:

(1) Such permission will be given only during the season of low water of the Nile, and ends when the water will flow freely in the canal.

(2) Permission will be given only when the proprietors of the land who use the Nili canal have given their general consent.

(3) If it is found necessary to construct dams to maintain the level along a Nili canal, these must be of earth.

(4) The owner of the machine is alone responsible to the people for all the damage occasioned by the breaking of dams, percolation, and the delay in building the dams at the time the supply of water is available.

Art. 11. Any person who had established a machine prior to the decree might apply for a permit.

Art. 12. After August 31, 1881, the operation of all machines established contrary to the provisions of the decree will be stopped.

Art. 13. The Government reserves the right to exercise, in the interest of the public, a supervision of the working of the machines, without removing from the proprietors the responsibilities which may be incumbent upon them.

Art. 14. Regulations for carrying the decree into effect and for the protection of such interests as are affected thereby will be prepared by the ministry of public works.

By a separate decree of April 6, 1881, the above was supplemented, as follows:

Art. 1. All applications for permits must be made upon stamped paper, and be addressed to the governor, and contain a full description of the machine; the location where it is proposed to establish it; whether it is to be used for irrigation or drainage purposes; the full names, professions, nationalties, and residences of the owners; and the period for which the permit is required.

Art. 2. The application is recorded in the governor's office upon a special register. It receives a number in sequence, after the payment of a fixed fee of 100 piasters ($4.93) for each machine. It is then transmitted to the chief engineer of the circle.

Art. 3. If the chief engineer approves the project, he draws up in due form and signs the permit, which must contain: The agreement under which the applicant agrees to abide by the present decree and all future laws and regulations; a description of the site upon which the machine is to be erected, and any special features necessary. All facts relative to such machine must be made public, so that objections may be made.

Art. 4. The permit is then sent to the engineer of the circle, to the province, or to the governor, and is signed by the latter and forwarded to the applicant. It becomes effective upon the payment of 50 piasters ($2.47) per horse-power. This tax, however, shall never be less than 500 piasters ($24.65).[2]

§ 99. **Irrigation litigation.**—Owing to the fact that the Government so absolutely controls the water of the country and its diversion and division there is no litigation between irrigators as to water rights. Cases are occasionally brought against the Government because the water supply is short or because the size of

[2] For applications for the drainage of swamps and marshes, a similar proceeding is had. See decree approved Feb. 21, 1894.

the pump the engineers have permitted to be installed does not suffice for the irrigation of the lands it was intended to serve. These cases are, however, rare. Such suits, if the amount of money involved is small, go first before the native courts, where, at present, a Government officer is usually looked upon with suspicion. As the irrigation cases in the courts are nearly all small and relate generally to rights of way and similar questions, and as the English have slowly instituted reforms in the court proceedings, just decrees and decisions are now the rule rather than the exception. Disputes are largely left to the engineers, who are enabled to take whatever decisive action is necessary and to institute such reforms, as in their judgment, are plainly necessary. Another question which often leads to a lawsuit against the Government is the remission of taxes on the irrigated land or the reduction of taxes on the lands where the water has to be pumped. The Government taxes on land which has to be irrigated by pumped water are only half as much as where the land is flooded. A suit of this kind is often expensive, and the testimony, as is the case of irrigation cases throughout the United States, is generally quite voluminous. If a native brings a suit, and the area of land involved is small, involving a loss of less than $500, the case is brought in a native court. If the land belongs to a foreigner, the case goes to the mixed tribunals. If an appeal is taken from the decision of the mixed tribunals, the case goes to the court of appeals at Alexandria.

When Mohammed Ali instituted and undertook the execution of perennial irrigation works in Egypt, he carried on the reform as though he were the proprietor of all the land and water in Egypt. He fixed the rate of taxation, hired engineers to design the irrigation works and superintend the construction of the same. Where labor was needed, by means of the corvée, he forced the native farmers, or fellahin, to leave their farms, either to excavate or clean the canals, or to work on the numerous irrigation structures connected therewith. The Egyptian farmer has long been used to this kind of treatment. In fact, he has never seen anything else until within the last fifty years, and it will take him a long time to recover, even if the Government makes it possible for him to do so. It is not surprising that a wise irrigation code has not developed in Egypt, when all these conditions are considered. In a

country where, up to quite recently, land titles were unknown, it is not very strange that the rights of an irrigator have not been recognized or protected to any great extent.

§ 100. **Criticism of the Egyptian laws.**—It will be noticed in the law that the inspectors are given almost absolute authority.[1] The authority of the governor, who is a native, is limited to the receiving complaints and referring the same to the inspectors with his recommendation, which may or may not be followed by the inspectors.

Art. 18 provides for repairs of ditches and head gates. It will be noticed that the slightest repairs can not be made without a formal inspection. If the parties are financially unable to make the repairs the Government will do so, at the expense of those interested; or, if the parties are poor, the Government may renounce all claim for reimbursement.

Art. 21 shows how intensely the land of Egypt is cultivated, and allows the cultivation of the beds and banks of the canals, however, at the risk of the farmers.

Articles 32-37, relating to offenses and prescribing the penalties therefor, contain a list of all offenses which had been called to the attention of the engineers, prior to the issuance of the decree. Art. 38, prescribing how offenders shall be tried, is another example of the summary proceedings in criminal cases, provided for in a law enacted and enforced by engineers. This law may be all right for Egypt, where the condition of the farmers is but one step removed from that of slavery, and it is undoubtedly better than the laws which preceded it, but it would not answer in any country where the farmers have the slightest degree of independence. The offenders are really tried before the party against whom the offense is alleged to have been committed—the governor, the chief engineer, or his deputy, and three prominent citizens of the province, to be chosen by the minister of the interior. There is no appeal where the sentence carries a fine only, and where both fine and imprisonment is the sentence, no appeal can be had unless the fine is paid. Then the appeal is had to a special committee composed of the under secretary of state, a khedival councilor, and a delegate from the ministry of public works. It

[1] See Secs. 94, 96-99.

will be noticed that in both tribunals there is at the start a majority in interest against the accused.

Art. 40 provides that the sheiks and watchmen, and the overseers shall be held personally responsible for the dikes and canals and all works of art which may be located within their respective jurisdictions; and, in case of offense, they are held personally liable for the expense of repairing the works, should the offenders not be apprehended. If this law was enacted in certain sections of our own country, making the officers personally responsible, the chances are that more criminals would be apprehended.

The laws upon the subject of water-lifting devices and pumps are also executed by the inspectors.[2] There is one feature of this law which has been adopted in many of our Western States, and that is that the right to install such a device must be upon a permit based upon an application made to the Government by the water user. This feature of the law in this country is applied to all rights to the use of the water by appropriation, and that, too, whether the water be taken from its natural source by pumps, or whether it flows to the place of use by gravity.

§ 101. The law of State control in Egypt, as compared with that in this country.—As has been seen in the preceding sections,[1] the question of irrigation is, above all, paramount in modern Egypt, as it has been in ages which are past.[2] If the science were abandoned, the whole country would immediately become a barren and desolate waste. If the modern methods for the regulation of the flow of the Nile should cease, a great part of the now cultivated portion of the country would revert to its natural desert condition, and the cultivation would be confined to that portion which was naturally flooded by the high Nile, and the small strips along the very margin of the river. The present method of controlling and utilizing the waters of the Nile has brought great changes in the physical conditions of the country, as well as in its economical conditions, and in its laws relating to the subject of waters and water rights. From a study of these laws, it will be readily seen that they embody a system of State control of the most extreme type, the like of which can not be found in any

2 See Sec. 98.
1 See Secs. 88, 89.

2 For Ancient Irrigation in Egypt, see Secs. 95-98.

other country. And, as far as irrigation is concerned, the system constitutes a government of engineers. And, it is easy to see from what source some of our own States, which have adopted the most radical forms of the law of State control, derived their ideas.[3] In the United States, during recent years, there has been a great deal of discussion as to whether the State or Government control was the better system, or whether the control and use of waters should be by local organizations more directly connected with and managed by the people of any particular locality, and who were directly interested in the use of the water.[4] By the Supreme Court of the United States, it has been practically settled that each State has the right to adopt any laws that it may see fit, to govern and control the waters flowing within their respective boundaries and their use.[5] It has, therefore followed that some of the jurisdictions have adopted laws of almost absolute State control, based somewhat upon the Egyptian system, while other States have adopted laws based upon other systems, or original with themselves. Again, by the National Reclamation Act,[6] the general Government of this country has adopted a law in which it seeks to control and regulate the distribution and use of all waters furnished by its various projects; but providing that the laws of the respective States wherein these projects are constructed must not be violated. But, in all of our laws the rights of the people are considered, and the rights of the individual users of the water protected.

But, under the Egyptian system of State control, the only object seems to be to make such a distribution of the water as will produce the largest return to the public treasury. The great defect of the modern Egyptian system is that the people are not considered as having any rights, but are treated solely as a revenue-producing body. The farmer who receives water one year has no assurance that he will be served the next year; and that, too, without any recourse for the taking away his supply. The English have undoubtedly made many improvements over the old systems, and the fellahin are now in a better condition under their rule

[3] For the Laws of State Control, see Chap. 68.

[4] For the Irrigation District Laws, see Chap. 70.

[5] For the Rights of States, see Sec. 593.

[6] For the National Reclamation Act, see Chap. 65.

than they have been before in centuries. They have in that country probably the best laws upon the subject which could have been adopted under existing circumstances. But, as far as a free people are concerned, this absolutism in the Government, and Government engineers, with an entire disregard of the rights of the people, is not the form of law best adapted to our conditions.

The irrigation laws of the Western States of the United States are framed to protect the individual farmer, and not for the sole purpose of producing revenue. This fundamental difference in the objects to be obtained makes Egypt's administrative system inapplicable to this country. There is every reason for not changing our policy. It is a wise policy that our irrigation administration should promote the prosperity of the water user as far as possible. And whether this policy can be obtained through the system of State or Governmental control, or by laws giving the control into the hands of the water users, will be discussed in a subsequent portion of this work.[7]

§ 102. The lessons to be derived from the Egyptian system.—In concluding this subject we will say, that through the English administration in Egypt, we of the United States can learn many things.[1] First among these is the showing of the yields and profits

7 See State Control, Chap. 68.

See Irrigation District Law, Chap. 70.

1 According to the English idea, the English government in Egypt has been the salvation of that country. Upon the retirement of Lord Cromer from the position of English representative in Egypt, a noted English writer said:

"The great majority of the inhabitants of Egypt are small, hard-working peasants, and these take a far greater interest in matters concerning their daily bread, such as taxation, police, sufficiency of water, than in national representative government. The fellahin care most for a good administration, and they have every reason to be quite satisfied with British rule. Former rulers of Egypt exploited the people without mercy. Mahommed Ali and Ismail, who piled up a national debt of £100,000,000—two rulers whom the older men still remember—saw in Egypt their private domain. They and their favorites ground down the people on whose work they lived. Not only was the fellah overloaded with taxes, pressed into the army—which at one time comprised 160,000 men—ordered to forced labor and flogged with the courbash, but the water necessary for the irrigation of his crops was diverted from his land to the lands of the Khedive and his favorites. Egypt was ruled by the four C's—the corvée, the courbash, conscription, and corruption. The Egyptian cultivator was the most un-

of irrigated land. In this, Egypt is full of significance and promise to the arid sections of the United States. It is only on irrigated land that the average net return from sugar cane reaches $80 to $100 an acre. The revenues of the Egyptian government from lands devoted to dates runs from $10 to $45 an acre, and the net profit to the farmer approximates $150 an acre. This little tract of agricultural land, no larger than the irrigable area of California, supports between 5,000,000 and 6,000,000 people, pays the expenses of a costly government, and meets the interest on a national debt half as large as our own, and this, too, from the returns of agriculture alone.

The great storage works of Egypt are of especial interest to the engineers of this country. Especially interesting are the great dams across the Nile, the foundation of the one at Assuan going down to bed rock. But the other great dams below Cairo, the one at Asuit, and the one at Esna, have no better foundation than the accumulated Nile mud, the bed rock itself being some hundreds of feet below this mud and sand. They rely upon their broad bases

fortunate worker on earth. Nowhere in Turkey was misrule more flagrant and more heartless than in Egypt. These were the fruits of national rule."

The improved aspect of the fellah's lot since Lord Cromer took the reins is thus described:

"Since the English occupation, the fellah has been given justice and prosperity. He has been given water in plenty through the regulation of the Nile and the construction of the Assuan Reservoir; he is no longer robbed of his land or of his work; he can easily obtain justice in the courts against the mightiest pasha; he is lightly taxed; he can borrow money at moderate rates; the corvée and conscription have been abolished; he has become free and very prosperous. Of 1,147,324 owners of land, more than 1,000,000 own five acres or less; and while the acreage possessed by these small holders has, during the last ten years, increased by 30 per cent, the acreage of the largest holders has decreased by 7 per cent. These figures eloquently prove that Egypt is being ruled for the greatest good of the greatest number. During the British occupation the productive power of the country and its population have doubled. Egypt has risen from bankruptcy to affluence because Lord Cromer followed the policy of 'Egypt for the Egyptians' in the broadest sense of the word. These are the fruits of British rule. The Egyptians can not even complain of being ruled by Englishmen. First, the number of Egyptians possessing the technical skill or the strength of character required in certain branches of the administration is quite inadequate. Secondly, out of 13,279 civil servants, 1252, or 1 in 13, are Europeans, and only 662, or 1 in 20, are Englishmen."

for their structure and properly distributing their weight across the river upon this concrete sill.

The methods by which the great irrigation works costing hundreds of millions of dollars have been financed is of interest to the capitalists of this country.

As far as the mechanical devices for lifting water, cleaning and building ditches, or cultivating the fields are concerned, we can learn nothing. We in this country have modern machinery for all this. In Egypt the fellah working for 15 cents per day still uses the crude lifting machines of the times of the Pharaohs for raising the water, a crooked stick for a plow, cleans out the canals and ditches by scraping the mud into baskets which he carries out upon his back.

Upon the questions of law regulating the use and control of water, the actual operations of applying the water to the land, there is but little for the American irrigator to learn. Egypt is governed by a foreign power, which has assumed arbitrary control over the water supply, recognizing no rights to those who actually use the water. As Elwood Mead says: "Such a system has brought about an efficient use of the Nile, but it is repugnant to American ideas. It is a success in Egypt because of lack of means on the part of the agricultural population and lack of the experience in business and political affairs, needed for the successful operation of irrigation systems under private ownership. The American farmer has both the economic ability necessary to the management of irrigation works and the political power and the intelligence to create institutions for controlling the water supply which will be in harmony with our ideas of free government. The study of Egyptian laws and administrative methods, while interesting, is of little value as an example to be followed."[2]

It is, however, from the lessons derived from foreign countries upon this subject, that we in this country have received our greatest knowledge of the most appropriate laws governing the subject of waters and their use by the individual.

[2] Egyptian Irrigation: a Study of Irrigation Methods and Administration in Egypt, by Clarence T. Johnston, 1903, Bulletin No. 130, Office of Experiment Stations, U. S. Dept. of Agriculture, letter of submittal, p. 6, by Elwood Mead, Chief of Irrigation Investigations.

CHAPTER 5.

MODERN IRRIGATION IN INDIA.

§ 103. Peculiarities of the country.
§ 104. Operations by the English.
§ 105. Division of irrigation works—Expenditures and revenue.
§ 106. Costs and profits in India as compared with those of the United States.
§ 107. The Government of India makes a net profit on its irrigation works.
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§ 115. The Northern India Canal and Drainage Act of 1873.
§ 116. The Bombay Acts of 1879 and 1880.
§ 117. The Burma Canal Act of 1905—The Punjab Minor Canals Act.
§ 118. Conditions and results in India and this country compared.

§ 103. **Peculiarities of the country.**—India, like China,[1] is another country having a dense population, and traces her irrigation works to very ancient times.[2] But, unlike Egypt, as far as is now known, her ancient systems nowhere equaled those of modern construction.[3] The older irrigation systems in India were comparatively small; and, until the English constructed the modern systems in that country, they were nowhere near the magnitude that were found in other ancient countries.

This undoubtedly was due to the physical structure of the country. Some of the mightiest works of Nature are to be found in that country. India includes within her borders the highest mountains in the world and some of the mightiest rivers and greatest plains. The great Himalaya range, 1,500 miles long, lying across the northern border, shuts out the rest of Asia. Mount Everest,

1 For Ancient Irrigation in China, see Sec. 69.
For Modern Irrigation in China, see Chap. 9, Secs. 168-170.
2 For Ancient Irrigation in India, see Sec. 70.
3 For Ancient Irrigation in Egypt, see Secs. 65-68.
For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.

the highest peak in the world, pierces the sky 29,002 feet above the sea, while peaks of over 20,000 feet elevation abound in all parts of the range. The historic Ganges, the Indus, and the Brahmaputra are the three great rivers of India. These rivers, with their affluents drain an area of nearly 900,000 square miles. The discharges of these streams are enormous; the Ganges alone, in flood, may discharge 1,350,000 cubic feet per second. This is caused from the fact that India has the heaviest rainfall in the world. This rainfall, which is accountable for this immense volume of water, comes exclusively from the evaporation from the Indian Ocean and the bays on either side of the peninsula. The distribution of this rainfall is extremely varied, ranging from a couple of inches a year, or in some sections practically nothing, to over 600 inches, which falls in a limited area in Assam. At Chara Pungi, Assam, the maximum rainfall of the world is reached in an average annual precipitation of 368 inches, while at the same place in 1861, it is recorded that 30 inches fell in 24 hours, and 805 inches fell during the year.[4] These figures can be appreciated when it is remembered that the annual rainfall in the Atlantic States of our own country is from 30 to 45 inches, and that in the West farming is conducted without irrigation on as low an annual rainfall as 15 or 16 inches. It can be readily seen from these conditions why the ancient East Indians did not construct works of the magnitude that were found in other ancient but arid countries.

No other country, unless it may be our own, has so vast and so fertile an expanse of territory, with such convenient slopes for the construction of canals, and, at the same time such an abundant supply of water. In general, there is a great similarity between the topography of the great northern plains of India and portions of our own country, especially on the eastern slope of the Rocky Mountains. In Central India, there are many features in common with the central portion of the arid region of this country, particularly in portions of northern Arizona and New Mexico and in southern Utah. The temperature is hot as a general thing, but it gets no hotter than it does in certain portions of the States mentioned. The average temperature, however, is higher. On the southwest coast, at Goa and Cochin, the annual average tempera-

4 Irrigation in India, by Herbert M. Wilson, 1903, 2d Ed., p. 44, Water-Supply and Irrigation Paper No. 87, U. S. Geol. Survey.

ture is nearly 80 degrees; at Calcutta it is 79.2 degrees, and at Bombay, 78.8 degrees. At the hill station of Simla, at an elevation of 7,100 feet, the average annual temperature is 54.4 degrees.

At the close of 1901 the area of India, including native States, was 1,559,603 square miles, and the total population was 294,266,603.

§ 104. **Operations by the English.**—As is the case in Egypt, so also it is the case in India, all of the modern irrigation works have been constructed by the English since they gained possession of that country.[1] However, the science of irrigation in India has been practiced for many centuries, first by utilizing small streams, and then the great rivers. As population increased, a new system for the storage of water was developed. In that land a rainy season prevails, when great quantities of water are precipitated, but during the season of growing crops the country is hot and dry. Under these conditions the people learned to store the storm waters in reservoirs constructed by erecting dams across gulches, and hundreds of thousands of these storm tanks were ultimately made. Since the British have held control of India, irrigation works have been constructed on stupendous plans. The hydraulic engineering practiced in their construction vies with the best in the world; and no longer is irrigation precarious, for the streams and storm waters are controlled by the highest human art. Today India stands pre-eminent for her gigantic irrigation undertakings.

In 1867 the Government decided to construct its own irrigation works and great activity prevailed at once, the Government irrigation force being largely increased. In 1869 schemes for ten years' work, involving $150,000,000 expenditures, were outlined, and the following sums were expended: In 1867, $1,096,000; in 1868, $2,344,250; in 1869, $10,040,000, and so on. The total expenditures for the first ten years actually amounted to $52,850,000. Since then the Government works have generally proved satisfactory investments, and as they have certainly added to the wealth and prosperity of the country and have mitigated the severity of famines, large sums have been annually appropriated for the maintenance of existing works and the construction of new ones.[2] Ac-

1 For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.

2 Irrigation in India, by Herbert M. Wilson, 1903, Water-Supply and Irri-

cording to the report of Mr. Herbert M. Wilson, "the grand total expended on such work from 1867 to 1900 being $337,850,000."[3] This sum must have included the additions and annual repairs on the many works which were constructed at the time of the Native rule in India amounting to from $5,000,000 to $10,000,000 annually, and works for which capital accounts are not kept by the British Government. According to the official report of W. F. O'Donogue, Esq., Accountant General of the Public Works Department in India, which lies before us, dated August 15, 1907, up to the first day of January, 1907, the Government, upon "all works for which capital and revenue accounts are kept," had expended the sum of Rs. 48,14,12,734.[4] No other government in the

gation Paper No. 87, U. S. Geol. Survey.

[3] Irrigation in India, by Herbert M. Wilson, 1903, Water-Supply and Irrigation Paper No. 87, U. S. Geol. Survey, 2d Ed., p. 34.

[4] This, according to the East Indian notation, equals 48 crores, 14 lacs, and 12,734 rupees. The basis of this system of notation is the rupee, which weighs approximately 175 grains of silver and formerly depended for its value upon the price of silver, but which now has a fixed value of 1s, 4d, or 32.443 cents; 100,000 rupees is called a lac, and 10,000,000 rupees is a crore. The above notation of the government accountant is upon the system used in India. All sums between 100,000 and 10,000,000 are written in lacs, thousands of rupees, etc., and all sums above 10,000,000 are written in crores. Taking the above amount for example, it equals 48 crores, 14 lacs, and 12,734 rupees.

See, also, the report of L. M. Jacob, Esq., Secretary to the Government of India, dated Aug. 15, 1907, and covering the same dates.

The above reports were furnished the author through the kindness of the government, by S. Eardley-Wilmot, Inspector General of Forests to the Government, and are the last reports which are available to the author.

Upon the general subject of irrigation in India, see the various Annual Reports issued by the Department of Public Works of the Government of India.

See, also, the Imperial Gazetteer of India for the various years, printed at the government general printing office, Simla, subject, Irrigation.

Irrigation Works of India and Egypt, by R. B. Buckley, 1893, E. & F. Spon, London, or Messrs. Spon and Chamberlain, 123 Liberty Street, New York; Facts, Figures and Formulae for Irrigation Engineers, by R. B. Buckley, may be procured from same as last above; Indian Storage Reservoirs with Earthen Dams, by W. L. Strange, may be procured from same as last above; Irrigation in Madras Presidency, by J. C. Anderson, Professional Papers, second series, No. 253; Duty of Water, and Memorandum on Irrigation, by J. S. Beresford, Professional Papers, second series, Roorkee, India; Report on the Ganges Canal Works, 3 Vols. & Atlas,

world has expended anywhere near the enormous sum as has been expended by the British Government in India. But, in spite of this vast outlay, this expenditure has been a profitable investment to the Government, as we shall show in another section.[5]

§ 105. Division of irrigation works—Expenditures and revenue.—For governmental purposes, the irrigation works of India are divided into major and minor works; major works being further subdivided into productive, or those which are expected to pay the cost of maintenance and also interest on capital outlay, and protective works, which are calculated to guard against a probable future expenditure in relief of distress, such as famine. Minor works are also subdivided into: (a) Works for which capital and revenue accounts are kept; and, (b) works for which capital accounts are not kept.

There are 50 works classed as productive works, nine of which were not open for irrigation at the beginning of the year 1907, and 13 of which have failed to fulfill the conditions of productive works as above stated. The capital invested on the construction of productive works at the beginning of the year 1906, amounted to Rs. 38,76,55,188, and in spite of the fact of the 21 actually nonproducing, as above stated, the net revenue derived by the Government from them during the year ending December 31, 1906, was Rs. 2,76,64,406, or a return of 7.14 per cent on the capital outlay.[1]

Sir Proby T. Cautley, London, 1860; Report on the Ganges Canal, by J. Crofton, 3 Vols., Public Works Dept., Calcutta, India; Irrigation and Reclamation of Land for Agricultural Purposes in India, Egypt, Italy, etc., by Prof. Geo. Davidson, 1875, Executive Document No. 94, U. S. Senate, 44th Congress, Washington, D. C.; Irrigation and Drainage in the Dehra Dun, by R. E. Forest, Professional Papers No. 5, Roorkee, India; Mutha Canals, by J. H. E. Hart, 1879, Bombay, India; Tank Irrigation in Ajmere and Mairwara, by F. Home, Professional Paper No. 229, Roorkee, India; Madras Engineers, Professional Papers, 4 Vols., Madras, India, 1856; Manual of Irrigation Works, by J. G. Medley, Thomason Civil Engineering College, Roorkee, India, 1873; Irrigation Manual, by Lieut. Gen. J. Mullins, E. and F. Spon, New York and London, 1880; Irrigation Experiments, by E. C. Palmer, Professional Papers, 2d series, No. 35, Roorkee, India; Irrigation in Mysore, Professional Papers Nos. 141 and 150, Roorkee, India, by Maj. R. H. Sanky.

See, also, the various Reports of the Famine Commission.

5 For the Profits to the Government, see Sec. 106.

1 For the equivalent of the rupee monetary system of computation in dollars, see note to Sec. 104.

On January 1, 1906, there were in India 35,730 miles of open productive irrigation canals, and the area actually irrigated during the preceding year was 14,205,158 acres.

The protective works, as the name implies, are all canals and other works so classed, as are constructed on the consideration of the protection they give against famine without any expectation upon the part of the Government of a return sufficient to pay interest and the expenses of maintenance. At the beginning of the year 1907, there were 30 of such works so classed, 23 of which were then under construction in various parts of the country, where they were needed the most. The total capital expenditure on these works on the 31st of December, 1905, was Rs. 3,12,88,246. However, these works actually gave a net revenue to the Government for the year 1905, of Rs. 6,03,229. And, on the first day of January, 1906, there were 1,351 miles of open protective canals; and the area irrigated during the preceding year was 471,372 acres.

Of minor works, class (a), works for which capital and revenue accounts are kept, there were 91 works so classed on January 1, 1906, and of these six were purely navigation works. On the 31st of December, 1905, the expenditure incurred on the construction of irrigation works alone, amounted to Rs. 4,00,69,156, and the net revenue during the preceding year amounted to Rs. 27,87,516, or a return of 6.96 per cent on the capital outlay. There were irrigated during the year of 1905, 1,696,866 acres. The capital outlay on the 31st of December, 1905, on the six navigation canals amounted to Rs. 2,24,00,144, and the net revenue during that year was Rs. 40,001. The minor works, class (b), works for which capital accounts are not kept, are numerous and are all small works, many of which were constructed at the time of Native rule in India. The cost of their construction can not be ascertained, and separate capital and revenue accounts are not therefore kept for them. The enhanced land revenue due to these works is assessed and collected along with ordinary land revenue, and accounted for in the civil accounts.[2]

2 The above was taken from the Report by W. F. O'Donogue, Esq., Accountant General, Public Works Department, upon the accounts of Revenue and Expenditures of Irrigation Works in India for 1905, 1906, and dated Aug. 15, 1907. See, also, for figures verifying the same, the report of L. M. Jacob, Esq., Secretary to the Government of India, Simla, dated Aug. 15, 1907.

§ 106. **Costs and profits in India, as compared with those of the United States.**—It will be interesting to examine the items of cost, interest, and revenue of such a canal as the Sirhind Canal, and to make comparisons between these costs and returns, and what might be derived from a similar work if made in the United States. In making this comparison, the amounts reported in the revenue returns for such expenditures as pensions, furloughs, and navigation works must be deducted from the total outlay, for the reason that these elements of expense do not enter into the calculations in this country. Also due allowance must be made for the difference in cost of each class of construction in the two countries, and for the water rate to be charged. To the end of 1901, the total expenditure on the Sirhind Canal was $19,663,000, of which $6,749,000 was interest while the work was under construction, and $1,000,000 was leave and pension allowance to employees. Though such a work would have been constructed in much shorter time in the United States, owing to the substitution of machinery for hand labor, the higher rates paid in our country for interest would probably more than equalize the charge. The total original cost of the works was about $12,000,000, from which must be deducted $2,200,000 for pensions, and $1,100,000 for tools and plant, which leaves a balance for net cost of $8,700,000. This makes a charge of about $8 per acre irrigated in India, where it is estimated that the same works would cost in this country about $15.35 per acre.

Owing to the recent completion of the Sirhind Canal in 1901, it then irrigated but 1,170,000 acres. This, however, paid in 1901 a profit, after paying interest on the capital outlay of 4.7 per cent per annum, or 9.1 per cent on the capital invested. The water rate charged averaged 90 cents per acre irrigated. We, in this country, would charge at least $2. The cost of construction being nearly double in the United States to that in India, and the receipts per acre nearly three times as great in this country, such a great work when doing its maximum duty would realize as a minimum 10 per cent on the capital invested.

In addition to the amount of profit realized to the Government, there is one source of revenue in the United States which does not exist in India. That is the annual increase in value of the land served by the canal to the individual owners of this

country. Owing to the fact that in India an individual can not acquire title to land, but it is all owned by the Government, there is no such increment available to private enterprise in India. In the United States, however, where land can be purchased for from $1.25 to $2.50 per acre, and when supplied with a water right will sell for from $40 to $100, or even higher, per acre, or bring an equivalent revenue, the increased return from such an investment is obvious.

§ 107. **The Government of India makes a net profit on its irrigation works.**—After charging up all the expenditures for the construction of all of the irrigation works in India, and also the expenses for interest and maintenance, the result shows a net profit to the Government; and that, too, in spite of the fact that many of the individual canals are an actual expense, owing to the fact that they are still incomplete, and do not yet irrigate the area for which they are being constructed.

The general financial results of all works for the year of 1906, as the same is reported by the Accountant General of the Public Works Department of India, upon the accounts of revenue and expenditures for that year, is as follows: [1]

See also the Review of Irrigation in India for the year 1905-6, by L. M. Jacob, Secretary to the Government of India, and dated,

	Productive Works Rs.	Protective Works. Rs.	Minor Works. Rs.	Total. Rs.
Capital Outlay—				
During 1905-6.....	88,81,365	36,16,750	19,71,503	1,44,69,618
Total to end of 1905-6....	38,76,55,188	3,12,88,246	6,24,69,300	48,14,12,734
Revenue Account, 1905-6—				
Gross revenue.....	4,15,95,240	9,73,779	49,83,188	4,75,52,207
Maintenance and working	1,39,30,834	3,70,044	21,55,671	1,64,56,549
Net revenue.....	2,76,64,406	6,03,735	28,27,517	2,10,95,658
Interest	1,45,19,532	11,02,310	.....	1,56,21,842
Net profit after paying interest	1,31,44,874	4,98,575	.....	1,26,46,299
Percentage of net revenue for the year on capital outlay to end of year..	7.14	1.93	4.74	6.46
As against year 1904-5...	7.61	1.97	4.93	6.93
As against year 1903-4...	7.43	2.90	5.42	6.93

[1] The above is in British-India notation, for which see note to Sec. 104.

Simla, August 15, 1907, in which there is this significant statement: "The total area (irrigated) was nearly 23,000,000 acres, while the value of the crops raised by the works, for which capital accounts are kept, is estimated at Rs. 51.6 crores,[2] or nearly 108 per cent of the capital outlay expended on them."

The total area cultivated in 1901 was 180,151,093 acres, and the total area then irrigated was 18,611,106 acres. Between the years 1901 and 1907, this was added to by about 5,000,000 acres. The additions to the irrigated area is also constantly being made by the construction of new works and the addition of acreage under old ones.

§ 108. **The Ganges Canals—United Provinces.**—Let us examine some of the individual canals of India. The greatest of all these works, and in fact, the largest in existence in the world, is the Ganges Canal. The total length of the main canals of this system is 419 miles, with a bottom width of 170 feet, all of which is navigable. The maximum discharge is 7,782 second feet. The total mileage in operation, including main distributaries, on January 1, 1907, was 3,259 miles, and during the preceding year it irrigated 1,369,393 acres. On January 1, 1907, the total cost was Rs. 3,24,86,256, and during the preceding year had yielded to the Government a gross revenue of Rs. 39,24,454, or a net profit of Rs. 13,84,815, and a total net profit, since the beginning of operations, of Rs. 2,14,45,883.[1]

There are 2,800,000 acres under the system, and the irrigable area is 1,820,000 acres. The above figures, as to the actual workings under the system, are from the official report of the Accountant General of the Public Works Department of India, dated August 15, 1907. And, while we have not the figures, we understand that the area irrigated from the system has been very much enlarged since that report. The magnitude of this system can be appreciated when we come to consider that the total length of the main canal and the main distributaries are about as long as is the distance from New York to San Francisco.

The Lower Ganges Canal system is nearly as large as that of

2 This equals 516,000,000 rupees, equal to 32.443 cents each, or about $172,000,000, for the year 1905.

1 For the reduction of the above notation to dollars, see Sec. 104, note.

the Ganges proper. On January 1, 1907, it had a total mileage of 3,227 miles, and during the preceding year irrigated 1,062,980 acres. On January 1, 1907, the total cost of this canal was Rs. 3,68,65,888, and during the preceding year yielded to the Government a gross revenue of Rs. 25,22,451, or a net profit of Rs. 1,53,642, and a total net profit, since the beginning of operation, of Rs. 23,19,126.

There are also a number of other large systems which take their water from the Ganges River in the United Provinces, all of which show a total net profit to the Government. The Agra Canal shows a net profit of Rs. 9,05,106; the Eastern Jumna Canal, of Rs. 2,62,54,777; and the Fatehpur branch, Lower Ganges, of Rs. 8,78,627.

§ 109. **The Sirhind Canal, and other Punjab canals—Total mileage.**—Another great irrigation system in India, and one that is likely to exceed that of the Ganges Canal, is that of the Sirhind Canal in Punjab. The total length of the main canal is forty-one miles, with a maximum discharge of 7,849 second feet. The total mileage in operation on January 1, 1907, was 3,004 miles; this included main distributaries only. And during the preceding year it irrigated 759,008 acres. On January 1, 1907, the total cost was Rs. 2,48,49,664, and during the preceding year yielded to the Government a gross revenue of Rs. 27,06,842, or a net profit of Rs. 8,32,305, and a total net profit, since the beginning of operations, of Rs. 21,26,213.

This canal is one of the newer systems in India, and is destined to become one of its largest. The gross area commanded by the system is 4,558,602 acres, about one-half of which is irrigable. Since the report from which the above figures were taken, [1] the irrigated area has been largely increased, and also the net profits to the Government. Of the important canals in India, the Sirhind far exceeds all others in matters of engineering interest, as it is one of recent and modern construction, besides being one of the greatest.

There are also a number of other great canal systems in Punjab, all of which show a net profit to the Government. The Western Jumna Canal shows a total net profit to the Government of

[1] That dated Aug. 15, 1906.

Rs. 4,08,90,148; the Bari Doab Canal, of Rs. 2,23,63,172; the Upper Sutlej Canal, of Rs. 7,53,270; the Lower Chenab Canal, of Rs. 2,91,52,955; the Sindhnai Canal, of Rs. 22,64,322; the Lower Jhelum Canal, of Rs. 25,92,322; the Indus Inundation Canal, of Rs. 1,53,348; the Upper Chenab Canal, of Rs. 41,795; and the Upper Jhelum Canal, of Rs. 27,501.

There are other canal systems, which would be considered enormous in this country, in the provinces of Burma, Bengal, Northwest Frontier Province, Bombay, and other portions of India. But space will not permit a description. However, the total mileage of all main India canals, including their main distributaries, on January 1, 1906, was 35,730 miles—nearly enough to go once and one-half around the earth.

§ 110. **Attitude of the Government toward irrigation.**—In order to convey a clear understanding of the method of promoting irrigation development in India, it is essential to first give a brief outline of the present attitude of the English rulers toward irrigation. At first, the Government permitted private corporations to construct and operate irrigation works, the earliest work planned by British engineers being undertaken by a private corporation on a guarantee of interest by the East India Company. During the last thirty years the Government has been active in the promotion and construction of nearly all good works projected. These projects are studied, examined, and reported upon usually several times during a series of years, and when the Government is finally satisfied with them, either as financial investments or as measures for the relief or prevention of famine, the work is sanctioned and the funds for its construction are appropriated.

The Government of India is, as a rule, greatly in favor of the extension of irrigation works. It encourages enterprises by granting loan funds for the construction of works whenever it can be proved that profits, increase of interest, and all the maintenance charges will probably be derived. It also constructs works as a means of famine relief in certain places, even when profits can not be obtained. The Government further fosters the use of irrigation waters by making the water rates very low, or by even giving water away in years of scarcity. As shown in the suc-

ceeding acts, the Government of India has entire control over all sources of water supply, and so exercises it as to make it the greatest benefit to the community at large. The powers of control over the waters for irrigation are entirely centralized.

But, unlike this country, in its National Reclamation Act,[1] where the money advanced by our Government is in the nature of a loan, without interest, and for the primary benefit of the settlers, the British Government in India always insists upon its net profits on all of its "productive works." Even in the works which are constructed primarily for the relief from famine and called "protective" works, and not constructed for profit, when a state of famine does not exist, and a profit may be derived by the Government, it always insists upon it. And, from such works, according to the report of the Accountant General of the Public Works Department of India, dated August 15, 1907, the total net profits from protective works alone are Rs. 1,12,05,456.

§ 111. **The construction of works—Officers in charge.**—The irrigation works of India are constructed by the officers of the construction division of the irrigation branch of the Public Works Department of the Government, and at Government expense. Each province of India has a separate branch of the Public Works Department, known as the irrigation branch, at the head of which is a chief engineer, generally also secretary to the government of that province, and over all the chiefs of engineers is an inspector general of irrigation, attached to the staff of the Governor General of India. The officers in the upper grades of the irrigation branch are nearly all Europeans, and are recruited from the royal engineers, or from civil engineers educated in well known colleges either in England or India. The lower grades of officers are composed of selected non-commissioned officers and soldiers, and from natives who have passed an examination after studying for a period at some college. The chief engineer is the head of the department in the province, and this latter is divided into circles, presided over by superintending engineers. Each circle is again divided into divisions, over which executive engineers preside. Each division is again divided into subdivi-

[1] For the National Reclamation Act, see Chap. 65.

sons, of which there are generally several under the charge of an assistant engineer. This concludes the list of the upper grades, and it will be noticed that from the top down the works are in charge of engineers, who hold their positions upon the merit system alone, and not on account of political influence or favoritism.[1]

§ 112. **The administration of works—Officers in charge.**—The administration of the irrigation works of India is also conducted by the Public Works Department, and the engineers are all civil servants in the employ of the British Government. Their status is fixed by law, their promotions are usually by seniority, as in the army and navy, and, like the members of those branches of governmental service, they receive stated salaries, according to the grades they occupy. They are entitled to leaves of absence and furloughs, and are retired with a pension after certain periods of service.

The executive authority of India is vested in a Governor General, called the Viceroy, who is appointed by the Crown, and acts under the orders of the Secretary of India. The laws are enacted by the Governor General and a council of seven members.

The country is divided into British Territory and native States. The larger presidencies of the former are governed by governors, appointed by the Crown, and each have their own council and civil service. The native States are governed by native princes. Land is the main source of revenue of the British Indian Government, and hence the levying and collecting of the land tax is the main work of the administration of that Government. In Bengal, the head man of a village makes the payment for the whole village to the Government, he collecting from each cultivator his portion of the revenues and retaining for himself a portion of the same. In other provinces the cultivator is the rent-paying unit. Each field is marked out, measured, and assessed separately. This method is simple, as the Government recognizes only the

1 See Irrigation in India, by Wilson, 1903, U. S. Dept. of Interior, Water-Supply and Irrigation Paper No. 87.

For the laws upon the subject, see The Northern India Canal and Drainage Act No. 8 of 1873; The Punjab Act No. 3 of 1905; The Burma Canal Act No. 2 of 1905.

owner of each field. With these owners settlements are made for periods of thirty years; in cases where the village is taken as a unit, terms of settlement are also made for periods of thirty years.

Besides the engineering department, which has been described in the preceding section, there is the revenue department, which works in conjunction with the engineering department, and whose duties are mostly concerned with the administration and the measurement of the fields for assessment.

All of the upper grades of officers—that is, from the assistant engineers upward—have to pass an examination in canal law, and are given magisterial powers, which enable them to inflict punishments for breaches of this law. The other powers conferred vary with the standing of the officers.[1]

§ 113. Laws—Title to lands—Methods of leasing.—By act of Parliament of August 2, 1858, all the territory of India was vested in Her Majesty, the Queen of England. All tributes and payments were disposed of in her name. Later, by act of January 1, 1877, Her Majesty assumed the title of Empress of India. The title to all the land in India is in the Crown. In Southern India, while the land owners do not own the land, they possess certain rights in it, such as the right to hold and to cultivate it so long as they make payment to the Government, which is usually made in a part of the produce raised on the land. In Northern India, there is a class of superior land owners between the cultivator and the Government. The cultivator cultivates the land and pays the rent to the landlord, and the latter pays a portion of this to the Government. These proprietors are associated together in villages, with an elected or hereditary head, who is responsible to the Government for the rent of the entire village. A system of leases is in vogue throughout the country. In Southern India, where the cultivators hold the land, it is leased to them for fixed periods of thirty years, though they can resign these holdings at the end of each agricultural year. They can sell or mortgage the land, and at the death of the holder his heirs inherit the right to the lease. In these southern presidencies each village is indicated on the revenue map, with a defined boundary, and

1 For the laws upon the subject, see Acts cited in previous section, No. 111. See, also, Secs. 113-117.

each field is marked out and numbered on the village plan. The different classes of soil are indicated in colors, with a description of the class of tenure, marked in a register accompanying each map, in which are also indicated all particulars of soil, tenants, and amount of assessment. The size of the field is determined by the extent of the particular variety of soil which can be cultivated with the assistance of a pair of bullocks. Thus, in light, dry soil, a field will constitute twenty acres; in heavy, dry soil, twelve acres, and in rich garden land, four acres. Some of the circumstances affecting the classification of land and the value of the fields are the position of the latter with respect to the village, the facilities for agricultural operations, the character of the soil, and the opportunities for irrigation.

§ 114. **Irrigation laws governing the Northwest Provinces—Act of 1845.**—The laws governing water rights, and the rules and regulations by which water is served to cultivators, are detailed in the various Canal Acts. The first Act bearing on irrigation legislation was Act VII, by the Governor General of India, in council, passed April 12, 1845, and covered the whole of the Northwest Provinces of India. This was entitled, "An Act for the regulating the levy of water rent, tolls, and dues on certain canals of irrigation constructed by the Government in the Northwest Provinces, and the protection of the said canals from injury.

"And it is hereby enacted that the said lieutenant governor of the Northwest Provinces shall be competent to draw out rules to regulate the levy of water rent and the supply of water for irrigation. . . . The rules thus drawn out shall be published for general information in the Government Gazette.

"And it is hereby enacted that all balances of water rent due for lands irrigated by the canal shall be levied, either by temporary deprivation of the benefits of the canal, or by the same process as is prescribed for the recovery of balances of land revenue.

"And it is hereby enacted, that whoever willfully causes any obstruction to any of the said canals, or to any of the water courses drawn and supplied therefrom, or damages the banks of the canal, or the works constructed for its maintenance, or will-

fully defiles the water in the canal, shall be liable to the penalties hereinafter described.

"And it is hereby enacted, that all persons offending against the provisions of this act shall be punishable, on conviction before the magistrate, by imprisonment without labor for a term not exceeding fourteen days, or a fine to an amount not exceeding fifty rupees (about $25), or both; and in default of payment of such fine by an addtional imprisonment of fourteen days."

The rules "drawn out" under this Act, provide that the water is to be served to cultivators on certain days, depending upon the local conditions and soil. As, for example, very often it is served on three days in one week, or possibly they may be allowed to use it for a longer period, as for one week, and are then deprived of it for the next week. The period in which they are not allowed to use the water is known as the period of "tatil," an Indian word, meaning closed. Breaches of "tatil," or the taking of the water when its use is not allowed, render the individuals committing the act liable to fine or imprisonment, under the act quoted. The executive engineer of the division has entire control over the distribution of the water, and complaints regarding scarcity, repairs, misappropriation of water, etc., are all referred to him; and he, having magisterial powers, either decides them himself or empowers the supervisorial officer or deputy magistrate to do so. The assistant engineer is generally a European, and his right-hand man, as far as irrigation matters are concerned, is the deputy magistrate, who is generally a native of some standing and education. These rules were drawn out by resolutions by the lieutenant governor of the Northwest Provinces on May 31, 1845, extracts of which are given in the foot note.[1]

In addition to these, rules are laid down providing, that in the event of any person secretly taking water from the canal

[1] In conformity with section 8 of the aforesaid Act, the superintendents of the said canals are invested with the powers of deputy collectors for the levy of rents, and of joint magistrates for the enforcement of penalties under the aforesaid act, and their assistants are declared competent to exercise the same powers under their directions and on their responsibility. The subordinate establishments of such superintendents have the power of subordinate revenue and police officers for the aforesaid purposes. An appeal lies direct to the commissioner of the division against orders passed by the superintendent or his assistants in the capacity of deputy col-

in any manner, for which rent is leviable, without entering into engagement to pay rent, or secretly taking more water than he has engaged to pay for, he shall be chargeable with double rates for all water so taken. Also rules are laid down defining the powers of superintendents and their assistants, and other officers on the works, as well as rules giving the charges which villages or individuals are subject to, who do not take water for irrigation, but who use it for watering live stock or for domestic purposes. The charges for filling reservoirs or tanks are also specified, as are the tolls for rafts or boats.

§ 115. The Northern India Canal and Drainage Act of 1873.—The law applicable to the Northwest Provinces referred to in the preceding section,[1] was superseded by the Northern India Canal

lector, and to the sessions judge against orders passed in the capacity of joint magistrate.

When it may be more expedient to give water on contract rather than according to the surface irrigated, the terms of contract may be as follows:

Where water flows naturally, 2 rupees (about $1.00) per annum for each square inch of opening taken from the summit level of the water and having a free course.

All land brought into cultivation within 20 yards of the canal or any branch stream from it, subsequently to the construction of the canal, shall pay water rent, whether taking water or not; and similarly all land cultivated from wells which have been dug or reopened within 20 yards of the canal boundary, or within 10 yards from any branch stream from it, subsequently to the construction of the canal, shall pay water rent, whether taking water from the canal or not.

When, from the carelessness of cultivators either in not properly closing the heads of the water courses or in leaving the water courses in bad order, the water overflows and spreads over waste or fallow land, a fine shall be levied not exceeding the highest rate of water rent leviable on the extent of land flooded.

It shall be in the power of canal officers to close the whole of the branch water courses from sunset to sunrise for the purpose of forcing the water onto the lower parts of the canal; and also, when necessary, for any period not exceeding three days in a week. At other times the water shall be at the command of the cultivators, provided it be in the power of the canal officer to furnish a supply. Persons taking water once so as to benefit a crop shall be liable to the charge for the whole year, or the whole crop, as the rate may be leviable.

Special agreements between individuals and the superintendent for the use of water for irrigation, for driving machinery, or for other purposes, on other terms than are embodied in these rules, shall be construed as other ordinary contracts are.

1 See Sec. 114.

and Drainage Act of 1873, which Act is now in force in all of Northern India, including the Northwest Provinces. The rules for the distribution of water, quoted in the note of the preceding section were continued under the subsequent Act, and are now practically the same as stated.[2]

The preamble of this Act tersely states the claims of the Government in and to the waters, in the following language: "Whereas, throughout the Territories to which this Act extends, the Government is entitled to use and control for public purposes the water of all rivers and streams flowing in natural channels, and all lakes and other collections of water," etc.

Upon the subject of the application of the water for public purposes, it is declared that: "Whenever it appears expedient to the local Government that the water of any river or stream flowing in a natural channel, or of any lake or other natural collection of still water, should be applied or used by the Government for the purpose of any existing or projected canal or drainage work, the local Government may, by notification in the Official Gazette, declare that the said water will be so applied or used after a day to be named in the said notification, not earlier than three months from the date thereof."[3] After the said date the power is given the canal officers to enter any land and remove obstructions, and do any other thing necessary for such application or use of the said water. However, claims for damages to existing rights are allowed.

Upon the subject of the construction and maintenance of works, powers are granted the canal officers to enter all lands for surveys and to clear them of buildings and improvements, for the purpose of rights of way for projected canals. Compensation for improvements destroyed is allowed by the Government, under special proceedings provided for in the act.

Any person desiring to use the water of any canal may apply, in writing, to the divisional or subdivisional canal officer of the division or subdivision of the canal from which the water course is to be supplied, requesting such officer to construct or improve

[2] See Sec. 114, note. This Act is known as "The Northern India Canal and Drainage Act, 1873," and designated as No. VIII.

[3] Part 2, Sec. 5, Act above cited.

a water course at the cost of the applicants.[4] The works will then be constructed by the Government and the expenses collected from the consumers, as provided.[5]

Upon the subject of the supply of water, written contracts may be made between the consumers and the Government, as prescribed by the act.[6]

The rates to be charged for canal water supplied for the purpose of irrigation shall be determined by the rules to be made by the local Government, and such consumers as accept the water shall pay for it accordingly. Provisions are also made for the collection of such charges.[7]

Provisions are also made for the navigation of such canals as are navigable, and the charges for the same.[8] Also, provisions are made for the drainage of lands and for the collection of assessments and charges therefor.[9]

The law upon the subject of obtaining labor for canals is drastic, and provides that, whenever it appears to a divisional canal officer that, unless some work is immediately executed, such serious damage will happen to any canal or drainage work as to cause sudden and extensive public injury, and that the laborers necessary for the execution thereof can not be obtained in the ordinary manner, the said officer may require persons to labor or to furnish laborers for the immediate execution of such work. "The local Government shall fix, and may from time to time alter, the rates to be paid any such laborers."[10]

By the Act, jurisdiction is conferred upon the civil courts to try all disputes relative to water rights.[11] Also, offenses and

4 It must be noted that the word "water course" as used here is the term given to consumers' laterals, and not natural water courses.

For the definition of "water course" as used in this country, see Secs. 301-307.

5 Part 3, Secs. 14-30, Act above cited.

6 Part 4, Secs. 31, 32, Act above cited.

7 Part 5, Secs. 33-48, Act above cited.

8 Part 6, Secs. 49-54, Act above cited.

9 Part 7, Secs. 55-62, Act above cited.

10 Part 8, Secs. 63-66, Act above cited.

See, also, for the corvée in Egypt, Sec. 93.

11 Part 9, Secs. 67-69, Act above cited.

penalties are prescribed, and criminal procedure for any violation of the provision of the act, or any rule made under the act. [12]

§ 116. **The Bombay Canal Acts of 1879 and 1880.**—The principal Act establishing the laws governing irrigation in the presidency of Bombay is Act No. VII of 1879, which was amended in 1880 by Bombay Act No. III. The preamble of said Act reads as follows: "Whereas, it is necessary to make provision for the construction, maintenance, and regulation of canals for the supply of water therefrom, and for the levy of rates for the water so supplied in the Bombay presidency, it is enacted," etc. The Act then goes on to define in detail what are understood as canals, water courses, and drainage works; defines the various officers appointed by law, prescribes their duties and powers; and upon the subject of governmental ownership and control of the waters, provides when the waters of any source of supply may be taken for governmental purposes, and how controlled after so taken.

"Whenever it appears expedient to the governor in council that the water of any river or stream flowing in a natural channel, or any lake, or any other natural collection of still water, should be applied or used by the Government for the purposes of any existing or projected canal, the governor may, by notification in the Bombay Government Gazette, declare that the said water will be so applied or used after a day to be named in the said notification, not being earlier than three months from the date thereof.

"At any time after the day so named, any canal officer duly empowered in this behalf may enter on any land, remove any obstruction, close any channel, and do any other thing necessary for such application or use of said water, and for such purposes may take with him, or depute, or employ such subordinates and other persons as he deems fit."

These powers, as will be recognized by those living under the laws of the United States, are exceedingly broad, and in favor of the Government—no such thing as a vested right to the use of the water being recognized in favor of the individual.

Following the powers set forth above, equally broad powers are given canal officers to enter or examine land in connection with

[12] Part 10, Secs. 70-74, Act above cited.

projected works, to inspect and regulate water supply, to enforce repairs, and prevent accidents. Additional provisions are formulated providing for suitable canal crossings, the removal of obstruction to drainage, and the construction of drainage works. The Act provides further for compensation in case of damages, the remission of water rates when allowable, compensation on account of the interruption of water supply, and for further causes.

Part 4 of the Act lays down the rules for the levying of water rates, and opens by stating that "such rates shall be leviable for canal water supplied for purposes of irrigation, and for other purpose, as shall from time to time be determined by the governor and council." Special rates are fixed, to be charged where persons use water unauthorizedly; also, when water may be permitted to run to waste. Provisions are made for the obtaining of forced labor on the canals in times of emergencies, and penalties are provided for damage done to canals and to other works.

§ 117. **The Burma Canal Act of 1905—The Punjab Minor Canals Act of 1905.**—One of the most recent canal Acts of India is that of the Burma Canal Act No. II of 1905, and which extends to the whole of Burma, including the Shan States.[1] The preamble of this Act provides: "Whereas, throughout the Territories to which this Act extends, the Government is entitled to use and control for public purposes the water of all rivers and streams flowing in natural channels, and of all lakes and other natural collections of still water, and to assume control and undertake, in whole or in part, the maintenance of any irrigation work, upon such terms, if any, as to compensation as it deems just, whenever it appears to be necessary in the public interest to do so; and, whereas, it is expedient to amend the law relating to irrigation, navigation, and drainage in the said territories. It is hereby enacted, as follows:"— Then follow provisions, which are almost identical with those of the Northern Canal and Drainage Act of 1873, abstracted in a previous section.[2]

1 Burma Act No. II of 1905, assented to by the Lieutenant Governor, Feb. 25, 1905, and by the Governor General, March 28, 1905, and published in the *Burma Gazette* of 22d April, 1905.

2 See Sec. 115.

The same power is given the local Government to declare that any waters are about to be applied to a public use,[3] and, upon notice of the same, no person shall construct any "dam, weir, embankment, sluice, channel, or other work, for purposes of irrigation, without previous sanction of the collector."[4]

Another recent Act was that of the Punjab Minor Canals Act of 1905,[5] which Act applies only to minor canals. And the Act provides that the Northern India Canal and Drainage Act, 1873, shall not apply to any canal which is included under those scheduled in the Act.[6]

§ 118. Conditions and results in India and this country compared.—Though the conditions of government and the people are so different in India from these in the western portion of the United States, where irrigation is practiced, many useful examples and lessons from the works themselves, methods of administration, and the laws governing waters may be learned from British India. Lessons can be also learned from the success or failure that has attended certain enterprises. Upon the economic side, the practice of irrigation involves the humane government of an intense and dependent population, consisting of many millions of people. These protective works involve the feeding of vast communities heretofore liable to the horrors of famine. They mean the reclamation of great tracts of land otherwise unoccupied and barren, and the creation of an enormous revenue from land rent to the Government, which is practically the sole landlord in that great empire. The physical conditions under which those in the United States must undertake irrigation enterprises are not so different from those existing in India as would first appear. Anywhere in our arid West, where irrigation works may be constructed, it is reasonable to suppose, judging from analogy between the two countries, that when a sufficient population settles below them, these works will be called upon to furnish all the water they can provide, and if carefully and properly planned

[3] See Sec. 115.

[4] Chap. 2, Sec. 6, and Chap. 2, Sec. 12.

[5] Punjab Minor Canals Act of 1905, No. III, assented to by the Lieutenant Governor, April 7, 1905, and by the Governor General, May 12, 1905.

[6] For the Northern India Canal and Drainage Act, see Sec. 115.

and estimated for, should return fair interest on the original investment. In other words, any works we may construct must depend for their utilization and revenue upon immigration, as they will be constructed in a still sparsely settled country, as compared with the population of India. In order to induce immigration, people must first be convinced of the benefits and utility of irrigation. After having learned their lesson, the people of this country will find, and that, too, not before many years, that the irrigated portion of this country will be capable of supporting the most intense population, and at the same time exporting vast quantities of products to the less favored portions of the country. A few of the great canals in the Northwest Provinces and the Punjab were undertaken in districts sparsely inhabited. These canals are among those of India that have paid the largest interest on the original outlay. Within ten years from their construction the country was fully populated, although immigration was often from remote portions of India. Then, upon the other hand, irrigation works have frequently been undertaken in portions of India that were already over-populated. They have rendered the land more fertile and sufficiently productive to support nearly double the population which it was previously capable of sustaining. This, too, has been accomplished despite the prejudices to be overcome, and the difficulties in inducing the people to make use of the water furnished, and of immigrating to other portions of the country—difficulties far greater than we would have to contend with in inducing immigration to our arid West.[1]

Only the subhumid portions of India have been subjected to famine. There are large regions of the country that have a similar climate to the western portion of Kansas, the Dakotas, Nebraska,

1 A writer, in giving the history of irrigation in Bombay, concludes with the following: "A husbandman who irrigates needs to be upon his plot early and late. He must work in it at night time in some seasons. In point of fact he must live upon it. By these necessities communities have been dispersed over their fields, to enjoy more freedom, more light, and fresh air, as well as water; a better housed people have been better occupied, better fed, and better clothed, rendered more contented, and in other ways more civilized; the whole of their life has been lifted a little by raising its material base. This has been accomplished under the very eyes of all observers, in the present generation, by means of irrigation in the Maratha country,"—3 *Irrigation Age* 178.

Oklahoma, and a portion of Texas. The famines in these regions have occurred every few years, and are the results of the country having been settled during the periods of fair rainfall. Following these good years came a season or two of minimum rainfall, when the crops were parched. It is only on account of the transportation facilities in our own subhumid West, and the extensive charities undertaken by the Government and people, on several occasions, that the settlers in the subhumid portions of our own country have been saved from famine. It is in such regions as those—the subhumid regions—that the Government of India has devoted the most time, attention, and money for the construction of irrigation works, as a means of protection against such losses; and no more convincing arguments need be made of the wisdom of this policy than their results.

CHAPTER 6.

MODERN IRRIGATION IN AUSTRALIA.

§ 119. Particular features of the country.
§ 120. The Government of Australia.
§ 121. Irrigation enterprises—Failure and success.
§ 122. Ownership and government of waters—In general.
§ 123. New South Wales—Irrigation and laws.
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§ 127. Victoria—The Water Act of 1905—Rights in natural waters.
§ 128. Victoria—Authorities empowered to construct works—The Board of Land and Works.
§ 129. Victoria—Authorities empowered to administer works—The State Rivers and Water Supply Commission.
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§ 119. **Particular features of the country.**—Australia measures 2,500 miles in length from west to east, and 1,950 in breadth from north to south, and contains an area of about 3,000,000 square miles—nearly the same as that of the United States, exclusive of Alaska. Along the entire line of the east coast there extends a succession of mountain ranges, called in different parts, the Australian Grampians, the Australian Alps, and other names, with an average height of 1,500 feet above the sea, although there are peaks many thousand feet high. The rivers flowing down the eastern slope have but short courses before they reach the sea, and very few of them are more than 200 miles in length. It is different with the Murray River, which flows westward, and has a length of 1,100 miles. This river is navagable during the greater portion of the year and drains, with its tributaries, about half a million square miles. There are a number of other rivers such as the Victoria, the Roper, the Brisbane, the Fitzroy, the Glenelg, and the Swan. But this continent can not boast of a Nile, an Indus, or a Mississippi, and the interior suffers for the want of water. There are great plains of rich soil, which need only the application of water to make them productive. The climate varies greatly in different localities. The rainfall is from six to ninety inches annually. With regard to the temperature,

the northern regions of the continent being situated within the Tropic of Capricorn, resemble parts of South America and South Africa, that are situated in corresponding latitudes. The seaward districts in this respect are like Southern Europe. The mean annual temperature of Sidney is 62° 4′ Fahr. The inland plains, however, which suffer much from evaporation, experience a summer heat which rises to 100° Fahr. in the shade, and sometimes as high as 140°. As a general thing, the climate of Australia is arid in the extreme, and in many portions the ordinary crops can not be raised without irrigation.

§ 120. **The government of Australia.**—Although Australia is nominally a British province, it stands upon an entirely different footing than does either British India or British Egypt, the irrigation features of which countries we have discussed in the previous chapters.[1] In that country there are no dominant and servient peoples, but all stand upon an equality, and with as much individual freedom as do the people of the United States. In fact, as was said by the Minister of Lands of Australia, the people of the United States and that country have the same language, the same governmental machinery, and the same inherited traditions as to the rights and duties of men.

The country has its Parliament, which passes its Federal laws, and which stands in the same relation as does the Congress of the United States to this country. The country is also divided into States, each of which has its Legislature, composed of the Legislative Council and Legislative Assembly. These Parliaments are similar to the legislatures of the respective States of this country. In fact, Australia is practically a republic, having all the powers, as far as self-government is concerned, as an independent sovereign country.

§ 121. **Irrigation enterprises—Failure and success.**—As in many other new countries, there have been many failures of irrigation schemes in Australia, resulting from many causes. The main trouble has been, and now is, the sparse population. In many cases the "trusts" saw no more than the advantages likely to

1 For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102. For Modern Irrigation in India, see Chap. 5, Secs. 103-118.

accrue to their districts through possessing a sufficient water supply, and did not consider seriously enough the large liability they had assumed for the repayment of the principal and interest of the loans they had received from the Government, or if they did understand the position, they probably relied upon the leniency of their creditors to postpone the day of reckoning until it was quite convenient to pay up. Further, at the outset few knew anything about irrigation in a practical way, and especially were they ignorant of the large expenditures necessary to bring land into a fit state to be irrigated. Then again, the farms are too large to be owned by one man. When it is considered that the most of the land included in the trust districts is held in blocks of at least 320 acres, and that in the irrigation world 20 acres is considered a large farm for one man to take care of, it will be seen how much must be done before any considerable area could be utilized for "intensive irrigated culture." The result has been that the available water has not been made use of to anything like the extent contemplated when the schemes were first proposed. [1]

Like the United States, the early States of Australia were too improvident in the distribution of their lands. Lands at first were regarded as of little value and were given away in large tracts to individuals with a mistaken generosity. The States are now endeavoring to correct this evil through the repurchase and subdivision of these estates, and through the imposition of a graduated land tax, which tends to promote subdivision of the large tracts by the owners. The later rule for the disposition of lands, especially in the State of Victoria, has been more enlightened, and it is now being disposed of in much smaller tracts. The owners of large tracts of land, as is the case in all countries where the same is allowed, have always stood out against irrigation enterprises, which would require large expense upon their part, and tend eventually to either a relinquishment or a subdivision of their lands. We have seen the same result in many portions of the Western States of this country. Irrigation

1 In Utah the average irrigated farm is 27 acres.

Under some of the Government projects constructed under the National Reclamation Act of the United States, the farm units are fixed as low as 10 acres. See Chap. 65.

stands for intense farming, and intense farming only goes with a small acreage.[2]

§ 122. **Ownership and government of waters—In general.**—To the independent States is left the entire government of all their internal affairs. Each Australian State owns the public lands within its boundaries, and also the waters flowing or lying therein; and, therefore, the government and control of the use of waters is a State, rather than a Federal matter, and this subject is left entirely to the respective States. In Australia the public utilities are, as a rule, owned and operated by the public and for the public. The tendency is also to conserve the natural resources of the country. There are extensive forest reserves not only protecting the timber intersts, but also the watersheds, and therefore protecting the flow of the streams as far as possible.[1]

The waters flowing within a State are claimed and owned by the State, and no one can take water from an Australian stream without paying for it. The charges for this service are nominal, the intention being simply to maintain the title to the water and to secure enough revenue to pay the expenses of supervision and of dividing the water in times of scarcity. No perpetual rights to water for any use are granted, and only licenses to use are granted, and the longest term of any license is fifteen years. Upon the expiration of this term a preference right is given for a renewal to the former users. Not only has Australia abrogated the common law as to riparian rights of the mother country, but it has also in all land grants reserved to itself the beds and banks of all of the streams, including a strip of land on each side of the streams of from one to three chains wide. Thus the State has become the sole riparian owner upon the streams. The State is then also in the position to say who may erect diverting works or pumps upon the banks of the streams for the diversion of the water. All power sites are protected and owned by the State, and the utilization of water power is thereby made an effective agency for the development of local industries by the people in general, rather than by the favored few. No corporation has, or can gain, under the present laws, a monop-

2 For the Effect of Irrigation Upon the Individual, see Sec. 9.

1 For Forests and Their Relation to Stream Flow, see Chap. 2, Secs. 40-62.

oly of any of the great natural resources of Australia, as is the case in many of the States of this country. These natural resources are owned by the State and are guarded and protected by it, and the right to their use is only granted under the license or lease system. Even the mineral lands are so protected, the title being retained by the State and the mines worked under a system of leases.

§ 123. New South Wales—Irrigation and laws.—The science of irrigation has not progressed as extensively or as rapidly in New South Wales as it has in the State of Victoria, discussed in subsequent sections of this chapter.[1] One reason is that they were later in passing a satisfactory law governing waters and their use, and the law now in force is defective in many respects. However, the possibilities of irrigation in this State are enormous. The rivers are large and the irrigable land extensive. However, a large irrigation project is about to be completed in that State, which is known as the Murrumbidgee project. This project, when completed, will open up 1,344,000 acres of land for settlement, and will make room for 200,000 settlers. One-fourth of this land will be irrigated and the rest used for pasture for the farmers.

In 1896, there was passed a law that is known as the Water Rights Act.[2] There had been a tendency upon the part of all of the

1 For Irrigation and Laws in the State of Victoria, see Secs. 125-129.

2 Whereas, it is desirable in the public interest to declare the respective rights of the crown and of riparian proprietors to the waters of rivers and lakes, and to make better provision for the conservation and supply of water and for regulating drainage: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the legislative council and legislative assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

1. (I). The right to the use and flow and to the control of the water in all rivers and lakes which flow through or past or are situated within the land of two or more occupiers, and of the water contained in or conserved by any works to which this act extends, shall, subject to the restrictions hereinafter mentioned, vest in the Crown. And in the exercise of that right the Crown, by its officers and servants, may enter any land and take such measures as may be thought fit, or as may be prescribed for the conservation and supply of such water as aforesaid, and its more equal distribution and beneficial use and its protection from pollution, and for preventing the unauthorized obstruction of rivers. For the purposes of this sub-section, "occupier" includes the Crown.

Australian States, prior to the passage of the statutory laws abstracted in this and other sections of this chapter,[3] to adopt in toto the common law of England as to riparian rights. This was also true in the provinces of Victoria and New South Wales; and, therefore, the perplexities of the water users were increased. This ancient principle of the common law gives to any land owner along the margin of a stream the right to have the water flow as it was wont by Nature, undiminished in quantity and unimpaired in quality;[4] or, at least, it renders it uncertain as to the extent to which the volume may be diminished without injury to the other riparian proprietors. This law was adopted from the mother country of these early Australian colonies, England, where, under an entirely different physical condition, this law first came into being. The Australian statute of New South Wales limited the rights of a riparian proprietor to the needed domestic pur-

(II). The right shall be subject to the following restrictions:

(a) It shall not be exercised in contravention of any right conferred on and lawfully exercisable by any person, company, corporation, or board, or under the authority of any act dealing with mining, or of any public or private statute, or of any license granted by the Crown.

(b) It shall be subject to the rights of the occupiers of land on the banks of rivers or lakes as hereinafter defined.

(c) It shall be subject to the rights of the holders of licenses under this act.

2. The occupier of land on the bank of a river or lake shall have the right to use the water then being in the river or lake for domestic purposes, and for watering cattle or other stock, or for gardens not exceeding five acres in extent used in connection with the dwelling house, and it shall not be necessary for the occupier to apply for or obtain a license for any work used solely in respect to that right. . . .

10. The license, if granted, shall in every case except Class IV., be granted for a period not exceeding 10 years (subject to the provisions of this act, with regard to the renewal of licenses and subject to such limitations and conditions as the minister may think fit to make) be renewed by the minister from time to time on the application of the person holding the license, on the payment of a fee calculated in the manner and according to the scale set forth in the schedule to this act: Provided, that no renewal shall be for a longer period than 10 years.

13. A license shall be deemed to be held by and shall operate and inure for the benefit of the lawful occupier for the time being of the land whereon the work is constructed or is proposed to be constructed.

3 See Sec. 126.

4 For the Doctrine of the Common Law, see Chaps. 21-28, Secs. 450-551.

For Irrigation as a Riparian Right, see Chap. 26, Secs. 489-525.

poses, the watering of stock, and for the cultivation of gardens not exceeding five acres in extent. The abrogation of the doctrine of riparian rights in these provinces was not made until after a careful study of irrigation in both Europe and America. These provinces are colonies of Great Britain, where the time-honored precedents of the mother country are supposed to be followed with greater strictness than in any other country that has adopted the common law. But after a most careful investigation, it was decided that the doctrine of riparian rights, as it was known under the common law, should have no place in a country where all the water the streams carry should be diverted and used upon the land. Hence the passage of the laws abolishing these rights. [5]

§ 124. **South Australia and Queensland.**—There are many irrigation projects in South Australia and Queensland, and many acres are under cultivation which are irrigated from the waters of the natural streams, and also from the flowing wells, but space will not permit us to discuss either these projects or the laws which govern them.

The principal discussion of this chapter will be confined to the State of Victoria, that State being more advanced along all lines than are any of the other States. [1]

§ 125. **Victoria—Irrigation projects in.**—The State of Victoria is further advanced along irrigation lines than is any other Australian State, both as to the practical side of the question and as to its laws.[1] On June 30, 1907, the total cost of State works was £3,177,822, which has been very much increased since that date. Since the Water Act of 1905, the construction of these works is imposed upon the Board of Land and Works; and, after the construction has been fully completed, the jurisdiction is transferred to the State Rivers and Water Supply Commission, of which commission Mr. Elwood Mead, formerly chief of the Irrigation Investigations of the United States Depart-

[5] Upon this subject, see the Laws of Canada, Secs. 177-237. Also, see, Riparian Rights in the United States, Secs. 450-551.

[1] For Irrigation and Laws in Victoria, see Secs. 125-129.

[1] For the Laws of Victoria, see Secs. 126-129.

ment of Agriculture, is at present the chairman. On the date above mentioned, there were then controlled by the commission thirty-seven separate works, besides a number of others under construction by the Board of Land and Works. And, at that time the area of lands artificially supplied with water for domestic and ordinary uses was about 10,800,000 acres. However, the degree of efficiency and completeness of the service was widely various. The total area of land actually irrigated then from these works was but 104,920 acres. This, however, is rapidly being extended, and, at the present time it is more than doubled. The number of cities and towns supplied from these works is 111.[2]

§ 126. **Victoria—Laws and their history.**—It was not until 1881 that the Victorian Parliament took any decisive action in the matter of irrigation and water laws, when at that time it passed an Act authorizing the formation of what are known in that country as water supply trusts, or "trusts." These trusts are somewhat similar to the irrigation districts of our Western States, based upon the Wright Law of California, and later passed.[1] This Act was found not to be entirely satisfactory; and, after a more careful investigation of the irrigation laws and practices of the United States and some of the European countries,[2] in 1886, a new irrigation Act was passed. This Act provided that any district, upon application to the executive government, giving plans and full particulars of a proposed scheme of irrigation and water supply, including cost, maintenance, and probable revenue, may be constituted an irrigation trust; provided, that the opposition to the scheme in the proposed district is not greater than a specified minority; and, provided further, that the Minister and chief engineer of water supply report favorably on it. The executive part of the Government having approved of the scheme, it is then to be laid before

2 See Annual Report of the State Rivers and Water-Supply Commission, 1906-07, pp. 3-6, Melbourne, Australia.

For subsequent data, see the subsequent Reports of the Commission.

1 For the Irrigation District Laws, see Chap. 70.

2 In 1885, Mr. Alfred Deakin, member of the legislative assembly, visited America for the purpose of studying irrigation in its latest application, and information was also obtained from various countries of the old and new world.

Parliament, with all data relating thereto, for its sanction. A specially authorized loan is then granted by the Government to the trust from a fund specially set apart for the purpose, to enable the necessary works to be constructed. A small rate of interest is charged and a sinking fund provided to extinguish the loan. It was also enacted that certain works may be denominated "National" works and paid for solely by the State, or "joint" works, payment being made by both State and trust, or "trust" works, for which the trust alone is responsible. These trusts are managed by commissioners elected by ballot of the rate payers in each district, who have full financial control and responsibility in connection with the undertaking, and who appoint the necessary officers for carrying out of the works and controlling the supply of water. Great facilities were thus afforded to districts in which the rainfall was deficient of obtaining an adequate supply of water. The value of this act was soon recognized, and between thirty and forty districts, or "trusts," were formed after its passage.

One of the most important features of the Act of 1886 is, that all waters of the State, including rivers, creeks, lakes, etc., were declared to be the property of the State, and to be held and controlled by it, or by the trusts appointed by the State, for the benefit of the people. It was thus that the first attack was made in Victoria upon what are known as "riparian rights," the great stumbling block to irrigation at that time in other parts of Australia, as well as to a number of the Western States of this country. But it was held by the Court, that riparian rights which had vested prior to the passage of the act were still in force, and that was also the opinion of the Crown solicitor, extracts from which opinions are quoted below. [3]

[3] "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water for his domestic purposes, and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with rights of the proprietors either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes

In 1890, the law of 1886 was amended in many particulars. But this law was unsatisfactory in many respects, especially upon the subject of riparian rights, and in 1899, an Act to declare and amend the laws relating to riparian rights was passed. This Act is known as the Riparian Rights Act of 1899. And in this law are defined all rights of riparian owners in the waters of the streams.[4] But the Act of 1899 did not prove entirely satisfac-

with the lawful use of the water by any other proprietors and inflicts upon them a sensible injury."—Miner v. Gilmour, 12 Moore P. C. 131, 7 Week. 328.

"A riparian proprietor has the right to use all the water which he requires for domestic use, and to water his cattle, and is also entitled to take from the river for any other purpose any quantity of water which will still leave in the river a sufficiency of water to substantially enable other riparian owners lower down the stream to exercise similar rights. This riparian right is still preserved by the Act of 1886, *as to persons who had such a right at the passage of the act.*"—Opinion of John Madden, Crown solicitor, in answer to inquiry from Secretary of Mines and Water Supply.

4 An abstract of this law is as follows:

Whereas, it is advisable to define what are the special rights in the waters of rivers, streams, water courses, lakes, lagoons, swamps, or marshes appertaining to the ownership of lands abutting thereon, and to amend the laws relating to such rights: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the legislative council and the legislative assembly of Victoria in this Parliament assembled, and by the authority of the same as follows:

Every owner of land alienated from the Crown before the 15th day of December, 1886, abutting on a river, etc., there being no reserve between such land and the bank, shall have a right to the use of the water in the river, etc., for the ordinary and domestic use of himself, and of his family and servants, and for the use of his cattle permanently depasturing on such lands.

Every such owner shall likewise have the right to take and divert water from such river, etc., for other uses on his riparian lands, provided such uses have been bona fide habitually exercised by such owner for not less than 20 years prior to the passing of the Irrigation Act of 1886.

A right to the permanent diversion or to the exclusive use or to any other than the ordinary and domestic and the use of cattle of the water in any river, etc., attaching to the ownership of any riparian lands by length of use or otherwise than under the provisions of some act of Parliament shall attach only to the riparian allotment as originally sold by the Crown and not to any other lands of the same owner. It shall not attach to any lands separated from the riparian lands by an allotment boundary or by a public road, or to any land distant more than one mile from the bank in respect of which the right accrues.

Any owner of such land claiming to have the right to take and divert water

tory. What was wanted in Victoria was a law vesting in the State the entire title to the waters flowing within its boundaries, and also giving the State the entire supervision and control of all the uses made of such waters. And it was not until December 12, 1905, that such an Act was passed. This Act is now the present law in the State of Victoria, with some slight amendments, and will be discussed in the following sections.[5]

from any river, etc., on the ground of his having exercised such use for not less than 20 years prior to the passing of the Act of 1886, shall register his claim to such right within 12 months from the passing of this act.

It shall be competent for the Crown or for any land owner or for anybody or person to challenge such claim and to have an issue tried at law to settle the same.

All claims not registered within 12 months shall absolutely lapse.

Except as hereinafter expressly provided, the water at any time in any river, stream, water course, lake, lagoon, swamp, or marsh shall be, and the same is hereby, *declared to be absolutely the property of the Crown and inalienable, and the right to the use of all such water shall in every case be deemed to be vested in the Crown.*

Where any river, etc., forms the boundary of an allotment of land alienated by the Crown, *the bed and banks thereof shall be deemed to have remained in the Crown and not to have passed to the land owner.*

Except as herein expressly provided, or except under the provisions of some act of Parliament, no person shall divert or appropriate any water from any river, etc., except in the exercise of the general right of all persons to use water for domestic and ordinary use and for the use of cattle from any river, etc., vested in the Crown, and to which there is access by a public road or reserve.

After the passing of this act no right to the permanent diversion or to the exclusive use of the water in any river, etc., and no right to take and divert such water for use on any riparian land other than the ordinary and domestic use of the owner and of his family and servants and of his cattle permanently depasturing thereon shall be acquired by any riparian owner or of any other person by length of use or otherwise as the same may be acquired or conferred under the provisions of some Act of Parliament. And no such right shall be deemed to have been acquired otherwise than as aforesaid since the passing of the Irrigation Act of 1886, notwithstanding the repeal of said act.

A provision to entitle the Crown, by the minister of water supply or his officers, to interfere summarily to prevent the undue, excessive or illegal diversion of water from any river, etc., and to lay on the person or body diverting, whether private land owner, trust, or other body or person, the onus of appealing against such interference and not on the Crown, and the onus of applying for an injunction or other process to restrain it or him.

5 See Secs. 127-129.

§ 127. Victoria—The Water Act of 1905—Rights in natural waters.—The "Water Act, 1905," passed by the Victorian Parliament in that year, is entitled: "An Act to consolidate and amend the laws relating to the conservation and supply of water to declare the law relating to certain rights in natural waters the property in the beds and banks containing the same and for other purposes."[1]

In Part II of the Act, the rights defined in natural waters are divided into two divisions, as follows:

Division I. Respecting Rights of the Crown and of Private Persons.

Sec. 4. "The right to the use and flow and to the control of the water at any time in any river creek stream or water course and in any lake lagoon swamp or marsh shall be subject only to the restrictions hereinafter provided and until appropriated under the sanction of this Act or of some existing or future Act of Parliament vests in the Crown."[2]

This section shall not operate so as to prevent any person from draining any land; provided, that the flow of water in any river, etc., is not thereby sensibly diminished.

Sec. 5. "Where any river creek stream or water course or any lake forms the boundary or part of the boundary of an allotment of land heretofore alienated by the Crown the bed and banks thereof shall be deemed to have remained the property of the Crown and not to have passed with the land so alienated."

Where such river, etc., forms the boundary of land hereafter alienated, the bed and banks thereof shall, notwithstanding such alienation, remain the property of the Crown and shall not pass with the land so alienated, even if one person owns on both sides of a stream.

Sec. 6. Except as in the Act provided, or under some future Act, "No person shall divert or appropriate any water from any river creek stream or water course or from any lake lagoon

1 Water Act, 1905, 12th December, 1905, No. 2016.

For definitions of terms used in the act, see Sec. 3, among which are found the following: "Board" means the Board of Land and Works. "Commission" means the State Rivers and Water-Supply Commission. "Irrigation" means any method of causing water from a stream or channel to flow upon and spread over land for the purpose of tillage or improvement of pasture or of applying water to the surface of land for the like purposes.

2 It will be noticed that throughout the act no commas are used.

swamp or marsh save in the exercise of the general right of all persons to take water for domestic and ordinary use and for watering cattle or other stock from any river," etc., "and to which there is access by a public road or reserve."

Notwithstanding the provisions of the Act as to the title, the owner of land adjacent to a water course may have access to the bed or banks of the same for grazing and to have a remedy for trespass thereon by others.

Sec. 8. No right to take and divert any of such waters shall be acquired by any owner of such land by length of use or otherwise than the same may be acquired under the provisions of the Act or of some existing or future Act.

It is made unlawful to obstruct a water course, "and any person who, being an occupier of any land conveyed as aforesaid, shall continue, or fail to remove, any such obstruction or interference shall be guilty of an offense against this Act on every day during which such obstruction or interference shall be continued or not removed after notice in writing to discontinue or to remove the same shall have been given by any Crown lands bailiff to such occupier."

Sec. 10. The pollution of the water in water courses and lakes is made an offense, but the rights granted under the Mines Act of 1904 shall not be interfered with.

Sec. 11. The right of entry is given the Crown to prevent the interference with a water course; obstructing an officer is made an offense, and compensation for injury provided for.

Sec. 12. The owner of adjacent land to any water course may have permission to protect his land from damage by erosion of flooding.

Sec. 13. The Commission is given the power to institute all proceedings for the protection of the rights of the Crown in and to such waters, and for the recovery and enforcement of any penalty; "and in such proceedings it shall not be necessary for the Commission to show that either the Crown or the Commission has sustained any damage by such illegal diversion or taking or pollution of water or unlawful interference with such beds or banks," etc.

Sec. 14. Riparian rights of owners adjacent to water courses are defined and limited to the ordinary use of themselves and of

their respective families, free of charge, and for watering cattle or other stock; "and shall have a further right to such water for the irrigation of a garden not exceeding three acres in extent being part of such land and used in connection with a dwelling."

Secs. 15-23. Certain riparian owners who have diverted the waters not less than for 20 years prior to the 15th day of December, 1886, may apply for a special license to continue the use of the water to the extent mentioned in the last section, under the proceedings prescribed in these sections and under the rules and regulations also provided for.

Division 2. Control of Water Courses, Lakes, etc., Affected by State Works.

Sec. 24. The conditions for the exercise of certain rights of the owners of lands adjoining the banks of streams which may be supplied wholly or in part from State works are prescribed. After the construction of such State works such person shall be entitled in virtue of such right to use only so much water as would be equal to the quantity of waters of the water course which would be available to him and to which he would be lawfully entitled but for the existence of such State works; but in no case shall he be entitled to a greater quantity of water than 4,000 gallons per day for domestic and ordinary use and for watering cattle or other stock in respect of every mile of frontage on such stream, and for the irrigation of a garden not to exceed three acres in extent being a part of the land adjoining the banks of the stream and used in connection with a dwelling.

Regulations for this use may be made by the Governor in Council from time to time, such regulations to be published in the official gazette. Penalties not exceeding £50 may be imposed by such regulations for any breach of the regulations made hereunder.

It can be readily seen from the above that the ownership of all the waters flowing or lying within the State of Victoria is in the State. That the State is also given the absolute control of the same; and that the common law riparian rights are effectually disposed of by the State owning the beds and banks of the streams; but that certain rights are granted to those who own lands "adjoining the banks" to the use of a certain limited and specified quantity of water under a definite license and under regulations

prescribed, and that, too, whether the streams are supplied naturally or from State works.

§ 128. **Victoria—Authorities empowered to construct works—The Board of Land and Works.**—Secs. 25-27. The authority is given the Board of Land and Works to construct and complete all such irrigation works as may from time to time by any Act of Parliament be directed to be constructed as State works of water supply or drainage, except extensions, improvements, renewals, and substitutions and works directed by any Act of Parliament to be carried out by the Commission. "Whenever the board and the chief engineer of the Department of Water Supply certify in council that any works so constructed by the board are completed the Governor in Council may make an order transferring such works to the Commission; and thereupon such works together with the lands over or upon which they have been constructed and the inheritance thereof in fee simple and the absolute property in all water at any time in or upon such works or lands shall become vested in and shall be held by and remain under the sole control and management of the Commission for the purposes of the act."

The works uncompleted at the time of the passage of the Act should also be finished by the board and afterwards be turned over to the Commission, under similar proceedings and with the same effect as above specified.

§ 129. **Victoria—Authorities empowered to administer works—The State Rivers and Water Supply Commission.**—Upon the State Rivers and Water Supply Commission, as designated in the Water Act, 1905, of the State of Victoria, is devolved the power and duty to administer all works which have been turned over to it by the Board of Land and Works,[1] as completed, and also the power and duty to supervise, regulate, and control all the uses of the waters taken through or by the means of such works, as follows:

Sec. 28. The Commission created by the act is composed of "three fit and proper persons," to be appointed by the Governor in Council, and one of such persons to be appointed as chairman. The Commission is a body corporate, and has a perpetual succes-

1 See preceding Sec., No. 128.

sion and a common seal, and is capable in law of suing and being sued, and is also given the power to take, purchase, lease, hold, exchange, and sell lands, tenements and hereditaments, goods, chattels, and other property for the purposes and subject to the provisions of the act.

Sec. 29. The commissioners shall not engage in other employment without the sanction of the Governor in Council. The chairman shall receive a clear annual salary not exceeding £1,200, and each of the other two a clear annual salary not exceeding £800; such salaries to be determined by the Governor in Council.

Secs. 30-35. The term of office of the commissioners is five years. Any commissioner may be removed for cause, and an acting commissioner be appointed. Any two commissioners shall form a quorum, and the chairman, if present, shall preside at all meetings.

Secs. 36, 37. All State works are to be vested in the Commission as prescribed by the act.

Secs. 38-49. The powers and duties of the Commission are definitely prescribed. All extensions of works to be carried out by the Commission. Contracts may be entered into for the construction of works. However, no contract made by the Commission the consideration of which exceeds £1,000 or the performance of which may extend over a period of one year shall have any force or effect unless sanctioned by the Governor in Council. The Commission may from time to time appoint or remove officers and employees. The funds for the current expenses of the Commission to be provided for by Parliament. All moneys collected by the Commission to be paid to the public account. As soon after the 30th day of June in each year the Commission shall prepare a full report, statement, and estimates. Such annual report shall be laid before both Houses of Parliament in the month of September in each year.

Secs. 50-59. From and after the commencement of the Act, the lands included in the area heretofore under the jurisdiction and control of each of the irrigation and water supply trusts,[2] as designated in schedule 4 of the Act, shall be and become an irrigation and water supply district; and the commissioners of each of such trusts shall thereupon go out of office and the corporation shall be

2 For Water Trusts, see Sec. 126.

dissolved. The Commission is to be debited with the cost of such works, and have, thereafter, jurisdiction over them. Such districts are to have their supply of water. New irrigation and water supply districts may be created; the orders constituting new districts to state full particulars, and such new districts shall also receive water. The Governor in Council, on the recommendation of the commission, may at any time make an order altering the boundaries of such districts, or combining one or two districts into one; all such districts to come under the jurisdiction of the Commission. The inclusion of a water works district in an irrigation and water supply district has the effect of abolishing the local authorities and placing full jurisdiction in the Commission. The register of lands to be prepared and revised at intervals not exceeding 15 years; and the water apportionment to the lands in such districts may be amended at the time of the revision of the register; such register to be open for public inspection. Any occupier or owner of land in any such irrigation and water district being dissatisfied with the description or classification of any land in such register, or with the apportionment of water right to any land, may, within 30 days from the publication of such register or revised register, appeal to a police magistrate sitting in the court of petty sessions held nearest to such land, under the proceedings prescribed. Such appeal must be heard by the court, "and the decision of the police magistrate shall be final and shall not be set aside reversed altered or varied by any court upon any ground whatsoever." If there appears, however, to be just cause for relief the court may amend the register of lands or the apportionment of water rights in such manner as the court may think necessary.

Secs. 60, 61. All occupiers or owners of land on the register shall be entitled to a supply of water for domestic use and for cattle. After supplying for such use, the surplus water is to be apportioned for irrigation by the Commission, which has absolute authority in this respect.

Secs. 62-67. A general water rate is to be charged on all lands, but less on lands distant from the works. The Commission has the power to provide by-laws for the making and levying of all water rates. Full proceedings are also provided for the collection of such water rates.

Division 3 of the act relates to the water works trusts for furnishing water to municipalities and their government, which subject is unnecessary to discuss here.

Part IV relates to the subject of the supply of water: Division 1—In general; Division 2—Supply of water in urban districts; Division 3—Pumping, leases, licenses, etc.

Part V relates to claims for compensation: Division 1—Compensation for lands taken for works or undertakings; Division 2—Compensation for injury by works.

Part VI provides for urban districts: Division 1—In general; Division 2—By-laws in urban districts; Division 3—Offenses in urban districts; Division 4—Pollution of water for supply of urban districts; Division 5—Rates for urban districts.

Part VII provides for loans to water works trusts and to local governing bodies.

Part VIII relates to general provisions: Division 1—Powers and property of authorities; Division 2—By-laws; Division 3—Rates and charges; Division 4—Offenses and penalties; Division 5—Legal proceedings and enforcement of the act.

Part IX relates to miscellaneous provisions.

Then follows the schedules Nos. 1-19.

Neither time nor space will permit a further discussion of the above provisions.

§ 130. **The lessons to be learned from Australia.**—The lessons to be learned in Australia by the American irrigators are many, and especially in the State of Victoria.[1] First and foremost, we find an English colony practically abrogating the common law of the mother country, by becoming the sole riparian owner itself upon the banks of all streams and other bodies of water and turning around and granting to the owners of lands "adjoining the banks" of such streams the right to the use of a certain quantity of water for certain limited and definite purposes, which purposes are in the nature of sustaining life. Then we have the declaration declaring all waters within the State at all times to be the property of the State, thus paving the way for the absolute State control provided for by the Victorian Water Act, 1905. The Victorian Government says to the farmer: "We will construct your

[1] For Victoria, see Secs. 125-129.

irrigation works; we will furnish you with water; and you, upon your part, must pay us a small compensation for the water and comply with the laws and regulations relative to the use of the same." We understand that more recently than the Water Act of 1905, the Australian States have made further inducements for settlers to come and settle upon their vacant lands now supplied with water for irrigation under these State works. The States will loan the settlers money to get a start; and, in some instances construct their houses and other necessary buildings, so that the ordinary hardships of the pioneer settlers are thus avoided.[2] Also teams and farm machinery will be loaned the settlers upon the start, and seeds will be furnished. In short, the scheme bears about the same relation to the pioneering ways of this country as the Pullman car bears to the prairie schooner. The question may be asked, and with reason, is this not making it too easy for the Australian settler? With all these things given him to start, will he turn out to be the hardy, rugged, independent, self-reliant citizen, the type of which we find thousands in the Western States of this country? It is adversity and having to fight for an existence that has made the type of rugged manhood which inhabits these Western States. We may also learn many lessons upon the subjects of the construction of irrigation works by the States, or by the Federal Government, and the regulation and distribution of the waters therefrom to the consumers. Australia has done in the history of her irrigation practice what the Western States of this country should have done; or, rather, what our Federal Government should have done many years ago—it being then the owner of all of the public lands. And that is, it has fixed the status of the ownership in and to waters, and has prescribed the exact conditions under which the water may be used. In our own country this was originally left largely to the individual. And by this means, enormous profit-making corporations have sprung up which own and distribute much of our waters; endless litigation has been and is being caused; and at all times the rights of the consumers are more or less unsettled. And, strange as it may seem, Australia learned many lessons from the conditions in this country. In turn, it is not too late for us to learn many lessons from Australia, especially as

2 These Acts are not before us.

to the utter abrogation of all riparian rights in the irrigated regions; or, at least to limit such rights to the flow of streams to the quantity of water that the riparian owner actually applies to a beneficial use or purpose. Just why we, in this country, should be so tied to precedents which sprung from the Island of England, under entirely different physical conditions, when the English colonies themselves, and the English Government itself in India and Egypt, entirely repudiate them, I have never been able to understand.

CHAPTER 7.

MODERN IRRIGATION IN SOUTH AFRICA.

§ 131. Particular features of the country.
§ 132. The Government of the Cape of Good Hope.
§ 133. Irrigation and irrigation projects in the Cape of Good Hope.
§ 134. Irrigation Act, 1906—Preliminary.
§ 135. Irrigation Act, 1906—Divisions of—Criticism.
§ 136. Irrigation Act, 1906—Utilization of streams.
§ 137. River districts and boards.
§ 138. Irrigation districts and boards.
§ 139. Water Courts.
§ 140. Expropriation of land and acquisition of servitudes.
§ 141. Irrigation loans, subsidies, and grants in aid.
§ 142. General provisions of the Irrigation Act, 1906.
§ 143. Lessons to be learned from the colony of the Cape of Good Hope.

§ 131. Particular features of the country.—There is another English Colony of which little is known concerning their irrigation practice in this part of the world, and that is the Cape of Good Hope in South Africa. As surprising as it may seem to some, the practice of irrigation in that country is already being carried on to a great extent, and the use of water for that purpose has been reduced to such a system, both in the matter of laws regulating the same and by practice, that it is equaled by no other country so young in the practice. With the usual activity of English colonists, when they are turned loose from the mother country, these settlers have taken every possible advantage of their situation in this as well as other enterprises.

The country rises from the sea by a series of terraces, of which the supporting walls are nearly parallel chains of rugged mountains rising to the central and highest range, which divides the drainage of the coastal streams from that of the inner tributaries of the Orange River in the north. The streams of the outer watershed are constant only in the extreme east of the country; toward the southwest and on the Atlantic coast their supply is very irregular. All partake at times of mountain torrents, being low and feeble for the greater portion of the year, but swollen and rapid during the rainy season. These streams are all small, few being navigable, and then but for a short distance from their mouths. The

Orange River, to which the inner shed drains, is longer. It rises in the Drakenberg, and flows westward for about 900 miles to the Atlantic. Its basin includes an area of upwards of 400,000 square miles. Even this river is not navigable except for a few miles above its mouth.

Nearly two-thirds of the surface of the country consists of vast arid plains, covered, however, with rich soil which only requires irrigation to render it a great agricultural region. There are vast quantities of water running to waste during the rainy seasons, but afterwards the country is naturally left dry and barren. There are, however, great opportunities for the storage of the flood water, and one of the first things that is requisite of every settlement in the interior is the formation of a reservoir for the collection and saving of a water supply.

§ 132. **The Government of the Cape of Good Hope.**—The Government of the Cape of Good Hope is similar in many respects to that of the Australian States discussed in a previous section.[1] It has its Governor and Parliament, consisting of the Legislative Council and the House of Assembly, the members of which are elective. This Parliament has full power to pass such laws governing the internal affairs of the country as it sees fit. The tendency during recent years is to conserve all the natural resources of the country. There are extensive forest reserves created by Acts of Parliament, which both tend to conserve the timber supply, and protect the watersheds, thereby regulating the stream flow.[2] Irrigation laws and laws regulating the uses of water have also been passed, the Irrigation Act, 1906, being the latest and the one now in force. This act will be discussed in subsequent sections of the chapter.[3]

§ 133. **Irrigation and irrigation projects—Cape of Good Hope.**—Prior to the Boer War, on the south side of the equator, in

1 See Sec. 120.

2 For Forests and Their Relation to Stream Flow, see Chap. 2, Secs. 40-62.

3 See Secs. 134-142.

For information upon the subject of Irrigation in Cape of Good Hope, see Irrigation Act, 1906, No. 32, assented to Aug. 21, 1906; The Annual Reports of the Director of Irrigation of rica; The Annual Reports of the Engineer-in-Chief of Public Works of Cape of Good Hope, Cape Town, Africa; The Annual Reports of the Chief Inspector of Public Works of

Africa, there was very little done in the way of irrigation, although in Cape Colony efforts had been made. Since the war a number of irrigation enterprises have been started, storage works constructed, and canals built. The most important is Van Wyck's Vley. Here a large reservoir has been constructed and a considerable tract of land brought under irrigation. Other enterprises are also under headway, and before many years a large portion of the irrigable land will be brought under cultivation.

In the Transvaal, under the Boer rule, practically nothing was done, in the way of irrigation development. But since the war things have changed. Large enterprises have been started by English and other capitalists, and it will not be many years before this country will be looked to, not only to supply their own needs but also to supply fruits and grains to Europe. As the seasons are the reverse of those of England, and of all the countries which supply England's markets, South Africa can always be sure of an ample market without competition. High-class delicate fruits can be put on the London market within fifteen days from Cape Colony, and at a reasonable cost of transportation.

The whole country is dependent upon irrigation, and the condition of the rainfall and opportunities for storage are such as to indicate that irrigation will be very successful. All the local, colonial, and State Governments are actively interested in the subject. The Cape Government constructs the irrigation works, and having recouped the cost by the sale of its own lands served by the works, turns them over for use to the owners of the lands. It also subsidizes or encourages private irrigation enterprises in several ways, but it regulates and controls all works and the water, and there is no such thing as the unlicensed, unrestricted grabbing of water, which in the United States has done so much to prevent irrigation development.

As is the case in all new countries, where the opportunity is given, irrigation started in South Africa by the individual farmers, in a small way; and, afterwards, its operations were enlarged by

Cape of Good Hope, Cape Town, Africa; Memorandum on the Irrigation Act No. 32 of 1906, by C. Reynolds, for Secretary for Public Works, Cape of Good Hope, Cape Town, Africa; see, also, the various regulations issued by the Office of the Commissioner of Public Works, Cape Town, Africa.

groups or associations of farmers. The Government, from time to time had passed laws regulating the use of waters, but these were not very effective until the Irrigation Act, 1905. In the meantime laws were also enacted authorizing the Government to construct some of the irrigation works, and some small works were constructed. According to the report of the Director of Irrigation for the two years ending December 31, 1905, there were three projects owned by the Government, one of which had cost the Government £21,809 and total receipts from the same work to the end of the year 1904-5 had been £10,580.[1] In 1906, the Buchuberg Irrigation Scheme was approved by Parliament, having an estimated cost of £33,375.[2]

But, according to the annual reports of the Director of Irrigation of the Cape of Good Hope, the great majority of the irrigation works throughout the country were either constructed by private individuals or companies, or district organizations, modeled somewhat after our irrigation districts in many of the Western States in this country.[3]

It has been the policy of the Government up to the present time rather than invest large sums of money in the construction of irrigation enterprises and wait for the lands to be settled up before there are any great returns from the investment, to loan money to either private parties, companies, or irrigation districts, for this purpose. And, for this purpose, a loan fund is created, and under the authority of the law, loaned out as occasion may require and the enterprises warrant.[4]

§ 134. **Irrigation Act, 1906—Preliminary.**—Under this part of the Act provision is made for the repeal of previous irrigation Acts, and for all regulations issued under such Acts to remain in full force and effect until revoked or replaced by regulations under this Act.

Definitions were also given of the terms used in the Act, including perennial and intermittent streams, which are defined as follows:

1 Report, pp. 10-12.

See, also, the Report of the Director of Irrigation for the year ending Dec. 31, 1906, pp. 5, 6.

2 See Report of the Director of Irrigation for the year ending Dec. 31, 1907, pp. 35, 36, Secs. 103-106.

3 For the Irrigation District Laws, see Chap. 70.

4 For Irrigation Loans, see Sec. 141.

"'Perennial stream' means a natural stream which in ordinary seasons flows for the greater part of the year in a known and defined channel, and the water whereof is capable of being applied to the common use of the riparian proprietors. Provided, that a stream which in part only of its course satisfies these conditions shall be deemed to be a perennial stream in so far as regards such part."

"'Intermittent stream' means a stream which is not a perennial stream, and into which the natural surface drainage waters flow from the lands of more than one riparian property. Provided that a stream shall not be deemed to be an intermittent stream above the highest point of its course at which the natural surface drainage waters from the lands of more than one riparian property unite, or for such lower portions of its course as satisfy the conditions of a perennial stream."

The above definitions are given for the reason that the two classes of streams are treated differently under the law and the regulations thereunder.[1]

§ 135. **Irrigation Act, 1906—Divisions of—Criticism.**—By the Act of August 21, 1906, of the Cape of Good Hope Parliament,[1] entitled "An Act to consolidate and amend the law relating to irrigation and the utilization of streams," a very effective irrigation law was passed, with one exception. The main object of the Act was to consolidate, with such amendments as experience had proved necessary, the statutory laws relating to irrigation.

The Act is divided into eight parts, as follows: Part I—Preliminary; II—Utilization of streams; III—River districts and boards; IV—Irrigation districts and boards; V—Water courts; VI—Servitudes; VII—Irrigation loans; VIII—General provisions. These subjects will be discussed in the above order in the following sections.[2]

The principal fault that we find with this law is that it upholds the common law of riparian rights. This defect may not be so apparent at the present time, while the population of the country is comparatively sparse. But, later, as the population increases and the demand for water increases correspondingly, it will be

1 Secs. 1-3, Irrigation Act, 1906.

1 Act No. 32 of 1906.
2 See Secs. 136-142.

found that this feature will greatly impede the growth and progress of the country. The best laws of the world upon this subject provide that the measure to the right to water is the quantity actually applied to some beneficial use or purpose, and that, too, regardless of the fact as to whether the right is based upon riparian ownership or by actual diversion and use.

§ 136. Irrigation Act, 1906—Utilization of streams.—This part of the act deals principally with the use of water of perennial and intermittent streams.

Sec. 4. Every person is entitled to the exclusive use and enjoyment of all water rising on his own land. A lower riparian owner is entitled to a reasonable share of the water, rising on the land of an upper proprietor, which flows for the greater part of the year beyond his land, and has for a period of at least 30 years been used by the lower owner.

Sec. 5. Water that falls on, or natural surface drainage water that flows on to, any land shall be the sole and undisputed property of the owner of such land, until it leaves such land or joins some stream on such land.

Sec. 6. "Every riparian owner is, subject to all existing rights of other persons and to the provisions of this act, entitled to a reasonable use for purposes of irrigation of the water of a perennial stream with reference to which his property is riparian. Provided that nothing in this section shall affect the right of a riparian owner to the reasonable use of the water of such stream for domestic and drinking purposes."

Sec. 7. "Subject to the existing rights of others, every riparian proprietor is entitled to use the water of an intermittent stream flowing on to or over his property, by diverting it on to his riparian land for the irrigation thereof;" and he shall, moreover, be entitled to impound and store such water for said purpose and for other useful purposes; provided, however, that any lower proprietor may apply to the Water Court for an order declaring the quantity of water which each upper proprietor requires for such purposes, and upon such order it shall be unlawful to impound any greater quantity.[1]

[1] For Water Courts, see Sec. 139.

Sec. 8 is a saving section for those who had acquired rights prior to the act.

Sec. 9. The Water Court is entitled to grant permits for the use of surplus water on non-riparian lands; and no person shall interfere with the use of such water as is authorized by such permit.

Sec. 10. The diversion of surplus water of perennial streams, if all the water can not be utilized within their catchment area, may be diverted across the watershed to other lands; provided that the rights of riparian proprietors are not interfered with.

Sec. 11. The point of diversion, the line of passage, is to be determined by the Water Court, which is also to determine the compensation for rights of way.

Secs. 12-14 provide for the rights of riparian proprietors where streams change their courses, accretions, and the diversions from natural causes.

Sec. 15 provides for surveys and investigations.

§ 137. **River districts and boards.**—By Part III of the Act, "River Districts" and "River Boards" are provided for, and the supervision and distribution of the water of rivers and streams provided for by local elective boards, assisted in technical matters by professional advice, provided at the cost of the Government. These river boards are for the local management and distribution of the waters claimed by riparian owners only, and their organization is something on the order of the irrigation districts of our Western States,[1] and something on the order of the "Irrigation Districts and Boards," relating to rights other than riparian, of Cape of Good Hope, and discussed in the next section.[2]

Sec. 16. "Any three or more riparian owners who, being entitled to the use of the water of any stream or streams, deem it expedient that there should be a combined system of control over such stream or streams, may present a petition to the minister[3] praying that an area containing the stream or streams, together with the properties riparian thereto, may be constituted a river district:" Provided that the persons signing must be owners of not less than one-tenth of such riparian land.

1 For Irrigation Districts, see Chap. 70.

2 See Sec. 138.

3 The minister to whom the Governor has assigned the administration of the Act.

Secs. 17, 18. The minister must cause an inquiry to be made by an engineer, and a report thereon. If such are in favor of the creation of such district, the governor is given the power to proclaim the area to be a river district, and fix its boundaries.

Secs. 19-27. The management of such district is vested in a board, which shall be a body corporate and shall have such name as may be given it by the proclamation; and by that name shall sue and be sued, hold property, and have perpetual succession and a common seal. The basis of voting is fixed upon the ratable area and property valuation. A list of such voters must be prepared and annually revised.

Sec. 28. The powers and duties of the board are prescribed as follows: To execute general supervision over the streams in the district; to assist the minister in giving effect within the district to the provisions of the Act; to investigate and record the quantity or share of water which, at different stages of flow in every stream in the district, every person is entitled to; to supervise the distribution and use of water from the streams in the district in accordance with established rights.

Appeal may be had from any order of the board to the Water Court. Special investigating boards may be appointed to investigate the acts of a common river board. Vested rights must not be interfered with. The governor may nominate an engineer to assist a board. A schedule of the ratable area of each property within the district must be prepared. Rates may be levied for the required expenses, and collected. Each river board is given the power to make regulations not inconsistent with the provisions of the Act; all such regulations must be proclaimed by the Governor.

§ 138. **Irrigation districts and boards.**—Similar in organization and powers to those of river districts and boards, discussed in the preceding section,[1] are the "Irrigation District and Boards," also provided for by Part IV of the Irrigation Act, 1906, only such irrigation districts are not limited to the rights of riparian owners or riparian lands. These organizations are also similar in many respects to the irrigation districts of many of our Western States.[2]

[1] See Sec. 137.

[2] For Irrigation District Laws, see Chap. 70.

These irrigation districts are given the power to raise by way of loans any money that is required by the board for the purposes of the Act. Assessments may be levied ratably and collected for the payment of expenses of construction and maintenance of works.[3]

§ 139. **Water Courts.**—One of the novel features of the Cape of Good Hope Irrigation Act, 1906, is contained in Part V and provides for the creation and jurisdiction of Water Courts.

Secs. 64-66. "The governor may appoint in any area a court, to be called a Water Court, for the purpose of hearing and determining disputes in connection with the use and appropriation of water, and for such other purposes as may be assigned to it by this Act, and such area shall be called a Water Court District; and the governor may prescribe, and from time to time alter or amend, the boundaries of any such district." "A Water Court shall consist of a resident magistrate, having jurisdiction over the whole or some portion of the Water Court District, who shall sit with two assessors selected from a list of Water Court assessors, not less than ten or more than 25 in number, appointed for the district by the governor, after consulting with the Divisional Council of every division any part of which is situated in the district." The qualifications of assessors to be so appointed are then prescribed. "Special Water Courts" are provided for, when any matter in dispute relates to two or more separate Water Court Districts; said court to consist of a resident magistrate and two assessors for each Water Court District, appointed and selected in the same manner as above.

Secs. 67-69. The general powers and duties of a Water Court are prescribed as follows: (a) On the application of any person as to a matter in dispute regarding the use, diversion, or appropriation of water within the district, or as to any matter which by the Act can be brought by such person before such court, to investigate and make order thereon.

(b) On the application of any interested person, to investigate, define, and record the rights to the use of water of any stream, or other source of supply, and to apportion the water for irrigation or other purposes, where such rights have not been defined

[3] See part IV of the Irrigation Act, 1906, Secs. 43-63.

or such apportionment made by a competent court, or by arbitration or agreement or in other legal manner.

(c) At the request of the minister or any superior court to report to such minister or court on the use or waste of water, diverted from any stream, or on any matter arising out of the provisions of this Act.

(d) To grant in accordance with the regulations, permits for the use of the water of any intermittent stream in the district.

(e) On application of an owner of land riparian to a stream to determine and fix in accordance with regulations the place or places, either upon said land or upon any land higher up in the course of the stream, at which such owner shall be deemed to have a right to the use of the water, and to determine, if required, the nature and extent of such use at such place or places, having due regard to the rights of others; and at that place or places the owner shall be entitled to divert and make use of the water as the court has determined, or as he may be entitled to by virtue of his riparian ownership, or any agreement, servitude or order of a competent court. Notice of the application shall be given to every owner of riparian land between that of the applicant and the place or places which it is proposed to fix, and such owners shall be entitled to appear before and be heard by the court upon the application.

(f) On application of any person for the removal of or interference with any dam, weir, or other obstruction in the course of a stream, to investigate the application and make order thereon, including, if the application is granted, the compensation, if any, to be paid to any person affected by the order.

(g) Generally, to do any matter or thing in the Act provided to be done by such court.

(h) On the application of any interested person, made in manner prescribed by regulations, to investigate, decide, and record, in the case of any stream, whose character has not already been defined by a competent court, whether such stream is perennial or intermittent, provided that an appeal, to be prosecuted within three months, shall be from any such decision of a Water Court to a Superior Court at the instance of an interested person.

Save with the consent of all parties in dispute as to water rights, no court other than a Water Court shall have original jurisdiction

in the hearing and settlement of such dispute; and any order of such court shall be binding on the parties unless and until set aside on appeal.

Sec. 70. Any person aggrieved by the order of the Water Court may appeal to the Supreme Court to set it aside or vary it; such appeal must be made within three months. The Supreme Court may make such final order upon appeal as it deems proper. If the time has lapsed within which to take the appeal, or if the Supreme Court dismisses the appeal, the order of the Water Court shall be final and binding upon all parties concerned.

Secs. 72-80. An agreement to accept the decision of a Water Court is final, and will not be subject to appeal or review by any court. The order of the court must be registered. A Water Court may refer any point of law to the Supreme Court, and must thereafter be guided by its decision. If an action with regard to water rights be brought in any Superior Court, such court may refer all or any of the issues to the Water Court, which shall hear the evidence and report to the Superior Court its findings thereon. Contempt of the Water Court may be punished.

Sec. 81. The Governor may proclaim regulations prescribing, defining, and regulating the procedure and practice in water courts, and the duties of their members.

§ 140. **Expropriation of land and acquisition of servitudes.**—Under Part VI of the Irrigation Act, 1906,[1] lands and rights of way may be acquired for the construction of irrigation works.

Secs. 82-85. Land may be expropriated under certain restrictions for a State irrigation work, or within an irrigation district, for the work of an irrigation board. Land may not, however, be expropriated for private irrigation works. It shall not be lawful for any board to interfere with any works, otherwise than with the consent of the owner, until their right to do so has been determined by the water court of the district,[2] and until compensation has been made to all parties for the injury occasioned.

Secs. 86-98. Any person having the right to water or to the use of water, is entitled to claim under the Act the following servitudes temporarily or in perpetuity, namely: (a) Servitude of aque-

1 Secs. 82-97.

2 For Water Courts, see Sec. 139.

duct, consisting of the ordinary rights of way for ditches and canals; (b) servitude of storage, consisting of the right to occupy, by flooding with water the land of another; (c) servitude of abutment, consisting of the right to occupy by dam or weir the bed of a river and the banks adjacent thereto, the property of another.

A claimant to any of these servitudes must give notice, in writing, to the owner of the land; and, if the owner does not within one month agree to the proposals of the claimant, the claimant may apply to the water court for the settlement of the matters in dispute. The water court may grant the application subject to such conditions as it deems equitable, and award compensation to be paid. Specific rules are prescribed as to what and how the damages shall be assessed. A servitude lapses if the work proposed to be executed is not completed and the water utilized within three years from the date of the order or of the period fixed by the water court.

§ 141. **Irrigation loans, subsidies, and grants in aid.**—The State of the Cape of Good Hope provides a loan fund in aid for the construction of the works of irrigation projects.

Part VII of the Irrigation Act, 1906, provides[1] how loans may be granted to irrigation boards or to private owners of land, as follows:

Secs. 99-101. An owner or irrigation board desiring to raise money on loan for the construction of irrigation or drainage works may make application to the Minister, stating the purpose for which the loan is required, the nature of the proposed works, the estimated cost of construction, the position and extent of the land to be irrigated or drained, the extent to which the value of the land will be enhanced by the work, and

(a) If the applicant is an owner, the nature and value of the property offered as security, and the extent to and the amount for which the property has already been hypothecated, or

(b) If the applicant is an irrigation board, the extent to which the rates leviable by the board under the Act have already been hypothecated or charged. Plans and estimates must accompany

[1] Secs. 99-112.

the application. If the applicant is an owner, the security offered for a loan shall be a mortgage on immovable property; and, with the amount for which the property is already hypothecated, it must be less than three-fourths of the latest valuation of the same. The security offered for a loan to an irrigation board shall be the rates leviable by the board under the Act, or such other security as may be approved by the Governor.

Secs. 102-104. Full proceedings are prescribed as to the formalities for obtaining such a loan, and the payment of the money to the applicant from time to time as the work proceeds.

Secs. 105-107. An irrigation loan advanced on the security of property shall be a charge upon that property, with preference over every other charge except a pre-existing mortgage in favor of a person who has not consented to the preference of the loan. A transfer of the hypothecated property must be made before the money is paid. An irrigation loan advanced to a board shall be a charge upon the rates of the board, with preference over all other charges.

Sec. 108. An irrigation loan shall be redeemed by the payment on the first day of January and the first day of July of one-half of the annual payment required to redeem such loan, in accordance with a general scale, the first payment not to be made later than two years from the date on which, in the opinion of the Minister, the works should be completed. Interest from the date of the loan shall accrue at the rate of 3½ per cent per annum.

Secs. 109, 110. In case of a default by an irrigation board, the treasurer may levy and recover rates sufficient to pay all back indebtedness; or, in case of the default by a board or owner, the Minister shall cause such action to be taken at the expense of the board or owner as may be appropriate.

Sec. 111. The Minister may, by notification, fix special rates for the carriage on Government railways of such goods or materials as are to be used for the purposes of irrigation within the colony, as a subsidy or grant in aid of irrigation projects.

"Further, as a practical aid to irrigation, the Government has for some time past assisted farmers by leasing to them the services of Government drills, and by granting a subsidy

for work carried out on farms by private boring contractors for agricultural purposes."[2]

Sec. 112. The Governor may proclaim regulations prescribing and defining the procedure for obtaining such loans, and for giving effect to the provisions of this part of the Act.

§ 142. **General provisions of the Irrigation Act, 1906.**—By the general provisions of the Irrigation Act, 1906,[1] the right of entry upon all lands is given the Minister or other officers; papers prescribed which are receivable in evidence; the enhancement of value of irrigated lands exempted from local rates, and the validity given to all regulations proclaimed by the Governor under the Act.

Sec. 117. The Governor, or a river or irrigation board, with the approval of the Governor, may prescribe a fine not exceeding £10 for the breach of any regulation or by-law.

Secs. 118-120. Offenses are prescribed against the Act, and jurisdiction given to try such cases to the resident magistrate, who may either try the case summarily, or hold a preparatory examination, as the case may require.

Any person summarily convicted of an offense under the Act shall be liable to a fine not exceeding £10, or to imprisonment not exceeding one month, or to both such fine and imprisonment; and, in the case of a second subsequent conviction to a fine not exceeding £25, or to imprisonment not exceeding two months, or to both such fine and imprisonment; and the magistrate may direct that the whole or any portion of the fine shall be paid by way of compensation to the person injured by the commission of the offense, if the person agrees to accept the payment in full satisfaction for the injury.

2 From a letter to the author from Lewis Mansergh, Secretary of Public Works, Cape of Good Hope, South Africa, under date of June 3, 1908.

The conditions for the hire of Government drills are set forth in Notice No. 901 of 1905, and for the payment of subsidy in Notice No. 1084 of 1905.

Information upon various matters relating to water-boring operations with Government drills, as well as by private contractors, will be found upon the following pages of the Annual Reports of the Public Works Department for the years 1903-1906, inclusive, viz: Report 1903, p. 100; 1904 (six months, Jan. to June), p. 64; 1904, p. 47; 1905, p. 53; 1906, p. 56.

1 Secs. 113-121.

Sec. 121. The Governor may, for the purpose of carrying out the provisions of the Act, raise by way of loan, either temporarily or by means of colonial or consolidated stock to be issued by the colony or in England, under the provisions of "the Cape of Good Hope General Loans Act, 1881" as amended, a sum not exceeding £200,000.

§ 143. Lessons to be learned from the colony of Cape of Good Hope.—The lessons to be learned in matters of irrigation from the Cape of Good Hope Colony upon the practical side of the question are few. The country is still new in the practice of irrigation, and, therefore, as is the case in all new countries, the irrigation works are of the smaller order, and in some cases crude. In the matter of laws, we believe that the Colony made a mistake in recognizing the common law of riparian rights, and this will eventually lead to a clash of interests and much litigation, as is always the case where these rights and the right of appropriation are attempted to be maintained side by side. However, it is provided that the Water Courts may prescribe and limit these rights to a certain degree.[1] The creation of Water Courts is something of an innovation in the way of water-right litigation.[2] The giving these courts jurisdiction to adjudicate all water rights, and the somewhat summary method in which the proceedings are conducted will tend to shorten the time which these actions usually take.

The interest the Government takes in providing a loan fund, even to the extent of borrowing if need be, for the purpose of aiding in the construction of irrigation projects, is to be commended. Although this is being done by some of our Western States, the method of the making of these loans and their repayment is worthy of notice. South Africa has made a good start along the lines of irrigation, and her efforts are but to be commended.

1 See, also, Sec. 139.

2 See Sec. 139.

CHAPTER 8.

MODERN IRRIGATION IN ITALY.

§ 144. Peculiarities of the country.
§ 145. The statutes and laws governing waters and their use.
§ 146. Italy as a teacher of scientific irrigation.
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§ 156. Associations of water users.
§ 157. Associations of water users—General Association West of Sesia.
§ 158. General Association West of Sesia—Government.
§ 159. The lessons to be learned from Italy.

§ 144. Peculiarities of the country.—There is one other country whose system of irrigation we will detail at length. Irrigation in Italy, with its densely populated communities, means the prosperity of the Italian Kingdom. The great plains and valleys of the Po, Ticino, Dora Baltea, and Adige Rivers of that country are almost entirely subjected to systematic irrigation, which prodigiously increases their fertility. The extent of irrigated lands in the valley of the Po is estimated at over 5,000,000 acres. Piedmont, Lombardy, and Venetia are networks of irrigation canals, crossing over and under each other, threading their way in all directions, and bringing water to almost every field.[1]

[1] For Ancient Irrigation by the Romans, see Sec. 75.

The country around Milan has been described by Hérisson as follows: "The system of irrigation has nowhere else been carried on to such an extent. As we pass through the Milanese lowlands we can perceive the power of this organization and its effects. Almost every hundred yards we come upon either a canal or a drain. There is not a field but is bathed along at least two sides by clear and running water, brought sometimes from a distance of more than 100 miles. Fertilizing streams intermingle with blocks of cultivated land, which are always beautiful, and even in the dead of winter we may see mowers cutting down splendid crops of grass. This

Geologists inform us that the valley of the Po was originally occupied by an arm of the Adriatic Sea. It is 250 miles long and 30 to 100 miles wide, and is bounded and sheltered on three sides by great mountain ranges,—the Alps on the north and west and the Apennines on the south. Upon the east there is not a hill from Turin to the Adriatic Sea. There is slope enough to make it easy to spread water over the fields and to furnish drainage, except in the eastern part of the valley, especially near the borders of the Adriatic, where the country is so flat as to make the rivers almost seem to run up hill. The sediment washed down from the mountains has been deposited here by the Adige and Po Rivers until their channels have been built up above the surrounding lands. Here levees are necessary to keep the rivers within their bounds, and drains have been dug to carry the water off the adjacent fields. The works required to protect this part of the country from floods and to reclaim the flat lands along the sea coast rank in magnitude and cost with the irrigation canals on the upper portion of the river. More than half of the irrigated land of Italy is found in the provinces of Lombardy and Piedmont. These provinces are among the most densely populated in the world, reaching in some places 800 inhabitants to the square mile.

The main water supply of the valley is the Po. It rises on the north flank of the Mounte Viso Mountains, a spur of the Alps, about 6,000 feet above the sea. For the first twenty miles it is a mountain torrent, but within fifty miles it changes into a broad stream, with a sandy channel, which looks somewhat like the Platte or Arkansas Rivers in the United States. Farther down toward the sea there is another change; the river has scarcely any fall and becomes a broad, sluggish stream, and an important highway of commerce. The rivers which rise in the Alps are largely fed from glaciers. They have their floods when the snows are melting

water which gives to the summer the freshness of the rainy season, can also give to winter the warmth of spring. The mind is overcome with wonder at what the intelligence and energy of the people have accomplished, especially when we consider that Lombardy has always been the battlefield of all Europe and that it has been in the midst of incessant ravages of war and the continual changes of governments that these prodigious works have been constructed."—Rapport sur les Irrigations de la Vallee du Po, Paris, 1881.

and during the autumn rains, April being the month when their supply for irrigation is most likely to be lacking. On several of these rivers floods are a constant menace to irrigation works. This is largely due to the destruction of the forests along their head waters.[2]

Other rivers rise or flow through lakes which serve as regulators, holding back the floods and warming the glacial waters, thus forming an added and valuable feature in the advantages this country presents for irrigated agriculture.

Northern Italy has the same latitude as the northern part of the United States. Milan, Turin, and Venice are farther north than St. Paul and Portland. Along the Adriatic there is little difference between the temperature of summer and winter, but in the western part of the irrigated district there are cold winters and long, hot summers.

The rainfall records have unusual interest because of the light they throw on the value of irrigation in humid regions. Northern Italy is not an arid country. The average rainfall of Milan, which city is in the center of the irrigated district, is greater than that of Cincinnati or Omaha, and it is three times that of Denver and about four times that of Salt Lake City. In other parts of the Po Valley the rainfall varies widely, being greater in some places and less in others. In some places the average annual rainfall reaches ninety inches. Close to the Alps the average is about fifty-five inches. In the middle of the valley the average ranges from thirty to forty inches. South of the Po it falls to twenty-five inches or less. It will be noticed from the above figures that in many parts of the United States crops are raised successfully without irrigation, and that, too, where there is less rainfall.[3]

[2] See The Relation of Forests to Stream Flow, Chap. 2, Secs. 40-62, and especially see Secs. 48-57, upon the influence of forests upon fallen precipitation.

Andamento Annuale e Diurno della Pioggia nel Clima di Milano, per E. Pini, 1891, Ulrico Hoepli, Milan.

[3] For irrigation in Italy, see the following: Irrigation in Northern Italy, by Elwood Mead, Chief of Irrigation Investigations, Bulletin No. 144 for Part I, 1904, and Bulletin No. 190 for Part II, 1907, Office of Experiment Stations, U. S. Dept. of Agriculture; Irrigation and Drainage Laws of Italy, translated by R. P. Teele, Expert Irrigation Institutions, 1907, Bulletin No. 192, same as above; Irrigation and Reclamation of Land for Agricultural Purposes in India, Egypt, Italy, etc., by Prof. George Davidson,

§ 145. The statutes and laws governing waters and their use.—The laws of Italy governing waters and their use are many and varied. There are general laws which apply to the entire kingdom, general laws which apply to any particular province in the kingdom, special laws which apply to any particular system of works, and rules and regulations of corporations and associations, which have also the effect of laws, under their charter.

By the general law of the kingdom of August 10, 1884, concerning the diversion of public waters,[1] the diversion of the public waters of the country, without first acquiring legal title thereto, is prohibited, in the following language: "Art. I. No one shall divert public waters, or establish any mill or other factory thereon, who has not a legal title or has not obtained a concession from the Government, which is subject to the payment of an annual rental and the conditions established by this law." Concessions for the use of water are made by royal decree, proposed by the Minister of Finance, upon the advice of the provincial council interested. And all concessions granted must be upon application to the proper officials, stating the quan-

1875, Executive Document No. 94, U. S. Senate, 44th Congress; Irrigation in Southern Europe, by Lieut. Scott Moncrieff, 1868, E. and F. N. Spon, London and New York; Italian Irrigation, by Capt. R. Baird Smith, 1855, Wm. Blackwood & Sons, London; Irrigazione del Piedmonte, Canali demaniali d'irrigazione nelle Provincie di Torino, Novara, Pavia ed Alessandria, Seconda Edizione, Roma, 1902, Ministero di Agricoltura, Industria e Commercio, Direzione Generale dell' Agricoltura, Carta Idrografica D'Italia; Irrigazione nella Provincia di Novara, Roma, 1893, *ibid.*; Irrigazione in Provincia di Mantova, alla sinistra del Mincio e del Po, Roma, 1897, *ibid.*; Cenni sulle Bonificazioni nelle Provincie Venete ed in quella di Mantova, con the carte annesse, Roma, 1892, *ibid.*

See, also, the annual official bulletins issued by the Minister of Agriculture, Industries and Commerce, especially Vol. III, Rome, 1905; Manuale dell' utente delle acque d'irragazione, ossia formole pratiche maggiormente in uso per calcolare la portata delle bocche di derivazione piu comuni e relative tavole, per Giovanni Pastore, 1894—Mortara: Botto; Trattato di Idraulica Pratica, per I. Nazzani, 1886—Milan: Ulrico Hoepli; Manuale dell' Ingegnere Civile e Industriale, per G. Colombo, 1902—Milan: Ulrico Hoepli.

[1] For the translation of this Act, see Irrigation and Drainage Laws of Italy, translated by R. P. Teele, Expert in Irrigation Institutions, 1907, Bulletin No. 192, Office of Experiment Stations, U. S. Dept. of Agriculture, pp. 9-13.

See, also, the laws and authorities cited in the following sections of this chapter.

tity of water, manner and condition of diversion, and other particulars relative to its use; and, where the diversion is for power, full particulars must also be stated relative to such use.[2] There are also general laws for the organization of associations for irrigation, which apply to all portions of the kingdom.[3] The irrigation district laws and the regulations for the organization of Water Users' Associations under the National Reclamation Act, in the United States, are modeled somewhat upon these Italian laws and regulations.[4]

There are also in Italy laws, general in their application, for the reclamation of swamp and wet lands, and for the drainage of irrigated lands.[5]

Besides the general laws, which are applicable to the entire kingdom, there are many laws which are only applicable to particular provinces, particular corporations, or associations.[6]

§ 146. **Italy as a teacher of scientific irrigation.**—Italy has some of the greatest students of scientific irrigation in the world; and the practice of irrigation in that country has become more in

2 For the regulations for the execution of the law of August 10, 1884, *supra*, see same bulletin cited, pp. 13-34.

3 Leggi Decreti e Regolamento sull' Ordinamento die Consorzi d' Irrigazione, 28 Febbraio 1886.

For a translation of the above and the regulations relative to the same, see bulletin cited above, pp. 35-44.

4 For the irrigation district laws, see Chap. 70.

For the National Reclamation Act, see Chap. 65.

For Water Users' Associations, see Chap. 65.

5 See Ministero dei Lavori Pubblici. Testo Unico della legge sulle bonificazione delle paludi e dei terreni paludosi, approvato con R. D. 22 Marzo 1900, Num. 195; *Id.* Regolamento per la esecuzione del testo unico della legge sulle bonificazioni delle paludi e dei terreni paludosi, 22 Marzo 1900, Num. 195, approvato con R. D. 21 Ottobre 1900, Num. 409. For the translation of the above laws and regulations, by Mr. Teele, see the bulletin above referred to, pp. 45-100.

See, also, Leggi sulle di bonificazione di laghi, stagni, paludi e terreni paludosi, 25 Giugno 1882 e 4 Luglio 1886, Num. 869 e 3962, Serie 3; Decreto e regolamento per l'esecuzione delle leggi 25 Giugno 1882 e 4 Luglio 1886 sulla bonificazione delle paludi e dei terreni paludosi, 7 Settembre 1887, Num. 4963; Decreto e regolamento per le bonificazione delle paludi e dei terreni paludosi, 21 Ottobre 1900, Num. 409; Legge che porta modificazione ed aggiunte alle vigenti leggi vigenti leggi sulle bonificazione delle paludi e dei terreni paludosi, 18 Giugno 1889, Num. 236.

6 For Associations of Water Users, see Secs. 156-158.

the nature of an exact science than in any other country. On account of this, during the past fifty years, Italy has become a sort of school of irrigation for the rest of the world. The United States,[1] France, and the British Governments of Egypt, India, and Australia, as well as a number of other countries, have sent their ablest engineers and economists to study the Italian system, which for many years has made Northern Italy one of the greatest agricultural countries of Europe.[2]

The Cipolletti weir was invented by Caesare Cipolletti, who was for a time the chief engineer of the Villoresi Canal of Lombardy, Italy. This weir is today one in the most common use for the accurate measurement of flowing water, in the arid portions of the United States.[3]

Not only is Italy foremost upon the practical side of the question of irrigation, but it also leads in its laws and regulations governing, and the administration of, these works. And, in this respect, Italy is more like the United States; or rather, the United States is more like Italy, than are the countries controlled by the English, discussed in the previous chapters, where all of the water is claimed by the Government and is leased out to the consumers by the year, or for a term of years.[4] There are laws regulating the diversion and use of the water by individuals and by corporations similar to those in this country,[5] and by associations of consumers, similar in many respects to our irrigation districts.[6] There are also laws regulating the works constructed

1 See Irrigation in Northern Italy, Parts I and II, by Elwood Mead, Chief of Irrigation Investigations, U. S. Dept. of Agriculture, Bulletins No. 144 and No. 190, Office of Experiment Stations.

Irrigation and Reclamation of Land for Agricultural Purposes in India, Egypt, Italy, etc., by Prof. George Davidson, 1875, Executive Document No. 94, U. S. Senate, 44th Congress.

2 See Italian Irrigation, by Capt R. Baird Smith, 1855; also Irrigation in Madras, India, 1856, by the same author, Wm. Blackwood & Sons, London; Irrigation in Southern Europe, by Lieut. Scott Moncrieff, 1868, E. and F. N. Spon, London and New York.

For further works upon the subject of modern irrigation in Italy, see Secs. 144, 145.

See, also, the authorities cited in the subsequent sections of this chapter.

3 For the Measurement of Water, see Secs. 888-898.

4 For Modern Irrigation in Egypt, India, Australia, and South Africa, see Chaps. 4-7.

5 For Corporations, see Chaps. 72 *et seq.*

6 For Irrigation District Laws, see Chap. 70.

See, also, Part 14, the sections re-

entirely at Government expense, similar in many respects to those constructed under our National Reclamation Act;[7] and also laws and regulations governing the use of the consumers under these works so constructed by the Government.

In the following sections we will discuss some of these systems, and the laws which govern them.

§ 147. **Lombardy—Naviglio Grande Canal.**—In the province of Lombardy, there are three distinct types of irrigation, with respect to their ownership and operation and the laws and regulations governing the same. As, for example, the Noviglio Grande is a canal owned by the Government, and used for irrigation, navigation, and power; the Villoresi Canal is owned by a corporation, similar to the modern irrigation corporations of the United States, and furnishes water for irrigation and power at annual rentals,[1] while the Vettabbia Canal is owned and operated by an association of farmers, similar to the mutual associations, which own and operate so many irrigation works throughout the western portion of the United States.[2] A description here of the peculiarities of these canals and their management and control will be sufficient as far as Lombardy is concerned. According to the official bulletin issued by the Minister of Agriculture, Industries, and Commerce, for the year 1905, there was then under irrigation in the province of Lombardy 680,000 ettari of land.

The Naviglio Grande is the largest and oldest of the three Government canals entering the city of Milan; it is the waterway to the west and unites the city with the Ticino River and the quarries, factories, and vineyards around Lake Maggiore. It was begun in 1177, and for more than seven hundred years it has been used both for navigation and irrigation. It is supposed to have been begun by the monks, because only the nobles and religious orders had at that time the means required for carrying out such enterprises. The most important structures connected with the canal are the dam and retaining walls at the head. This dam is 918.5 feet in length, and from 31 to 58 feet in breadth, and ex-

lating to this subject under the respective States.

7 For the National Reclamation Act, see Chap. 65.

1 For the Villoresi Canal, see Secs. 148, 149.

2 For the Vettabbia Canal, see Sec. 150.

tends diagonally up the stream, but does not reach entirely across, about 215 feet of the channel of the river on the opposite side from the canal being left open. The discharge of the Ticino varies widely in different years, having reached as high as 176,000 cubic feet per second. The stability of this dam is shown by the fact that it has stood for two hundred years, in spite of the fact that at times there have been tremendous floods. The canal has no headgates, on account of its use for navigation, and this has made the regulation of the supply during floods a serious problem to those who operate the canal. To accomplish this a large number of waste ways, having in all 185 openings, have been constructed within the first five miles of the canal. The first five miles of the canal have been reconstructed to utilize the heavy fall in this distance for power purposes. By the construction of the new canal for this distance the gain in the grade gives a drop of twenty-seven feet, which will furnish 6,000 effective horse-power. These improvements were made by a company to which the Government granted a franchise, for this purpose only, to run for sixty years at a yearly rental of $3,600. The cost of the work was $720,000. Navigation on the canal is free to the public.

There are over 100 ancient rights to the use of the water in the canal, which entitle the owners to the free delivery of the water covered by such rights, the Government getting nothing for the water or for the expenses in the maintenance of the works, or for the expenses in distributing the water.[3] All of the ancient vested rights are protected by the Government to the same extent that vested rights are protected in this country, by the law and the courts. There are also some of the older water rights, for which a charge is made for annual maintenance and delivery of the water. But this charge is much lower than that which is made under recent agreements. No perpetual rights are now being sold by the Government, the usual limit for concessions being thirty years. What water the Government is able to dispose of without restrictions is delivered to the farmers for $180 per cubic foot per second for the entire year, or for $140 for the same volume for the summer irrigation.[4]

[3] See, also, for ancient rights, Secs. 150-155.

[4] See Irrigation in Northern Italy, by Elwood Mead, Chief of Irrigation

There are few places in the world, perhaps, where the growing influence of water for industrial uses is more apparent than in the valley of the Ticino, and that, too, in one of the oldest countries in the world. This is true especially along the upper half of the Naviglio Grande, and certain it is, that there are few places in the world where the industrial changes which are increasing the struggle for extended and intensive use of the water are more evident.

§ 148. **Lombardy—The Villoresi Canal.**—The Villoresi Canal is of special interest to American irrigators, because it belongs to the same type of canals as the largest irrigation works of the United States, with the exception of those that have been constructed by the Government under the National Irrigation Act. Its operation strongly resembles that of such canals as the Amity, High Line, and Del Norte, in the State of Colorado, the Wyoming Development Canal Company in Wyoming, the Bear River Canal in Utah, the Sunnyside Canal in Washington, and the Imperial Canal in California. This canal and those named in the United States are all owned and operated by private corporations. The arrangements for delivering the water have been worked out with more system than is shown in many similar enterprises in the United States. The idea of a high line canal was started in the fourteenth century, and after many attempts and failures, in 1850 an engineer by the name of Villoresi evolved plans for the canal, but owing to a conflict of water rights and the failure to secure sufficient subscriptions to the capital stock to enable Villoresi to begin the construction, he died in 1880 without seeing the work begun. Following Villoresi's death the city of Milan offered to undertake the work as a municipal enterprise if the farmers would agree to purchase 353 cubic feet of water per second. This they would not do, and the city abandoned the enterprise. The reasons for this failure were that the farmers were required to sign in advance perpetual contracts to take

Investigations, 1904, Bulletin No. 144, Office of Experiment Stations, U. S. Dept. of Agriculture, pp. 25-32.

See, also, Bollettino Ufficiale del Ministero d'Agricoltura, Industria e Commercio, p. 137; Carta Idrografica d'Italia, Relazioni, Lombardia—Roma: G. Bertero, 1896; Relazione Settima, Fiumi, Canali e Laghi Navigabili di Lombardia, Ministero dei Lavori Pubblici, 1903, Roma.

water, which would have been equivalent to placing perpetual mortgages upon their farms. In the United States the same proposition has been met with in many enterprises. Farmers feel that there is hazard enough in signing such contracts after the canals are built, much less in advance of their construction. And the second cause of the failure was, that the holders of the prior rights to the water in the Ticino River feared the new canal would lessen their supply, or subject them to anxiety and expense in preventing the same. The same objections are frequently made to proposed enterprises in the United States, and even have to be met with by the Government in the construction of works under the National Irrigation Act. Before the Government would issue a concession to the corporation to build the new canal, arrangements had to be made to relieve the fears of the owners of the prior rights. This was done by building head works in such a way that they would let flow down the stream the entire amount belonging to the holders of prior rights below before any water could be taken into the Villoresi Canal. They also undertook to see that this agreement was carried out. And after a third of a century of fruitless effort to build the canal a corporation known as the Italien Society for Aqueducts offered to build the canal without any advance contracts from the farmers, if the city of Milan would give a bonus of $400,000, payable in ten annual installments. This the city did, and thus one of the monumental irrigation works of the world was begun. No irrigation works in America equal it in the strength and perfection of its engineering features. From the dam at the head to the smallest measuring box on the laterals the work has been planned and carried out with a perfection and careful consideration of the service it is to render. Without going into a detailed description of the engineering features of this enterprise, we will only say that the dam is 950 feet long, 78 feet wide, and 12 feet high, and is built of concrete faced with cut granite masonry, and is protected at the foot by a masonry platform, which extends downstream 50 feet. Both ends of the dam are protected by masonry wing-walls, which were necessary to protect it from the enormous floods. A navigation canal, with suitable locks was constructed; also, a weir had to be so constructed

that it would guarantee the automatic delivery of the water belonging to the holders of prior rights below.

§ 149. **Lombardy—Management of Villoresi Canal.**—The management of the Villoresi Canal is of more interest to the American irrigator than its construction. The territory served by the canal is divided into four main districts, each of which is supplied with one or more branches. The farmers who live under the branch canals are united into two classes of associations, one of which is a subdivision of the other. The larger society is called the "comprensorio," and embraces the whole of a secondary canal, or all of one of its more important branches. The smaller society is called a "comizio," and is composed of those farmers that take directly from field laterals, each lateral having its separate society. These laterals, together, have representatives in the larger society. The Italian Society for Aqueducts, the owner of the canal, does not, as a rule, retail water to the individual farmer. It sells it at wholesale to the comprensori, and these societies retail it to the comizi, and the members of each comizio arrange for the division of the quantity of water that they so purchase among themselves. The power given by the Government to the owning corporation makes these contracts between it and the various associations of comprensori practically the law upon the subject. The contracts are for a term of six years. These long-term contracts are one of the interesting features of water-right agreements in Italy.[1] These associations of comprensori are very similar to the Water Users' Associations under the operations of the National Reclamation Act of the United States.[2]

1 For a more complete description of the Villoresi Canal, see Irrigation in Northern Italy, Part I, by Elwood Mead, 1904, Bulletin No. 144, Office Experiment Stations, U.S. Dept. of Agriculture, pp. 32-58; Societa Italiana per Condotte d' Acqua—Brevi Cenni sul Canale Villoresi—Roma: Ereda Botta, 1885, p. 18; Canale Villoresi, e Fiume Ticino—Tabella delle Portate del—Milan: Capriolo e Massimino, 1902; *Comprensorio di Corbetta*—Testo unico del regolamento del, Edizione del 1900, Corbetta: L. Radaelli, 1900; *Id.* Memoria pella liquidazione dell' acquisto di servitu di passaggio d' acqua in base ai patti ed alle condizioni del regolamento del comprensorio; *Id.* Convenzione fra il, e la Societa Italiana per condotte d' acqua relativa ai cavi emuntori e fugatore; *Id.* Convenzione per affitto d' acqua del Canale Villoresi pel sei enno 1898-1903.

2 For Water Users' Associations, see Chap. 65.

In selling water to these associations the canal company does not always charge the same price. Like a railway company, it

The important features of this contract with the Corbetta comprensorio, translated, is as follows:

(3) After stating where the water acquired by the users will be measured, the section proceeds: The water will be measured and delivered according to the quantities and schedules communicated by the officers of the association to the Italian Society (the owner). The distribution of water at the measuring boxes of the districts along the Corbetta Canal shall be made by the association at its own expense, as well as the distribution in the canals in the association below the modules. The Italian Society will, however, clean, maintain, and repair the secondary canal and all the modules for measuring water to the same secondary canal and to the districts.

(4) The above mentioned water will be distributed to the districts of the association of Corbetta by the officers of the association and will be distributed if possible in rotation running through seven days and in a quantity of 200 to 320 water liters (7 to 11 cubic feet per second), according to the judgment of the supervising committee of the association, taking into consideration the kind of land to be watered, the distance from the measuring box, and the kind of distributing ditches and laterals. Each subscriber will have the right to use a stream for fourteen minutes for every perdica of meadow and four minutes for every perdica of other crops.

(5) The water for the lands not members of the association will be at the disposal of the Italian Society, or its representatives, and will have the following water hour for each period: To each of the districts 1, 2, 3, and 4, five hours; to each of the districts 5, 6, 7, 8, and 9, seven hours, and for each of the districts 10, 11, 12, 13, 15, and 21, nine hours. The society has the right to change a part of the water from one district to another, but not in such manner as to give more than twelve hours to non-members in any district. That part of the period of rotation which has not been assigned to those who are not members of the association will be for the free disposal of the association. The parochial prebenda and the ecclesiastical beneficiaries that have made special arrangements with the Italian Society in order to have the same rights as members (of the association) are considered in this case as being members. If any parties who are not yet in the list of members desire to enter that list before the month of June, 1903, with the purpose of receiving the water under the conditions of this agreement, the officers of the association shall have the right to give them water so long as this agreement continues. The money paid by these parties for water will be divided equally between the society and the subscribers to this agreement. In this case the society renounces a part of the hours it has the right to have under Article 3 in the districts belonging to the parties that have become parties to this agreement.

(6) During the six years (as provided for in Sec. 1) the undersigned consumers must use the water purchased only on the lands belonging to themselves, as located on the maps of the association, or for lands represented by the undersigned consumers in this agreement, and located on the maps of the association. (An official

charges for the distance the water is carried. The expense for delivering water at the lower end of the canal is greater than

map is made of the irrigated territory included in each association and the districts in this territory numbered. The numbers above given in paragraph 5 refer to the districts as numbered on this official map. The land of non-members is interspersed with that of members and is watered from the same laterals, but under separate agreements.) *In case of violation of this rule the society has the right and the association has both the right and duty of cutting off the water of the consumers who violate the rules. For this stoppage of water the consumer has no right to ask for damage; on the contrary, the rights of the society are unimpaired and the consumer is obliged to pay the price fixed in paragraph 5.*

(7) For the water put at the disposal of the undersigned consumers these consumers obligate themselves to pay to the Italian Society in Milan, in two installments, one on the 15th of June and the other on the 15th of July of each year during the present agreement, 45,000 lire, divided among the subscribers according to the schedule in paragraph 14. In said sum of 45,000 lire, and in the sums to be paid by every subscriber, is included the annual rental for partnership water and the annual payments for the sinking fund to the Italian Society for Aqueducts. The receipts of the society (Villoresi Canal Company) to its customers shall show that they have paid the annual sinking fund. If a customer has not paid within fifteen days after the time fixed, the society has the right and the association has the right and duty of cutting off the use of water to that customer under the conditions stated in paragraph 5. In any event, this customer has to pay the society interest at the rate of 5 per cent per annum for the amounts that he did not pay at the proper time, for the period from the date when due to the date of payment, deducting fifteen days' grace granted as above.

(8) It is agreed that each consumer shall obligate himself individually and his successors to the Italian Society for the amount that he is to pay, according to paragraph 15.

(9) All the subscribers to the present agreement obligate themselves to take water for all the land shown on the map of the association, both meadow and cultivated land. In the 14th, 15th, and 21st districts the lands which the members of the association will not water from the Villoresi Canal during the six years of this agreement shall not be considered if the supervising committee to the Corbetta Association will admit that they are provided with their own water supply. One or more members will be permitted to represent the water belonging to the members not signing the agreement, assuming all the rights and duties toward the Italian Society. Payments for water shall be based upon one perdica of the land shown by the map of the association, and at uniform rates for the different kinds of land in the different zones of the association. For the list of the sums to be paid by each subscriber see Article 14. In these sums are to be included what is to be paid by the subscribers for partnership water. The payments to the sinking fund of 5 lire for one liter are to be added to the sum which each subscriber is to pay to the society. For no reason can a subscriber

at the upper end. There is greater loss from seepage and evaporation, hence the associations at the lower end are charged a higher price.

The cubic meter per second (35.31 cubic feet per second) is

pay less than the price of the water for which he originally subscribed. In case the amount raised by the above specified uniform rates and the sums for the sinking fund do not reach a total of 45,000 lire, the subscribers obligate themselves, if it is necessary in order to reach that sum, to increase the amount they have to pay 5 per cent, excluding their payments to the sinking fund.

(10) If any members, directly or through their tenants, have already assumed obligations for water from the association, or for the rental of water advantageous to the Italian Society, it is agreed that if said members, or their tenants, do not accept the present agreement, those who sign will consent that the association place at the disposal of the members not consenting, or their tenants, the water for which they have contracted, and the Italian Society for Aqueducts will include in the 45,000 lire agreed upon the payments to be made by these members, and will be responsible for their collection.

(11) If for any reason the water supply is partially or entirely deficient the Italian Society shall refund to the undersigned customers a part of the sums paid in, proportional to the deficiency and its duration; but no account shall be taken of a deficiency in the water supply during the spring time prior to April 15. Equal reimbursements shall be made to subscribers in districts in which irrigation is forbidden by order of the public authorities. No money shall be refunded by the said Italian Society under the last named condition, provided the suspension or prohibition takes effect after August 15.

Reimbursements shall be made at the office of the Italian Society in Milan on the 30th of September of each year in which there is a deficiency in the water supply or in which irrigation is prohibited; but it is stipulated that such deficiency or prohibition shall not in any way remove the obligation of paying to the Italian Society the sums fixed and at the times specified, as provided in Article 6.

(12) If the association finds it necessary because of heavy rains or other reasons to reduce the amount of water supplied, the Italian Society for Aqueducts guarantees to arrange for the required reduction within a period of 48 hours.

(13) This agreement must be subscribed to on or before February 10, 1898. If at that date the amount subscribed has not reached the sum of 45,000 lire, including the assessment of 5 per cent provided for in Article 9 (last clauses), this agreement shall be void and without effect.

(14) Provides for the reduction of 9,089.50 lire for partnership water already purchased by the subscribers to the agreement, in accordance with previous agreements, leaving a balance on which the tax is to be levied annually for six years of the sum of 35,910.00 lire, or a total for the six years of 215,463 lire ($43,092.60).

(15) Contains a long list of the subscribers to the agreement and the amount for which each is responsible.

the unit of volume usually employed in the wholesale transactions to the comprensori; in retail transactions the liter per second (0.035 cubic foot per second) is the unit employed. Among the members of the comizio no attempt is made to measure the water. They make their division on a time basis, each one taking the full amount purchased for the number of hours per week, which represents his part of the payment. Thus, if a certain amount of water per second is delivered at the head of a lateral, the farmer who pays for one-fourteenth of it would be allowed the whole amount for twelve hours each week. The canal company does not allow farmers to sell water to one another. The right of use can not be shifted from the land described in the contracts without the consent of the canal company. A farmer is not allowed to irrigate one of his fields with water he has purchased for the irrigation for another.

Irrigators under the Villoresi Canal can obtain water in one of three ways:

(1) Water is furnished at 30 lire per liter per second ($166 per cubic foot per second) as an annual rental, with 5 lire ($1) additional annual payment on the purchase price of a perpetual water right in the canal. These annual payments of 5 lire are to continue for forty years, making the cost of a perpetual right to one liter per second $40.

(2) Water is furnished at 30 to 40 lire for one hour's run each week of 200 liters per second ($5.80 to $7.75 for one hour each week of seven cubic feet per second).

(3) The canal company sells to farmers' associations at wholesale under special agreements, a copy of one of which agreements is set forth in the foot note.

The canal company each year publishes large posters, giving the terms under which it will furnish water to individuals or associations who may desire the water for one season only. The contract price upon a six years' contract usually varies in occordance with the amount furnished, being less for the larger amount.

§ 150. Lombardy—Vettabbia Canal—Use of sewage water.—There is another canal in Lombardy, which, on account of the various propositions it involves, is worthy of the closest study

by the American irrigator. This is called the Vettabbia Canal, and is owned and operated by an association of farmers, composed of fifty voting members; some of them represent smaller associations formed by irrigators along laterals, this being the prevailing practice under Italian irrigation works. The members of the main society pay each year a certain amount for expenses, and each member of the association is entitled to a certain definite amount of water. Whatever amount can be saved above this is sold to other irrigators.

If history and tradition are to be believed, the Vettabbia Canal is the oldest irrigation work in Lombardy, and it irrigates fields where marcite—the most profitable crop in Italy—was first grown.[1] This canal was originally a natural stream formed by the confluence of three small creeks, which come together in what is now the city of Milan. Later on, when Milan grew into a fortified town, surrounded by a wall and a moat, these creeks emptied into the moat, for which the Vettabbia River served as a waste way and drain. A few miles below the city the Cistercian monks had founded the monastery of Chiarvalle and brought under cultivation a large tract of land. The creek which flowed past it served as a sewer for the city and the water had an additional value as a fertilizer, and small ditches were built about seven hundred and fifty years ago to bring the water upon the lands of the monastery. As time went on other religious communities scattered along the Vettabbia had become aware of the value of its water for irrigation, and in the years 1236-1311 received grants to the rights to its use. In 1267 the health of the city was impaired because the crooked, shallow channel of the Vettabbia furnished an imperfect drain for its sewers, and agree-

1 Marcite, a mixture of clover and Italian rye grass. The method of irrigation is to have the water flow almost continuously in winter and either continuously or at short intervals in summer. The grass is cut when about 18 inches high, and on some farms 10 to 12 cuttings are made each year, of from 10 to 15 tons per acre. It sells at about $2.00 per ton.

For a more complete description of the Vettabbia Canal, see Irrigation in Northern Italy, Part I, by Elwood Mead, 1904, Bulletin No. 144, Office of Experiment Stations, U. S. Dept. of Agriculture, pp. 58-67.

See, also, the authorities cited upon irrigation in Lombardy, in the last two sections, Nos. 148, 149; La Vettabbia; a history of the Vettabbia Canal.

ments were made with the various monasteries to give them the right to the sewage water if the monasteries would improve the channel so as to carry it away from the city. This was accomplished, and the sewage mixed with the water of the various streams has been put to use for irrigation, this being the earliest example known of the purification of sewage water by using it for irrigation.[2] By subsequent changes, the water rights in this canal passed out of the hands of the church authorities and into the possession of the association of land owners above described.

2 See Sewage Water for Irrigation, Sec. 1131.

The sewage of a part of Milan has been discharged into the Vettabbia and used on the lands under that canal for centuries. At the present time the sewage from part of the city having 150,000 inhabitants is at present used upon an area of 6788 acres, more than 5000 acres of which are marcite meadows. These meadows, unlike the sewage farms of other European cities, are not cultivated, and it was thought by many that their use as a means of sewage purification was detrimental to the health of the region and might prove injurious to agriculture. In 1900 the city of Milan appointed a commission to inquire into the whole matter of sewage disposal. A sub-commission was charged with the investigation of the hygienic and agricultural effect of the use of sewage in the irrigation of marcite. The work of this commission included analyses of the water before it was applied to the land, and as it flowed from the meadows; analyses of the water from springs and wells; analyses of the soil on which the water had been used; and inquiries into the records of disease and mortality, and of crop returns.

The soil on which the sewage is used is disintegrated rock resting on a bed of sand and gravel, and is therefore favorable to filtration of water. Marcite meadows have the advantage of using water throughout the year, but the disadvantage of not being plowed so as to bring the sewage water in contact with fresh soil. It was found that a part of the filtration took place in the soil and a part through the grass. In marcite irrigation the water is used upon several squares in succession, that draining from the first square being collected in drains and applied to the second square, and again collected and applied to the other lands. It was found that muddy water applied to the first square came off nearly clear, and after flowing over two or three squares was perfectly clear, free from odor, and without any of the impurities contained in the sewage water. From the standpoint of the purification of the water its use in marcite irrigation is entirely successful.

It was found that there were bare spots in the meadows on which a coating of algae had formed, preventing the growth of the grass, and that paper and other refuse collected in places sufficiently to cause some inconvenience, but the commission was of the opinion that both of these could be prevented by care in cleaning the canals and in the use of water. Analyses showed that in places where the soil contained no lime there was a

Under the new drainage system which was planned for the city in 1889, the Vettabbia Association enlarged the canals to carry away the increased drainage of the city, and receives in consideration for these expenditures, which amounted to about $400,000, a right to the municipal sewage and drainage water from 5,187 acres of land. The municipality pays all the expenses within the city limits, and the canal association all the expenses outside. This seems to be a satisfactory arrangement all around—the city of Milan feels that it is satisfactory to get rid of the sewage without expense, and the canal company is making fortunes in using it in connection with the other water it owns for irrigation.

The disposition of sewage from our large cities so as not to be a constant menace to health, has always been one of the great questions that have confronted the American people. The question of how to dispose of it, and at the same time to utilize it at a profit, has barely been touched upon. This old Italian city, located as it is in the midst of what we would call an overpopulated country, seems to have solved both of these questions to the satisfaction of the population at large and to science.

§ 151. Irrigation in Piedmont.—In Piedmont there are two classes of streams: Those which rise in the foothills and are fed

tendency for organic matter to accumulate to a harmful degree. This condition can be corrected by the application of lime, and the commission recommends that course.

Analyses of water from wells and springs showed that there was no contamination from sewage water, and careful inquiry and examination of records showed that the sanitary conditions under the Vettabbia were not different from those in other sections.

The general conclusions of the commission were that the water is thoroughly purified; that there is no danger to health; that from an agricultural standpoint there was some trouble, but it was of little importance and can be overcome with proper care. It is recommended that in order to maintain these conditions that there should be one acre of land to every 36 inhabitants, and in no case less than one acre to 60 inhabitants, and that provision should be made for diluting the sewage water to such an extent that the nitrate contents shall not exceed 120 milligrams per gallon. If these conditions are observed there will be no danger in the use of sewage water. Irrigation in Northern Italy, by Elwood Mead, 1904, Part I, p. 66, U. S. Dept. of Agriculture, Experiment Stations, Bulletin No. 144.

See, also, La depurazione Agricola delle Acque di Fognatura di Milano, per A. Celli e A. Menozzi, 1902, Modena Societa Tipografica.

by the rains and snows, and those which extend back into the high mountains and are fed largely by glaciers. The waters of the first class are warm, and, as a rule, carry considerable fertilizing material. On the other hand, the streams fed by the glaciers are too cold to be used in the spring. Cakes of ice sometimes travel the entire length of the canals diverting the Dora Baltea. As formerly used, neither class of these rivers exactly met the requirements of the irrigators depending upon them. Farmers along the glacial rivers were often short of water in the spring, or were compelled to irrigate when the water was so cold that the growth of the crops was checked. The farmers along the foothill streams, on the other hand, had more warm water in the spring than they could make use of and suffered from droughts in midsummer. It was realized that if the water of the foothill and glacial streams could be mixed so that the irrigators could be served by the foothill streams in winter and spring, and by the glacial rivers in summer, it would add immensely to the profits of agriculture. It was found that this could be done by building a regulating canal along the foothills, intercepting the different rivers flowing down from the mountains into it in such a way as to use them for feeders for the canal, or to turn the water into them, as conditions might require. The project of building such a regulating canal was first publicly advocated in 1633. The canal that was finally built follows the surveys of the distinguished Italian engineer, Carlo Noe, and the credit for carrying out the project is largely due to the enterprise and persistence of Count Cavour, for whom the canal was named.[1]

1 For irrigation in Piedmont, see Irrigation in Northern Italy, Part I, by Elwood Mead, 1904, Bulletin No. 144, Office Experiment Stations, U. S. Dept. of Agriculture, pp. 68-100; *Bollettino Ufficiale del Ministro d'Agricoltura*, Industria e Commercio, Roma, 1905, p. 136; *Id.* Carta Idrografica d'Italia, Relazione, Piedmonte, Roma, 1895, G. Bertero; *Id.* Carta Idrografica, d'Italia, Irrigazione del Piedmonte, Canali demaniali d'Irrigazione nelle Province di Torino, Novara, Pavia ed Alessandria, 2d Ed., 1902; *Id.* Carta Idrografica d'Italia, Irrigazione nella Provinca di Novara, Roma, 1893; Leggi e Decreti sul Riscatto dei Canali Cavour, 16 Giugno 6, 9, e 11 Luglio, 1874, Nri. 2002, 2004, 2018 e 2020, Serie 2, Turin: Gazzetta del Popolo, 1874; Leggi complementari sul Canale Cavour sul Cavo Gazelli presso Chivasso sul Canale di Cigliano e sul Canale Quintino Sella, 23 Luglio 1881, 7 Marzo 1886, 6 Febbraio 1887, 2 Giugno 1887 e Agosto 1893,

According to the official bulletin of the Minister of Agriculture, Industry, and Commerce, there were under irrigation in Piedmont in the year 1905, under all canals, 542,200 acres.[2] And the total length of the main canals owned by the Government was something over 1,000 miles.

§ 152. Piedmont—Cavour Canal—History.—The system of irrigation works of which the Cavour Canal is the basis, has its office in Turin, the capital of Piedmont. It will aid in understanding the system to give something of the history of its evolution; this will also serve as a practical illustration to the irrigators of America as to how enormous conflicting interests can be brought under one system of Government and control, which can only result in good to the country at large where that system is operated, as well as to the individuals directly interested.

Water rights and the ownership of canals in eastern Piedmont have always been closely interwoven with the political and financial fortunes of the country's rulers. As early as the twelfth century a number of the canals, which now form the system of the Cavour, were constructed by the various houses of the nobility, and religious orders. By inheritance, sale, gift, and war, these various canals were held in private ownership until the middle

Nri. 329, 3714, 4313, 4530, Serie 3 e 446; Turin: Gazzetta del Popolo, 1894; Decreto e Regolamento per l'amministrazione Economica der Canale Cavour e degli altri Canali che vi sono annessi, 27 Aprile 1890, Nri. 6861, Serie 3; Turin: Gazzetta del Populo, 1890; Legge riguardante i Consorzi per l'Irrigazione in data 25 Maggio 1873, Nri. 1387, Serie 2; Turin: Gazzetta del Popolo, 1887; Leggi, Decreti e Regolamento sul l'Ordiamento dei Consorzi d'Irrigazione, 28 Febbraio 1886, Nri. 3731, 3732 e 3733, Serie 3, Turin: Gazzetta del Popolo, 1887; Regio Decreto che modifica l'articolo 18 del regolamento 28 Febbraio 1886, Nri. 3733 serie 3a, per l'esecuzione delle leggi sui d'Irrigazione, 30 Gennaio 1890; Legge portande disposizione complementari alla legge 28 Febbraio 1886, Nri. 3732 serie 3a, sui consorzi di irrigazione e di derivazione di acque per uso industriale, 11 Maggio 1890; Legge che fissa le norme e le disposizioni secundo le quali debbono essere ordinatti i consorzi di derivazione e di uso delle a scopo industriale sia volontari che obbligatori, 2 Febbraio 1888, Nri. 5192, Serie 3a, Turin: Gazzetta del Popolo, 1888; Decreto e regolamento per l'esecuzione della legge 2 Febbraio 1886, Nri. 5192, concernemente i consorzi di derivazione e di uso delle acque a scopo industriale, 24 Giugno 1888, Nri. 5497, Serie 3a, Turin: Gazzetta del Popolo, 1888.

2 Official Bulletin, 1905, p. 136.

of the nineteenth century, when, in one way or another, they were absorbed by the Government, which had to assume the obligation of supplying free of all charges certain ancient and perpetual rights. The advantages of uniting the different water supplies and operating a large number of canals under one system had long been manifest. The creation of one comprehensive system, however, made little substantial progress until 1840. At this time the needs of irrigation had become so great that the farmers were insistent in their demand for more water and additional canals. Previous to 1853 the farmers had little benefit from Government ownership of canals. The properties belonging to the State were farmed out to speculators, who were given free hand to make whatever terms they could with the irrigators, and often oppressive rates were charged, which the farmers had to pay. In 1853, however, the Government put an end to this practice. A co-operative society of farmers was organized, which included all the users of water from the State canals, and this society did away with the speculative middlemen.

Owing to the war with Austria, the Government did not have the money to build the Cavour Canal, and finally made a contract with a syndicate of English and French capitalists, by which it sold to the syndicate all of the canals taking water from the Dora Baltea, Elvo, Servo, and Sesia Rivers, then owned by the State, for $4,060,000; the company, however, being obliged to respect all of the ancient vested rights in these canals and to carry out a contract of the Government made with the farmers. The company constructed the main canal, but got into financial difficulties owing to the failure to sell its bonds, and to increased expenses, and was therefore unable to carry out its agreement with the farmers' association, and therefore the farmers terminated the contract. In 1867 the company was declared bankrupt, and for three years the whole project was tied up in litigation and other complications. More than $10,000,000 had been spent, in addition to the first cost, and when the main canal had been completed, only about one-tenth of the water could be disposed of, and the small revenue from this would not pay the interest guaranteed by the State; and, as the canal had not been built, as it was claimed by the Government, according to the specifications, the Government refused to pay this. In the suit which

followed, the Government was defeated, but in the meantime the company had gone into bankruptcy, and the complications and controversies which beset it led to the creation of a commission in 1870 to determine what the Government should do. The Government purchased the property under the law passed in June, 1874, together with the other canals which it had originally owned, and those which had been built or purchased as a part of the system. Since that time the canal has been owned by the Government and operated as a State work.

This canal, irrigating as it does about 200,000 acres of land, and managed entirely by the Government, is one of the best examples of governmental control of such works. It also shows the many benefits to be derived by uniting under a single ownership and control all interests within a single district.[1]

§ 153. Piedmont—Cavour Canal—Particular features.—The Cavour Canal starts on the north bank of the Po, about fifteen miles below Turin, the capital of Piedmont. It crosses the Dora Baltea River on an arched masonry aqueduct, and goes under the Elvo and Sesia Rivers by means of inverted syphons, and, after crossing a large number of canals and smaller streams, finally ends on the west bank of the Ticino River. When it was built one great source of expense was arranging for these canal crossings. Some of the canals were connected with it from the outset and others have been brought into connection, so that now the prevailing plan is to let the canals which start from these rivers above empty into the Cavour and then fill them again at the points most desirable on the other side. This right was granted by the owners of the old canals also, for the reason that, by having all the higher canals empty into the Cavour the water from the cold and warm streams, and from the streams carrying silt, and those clear, becomes thoroughly mixed, and irrigators below have the advantage of water adapted to irrigation throughout the year. The Cavour, therefore, has connected with it an immense system of subsidiary canals feeding it and drawing water from it. The water it takes directly from the rivers is consequently only a fraction of what it receives and discharges. To

1 For the laws governing the Cavour Canal and the province of Piedmont, see Secs. 154-158.

keep an accurate record of the water received from the streams and canals and that turned out into other streams and canals, is an undertaking in water measurement more complicated and important than any yet required on any irrigation system in the United States, and illustrates the fact that the measurement and the control of water rights as between conflicting interests has become an exact science. The combined capacity of the Cavour Canal and its connections is 10,240 cubic feet per second, and it is the most costly Government canal in Europe.[1]

All the works are constructed in the most substantial manner known to science, regardless of cost, and with a view only to permanency. And not only this, where opportunity offered, architectural beauty has been added appropriate to great public works. The headgate is of an imposing and monumental character, three stories in height, upon the top of which is a bridge for crossing and a gallery for the operation of the gates. Much of the canal work is of solid masonry. The total length of the main canal is 51.1 miles, and at the head it is 131 feet wide upon the bottom. The total cost of the properties transferred, with the improvements made on them since, represents an outlay by the Government of Italy of over $20,000,000.

§ 154. **Piedmont—Cavour Canal—Administration.**—The Cavour Canal was sold to the Government in 1874, with all the connecting canals, their rights and privileges. The properties then had cost nearly $20,000,000. They are administered by the treasury department of the Government, the head office being in Turin, with branch offices in other cities. The general manager, water masters, and ditch tenders are connected with the treasury department; the engineering force, with the department of public works. Two branches of the Italian Government have, therefore, intimate relations with the Government irrigation works.

The general manager superintends the making of contracts or concessions, fixes water rentals, and arranges for the delivery of water to consumers. He has charge of all surveys and plans for

1 For a description of the Cavour Canal system, see Irrigation in Northern Italy, Part I, pp. 68-93, by Elwood Mead, Bulletin No. 144, Office of Experiment Stations, U. S. Dept. of Agriculture.

See, also, the authorities cited in Sec. 151.

improvements and for the disposal of water for purposes other than irrigation. He represents the Government in all lawsuits and signs all contracts. The supervisors, ditch tenders, and tax collectors are subordinates of the general manager. Civil service regulations govern all employment under the treasury department. One-half the vacancies among the supervisors must be filled from the ranks of subordinates, and the other half taken from the minor officers in the army. All vacancies among ditch tenders except the lowest rank are filled by promotion. These regulations have given to the canals a body of highly trained and thoroughly competent men.

The chief engineer is connected with the department of public works, but is under the direction of the general manager. He makes plans for all improvements or repairs, prepares estimates of expenses for operation and maintenance, and is authorized to do emergency work without instructions from the general manager. He purchases all supplies, superintends the construction of any work undertaken, examines applications for water-right concessions, and is the expert engineering adviser of the general manager on all questions, whether administrative, legal, or technical.

Plans and estimates for any work to cost more than $400 must be approved by the engineer. Contracts which involve an expenditure of more than $8,000 must be let by public bid. Contracts which involve more than $1,600 up to $8,000, may be let privately, but must first be submitted to the Minister of the Treasury. In emergency cases the general manager can make contracts up to $1,600 without this reference.

§ 155. **Piedmont—Water rates from Government canals.**—The sale of the water from the Government canals of Italy is of particular interest to the American irrigator and the capitalists interested in the subject. Like all governments which own and operate irrigation works in Europe, Italy seeks to operate her works at a profit. The price charged for water varies in different localities, depending upon the distance that the water has to be conveyed before it reaches the place of use, and the competition offered by private companies. The basis of measurement for such sales is usually the cubic foot per second of time, either for the

whole or a portion of the year. However, in some cases it is based upon acreage, depending upon the character of the crops irrigated. The average annual income of the Government canals in the Province of Piedmont is the sum of about $600,000.[1] A considerable part of the water carried by the State canals belongs to the holders of ancient perpetual rights, which are not affected by tariffs or other regulations. This, of course, makes the expenses for operating correspondingly higher upon the Government or the association which has to deliver the water, and for which there is no recompense, except by assessing the individual users higher than they should be assessed for the amounts that they respectively use. In disposing of the water which has no incumbrance of ancient rights, payments depend upon the use made of the water, the different uses being classified as follows:

Summer irrigation, winter irrigation, power for operating farm machinery, power for industrial establishments, water for ice making.

There is a regular tariff for each of these uses except power for industrial establishments, where special agreements are made in each case. In none of the contracts of the Government is there any guaranty against damage because of shortage in the water supply in the streams or from accidents, but where the full amount is not furnished the amount paid is proportionately reduced. As far as possible contracts for power are made subordinate to contracts for irrigation.

Three methods for regulating charges are used in this system, which are as follows:

1. Charging according to the area irrigated.
2. Charging for the quantity flowing through a simple opening in the side of a canal.
3. Charging for the quantity delivered, measured by regulating either the pressure on an orifice or the depth flowing over a weir.

The present rate of tariffs is as follows:

1. The regular price for summer irrigation is $125.75 per cubic foot per second.

[1] See Irrigation in Northern Italy, Part I, by Elwood Mead, 1904, Bulletin No. 144, Office Experiment Stations, U. S. Dept. of Agriculture, pp. 84-86.

2. The special price for summer irrigation is $82 per cubic foot per second. (This is the price to associations that take very large quantities.)

3. A reduction of 20 per cent is made for three years when the land is irrigated for the first time.

4. The price for winter irrigation is $9.84 per cubic foot per second.

5. The price for power purposes is $1 per horse-power per month.

6. The price for water furnished by the day during the summer is $2.18 per cubic foot per second.

Where payment for water is based on the area irrigated, the charges are as follows:

7. Water for rice fields, $7.81 an acre.

8. Water for meadows, $4.69 an acre.

9. Water for marcite, $5.86 an acre.

The cost of water supplied to irrigators by private canals varies greatly, dependent upon the ownership of the canals, and competition between canals. The distance from the stream also affects the rates. There are also many seepage canals which gather up the waste water from the State canals and the water which percolates from the fields above. Rates under these canals are low because they cost little to build, are not subject to dangers from storms, and the water supply can not always be relied upon. In the irrigation of rice, rentals are frequently paid in a share of the crops. This plan has also been adopted in some portions of the United States, notably Louisiana and Texas. Where the water rental is so paid the share varies from one-fourth to one-seventh, according to the place and the amount of water required.

§ 153. **Associations of water users.**—The organizations or associations of water users under the Government canals in Italy have been largely copied in our "Water Users' Associations," under the Government projects constructed under the provisions of the National Reclamation Act of the United States.[1] By this means, the Governments in both cases deal with the associations instead of the individual, and thus leave to such associations the minute

[1] For the National Reclamation Act, see Chap. 65. For Water Users' Associations, see Chap. 65.

and detailed supervision of the use of the water by each individual consumer to the association, which supervision would otherwise be required by the Government. In Italy, the greater portion of the water from the canals owned and operated by the Government is sold to these farmers' associations. The policy of the State is to discourage contracts with the individual irrigators. These associations are worthy of the closest study by the American irrigators, and serve to illustrate how the many, diverse, adverse, and oftentimes hostile interests can be brought together under one harmonious whole. These associations buy the water at wholesale rates, and then retail it to their members, who are the actual consumers. The loss to the Government on these rates is more than made up by the expenses which it does not have to pay for the detailed management, control, and use of the water by the individual consumers. In Italy, these associations, as a rule, lease and operate the secondary canals or main distributaries, used in the distribution of the water purchased, where these distributaries are owned by the Government.

§ 157. **Associations of water users—General association west of Sesia.**—The largest and most successful of these water users' associations in Italy, described in the preceding section,[1] is known as the "General Association West of the Sesia," with its headquarters in Vercelli. This association is widely known, and has influenced irrigation development in many parts of the world. The creation of this association is due to Count Cavour, and its organization grew out of the unsettled rights, the conflict between public and private ditches, between appropriators of water from streams and those who depend on seepage supplies, between individuals using the water from the same streams and between all of those various conflicting interests that always have sprung up and always will spring up in very populous communities and where the water is over-appropriated from the streams. To put an end to these controversies, Count Cavour took a leading part in a movement whereby all of the appropriators and all of the canals in the district were combined under one management. It controls every canal within the district, fixes the price of all water used, manages its delivery, and also exercises a large discretion in the

[1] See Sec. 156.

selection of crops to be used.[2] The statutes, by-laws, and regulations of the society cover many pages, and space will not permit us to abstract them in this work.[3]

Some of the powers granted by the Government and exercised by the association seem extraordinary when compared with the practice in the United States. The association has the power of making the laws, in effect, governing the control and use of waters within its territory. For instance, the association determines how many acres in each district may be planted to rice and how many to cultivated crops; also how many acres each individual shall plant to any particular crop. The farmers must plant

2 Some idea of the extent of the operations of this association may be had from the following statistics: It has 14,000 members, operates 9600 miles of ditches, has 266 miles of telegraph and telephone lines, supplies water for the irrigation of 141,000 acres of land, and does a business of $600,000.00 a year. It buys from the Government about 1300 cubic feet of water per second each year. In consideration of this large purchase of water the Government gives the association the cheapest rate for the water and control of all the secondary State canals through which the water is distributed. In addition to the water bought from the State, the association controls and distributes all of the water to private canals and private rights within its territory. Under legislation secured by the society, the owners of these private (not ancient vested rights) rights are compelled to turn the water over to the association because it is illegal for even the Government to sell water to individuals or to any one but to the association within its territory. Holders of private rights are, however, paid for the quantity taken, the price given being 20 per cent less than that paid to the Government. In addition to the water purchased from the State and from private holders, there are ancient vested rights to 493.4 cubic feet of water per second, the holders of which are entitled to have this water delivered to them free of cost. The association has assumed for the Government the responsibility of supplying these vested rights, the Government furnishing the water at the head of the distributing canals, with 7 per cent added to compensate for losses for seepage and evaporation. In addition to the water purchased, the association collects a large amount of seepage water, which it supplies to its members. Altogether the association distributes to its members about 2275 cubic feet of water per second.

3 See law for the organization of associations for irrigation, translated by R. P. Teele, Expert in Irrigation Institutions, 1907, Bulletin No. 192, Office of Experiment Stations, U. S. Dept. of Agriculture, pp. 35-57; l'Associazione d'Irrigazione del l'Agro al l'Ovest della Sesia, Capitolato e Statuto per, pel secondo trentennio a partire dal 1 Gennaio 1884, Vercelli: Guidetti Francesco, 1882.

See, also, Irrigation in Northern Italy, Part I, by Elwood Mead, 1904, Bulletin No. 144, Office Experiment Stations, U. S. Dept. of Agriculture, pp. 86-93.

as the association decides, as there is no appeal from the ruling of the superintendent. It takes seven times as much water to irrigate an acre of rice and three times as much to irrigate an acre of meadow as it does to irrigate an acre of land seeded to corn or wheat. Having a definite quantity of water which it must sell, the association requires the farmers to plant crops which will insure a market for it. The man who does not cultivate rice on the land which the association assigns to that crop must pay the same water rent as if he did. Men who waste water or who undertake to make a profit from waste water coming from their own land may be fined. The cost of water to members of the association is determined by adding to the purchase price the expense of the association for administration, maintenance, and repairs. The books are balanced and computations made in October. The assessments are paid after this between November and January, or after the water has been furnished for the season, instead of in advance. This enables accurate computations to be made for that season upon which the assessments are based. In the 50 years that the society has been in operation there has never been an instance of a member failing to pay his assessment within the prescribed time. This is undoubtedly due to the severity of the penalty which the association can impose, and that is to refuse to furnish water to such members thereafter.

The various officers and employees of the association are under civil service regulations. Each one when appointed has to serve a probationary period of two years, and after he has served acceptably for this length of time he can not be discharged except for cause.

§ 158. **General Association West of Sesia—Government.**—The settlement of water disputes among the members of the Association West of the Sesia is worthy of particular notice by the irrigators of the United States. Every question connected with water rates, or with water rights, the relation of individuals to the association or to each other is referred to a court of arbitration composed of three members. This court or board has the authority given by law to punish with fines any members of the association found at fault, and the sentences it imposes are considered as law court sentences and the property of the offender

may be seized and sold in order to carry the sentence into effect. Parties to these trials, if they are so disposed, may appeal from these decisions to the law courts, but in practice there is no disposition to do so. In the 50 years during which the association has been in existence, there has never been such an appeal. On the contrary, the celerity with which decisions are rendered, the cheapness of proceedings, and the popular confidence in the integrity and fairness of the tribunal are so great that the people at large are willing to abide by these decisions and there is a tendency to bring before it other than irrigation matters for settlement. This may be due somewhat to the general desire for self-government, at least, in certain matters.

The success of this association has been both a public and a private benefit. It was organized in 1854. At the outset it was an experiment, not only in Italy but in the world, but that stage has long since passed. The combination of the control of both State and private canals under one authority and control, and the exercise of authority over farmers, who are also members of the association, in the crops to be grown, were both novel innovations. It has given the farmers a secure water supply and at cheaper rates. It has given the State an efficient management of its canals and a stable market for its water supply. Its influence along social and economic lines has been equally valuable. It is really a little republic of irrigation and has trained the Italian farmers to understand and practice self-government and to exercise large administration in public affairs. In form the association has a government something after the order of the irrigation district organizations of California, Colorado, Utah, and other States, but with more power within itself to settle all disputes than any of the above mentioned States. More recently many of the principles have been adopted in the organization of the Water Users' Associations under the projects constructed by our Government under the National Reclamation Act.[1] There is practically no State control within the districts covered by these Italian associations, all of the necessary powers being granted to these districts for their self-government. All the Government does is to sell to

1 For the Irrigation District Law, see Chap. 70. For the National Reclamation Act, see Chap. 65.

the association a certain amount from the Cavour Canal and attend to its delivery to the laterals of the association.

To those acquainted with the contentions, lawsuits taking years before a final decision is reached, jealousies, and anxieties of irrigators under neighboring canals in our Western States, the fact that this association has managed and controlled its affairs, in maintaining and measuring water for over 9,000 miles of canals for over half a century without a single lawsuit, or an appeal to the courts from the rulings of their own officials, is one of the remarkable features of Italian irrigation. The division of a river and the delivery of the water among the numerous ditches and farms is a complicated problem in transportation and needs the same preliminary organization and the same details in its management as a railroad or express company. It also requires that the farmers shall submit with the same readiness to the regulations of a canal that they do to those of a railway. It needs a public sentiment which will regard the stealing of water as no different from the stealing of a horse, and the opening and closing of head gates without authority as much law breaking as the robbing of a bank or the burglary of a house. After having acquired this public sentiment, laws will soon follow that will govern the subject. Because public sentiment does not so regard the interference with head gates or the taking by one irrigator of the water which belongs to another; and because in many of our States, we have failed to make the welfare of the community superior to the welfare of the individual, there are friction, controversy, and litigation between the farmers of our Western States. Competent investigators say that if this could be done away with, it would add many millions to the selling value of the lands now irrigated, and greatly lessen the operating expenses of canals and ditches. Legislation alone will not accomplish this. It must come through the growth of co-operation among the farmers themselves, as has been exemplified in the results accomplished by the General Association West of the Sesia of Italy. We have no hesitancy in saying that this association, as it has existed for over 50 years, is the best organized, and the best controlled and managed of any irrigation community in the world today, and that, too, regardless of the fact whether governed by statutory laws, or by association rules and regulations.

§ 159. **The lessons to be learned from Italy.**—The lessons to be learned from Italy relative to the government and use of waters are many and of the utmost interest to the American irrigators. In a country of a dense population requiring a most intense cultivation of the soil in order to produce even the requirements of the country itself, the laws governing the use of waters are about as perfect as have been devised to this day. But, not only has Italy excelled in her laws and regulations relative to waters, but also in the scientific construction of her great works for the diversion and use of the waters, and in the practical application of the waters to the soil to secure the best crop results. Already in the Western portion of this country there have been adopted many of the methods of Italy for the measurement of water and other methods upon the practical side of the subject. We also have in our laws and regulations governing the use of water many of the features taken from those of Italy, notably in our laws of State control, irrigation district laws, and the laws and regulations of Water Users' Associations. As the population of the West becomes more dense and there is a greater requirement for more intense cultivation of the land, undoubtedly other features both upon the practical side, and upon the side of the laws and regulations will also be adopted.

The best lessons that we can have are from the actual experience of other countries under similar conditions. And, as has been stated before, Italy is not an arid country, as that term is understood in the West. Crops can be raised there even without irrigation. Therefore, irrigation in Italy is more in the nature of "supplemental irrigation."[1] This is an example to the Eastern and Middle portions of this country. Although crops may be raised there without irrigation, it will be ascertained, as the population becomes more dense, that larger and better crops can be raised by irrigation supplementing the natural rainfall.[2]

[1] For Supplemental Irrigation, see Sec. 29.

[2] For Irrigation in the Eastern States, see Secs. 257-260.

CHAPTER 9.

IRRIGATION IN VARIOUS COUNTRIES.

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§ 175. Modern irrigation in Mexico.
§ 176. Modern irrigation in the world—Conclusions.

§ 160. **Scope of chapter.**—In the discussion of modern irrigation in a number of the countries of the Old World in the preceding chapters, we have gone into the subject at considerable length, especially as to those countries which have the greatest irrigation works, and where the science of irrigation is practiced to the greatest extent.[1] We have also discussed the particular features of the laws of these countries governing the waters flowing or lying within their boundaries, and their use. There are many other countries in various portions of the world where irrigation is extensively practiced. But space in this work will permit us to give only some of them a passing notice. This we will do in the respective sections of this chapter, after which we will discuss the subject of modern irrigation in Canada,[2] and then modern irrigation in our own country.[3]

1 See Chaps. 3-8.

2 See Chap. 10, Secs. 177-237.

3 For Modern Irrigation in the United States, see Chap. 11, Secs. 238-270.

For Irrigation by Indian Tribes, see Chap. 12, Secs. 271-285.

For Irrigation in the Respective States, see the preliminary sections in Part 14.

§ 161. **Modern irrigation in France.**—In France, irrigation is an insurance on ancient agriculture and the prosperity of great agronomic interests. This country is one of the countries which follows the civil law relative to waters and water rights, or the right to the use of water.[1] Irrigation in this country began at an early date, and in recent years new interest has been taken in the subject, so much so that in many of the departments such as Drôme, Alpes Maritimes, Ande Hèrault, Vaucluse, Basses Alpes, Hautes-Alpes, and Loire, many millions of francs have been expended on no less than twenty different canals for waterways and irrigation.

The Forez Canal system, supplied by the Loire River, is the most important. This system irrigates something like 100,000 acres, and was begun in 1863. The National Government gave $122,200 for it, and loaning the balance to the department at 4 per cent per annum. Each department has its own distinct organization, which corresponds somewhat to the district organizations in the Western States of this country. The water is distributed periodically through pipes and flumes, carrying it to points most convenient for a group of farms, where it is delivered to the farm laterals. It is the custom to serve the water once each week, on the same day and hour, the amount being regulated by the amount purchased. The delivery usually commences on the land farthest from the main lateral, and each proprietor turns off the water from his lateral when he has received the amount paid for, and the next order is then served. The assignment is made out by November 1, and each irrigator is notified of the days and hours when water will be applied to his land. Irrigation at first was almost wholly used on meadows, but of late years it has been used on all crops and orchards as an adjunct to the rainfall. The statutory laws governing the subject of waters and water rights are not as extensive or as specific as are the statutes of many countries, the principal law upon the subject being contained in Loi sur Régime des Eaux of April 8,

1 For Modern Irrigation in Italy, see Chap. 8, Secs. 144-169.

For Modern Irrigation in Spain, see Sec. 162.

For the Civil Law upon the Subject of Waters, see Chap. 29, Secs. 552-569.

1898,[2] and the law of June 21, 1865, as amended by the law of December 22, 1888, the same being the law governing corporations and associations.[3]

By the laws there are very severe penalties provided relative to the taking of water out of turn. By the civil law the water is considered as a part of the property of the entire people, and the appropriating it to the use of an individual, when he has no right, is regarded as an act as contrary to law as stealing, and it is stopped, just as other thefts would be; and, if persisted in, the thief is severely punished. Under the first French statute—passed in 1845—upon the question of rights of way for canals over private land in order to conduct the water for the irrigation of other lands, it was in effect provided that every proprietor who may wish to be served for the irrigation of his property with the natural or artificial waters of which he has the right, can obtain the right of way for these waters over intermediate lands by paying just indemnity. There are excepted from this, lands occupied by houses, pleasure grounds, gardens, parks, and enclosures belonging to dwellings. It was also provided that the proprietors of lower lands will have to receive the waters which percolate from lands thus irrigated, being indemnified if damage occurs. Rights under the Code Napoleon, similar to those of riparian proprietors under the common law,[4] were provided for, in language as follows: "He whose property borders on a running water, other than that which is declared a dependency on the public domain by Article 538, may employ it in its passage for the watering of his property. He whose estate is intersected by such waters is at liberty to make use of it within the space through which it runs, but on condition of restoring it at the boundaries of his field to its ordinary course."[5]

For the similarity of the Louisiana Code to the above, see Louisiana Code, Article 657, quoted in Sec. 575.

2 Loi de 8 Avril 1898 sur le Regime des Eaux, Ministere de L'Agriculture, Paris, Imprimerie Nationale.

3 Loi du 21 Juin 1865 sur les Associations syndicates modifiée par la Loi du 22 Decembre 1888. See, also, Loi du 22 Mars 1890 sur les Syndicates de communes, Ministere de L'Agriculture, Direction de L'Hydraulique Agricole.

4 See Sec. 575.

5 Code Napoleon, Art. 644.

§ 162. Modern irrigation in Spain.[1]—In Spain, irrigation is being practiced each year to a greater and greater extent. It is a much more important feature to the agriculture of that country than it was in the times of the Romans or the Moors. However, many of the works of these ancient rulers of the country still exist, some of which are still in use by the modern irrigators. The civil law is also in force in this country relative to water rights.[2]

The most prosperous agricultural provinces of Spain are the two in which the soil is probably the poorest in the kingdom. But the valleys of both these provinces are thickly seamed with irrigation canals and the slopes are carefully terraced for cultivation. This explains the paradox. Supplemental irrigation is practiced, irrigated crops being grown alongside of non-irrigated. At this day ancient and modern methods of irrigation seem to go along almost hand in hand. Simple water wheels are in common use to obtain water from wells, horse-power being employed, and small buckets being used for the method of conveyance, after the ancient Egyptian fashion. On the other hand, modern windmills are also in quite common use. The total irrigated area of Spain is nearly 4,000,000 acres, and some of this is under systems of great age and of expensive construction. In Valencia and Catalonia the water comes from swift mountain streams, whence it is conveyed by long canals or "acequias" along the mountainsides, or by lofty aqueducts, to the fields on which it is to be used. Spain is not an arid country; in fact, it is classified among the humid countries. Irrigation is used to supplement the rainfall. The effect of this irrigation is shown by the significant fact that the irrigated portion of Murcia has a population of 1681 per square mile, as against only 101 per square mile from the entire province; while Orihuela has a population of 767 per square mile, as against 194 from the whole province. This shows the accomplishment of irrigation in a humid region.[3]

The Spanish law upon the subject of waters followed largely the civil law of the Romans as modified by Spanish decree.[4]

1 See Ancient Irrigation in Spain, Sec. 76.

2 See Civil Law, Secs. 570-584.

3 For Supplemental Irrigation, see Sec. 29.

4 For the Civil Law, see Chaps. 29, 30, Secs. 570-594.

This law, as described by Eschriche, is to the effect that, where running water flows between the properties of different owners, each may use it for the irrigation of his property or for any other useful purpose. Each, however, may not use it all, but only to the extent of the part that belongs to him, because all have equal rights, and hence they can prevent each other from taking more than their respective shares. If, however, the water flows within a property, the owner may use it as he sees fit, since both the banks are his, and his right is not subject to the interest of a riparian owner on the opposite bank. But in doing so, at the lower side of his estate, he must return the water to its natural or ordinary channel. He has no power to absorb or to entirely consume the water, nor to give it another direction, because the water does not belong to him as a property, but only to the extent of the use which he can make of it as it flows along. As every riparian owner can use the water which passes by the borders of his property to irrigate his land, he is permitted to open drains, irrigating canals, and ditches, and he may even construct a dam or other structures to divert the water and carry it to the place of use upon his own property. In doing this he must not make the water overflow the higher lands, against the will of their owners, or flood the lower lands in a way that may cause injury. Neither can he hold the water back in such a way that the lower owners on the stream are deprived of their rights to use the water for irrigation. No riparian proprietor can construct works on the land of another without his consent, nor can he construct a dam upon such property to cause the water to flow more readily upon his own land. As the rights of all proprietors upon the same stream are equal, the irrigation works ought not to be made, unless in such a manner that the water may be divided equally between them. But the rule of equality in the diversion of the waters is subordinate to the interest of agriculture, which will regularly demand that the greater portion of the water be diverted to the estates of the greatest extent, as the Roman law required. But, as the largest estate does not always need or use the greatest amount of water, the rule of the Romans should not be applied, except under certain restrictions and limitations.[5]

[5] See, also, the rule of correlative rights under Irrigation as a Riparian Right, Sec. 513.

As all upon the stream are entitled to water, therefore, the upper proprietors can not absolutely deprive the lower ones of the use of the water, but they must restore the water to its natural channel after having used it, undiminished in quantity, except as to the inevitable loss caused from the irrigation of the lands. It is also provided that no owners of mills, operated for any purpose, can totally deprive the lower proprietors of the water. A preference right to the use of water is further provided for, to the effect that when it is a question as between agricultural interests and mills in a country where there are few, and on account of the drought they need all the water, the irrigation of the meadows and other properties, as long as the state of drought lasts, ought to be suspended. It will be noticed that this is different from the preference uses to the right of water granted under the statutes of some of our Western States, where the preference right to the use of water is given, first, to domestic purposes, and second, to agricultural purposes. In Idaho, however, the second preference right is given to mining.[6] In many of the districts of the country the old Moorish laws are followed as to the diversion of the water and its application to a beneficial use. That law is more after the Arid Region Doctrine of appropriation in vogue in the Western States of this country. Its rules are better applicable to an irrigated country than are either those of the common law or the civil law.[7] The agricultural interests of Spain have prospered under these laws, and the Spanish are considered among the best irrigators in the world, as is well illustrated in the Spanish-American countries in America.

§ 163. Modern irrigation in Algeria.—Even in that part of Africa which was at one time considered the most dangerous, desolate waste upon the face of the globe—the great Sahara Desert—this art of irrigation within the last few years has brought about changes which fifty years ago would have been

6 For Preference Right to the Use of Waters, see Secs. 792-794.

7 For the Common Law of Riparian Rights, see Chaps. 21-28, Secs. 450-551.

For the Civil Law, see Chaps. 29, 30, Secs. 552-584.

See, also, Sec. 76, for the old Moorish law.

regarded as absolutely impossible. This desert is far from flowing streams, and the water is obtained by boring artesian wells. For the purpose of this work we will select but one section of that country, which is the most remarkable example of reclamation by means of artesian well water that can be found in the world, but which is found in the desert itself in the provinces or departments of Algeria, under French rule. The area officially given of French Algeria is 184,465 square miles. The outlying portion is put at 135,000 square miles. In this total of over 359,415 square miles, one-half belongs to the Sahara or desert portion. The European population in 1887 was about 250,000; the natives and naturalized were 3,228,549, making a total of 3,478,549. Cultivation by means of flowing well waters has been sedulously fostered by the French Colonial Government, for both political and economic reasons. Such wells, as a means of reclamation, began systematically to be bored in 1857, the French engineer, M. Jus, having demonstrated in 1856 that the desert was endowed with large supplies of underground water. The total number of wells bored since that date in the departments of Algiers, Oran, and Constantine is stated at 13,135. These wells range from 75 to 400 feet in depth, and the low pressure common to the majority of them forces the water over the small board casings to a height of about two feet above the ground. The waters are then collected in small ditches, which convey them to the vineyards, date trees, and fields of millet, wheat, and other grain, which comprise the chief products of that country. In all, about 12,000,000 acres have been reclaimed in this way. The Government bores at least one-tenth of the whole number. As an illustration of the reclamation brought about by this method of irrigation by artesian wells, the following figures from a report in 1885 will be of value, but they relate solely to the cultivation of the grape for wine-making purposes: In the province of Algeria there are 60,382 acres; in Constantine, 25,021 acres; in Oran, 26,114 acres. Thus, when we see what irrigation has done in Africa, notwithstanding its burning winds and scorching sun, its possibilities seem to be almost limitless. In Algerian Sahara, since the sinking of the first artesian well in 1848, at Biskra, the work has gone forward down to the present time. In 1875 there were 615 wells put down, having an

average depth of 145 feet; 404 of these wells are in the province of Constantine, 194 in the province of Algiers, and fifteen in that of Oran. It will be noticed that the depth of these wells is comparatively shallow. Another strange thing about these wells is that their waters contain nitrates, and irrigation with them has brought upon the desert sands wonderful oases, upon which grow the date palms and many other fruit trees.

§ 164. **Modern irrigation in England.**—In England itself, that island of humid atmosphere and low altitude, surrounded by the sea, and having what one would think a rainfall sufficient to be absolutely independent of any artificial distribution of water for raising crops, there are numerous water meadows, which have been irrigated so long that the time at which the systems were laid out and the canals and ditches dug is unknown. It is thought that some of these were constructed under the Romans, while others are supposed to have been introduced from the Netherlands. These canals can be found in Berkshire, along the Kennet; in Derbyshire, in the valley of the Dove; in Dorset, in Gloucestershire, along the Churn, Severn, Avon, Lidden, and other streams; in Hampshire, along the Avon, Itchen, and Test; in Wiltshire, in Worcestershire, and in Devonshire. In all these what is known as supplemental irrigation is in vogue.[1]

However, the Assistant Secretary of the Board of Agriculture and Fisheries, speaking of the subject of irrigation in a letter to the author, under date of May 23, 1908, says: "For physical reasons, the question is relatively of small importance in this country."

Of course, the common law is followed in the country of its origin, and irrigation by one riparian proprietor is allowed, provided that the equal or relative rights of all the other riparian owners upon the same stream are not injured or interfered with.[2]

Although England, in the home country, practices irrigation

1 For Supplemental Irrigation, see Sec. 29.

For Ancient Irrigation by the Romans, see Sec. 75.

2 For the Common Law of Riparian Rights, see Chaps. 21-28, Secs. 450-551.

For Irrigation as a Riparian Right, see Chap. 26, Sec. 498.

For the right of irrigation in England, see the Chronological Table and Index of Statutes, under the subjects of Irrigation, Canals, Rivers, Land Improvement, and Drainage.

in but a limited way, and has paid very limited attention to irrigation laws, it is from physical reasons only. There, it is more a question of drainage than it is the diversion of water from the natural streams for the cultivation of crops. However, in the English Colonies, and in countries controlled by the English, where the physical conditions are different, and there is a hot, dry, and arid climate, as we have seen, they are the greatest irrigators on earth.[3]

§ 165. Modern irrigation in other countries of Europe.—There are many other countries of Europe and Asia that have either revived an ancient agriculture by irrigation, or have more recently adopted irrigation as the surest method of bringing great results, and as a safeguard against famine in thickly populated districts. This has been done either primarily as an absolute necessity, or as supplemental to the rainfall. Without going into great detail in this work as to the history of those countries in this respect, I will, in passing, name a few of those countries.

In Switzerland, we are surprised to find, even in the higher altitudes, the mountain streams formed by the melting of the snow are turned into ditches and conducted thereby to the meadows, where the waters are used for irrigation. And, in the lower valleys, crops are cultivated by this means.[1]

See, also, the Report of the Select Committee on Canals, 1883, House of Commons, No. 252 of 1883; A Dissertation of the Common Law of Waters, by Musgrave, 1890; Law of Waters, Sea, Tidal and Inland, by Coulson & Forbes, 1902.

3 For Irrigation in Egypt, see Chap. 4, Secs. 88-102. For Irrigation in India, see Chap. 5, Secs. 103-118; in Australia, Chap. 6, Secs. 119-130; in South Africa, Chap. 7, Secs. 131-143; in Canada, Chap. 10, Secs. 177-237.

1 For the laws of Switzerland upon the subject of the use of water, see Loi du 18 fevrier 1901 et Reglement du 26 avril 1901 sur l'utilisation des lacs et cours d'eau dépendant du domaine public, Lausanne, Imprimerie Lucien Vincent, 1901; Loi Generale sur les Routes, la Voirie, les Constructions, les Cours d'eau les Mines et l'Expropriation, du juin 1895, Genève, Imprimerie L. Bron, 1906.

See, also, upon the subject of waters: Gutachen und Bericht über die Stauverhaltnisse des Sihl-Sees erstattet an den Bezirksrat von Einsiedeln und die Maschinenfabrik Orlikon durch die in Art. 4 der vom 30, juli 1907 datierten Zusatz-Bedingungen zur Etzelwerk-Konzession vorgesehene Kommission, Marz 1908, Bern, 1908; Pour la votation populaire du 26 mai 1907, Loi concernant l'Utilisation des forces hydrauliques, Message du Grand

In Belgium, there is a great system of canals known as de la Campine, which has an aggregate length of over 400 miles, the construction of which cost over $6,000,000. This is used both for navigation and irrigation. An area of about 7,000 acres of barren soil, which produced absolutely nothing before irrigation, has been reclaimed, and now produces good crops.

In Bavaria, meadow irrigation is common, as well as irrigation for many other crops. There are many current wheels along the streams, constructed something after the order of the Persian water wheels. Irrigation in this country has been found to be a very profitable adjunct to the rainfall.

In Denmark, there is a network of something over 150 canals, belonging to one system, and carrying over 30,000 second cubic feet of water. By this means over 40,000 acres of sandy heath lands in Jutland have been reclaimed and its value greatly increased.

In Austria-Hungary, irrigation is practiced in many sections of the country: In the Mattig Valley, in Upper Austria; in Lower Austria; in Carinthia, near Klagenfurth; in many of the upper and central valleys of the Tyrol; in the Bistriz Valley, and in Bohemia, in the valley of the Elbe. In these countries more modern systems of irrigation are in existence. Owing to the fact that the land has plenty of fall, the water is taken from the streams by dams, and runs by gravity, directly upon the fields. There are also many reservoir systems whereby the water is

Conseil du Canton de Berne au Peuple Bernois; Zur Boltsabstimmung vom 25 Otober 1908. Bundesbeschluts betressend die Gesetzgebund des Bundes uber die Nutzbarmachung der Wasserkrafte und uber die Fortleitung und die Abgabe der electrichen Energie, Bom 26 Juni 1908; Der Grosse Rat des Kantons Graudunden an die ehrfamen Germeinden deselben, 18 November 1905; Gutatchten uber die Wasserverhaltnisse des Etzelwerk-Projektes erstattet an die Etzelwerk-Kommission, von Ing. J. Epper, Chef des eidg. hydronretrischen Bureaus, 10 November 1904, Druck von Aschmann & Scheller, Zurich; Die Wasserkraftverhaltnisse im Puschlav. Gutachten erstattet an die gemeinde Puschlau und die Keartwerke Brusio, von Ing. Dr. J. Epper, Chef des eidgenossischen hydrometrischen. Bureaus, Bern, 1907, Buchdruckerei Rosch & Schatzmann; Die Abalation der Rhone in ihren Walliser Einzugsgebiete im Jahre 1904-05, Inaugural-Dissertation der Philosophischen Fakultat der Universitat Bern zur Erlangung der Doktorwurde vorgelegt von Erich Uetrecht, aus Minden (Westfalen), Bern, 1906; Einige gesetzgeberische Erlasse betreuffend die Asunutzung von Wasserkraften, Bern.

stored during the times of flood and used during the dry seasons. There are also many water wheels and windmills to be found along the streams, whereby the water is pumped up and then run upon the fields.

In many other parts of Europe, water has been for many years and now is used for irrigation. The tendency in many of these countries is to modernize the ancient systems and to adopt improved methods. In some sections the most modern pumping plants and machinery can be found. Also in many countries these enterprises are fostered by the respective Governments, by the way of laws enacted for their protection, and by the loans of money to assist in their construction. In other sections by individual efforts alone great irrigation enterprises have been promoted and capital supplied for the construction of the works. These enterprises, in the thickly settled countries of Europe, have been and are bound to be in the main successful.

§ 166. **Modern irrigation in Asia.**—Passing to the continent of Asia, we find irrigation practiced over a wide extent of territory in many countries other than those described at length in this chapter. It is largely carried on by individual effort, and is widely and irregularly scattered. Indeed, it must be said that all through Asia and Asia Minor isolated and individual irrigation plants are to be found, which in the aggregate would sum up a grand total. It is to be found in Corea, Afghanistan, and parts of Russian Central Asia. In Thibet and on the Pamier, "the roof of the world," are to be found systems of irrigation that have been fraught with such difficulties, in taking out the water and conducting it to the places where it was needed, that few Americans would think of undertaking the task.

In parts of Armenia, where there is an abundance of subterranean water, it is the common practice to dig a line of wells extending down a slope and then, by connecting the bottoms of these wells by a tunnel leading out upon the surface at a lower level. By this means the water becomes available for irrigation, and is collected in reservoirs, whence it is conducted by ditches to the fields where it is used. The same practice is also in vogue in other parts of Central Asia.

Irrigation in other portions of Asia will be discussed in the following sections.[1]

§ 167. **Modern irrigation in Assyria.**—The whole of Northern Assyria, or Syria,[1] including the vast plains lying in the districts of Aleppo and Adana, are possessed of excellent soil and immense courses of water, including the Euphrates, the Orontes, and the Tigris Rivers. This section of the world was called in the centuries that are passed "the granary of Europe." For the past few hundred years, however, owing to neglect, these vast and semi-arid regions have been unproductive and sterile. His Excellency Raif Pasha, when he took over the government of this province, determined that efforts should be made to rescue these lands. Throughout the whole of the district he saw that there was plenty of water. But, during the ages past, the most crude methods were employed to take out the water upon the land. These old methods might be sufficient for the present needs of the population, but in an agricultural country the people could not be really prosperous and keep pace with the march of time, unless that agriculture was worked in its highest efficiency. Hence the old methods of diverting the water and running it upon the land for irrigation must be replaced by more modern ones.[2]

1 See Secs. 167-173.

For Modern Irrigation in India, see Chap. 5, Secs. 103-118.

1 "Syria" is merely an abbreviation of "Assyria."

For Ancient Irrigation in Assyria, see Sec. 72.

2 As described by E. Rahib Raif of Aleppo, Turkey, in his picturesque language: "From the dawn of human ingenuity, for centuries unnumbered, wooden water wheels of fearful form and cumbrous weight, huge monsters which gave grudgingly, were used along the river banks, requiring high dams and constant repairs, much attention for meager results. With what success? In winter, a heavy, sullen, groaning revolution, turning at the will of the capricious currents, and at a time when water, in the form of rain, was showered down, and the water from the streams was not needed for irrigation. In the summer, when the heats were come, the dried earth cracked and crying, they would stand mockingly motionless in their sluggish currents, seeming to ridicule the puny efforts of primitive man. Yet this, in its primordial state, was incomparably superior to the systems used on land where no running water was to be had, for the working of these cumbrous machines. Here the water had to be drawn by hand, or else a horse or an ox would be harnessed to a rope and by its weight and the declivity of the ground pain-

His Excellency first gave his consideration to the most urgent wants—the lands which no streams watered as they passed. Here new and modern appliances were called into requisition. Water could be found by digging shallow wells, and the air at least was at command and could be utilized. And then a sudden transformation seemed to break through the silent sleep of ages. On all sides steel windmills rose, new patent water-lifts replaced the old wooden "norias," chain and centrifugal pumps were called to lend their aid to cultivate the lands. Simplicity, combined with efficiency, began to call the farmer from his apathy and dullness. Great profit came from his efforts in a financial way. And it is now proved that the farmer can become, in a great measure, independent of the caprices of drought and heat. And that country, which had lapsed into a somnolent state, has awakened to the new possibilities. The history of Assyria is the history of many of the old countries of Europe and Asia in this regard.

§ 168. **Modern irrigation in China.**—In China, for hundreds of years, irrigation has had a very extended and general distribution.[1] The Grand or Imperial Canal system was laid out primarily for navigation, but it is also in general use for irrigation. The rivers of China are her glory, and there are few countries in the world so well watered, and none with such splendid transportation facilities. Of these the Yang-tse-Kiang is much the largest, flowing through extensive fertile plains and finally emptying into the Eastern Sea, after traversing a distance of over 200 miles. Its discharge is estimated at over 1,000,000 cubic feet per second. The Hoang-Ho or Yellow River is nearly as long as the Yang-tse-Kiang; its current is very rapid and its course sinuous, and it is noted for its frequent and violent floods. The Pearl or Canton River is not nearly so large as the others, but

fully draw up an insufficient supply of water, which seemed to rather irritate than saturate the ground. Or the 'garaffe'—the wooden noria (a Persian water wheel) that perpetual circle of a beast condemned to tread its round from day to day—rotten planks, rotten cords, loss of time, loss of energy. This state of things might have boasted of its results in times gone by, but it must abandon the field to the march of progress and science."

1 For Ancient Irrigation in China, see Sec. 69.

is of great importance for navigation. At some points it spreads out into large lakes; in others it passes between narrow gorges which, if dammed, would afford large storage capacity for irrigation. The Chinese, however, have not worked out the great possibilities of modern irrigation systems in their different phases as completely as they can be found in other countries, or as would be expected of such an agricultural people. Agriculture, even at the present time, is most primitive, and the wonder is how such an immense population can be supported from the soil, until the great economy practiced in all things is understood. On the Great Plains every available foot of land is utilized for growing something and every particle of fertility returned to the soil.

The Great Plains of China is one of the most wonderful sections of the world. It is over 700 miles in length and varies from 200 to 400 miles in width, occupying the northwestern portion of the empire, and containing about 250,000 square miles of wonderfully fertile soil. It is very low and flat, and has not sufficient fall to run the water upon the land. There are in this vast area thousands of acres of land that lie under water a great portion of the year, and are therefore not cultivated. The most interesting feature of this plain is the enormous population it supports. There are not less than 200,000,000 human beings upon the Great Plains, making it the most densely settled of any part of the world.

§ 169. **China—Methods of irrigation.**—The methods of irrigation used by the Chinese at the present day are ancient and crude. In the mountainous districts, of course, they can, and do divert the course of the streams into the irrigation ditches by making small dams; but on the Great Plains this can not be done, owing to the flatness of the country. In this part of the country the best method pursued is to level small plats of land, containing about one-third of an acre, and run ditches through and around them in such a manner that, when the ground is wet enough, the surplus water can be run into an adjoining patch, which, as a general thing, is a few inches below the level of the first. Thus, throughout the Great Plains of China, patches or strips of land may be seen, one a trifle above the other, made so, artificially, for the purpose of utilizing a single water course

to the greatest possible advantage. Archimedean pumps are used in some places to raise the water from the creeks, rivers, and canals. In other places, and to a greater extent, troughs about fifteen inches wide, with four-inch sides; and at the end of these troughs there is a revolving shaft with ratchet wheels, over which passes an endless belt, with conveyors or buckets about fourteen inches apart. The shaft of the upper ratchet wheel is attached to an upright shaft. These machines are worked by buffaloes, and often by human labor, a man working a crank with his feet, something after the manner of riding a bicycle. The most primitive and laborious method is the ancient well sweep, such as is seen today on many an old New England homestead. The most common way of raising water for irrigation purposes, however, is by hand. Two persons, oftentimes children, are placed on the banks of a stream, each with a rope about five feet long; one end of each of these ropes is attached to a bucket of about four gallons' capacity. The bucket is dropped into the water and filled; then, by a horizontal pull on each side, it is raised to the distributing tank and emptied. Two girls thus at work can often raise from sixty to eighty gallons per minute.[1] There are windmills in China, such as they are, but they are like nothing that can be found elsewhere upon the face of the earth. They are made of a number of lateen sails attached to a framework, and revolve horizontally about a central bamboo shaft. But a small amount of water can be raised in this manner. One of the most common methods is by means of the water wheel, which is used where there is a current in the stream and where the land to be watered is well above the channel of the stream. The wheel is turned by the force of the current and is sometimes thirty feet high, its buckets being sections of bamboo, which are raised by the motion of the wheel and empty their contents into troughs or ditches. After the water has been raised by any of these methods, often hollow bamboo pipes or tubes are used for distributing the water over the fields. They rest upon wooden supports and branch in every direction from the source of supply.

1 It will be noticed that some of these methods greatly resemble the crude methods of the modern Egyptians. See Modern Irrigation in Egypt, Sec. 92.

See Irrigation and Its Many Methods, Sec. 30.

However, in many sections of the country the water for irrigation is carried considerable distances in buckets on a yoke placed on the shoulders of men.

That the Chinese are always slow to adopt new methods, and that they cling to their old and crude ideas, even when the example is set for more modern ones, is illustrated by the market gardeners who have come to this country. In many places in this country they use the same methods as those described above in vogue in their own country. There is one thing that they have taught the people of the eastern portion of this country, and that is the value of irrigation. Many of the market gardens along the bottom lands near our Eastern cities have a system of irrigation. The result is, that an intense cultivation and a much greater amount of products upon the same tract is made possible; in many instances a number of crops are raised upon the same tract during the same season.

§ 170. **Lessons to be learned from China—Economy.**—The only lesson the American irrigator can learn from the Chinese is in the matter of economy, and the conditions of this country have not reached the point when such extreme economy as practiced by the Chinese is necessary. However, in many sections of this country, where the water is scarce, and it is a question of the saving of water or of preventing waste, the examples set by the Chinese might well be followed.

The Chinaman fertilizes not merely once a year when putting in his crop, but from time to time until it is nearly ripe. The earth that is scooped up from the bottom of the canal is hardened in the sun, pulverized, and put on the fields. The entire surface of many of the rice fields is smoked and burned by straw. This is a laborious but very effective method of strengthening the soil, and it also kills the weeds. Of course, all the manure of domestic animals is made the most of. The value of ashes as a fertilizer is well understood, and the housewife carefully saves them, selling for a good price or using them upon the family fields. Even the sweepings of the houses are saved by these thrifty economists. The value of bones is understood, and they bring a high price. They are pulverized in a stone mortar, with hand or foot power, and used for certain soils and crops. Vats of cement or stone are

everywhere, and into these vats are thrown straw, vegetable tops, leaves, and whatever refuse there is that is not wanted for fuel or for other commercial purposes. Water is then poured in, and when the refuse is entirely rotted this water is carried in buckets and sprinkled on the growing rice and vegetables. This gathering up all the filth and using it to produce more food serves a double purpose. Not only is the productiveness of the soil preserved, but a degree of cleanliness is maintained that makes life possible. With the utter ignorance and indifference of the Chinese to cleanliness for the sake of comfort and health, if it were not profitable for them to clean up their houses and streets they would become so filthy that pestilence would sweep the population off the earth. In proportion to the density of the population the value of all fertilizers increases, so that the very crowding of the people tends to improve their cleanliness. Some of the cities are fairly clean, and it pays the people to clean up the streets and houses and carry the dirt off to their fields. the farmers are willing to pay for the privilege of buying all the refuse of a city at a good price. Bean-pulp and peanut-pulp are also purchased and used very extensively. The expense of all this, it is plain to all, must be very great. The Chinese farmer can tell you exactly what will be the difference in his crop from using a certain fertilizer, and how much is necessary to bring the best results. He calculates upon spending for this purpose alone at the rate of $12.00 (Mexican) a crop an acre, or ordinarily $36.00 a year for his three crops.

§ 171. **Modern irrigation in Siam.**—Like China and Japan, Siam has also been the home of irrigation for many centuries. About one-half of the whole country is under cultivation, and of this area four-fifths are under irrigation. A great deal of rice is raised by this method. The fields are supplied with water from canals and ditches, which branch from the rivers in all directions. The main canals are constructed by the Government, but the smaller ones, those supplying the individual fields directly, are made by the owners of the fields benefited. The country, although not so densely populated as either China or Japan, is largely under cultivation, and exports a large amount of prod-

ucts to the neighboring countries. This could only be accomplished through the system of irrigation that is practiced.

§ 172. **Modern irrigation in Japan.**—In Japan, as well as in China, irrigation has been practiced from time immemorial. But, unlike the Chinese, the Japanese do not cling so closely to the ancient customs and practices. They are always ready to adopt better methods and modern machinery, and are the most progressive people of the Orient. In the matter of irrigation they have always been progressive in their methods, and within the last few years they have sent representatives to other countries to study the question, and today rank among the foremost of nations in the matter of the conservation of water and its economical distribution. It is estimated that not less than fifteen millions of acres are under irrigation. On all of the islands the greatest possible care is exercised to utilize the water of all the short streams. On the slopes and in the narrow valleys the lands are carefully leveled and terraced, to avoid washing and to cause the water to spread evenly over the surface of the soil, and thus to become more effective. On the margins of the terraces are constructed slight ridges, which are given permanency of form by being set out to shrubbery and grass; these are the boundaries and footways between the patches of ground, as well as barriers against the washing of the water. Dams are used upon the streams, and the terracing has been such that the water can be spread out upon the cultivated fields and gently let down to lower levels and back into the main channels of the streams, after having done its work of saturating and fertilizing the fields. In times of high water the systems are so perfect that the water is spread throughout the reservoirs and ditches, thus lessening the danger of flood, as well as accomplishing its work of irrigation. In order that nothing shall be lost by washing, there are constructed ditches and canals around the lower margins of the terraced areas, which conduct the water to the lowest corners, where it passes to the next terraces below, but first flowing through settling basins, partly filled with rubbish, which collects the silt. This is afterward returned to the land for fertilization.

Upon the whole, although the streams of Japan are small and

swift, and owing to the heavy rains, there is great danger at times from floods, the Japanese seem to have made the most of their natural advantages in the matter of irrigation.

§ 173. **Modern irrigation on the Islands.**—There are many islands all over the world owned by various nations, upon which irrigation is practiced to a great extent.

On the Island of Madagascar, off the east coast of Africa, there are extensive systems. At first it was used only for rice culture, but within recent years it is being used in the cultivation of all fruits and cereals.

On the Island of Maderia off the west coast of Africa, the irrigation systems are both elaborate and extensive, covering over one-half of the entire island. Nature, on that island, has provided many catchment basins or reservoirs; many reservoirs have also been constructed, both by the Government and by individuals. There are also many springs and wells upon the island. Canals have also been constructed with great care and skill, some of them being seventy to eighty miles in length. Besides the public works, the farmers have on their lands reservoirs into which they collect their share of the water when it is delivered to them from the public ditches, and from these reservoirs they use the water as it is needed.

Upon the Islands of Hawaii the art of irrigation is practiced with great skill, and has been so practiced for many years. As these islands belong to the United States, they will be treated of in a separate chapter.[1]

In Sicily nearly all fruit culture is carried on by irrigation. As this island is a part of Italy, the system in vogue has been treated of in other sections.[2]

On the Island of Java, too, irrigation has been extensively practiced for many years, and all kinds of crops are grown by this method.

On the Island of Lombok, which lies to the east of Java, there

1 See Hawaii, Part 14.

2 See Ancient Irrigation in Italy, Sec. 73.

See Modern Irrigation in Italy, Secs. 144-159.

See, also, Carta Idrografica d'Italia, Relazioni, Sicilia, 1891, Roma: G. Bertero; Bollettino Ufficiale del Ministero d'Agricoltura, Industria e Commercio, Roma, giugno 1905, p. 149.

is the most intense cultivation of the land by means of irrigation. Here, many hundreds of square miles of irregularly undulating country have been skillfully laid out and terraced, and canals and ditches so run over it that every portion can be irrigated or drained at pleasure. It is said that the system and care with which the land is laid out, and the amount of labor that is expended upon it, exceed any other tract of equal extent in any country of Europe.

On the Island of Ceylon, under the British authorities, a decided effort has been made, and is still being made, to modernize the ancient irrigation systems, which theretofore had been allowed to fall into ruins. New canals have been built, new reservoirs constructed, and, besides this, the ancient canals and reservoirs have been modernized and are now being used. Over 1,000 miles of new canals have been constructed, and over 3,000 reservoirs, small and large, have been restored.

Upon many other islands, too numerous to mention here, throughout the entire world, the science of irrigation is practiced wherever the opportunity affords, and crops can be better raised by that means. The laws governing the waters on these islands, and its use, depend largely upon the laws of the country to which they respectively belong. But, on many of these islands, especially those owned and controlled by England, the laws of the mother country are abrogated, if found necessary, and the water taken from the streams either by the Government itself, or by private parties, and utilized to the utmost possible extent, regardless of the common law of riparian rights. This, as we have seen, is also the case in all countries controlled and governed by the English, and also the case in all English Colonies, with the exception of South Africa.[3]

§ 174. **Modern irrigation in America.**—Coming to the American continent, we find that many countries are practicing irrigation, besides the United States. In all of these countries, we may say, plans are being laid for more extensive operations. Even in the semi-arid regions we find that the application of water, by way of supplemental irrigation, is becoming each year

[3] For Irrigation in Egypt, see Chap. 4; in India, Chap. 5; in Australia, Chap. 6; in South Africa, Chap. 7; in Canada, Chap. 10.

more and more in vogue. It is recognized as the best insurance that a region can have for a regular crop return. Many regions are counted as arid, and in these, of course, irrigation is an absolute necessity; and in these regions some of the best returns are to be found. The Governments of these countries have taken the matter in hand, and either are constructing the works at their own expense, or are so fostering private enterprises that the work is going forward without intermission.

In all the Spanish-American Republics in Central and South America, irrigation is practiced to a greater or less extent. And, as has been said: "The Spanish are the best irrigators on earth." This is true to a certain extent, and they are among the best irrigators.[1] The laws of these countries follow largely the civil law, except as modified by local statutes.[2]

During the past twenty years our neighbors on the North, in Canada, have constructed great irrigation projects and have adopted laws suitable to the conditions of the country in that respect, and that, too, regardless of the common law of riparian rights of the mother country. But irrigation in Canada and the laws of waters will be discussed in another chapter.[3]

§ 175. **Modern Irrigation in Mexico.**—Our neighbors on the South, in Mexico, have continuously practiced irrigation since the time of the Spanish conquerors. In many portions of the republic great diverting and conveying works have been constructed for this purpose, and this construction is still going on. And, in this respect, the Mexican engineers are second to none in the world. The law governing the subject of waters and their use is largely based upon the civil law.[1] However, this law has been modified in many respects by the more modern Mexican statutes. We shall discuss the law of waters in force in Mexico in our chapter upon the civil law.[2]

1 For Ancient Irrigation in Peru, see Sec. 78.

2 For the Civil Law, see Chaps. 29, 30, Secs. 552-584.

3 For Irrigation in Canada, see Chap. 10, Secs. 177-237.

1 For the Civil Law, see Chaps. 29, 30, Secs. 570-594.

2 For Ancient Irrigation in Mexico, see Secs. 79-85.

See, also, Leyes sobre Vias Generales de Cominicacion y Aprovechamiento de las Aguas, de Jurisdiccion Federal, Mexico, 1894; Leyes Federales: Tierras, Aguas, Colonizacion, etc., in the series "Coleccion de Co-

Although irrigation has been practiced in Mexico for many centuries,[3] it was not until the more recent years that the greater projects were constructed. These operations must be under concessions granted by the Government, and many of these have been granted both to home and foreign capital. These projects have afforded a new opening for the investment of considerable money from this country, and the opportunity is being taken advantage of by a number of persons from the United States. The greatest drawback to the agricultural development of Mexico has been that the land of the country has been held by comparatively few people. These estates are vast and almost feudal in their pretensions. This was one of the main causes of the Mexican revolution of 1911. The signs of the times are now favorable

digos y leyes Federales," published by Herrero Hermanos, Editores; 10, Callajon de Santa Clara, 10, Mexico.

See, also, the following Diaris Oficial:

No. 38. Tuvo primera lectura y se mandó imprimir el dictamen emitido por las Comisiones unidas 1a y 2a de Puntos Constitucionales, que consulta se adicione el artículo 72 de la Constitución Política de la República, en los términos siguientes:

"Fracción XXII . . .; para definir, determinar cuáles son las aguas de jurisdicción federal y expedir leyes sobre el uso y aprovechamiento de las mismas."

No. 40. Se dió segunda lectura al dictamen subscripto por las comisiones unidas 1a y 2a de Puntos Constitucionales que termina con el siguiente.

PROYECTO DE LEY:

Artículo único—Se adiciona el artículo 72 de la Constitución Política de la República, en los términos siguientes:

Fracción XXII . . .; para definir, determinar cuales son las aguas de jurisdicción federal y expedir leyes sobre el uso y aprovechamiento de las mismas.

La Secretaría manifestó á la Cámara que las Comisiones dictaminadoras se habían acercado á la Mesa solicitando que á este dictamen se le dispensara el último trámite que le faltaba y se pusiera luego á discusión.

La Cámara accedió á lo solicitado por las comisiones ponentes y se puso luego al debate. Sin éste, el artículo único fué declarado con lugar á votar en lo particular en votación económica, y en votación nominal se aprobó por unanimidad de 125 ciudadanos diputados; mandándose comunicar á las Legislaturas de los Estados para los efectos constitucionales.

La Secretaría suplico á los ciudadanos diputados se sirvan concurrir mañana con toda puntualidad á las tres y media de la tarde.

Se levantó la sesión.

Eutimio Cervantes, diputado presidente.—*Daniel García*, diputado secretario.—*José R. Carral*, diputado secretario.

Confrontada—*Emilio Cortés.*

Es copia. México, Diciembre 14 de 1907.—El Oficial Mayor, *Agustín S. de Tagle.*

[3] For Ancient Irrigation in Mexico, see Sec. 79.

for a general breaking up of the old conditions, and that an era of general development is about to set in that will make this country a marvel in agricultural productiveness. Already, in many localities of the republic, a good start has been made in this direction. Scores of enormous tracts of land in the States of Tamaulipas and Vera Cruz, and on the Isthmus of Tehuantepec have passed into the ownership of Americans and capitalists of other countries, and have been divided up into small tracts and sold to settlers.

One of the largest irrigation projects now in process of accomplishment in Mexico is that for the utilization of Lake Chapala for a reservoir, by means of which it is expected to irrigate 500,000 acres of land in the immediate vicinity.

The Federal Government has also taken steps to improve conditions in a most substantial manner. The valley of the Nasas River is far famed for the richness of its soil. It is the chief cotton producing territory of Mexico. However, here nothing can be grown without irrigation, and the fact that during several months of the year the bed of the river is dry, has led the Federal Government to take steps to afford permanent relief to the lands already under cultivation and to water all of the available land along the river. The Government has already let the contract to an English company for the construction of a great dam across the Nasas River, at a cost of $12,500,000, Mexican money. It is said that the proposed dam will be one of the largest in the world, and will afford storage capacity for water sufficient to irrigate the whole lower valley of the river. It is understood that, although the Federal Government will bear the original cost of building the dam and the construction of the other part of the system, the land owners, to be benefited thereby, will eventually be made to reimburse the Government for the financial outlay. In fact, the general scheme is very much after those projects which are being constructed under the provisions of the National Reclamation Act by our own Government.[4]

It is in the vast central plateau of Mexico where almost unlimited opportunities are offered for the establishment of extensive irrigation projects, and considerable attention is now being given to this character of industrial development. In the more

4 For the National Reclamation Act, see Chap. 65.

northern part of the plateau the rainfall is so deficient as to make it impossible to grow crops without irrigation, except in the more particularly favored sections. In the southern portion, where there is a well defined rainy season, the precipitation is ample; but, as is the case in all countries of this nature, it lacks evenness of distribution. It is claimed that if storage reservoirs were constructed, and the surplus water distributed over the land, it would be possible to grow crops during the whole of the year and enormously increase the revenue of the land. In the northern portion of this plateau region there are already a number of large and modern irrigation systems, but for the most part the work is carried on by the natives, who still cling to the ancient methods of lifting the water from wells, streams, or reservoirs by various kinds of cumbersome water wheels or other primitive devices.[5] These primitive devices are made of wood, roughly cut and hewn, and put together with wooden pegs or tied with leather and fiber. They are operated usually by man or horse-power, but usually the former. In most cases one or two natives to each wheel do the water lifting by the exercise of their arms and legs. Although, in many localities, Americans have installed modern gasoline or steam pumps for lifting the water, the natives are slow to adopt them, and prefer the primitive methods.

Everything being considered, it may be well said that Mexico is about to enter an era of wonderful agricultural development, and that if liberal encouragement is continued to be offered by the Federal Government, it promises, within the next decade, to be one of the great agricultural countries of the world.

§ 176. Modern irrigation in the world—Conclusions.—Enough has been said to show that in the countries of the Old World, irrigation has been practiced for many years, for two main reasons. In the hot, dry, and populous countries, like Northern Africa, India, and China, the art of irrigation is a matter of great National precaution to ward off famine, which would surely follow its abandonment. The waters of the rivers, which would naturally waste themselves in the sea, are diverted from their courses and conducted over the land for the irrigation of crops to ward

[5] For Irrigation and Its Many Methods, see Sec. 30. For Methods of Taking and Applying Water to Egypt, see Sec. 92.

off famine, and to aid in saving starving humanity. In other countries that are more favorably situated, so that the annual precipitation is greater, like Italy, France, and Spain, and even England, irrigation is practiced, in a supplemental way, for the purpose of adding to the crop return, and, incidentally thereto, to the profits of the undertaking. But even in India and Egypt, the Governments seek to and do reap a profit from their investments, and that, too, even from the canals constructed primarily to ward off famine, and called "protective works."[1] It therefore follows that the motives for the practice of irrigation in any country may be many, but the great and underlying motive of all is to enlarge the capability of supporting a larger population upon a certain area of land, or in a certain country.

[1] For Modern Irrigation in India, see Secs. 106, 107, 118.

[2] For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.

CHAPTER 10.

MODERN IRRIGATION IN CANADA.

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§ 191. Saskatchewan and Alberta—"Irrigation Act"—Mode of acquisition—Construction of works.
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§ 207. British Columbia—Water Act—Powers of Board of Investigation—The determination of existing water rights.
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§ 236. Saskatchewan and Alberta—Review and our criticism of the "Irrigation Act."
§ 237. Saskatchewan and Alberta—Irrigation Act—Comparative study—Riparian rights.

§ 177. **Scope of chapter.**—In previous chapters of this work we have discussed the subjects of ancient and modern irrigation in the Old World.[1] We have also discussed modern irrigation in countries governed and controlled by the English in Egypt,[2] in India,[3] in Australia,[4] and in South Africa.[5] We will now, in the present chapter, discuss the subject of irrigation and irrigation laws in Canada and in the respective Provinces of that country, which are all English Provinces. And, in our discussion, we will make a comparison between the laws governing water rights and the use of waters in the Dominion of Canada, as compared to those subjects in the western portion of this country.

§ 178. **The English Colonists as irrigators.**—In the previous chapters of Part II, we have confined our discussions to countries governed and controlled by the English in different parts of the world, outside of America.[1] In this chapter we will discuss what is being done on this side of the water in the Dominion of Canada, which is also an English country, or province; although, in form of government it is practically independent, having the power to enact its own laws governing its internal affairs. From the five countries discussed, those of Egypt,[2] India,[3] Australia,[4] South Africa,[5] and now Canada,[6] it will be readily seen that the English people, outside of their own little island, are the greatest irrigators in the world. It seems to be a general tendency of the English people, the moment that a colony swarms out from the mother country into a new, and many times wild country, to begin the development of its natural resources at the earliest possible moment, and to the greatest possible extent. And, as agriculture is the main resource of life, and in many of these countries it can not be developed to its fullest possibilities,

1 For History of Irrigation, see Chap. 3, Secs. 63-87.

2 For Modern Irrigation in Egypt, see Chap. 4, Secs. 88-102.

3 For Modern Irrigation in India, see Chap. 5, Secs. 103-118.

4 For Modern Irrigation in Australia, see Chap. 6, Secs. 119-130.

5 For Modern Irrigation in South Africa, see Chap. 7, Secs. 131-143.

1 See Chaps. 4-7.

2 See Chap. 4, Secs. 88-102.

3 See Chap. 5, Secs. 103-118.

4 See Chap. 6, Secs. 110-130.

5 See Chap. 7, Secs. 131-143.

6 See the following Secs., Nos. 179-184.

if at all, without irrigation, it therefore follows that irrigation is developed in its aid. Neither is this done without system, or in a haphazard, careless manner; but their operations, both upon the practical side of the question and in the enactment and enforcement of laws and regulations, are based upon the experience as gleaned from all parts of the world. At the same time, while developing the resources of a country, it is also the tendency of the English people to conserve those natural resources to the greatest possible extent consistent with that development. The theory is, that the Empire of England was not built for a day; and, therefore, no one generation should rob the earth of its fruits, but that these countries should be handed down to posterity in such a condition that it might also enjoy some of these fruits. The wise laws and forest policies, the laws tending to conserve the flow of streams, the laws regulating the use of mineral lands, the laws for the protection of the soil, and the drainage laws of the English Colonies, are among the best that can be found on earth. And, with these just laws and policies is it any wonder that the British Empire has spread out until it governs in all parts of the world?

§ 179. **Particular features of the country.**—The Dominion of Canada extends from 45° north latitude northward, and reaches from the Atlantic to the Pacific Ocean. In area it is nearly equal to the whole of Europe, and comprises about 3,500,000 square miles. Canada is featured by great rivers, great lakes, plains, and forested areas. It is also traversed by great mountain ranges, the principal ones being a continuation of the Rocky Mountain ranges extending from the United States northward. The natural resources of the Dominion are enormous, and can not be exceeded by any country on the globe.

The variations of the Canadian climate are less than in many countries of much smaller extent. But throughout nearly its whole area, the country is characterized by a greater heat in summer and a much lower temperature in winter than in corresponding European latitudes. The winters are usually cold, with considerable precipitation in the way of snowfall, and the temperature varies greatly, according to the location, latitude, altitude, prevailing winds, and other conditions, which we shall not attempt to discuss here. In many portions of Canada, fruits of

all kinds, except tropical, can be grown with success. In all portions, except in the extreme north, grains and forage may be grown.

As far as the precipitation of the country is concerned, as is the case with the United States, the country merges from a humid climate in the eastern portion to one that, as far as all practical purposes are concerned, is arid, although the aridity does not reach the extent that it does in some portions of the United States, notably in Arizona, New Mexico, and in the Great Basin. In many of the driest portions crops may be grown without irrigation; but from experience, it has been ascertained that with irrigation either as supplemental to the rainfall, or regardless of the rainfall, better results may be obtained. The great fertile plains of the country, and its enormous water resources, make the cultivation of crops by irrigation practicable and always insure good results.

§ 180. **The Government of Canada.**—The Dominion of Canada is governed in many respects similar to this country. It has its general Parliament, which corresponds to our Congress. The various Provinces also have their parliaments or legislatures, which correspond to the legislatures of the States of this country. Each State may enact such laws as it sees fit, regulating and controlling the waters within its boundaries, and the uses of the same; provided, that such laws do not conflict with the laws enacted by the Dominion Parliament upon the same subject. In the Provinces of Alberta and Saskatchewan, the general laws governing and controlling the waters therein, are enacted by the Dominion Parliament, and all irrigation rights and matters are dealt with solely by the Dominion Government, and these laws are administered through the Commissioner of Irrigation, a Dominion officer. Therefore, it must be understood that the old "Northwest Irrigation Act,"[1] now the "Irrigation Act," was made solely by the Dominion Government, and the Provinces of Alberta and Saskatchewan had no voice in such enactment.[2]

In the Province of British Columbia, greater powers are conferred upon its legislature, and the "Water Act" of 1909, here-

1 See Sec. 185.

2 For the Irrigation Act, see Secs. 186-201.

inafter discussed,[3] was enacted by the legislature of British Columbia.

The principal laws upon the subject of waters in the Dominion of Canada will be discussed in the subsequent sections of this chapter. As a general thing the water and irrigation laws of Canada are wise, sane, and consistent. The strong features of these laws are, as is the case in all English Colonies or Provinces, the most absolute State control of the flow of streams, the distribution and even use of the water, and the abrogation, or at least the restriction of the old common law of riparian rights of the mother country. Very little is left to the individual in this respect. Still, all rights of the individual are protected by governmental interference, and all the farmers of that country seem prosperous and contented. This is one of the surest indications of a good Government and wise laws.

§ 181. **Irrigation projects in Canada.**—In Canada we find that there are four Provinces where great preparations have been and are now being made in irrigation matters, and these are the Provinces of Alberta, Saskatchewan, Manitoba, and British Columbia. No one of these Provinces can be called arid in the sense that aridity is known in Arizona and New Mexico, but large portions of all come within what is known as the semi-arid region. For this very reason very little interest was taken in the subject of irrigation during the first settlement of these portions, and irrigation enterprises were slow in starting. There were cycles of years when crops could be matured, and then would come a period of dry seasons, when there was almost utter failure of crops.

As was said by Mr. J. S. Tempest, C. E.:[1] "Although irrigation is usually practiced only in arid and semi-arid countries, and in the latter often only when the seasons are too dry to produce merely fair crops, it is a fact that much benefit and economic gain would result from the practice, even where there is a fairly good average rainfall. Rain does not always, or even often, fall at the time it is needed, while an efficient irrigation scheme is ready to turn on the water at a moment's notice. It has been

3 See Secs. 202-235.

1 In Bulletin No. 1, Irrigation Series 1910, Department of Interior of Canada, p. 13.

truly said that irrigation is not a mere substitute for rain, but an improvement on it."

The most of the settlers coming into the country knew nothing about irrigation, and during these dry seasons many of them abandoned their lands and moved to other sections, where there was a greater rainfall. However, about the year 1890, some settlers, who had come from the arid regions of the United States where irrigation was common, commenced experimenting by constructing small ditches for the irrigation of the lands in the valleys of the smaller streams, and the results obtained by them caused the first interest in the subject of irrigation, and indicated that by that means bountiful crops could be produced. From that small beginning irrigation in Canada has grown, until it has passed beyond the experimental stage. The enormous possibilities of the country along these lines have awakened great interest in the subject, and many great projects have been and are now being constructed. Opportunities are given under the laws for the operation of private enterprises, and much private capital is invested in these works, many of which are upon a paying basis. Railroad companies have taken advantage of their opportunities and have also constructed works for the irrigation of the lands through which their lines run.

§ 182. **Saskatchewan and Alberta Provinces—Particular features of.**—The portion of Canada included in the Provinces of Saskatchewan and Alberta, and which were formerly a portion of the Northwest Territories, lying within what is known as the semi-arid region, commences at the intersection of the 103d meridian with the International boundary, and extends northward about 350 miles. The other portion of these Provinces is within the humid region. This semi-arid region includes some 99,108 square miles, or 64,621,169 acres.

This district is intersected by several main drainage channels, including the South Saskatchewan, Bow, Belly, St. Mary, Oldman, Highwood, and Red Deer Rivers, and numerous smaller streams. The soil of this region is, as a whole, of a most fertile character. Grass of a more or less luxuriant growth is produced all through this vast area, and it may be said that within it can be found the largest unoccupied area producing grass and suitable for grazing cattle, sheep, or horses at large in Northern America. In its

general characteristics of soil and climate, and in so far as temperature is concerned, the semi-arid region is well adapted for settlement, but is lacking in the important feature of sufficient rainfall to assure the growth of crops each year, without irrigation. It is now known that during certain years there is sufficient rainfall to mature crops, and that in such seasons bountiful crops in certain districts have been harvested, but it is generally recognized that during the majority of years there is not the requisite amount of moisture to make agriculture successful, and that to insure a crop, water must be applied through irrigation.

In the matter of temperature, the area comprised in the semi-arid portion of the Provinces is more favored than other parts. Speaking generally, the summers are hot and the winters cold, and during the winter season all parts of the region are subject, to a greater or less degree, to chinook winds, which blow from the west, and which, for a period of ten weeks' duration, raise the temperature to almost summer-like conditions.

Fortunately, the semi-arid portion of the Provinces has, as a whole, been favored with a fair supply of water available for irrigation, but as is usually the case, it is far short of the amount that would be necessary to irrigate all of the land. The total amount of the water available for irrigation will only irrigate a small percentage of the total area of the 64,000,000 acres of land. Speaking in general terms, it may be stated that under the most favorable circumstances of storage of the high water and flood discharges of the streams, and also taking into consideration all the smaller water supplies, as well as of the larger rivers, and with the most intelligent use of the water, it can not be hoped to irrigate more than 15 per cent of the area included in this vast region.[1] This statement will serve to illustrate the fact that for all time some 85 per cent of this area must be devoted to grazing, and indicates that the greatest development in the region will result from as wide a distribution as possible of the irrigated areas throughout the whole region.[2]

§ 183. Saskatchewan and Alberta Provinces—The Canadian Pacific Railway Company and irrigation.—Among the greatest

1 Report of Irrigation in the Northwest Territories, 1902, p. 35.

2 See, also, for the particular features of the country, Sec. 179.

projects of the country are those owned and operated by the Canadian Pacific Railway Company. The directors of this company have always had their eyes on the more or less distant future. They have been wise enough to see that the interests of the company and those of the Dominion were in many respects identical, and that when the company expended money in the construction of irrigation works and in inducing settlers to take up land in Canada, they were not only aiding in the development of the country, but they were also insuring increased traffic for their road. For many years the investments of this company were without results, but now the returns are coming in. These returns are infinitely more satisfactory to all concerned than they would have been had the company endeavored to despoil the shippers and the country, as is the case with a number of railroad companies this side of the Canadian line. In 1911, this company owned and controlled 16,137 miles of road, as against 4,315 miles in 1886. The average annual mileage addition has been 380 miles, and during the last two years it has even been greater. In 1910 the addition was 460 miles, and in 1911, 753 miles. These facts are mentioned to show that the policy of this company is constructive, and not destructive, and that it is the greatest agent in the country tending to build up and develop its great resources. That the policy of the company was a wise one is proved by the great numbers of settlers which have come and taken up homes along its lines.

During the later years much attention has been paid by the company to its lands. On June 30, 1911, the company owned 7,061,184 acres in Manitoba, Saskatchewan, and Alberta, and 4,427,811 in British Columbia. The interesting feature of these lands is their steady rise in value. In 1905, one-half million acres, unimproved, were sold at an average of $4.80 per acre; in 1909, 306,083 acres were sold at an average of $10.96 per acre; in 1910, 829,609 acres of unimproved lands sold at $12.78 per acre, and 145,421 acres of irrigated land sold at $26.59 per acre; and in 1911, 631,777 acres of unimproved land sold at the average of $14.11, and 19,097 acres of irrigated lands were sold at the average of $33.63 per acre. And, deducting the expenses per acre for irrigation, it was seen that it was to the decided advantage of the

company to sell the lands with the water rights, rather than to sell them unimproved in this respect.

It is only within the recent years that the Canadian Pacific Railway Company has taken up the question of irrigation and the sale of irrigated lands, and even now the far-seeing statesmanship of its managers and directors is nowhere more clearly exemplified than in its great irrigation projects, and by the stimulation of immigration to the Dominion through these efforts. Up to the end of June, 1905, the total expenditures by the company on irrigation works was the sum of $796,695. In 1906, the sum of $748,270 was expended for the same purpose, or nearly as much as had been theretofore expended altogether. In the two years, 1907 and 1908, a further sum of $585,351 was devoted to this improvement work. In 1909, the further expenditure of $719,514 brought the total up to $2,849,830. This sum constructed works sufficient to irrigate an area of about 350,000 acres, being a portion of the western block of lands in the Province of Alberta. These lands, previous to this time had been unsalable on account of their arid condition, and by the expenditure of less than $3,000,000 the company was able to sell a little more than one-third of the block for more than $9,000,000. At the stockholders' meeting for the year 1910, the executive asked for and secured an appropriation of $8,500,000 for providing water for the 1,100,000 acres of land comprising the eastern block in the Province of Alberta. It was estimated that it would take three years to complete the work as then planned. Up to the end of June, 1911, something over $2,000,000 had been expended upon this second project. And, according to the last report, in all, from the beginning, the company has expended $5,018,953 in these irrigation projects. All works are constructed upon the most modern, scientific, permanent lines. The progress of the settlement under these lands has been rapid, many of the settlers coming from the United States. The company will erect a house and barn, and break and sow the land for the first year, and the settler finds thus a ready made farm, which he can purchase and enter into possession of for from $1,000 to $3,000. The cost of this work and improvements is added to the sale price of the farm. Upon the purchase of a farm the settler pays down one-tenth of the pur-

chase price and the balance is made payable in nine equal annual installments, with interest at 6 per cent per annum. The company also employs competent men to explain the most approved methods of irrigation, and to assist the settlers in the construction of their ditches.

This project is something new in irrigation matters, it being both projected and constructed by a railway company. While the railway companies in the United States have done much to promote irrigation in order to settle the country adjacent to their various roads, yet it is not within the knowledge of the writer that any of these roads has ever undertaken, with its own funds and as a part of its corporate activities, to construct and maintain an irrigation system. The Canadian Pacific Railway is unique in this matter, as it has not only constructed this irrigation system at the expense of millions of dollars, but it guarantees the water to the settler according to the "duty of water" as prescribed by the Canadian irrigation laws, and also guarantees to forever maintain the system of canals and to deliver the water to each quarter section of land brought under ditch. Partly because the cost per acre of getting the water upon the land is comparatively small, although the aggregate cost is large, and partly because the railway company is more desirous of building up a great agricultural community thereby increasing the traffic of the road, than of making an immense profit by the sale of the lands, they have been placed upon the market, with a perpetual water right, at a very moderate price.

The vastness of the undertaking, together with the fact that the great corporation, the Canadian Pacific Railway Company, is forever to maintain the system, has attracted not only the settlers to that section of the country, but it has also attracted the attention of experts in irrigation affairs the world over. The method of operation and the general policy of this railway company is something upon the order of the policy of the Government of Australia, discussed in a previous chapter.[1] Only, we believe that the railway company adopted the policy first.

In the following section, we will give a further statement of

[1] For Modern Irrigation in Australia, see Chap. 6, Secs. 119-130.

the facts of this great railway enterprise as related by Mr. A. S. Dawson, the chief engineer in charge.[2]

§ 184. The Canadian Pacific Railway Company—Statement by Mr. A. S. Dawson, chief engineer in charge of the project.—Mr. A. S. Dawson, Chief Engineer, in charge of the Canadian Pacific Railway Company's Irrigation Projects in the Provinces of Alberta and Saskatchewan, says:[1] "Supplying moisture to desert and semi-arid lands by artificial means is no new thing in the enterprises of civilization, and has been practiced on one portion or another of the globe since the dawn of history.

"It was practiced by the Egyptians, Arabians, and Assyrians many centuries past; and history records that the flood waters of the Nile were used to irrigate its valleys many hundreds of years ago. The Romans operated vast systems, which are in use at the present time; and the Chinese are credited with having put water on their rice lands by artificial means several centuries before the Christian era.

"This ancient art had its origin in America in prehistoric times with the Pueblo Indians, who inhabited what are now portions of New Mexico and Arizona.

"Mormons settling on the shores of Great Salt Lake were the first English-speaking people to make a systematic application of the principles of irrigation in Western America; and this was shortly followed by the use of ditches in California, originally constructed for placer mining. The results obtained therefrom soon induced settlers in the States of Idaho, Washington, Oregon, and Wyoming to resort to similar means in the cultivation of their crops. This was followed by large private enterprises, and by the passing in 1902 of the Reclamation Act by the Government of the United States. This vast enterprise, under the direction of the Secretary of the Interior, has now either in operation or under construction projects involving an expenditure of over $60,000,000; and has undertaken to complete 35 projects, to serve 3,200,000 acres of land, at an estimated cost of $145,000,000.

2 See Sec. 184.

1 In a lecture delivered before the Fifth Annual Convention of the Western Canada Irrigation Association, held in Calgary, Alberta, August, 1911.

"The extent to which irrigation is practiced today is oft-times overlooked; amounting as it does to 53,000,000 acres in the Indian Empire, 8,000,000 acres in Egypt, 5,000,000 in Italy, 3,000,000 in Spain, 15,000,000 in the United States, with smaller areas in China, Japan, Australia, France, South America, and elsewhere.

"The works providing for the irrigation of these vast areas represent an investment of over $1,000,000,000, and produce annually crops valued at over that amount.

"Irrigation in Southern Alberta may be said to date from 1892, when a series of dry years turned the attention of the settlers to the possibility of aiding the growth of their crops by the artificial application of water. The question subsequently assumed such importance as to warrant its being taken up by the Government, with the result that well-considered and comprehensive laws relating to the use of water for irrigation were passed, a system of general surveys undertaken to determine the source and value of available supplies, and the location of the areas where such water could be used to best advantage.

"These surveys showed that three extensive areas offered special advantages for irrigation—one containing some 250,000 acres, situated in the Lethbridge district, which could be supplied from the St. Mary's River; a second containing about 350,000 acres, lying near the junction of the Bow and Belly Rivers; and a third, a much larger one, situated along the main line of the Canadian Pacific Railway, and extending about 150 miles east of the city of Calgary. It is interesting to note that the works to serve all of these tracts have either been built, or are now under construction.

"It is the last mentioned project that this paper deals with specifically.

"This tract of land eventually passed into the hands of the Canadian Pacific Railway Company, and is now known as the Bow Valley Irrigation Block. It was conceded that its development and colonization along proper lines would add materially to the selling prices of the land; would do away with the uncertainty of getting sufficient moisture for certain crops in certain years; would admit of intensive farming on smaller areas, and would result in settlers being attracted in greater numbers than

could otherwise be expected; all of which are the basis of the revenue-producing value of any agricultural country, as far as traffic receipts are concerned.

"The Bow River heads, as you are aware, in the Bow Lakes on the eastern slope of the Rocky Mountains, and with its tributaries, has a drainage area of about 3,800 square miles at Calgary, and about 5,100 square miles at Bassano. It generally reaches its highest stages between June 15th and August 15th of each year, and its lowest stages during January and February. Its maximum flood discharge at Calgary has probably been close to 100,000 second feet, although the hydrographic records for both extreme high and low water are rather meager.

"The 'block' is an open prairie plateau, with a general elevation of about 3,350 feet above sea level at its westerly limits, sloping gradually until a general elevation of about 2,300 feet is reached at its easterly boundary. Its topography is rolling, particularly in the western portion, whereas large areas of almost level plains are found in its easterly limits. The soil is good, consisting of a heavy, black loam and clay subsoil in the westerly portions, and a lighter sandy loam of great depth overlying clay and hardpan in its easterly limits.

"It is bounded on the west by the Fifth Meridian; on the south by the Bow River; on the east by the line between ranges 10 and 11, west of the Fourth Meridian; and on the north by the Red Deer River and the north boundary of township 28. Its length east and west is about 140 miles, and it has an average width north and south of about 40 miles. It is intersected by the main line of the railway company, and numerous other railway facilities are being provided in various directions. It contains an area of 4,840 square miles, or 3,097,580 acres.

"The precipitation varies considerably from year to year, and decreases easterly as the altitude becomes lower. Meteorological records only exist subsequent to 1886, and are only applicable to the westerly portion of the block. The average annual precipitation at Calgary, between 1886 and 1910, was 15.15 inches; the minimum for the same period being 5.90 inches in 1889, and the maximum for that period 31.90 inches in 1902. The average for the irrigation period of five months, from May 1st to October 1st, covering the same years, was about 11 inches.

"This moisture, however, is not always available when most needed, and it is a recognized fact that without irrigation certain crops can not be raised to advantage; and that in any year the certainty of crop production with large yield can only be assured by artificial means.

"Surveys in connection with the project were commenced by the railway company in 1903, and have been gradually extended in detail since that date. As you may understand, this represented a vast amount of work, as an irrigation project demands surveys and examinations far more complete than those for a railway line. Elevation is the controlling feature, and lateral extent or width of country is as important as length; and width, length, and height have all to be considered.

"Accurate topographical surveys have been carried on by plane-table methods over practically the whole block at an average cost of about 10 cents per acre, on which the complete system has been projected.

"On the completion of the preliminary surveys it became evident that the block naturally divided itself into three sections, which were designated as the western, eastern, and central, of about 1,000,000 acres each; and the work is being carried on along the lines of development in the order named. The western and eastern sections are complete units in themselves, whereas the central section, owing to its general elevation, could only be served by an enlargement of a portion of the trunk lines in the western section." And then follows a specific description of the three sections referred to.

Speaking of the western section of the work, he says: "This portion of the system is being designed with a view of rotation in supply being adopted, which will result in each individual farmer obtaining a satisfactory head, a fair division of water, and simplification of operating problems. This is a matter which can not be worked out in detail until the lands are settled, but the system is being designed on the basis of giving parcels of between 80 and 100 acres a supply of two second feet for a period of 96 hours, and parcels smaller than 80 acres a similar flow for 48 hours.

"It is the intention that daily records of the receipt and delivery of water and of the outflow through all branches of the

system shall be maintained from the beginning; such data as necessary in irrigation management as bookkeeping in any commercial institution. The information thus obtained is essential in enforcing proper water economy; in preventing land from being injured; and in keeping farmers from getting into bad habits in using water, which once acquired, result in reduced crop production, increased cost of operation, and needless annoyance to the management.

"World-wide experience in the use of water on cultivated lands under any kind of crops during long periods of years, shows that duty varies with, (1) the nature of the soil; (2) the age of the soil; (3) the kind of crop; (4) the weather conditions; (5) the slope and condition of the conveying channels of supply; (6) the distance the water is carried in the ditches and channels to the fields; and (7) the experience and skill employed in irrigation. As you are aware, the legal duty in the Province of Alberta is fixed by the Irrigation Act as a continuous flow of one cubic foot per second per 150 acres for 153 days, between May 1st and September 30th. Measurement of this supply is arranged for by weirs approved by the Commissioner of Irrigation.

"The company has adopted the plan of constructing the complete distribution system so as to deliver water at the boundary of each farm unit of 160 acres or less; as it was considered impracticable to leave to the settlers the building of the smaller ditches, which would have resulted in delays to the work, excessive cost, and a retarding of the development of the area, followed by increased difficulties in operation. In constructing the distribution system, 160 acres have been considered the farm unit, although in the western section several colonies have been established on the so-called 'ready-made' farms of 80 acres. In the eastern section of the block about 5 per cent of the farm units will be sold as 80-acre farms, in addition to the establishment of a number of colonies on farms averaging from 80 to 120 acres.

"The successful outcome of any large irrigation project is only partially solved by good construction, and in some cases the administrative heads of large schemes have failed to realize that the ultimate success of such enterprises can not be fully

brought about without farmers; and that it is their labors which determine the real value of such properties. With this realization, the sale of the lands in this block warranted the establishment of a very large organization, which has extended over all important points in Canada, the United States, Great Britain, and parts of Continental Europe, and which has resulted during the past five years in the disposal of over 1,300,000 acres.

"Everything that follows in the wake of increased population is an argument in favor of irrigation and the cultivation of small areas, which can only be carried out by this means of farming. Moreover, this results in a better type of farmer, greatly improved living conditions, and correspondingly elevated social conditions.

"No practical agriculturist can fail to realize the fact that the scope for irrigation in semi-arid conditions in northern latitudes is very great, and that this system of farming will ultimately become a leading factor, and occupy a vitally important place in the agricultural development of Southern Alberta."

§ 185. Saskatchewan and Alberta Provinces—The old Northwest Irrigation Act.—In 1905 the old Northwest Territories were abolished and the Provinces of Alberta and Saskatchewan created thereout by the Dominion Parliament statute,[1] and by the Act it was provided that all laws and all orders and regulations made thereunder, so far as they are not inconsistent with the Acts creating the Provinces, shall continue in said Provinces until repealed, or amended.

In these Provinces the necessity for legislation regarding the important subject of the use of water for irrigation became apparent only during the past few years, and may, in fact, be said to date from the time, within the past twenty years, when the earlier settlers in the southern and southwestern portions of the old Northwest Territories had, by painful experience, proved that farming without the aid of irrigation was a precarious undertaking. Fortunately, however, the necessary legislation followed almost immediately upon the footsteps of crop failures, and there was practically a clear field, as far as vested rights are concerned, for the introduction of laws upon the subject of water

1 Chaps. 3 and 42 assented to July 20, 1905.

rights. This fact has had much to do with the success and the absence of litigation so far attending the administration of the Canadian irrigation law. As is stated in the introduction in Bulletin No. 1, Irrigation Series of the Department of the Interior of Canada, p. 5, "Irrigation has been practiced to some slight extent in the southern portions of what are now the Provinces of Alberta and Saskatchewan ever since these districts were first settled, but the irrigated tracts were of small extent and the works were crude, usually consisting merely of a makeshift dam and headgate and a ditch, for the irrigation of a few acres of garden or hay land in connection with cattle raising, which was practically the only occupation of the earlier settlers.

"There was at this time no law regulating the use of water for irrigation, and he who wished took from the nearest stream what he required, or thought he required, without permission and without making any record of the quantity taken. As settlement advanced, the attention of the Government was drawn to the confusion that was certain to result as this practice became more general, and steps were taken to frame an irrigation code adapted to the needs of the country."

The laws of the old Northwest Territories of Canada relating to the use of water were contained in two enactments, namely, the "Northwest Irrigation Act," assented to on June 13, 1898, and the "Irrigation District Ordinance," also assented to in 1898. The first mentioned law was an Act passed by the Dominion Parliament in 1894, and subsequently amended and consolidated, while the "Irrigation District Ordinance" was an enactment of the Territorial Legislature, authorizing the formation of the irrigation districts, which, after acquiring water rights under the Irrigation Act, the parent law, are empowered to construct works for the utilization of such water as municipal or district organizations. The history of the enactment of the "Northwest Irrigation Act" is given in the preliminary statement in Bulletin No. 1, Irrigation Series 1910, Department of the Interior of Canada, wherein it is said: "Officers of the Topographical Survey Branch of the Department of the Interior were assigned to the work, and, as a result of their investigations, a bill was introduced at the session of Parliament in 1893, but was not pressed to a vote at that session. In the following year,

opportunity having in the meantime been given for further investigation, the bill was re-introduced and passed under the title of 'The Northwest Irrigation Act.' This law has since been amended from time to time in such manner as experience has shown to be necessary, but, in its essential features, it stands today substantially as when first enacted."

After the formation of the Provinces of Alberta and Saskatchewan out of the old Northwest Territory, the "Northwest Irrigation Act" was amended, revised, and re-enacted, and is now known as the "Irrigation Act," and will be thoroughly discussed in following sections of this chapter.

§ 186. Saskatchewan and Alberta—"Irrigation Act"—Principal features of the Act—Irrigation District Ordinance obsolete.—The principal features of the Irrigation Act as the same is in force today, is set forth in a synopsis in Bulletin No. 1, Irrigation Series, 1910, Department of the Interior of Canada, as follows: "The present law is believed to embody such of the best principles of the irrigation laws of other countries as are applicable to local conditions in Western Canada, and to be free from most of the defects of those laws. The Irrigation Act applies 'to the Provinces of Saskatchewan and Alberta and to the Northwest Territories, except the provisional districts of Mackenzie, Franklin, and Ungava.' Its essential features are:

"I. That the water in all streams, lakes, springs, ponds, or other surface sources of water supply is the property of the Dominion Government.

"II. That the right to use this water may be obtained by companies or individuals upon compliance with the provisions of the law.

"III. That the uses for which water rights may be so acquired are: (a) Domestic, which includes household and sanitary purposes, and all purposes connected with the watering of stock and the operation of agricultural machinery by steam; (b) industrial, *i. e.*, the operation of railways and factories by steam; (c) irrigation, and (d) other purposes than those above-mentioned.

"IV. That the individual or company acquiring such a water right shall be given a clear and indisputable title to the right to

the use of the water so long as he shall continue to apply it to beneficial use.

"V. That such rights may be forfeited by abandonment, waste, or non-use.

"VI. That holders of water rights shall have the protection and assistance of permanent Government officials in the exercise thereof and that all disputes and complaints in connection therewith shall be referred to and settled by such officials, whose decisions shall be final."

In addition to the old Northwest Irrigation Act,[1] covering the territory which now includes the Provinces of Saskatchewan and Alberta, there was another law in force concerning waters, known as "The Irrigation District Ordinance,"[2] to be found in Chapter 74 of the Consolidated Ordinances of 1898. Upon the division of the territory composing Saskatchewan and Alberta, this ordinance was continued in full force and effect in each Province. The ordinance was modeled somewhat upon the California Irrigation District laws, with changes necessary, adapting it to local conditions.

But in spite of the success of irrigation districts in this country, they do not seem to have been successful in the Canadian Provinces, or to have been accepted by the people to any great extent. Therefore, as far as the Province of Saskatchewan is concerned, the ordinance was repealed on June 12, 1908.[3]

Relative to the Province of Alberta, advices from Mr. W. F. Clarry, Deputy Attorney General of the Province of Alberta, and P. M. Sander, Acting Commissioner of Irrigation, to the author, under date of March 28, 1912, is as follows: "This ordinance is still nominally in force, but there are, at the present time, no irrigation districts operating under its provisions." The only explanation for the failure of the Irrigation District Ordinance is, that the people of these Provinces are better satisfied with the provisions of the Irrigation Act, which is upon the theory of strict governmental control, as to the distribution and use of the waters within these Provinces.

1 See Sec. 185.

2 Enacted in 1898, No. 30.

3 Statutes of Province of Saskatchewan for 1908, Chap. 38, Sec. 8, which reads as follows: "The Irrigation District Ordinance as amended, Chap. 28 of the Ordinance of 1901, is hereby repealed."

§ 187. Saskatchewan and Alberta—"Irrigation Act"—Titles—Interpretation.—The existing irrigation and water law originally enacted in 1906,[1] by the Dominion Parliament for the Provinces of Saskatchewan and Alberta, and as amended to date, is entitled: "An Act respecting irrigation, as amended by Chap. 38, 7-8 Edward VII, and Chap. 34, 9-10 Edward VII,"[2] and is as follows:

Short title.—1. This Act may be cited as the Irrigation Act.[3]

Interpretation.—2. In this Act, unless the context otherwise requires: (a) "Minister" means the Minister of the Interior; (b) "Department" means the Department of the Interior at Ottawa; (c) "Commissioner" means the officer appointed by the Governor in Council for the execution within any Province of the duties by this Act imposed upon the commissioner; (d) "Chief Engineer" means the officer appointed by the Governor in Council for the execution within any Province of the duties by this Act imposed upon the chief engineer; (e) "Dominion land surveyor" means a surveyor duly authorized, under the provisions of the Dominion Lands Act, to survey Dominion lands; (f) "company" means any incorporated company, the object and powers of which extend to or include the construction or operation of irrigation or other works under this Act, or the carrying on thereunder of the business of the supply or sale of water for irrigation or other purposes, and includes any person who has been authorized or has applied for authority to construct or operate such works or carry on such business, or who has obtained a license under this Act, and also includes any irrigation district incorporated under an ordinance of the Northwest Territories, whether passed before or after the first day of September, one thousand nine hundred and five, or under an Act of the legislature of the Province of Saskatchewan or of the Province of Alberta; (g) "works" means and includes any dikes, dams, weirs, floodgates, breakwaters, drains, ditches, basins, reservoirs, canals, tunnels, bridges, culverts, cribs, embankments, headworks, flumes, aqueducts, pipes, pumps, and any contrivance for carrying or conducting water or other works which

1 Chap. 61, R. S. C. 1906; 61 V., c. 35.

2 This consolidation of the three above mentioned Acts is a department consolidation for office purposes.

3 61 V., c. 35, s. 1.

are authorized to be constructed under the provisions of this Act; (h) "duty of water" means the area of land that a unit of water will irrigate, which unit is the discharge of one cubic foot of water per second; (i) "applicant" means a company which has applied or is about to apply for a license; (j) "licensee" means any company which has been granted a license under this Act; (k) "domestic purposes" means household and sanitary purposes, and all purposes connected with the watering of stock and the working of agricultural machinery by steam, but shall not include the sale or barter of water for such purposes;[4] (l) "industrial purposes" means the working of railways or factories by steam, but shall not include the sale or barter of water for such purposes; (m) "Board" means the Board of Railway Commissioners for Canada.[5]

§ 188. **Saskatchewan and Alberta—"Irrigation Act"—Unit of measurement—Application of Act.**—For the unit of measurement of water and the application of the Act, it is provided, as follows:

Unit of Measurement.—3. The discharge of one cubic foot of water per second shall be the unit of measurement of flowing water.

(2) The cubic foot or acre foot, shall be the unit of measurement and quantity, and the acre foot is equivalent to 43,560 cubic feet.[1]

Application of Act.—4. This Act shall apply to the Provinces of Saskatchewan and Alberta and to the Northwest Territories, except the provisional districts of Mackenzie, Franklin, and Ungava.[2]

§ 189. **Saskatchewan and Alberta—"Irrigation Act"—Water rights.**—5. *Irrigation companies subject to this Act.*—All companies formed to promote irrigation prior to the thirteenth day of June, one thousand eight hundred and ninety-eight, shall, except, as to their powers to issue bonds, debentures, or other securities, be subject to the provisions of this Act.[1]

[4] 61 V., c. 35, ss. 2 and 8; 4-5 E. VII, c. 26, s. 1, as amended by 7-8 E. VII, c. 38, s. 1.

[5] 7-8 E. VII, c. 38, s. 1.

[1] 61 V., c. 35, s. 38.

[2] 61 V., c. 35, s. 3.

[3] 61 V., c. 35, s. 53.

6. *Property in and right to use water vested in Crown.*—The property in and the right to the use of all the water at any time in any river, stream, water course, lake, spring, creek, ravine, canyon, lagoon, swamp, or other body of water shall, for the purpose of this Act, be deemed to be vested in the Crown, unless and until and except only so far as some right therein, or to the use thereof, inconsistent with the right of the Crown, and which is not a public right or a right common to the public, is established.

(2) *Diversion or use prohibited except in exercise of right.*—No person shall divert or use any water from any river, stream, water course, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh, or other body of water, otherwise than under the provisions of this Act except in the exercise of a legal right existing at the time of such diversion or use.[2]

7. *Grant of lands not to convey water rights.*—Except in pursuance of some agreement or undertaking existing on the thirteenth day of June, one thousand eight hundred and ninety-eight, no grant shall be made by the Crown of lands or of any estate therein, in such terms as to vest in the grantee any exclusive or other property or interest in or any exclusive right or privilege with respect to any lake, river, stream, or other body of water, or in or with respect to the water contained or flowing therein, or the land forming the bed or shore thereof.[3]

8. *Water rights to be acquired only under this Act.*—Unless acquired by a grant made in pursuance of some agreement or undertaking existing on the thirteenth day of June, one thousand eight hundred and ninety-eight, no right to the permanent diversion or to the exclusive use of the water in any river, stream, water course, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh, or other body of water shall be acquired by any riparian owner or any other person by length of use or otherwise than as it may be acquired or conferred under the provisions of this Act.[4]

9. *Persons holding rights when Act first passed.*—Every person or company who immediately prior to the thirteenth day of June, one thousand eight hundred and ninety-eight—(a) held water rights of a class similar to those which may be acquired

[2] 61 V., c. 35, s. 4, as amended by 7-8 E. VII, c. 38, s. 2.

[3] 61 V., c. 35, s. 5.

[4] 61 V., c. 35, s. 6, as amended by 7-8 E. VII, c. 38, s. 3.

under this Act; or, (b) with or without authority, had constructed or was then operating works for the utilization of water, may, if he had, prior to the first day of June, one thousand eight hundred and ninety-eight, obtained a license under this Act, exercise such rights and carry on such works under the provisions of this Act.[5]

10. *Application for water rights.*—Any water, the property in which is vested in the Crown, may be acquired, for domestic irrigation, industrial, or other purposes, upon application therefor as hereinafter provided.

(2) *How made.*—All applications shall be made in accordance with the provisions of this Act.

(3) *Precedence.*—Such applications shall have precedence according to the respective dates of their filing with the commissioner.[6]

(4) *Irrigation license to include domestic use.*—A license of water for irrigation purposes, or any person who has acquired from a license water for such purposes, shall be entitled to use such water for domestic purposes.[7]

11. *Riparians not to be deprived of water for domestic purposes.*—No application for any purpose shall be granted where the proposed use of the water would deprive any person owning lands adjoining the river, stream, lake, or other source of supply of whatever water he requires for domestic or industrial purposes.[8]

§ 190. Saskatchewan and Alberta—"Irrigation Act"—Mode of acquisition—Construction of works, how authorized.—12. *License for preliminary work.*—An applicant contemplating or projecting any works under this Act, may, upon submitting a general description of such works and upon payment of a fee of three dollars, obtain from the chief engineer a license to do the necessary preliminary work in connection with the location of such works.

(2) *Licensee may enter lands, etc.*—The applicant, after he obtains such license, may, with such assistants as are necessary, enter into and upon any public or private lands to take levels, make surveys, and do other necessary work in connection with

[5] 61 V., c. 35, s. 7.

[6] 61 V., c. 35, s. 8, as amended by 7-8 E. VII, c. 38, s. 4.

[7] 7-8 E. VII, c. 38, s. 4.

[8] 61 V., c. 35, s. 9, as amended by 7-8 E. VII, c. 38, s. 5.

such location; Provided, that he shall do no unnecessary damage.[1]

13. *Requirements of application.*—Every applicant under this Act shall file with the commissioner a memorial, in duplicate, on forms provided by the commissioner, in which the applicant shall set forth: (a) His name, residence, and occupation; (b) his financial standing; (c) the source from which water is to be diverted and the point of diversion; (d) the probable quantity of water to be used; (e) the size and character of the works to be constructed; (f) the area and location of the land to be irrigated; (g) the value of such land in its present state, including improvements; (h) the probable number of consumers; and, (i) the rate, if any, to be charged for water sold.[2]

14. *If applicant incorporated company.*—If the applicant is an incorporated company, the memorial shall, in addition to the other requirements of this Act, set forth: (a) The names of the directors and officers and their places of residence; (b) the date of incorporation; (c) the amount of the subscribed and the paid-up capital and the proposed method of raising further funds, if needed; and, (d) the purposes for which the company is incorporated.[3]

15. *Documents, etc., to be filed.*—Every such application shall also file with the commissioner:

(a) *Permission to cross road, etc.*—Permission in writing from

1 61 V., c. 35, s. 10.

A person who desires to acquire a right to use water for any of the purposes previously mentioned should apply to the Commissioner of Irrigation at Calgary, Alberta, giving a general description of his proposed undertakings. Upon payment of a fee of $3 the commissioner is authorized to issue a license permitting the applicant to enter upon public or private lands for the purpose of making the necessary surveys, provided that no unnecessary damage shall be done.

2 61 V., c. 35, s. 11.

3 61 V., c. 35, s. 11.

In such cases it is required that the memorial shall, in addition to the other requirements of the Act, set forth the names and places of residence of the directors and officers, the date and purpose of incorporation, the amount of the subscribed and the paid-up capital, and the proposed method of raising further funds, if needed. More elaborate plans are also required in the cases of these larger projects, and the law is so framed as to place the Government in a position to examine the application not only from an engineering standpoint, but as a business venture as well, and has a tendency to prevent the filing of purely speculative applications.

the provincial, municipal, or other authorities having jurisdiction in that behalf, to construct any canal, ditch, reservoir, or other works referred to in the memorial upon, along, across, or under any road allowance, or any public highway, square, or other public place which may be affected by such works, or from the board as hereinafter provided, if such permission can be obtained in advance of authorization.[4]

(b) *Detail plan.*—A plan, in duplicate, on tracing linen, showing in detail all headworks, dams, flumes, bridges, culverts, or other structures to be erected in connection with the proposed undertaking.

(2) *General plan.*—The applicant shall also file with the commissioner a general plan, in duplicate, on tracing linen, drawn to a scale of not less than one to a mile, showing: (a) The source of supply; (b) the position of the point of in-take; (c) the location of the main canals or ditches; (d) the tract of land to be irrigated; (e) the name of the owner of each parcel of land crossed by the canal or ditch, or by any reservoir or other works connected therewith, or to be irrigated therefrom; and, (f) the position and area of all ponds, reservoirs, and basins intended to be constructed for the storage of water.[5]

16. *Additional material in case of large works.*—In the case of all ditches or canals carrying more than 25 cubic feet of water per second, the applicant shall, in addition to the aforesaid information, furnish in duplicate:

(a) *Profile.*—A longitudinal profile of the ditch, showing the bottom profile and the proposed service water line, with a hori-

4 7-8 E. VII, c. 38, s. 6.

5 61 V., c. 35, s. 11, as amended by 7-8 E. VII, c. 38, s. 6.

Having completed his surveys and finally decided upon his project, he should next file with the commissioner—

(a) A memorial containing full information as to the location, character, and estimated cost of the works, the location and character of the land to be irrigated, and, if water is to be supplied to others, the terms and price to be charged. Sufficient information should also be furnished to permit the commissioner to judge of the applicant's financial ability to carry out the project.

(b) A general plan of the proposed project.

(c) Detail plans of the necessary structures in connection with the undertaking.

Such memorials and plans shall be open for examination by the public at all times in the Department of the Interior and in the office of the Commissioner of Irrigation.

zontal scale not less than one inch to 400 feet, and a vertical scale not less than one inch to 20 feet;

(b) *Plan of ditches.*—A plan on a horizontal and vertical scale of one inch to 20 feet, showing, when any portion of the water is to be conveyed in full, cross-sections at a sufficient number of points to fully illustrate all the different forms which the ditch when constructed will take, particularly on side hills or elsewhere and showing, when water is to be conveyed in cut, cross-sections at the points where the shortest horizontal distance from either side of the bottom of the ditch to the surface of the ground is less than double the bottom width of the ditch;

(c) *Plan of works in connection with reservoirs.*—Plans of any dams, cribs, embankments, or other works by which it is proposed to create or which may have the effect of creating a pond, reservoir, or basin of water, or by which it is proposed to obstruct or which may have the effect of obstructing any river, stream, lake, or other source of water supply, which plans shall be prepared on a longitudinal scale of not less than one inch to 100 feet, and for cross-sections on a scale of not less than one inch to 20 feet, and shall show in detail on a scale of not less than one inch to four feet, the timber, brush, stone, brick, or other material intended to be used and how it is intended to be placed in such works; and,

(d) *Cross-section maps.*—Cross-section maps or plans, the horizontal scale of which shall not be less than one inch to 100 feet and the vertical scale of which shall not be less than one inch to 20 feet.

(2) *What the cross-section maps shall show.*—Such cross-section maps or plans shall show: (a) The surface of the ground under such pond, reservoir, or basin of water, and the surface of the water proposed to be held therein; (b) a sufficient number of lines of levels, so that the contents of the pond, reservoir, or basin of water may be accurately determined.

(3) *Scale.*—If the maps or plans show the levels by contour lines they shall be on a scale sufficiently large that the contour lines shall show a vertical distance between them not exceeding one foot.

(4) *Further particulars.*—The maps and plans shall also contain sufficient information to show clearly the property likely to be

affected by the creation of such ponds, reservoirs, or basins of water, and the manner in which affected, and shall show in detail, on a scale of not less than one inch to four feet, the proposed manner of controlling and drawing off the water from any such pond, reservoir, or basin.[6]

17. *Memorials and plans to be open for inspection.*—Such memorials and plans when so filed as above prescribed, or a true copy thereof, shall be open for examination by the public at all times in the department and at the office of the commissioner.[7]

18. *Filing elsewhere.*—In any case in which he thinks proper, the Minister may direct that a copy of the memorial and plans shall be filed in such other place or with such other official or person as he names for that purpose.

(2) *Inspection.*—Such copy also shall be open to public inspection.[8]

19. *Public notice of application—Protests to be made within thirty days.*—Public notice of the filing of the memorial and place shall forthwith be given by the applicant in some newspaper published in the neighborhood, to be named by the commissioner, not less than once a week for a period of thirty days, within which time all protests against granting the rights applied for shall be forwarded to the Minister, and such notice shall contain a statement of the nature of the rights applied for, and the general character and location of the proposed works.[9]

6 61 V., c. 35, s. 12.
7 61 V., c. 35, s. 13.
8 61 V., c. 35, s. 14.
9 61 V., c. 35, s. 15.

The application may be refused by the commissioner if it does not comply with the provisions of the law, if after inspection it appears that the project is impracticable from an engineering standpoint, or if the records show that there is not enough water available for the purpose. If, however, the application be approved, it is recorded against the stream or other source from which the water is to be drawn and the applicant is instructed to give public notice of his application by publication in five weekly issues of a local newspaper named by the commissioner. A copy of each issue of such paper should be forwarded by the applicant to the commissioner for record in his office.

The object of publication is that all interested persons may be informed of the application and given an opportunity of protesting against it if they believe it injuriously affects their interests. If protests are received they are carefully inquired into and, if ascertained to be well founded, the application is either refused or so amended as to remove the cause of complaint.

20. *Memorial and plans to be examined and approved.*—The memorial and plans filed with the commissioner, as herein provided, shall be examined by the chief engineer, and, after they have been approved by him, one copy shall be forwarded for record purposes to the department.

(2) *Minister may authorize construction.*—Upon receipt of such memorial and plans, properly approved, together with a certificate of the commissioner that the proper notice of the filing of such memorial and plans has been published, and that, if such is the case, permission has been granted by the provincial, municipal, or other authorities respectively having jurisdiction in that behalf, or by the board as hereinafter provided, to construct the said works upon, along, across, or under every road allowance, public highway, square, or other public place affected thereby, and after considering all protests filed, the Minister may authorize the construction of the proposed works with such changes and variations as he deems necessary, fixing in such authorization a term within which the construction of the works is to be completed.[10]

20a. *Minister's authorization before permission if obtained to cross roads.*—If, as respects any such road allowance, public highway, square, or other public place, the permission of the provincial, municipal, or other authorities, or the order of the board can not be obtained until the works are authorized, the Minister may authorize their construction subject to the condition that before the works are constructed upon, along, across, or under such road allowance, public highway, square, or other public place, the requisite permission shall have been obtained and filed with the commissioner and the commissioner shall have so certified to the Minister.

20b. *Crossing of irrigation works by roads.*—If the provincial, municipal, or other authorities having jurisdiction, authority, or control over any public highway desire to construct such highway over or across the works of any company and can not obtain the consent of the company so to do, or can not obtain such consent otherwise than subject to terms and conditions not acceptable to them, they may apply to the board for leave to construct, maintain, and operate such highway over or across such works.

(2) *Plan to be submitted to board.*—Upon such application the authorities so applying shall submit to the board a plan of the

[10] 7-8 E. VII, c. 37, s. 7.

works of the company at the point where it is desired to make such crossing and a plan or plans showing the proposed method of constructing the highway over or across the works, and such other plans, drawings, and specifications as the board in any case or by regulation requires.

(3) *Order granting application.*—The board may, by order, grant such application in whole or in part on such terms and conditions as it deems just and proper, subject to the provisions of this Act; may change the plans, drawings, and specifications submitted; may fix the place and mode of crossing and give directions as to the manner in which the crossing is to be constructed; and may order that detailed plans, drawings, and specifications of any structures, equipment, or appliances required shall before construction or erection be submitted to and approved by the board.

(4) *Exercise of powers.*—Upon such order being made, the authorities so applying may exercise the powers granted by the order in accordance with the terms, provisions, and conditions thereby prescribed.

20c. *Application to board to cross roads.*—If the applicant can not obtain the consent of the provincial, municipal, or other authorities having jurisdiction, authority or control over any road allowance, public highway, square, or other public place affected by its works, or can not obtain such consent otherwise than subject to conditions not acceptable to the applicant, the applicant may apply to the board for leave to construct, maintain, and operate the said works upon, along, across, or under such road allowance, public highway, square, or other public place.

(2) *Plan to be submitted.*—Upon such application the applicant shall submit to the board a plan of such road allowance, public highway, square, or public place at a point where it is desired to construct such works upon, along, across, or under the same, and such other plans, drawings, and specifications as the board in any case or by regulation requires.

(3) *Order granting application.*—The board may, by order, grant such application in whole or in part on such terms and conditions as it deems just and proper; may change the plans, drawings, and specifications submitted; may fix the place and mode of crossing and give directions as to the manner in which the crossing

is to be constructed; and may order that detailed plans, drawings, and specifications of any structures, equipment, or appliances required shall, before construction or erection, be submitted to and approved by the chief engineer.[11]

(4) *Exercise of powers.*—Upon such order being made, the applicant may exercise the powers granted by the order in accordance with the terms, provisions, and conditions thereby prescribed.

20d. *Powers of Board.*—All the applicable provisions of the Railway Act shall, *mutatis mutandis*, apply to the Board in the exercise of the jurisdiction conferred by this Act and to all persons concerned and all things affected by such exercise.

20e. *Crossings of road allowances.*—When an order is made by the board as hereinbefore provided granting leave to construct, maintain, and operate a public highway over or across the works of any company at a point where such works are crossed by a road allowance laid out according to the system of survey provided for by the Dominion Lands Surveys Act, the bridges and approaches thereto necessary for such crossing shall be constructed and maintained by the company.[12]

Excepted works.—Section 20f shall not apply to any company as respects any works for the construction of which it has obtained authorization before this Act comes into force.[13]

21. *Changes ordered by Minister to be filed.*—Any changes and variations ordered by the Minister regarding the plans of the proposed works must be filed by the applicant in the office of the

11 In case no protests have been filed, or after the satisfactory disposal of such as may have been filed, the commissioner issues a certificate to the effect that the applicant has complied with the provisions of the law, and at the same time he recommends the issue of authorization for the construction of the works, specifying the length of time he considers necessary for the purpose. The form of authorization issued to the applicant permits him to construct the works as shown by the memorial and plans filed by him, and fixes the time within which they are to be completed, but provides that right of way shall be obtained by the applicant before the works are constructed across any lands not owned or controlled by him.

12 All public highways shall be kept open for safe and convenient travel during the construction of works under the provisions of the Irrigation Act, and substantial bridges shall be constructed by the applicants before the works are taken into use, and such bridges shall always thereafter be maintained by the applicant.

13 7-8 E. VII, c. 35, s. 9.

commissioner, and shall form a portion of the record open for public inspection.[14]

22. *Deviation from plans.*—No material deviation from the plans filed shall be made without permission, and any question arising as to whether any deviation is material or otherwise shall be decided by the chief engineer or such other officer as the Minister designates.[15]

23. *Filing of plans may be waived in certain cases.*—In the case of applications for water for domestic or irrigation purposes, the Minister may, if he sees fit, waive the necessity for filing the plans required by this Act, and may require the applicants to file a memorial only.

(2) *What memorial shall contain.*—The Minister may order that such memorial shall contain all the information necessary to a full and complete understanding of the rights applied for.[16]

§ 191. **Saskatchewan and Alberta—"Irrigation Act"—Mode of acquisition—Construction of works.**—Provisions for the construction of works are as follows:

24. *When work may be commenced.*—The applicant, immediately after the receipt of the authorization, may proceed with the construction of the works authorized.[1]

25. *Highways — Bridges.* — Any applicant constructing works under the provisions of this Act shall, during such construction, keep open for safe and convenient travel all public highways theretofore publicly traveled as such, where they are crossed by such works, and shall, before water is diverted into, conveyed, or stored by any such works extending into or crossing any such highway, construct, to the satisfaction of the Minister, a substantial bridge, not less than 14 feet in breadth, with proper and sufficient approaches thereto, over such works.

14 61 V., c. 35, s. 16.
15 61 V., c. 35, s. 16.
16 61 V., c. 35, s. 17.
1 61 V., c. 35, s. 19.
Immediately upon the receipt of authorization the applicant should proceed with the construction of the works and, unless such authorization is granted between November 1 and May 1 following, is required to commence construction within two months of the date of authorization. If the Minister of the Interior so determines, the works shall be subject to inspection during construction and the cost of such inspection may be assessed upon the applicant.

(2) *Maintenance.*—Every such bridge and the approaches thereto shall be always thereafter maintained by such person or company.[2]

26. *Time for commencing works limited.*—The construction of any work authorized under this Act shall be commenced not later than two months after the date of the authorization, unless such two months expire between the first day of November and the first day of May following, in which case the time of commencement shall not be later than the first day of May following, and shall proceed continuously until sufficiently completed to supply water to all persons applying therefor within the area described in the authorization, provided there is sufficient water available for that purpose; and the Minister, or such officer as he designates, shall be the sole arbiter as to whether the work is being prosecuted with sufficient vigor.

(2) *Extension of time in case of disaster.*—Should any unforeseen disaster intervene to prevent the construction or completion of the works within the time limited, or, if for any other reason the Minister deems it expedient, he may authorize an extension of time for the commencement or completion of the works.[3]

27. *Inspection of works.*—Any works authorized under this Act shall, if the Minister so determines, be constructed subject to inspection during construction by the chief engineer or any other officer to be named by the Minister.

(2) *Cost.*—The cost of such inspection or such portion thereof as the Minister decides, shall be borne by the licensee constructing such works.[4]

§ 192. Saskatchewan and Alberta—"Irrigation Act"—Expropriation.—The provisions for the acquisition of rights of way and lands required for the works of any applicant are as follows:

28. *Applicant to have powers of railway company for purposes of construction.*—The applicant, after the receipt of the authorization, may proceed with the construction of the works authorized, and for the purposes of such construction shall have the powers

2 61 V., c. 35, s. 37.

3 61 V., c. 35, s. 20.

Should any unforeseen disaster occur to prevent the construction or completion of the works within the time limit, or if for any other reason the minister deems it expedient, he may authorize an extension of time.

4 61 V., c. 35, s. 18.

conferred by the Railway Act upon railway companies so far as the same are applicable to the undertaking of the applicant and are not inconsistent with the provisions of this Act or with the authority given to the applicant, the provisions conferring such powers being taken for this purpose to refer to any work of the applicant where in the said Act they refer to the railway.[1]

29. *Power to take lands.*—Lands required for the works of any applicant, as shown by the maps and plans filed, in whomsoever they are vested, whether in the Crown or in any other applicant or licensee, or in any railway company, or in any other person whomsoever, or any interest in or right or privilege with regard to such land which is so required, may be taken and acquired by such first mentioned licensee; and to this end all the provisions of the Railway Act which and so far as they are applicable to such taking and acquisition, shall apply as if they were included in this Act, the Minister and the Department being substituted for the Minister of Railways and Canals and the Department of Railways and Canals, respectively, wherever in the provisions of the said Act the latter Minister and Department are referred to: Provided, that the Minister may impose such terms and conditions as he thinks proper in the public interest in connection with the acquisition under this section of any lands which are vested in any other applicant or licensee, or in any railway company, or of any interest in such lands or any right or privilege affecting such lands.

(2) *Compensation.*—All the provisions of the Railway Act

1 61 V., c. 35, s. 19.

The form of authorization for the construction of works empowers the applicant to expropriate any public or private lands necessary for his purpose. Permission must, however, be obtained from the provincial, municipal, or other authorities having control over any public highway or road-allowance for the construction of the works across such, and, in the event of such consent not being obtained, provision is made in the Act for referring the application to the Board of Railway Commissioners, who have power to grant the necessary permission, either wholly or in part, or subject to such modifications in plan as may seem necessary, and upon such terms and conditions as may seem to be in the public interest.

Public or private lands, other than public highways, may be acquired by expropriation in the same manner as in the case of lands required for railway purposes, but the Minister of the Interior shall be the sole arbiter as to the area which may be taken without the owner's consent.

which are applicable shall in like manner apply to fixing the amount of and the payment of compensation for damages to lands arising out of the construction or maintenance of the works of the applicant or out of the exercise of any of the powers granted to him under this act.[2]

29a. *Lands for connecting works.*—Lands required by any person for works to be constructed to connect with and to obtain and carry water from works already authorized, plans of which have been filed as required under the provisions of this Act, may be taken and acquired by the said person under the provisions of Section 29 of this Act upon his filing with the commissioner a memorial and plans of the connecting works, together with evidence in writing that the owner of the works already authorized has consented to water being diverted therefrom by means of such connecting works, and obtaining thereupon the authorization of the Minister for the construction of such connecting works.[3]

30. *Company may construct telegraph and telephone lines, etc.*—The applicant may, for the purpose of his undertaking, construct or acquire electric, telegraph, and telephone lines or any other contrivance for the transmission of messages through or along wires, rods, tubes, or other appliances, and may acquire any land necessary for the construction and operation of such lines or contrivances, and the lands necessary to be taken and acquired for this purpose may be acquired under the provisions of the last preceding section.[4]

31. *Maps, etc., to be certified and filed.*—All maps, plans, and books of reference showing any lands other than Crown lands necessary to be acquired under the provisions of this Act, by any applicant for right of way or for any purpose in connection with the construction and maintenance of the works, must be signed and certified as correct by a duly qualified Dominion land surveyor.

(2) *In duplicate.*—Such maps, plans, and books of reference shall be prepared in duplicate, and one copy shall be filed in

2 61 V., c. 35, s. 21.

3 7-8 E. VII, c. 38, s. 10.

Plans of right of way required over private lands shall be signed and certified by a Dominion land surveyor and registered in the local land titles office. An additional copy of such plans shall be filed in the Commissioner's office.

4 61 V., c. 35, s. 50.

the office of the commissioner and the other registered by the applicant in the land titles office for the registration district within which the lands affected by such surveys are situated.[5]

32. *Disputes as to area to be taken.*—The Minister, or such officer as he designates, shall, in case of dispute, be the sole arbiter as to the area of land which may be taken by the applicant without the consent of the owner for any purpose in the construction or maintenance of the works.[6]

§ 193. Saskatchewan and Alberta—"Irrigation Act"—Licenses and licensees.—Upon the subject of the issuance of licenses and the rights of the licensees thereunder it is provided:

33. *Inspection of works on completion.*—Upon the expiration of the time mentioned in the authorization for the construction of any works, or at any time before such date, if the construction is sooner completed, an inspection shall be made by the chief engineer or such other officer as the Minister appoints.

(2) *Certificate.*—If the chief engineer upon such inspection is satisfied that the works have been completed in accordance with the application, that the right of way for the works has been obtained, that agreements have been entered into for the supply of water for the irrigation of lands which are not the property of the applicant, and that the works as constructed are capable of carrying and utilizing a stated quantity of water, he shall issue and forward to the Department a certificate setting forth the facts.

(3) *License.*—Upon receipt of such certificate the Minister shall issue a license to the applicant for the quantity of water to which he is entitled, and such license shall be recorded in the office of the commissioner.[1]

5 61 V., c. 35, s. 22.
6 61 V., c. 35, s. 23.
1 61 V., c. 35, s. 24.
Upon completion of the works an inspection shall be made by the commissioner or other officer appointed for the purpose. If, after such inspection, the commissioner is satisfied:

(a) That the works have been completed in accordance with the application;

(b) That right of way has been obtained;

(c) That agreements have been made and filed for the supply of water for the irrigation of lands which are not the property of the applicant; and

(d) That the constructed works are capable of utilizing the required quantity of water, he shall issue and forward to the department a certifi-

34. *Priority of right.*—Licensees shall have priority among themselves according to the number of their licenses, so that each licensee shall be entitled to receive the whole of the supply to which his license entitles him, before any licensee whose license is of a higher number has any claim to a supply.[2]

(2) *Settlement of disputes.*—If a complaint is made to the Minister, or to an officer authorized by him to receive such complaints, that any licensee is receiving water from a source of supply to which another licensee is entitled by virtue of priority of right, and that the licensee having such priority of right is not receiving the supply to which he is entitled, some officer to be named by the Minister, or the officer to whom complaint is so made, as the case may be, shall inquire into the circumstances of the case, and if he finds that there is ground for the complaint, shall cause the headgates of the ditch or other works of the licensee who is receiving an undue supply of water to be closed, so that the supply to which the other licensee is entitled shall pass and flow to his works.[3]

35. *Licensee's rights limited by capacity of works.*—When any works for carrying water are not of sufficient capacity to carry the quantity of water acquired by their owner, his exclusive right shall be limited to the quantity which such works are capable of carrying.

(2) *Inspection.*—In case of dispute as to such quantity, the Minister may order an inspection of the works.

(3) *Report final.*—The report and finding of the inspecting officer as to the capacity thereof shall, for the purpose of this section, be final and conclusive.[4]

cate setting forth the facts. A license is then issued to the applicant for the quantity of water to which he is entitled, based upon the area to be irrigated and the "duty of water" as fixed by the Minister. A fee of $10 is charged for each such license.—Bul. No. 1, Irr. Series, Dept. of Int., Canada, p. 8.

2 The rights of licensees are determined by the numbers borne by their licenses, and these are assigned on the dates when their applications for water rights are accepted and filed in the office of the commissioner. Each licensee is entitled to receive the whole of the supply called for by his license before any licensee whose license bears a higher number has any right to a supply. Thus, the right of each applicant is protected against all subsequent applicants, provided he complies with the law and proceeds in good faith to complete his works.

3 61 V., c. 35, s. 25.

4 61 V., c. 35, s. 26.

36. *No discrimination in prices after stated time.*—No licensee undertaking to sell water conveyed by his works shall, subsequent to the first four years after the construction of such works as are necessary to convey the water to the user, discriminate between the users of such water regarding the price thereof.

(2) *If supply of water is insufficient.*—If from any cause the whole amount of water agreed to be supplied by a licensee is not available, the licensee shall furnish to each user so much water as shall bear to the available water the same proportion as his usual supply bears to the whole amount agreed to be furnished.[5]

37. *Storage of water.*—The Minister may grant to any licensee the right, during periods of flood or high water or during those portions of the year when water is not required for irrigation purposes, to store for such purposes any water which is not required or not being used therefor.

(2) *Utilization for such purpose of existing works.*—Should there be any works for the carriage of water which are not being utilized to their full capacity by their owner, and which can with advantage be utilized to carry the whole or any portion of the water to be stored any portion of the distance it is required to be so carried or conducted, without interfering with the use made of the said works by their owner, then the said works shall be placed at the disposal of the licensee desiring to so use them.

(3) *Minister may fix rate of compensation.*—If the parties can not agree upon the amount of compensation for such service, the Minister may fix the rate to be paid therefor.[6]

38. *Disposal of surplus water to applicants.*—Any licensee shall dispose of any surplus water flowing in his works which is not being utilized for the purposes authorized, to any person

5 61 V., c. 35, s. 35.

6 61 V., c. 35, s. 36.

The Minister may grant to any licensee permission to store flood water which is not required or being used for any purpose, and if any works for the carriage of water are not being utilized to their full capacity by their owner, the Minister may permit of the use of such works by any licensee for the carriage of such water. If the respective parties fail to agree upon terms the Minister may fix the rate to be paid.—Bulletin No. 1, Irr. Series, Dept. of Int., p. 9.

applying therefor for irrigation purposes and tendering payment for one month in advance at the regular prices.

(2) *Payment by applicant.*—The delivery of such surplus water need not be made until the persons so applying pay or tender an amount equal to the cost and expense of the works required to convey the surplus water to them, or until they shall themselves construct such works.

(3) *Quantity of water to which applicant is entitled.*—When the necessary works have been so constructed the applicant shall be entitled to the use of so much of the surplus water as such works have the capacity to carry.

(4) *Limitation.*—Nothing in this section shall be considered to give to any person acquiring the right to use surplus water any right to the said surplus water when it is needed by the licensee for the purposes authorized, or to waste or sell or dispose thereof after being used by him, or shall prevent the original owners from retaking, selling, or disposing thereof in the usual customary manner after it has been so used as aforesaid.[7]

§ 194. **Saskatchewan and Alberta—"Irrigation Act"—Complaints and inspection.**—The provisions for complaints and the inspection of the works are as follows:

39. *Order by Minister in case of complaint against licensee.*—When a complaint, under oath of the complainant and of at least one witness, is made to the Minister or the commissioner by a customer of water who has paid his rates, that a licensee who has engaged or is under obligation to supply him with water is failing to do so, or is failing to keep his works in proper condition, the Minister or some person or officer appointed by him for the purpose may make immediate inquiry and take all necessary steps to ascertain the truth of the complaint, and, if he considers the complaint established, may order and direct that the licensee shall take forthwith such action as he considers necessary in order, as far as possible, to remove the cause of complaint.

(2) *Certificate by Minister if order disobeyed.*—If the licensee

[7] 61 V., c. 35, s. 34.

fails to obey such order, the Minister shall forthwith issue a certificate to that effect, reciting all the facts.[1]

(3) *Reference to judge.*—In the Province of Saskatchewan or Alberta the judge of the Supreme Court of the Northwest Territories for the judicial district in which such works lie, pending the abolition of that court by the legislature of the Province, and thereafter any judge of such superior court as in respect of civil jurisdiction is established by the legislature of the Province in lieu thereof, and in the Northwest Territories a stipendiary magistrate having jurisdiction in the district or place where such works lie, upon the production of such certificate, shall hear and determine the matter in a summary manner, and shall order the licensee to proceed with all dispatch to take such measures as the judge or magistrate considers necessary in the premises.

(4) *Refusal to obey order of judge.*—The refusal or neglect to obey any order made by the judge or magistrate under this section may be treated and punished as contempt of court, and such other proceedings may be had and taken thereon as in the case of non-compliance with any other mandatory order of the said court or a judge thereof.[2]

40. *Disputes as to quantity diverted.*—In case of dispute as to quantity of water diverted, the Minister may order an inspection of the works of the licensee by an officer named by him for that

1 Very complete provision is made for ensuring that companies undertaking to supply water for irrigation purposes shall live up to their obligations. As has already been said, the rates to be charged for water and the general form of the agreements for its supply are subject to the approval of the Minister, and copies of all such agreements must be filed in the office of the commissioner and in the Department. In addition to this the Minister is empowered to inquire into such complaints as may be brought to his notice, and to take such action as he may consider necessary to remove the cause thereof. Upon failure by any licensee to obey the Minister's order the matter may be referred to the courts.

If, after inspection, it shall be shown to the Minister's satisfaction that any works, either completed or under construction, are injuriously affecting the interests of others, he may order such changes in the works as he may consider necessary for the purpose of removing the cause of complaint, and upon failure of an applicant or licensee to obey such order the minister shall refer the matter to the courts for summary hearing and such remedial action as the judge or magistrate may consider necessary.—Bulletin No. 1, Irr. Series, Dept. of Int., p. 9.

2 61 V., c. 35, s. 40.

purpose; and for all purposes of this Act, the report and finding of such officer as to the quantity diverted shall be final and conclusive.[3]

41. *Inspection on application of proprietor near works.*—Should any person residing on or owning land in the neighborhood of any works, either completed or in course of construction, apply to the Minister in writing for an inspection of such works, the Minister may order an inspection thereof.

(2) *Deposit to be made by applicant.*—The Minister may require the person so applying to make a deposit of such sum of money as the Minister thinks necessary to pay the expenses of an inspection, and in case the application appears to him not to have been justified, may cause the whole or part of the expenses to be paid out of such deposit.

(3) *Enforcing payment of costs.*—In case the application appears to the Minister to have been justified, he may order the applicant for a license, or the licensee, to pay the whole or any part of the expenses of the inspection, and such payment may be enforced as a debt due to the Crown.

(4) *Works, etc., to be made secure.*—Upon any inspection under the provisions of this section the Minister may order such applicant or licensee to make any addition or alteration which he considers necessary for their security to or in any works of the applicant or licensee, and if the applicant or licensee fails to obey such order, the Minister shall forthwith issue a certificate to that effect, reciting all the facts, and, in the Province of Saskatchewan or Alberta, the judge of the Supreme Court of the Northwest Territories for the judicial district in which such works lie pending the abolition of that court by the legislature of the Province, and thereafter any judge of such superior court as in respect of civil jurisdiction is established by the legislature of the Province in lieu thereof, and, in the Northwest Territories, a stipendiary magistrate having jurisdiction in the district or place where such works lie upon the production of such certificate, shall hear and determine the matter in a summary manner and shall order the applicant or licensee to proceed with all dispatch to take such measures as the judge or magistrate con-

[3] 61 V., c. 35, s. 32.

siders necessary in the premises; and the refusal or neglect to obey any order made by the judge or magistrate under this section may be treated and punished as contempt of court, and such other proeeedings may be had and taken thereon as in the case of non-compliance with any other mandatory order of the said court or judge thereof.

(5) *Section not to apply.*—This section shall not apply to cases where the Minister waives the filing of plans.[4]

42. *Information to be afforded to inspecting officer.*—Every applicant or licensee and the officers and directors of the applicant or licensee, if an incorporated company, shall afford to any inspecting officer such information as is within their knowledge and power in all matters inquired into by him, and shall submit to such inspecting officer all plans, specifications, drawings, and documents relating to the construction, repair, or state of repair of the works or any portion thereof.

(2) *Proof of his authority.*—The production of instructions in writing, signed by the Minister or his deputy or the secretary of the Department, shall be sufficient evidence of the authority of such inspecting officer.[5]

§ 195. Saskatchewan and Alberta—"Irrigation Act"—Amalgamation of companies.—Provisions are made for the amalgamation and consolidation of companies, as follows:

43. *Procedure and requirements.*—The Governor in Council may authorize two or more companies whose works are contiguous, no one of which is an irrigation district incorporated under an ordinance of the Northwest Territories, to unite and form one company with a view to providing increased water supply and extending their works, when he is satisfied that: (a) The holders of more than 50 per centum of the capital stock of each company are in favor of the union; (b) the users dependent upon the water supply will not be injured; and, (c) the companies to be united have the necessary financial means for carrying out the proposed undertaking.

(2) *Particulars.*—In such case the same particulars shall be furnished to the Governor in Council as are required to be fur-

[4] 61 V., c. 35, s. 18. [5] 61 V., c. 35, s. 28.

nished upon an application for authorization to construct works under this Act.

(3) *Notice.*—Public notice of the authorization of the united companies and their proposed works shall be given in the manner prescribed by this Act respecting the publication of a notice of filing of memorials and plans.[1]

§ 196. Saskatchewan and Alberta—"Irrigation Act"—Expropriation, cancellation, and forfeiture by the Government.—Provisions for the expropriation of works of private parties by the Government, the cancellation of licenses, and the forfeiture of rights by the Government, are as follows:

44. *Expropriation of works by the government.*—The Governor in Council may, if in the public interest it is at any time deemed advisable so to do, take over and operate or otherwise dispose of the works of any licensee authorized under this Act: Provided, that no person who is then using the waters of the said works shall be deprived of the quantity of water to which he is entitled, and that the Governor in Council shall have due regard to the claims to consideration of any persons who have prepared, or have in course of preparation, any land to be supplied with water by the works taken over.[1]

(2) *Compensation.*—Compensation shall be paid for such works at such value as shall be ascertained by reference to the Exchequer Court, or by arbitration, one arbitrator to be appointed by the Governor in Council, the second by the licensee, and the third by the two so appointed, or, in case these can not agree as to the third arbitrator, by the Exchequer Court.

(3) *Measure of.*—In estimating such value the Court or the arbitrators may take into account the expenditure of the licensee and the interest on such expenditure, and the value of his property, works, and business.[2]

1 61 V., c. 35, ss. 41 and 54.

1 The Governor in Council is empowered to take over, operate, or otherwise dispose of any works authorized under the Irrigation Act, if he deems such action advisable in the public interest, having due regard to the rights of all persons dependent upon such works for water supply. The rate of compensation to be paid for works so taken shall be fixed by arbitration.—Bulletin No. 1, Irr. Series, p. 10.

2 61 V., c. 35, s. 46.

45. *Cancellation of license and reservation of water right in certain cases.*—When the land to be irrigated by the water granted to a licensee is land for which letters patent from the Crown have not been issued, being held by the licensee under a homestead or other conditional entry or a lease in accordance with the provisions of the Dominion Lands Act, or under an agreement to purchase such land, the license for such water shall be cancelled upon receipt by the Minister of a certificate of the cancellation of such homestead or other conditional entry, lease, or agreement: Provided, that the water right necessary for the irrigation of such land may be reserved for such time as the Minister determines, and may be disposed of, together with all works connected therewith, to the next occupant or purchaser of such land, upon such terms and conditions as the Minister determines.

(2) *New license.*—The new license issued for such water shall have the same number and hold the same priority of right as the original or cancelled license.[3]

46. *Forfeiture of licensee's rights by waste or nonuser.*—When any licensee abandons or ceases to use or wastes any water to which his license entitles him, and any charge of such abandonment or ceasing to use or wasting water is made to the Minister, such charge may be inquired into by him or by any person or officer appointed by him for that purpose.

(2) *By Minister.*—The Minister, if he deems just and proper, may, by order, declare a forfeiture of the license, and the license so ordered or declared to be forfeited shall be cancelled and shall cease and determine.[4]

47. *Forfeiture of rights held prior to July 1, 1898, if license not taken.*—Unless he had been duly licensed under the Northwest Irrigation Act of 1894, or unless he obtained a license under

[3] 61 V., c. 35, s. 27.

[4] 61 V., c. 35, s. 33.

When any charge is made to the Minister that any licensee has abandoned, or ceased to use, or is wasting water, such charge may be inquired into and, if found true, the license may be canceled, if the Minister so orders.

If any authorized works are not completed within the time granted for the purpose, the applicant's rights shall cease, except in so far as they are necessary for the operation of that portion of the works then completed.—Bulletin No. 1, Irr. Series, p. 8.

the provisions of the Northwest Irrigation Act, 1898, the interest of any person in water rights of a class similar to those which might be acquired under the said last mentioned Act, held immediately prior to the thirteenth day of June, one thousand eight hundred and ninety-eight, or in works constructed and in operation for the utilization of water immediately prior to that date, shall, without any demand or proceeding, be absolutely forfeited to the Crown, and shall be disposed of or dealt with as the Governor in Council sees fit.[5]

48. *Forfeiture of rights if works are not completed within time limited.*—Upon the expiration of the time limited under the provisions of this Act, or under an extension granted by the Minister for the completion of any authorized work, the rights granted to the person or company shall cease and determine, except in so far as they are necessary for effectually operating the works then completed, and any works at the date of such forfeiture constructed or acquired, may be taken over and operated or disposed of by the Minister in the manner and upon the terms hereinbefore provided.[6]

§ 197. Saskatchewan and Alberta—"Irrigation Act"—General provisions.—The general provisions relating to the by-laws of companies, water rates, and agreements with consumers are as follows:

49. *By-laws of company.*—The by-laws and regulations of companies operating under this Act shall be subject to revision and approval by the Minister and shall not contain anything contrary to the true intent and meaning of this Act.

(2) *Tariff of charges.*—No tariff of charges for water furnished by any licensee shall come into operation until it has been approved by the Minister.[1]

(3) *Agreements with consumers.*—No agreement for the supply of water to consumers by companies operating under this Act shall contain anything contrary to the true intent and meaning of this Act, nor shall any such agreement become effective unless the general form thereof and the conditions contained therein have been first authorized by the Minister.

5 61 V., c. 35, s. 7.
6 61 V., c. 35, s. 20.
1 61 V., c. 35, s. 47.

(4) *Filing of by-laws, tariffs, and agreements.*—Copies of all such by-laws, regulations, agreements, and tariffs shall be filed in the office of the commissioner and in the Department.[2]

50. *Borrowing powers.*—Any company authorized under this Act, and which is not an irrigation district incorporated under an ordinance of the Northwest Territories, may issue bonds, debentures, or other securities to the amount of its subscribed capital, or double the amount of its paid-up capital, whichever is the smaller amount.[3]

51. *Company may acquire lands for improvement by irrigation.*—Any company authorized under this Act, and which is not an irrigation district incorporated under an ordinance of the Northwest Territories, may acquire land by purchase or lease for improvement by irrigation.

(2) *Disposal of lands within 15 years.*—The company shall dispose of such land within fifteen years after acquiring the same, except such lands as are actually under cultivation or are being used for farming, gardening, stock-raising, dairying, horticulture, tree-planting, and forestry; provided, that the lands so excepted do not comprise more than 10 per centum of the total area of land brought under irrigation by the company.

(3) *Otherwise to revert.*—Any of such lands not so disposed of shall revert to the Crown.[4]

52. *Annual return by company.*—Every company obtaining a license under this Act, shall, on or before the thirty-first day of January in each year, make a return to the Minister, attested by the oath of its president and secretary, for the year ending the thirty-first day of December preceding, showing: (a) The amount expended on construction; (b) the amount expended on repairs; (c) the amount received from shareholders; (d) the amount of bonds issued; (e) the amount received for water supplied for irrigation; (f) the amount received from other sources; (g) the amount of dividend declared and paid; (h) the amount of capital stock authorized; (i) the amount of capital stock subscribed; (j) the amount of capital stock paid up to date; (k) the amount of bonded indebtedness; (l) the amount bonds sold for; (m) the rate of interest bonds bear; (n) the amount of indebted-

[2] 7-8 E. VII, c. 38, s. 11.
[3] 61 V., c. 35, ss. 48 and 54.
[4] 61 V., c. 35, ss. 49 and 54.

ness other than bonds, and the rate of interest such indebtedness is bearing; (o) the cost of management; (p) the works, and their extent and character; (q) the number of miles of canals, ditches, etc.; (r) the number of users; (s) the number of acres actually under irrigation; (t) the number of acres of irrigable land in the system; (u) the names of officers and employees; (v) the proposed extensions during ensuing years and the acreage to be covered thereby; and, (w) such other data as the Governor in Council sees fit to order.

(2) *Copy of by-laws.*—Such annual return shall have attached thereto a copy of the by-laws of the company, showing all amendments thereto during the year covered by the said return.

(3) *Exception.*—The returns required by this section may be waived by the Minister in the case of a private person supplying water solely to himself.[5]

§ 198. Saskatchewan and Alberta—"Irrigation Act"—New Provinces.—53. *Administration in new Provinces.*—The Governor in Council may, by order, make provision for the administration of this Act, within the Provinces of Saskatchewan and Alberta and any Province established in any portion of the Northwest Territories, and for the appointment of such officers and persons, and the designation of such places for the filing or deposit of applications, memorials, maps, plans, books of reference, and other documents and things, and for the recording of licenses, and for the designation of such other places as are deemed necessary for the purposes of such administration.

[5] 61 V., c. 35, s. 39.

Each company obtaining a water license is required to file a return in January of each year, giving a comprehensive statement of its operations, including statements of all receipts and disbursements, the mileage of canals and ditches constructed, the number of water users, and the acreage actually under irrigation. Copies of all by-laws, regulations, agreements, and tariffs must also be filed, and the general form of, and the conditions contained in, agreements for the supply of water, as well as the rate to be charged for water, must be submitted to and approved by the Minister before coming into operation. Thus in addition to a careful scrutiny of each application before acceptance, very complete supervision and control is afterward provided, in order that the interests of water users may be adequately protected.—Bulletin No. 1, Irr. Series, p. 9.

(2) *Publication.*—Any such order shall be published in the "Canada Gazette."[1]

§ 199. Saskatchewan and Alberta—"Irrigation Act"—Powers of Minister.—54. The Minister may—

(a) *Measure of water.*—Define the manner in which the measure of water shall be arrived at;

(b) *Duty.*—Define the duty of water according to locality and soil;

(c) *Time.*—Define the portion of the year during which water shall be supplied for irrigation;

(d) *Licenses, fees.*—Fix the fees or charges to be paid for licenses issued under this Act, which fees or charges may be varied according to capital employed or volume of water diverted;

(e) *Diversion.*—Regulate the extent of diversion from rivers, streams, lakes, or other waters;

(f) *Passage of logs.*—Regulate the passage of logs, timber, and other products of the forest through or over any dams or other works erected in rivers, streams, lakes, and other waters under the authority of this Act;

(g) *Water rates.*—Regulate from time to time the water rates which may be charged by licenses, and the publication of tariffs of rates;

(h) *Forms.*—Prescribe forms to be used in proceedings under this Act;

(i) *Penalties.*—Impose penalties for violations of any regulation made under the authority of this Act, which penalties shall in no case exceed a fine of $200 or three months' imprisonment, or both;

(j) *Supply of water.*—Regulate the manner in which water is to be supplied to persons entitled thereto, whether continuously or at stated intervals, or under both systems;

(k) *Determination of disputes.*—Authorize some person or officer, whose decision shall be final and without appeal, to decide in cases of dispute as to what constitutes surplus water as mentioned in this Act;

(l) *Generally.*—Make such orders as are deemed necessary, from time to time, to carry out the provisions of this Act accord-

1 4-5 E. VII, c. 26, s. 1.

ing to their true intent, or to meet any cases which arise and for which no provision is made in this Act;

(m) *Idem.*—Make any regulations which are considered necessary to give the provisions of this Act full effect;

(n) *Water gauges.*—From time to time authorize the establishing in rivers, streams, lakes, and other waters, water gauges for computing the approximate volume and discharge of waters, the placing of high-water marks on rivers and streams, lakes, and other waters when in flood, the taking of steps for securing analyses of the water of rivers, streams, lakes, and other waters, and the adopting of such other measures and proceedings for promoting the beneficial use of water, and for controlling and regulating the diversion and the application thereof as he finds necessary and expedient and as are consistent with the provisions of this Act;

(o) *Power of Minister to secure surveys and estimates.*—Take such steps as he deems necessary at any time to secure a complete or partial survey of the sources of the water supply for irrigation and other purposes, with an estimate of the extent and location of irrigable lands and of the site or sites suitable for ponds, basins, and reservoirs for water storage and irrigation canals and ditches, and reserve lands forming such sites from general sale and settlement and dispose thereof by sale or lease, to be utilized for the purposes within the purview of this Act. Where any of the lands required for such purposes are not Dominion lands, the Governor in Council may acquire title thereto by expropriation, and for this purpose all the provisions of "The Expropriation Act," which, and so far as they are applicable to such acquisitions, shall apply as if they were included in this Act;

(p) *Protection of sources of supply.*—Take such steps as he thinks necessary to protect the sources of water supply and to prevent any act likely to diminish or injure such supply.[1]

[1] 61 V., c. 35, ss. 44, 45, and 51, as amended by 9-10 E. VII, c. 34, s. 2.

Under section 54 of the Act the Minister is given general power to make such orders and regulations as may be necessary to carry out the provisions of the Act according to their true intent and to meet any cases which may arise and for which no specific provision is made. Among the more important of the regulations so far made are the following:

Measurement of water. Detailed instructions have been given for ascer-

55. *Minister may issue subpoena.*—The Minister or any one specially authorized by him may, when he deems it necessary for the satisfactory carrying out of the provisions of this Act or the regulations to be framed under it, summon before him any person

taining the volume of water carried by any stream and the measurement of the quantity diverted therefrom, for the establishment of gauge rods in the streams and for standard measuring devices at the headgates of diversion canals and ditches.

Duty of water. The ratio between a given quantity of water and the area of land it will irrigate has been fixed at one hundred and fifty acres for each cubic foot of water per second flowing constantly throughout the "irrigation season" and all licenses are issued upon this basis.

Irrigation season. The portion of the year during which water may be used for irrigation purposes has been defined as the period from the 1st of May to the 30th of September.

License fees. A fee of $10 is charged for each license and a separate license is issued to each person for each stream from which water is diverted. It is not the intention to derive revenue from the issue of licenses, but merely to cover the cost of preparation and issue.

Right of way. Right of way for irrigation canals or other works in connection therewith is granted free of charge over Dominion lands and such right of way, whether over Dominion or private lands, is limited to a strip of thirty feet in width, exclusive of the width of the ditch, the intention being to limit the grant to such land as may actually be required to give access to the works for the purpose of repairs.

Forms. The Minister may prescribe the forms to be used in carrying out the provisions of the Act and suitable forms have been adopted where necessary.

Surveys, etc., and reservation of land. The Minister is empowered to make such surveys as may be necessary to determine the quantity of water available for use under the provisions of this Act; to establish water gauges for computing the volume of discharge at the various stages of streams; to regulate the extent of diversions so as to secure a beneficial use of the available supply; to reserve from general sale and settlement such Dominion lands as may be required for reservoirs or other purposes in connection with irrigation, and to acquire by expropriation any private lands similarly required. Lands so reserved or acquired may be disposed of by sale or lease for utilization under the provisions of this Act.

Leasing of reservoir sites. Suitable sites for reservoirs in connection with any authorized irrigation scheme may be leased for the purpose of water storage, and such leases may be renewed from time to time at the will of the lessee so long as he continues to use the lands for such purposes and complies with all the provisions of the Irrigation Act. Should the lessee cease to use the lands for the purposes mentioned the lease shall be cancelled and the lands will then become available for lease to any other applicant upon similar terms. The annual rental of land for reservoir purposes is at present fixed at twenty-five cents per acre.—Bulletin No. 1, Irr. Series, pp. 10, 11.

by subpoena, examine such person under oath, and compel the production of papers and writings.

(2) *Penalty for disobeying it.*—Upon neglect to obey such summons or refusal to give evidence, or to produce the papers or writings demanded of him, the Minister or the person authorized may, by warrant under his hand, order the person in default to be imprisoned in the nearest common jail as for contempt of court, for a period not exceeding fourteen days.[2]

56. *Before whom affidavits, etc., may be taken.*—All affidavits, oaths, solemn declarations or affirmations required to be taken under this Act, or any regulation made thereunder, may be taken before the Chief Engineer, or any person specially authorized by the Minister to take them, or any other person authorized to take affidavits in the Provinces of Saskatchewan or Alberta, or the Northwest Territories.

(2) *Minister may require verification by affidavit.*—The Minister may require any statement called for under this Act, or under any such regulation, to be verified by oath, affidavit, affirmation, or declaration.[3]

57. *Publication of regulations.*—All regulations made and forms prescribed by the Minister under this Act shall be published in the "Canada Gazette," and shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof.[4]

§ 200. **Saskatchewan and Alberta—"Irrigation Act"—Penalties.**—The provisions relative to crimes and offenses, as provided by the Act, are as follows:

58. *Obstructing inspecting officer—Penalty.*—Every person who wilfully obstructs an inspecting officer in the inspection of his duty shall be liable, on summary conviction, to a penalty not exceeding $20, or to imprisonment for a term not exceeding two months, with or without hard labor, or to both.[1]

59. *Obstructing engineer or surveyor—Penalty.*—Every person who interrupts, molests, or hinders in this work any engineer or Dominion land surveyor engaged in making surveys or levels, or in other operations in connection with any work authorized

[2] 61 V., c. 35, s. 42.
[3] 61 V., c. 35, s. 43.
[4] 61 V., c. 35, s. 52.
[1] 61 V., c. 35, s. 29.

under this Act, is guilty of an offense, and liable, on summary conviction, to a penalty not exceeding $20, or to imprisonment for a term not exceeding two months, or to both.[2]

60. *Improper diversion by any person—Penalty.*—Every person who wilfully, without authority, takes or diverts any water from any river, stream, water course, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh, or other body of water, or from any works authorized under this Act, and every licensee or other person who takes or diverts therefrom any greater quantity of water than he is entitled to, is guilty of an offense, and liable, upon conviction, either summary or upon indictment, to a fine not exceeding $5 per day or fraction of a day for each unit or fraction of a unit of water improperly diverted, or to imprisonment for a term not exceeding thirty days, or to both.[3]

61. *Discriminating between the users of water.*—Every licensee under obligation to sell water conveyed by his works who, after the expiration of four years from the time of completion of the works so as to convey the water to the user, discriminates between the users of such water regarding the price thereof, or who in case of a deficiency in the whole amount agreed to be supplied, discriminates between the users of the water regarding the proportionate quantity to be furnished to each user, shall be guilty of an offense against this Act and liable, upon summary conviction, to a fine not exceeding $1,000 for each and every such offense, or to imprisonment for a period not exceeding two months, or to both.[4]

61b. *Application of provincial laws respecting drainage.*—Notwithstanding anything in this Act contained, the Minister may, upon the application of the proper officer of the Province, approve of the construction of any ditch or drain proposed to be constructed under the authority of an Act providing for the drainage of lands, enacted by the legislature of any Province to which the "Irrigation Act" applies.

(2) *Report by commissioner on proposed drainage works.*—Before such approval is given, there shall be filed in the office of the commissioner a general description of the land which it

[2] 61 V., c. 35, s. 30.
[3] 61 V., c. 35, ss. 31 and 32, as amended by 7-8 E. VII, c. 38, s. 12.
[4] 61 V., c. 35, s. 35.

is proposed to drain, and the nature and location of the proposed ditch or drain, and the commissioner shall report to the Minister, setting forth: (a) The effect of the operation of such ditch or drain upon the effectiveness or operation of any works theretofore authorized under the "Irrigation Act"; (b) the effect of such operation upon irrigation generally, and its future developments; and (c) his own opinion as to the merits of the application.

Plans may be required.—The Minister may, if he deems it advisable, require filing of duplicate plans showing the proposed works and the land to be drained.[5]

(3) *Approval of Minister.*—When such approval has been given by the Minister in writing, such ditch or drain may be constructed and operated under the provisions of the Provincial Act, notwithstanding anything in this Act contained; and no further or other license to use or affect such waters as are used or affected by its construction and operation shall be necessary.

(4) *Rights saved.*—Nothing in this section or in any such approval shall affect any right which has heretofore been acquired under the "Irrigation Act" and is still subsisting.[6]

§ 201. **Saskatchewan and Alberta—Regulations for the sale of lands required in connection with any system of irrigation.**—In order to encourage settlement and the practice of irrigated farming in southern Alberta and southwestern Saskatchewan where the available annual rainfall seldom exceeds 16 inches, and often falls considerably below that figure, the Government offers to sell its land within a defined tract in the drier portion of this district at the rate of $3 per acre, under an order approved in Council, dated November 9, 1910, as amended by an order in Council, dated November 25, 1910.[1]

1. The sale of lands for reclamation by means of irrigation or in connection with any system of irrigation works shall be confined to lands within the following described territory. (Here follows a description of the land.)

2. Lands within the tract described in paragraph one (1) may

[5] 7-8 E. VII, c. 38, s. 2 of s. 13, as amended by 9-10 E. VII, c. 34, s. 1.

[6] 7-8 E. VII, c. 38, s. 13.

[1] In effect by departmental order from 18th of April, 1910.

be sold for irrigation purposes on the following terms and conditions:

(a) No agreement for sale shall be made unless the purchaser shall have received authorization for the construction of works for the irrigation of such proportion of the lands so purchased as may be satisfactory to the Minister of the Interior and in accordance with the conditions set forth in clauses (b) and (c) of these regulations.

(b) The sale of an individual quarter section, or less, may be made on the condition that the area thereof to be irrigated shall be ten acres or over, and provided that such area shall be irrigated by means of an irrigation system which shall not be connected with any other system and the water in which shall not be used upon any other lands.

(c) Sales of areas in excess of one quarter section, or in case it is proposed to irrigate land on more than one quarter section, will be made only upon the condition that at least fifty per cent (50%) of the area sold shall be irrigated.

(d) All sales shall be at the rate of $3 per acre, payable in six equal, annual installments, the first of which shall become due and payable sixty days from the date upon which the sale is authorized. Interest at five per cent per annum will be charged from the date of the sale.

(e) It shall be a condition of all sales that the irrigation works shall be completed to the satisfaction of the Minister of the Interior and that the lands shown as irrigable shall actually be irrigated for at least one season before letters patent are issued.

(f) Each purchaser will be required to enter into an agreement to acquire, by purchase or otherwise, any lands not owned by the Crown and upon which any of his works are to be constructed, and then to vest such lands in the Crown. A license of occupation will be issued to the purchaser, after the completion of the works and the issue of the water license, granting to him the right to use such lands, as well as other lands owned by the Crown which may be required for this purpose, for so long as his water right remains in effect, such grant being cancellable by the Minister of the Interior upon failure to maintain the irrigation works or any portion of them. The lands to be so acquired and vested in the Crown shall comprise a strip of 30 feet, exclusive of the width of the

ditch, being 20 feet on one side and 10 feet on the other side of said ditch, so as to give access thereto for the purpose of repairs; in the case of works other than ditches sufficient land shall be acquired to give free access to and control of the works.

(g) If any purchaser of land fails to use the irrigation works on such land for the purposes shown in the memorial and plans filed by him in the Department of the Interior and with the Commissioner of Irrigation, within a period of two years from the completion of such works, or if the said purchaser at any time thereafter shall cease to operate the said irrigation works for a continuous period of twelve months, without special leave in writing from the Minister of the Interior to that effect, the ownership of such irrigation works shall revert to the Dominion Government.

(h) If at the end of the period which may be granted for the construction of the irrigation works, such works have not been completed, the agreement to sell the lands may be canceled and any amount paid on account thereof, or works constructed in connection with such irrigation system, may be forfeited to the Crown.

3. All applications for water rights for irrigation purposes must be made to the Commissioner of Irrigation, at Calgary, Alberta, and such applications must be accompanied by a description of the lands applied for in connection with such water rights.

4. All applications for the purchase of lands for irrigation purposes, under these regulations, must be made to the Agent of Dominion Lands for the district in which such lands are situated.

§ 202. **British Columbia—Water Act—Short title.**—During the last few years the Province of British Columbia has not been behind in the enactment of laws governing the rights to the use of water within its jurisdiction. By the Water Act of 1909,[1] entitled, "An Act to declare the rights of the Crown in respect to water and water power and relating to the diversion, acquisition, and use of water," the legislature of British Columbia provided one of the most effective laws governing this subject that can be found in North America. This Act was afterward amended by the Act assented to on February 26, 1912.

As declared by the preamble of the Act its object was as follows: "Whereas, all water in the Province, not under the exclusive juris-

1 1909, c. 48.

diction of the Parliament of Canada, remaining unrecorded and unappropriated on the twenty-third day of April, 1892, has already been declared by the legislature of British Columbia to be vested in the Crown in the right of the Province;

"And whereas, in the past, records of the right to divert and use water have been honestly, but imperfectly made, resulting in confusion and litigation;

"And whereas, it is desirable that the rights of existing users under former records should be properly declared;

"And whereas, it is desirable and expedient that the law relating to the acquisition and use of water for all purposes should be amended and consolidated, and the right to acquire and use water should be brought under one uniform system;

"Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows."

Short title.—1. This Act may be cited as the "Water Act."[2]

§ 203. **British Columbia—Water Act—Interpretation.**—Upon the subject of interpretation the following are the most important provisions:

2. In the construction and for the purposes of this Act, including this section (if not inconsistent with the context or subject-matter), the following terms shall have the respective meanings hereinafter assigned to them:

"Minister" means the Minister of Lands, and shall include any person for the time being lawfully acting in that capacity.

"Department" means the Department of Lands of the Provincial Government.

"Water Commissioner" shall include the Chief Water Commissioner, and any Water Commissioner appointed for any one or more water districts, or any person for the time being lawfully acting in that capacity.

"Works" means and includes any and all dikes, dams, weirs, flood-gates, measuring devices, breakwaters, drains, ditches, canals, basins, reservoirs, tunnels, bridges, culverts, cribs, embankments, head-works, flumes, aqueducts, pipes, pumps, and any and all contrivances for holding, carrying, or conducting water, or

[2] 1909, c. 48, s. 1.

other works which are authorized to be constructed under this Act.

"Water" or "stream" shall include all natural water courses or sources of water-supply, whether usually containing water or not, and all rivers, lakes, creeks, springs, ravines, and gulches, and all water-power.

"Duty of water" means the area of land that a unit of water, as regulated by this Act or any lawful authority, will irrigate.

"Acre-foot" means a quantity of water that will cover one acre of land one foot deep.

"License" means a license to use water, or to take and use water, or to store or pen back water, except in Part XI, where it means a license granted under Part XI of this Act.[1]

"Licensee" means any municipality, company, partnership, or person who is granted a license in accordance with this Act.

"Domestic purposes" means and shall include household, sanitary, and fire-protection requirements, and the watering of cattle and poultry.

"Municipal purposes" means and shall include the supply of water to any city, town, village, or unincorporated locality for domestic purposes, and within the boundaries of any municipality the supply of water to railways, manufacturers, and others for conversion into steam.

"Rules" means and shall include rules and regulations made by the Lieutenant Governor in Council pursuant to the powers conferred by this Act.[2]

§ 204. British Columbia—Water Act—Confirming to the Crown the ownership of all waters.—4. *Saving right of riparian owner.*—Saving the right of every riparian proprietor to the use of water for domestic purposes, the right to the use of the unrecorded water in any stream is hereby declared to be vested in the Crown in the right of the Province; and save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water except under the provisions of this or some former Act, or except in the exercise

1 Act of 1909, as amended by the Act of Feb. 26, 1912, s. 3.

2 Act of 1909, as amended by the Act of Feb. 26, 1912, s. 3.

of the general right of all persons to use for domestic purposes water to which there is lawful public or private access.[1]

5. *No grant of land to vest exclusive right.*—No right to the permanent diversion or to the exclusive use of any water shall be acquired by any riparian owner or by any other person by length of use or otherwise than as the same may have been acquired or conferred under some former Act, or by license under this Act.[2]

§ 205. British Columbia—Water Act—The unit of measurement — Water districts and water commissioners.—6. *Unit of Measurement.*—The discharge of one cubic foot of water per second shall be the unit of measurement of flowing water, and the acre-foot the unit of measurement of quantity.[1]

6a. *Unit of quantity.*—Applications for licenses for the diversion of water may state the quantity to be diverted in cubic feet of water per second, in acre-feet per annum, in gallons per day, or in miner's inches.[2]

7. *Water Divisions.*—It shall be lawful for the Minister to divide the Province, or such parts thereof as may be convenient, into districts, to be called "water districts," and to define the boundaries thereof.[3]

8. *Water Recorders.*—The Lieutenant Governor in Council may appoint a Comptroller of Water Rights for the Province and Water Recorders for any one or more water districts. The Comptroller of Water Rights shall have all the powers and authorities conferred upon Water Recorders under this Act.[4]

§ 206. British Columbia—Water Act—The creation of the "Board of Investigation" for the purpose of determining existing rights.—Of special note is the creation of a tribunal having conferred upon it jurisdictional powers somewhat similar to the Board of Control of Wyoming, for the purpose of determining existing water rights. The said provisions are as follows, to wit:

9. *Creation of board of investigation—Its duties and powers.*—There shall be and there is hereby created a tribunal, to be

1 1909, c. 48, s. 4.
2 1909, c. 48, s. 5.
1 1909, c. 48, s. 6.
2 1909, c. 48, as amended by Act of Feb. 26, 1912, s. 5.
3 1909, c. 48, s. 7.
4 1909, c. 48, s. 8, as amended by Act of Feb. 26, 1912, s. 2.

named the "Board of Investigation" (hereinafter in this part of this Act called "the Board"), for the purpose of hearing the claims of all persons holding or claiming to hold records of water or other water rights under any former public Act or Ordinance, of determining the priorities of the respective claimants, of prescribing the terms (not inconsistent with this Act) upon which new licenses, replacing records under former Acts, to take and use water pursuant to this Act will be granted, and generally of determining all other matters and things in this part of this Act or by the Lieutenant Governor in Council referred to the Board for determination, and discharging such duties with respect to existing rights and claims as may be imposed upon the Board, and with such powers and authorities for that purpose as are in this part of this Act conferred.[1]

10. *How Board constituted.*—The Board shall consist of the Comptroller of Water Rights and such other two or more persons as the Lieutenant Governor in Council may for such periods of time and from time to time appoint.[2]

11. *Quorum.*—Two members of the Board shall form a quorum, and not less than two members shall attend the hearing of any claim.[3]

12. The Comptroller of Water Rights, or some member of the Board authorized by the Minister, shall preside at all meetings of the Board, and, if the Board shall consist of an even number of persons, shall have a second or casting vote.[4]

13. *Remuneration.*—The remuneration of the members of the Board shall be in the discretion of the Lieutenant Governor in Council.[5]

14. *Oath of office.*—As soon as practicable after the appointment of the members of the Board, they shall severally take the following oath: "I, A. B., swear that I will fulfill and discharge the duties of a Comptroller of Water Rights (or of a member of the Board of Investigation, as the case may be), justly and accord-

1 1909, c. 48, s. 9; 1911, c. 59, s. 2, as amended by Act of Feb. 26, 1912, s. 6.

2 1909, c. 48, s. 10; 1911, c. 59, s. 3, as amended by Act of Feb. 26, 1912, s. 2.

3 1911, c. 59, s. 4.

4 1909, c. 48, s. 11; 1911, c. 59, s. 5, as amended by Act of Feb. 26, 1912, s. 2.

5 1909, c. 48, s. 12.

ing to the statutes and rules governing or prescribing my duties, to the best of my cunning, wit, and power, and that I will take nothing for my office but of the King or fees accustomed. So help me, God." The oath may be administered by any judge of the Supreme or County Court, or by the Comptroller of Water Rights, or member of the Board presiding at any meeting, if he shall have taken the oath, and they shall, as soon as convenient thereafter, meet for the transaction of business.[6]

15. *Lieutenant Governor in Council to appoint assistants.*—The Lieutenant Governor in Council may appoint such other persons (and prescribe their duties) as may be necessary to assist the Board in the discharge of their duties.[7]

§ 207. British Columbia—Water Act—Powers of Board of Investigation—The determination of existing water rights.—16. *Board to make rules.*—The Board may from time to time make rules, not inconsistent with this Act or any rules or regulations made by the Lieutenant Governor in Council, for the regulation of business and the maintenance of order when hearing claims and determining rights and adjudicating thereon, and generally for the orderly transaction of their own business or that of others that may be brought before them.[1]

19. *Streams to be examined and measurements of water made.*—The Minister may cause to be made on any stream a proper measurement of the low water, high water, and flood discharge, and an examination of all the works constructed for conveying or utilizing water from each stream; and the report of such measurement and examination may be used by the Board when inquiring into and determining rights and claims upon any stream.[2]

21. *Board may make personal examination and act thereon.*—The Board shall be at liberty to make any personal examination of any stream or part of a stream or any works, and the Board may act upon any such examination in determining rights and claims.[3]

6 1909, c. 48, s. 13, as amended by Act of Feb. 26, 1912, s. 7.

7 1909, c. 48, s. 14.

1 1909, c. 48, s. 15.

2 1909, c. 48, s. 18, as amended by Act of Feb. 26, 1912, s. 9.

3 1909, c. 48, s. 20.

22. *Notice by advertisement to be given.*—The Board shall, by advertisement in some local newspaper, give one month's notice of their intention to investigate claims to the water of any stream, giving all the names by which the stream has at any time been known, or, if unnamed, a good description thereof, and directing all persons having claims to water on such stream, on or before a certain date, to come in and present their claims as herein provided.[4]

24. *Time and place of hearing—Service of notice.*—The Board shall fix the time and place for hearing claims and determining rights to water on each and every stream, and shall give such notice thereof to the persons who shall appear to the Board to be interested as in their opinion shall be just, but in no case shall the notice be less than thirty clear days. In the event of inability or serious inconvenience to give personal notice, the notice shall be given by letter addressed to the last known residence of the person intended to be served and by advertisement in a local newspaper. In no case, however, shall the sufficiency of the notice be called in question:

(a) *Summary hearing.*—Provided, always, that when holders of water rights request in writing the summary hearing of claims to water rights on a stream, the Board may fix the date of the hearing, and, without advertising, proceed to adjudicate as between such holders after giving ten clear days' notice of the date of the hearing by registered letter mailed to the last known address of each such record holder; (b) and provided further, that the Board may, by consent in writing, without notice, adjudicate at any time between persons whose water rights conflict.[5]

25. *Power to administer oaths, etc.*—The Board or any member thereof may administer oaths, take and receive affidavits, declarations, and affirmations in or concerning any matter or thing in or in anywise concerning any proceeding before them or relative thereto.[6]

26. *Extend time.*—The Board may from time to time by writing, or by such notice as they may deem expedient, extend the time

4 1909, c. 48, s. 22; 1911, c. 59, s. 8, as amended by Act of Feb. 26, 1912, s. 11.

5 1909, c. 48, s. 21; 1911, c. 59, s. 7, as amended by Act of Feb. 26, 1912, s. 13.

6 1909, c. 48, s. 24.

for hearing claims and adjudicating upon rights upon any particular stream, and, when in their opinion the justice of the case shall require, may, upon such terms as shall be deemed just, extend the time for any particular claimant or claimants to present his or their claims before the Board.[7]

27. *Meet and adjourn.*—The Board may meet and adjourn at their absolute discretion. In the absence of the others, any one member of the Board may adjourn a sitting or meeting. In the absence of all members of the Board, the Water Recorder of the district, on instructions from the Board, may adjourn the meeting to such time as he has been instructed by the Board to adjourn it. If no such instructions have been received by the Water Recorder, he shall adjourn the meeting from day to day.[8]

28. *Statement of Claim.*—(1) No particular form shall be necessary to bring on any claim before the Board. It shall be sufficient if the claimant presents a statement of claim in writing, setting out: (a) An exact copy of the record or records claimed; (b) a description of the particular land to which it is claimed the record is appurtenant; (c) a sketch showing the position of the point of diversion and the dams, ditches, and flumes to the claimant's land; (d) the character and brief description of the works; (e) the purpose for which the water has been used; (f) the title to the land held by the grantee at the date of the record, including the date of pre-emption record or permission to purchase from the Crown; (g) the title of the claimant to the land to which the record is appurtenant; (h) the irrigable area of such land; (i) the quantity of water claimed, expressed in miner's inches, cubic feet per second, gallons per day, or acre-feet per annum. (2) Any number of persons claiming under the one record may unite in a statement of claim.[9]

29. *Form not essential in conduct of proceedings.*—No special or particular form shall be necessary in the conduct of proceedings antecedent to the hearing, or before the Board, or in the conduct or management of the Board's business or any part thereof.[10]

7 1909, c. 48, s. 25, as amended by Act of Feb. 26, 1912, s. 15.

8 1909, c. 48, s. 26, as amended by Act of Feb. 26, 1912, s. 16.

9 1909, c. 48, s. 27; 1911, c. 59, s. 9, as amended by Act of Feb. 26, 1912, s. 17.

10 1909, c. 48, s. 28.

30. *Adjudication.*—The Board may, among other things: (a) Examine the claim presented for their consideration, and hear evidence in support of and in opposition to each claim respectively; (b) determine the priorities of the respective claimants to water out of any particular stream; (c) order the cancellation of the former records; (d) determine the quantity of water to which each claimant is entitled; (e) direct and establish the character of the works to be constructed by each claimant, having due regard to existing storage-works; (f) from time to time give directions and make such orders as they may think necessary for the improvement of any works to prevent waste and insure stability; (g) direct the Comptroller of Water Rights to enter in a book kept for that purpose—(1) the name and postoffice address of the claimant entitled to the water; (2) the priority as determined; (3) the quantity or flow of water to which the claimant is entitled; (4) the name of the stream; (5) the point of diversion; (6) a concise description of the works; (7) the purpose for which the water is to be used; (8) the hereditament or undertaking to which the license shall be appurtenant.[11]

31. *Issue of licenses.*—The Comptroller of Water Rights shall issue licenses to replace the former records as directed by the Board.[12]

32. *No errors in record to prejudice right to hearing.*—No error or defect in any record shall prejudice the right of any claimant to have his claim heard and determined by the Board, provided there has been a bona fide application for water, and such water has been used for some beneficial purpose.[13]

33. *All claims shall be heard.*—Without restricting the scope of the foregoing sections, the Board shall hear and shall determine upon their merits all rights and claims submitted to them.[14]

34. *Holder who does not file a claim.*—In the event of any holder of a record neglecting to present a statement of claim to the Board at the time fixed for the hearing, the Board shall take his rights into consideration, and shall notify him by regis-

11 1909, c. 48, s. 29, as amended by Act of Feb. 26, 1912, s. 18.

12 1909, c. 28, s. 30, as amended by Act of Feb. 26, 1912, s. 19.

13 1909, c. 48, s. 32.

14 1909, c. 48, s. 32, as amended by Act of Feb. 26, 1912, s. 20.

tered letter mailed to his last known address of its decision; and if he does not appear before the Board within thirty days after the giving of such notice, such decision shall stand and his former record shall be canceled; if he does appear, he may be granted a rehearing on such terms as shall seem just to the Board.[15]

35. *Forfeiture and cancellation on claimant failing to establish his claim.*—In the event of any claimant appearing before the Board and failing to establish his claim, any record held by him shall, without any further notice, demand, or proceedings, be forfeited, and the entry of such record canceled, and his works, if upon Crown lands, shall become forfeited to the Crown, and if not upon Crown lands shall become forfeited to and become the property of the owner of the land upon which the works are situate.[16]

36. *No certiorari.*—No writ of certiorari shall be granted to remove any proceeding before the Board save for excess or want of jurisdiction.[17]

37. *No prohibition.*—No writ of prohibition shall issue directed to the Board or any member thereof, save for excess or want of jurisdiction.[18]

38. *No injunction except on information of Attorney General.*—Except on the information of the Attorney General of the Province, no Provincial Court shall, by injunction or any other process of the Court, restrain or interfere with any claimant seeking to establish his claim before the Board.[19]

39. *Board to Keep Record.*—The Board shall keep minutes of their proceedings, including the evidence in support of and in opposition to any claim, and generally of all matters brought before them for adjudication.[20]

40. *Enforcement of decisions.*—The decision of the Board may, by leave of the Supreme Court or a Judge thereof, be enforced in the same manner as a judgment or order of the Court to the same effect.[21]

15 1909, c. 48, s. 33, as amended by Act of Feb. 26, 1912, s. 21.
16 1909, c. 48, s. 34.
17 1909, c. 48, s. 35.
18 1909, c. 48, s. 36.
19 1909, c. 48, s. 37.
20 1909, c. 48, s. 38, as amended by Act of Feb. 26, 1912, s. 22.
21 1909, c. 48, s. 39.

41. *Supreme Court may make orders to assist.*—The Supreme Court or a Judge thereof may, on petition signed and presented by the Board setting out the facts, make any order necessary in the opinion of the Court or a Judge thereof to assist and enable the Board to discharge the duties imposed upon the Board by this Act.[22]

42. *Appeal.*—An appeal shall lie to the Court of Appeal from every order or decision of the Board, and the statutes and rules governing appeals from the judgment of a judge of the Supreme Court to the Court of Appeal shall apply to and govern all appeals from the Board to the Court of Appeal.[23]

43. *Prior rights acquired.*—(1) The rights, records, powers, privileges, and priorities which have been acquired, had, exercised, and enjoyed by any municipality or power company for the purposes of its undertaking and works shall, so long as the same are used for such purposes, be vested in such municipality or power company, as the case may be. (2) Subject as aforesaid, municipalities and companies holding records of water and whose works have been approved by the Lieutenant Governor in Council, pursuant to the "Water Clauses Consolidation Act,"[24] shall, on presentation to the Board of their record and evidence of the approval of their works, and, in the case of a company, of the bona fide exercise of its powers and privileges, be entitled to a license under this Act for the same quantity of water and having the same priority as the record, and shall thereupon have all the rights and privileges conferred by this Act on licensees whose works have been approved by the Lieutenant Governor in Council, and shall also be liable to the obligations imposed by this Act on such licensees. (3) Companies who made application before the twelfth day of March, 1909, to a Judge of the Supreme Court for a certificate under Section 55 of the said "Water Clauses Consolidation Act," and have obtained such certificate, shall, upon presentation to the Board of their record and of such certificate, be entitled to a license under this Act, and shall thereupon have all the rights and privileges conferred by this Act on licensees whose works have been ap-

22 1909, c. 48, s. 40.
23 1909, c. 48, s. 41.
24 Chapter 190 of the Revised Statutes, 1897.

proved by the Lieutenant Governor in Council, and shall also be liable to the obligations imposed by this Act on such licensees.[25]

44. *Works not constructed.*—If the holder of a record shall not have constructed the works necessary for a diversion of the water, the Board may fix a time within which to begin, and a further time within which to complete, the construction of such works as the Board shall order; and he shall not be entitled to a license in substitution for his record unless and until such works have been so commenced and completed.[26]

45. *Proof of completion of works.*—If proof of the completion of the said works is not filed with the Comptroller of Water Rights within one month after the date set by the Board for such completion, the Comptroller of Water Rights shall, without further notice, demand, or proceeding, declare the said record forfeited and the entry of such record canceled; and the works constructed under such record, if upon Crown lands, shall become forfeited to the Crown, and if not upon Crown lands, shall become forfeited to and become the property of the owner of the land upon which the works are situate.[27]

46. *Power to extend on terms.*—Before the time fixed for the completion of the works as aforesaid, an application to extend the time may be made to the Board, but the Board shall not entertain the application nor have any power to extend the time, unless the applicant shall satisfy the Board, upon oath, that the applicant has begun and diligently continued the work in perfect good faith, and has been prevented by causes beyond his control from completing the works so ordered to be constructed as aforesaid.[28]

§ 208. British Columbia—Water Act—Priority of purpose and of right in acquisition of water.—47. *Acquisition of Water.*—The right to use water may be acquired upon application therefor to the Water Commissioner for a license as hereinafter provided.[1]

48. *Protecting riparian owner using water for domestic purposes.*—Every license to take and use water shall be issued with

25 1909, c. 48, s. 42, as amended by Act of Feb. 26, 1912, s. 23.

26 1909, c. 48, s. 43, as amended by Act of Feb. 26, 1912, s. 24.

27 1909, c. 48, s. 44, as amended by Act of Feb. 26, 1912, s. 25.

28 1909, c. 48, s. 45.

1 1909, c. 48, s. 47.

due regard to the requirements of riparian proprietors for domestic purposes.[2]

49. *Priorities of licenses.*—After the twelfth day of March, 1909, all applications for water shall be subject to the claims and rights as finally settled, and to the licenses issued by the Board under Part III of this Act, and shall have precedence according to the time of the filing in the office of the Water Recorder for the district of a copy of the notices posted on the ground, and the licenses and the privileges thereby granted shall have precedence and priority according to their date.[3]

50. *Priority of use of water.*—Subject to the provisions of the last preceding section, all licenses to use water shall have issue with due regard to the purpose for which it is required, which shall have priority in the following order: First—Domestic purposes. Second—Municipal purposes, which means and shall include the supply of water by a municipality or by any company to any municipality, city, town, village, or unincorporated locality for domestic purposes. Third—Irrigation of land. Fourth—Industrial purposes, which means and shall include water required for the production of steam and all other purposes save domestic, municipal, irrigation, the production of power for sale, barter, or exchange, and mining. Fifth—Power, which shall include the use of water for generating power for sale, barter, or exchange. Sixth—Mining, which shall include any use of water in connection with mining. Seventh—Clearing streams for driving logs. Eighth—Lowering the level of any standing body of water for the purpose only of reducing the same. Ninth—Utilization of mineral waters.[4]

§ 209. British Columbia—Water Act—Procedure to obtain water licenses and the general rights acquired by licenses.—51. *License for one purpose only.*—No license shall issue for more than one of the purposes mentioned in Section 50 of this Act.[1]

52. *No license to sell.*—No license shall issue to any individual

2 1909, c. 48, s. 46.

3 1911, c. 59, s. 10, as amended by Act of Feb. 26, 1912, s. 2.

4 1909, c. 48, s. 49; 1911, c. 59, s. 11, as amended by Act of Feb. 26, 1912, s. 26.

1 1909, c. 48, s. 50, as amended by Act of Feb. 26, 1912, s. 27. Further-

or partnership for the sale, barter, or exchange of water, or of power generated from water.

53. *License to sell.*—(1) A municipality or a company may, with the consent of the Lieutenant Governor in Council and upon the approval of their undertaking, as provided in Part VI of this Act, acquire one or more licenses to take and use water for municipal or power purposes, as defined by Section 50 of this Act, or both of such purposes. *License appurtenant to dominant land.*—(2) An owner of land may acquire one or more licenses to take and use water on any one or more hereditaments for domestic, irrigation, industrial, or mining purposes, or any of them. (3) An individual, a partnership, or a company may acquire: *License under Part XI.*—(a) One or more licenses for clearing streams for driving logs under Part XI of this Act; (b) one or more licenses for lowering the level of water; (c) with the consent of the Minister, one or more licenses to take and use, sell, barter, or exchange mineral water. (4) *Licenses for Indians.*—An Indian Agent may acquire, in trust for Indians located on any Indian reserve, one or more licenses to take and use water for domestic, irrigation, or industrial purposes, subject to the provisions of Sections 299, 300, 301, and 302 of this Act. (5) *Storage licenses.*—A licensee or an applicant for a license to take and use water may apply for one or more licenses to store or pen back sufficient unrecorded water to supply the flow or quantity which the licensee or applicant is or may be authorized to take and use.

54. *Posting notice for diversion.*—The applicant for a license to take and use water shall, at conspicuous points in the neighborhood of the point of diversion and of the proposed place of user, post a notice of his intention to apply for such license. The notice need not follow any particular form, but shall contain or describe: (1) *Contents of notice.*—The name and address of the applicant. (2) The Water Recorder's office in which the application will be filed. (3) The name or a clear description of the stream from which the water will be diverted. (4) The quantity of water in acre-feet per annum, cubic feet per second, gallons per day, or miner's inches applied for. (5) The point of diversion.

more, Secs. 51 to 88, inclusive, were also repealed by the Act of Feb. 26, 1912, and substitute sections enacted in lieu thereof, and no further reference will be made in this section thereto.'

(6) The purpose for which the water will be used. (7) The premises where the water will be used, or the territory within which the water or the power generated from the water will be sold, bartered, or exchanged. (8) The date when the notice was posted on the ground.

55 *Posting of notice for storage.*—An applicant for a license to store or pen back water or for lowering the level of water shall, at conspicuous places in the neighborhood of the point of diversion or proposed point of diversion and of the proposed place of user, post notice of his intention to apply for such license. The notice need not follow any particular form, but shall contain and describe, where the application is for a license to store or pen back water: (1) *Contents of notice.*—The name and address of the applicant; (2) the Water Recorder's office where the application will be filed; (3) the name or a clear description of the stream from which the water will be diverted; (4) the capacity of the proposed reservoir, expressed in acre-feet or gallons; (5) the situation of each reservoir site; (6) the purpose for which the water will be used; (7) the premises where the water will be used, or the territory within which the water or the power generated from the water will be sold, bartered, or exchanged; (8) the date when the notice was posted on the ground. And where the application is for a license for lowering the level of water: (1) The name and address of the applicant; (2) the Water Recorder's office where the application will be filed; (3) the name or a clear description of the body of water the level of which is to be reduced; (4) the date when the notice was posted on the ground.

56. *Consolidation of notices.*— The notices prescribed by the last two preceding sections and the particulars therein required may be combined in one notice.

Sections 57 and 58 provide for the posting of the notices and the publication of the same. The applicant must publish once a week for four weeks in a local newspaper, and if the application is for a commercial license, for two weeks in the Gazette.

59. *Filing application.*—Within ten days after the first appearance of every such notice in the local newspaper, the applicant shall file in the office of the said Water Recorder an application in duplicate pursuant to such notice, and a sketch in dupli-

cate showing approximately the course of the stream and the lands affected. Such sketch need not be drawn to scale.

60. *Contents of application.*—The application shall be on printed forms to be supplied by the Water Recorder, and shall contain and describe: (1) The full name and address of the applicant. (2) A clear description of the stream, with its name or names (if any). (3) The quantity of water, expressed in acre-feet per annum, cubic feet per second, gallons per day, or miner's inches applied for. (4) The point of diversion. (5) The dams, ditches, flumes, pipe, or other conduits. (6) The purposes for which the water will be used. (7) An accurate description of the land or mine where it is proposed to use or lower the water, or of the territory within which the water or power generated from the water will be sold, bartered, or exchanged. (8) A general description of the lands which may be affected by the construction of the proposed works. (9) The area of Provincial Crown land which will be affected by the said works. (10) The area of private lands which will be affected by the said works. (11) The date of the posting of the notice or notices. (12) The date of the first publication of the notice in the local newspaper, and the name of the newspaper and the place of the publication. (13) The address to which notices to the applicant may be mailed, or such of the said particulars as are applicable to the license applied for. If the newspaper is published more than fifty miles from the Water Recorder's office, item (12) may be omitted. *Contents of storage application.*—If the application is for the storing or penning back of water, it shall contain, in addition: (14) A description of each reservoir site. (15) An estimate of the area of each reservoir when full. (16) The probable length and height of each dam.

61. *Final proofs.*—The applicant shall, within fifty days from the first publication of the notice in the local newspaper, file with the Comptroller of Water Rights: (1) Proof of the posting and publication of the notices, and a printed copy of the notice in the local newspaper. (2) If the application is for a license other than for lowering the level of water, a list of all water records or licenses appurtenant to the hereditaments or held in connection with the undertaking for which the water will be used. (3) If the applicant is a company, proof that the com-

pany is authorized to carry on business in the Province, and of the amount of the company's paid-up capital. (4) If the application is for domestic purposes, a statement of the number of persons and of cattle to be supplied with water. (5) If the application is for municipal purposes, a statement of the area and population of the territory to be supplied. (6) If the application is for irrigation, a statement of the approximate acreage of the irrigable portion of the land to which the license shall be appurtenant. (7) If the application is for industrial, power, or mining purposes, a statement of the place where the water will be returned to a natural channel, and of the difference in altitude between the point of diversion and such point of return. (8) If the application is for water to be used for industrial, mining, or power purposes, such a statement of the particular use to which the water or the power generated is to be put as will show whether the quantity applied for is reasonable. (9) If the application is for water to be used for municipal or power purposes at a future date, a statement of the benefit which will accrue to the public by the granting of the license at the time of the application. (10) If the application is for water to be used for municipal purposes or for supplying water for domestic use in connection with an industry employing over fifty persons, a certificate from the Secretary of the Provincial Board of Health that the water to be diverted is fit for human consumption. (11) If the application is for mining purposes, the number and date of expiration of the applicant's free miner's certificate.

Section 62 provides for the endorsement and filing of water applications and procedure by the Water Recorder.

Section 63 provides that any individual, partnership, company, or municipality whose rights would be injuriously affected by the issue of the license applied for, may within thirty days of the first appearance of the notice, file with the Water Recorder objection, setting forth the grounds of such objection. The Water Recorder shall without delay forward a copy of every such objection filed with him to the Comptroller, who shall consider the objection, and if in his opinion the alleged grounds of complaint are prima facie sufficient to warrant inquiry, shall set a day for hearing before himself or the said Water Recorder,

or some person appointed by the Minister. If he does not consider the grounds sufficient he shall so notify the objector.

64. *Hearing by Comptroller of Water Rights and granting of licenses.*—Licenses under this part shall be granted by the Comptroller of Water Rights, who, upon the application for such licenses, shall take into consideration the application, the quantity of unrecorded water in the stream, prior applications still pending, the objections filed, and any material information contained in departmental plans and surveys; and he may: (1) Refuse the application. (2) Take further evidence, and for that purpose summon and examine witnesses upon oath or affirmation. (3) Adjourn the hearing of objections until the applicant has submitted plans of the proposed works. (4) Grant a permit to make surveys upon such terms as he may think fit, and therein determine the time within which the said surveys shall be made, and the plans of the works required for the diversion, carriage, storage, or lowering the level of the water shall be submitted to him for approval, and the time within which the application to the Lieutenant Governor in Council for the approval of the undertaking shall be made under Part VI of this Act. (5) Settle the priority of the application and of any license which may be issued thereunder.

Section 65 provides that under certain circumstances the advertisement may be dispensed with. Riparian rights are disposed of and limited in the following terse provision:

66. *Riparian requirements.*—When considering the requirements of any riparian proprietor for domestic purposes, the Comptroller of Water Rights shall fix the quantity to which he is entitled for those purposes, and when necessary the means of conveyance thereof.

Section 67 provides that in certain circumstances and for good reason the extension of time may be granted for the commencement of the survey and submission of plan.

Section 68 provides that if the surveys are not made or the said plans not submitted, within the time fixed by the permit under Section 64 or any extension granted, that the permit shall become null and void without further notice.

Section 69 provides that the applicant shall, on the issue of such permit, forthwith proceed to have the surveys and plans made of the work.

Section 70 provides that the applicant shall, within the time granted him, file with the Comptroller of Water Rights, and with the Water Recorder of each district in which the works are situated, a statement in writing and plan containing full information relative to the route, position of works, parcel of land crossed, and other information required.

Section 71 provides that if the application is for a non-commercial license the applicant shall serve a notice on each person whose land will be touched or in any way affected by the works. If the application is for a commercial license the applicant shall serve such notice on each person so affected, and shall also publish a notice in the Gazette and in a local newspaper.

Sections 72 and 73 provide for protests and objections on behalf of any one who will be injuriously affected by the issuance of a license and for the hearing thereon before the Comptroller of Water Rights, the Water Recorder or some person appointed by the Minister to take evidence and report.

74. *Issue of license.*—After the approval of the plans and application, the Comptroller of Water Rights shall issue to the applicant a license or licenses under this part, having the precedence therein mentioned.

75. *Licenses for municipal purposes.*—A license for municipal or power purposes for any quantity of water, or a license to a company for industrial purposes when the quantity applied for exceeds ten cubic feet per second, shall not issue, unless and until the undertaking has been approved by the Lieutenant Governor in Council under Part VI of this Act.

76. *Diversion of water.*—The grant of a license to take and use water shall include the right to the licensee to divert the water included in the license at the point of diversion.

77. *Right to the flow.*—The grant of a license to take and use water shall entitle the holder to the flow of the specified quantity of water in the stream at the point of diversion, which right shall not be prejudiced by subsequent grants at higher points on the stream or any tributary thereof.

78. *Subject to adjustment.*—All licenses granted under this part of this Act to take, use, store, or pen back water shall be subject to subsequent adjustment by the Comptroller of Water Rights after a hydrographic survey of the stream has been made. Such adjustment shall, however, where the water is used for irrigation, be made with due regard to the duty of water on the hereditaments watered by the stream, and in all cases without changing the priority of the license.

79. *Storage rights.*—Subject to any obligations hereinafter imposed, the rights and powers herein conferred shall, when mentioned in the license, but not otherwise, include the right or power to store water and to lower lakes and other standing bodies of water below their normal level, and to construct the works authorized and approved in respect thereof.

80. *Mineral water.*—A license to take or use water shall not confer any right to the use or diversion of mineral water unless expressly mentioned in the license.

81. *Change of point of diversion.*—Any holder of a license or record may obtain permission from the Comptroller of Water Rights to change the point of diversion of the water used by him, or the course of his ditch, flume, or other conduit, on giving such notices and complying with such terms as the said Comptroller may require or impose.

Section 82 provides that whenever a licensee or the owner of a segregated portion of land to which a license is appurtenant desires to have the water apportioned between two or more parts thereof, he may apply to the Comptroller of Water Rights, and on its being proved to his satisfaction that the rights of others will not be prejudiced or impaired, the Comptroller, after notice to all persons interested, may amend the license originally granted or may issue two or more licenses to the apportionment permitted.

Section 83 provides for the entry on private lands by any licensee or the holder of a permit for the purpose of surveying the location of the point of diversion, the place of storage, and the route for the carriage of the water as part of the works proposed to be constructed, doing as little damage as possible and fully compensating the owner of said property. Before entering upon the lands the licensee must give a bond for the payment of any loss, damage, or injury to such owner.

84. *May construct works.*—The licensee, subject to and in conformity with this Act and the authority received from the Comptroller of Water Rights, or by the certificate of the Lieutenant Governor in Council, as in the Act prescribed, may construct any works necessary to beneficially use the water referred to in his license.

Section 85 provides for the joint construction of two or more licenses upon such terms as may be agreed upon between them. And any company organized for the purpose of carriage of water held under records or licenses may, upon, but not without, filing their plans in connection with such carriage with, and obtaining the approval thereof by, the Comptroller of Water Rights and obtaining the approval of their undertaking by the Lieutenant Governor in Council, construct such works to carry such waters and may mingle such waters.

86. *License appurtenant to hereditaments.*—Whenever a license is granted for the use of water upon any particular hereditaments, such license shall be deemed to be appurtenant to the hereditaments in respect whereof such license is granted, and shall pass with any demise, devise, conveyance, alienation, or transfer of the said hereditaments.

87. *License evidence.*—The production of the license or of a certified copy of the counterfoil thereof in the Water Recorder's office, without further proof, shall be evidence in all Courts of the matters and things therein mentioned.

88. *Appeal.*—Any person aggrieved by or dissatisfied with any order made by the Comptroller of Water Rights or Water Recorder under this part may appeal therefrom to the Minister in the manner hereinafter prescribed.

§ 210. **British Columbia—Water Act—Approval of the undertaking of municipalities and companies.**—Sections 89 to 99 of the Water Act provide that if under this Act the undertaking of a municipality or company requires the approval of the Lieutenant Governor in Council before the issuance of a license, the applicant may apply for such approval at any time after the filing of its application for license. Such application may be also made by petition; notice of the same must be given in the usual way; objections may be filed against the granting of the application,

and a hearing upon such objections provided. The Lieutenant Governor in Council, after the disposal of such objections, may issue a certificate setting forth that the proposed undertaking has been approved, or has been approved with certain limitations.

94. *Certificate to a company.*—If it be intended to issue such certificate to a company, then in and by such certificate the following matters and things shall be determined and set out therein: (a) The amount of the capital of the company which shall be subscribed and the amount which shall be actually paid up before the company shall begin the construction of the works; or (b) if the work has been divided into parts, then the amount of capital which shall be subscribed and the amount which shall be actually paid up in respect of each part before beginning the works on each particular part; (c) the time within which the works shall be begun, and if divided, then the time within which each part shall be begun; (d) the time within which the works shall be completed and in actual operation; (e) the territory within which the company may exercise its powers.

It is also provided that the Lieutenant Governor in Council may from time to time grant any further certificate or certificates that may be necessary respecting any part of the undertaking or any matter or thing not contained in the first or any former certificate. A copy of the certificate must be filed at the office designated in the Act. Extensions of time for the completion of work may be granted by the Lieutenant Governor in Council upon certain showing and conditions.

98. *Powers conferred.*—Upon the grant of the first or any subsequent certificate by the Lieutenant Governor in Council and the issue of a license, the municipality or company, subject to such certificate or certificates, shall have, hold, and enjoy all the rights, powers, and privileges conferred upon companies licensed to take and use water under this Act.

Section 99 provides that the Minister may cancel a certificate where there has been a default in not having commenced the work within six months or within the extended time, and that there shall be an appeal to the Lieutenant Governor in Council upon the decision of the Minister under this certificate.[1]

[1] As amended by Act of Feb. 26, 1912, s. 27.

§ 211. British Columbia—Water Act—General powers and privileges of municipalities and companies using water for domestic purposes.—Sections 100 to 107 of the Water Act provide as follows:

100. *Entry on and expropriation of lands.*—Upon the undertaking and works of the municipality or company being approved by the Lieutenant Governor in Council and a certificate of such approval being granted, and a license being issued, the municipality or company may, in the manner hereinafter prescribed and upon the terms and conditions and for the purposes mentioned in the said certificate and license and subject to the obligations hereinafter imposed, enter upon, take, and use Crown lands and other lands howsoever and by whomsoever held.[1]

Section 101 provides that the municipality or company may, after the issuance of the license, construct their works upon any lands referred to in the map or plan submitted at the time when the application was made for the approval of the works and, subject to the obligations thereinafter imposed, shall, for that purpose, have the right of ingress and egress over such lands and do and perform all such acts and things as may be necessary for the purpose of so constructing their works.[2]

Section 102 provides the purposes for which expropriation of lands may be made, which are as follows: (a) Maintaining, altering, improving, or repairing their works; (b) opening new streets required for their works; (c) the protection of their works; (d) preserving the purity of the water supplied by them to the inhabitants; (e) providing for efficient distribution of the water to the inhabitants.[3]

Sections 103 to 117 provide for the conveyance of water to the outer line of the street by the municipality or company and keeping the line in repair; for the laying of service pipes; that the occupier must construct all other works to receive the water; the expenses of laying and repairing pipe must be paid by the owner on demand to the municipality or company; that stop-cocks are

1 1909, c. 48, s. 97; as amended by Act of Feb. 26, 1912, s. 28.

2 As amended by Act of Feb. 26, 1912, s. 29.

3 1909, c. 48, s. 99, as amended by Act of Feb. 26, 1912, s. 30.

not to be disturbed save in case of accident, etc.; the providing for taps for the use of the water; that certain persons are authorized to have the right of entry and inspection; that the company or municipality has the power to regulate the distribution and use of the water; that the water rates may be levied by the municipality as taxes and by the company; that they may be considered as debts to be recovered by action in any court of competent jurisdiction, and the municipality or company may further shut off the water from the premises; that the municipality or company may from time to time make and enforce by-laws, rules, and regulations not inconsistent with the Water Act or any rules made thereunder; that the municipality or company shall not be liable for damages caused by the breaking of any service pipes or attachment, except in certain cases; that the municipality or company shall have the power and authority to supply non-residents; the municipality or company may also sell or dispose of any real or personal property acquired by them when no longer required.

§ 212. **British Columbia—Water Act—Special powers and privileges of municipalities using water for domestic purposes.**—Section 118 provides that no license for municipal purposes, as defined by Section 50 of the Water Act, granted to a municipality shall become void or be canceled by reason of non-user in whole or in part. But in so far as the quantity of water licensed to be diverted by a municipality is not required for its present purposes, a license may be granted to others authorizing the use of water subject to and until it is required for municipal purposes.[1]

119. *Expropriation of recorded water by municipality.*—In those cases where a sufficient supply of unrecorded water is not available within reasonable limits of distance and expenditure, and save as to water required by any individual for domestic purposes and water acquired by a company already supplying a municipality or unincorporated locality with water for municipal purposes, every municipality may, for municipal purposes only, apply to the Lieutenant Governor in Council for leave to expropriate any water record or water license and the works con-

1 As amended by Act of Feb. 26, 1912, s. 31.

structed thereunder, and acquire another license in respect thereof.[2]

Sections 120 to 122 provide that an application to the Lieutenant Governor in Council must be made by petition in the proper form as provided for the expropriation of water as provided for in Section 119. A copy of such petition endorsed with a notice of the time fixed for the hearing must be served upon the existing licensee or holder of the water record and all other persons who are affected by the application. The Lieutenant Governor in Council may, on such application, make such order as may be deemed just and expedient.

Sections 123 to 126 provide that any municipality may for municipal purposes acquire by purchase any water record or license to divert water into works connected therewith; and any municipality may for municipal purposes on giving one year's notice in writing to the company supplying the municipality with water, expropriate such water company's license or record of the works and also so much of the company's land as is used in connection with the works. The value of the works and land of the company shall be ascertained by arbitration under the "Arbitration Act," and shall, with the following additions thereto, be the price paid by the municipality: (a) If the company's works have been in operation less than five years, a 30 per cent bonus upon such value; (b) if in operation five years and less than ten years, a 25 per cent bonus; (c) if in operation ten and less than 15 years, a 20 per cent bonus; (d) if in operation 15 and less than 20 years, a 15 per cent bonus; (e) if in operation 20 years or more, a 10 per cent bonus. In estimating the value of the company's works and land, arbitrators shall take as the basis of the valuation the amount which would be required to construct such works and their condition at the time of the arbitration.

Section 127 provides that whenever the net profits of a company supplying the inhabitants of a municipality with water shall exceed 20 per cent per annum on the paid-up capital of the company, the rate charged by the company for water, on petition of the municipality, may be so reduced that the company shall not pay or be able to pay more than 20 per cent per annum.

[2] 1909, c. 48, s. 116.

Sections 128 to 136 provide that any company supplying the inhabitants of a municipality may be required to make reasonable extensions of the company's works upon the municipality's giving reasonable notice. Upon receipt of such notice the company shall, within 14 days, inform the municipality whether or not it intends to comply therewith. In the event of the company omitting to give such information the omission shall be equivalent to a refusal and may be so treated. In the event of the company refusing or neglecting to comply with the terms of such notice the municipality may by petition apply to the Judge of the Supreme Court to enforce the request contained in such notice. Upon the hearing of such petition the Judge may determine the reasonableness of every matter and thing brought before him and shall make such order therein, consistent with the Water Act, as shall in his opinion be just. Without limiting in any way, the power of the Judge to enforce any order he may make, any such order may be enforced by a Writ of Sequestration. Any order so made by the Judge shall be subject to appeal as if it were a final order in an action.

§ 213. British Columbia—Water Act—Powers and privileges of power companies.—

137. *Entry on Crown lands and expropriation of other lands.*—Any company having obtained the approval of the Lieutenant Governor in Council to the undertaking and works of the company for power purposes, and upon a certificate of such approval being granted, may after the issuance of a license and upon the terms and conditions mentioned in the certificate and license and in the manner hereinafter prescribed and subject to the obligations hereinafter imposed, enter upon, take, and use Crown lands and enter upon and expropriate other lands, howsoever and by whomsoever held.[1]

Section 138 provides that after the issuance of said license the company may construct their works in accordance with the plans submitted and for that purpose shall have the right of way over the lands to do and perform all acts and things as may be necessary for the purpose of so constructing their works.[2]

1 1909, c. 48, s. 134, as amended by Act of Feb. 26, 1912, s. 32.

2 As amended by Act of Feb. 26, 1912, s. 33.

Section 139 provides that in addition to the general powers conferred on all licensees, the company may, in conformity with the license obtained and the certificate granted, use and apply water and water power for any of the purposes and in the manner and methods following and shall generally have the powers as specifically set forth in this section for that purpose.

Sections 140 to 151 provide that any municipality and power company are authorized to make and enter into any agreement relating to the construction, maintenance, and operation of the undertaking of the works of the power company. Certain rights are also granted over the highways. Regulations are also provided for the use of tramways. The fittings of the company or apparatus on any premises shall not be subject to distress for rent for the premises where the same may be, nor be taken in execution under any process of law or equity against the person in whose possession the same may be. Power is also given to the servants of the company to enter premises at all reasonable times to make examination and to inspect all electric lines and apparatus belonging to the power company. Power is also given to the directors of such company to make such by-laws as may be necessary. All actions for damages against such power company must be commenced within twelve months after the time when such supposed damage is sustained.

§ 214. British Columbia—Water Act—Municipalities as power companies.—Section 152, as amended, provides:[1] "Whenever a municipality, pursuant to any authority conferred by any Act of the legislature has passed a by-law or by-laws for any of the following purposes"—(a) For purchasing, constructing, operating, and maintaining works for supplying the inhabitants of municipalities with water, electric light, or gas; (b) for acquiring by purchase any existing works or to lease or to maintain, operate, and extend the same, as may seem expedient in the discretion of the council; (c) for purchasing, constructing, operating, maintaining street railways and ferries, etc.—"then such municipality may apply for a license to take and use water pursuant to this Act."

1 By Act of Feb. 26, 1912, s. 34.

The Act also provides that the right granted must be upon application to the Lieutenant Governor in Council for the approval of its undertaking. The application must also contain full description of the project or projects and of the properties necessary thereto, as prescribed in the section.

The section also provides that when such municipality has obtained the approval of the Lieutenant Governor in Council of its undertaking and has obtained a license under this Act, the municipality shall: (a) Have all the rights, powers, and privileges of a power company; (b) be subject to all the obligations of a power company; (c) conform to this Act and rules made by its authority in all matters and things in relation to the license and the construction of its works and the exercise of its powers.

§ 215. British Columbia—Water Act—Clearing streams for driving logs.—As the timber industry is one of the foremost in the Province of British Columbia, and the natural streams must be used in order to transport the timber and lumber to market, the Water Act provides specifically how the right of any company to streams for this purpose may be acquired.

153. *Application for license to clear stream.*—Any person or company desiring to obtain a license permitting them to clear and remove obstacles from any stream or streams for the purpose of making the same fit for rafting and driving logs may apply to the Minister for such license, and shall describe the stream or streams proposed to be cleared and, briefly, the nature and character of and the lands that will be affected by the proposed undertaking and works.[1]

Sections 154 to 160 provide that the application to use the streams for the above purposes shall be by petition, addressed to the Minister, and shall be in conformity with any rules on the subject, and be accompanied by a sketch, map, or plan, showing approximately the nature, character, and extent of the proposed undertaking and works, and shall also state the terms and conditions upon which it is proposed the license shall be granted. The powers of the Minister are defined to be such that he may grant a permit to make surveys; refuse the application in his

[1] 1909, c. 48, s. 151.

discretion; limit the time within which the power conferred by the permit may be exercised; make any order with respect to the application that in his opinion the public interest may require, and shall require the applicant to furnish security for compensating any person for any loss, damage, or injury that may be sustained by reason of any entry upon the lands of private owners.[2] The powers of the provisional licensee are also provided for, in that he may enter into Crown and other lands for the purpose of making surveys.[3] After surveys the licensee must make maps and plans.[4] The applicant shall also cause to be made a map or plan of the improvements of the works proposed to be made, and the said maps and plans which conform to any rules upon the subject; and, further, shall give in detail a full description of the particulars of the undertaking, as set forth in the section.[5] All maps and plans and the particulars mentioned above must be delivered to the Minister. Upon the Minister being satisfied that the maps, plans, and particulars contain the necessary or required information, he shall submit the same to the Lieutenant Governor in Council for consideration.

161. *Application for final license.*—The application for a final license shall be by petition to the Lieutenant Governor in Council, setting out the matters aforesaid, and shall conform to any rules on the subject.[6]

Sections 162 to 164 provide that on presentation of the petition, the Lieutenant Governor in Council may appoint an engineer to examine and make a report on the proposed undertaking and works, and require the petitioner to give security for all costs and expenses in connection therewith. The notice of intention to apply for a final license must be advertised in accordance with the Act.[7] The applicant shall also, at least 30 days before applying to the Lieutenant Governor in Council, address a registered letter containing a like notice to every person, any part

2 Sec. 155, as amended by Act of Feb. 26, 1912, s. 35.

3 Sec. 156, as amended by Act of Feb. 26, 1912, s. 36.

4 Secs. 157, 158, as amended by Act of Feb. 26, 1912, s. 37.

5 Sec. 163, as amended by Act of Feb. 26, 1912, s. 38.

6 1909, c. 48, s. 159.

7 Sec. 163, as amended by Act of Feb. 26, 1912, ss. 38 and 39.

of whose lands are likely to be affected by the proposed undertaking.[8]

165. *Lieutenant Governor in Council may consider certain matters.*—Upon the hearing of the petition, the Lieutenant Governor in Council may consider the probable effect not only upon the rights already acquired with respect to the use of water from the stream or streams for any purpose, but also the probable effect the proposed undertaking and works may have upon the possible use of the stream or streams for any of the purposes mentioned in Part IV of this Act, and shall have due regard to the priority in that part established, and may make any order or give any direction at the cost of the applicant for the purpose of obtaining information before finally acting upon the petition. And he may further direct that notice of the petition be served on any other person whom it may be deemed desirable to serve; adjourn the hearing from time to time; refuse the petition; alter or modify the proposed undertaking and works; approve the undertaking and works; grant a final license upon such terms and conditions as he may deem expedient; generally make any order in the premises that may be expedient.

Sections 166 to 170 provide that final licenses are to contain certain particulars, as stated; the licensee is to give security as the Lieutenant Governor in Council may require for the payment of all such sums as may be awarded by way of compensation to owners of private property for any damage or injury done to the same. When making entry on private property the licensee shall do as little damage as possible and shall make full compensation for any loss, damage, or injury done. If the amount of compensation can not be agreed upon, then it shall be settled by arbitration, pursuant to the "Arbitration Act." The Lieutenant Governor in Council may extend the time of any hearing or proceeding in this section.

171. *Powers of licensee.*—When the licensee has received a final license as aforesaid, he shall, upon the terms and conditions and for the time therein specified, have power: (a) To remove any obstruction from the stream referred to in the license; (b) to construct any apron, dam, slide, gate, lock, boom, or

[8] Sec. 164, as amended by Act of Feb. 26, 1912, s. 39.

other works therein necessary to facilitate the floating and transmitting of logs, rafts, and crafts; and, also, (c) in the manner hereinafter prescribed, to take and use any lands which may be necessary for the construction of the said works. These powers shall be subject to the prior rights of record holders under former Acts, and licenses under other parts of this Act to the uninterrupted flow of so much of the water of such stream as is required for actual beneficial use under such records or licenses.[9]

Sections 172 to 184 provide for the penning or holding back of water. And it is provided, "If as a result of the construction of any works by a licensee under this part of this Act any water power is created, the licensee shall not, by reason of such construction only, have any right, title, or claim to use the power so created."[10] It is also provided that water must not be released wthout notice to all persons whose property is liable to injury from the releasing of such water. All works must be kept in repair. The licensee is liable for all injury caused by failure to repair and defective construction. But it is provided that there is no liability if the works are constructed in accordance with the plans and specifications or from the accidental destruction or injury of the works. Licensees may consolidate their rights and an assignment of authority be made to improve their works, subject to the approval of the Lieutenant Governor in Council. Before the issuance of the license the licensee shall pay to the Minister on the first day of June the sum of $100, and annually thereafter, during the continuance of the license, shall pay the sum of $25;[11] also existing rights are to be governed by the Act as far as payments are concerned.[12] Existing rights not used may be revoked by the Lieutenant Governor in Council. Such persons, granted the rights above named, shall also have the right to use the banks of rivers and natural streams.

Sections 185 to 197 provide that when any licensee improves a stream in accordance with his plans and specifications he is

9 Sec. 171, as amended by Act of Feb. 26, 1912, s. 40.

10 1909, c. 48, s. 171.

11 Sec. 180, as amended by Act of Feb. 26, 1912, s. 41.

12 Sec. 181, as amended by Act of Feb. 26, 1912, s. 42.

given the power to collect tolls from others who use such stream for the floating of saw-logs, timber, or other crafts down the same. The amount of the toll shall be graded upon the measurement of the timber so floated. In case of dispute, it is provided that the County Court Judge may fix the rate of the toll which may be collected. Such toll may be collected by an action at law. And if the timber has not come through or over the whole of the works, the licensee can only collect a proportional toll. The tariff fixed by the County Court Judge shall remain in operation unless notice is given. Appeal from the judge's order fixing toll or changing the same may be made to the Court of Appeal. If the rates are not settled, the licensee has a lien on logs, etc., which are floated through such works for the tolls. A warrant may be issued for the seizure of the same and the logs may be sold. All rules and regulations made by the licensee relative to operation must be approved by the Lieutenant Governor in Council. The penalty is fixed for the obstruction of any of the servants of the licensee in the sum of not less than one dollar, and not more than $10, and all costs.

§ 216. **British Columbia—Water Act—Storing water.**—The subject of reservoir rights and the storing of water are prescribed fully in the Water Act.

198. *Licensee having right to store water.*—Any licensee whose license includes the right to store water, and whose works have been approved pursuant to this Act, may proceed with the construction of the works necessary for such storage purposes and, pursuant to the rules in that behalf, the acquisition of the land required.[1]

Sections 199 to 206 provide that the right to store water shall be subject to prior rights to its uninterrupted flow for domestic purposes. "Any person affected or prejudiced by an unlawful storage or penning back of water may apply to the Water Recorder to restrain or regulate such storage or penning back."[2] Upon such application the Water Recorder shall promptly issue notice to the licensee, which notice shall state the time and place

[1] 1909, c. 48, s. 196; Sec. 198, as amended by Act of Feb. 26, 1912, s. 43.

[2] Sec. 200, as amended by Sec. 44 of the Act of Feb. 26, 1912.

of the proposed inquiry. A speedy inquiry into the matter must be had. Any person objecting to the penning back shall serve such objections on all parties mentioned by him to the Water Recorder, as probably prejudiced by the same. Personal service must be had in all cases where possible. The duty and the powers of the Water Recorder are fixed in regard to such a hearing. The Minister may appoint some other person to discharge the duties of the Recorder.

Sections 207 to 212 provide: "207. *Licensee may turn water into stream and retake it.*—Any licensee having obtained permission to store water may turn, divert, and deliver water so stored by him into the natural channel of any stream, and, subject to a deduction for seepage and evaporation, may at any point or points take from the same, or any other stream into which the stored water flows, the quantity of water so turned into such natural channel as aforesaid.[3] Notice must be given of the intent to turn the water down the stream. The water must be measured where turned in and taken out. The Water Recorder shall, when required so to do, make an examination of the stream and works for the purpose of determining the deduction to be made for seepage and evaporation, and after such examination shall determine the deduction to be made."[4] Certain powers are granted the Water Recorder in determining the seepage. He must fix a time within which any particular deduction for seepage and evaporation shall continue.

Sections 213 to 218 provide that when two or more licensees have acquired the right to store water and they can not agree as to the share of the cost of construction, then the matters in dispute shall be determined by arbitration pursuant to the "Arbitration Act." Any licensee may before entering upon such arbitration abandon his right to store water, but if the licensee abandons his right after the awarding is made, he is liable to all costs. Increased storage is provided for; also the distribution of stored water.

219. *No appeal.*—No appeal shall lie from any order made by a Water Recorder under this part of this Act.

219a. *Lowering of water.*—The provisions of Sections 200 to 206 (both inclusive) of this Act shall apply *mutatis mutandis* to

[3] 1909, c. 48, s. 205.

[4] 1909, c. 48, s. 208.

the lowering of the level of water under a license for that purpose issued under this Act.[5]

§ 217. **British Columbia—Water Act—The taking and using of lands.**—The taking and using of public and private lands is provided for as follows: Section 220 provides that the word "works" shall include not only the meaning given to it in the interpretation clause, but also all the things which may be done or constructed by power companies.

221. *Terms of entry on Crown lands.*—No licensee shall take possession of, use, or occupy any Crown lands or fell timber thereon, except in conformity with this Act and rules, unless the works have been approved under this Act, and the conditions of such entry, use, occupation, and felling of timber have been settled and defined, and have been approved of by the Lieutenant Governor in Council.[1]

Section 222 provides that any licensee may, pursuant to this Act and rules, or with the approval of the Lieutenant Governor in Council as aforesaid, enter upon, take, use, and occupy so much of the lands of the Crown as may be necessary for the licensee's works.[2]

223. *Alienation.*—No licensee shall alienate lands so taken, used, or occupied, save in connection with the undertaking and works.[3]

224. *Limits entry on private lands.*—No entry shall be made on the lands of private owners if the works can be reasonably constructed upon Crown lands without such entry.[4]

225. *Power to take lands.*—Any licensee may enter upon, take, use, and occupy so much of the lands of others without their consent as may be necessary for the construction, maintenance, and operation of the licensee's works in, upon, over, through, or under such lands, and no more.[5]

Sections 226 to 250 provide that before entering upon any lands other than Crown lands, intended to be taken and used or for the purpose of felling timber, the licensee shall file in the Land Reg-

[5] 1909, c. 48, s. 217; Sec. 219a, as added by s. 45 of the Act of Feb. 26, 1912.

[1] Sec. 221, as amended by Act of Feb. 26, 1912, s. 46.

[2] 1909, c. 48, s. 220.

[3] 1909, c. 48, s. 221.

[4] 1909, c. 48, s. 222.

[5] 1909, c. 48, s. 223.

ister Office of the district a map or plan of the lands intended to be entered upon. Notice of the same must be served upon the land owner, and also notice of the amount of the compensation proposed to be given and adequate security for such compensation. The date to which compensation shall be paid must be ascertained. The owner of the land must either refuse or accept the compensation. If the owner is absent, application may be granted by a Judge of the Supreme Court, giving leave for substituted notice. If the proposed compensation is accepted the licensee may enter the land at once and use the lands mentioned in the map or plan accompanying the said notice for the said purposes mentioned. In event of the owner not agreeing on the compensation the amount shall be settled by arbitration, under and pursuant to the "Arbitration Act." Provisions are made for the costs of such arbitration. The licensee may pay the compensation to the Supreme Court, notice of which must be served and published. All owners of lands or interests therein are given the power or may be given the power by the Court, to convey their interests to the licensee. The licensee shall not be responsible for the disposition of any purchase money for lands taken by the licensee for its purposes if paid to the owner of the land or into court for his benefit.

§ 218. British Columbia—Water Act—The obligations, duties, and limitations imposed upon Licensees.—

251. *No obstruction without authority.*—Without lawful authority no licensee shall obstruct any navigable stream.[1]

252. *License for beneficial use.*—Every license issued under this Act shall be for the beneficial use of the quantity of water permitted to be taken and used, and notwithstanding the quantity of water granted by any license, no licensee shall, to the prejudice of others, divert more water from any stream than can for the time being be by him beneficially used, and the exclusive right of the licensee shall be limited to the quantity of water his works will carry.[2]

Sections 253 to 256 provide that when water is not beneficially used by any licensee any person, on application to the Comptroller

1 1909, c. 48, s. 249. 2 1909, c. 48, s. 250.

of Water Rights, and upon showing to the satisfaction of said officer that any licensee is not beneficially using or is using a quantity in excess of his requirements, may obtain a license to take and use so much thereof as in the opinion of the Comptroller may be just to all parties. The decision of the Comptroller shall be subject to appeal to the Minister under the rules prescribed.[3] The license thus granted shall not have the same precedent as the license in default, and shall be subject, if the nonuse is or has been of temporary character, to the resumption by the original licensees of the rights granted by the original license when the water can be beneficially used.[4] If the powers granted by any license shall not be exercised for three years, they shall *ipso facto* become null and void. The Comptroller may, however, on application, renew such rights, giving it the original or any priority he may deem just.[5] Upon any such application there must be taken into consideration any intervening rights acquired by others.[6]

257. *License subject to cancellation for waste.*—Every license shall be subject to cancellation for waste or for nonuser of the privilege granted, or noncompliance with the terms and conditions of the license or certificate of the Lieutenant Governor in Council, save where such nonuser or noncompliance has arisen from circumstances that were accidental, unavoidable, or not wholly within the control of the licensee. The Minister alone shall, upon notice to the licensee, have the power of cancellation pursuant to this section, subject to an appeal to the Lieutenant Governor in Council.[7]

Sections 258 to 267 provide all orders given by the Lieutenant Governor in Council, the Minister, or the Board shall be promptly obeyed. Every licensee shall at his own expense construct and maintain culverts for the passage of waste and superfluous water flowing from any works constructed by him. It is made the duty of every municipality or company holding a license for the use of

[3] Sec. 253, as amended by ss. 2 and 47 of the Act of Feb. 26, 1912.

[4] Sec. 254, as amended by s. 48 of the Act of Feb. 26, 1912.

[5] Sec. 255, as amended by s. 2 of the Act of Feb. 26, 1912.

[6] Sec. 256, as amended by s. 2 of the Act of Feb. 26, 1912.

[7] 1909, c. 48, s. 255, as amended by Act of Feb. 26, 1912, s. 49.

municipalities to prevent and extinguish fire. Works of others must not be injured; and in case of injury, compensation must be made. The roads and highways must be protected; and any damage to the same must be made good. All rights are subject to the "Health Act." The duty of water may be determined by the Water Recorder.[8]

268. *May order repairs.*—Notwithstanding the approval of the licensee's works, the Water Recorder shall have power from time to time and at all times to order reasonable repairs, alterations, and improvements in the works to prevent any extraordinary loss by seepage.[9]

Section 269 provides that appeal in any manner hereinafter prescribed shall lie from any order made by the Water Recorder under the last two preceding sections to the Minister and from him to the Lieutenant Governor in Council.[10]

§ 219. British Columbia—Water Act—Respecting highways and other ways.—Sections 270 to 274 provide that all lands, highways, streets, and ways disturbed by any licensee in any manner howsoever shall be restored by such licensee to their original condition as speedily as possible. All works on highways shall be subject to the permission of and be constructed under the supervision and control of the Minister. Where such works are proposed to be constructed within the boundaries of any municipality the permission of the Council shall be first had and obtained, and the construction of the works and their use thereafter shall be subject to such regulations, modifications, changes, matters, and things, as the Council may by by-law determine. The Minister may also authorize the interference with existing ditches for such period and upon such terms as he shall direct and impose. Nothing shall be constructed to limit the right of the Minister to lay out from time to time the public roads of the Province across, through, along, or under any ditch without compensation provided that as little damage as possible shall be done.

§ 220. British Columbia—Water Act—Power companies.—Section 275 defines the special obligations of power companies to

8 Sec. 267, as amended by Act of Feb. 26, 1912, s. 2.

9 1909, c. 48, s. 266, as amended by Act of Feb. 26, 1912, s. 50.

10 Sec. 269, as amended by s. 2.

the effect that they shall not interfere with the public right of traveling on roads or highways; shall not obstruct the free access to any building; shall not affix any wire less than twenty feet above the surface of the ground; shall not erect more than one line of poles along any road or street; shall be responsible for all damages which its agents, servants, or workmen cause to individuals or property in carrying out or maintaining any of its undertakings and works.

Sections 276 to 280 provide that no exclusive right shall be given to any company in any canyon and any other company proposing to run a tramway line which would pass through the same pass or canyon, shall be entitled to run their engines, cars, trucks, or other vehicles over the first mentioned line of tramway through such pass and canyon. Just compensation must be made for this right; and in case the parties interested therein can not agree to the amount to be paid, such amount shall be ascertained by arbitration, pursuant to the "Arbitration Act." All by-laws fixing rates must be submitted to the Lieutenant Governor in Council for approval, who may approve, or disapprove of the same, in whole or in part, and may adjust increase or decrease of such tolls, rates, or charges as may be deemed expedient in the public interest. The tariff of rates as approved must be published. All broken roads or highways must be reinstated by the company.

281. *Water to be returned.*—All water lawfully diverted from a stream and not consumed shall be returned, except where natural circumstances render it impossible, to the same stream unpolluted and undefiled.[1]

Sections 282 and 283 provide that any power company having a surplus of water, water power, or power procured or generated therefrom as aforesaid not used or sold, shall, upon the payment or tender thereto of the amount of charges or tolls legally chargeable, in respect thereof convey and deliver to any person or company desiring to use same, such surplus of water, water power, or power procured or generated therefrom, or such reasonable part thereof as may be required, and shall continue to so convey and deliver the same as long as the said surplus exists, and the said payment or tender be made. Any company or person desiring to exercise this right must procure and furnish all necessary means

[1] 1909, c. 48, s. 279, as amended by Act of Feb. 26, 1912, s. 51.

of conveyance and all necessary appliances for the taking and using of such surplus water or water power.

§ 221. **British Columbia—Water Act—Limitations of power to purchase.**—Section 284 provides that no undertaking or works of any municipality and no record, license, or privilege appurtenant thereto shall be taken or purchased by any other municipality or by any company under the Act, except, "(a) with the consent of the municipality owning such undertaking or work; or (b) under authority of an order in Council made by the Lieutenant Governor in Council upon its being made to appear that such taking or purchase is necessary or expedient in the public interest."[1]

285. *No other works to be expropriated, save as herein provided.*—No record or license for municipal or power purposes shall be assigned or transferred except under authority of an order in Council made by the Lieutenant Governor in Council upon application made for that purpose, and upon its being made to appear upon such application that such purchase is necessary or expedient in the public interest.[2]

Section 286 provides that in the event of compulsory purchase of any undertaking or works under the authority made by the Lieutenant Governor in Council, the purchasing company or municipality shall pay to the municipality or company from which such compulsory purchase is made, the cost of construction and a sum sufficient to make up the interest on the capital invested in cost of construction and maintenance to the amount of 15 per cent per annum to the date of purchase, after taking into account any profit that may have been made up to that time, and a further sum equal to a bonus of 30 per cent on the capital actually invested. Provisions are made as to how the amounts shall be computed.

§ 222. **British Columbia—Water Act—Respecting free miners.**—287. *Absolute right of free miners to certain quantity of water.*—Where one or more licensees have been authorized to divert all the water from any stream for mining purposes, and

1 1909, c. 48, s. 282.

2 1909, c. 48, s. 283; 1911, c. 59, s. 22, as amended by Act of Feb. 26, 1912, s. 52.

placer mines have at any time been properly located, and, *bona fide*, worked either above or below the point of diversion, the owners of such placer mines shall be entitled, if the quantity of water diverted by the said licensee or licensees does not exceed five and sixty hundredths cubic feet per second, to the continuous flow in the stream past or to divert water into, upon, or through such mine or mines one and sixty-eight hundredths cubic feet of water per second. If the licensee or licensees be diverting eight and forty hundredths cubic feet per second, then the said miners shall be entitled to the continuous flow or diversion as aforesaid of two and fifty-two hundredths cubic feet per second. The flow of water in this section provided for shall be for such distance above and below the said placer mines as is necessary for the continuous and economical working of the said placer mines, and carrying away of tailings and debris arising therefrom.[1]

Section 288 provides that the miners or occupiers of any mine traversed by a tramway or power company may lay down upon their own land or mine any collateral branches of tramway to connect with the power company's tramway for the purpose of bringing trains to or from such company's tramway to the property of the miners.

§ 223. British Columbia—Water Act—Inspection of works.—Sections 288a to 288g, as added by the Act of February 26, 1912,[1] provide as follows: That in addition to all the other powers conferred upon him by the Act the Minister may: "(a) At the request of any person residing on or owning land in the neighborhood of any works, whether constructed under this or any former Act, or otherwise howsoever; or (b) if the Minister deems it expedient in the public interest—direct that such works be inspected by an engineer, and may appoint an engineer to make such inspection." The Minister may require the person making the request for such inspection to make a deposit of such sum of money as the Minister thinks necessary to pay the expenses of inspection. If the inspection is directed, the engineer so appointed shall have the right to and shall make such inspection and shall report to the Minister

1 1909, c. 48, s. 285.

1 Secs. 288a-288g, added by s. 53 of the Act of Feb. 26, 1912.

the condition, security, and stability of said works. In case the request appears to the Minister not to have been justified, he may cause the whole or part of the expenses to be paid out of the deposit made by the person requesting the inspection. However, if the complaint appears to the Minister to have been justified, he may order the holder of the license granted in respect to such works or the owner of said works to pay the whole or any part of such inspection. If the engineer reports that said works have not been constructed in accordance with the terms and conditions of any certificate in respect thereof or that an addition to or alteration in the works is required to insure the stability thereof, the Minister may by notice in writing to the owner, direct that such certificate be complied with or that such addition or alteration be made and may in such notice fix the time for complying with such certificate or making the addition or alteration.

288g. *Compliance with order—Cancellation of license.*—If the directions of the Minister contained in said notice are not complied with within the time so fixed, the Minister shall forthwith issue a certificate to that effect, reciting the facts, and thereupon the Lieutenant Governor in Council may cancel the said record or license.

§ 224. **British Columbia—Water Act—Settlement of Disputes.**—Section 289a as added to the Water Act by the Act of February 26, 1912,[1] provides that any licensee or riparian proprietor aggrieved or prejudiced by the illegal, the excessive diversion, or the waste of water, or by the noncompliance by a licensee with the terms and conditions of the license or the certificate of the Lieutenant Governor in Council, or the approval of the works granted under this or under some former Act, may apply to the Water Recorder to restrain or regulate such diversion or for an order that the licensee or record holder comply with the terms and conditions of said license or record. Upon any such application, the Water Recorder shall forthwith issue notice directed to the person whose acts are objected to and in the Act called the defendant, requiring him within not less than two days after the service of notice to show cause why he should not be restrained wholly or partially from such illegal or excessive diversion or waste. The

1 Sec. 289a, as added by s. 55 of the Act of Feb. 26, 1912.

notice shall state the time and place of the proposed inquiry. The Water Recorder may also direct notice to be served upon any person who in his opinion is likely to be affected by the application. The time fixed by the Water Recorder for making the inquiry shall be as soon after the application as is reasonably convenient. The complainant shall cause the notices to be personally served upon the defendant. Where personal service can not be speedily effected, substituted service may be had.

The powers of the Water Recorder are defined as follows: "The Water Recorder upon an application as aforesaid, may exercise any of the following powers: (a) Make, either before or at the hearing, a personal examination of the stream and of the works of any or all parties interested, and may act upon such examination and the information derived therefrom in order to arrive at a just conclusion; (b) may appoint a disinterested person, being a civil engineer, to examine the stream and works of any or all parties interested, and may act upon the report of such engineer; (c) require any person to attend and give evidence before him; (d) administer an oath to any person intending or compelled to give evidence; (e) adjourn the hearing from time to time as may be necessary; (f) extend the time fixed for hearing any application or the performance or any matter or thing directed to be done; (g) make an order wholly or partially restraining or regulating the diversion or waste of water or determining the quantity to be diverted, or that the licensee or record holder do comply with the terms and conditions of the said license, record, or certificate; (h) may recommend to the Minister that the license or record and certificate be canceled; (i) pending the hearing, may make any order in connection with the matter that to him may seem just. (7) Any person aggrieved by or dissatisfied with any order made by a Water Recorder under this section may appeal therefrom to the Minister in manner provided by Section 322 of this Act."

§ 225. British Columbia—Water Act—Miscellaneous rights—In general.—

289. *Water Recorder to control distribution of water.*—The Water Recorder shall, in the district or districts for which he may be appointed, have immediate direction and control of the

diversion, storage, and distribution of the water, and shall have such powers not inconsistent with this Act as are conferred by this Act and rules, and discharge such duties as are imposed upon him by this Act or rules.[1]

Sections 290 and 291 provide for the power of the Board or Water Recorder to compel the attendance of witnesses, and they or he shall for that purpose have all the powers and jurisdiction of the justice of the peace under the "Summary Convictions Act." Any riparian proprietor, pre-emptor, homesteader, and lessee from the Crown may without making the Crown a party maintain an action and take any proceeding in any court of competent jurisdiction to prevent any unlawful or wrongful diversion of the water.

Sections 292 to 295 provide as follows: 292. *Water for irrigation purposes.*—Licenses and records to use water for irrigation purposes and the works connected and used with such licenses and records, may, when the place where the water is used is situated wholly within the boundaries of any municipality, be acquired by such municipality with the consent of the licensee for such consideration and upon such terms as may be mutually agreed upon.[2] Section 292a provides that a municipality which has acquired licenses under the above provisions may surrender the licenses so acquired and obtain from the Comptroller of Water Rights, in substitution therefor, license of the same priority and for the same quantity of water, extending the use of the water to any point of the municipality.[3] Such municipality in arranging the terms of purchase with the licensee may assume any obligations of such licensee with respect to the distribution of the water. Before acquiring any rights and assuming any obligations under the above provisions the municipality shall submit a by-law to authorize the borrowing of money; after the passing of the by-law authorizing the purchase of water right referred to and the completion of the purchase, the municipality shall fulfill all obligations whatsoever of the licensee whose rights have been purchased, control and regulate the distribution of water, and, subject to the rules, fix the price thereof.

1 1909, c. 48, s. 287, as amended by Act of Feb. 26, 1912, ss. 2 and 54.

2 1909, c. 48, s. 290; 1910, c. 52, s. 8.

3 Sec. 292a, as added by s. 56 of the Act of Feb. 26, 1912.

§ 226. British Columbia—Water Act—Abandonment of rights.—296. *Licensee may abandon. But not to prejudice of mortgagee.*—Any licensee or record holder may, by notice in writing to the Water Recorder, abandon the whole or any part capable of separation of the rights, powers, and privileges acquired. Provided, however, that where any hereditaments to which a record of or a license to take and use water is appurtenant are mortgaged or charged, no abandonment of such record or license and rights shall be effective without the consent of the mortgagee or chargee.[1]

297. *Entry of abandonment.*—In the book kept for the purpose of recording licenses and opposite to, across, or in the margin where such original entry is made, the Water Recorder shall record the fact of such abandonment, and shall carefully file the notice of abandonment for reference.[2]

298. *Mine or land abandoned, water rights void.*—Whenever a mine shall be worked out or abandoned, or a pre-emption record of land shall be abandoned or canceled, or whenever the occasion for the use of water upon such mine or pre-emption shall have permanently ceased, any record of or license to use water in respect of such mine or pre-emption shall be void, and shall be canceled in the book of records or the register of licenses accordingly.[3]

§ 227. British Columbia—Water Act—Indian rights.—

299. *Procedure to obtain license for Indians.*—The Minister, with the approval of the Lieutenant Governor in Council, may, upon such terms and conditions as to compensation to persons affected as the Minister may think proper to impose, authorize the issuance of a license to any Indian Agent as trustee for the benefit of all or any of the Indians located on any Indian reserve of so much of any unrecorded water from any stream as may be reasonably necessary for domestic and irrigation purposes upon such reserve. (a) No license shall be issued under this section unless and until (1) the provisions of this Act as to applications to take, use, or store water have been satisfied; (3) the Indian Agent has

1 1909, c. 48, s. 295, as amended by Act of Feb. 26, 1912, s. 2.

2 1909, c. 48, s. 296, as amended by Act of Feb. 26, 1912, s. 2.

3 1909, c. 48, s. 297, as amended by Act of Feb. 26, 1912, s. 57.

served upon or forwarded by registered letter to each person who may be affected by the proposed diversion, a copy of such notice; (4) the Water Commissioner has reported thereon in writing to the Minister as to the volume of water in the stream from which the water is proposed to be taken; the damage from such diversion to the land owners and that amount of water asked for is necessary and reasonable.[1]

Sections 300 to 302 provide that the Minister may, with approval of the Lieutenant Governor in Council, alter, vary, or cancel any license issued under the last preceding section upon such terms and conditions as he may deem proper.[2] No license under the above provisions shall be granted unless and until the Minister has been satisfied that the terms and conditions as to notice have been complied with and compensation, if ordered, has been paid.[3] All questions connected with the diversion of water under Section 299 above, compensation for damages, and quantity of water required shall be decided in a summary manner by the Minister.

§ 228. British Columbia—Water Act—Naming streams—Securities.—Sections 303 to 305 provide that the Comptroller of Water Rights shall give each stream, whether already named or not, or whether known by one or more names, an official name, and such stream shall thereafter be known by that name and no other, and shall be so described and known in all maps and plans and all official documents whatsoever. In the naming of streams some regard must be had to existing maps and names.[1]

Save where in the Act it is otherwise provided, the security to be given, before entry upon the lands of private owners for the purpose of surveying only, shall be to the satisfaction of the Minister. Every security required by the Act shall be by bond in double the amount of security required, and shall be given to the Attorney General of the Province, who may, if and when it becomes necessary, assign it to any person or persons injured or claiming to be injured by the obligor, or sue on it himself, as he may deem expedient.

1 Sec. 299, as amended by s. 58 of the Act of Feb. 26, 1912.

2 Sec. 300, as amended by s. 59 of the Act of Feb. 26, 1912.

3 Sec. 301, as amended by s. 60 of the Act of Feb. 26, 1912.

1 Secs. 303-305, as amended by s. 2 of the Act of Feb. 26, 1912.

§ 229. **British Columbia—Water Act—Rents and royalties.**—Sections 308 to 315 provide: "308. *Lieutenant Governor in Council may fix rents, etc.*—The Lieutenant Governor in Council may from time to time, by order in Council, reserve and fix such rents, royalties, tolls, and charges in respect of the water used or taken and used, and of the lands of the Crown used, and of the rights, powers, and privileges which may be acquired by any licensee under this Act."[1] It is further provided that the lands, royalties, tolls, and charges so fixed shall not be altered or changed save with the consent of the licensee for a period of three years after the passing of the order fixing the same. Subject to this, the Lieutenant Governor in Council may repeal any order reserving and affixing the rates and charges as aforesaid or alter the same as may be deemed expedient. The rents, etc., imposed upon power companies may be founded on the power produced or the quantity of water used, as may be deemed expedient. All by-laws fixing tolls, rents, etc., of any company must be submitted to the Lieutenant Governor in Council for approval who may approve or disapprove of the same in whole or in part "and may adjust, increase, or decrease such tolls, rates, or charges, as may be deemed expedient in the public interest." Notice of the intention to submit for approval any schedule of rates must be published; any person interested may appear before the Lieutenant Governor in Council at the hearing. After the rates have been fixed the schedule of such rates must be published; "and in any action brought against any person for nonpayment of any charge thereunder, such person may plead, as an answer to such action, that the publication had not been made as aforesaid."

§ 230. **British Columbia—Water Act—Reservations—Correction of errors in licenses.**—Sections 316 to 318 provide that the Lieutenant Governor in Council may at any time, by notice signed by the Minister and published in the "Gazette," reserve from being taken or used or acquired under this Act any unrecorded water in any stream or in any portion thereof. The purposes of such reservations are specified as those for the use of the Crown, for municipal purposes, or for the purpose of making provision,

1 1909, c. 48, s. 306.

wherever it appears expedient, as a source of supply for a water works system, or for the storing of water, or for such other purposes as may be deemed advisable. An order in Council establishing a reserve of water shall contain a direction for a record of the amount of water so reserved with all necessary particulars. Interim licenses may be granted for the use of water prior to the establishment of the system for which the reservations were made.[1] The Lieutenant Governor in Council may cancel any reservation of unrecorded water made under the above provisions. Fees may be charged companies erecting pulp or paper mills for the use of water.

Sections 319 to 321 provide for the amendment of licenses. "319. Whenever a license under this Act has been imperfectly issued, or has been issued without compliance with all of the terms of this Act, the Comptroller of Water Rights may, upon the application of the holder of such defective license, amend the same, or may cancel the same and grant a new one in its stead, which new or amended license shall relate back to the date of the original and shall operate as if issued at the date of such original license, but the quantity of water to be taken under such new or amended license shall not be increased, nor the area in respect of which the former license was used or held be enlarged."[2] The licensee intending to apply to have a license amended must give notice in the "Gazette" and in a local newspaper of his intention and proceed in accordance with the rules laid down in the Act.[3] The hearing upon the application must be had before the Comptroller of Water Rights and any person interested may appear. Appeal shall lie from any such decision to the Minister in manner hereinafter prescribed.[4]

§ 231. **British Columbia—Water Act—Respecting appeals—The certificate of the Lieutenant Governor.**—Section 322 provides that in all cases where the right to appeal from the Water Recorder or the Comptroller of Water Rights to the Minister or from the Minister to the Lieutenant Governor in Council is given by this Act, such appeal shall be a rehearing by petition and be regulated as

1 Sec. 316, as amended by s. 61 of the Act of Feb. 26, 1912.

2 1909, c. 48, s. 314, as amended by Act of Feb. 26, 1912, s. 63.

3 Sec. 320, as amended by s. 64 of the Act of Feb. 26, 1912.

4 Sec. 321, as amended by s. 2 of the Act of Feb. 26, 1912.

provided in the section. Such petition shall set out fully all facts relative thereto as they appear before the Water Recorder or the Minister and all documents relating to the subject shall state the persons upon whom the petition has been served, and shall be verified by the petitioner's affidavit. The petition shall be presented to the Minister, or if the appeal is from him, then to the Provincial Secretary, within thirty days from the making of the order appealed from. Upon the receipt of the petition the Minister or the Provincial Secretary, as soon as conveniently may be, shall fix a place, day, and hour for hearing of the petition, and may direct that a copy of the same shall be served upon any other person or persons that he may think proper. Within ten days of the service of the petition the respondent or any of the persons served may file an answer and shall serve a copy thereof on the appellants. The Lieutenant Governor in Council or the Minister may make any order in the matter he may deem just. "Upon the hearing of the petition, the Lieutenant Governor in Council or the Minister, as the case may be, shall determine the matter upon its merits and make such order thereon as shall be deemed just."[1]

323. *Effect of Lieutenant Governor in Council certificate.*—Any certificate granted by the Lieutenant Governor in Council pursuant to this Act, and any license referred to in such certificate or which has led to the issuance of such certificate, shall, if such license or certificate shall not have been canceled, or declared null or void under any of the provisions of this Act or otherwise, be conclusive evidence in any court of law or other tribunal in the Province of all matters and things therein contained, and shall not be inquired into or disturbed in any manner whatsoever, save in some proceeding to which the Attorney General of the Province is a party, or by petition of right, or by the consent of or at the request of the Lieutenant Governor in Council expressed through the said Attorney General.[2]

§ 232. British Columbia—Water Act—Rules and regulations.—324. *Power to refer.*—The Lieutenant Governor in Council or the Minister may refer any matter, question, or thing to any person whatsoever for the purpose of obtaining information or making

1 Sec. 322, as amended by s. 65 of the Act of Feb. 26, 1912.

2 1909, c. 48, s. 318, as amended by Act of Feb. 26, 1912, s. 66.

any inquiry or taking any account upon oath, or otherwise, and may act upon the report of such referee or not, as may be deemed expedient.[1]

325. *Make rules.*—The Lieutenant Governor in Council may from time to time make, alter, and repeal rules and regulations for carrying out the spirit, intent, meaning, and purpose of this Act, including matters in respect whereof no express or only partial or imperfect provision has been made, and, without restricting the generality of the foregoing, in respect of the following matters and things: The time and place of payment and collection and enforcement of payment of rents, charges, etc.; the powers, duties of, jurisdiction of the Comptroller of Water Rights, the Water Recorder, and other officers to give effect to the Act; regulate headgates, flumes, weirs, and water-gates, and all measuring devices and the manner in which they are to be placed and used; the information required to obtain the approval of licenses; the hearing of appeals; the extension of time for presenting petitions and other applications; the issuance of certificates; proceedings by municipalities to expropriate the water rights of others; obtaining any information for any purpose whatsoever; the entry upon, using, and taking Crown lands, and prescribing the conditions therefor; the service of notices on any municipality, company, or person; the deduction for seepage and evaporation and the mode of determining the same; the books to be kept by the Water Recorder; respecting maps, plans, specifications of any works; classifying violations of the Act and providing penalties for each such violation.[2]

§ 233. **British Columbia—Water Act—Penalties.**—Section 326 provides that if any person does or commits any of the following acts: Wilfully and maliciously hinders, interrupts, or causes the same to be done, any municipality or company in the exercise of any of the powers and authorities by the Act conferred; wilfully or maliciously lets off or discharges any water so that the same runs waste or useless out of any works; being occupant, tenant, or inmate of any house, supplied with water by any municipality or company, sells or disposes of the water thereof or gives it away

1 1909, c. 48, s. 319.

2 Sec. 325, as amended by s. 2 of the Act of Feb. 26, 1912.

or permits it to be taken or carried away or uses or applies it to the benefit of others or to any other than his own use or benefit, or wrongfully neglects or improperly wastes the water; not being in the employment of a municipality or fire brigade wilfully opens or closes any hydrant; throws or deposits injurious, noisome, or offensive matter into the water and water works or encourages the same to be done; wilfully alters any meters; lays or causes to be laid any pipe or main to communicate with any pipe or main; or wrongfully takes or appropriates any water from any public or private tap or in any way obtains or uses any water of the said water works without the consent of the said municipality or company; bathes or wastes or cleanses any wool, cloth, leather, skins of animals, or permits any nuisances or offensive thing within or near the source of supply for any works used for domestic purposes in any stream from which the water for said purposes is obtained; without lawful excuse interferes in any manner whatsoever with any works; such person shall for any such act, upon summary conviction, be liable to a penalty not exceeding two hundred and fifty dollars, together with the costs and charges attending the proceedings and conviction, and in default of payment to imprisonment for a period not exceeding two years.

(2) *Penalty for unlawful diversion.*—Any person who wilfully, without authority, takes or diverts any water from any river, stream, lake, spring, or other waters, or from any works authorized under this Act, and any licensee or other person who takes or diverts therefrom any greater quantity of water than he is entitled to, shall be liable, upon summary conviction, on a complaint laid by a Water Recorder, to a fine not exceeding five dollars per day or fraction of a day for each cubic foot per second or fraction of a cubic foot per second of water improperly diverted, or to imprisonment for a term not exceeding thirty days, or to both.[1]

Sections 327 to 336 provide that a conviction as above prescribed shall not relieve the defendant from any liability to answer in damages. Any licensee wilfully violating any provisions of this Act or the terms and conditions upon which the license has issued, or the approval of the Comptroller of Water Works or the Lieutenant Governor in Council, or the rules shall, after the hearing provided for, "be liable to have his license forfeited and all the

1 1909, c. 48, s. 321, as amended by Act of Feb. 26, 1912, s. 67.

rights and privileges granted, revoked, and canceled, or to such other penalty as any rules on the subject may prescribe." Any person injuriously affected by such a violation may present a petition to the Provincial Secretary, addressed to the Lieutenant Governor in Council, praying for relief and for the punishment of the offenders. Upon hearing any such application as aforesaid, the Lieutenant Governor in Council may revoke and cancel the license granted to the offender, and declare all his rights and privileges forfeited, or held in abeyance for such time as the Lieutenant Governor in Council may direct, or otherwise make any order respecting the matter, as may be deemed expedient.

Any person who in any way wilfully obstructs or interferes with the undertaking and works of any municipality, company, or person, shall on summary conviction thereof be liable to a penalty for every such offense of not exceeding one hundred dollars, together with the costs, and, in default of payment, to imprisonment for a period of not more than two months. The penalty for molesting or interfering with any officer in the discharge of his duty is fixed at a fine of not less than twenty dollars, and not exceeding one hundred dollars, and, in default of payment, to imprisonment, with or without hard labor, for a period of not more than two months. It is made unlawful to obstruct the natural flow of water courses by throwing any slabs, bark, sawdust, or waste stuff from saw mills in or across such water courses. The penalty for this offense is a fine not exceeding ten dollars, and not less than one dollar, for each day during which such condition exists over and above all damages arising therefrom, and in default of such payment, the offender shall be liable to imprisonment for a period not exceeding two months. The provisions of these last two sections, however, shall not apply to a dam, weir, or bridge erected in or over such lake, river, stream, rivulet, or water course, or to anything done *bona fide* in or for erecting the same or to any tree felled across such for the purpose of being used as a bridge; provided such tree does not impede the flow of the water or the passing of rafts.

336. *Recovery of penalties.*—Any penalty under this Act may be recovered with costs upon summary conviction before any stipendiary magistrate, police magistrate, or justice of the peace.[2]

2 1903, c. 28, s. 4.

§ 234. British Columbia—Water Act—Saving clauses.—Sections 337 to 342 provide that notwithstanding anything in the Act contained, it shall be lawful for the Lieutenant Governor in Council, in remote districts and under special circumstances, to increase the quantity of water mentioned in the preceding sections of the Act, over which the Water Recorder may exercise the jurisdiction of approving of the works of the licensee. Application under any former Act, not completed on the 12th day of March, 1909, may be continued to completion under such former Act or under the Water Act, as the applicant may elect. If the application be in accordance with any former Act, then the applicant shall apply for and obtain a license as provided in the Water Act. Save as above set forth no proceedings shall be taken under any former public Act to acquire any right to water or the use thereof. The holders of water rights under any former public Act shall have all the rights and privileges granted licensees under the Water Act, and shall be liable to all the obligations imposed by the Water Act on licensees. Notwithstanding the repeal of any former legislation, the rights and privileges acquired thereunder are expressly preserved, subject, however, to all conditions and provisions of such repealed legislation and to the provisions of the Water Act applicable thereto.

By Sections 68 and 69 of the Act of February 26, 1912, the following provisions were added to the Water Act, subject to any Dominion statute or order in Council, governing the same. The provisions of the Water Act shall extend to the waters and streams within the Railway Belt, including all records, applications for records, licenses, applications for licenses, or claims to water or water rights in respect thereof. Applications which have been made or filed with the Water Commissioner under any former Act, not completed at the commencement of this Act, may be continued to completion under the provisions of said former Act, or under this Act, as the applicant may elect.

§ 235. British Columbia—"Water Act"—Our criticism of the Act.—In this chapter we have detailed at considerable length the laws of the Canadian Provinces of Saskatchewan, Alberta, and British Columbia. We did this for the reason that we decided in a comparative way to show the distinction between the laws of

those Provinces and the laws of the Western States of this country. In those Provinces the absolute title of the water is vested in the Crown and by the "Irrigation Act" of Saskatchewan and Alberta and the "Water Act" of British Columbia the absolute control, even to the most minute detail, is also vested in the Government by statutory laws covering every phase of the subject. In this country it is different, even in States which have the most drastic statutory laws. Many of the questions involving the diversion and use of the waters are left open, thereby leaving a loophole for controversy and continuous litigation.

The details of our criticism will be given in the next two sections and are applicable to a large extent to all three of the Provinces above named, although written with a view only of criticising the Saskatchewan and Alberta laws.[1]

The Water Act of British Columbia of 1909, as amended by the Act of February 26, 1912, and abstracted in the preceding sections,[2] is still new. No litigation has yet arisen concerning its provisions, as the author was informed by Mr. J. F. Armstrong, Acting Comptroller of Water Rights, in a letter under date of April 4, 1912, in which he said: "The first sitting of the Board as now constituted was held in Kelowna, in October, 1911. The Board then passed on 320 records, fixing the precedence and priority of each and settling the basis on which a quantity of water would be allotted to each claimant, and the manner of determining to what lands each record was appurtenant. These decisions proved satisfactory to all claimants who were present. The Board considered that a grant of a constant flow of water was not suited to our system of irrigation, and was particularly inconvenient where land had been subdivided into small blocks of five or ten acres, and therefore announced that the quantity allowed should be expressed in acre-feet per annum.

"The Board has since examined the records and compared them with the plans under the direction of the Chief Hydrographer of the Department and with other information in our archives. Awards are now almost completed and will be rendered at an adjourned meeting in a couple of weeks; they will then be subject to appeal. The chief difficulties encountered by the Board were caused by the imperfect manner in which the records before 1897

1 See Secs. 236, 237.

2 See Secs. 202-234.

were made. Much research was necessary to complete the information which had been omitted in the records. Some of them did not have any description of the stream, others omitted or exaggerated the quantity of water granted, and most of them did not define the land to which the records were appurtenant. About 1200 licenses will be issued in substitution of the 320 records.

"The Board made its award on the following principles, when the record did not show the contrary. 1. Priority of record is priority of right. 2. The works on the ground are the best evidence as to the intentions of the record holder and of the commissioner who granted the record. 3. Records are appurtenant to such of the lands occupied by the record holders at the date of the record as could be irrigated under the system then in vogue."

Also Mr. R. W. Ross, Minister of Lands, in a letter under date of April 8, 1912, writes the author: "You will see from this that we are only now getting the Water Act into working shape for active administration, as the last few years have been occupied in securing engineering information upon which the judgments of our various boards will be based, and also upon which the decision of our Comptroller of Water Rights with reference to further licenses will be guided.

"During the season of 1911, the first large number of board decisions was given, but the actual awards have not yet been handed out, so that there has not yet been an opportunity for litigants to formulate appeals from these decisions."

The Water Law is drastic and covers the subject of the title to and the use of waters in its most minute details. In fact, we consider it one of the most effective statutory laws upon the subject in existence, and undoubtedly it will stand the test of both time and all the litigation, under the Canadian form of government, that may be brought against it.

§ 236. **Saskatchewan and Alberta—Review and our criticism of the "Irrigation Act."**—To make the record of all water rights complete and to prevent disputes regarding vested rights at the time the original Northwest Irrigation Act went into effect,[1] provisions were made in Section 7 of that Act that all rights of

[1] See Sec. 185.

a kind similar to those which can be acquired under the Act were required to be registered before the first day of July, 1898, or to be forfeited to the Crown. The amended Act of 1906 also declares forfeited to the Crown all such rights unless they had been duly licensed under the Northwest Irrigation Act of 1894. The wisdom of these provisions will be recognized when it is remembered that only by a complete record of the rights to the water of any river or stream can it be hoped to deal intelligently with the supply from such source. It was recognized in the earliest stages of the administration of the Act that the first duty of the Government was the endeavor, by a careful system of topographical and hydrographical surveys, to determine the actual supply of water available from each source; and, to accomplish this, the Canadian Irrigation Surveys were inaugurated and carried on systematically each year. One of the main features of the work undertaken was to determine, by careful measurements and gaugings, the actual supply of water available from each stream and other source for irrigation, so as to know what there was to grant, and thus prevent the possibility of waste of money resulting from the construction of canals and ditches, for which the owners can not hope to obtain water without taking what rightly belongs to some one else. This system, strictly enforced by the administrative officers, was also a complete bar to all "wildcat" or "boom" enterprises. This phase of the administration of the law is dealt with as follows: Each stream or source from which water may be diverted is given a place in a register containing as it were a debit and credit account of the water, the credit side being filled up from the measurements and gaugings of the supply at low water, high water, and flood discharge; and the debit side being a charge against this supply of rights to such water acquired under the Act and the vested rights prior to the Act. An examination of this register at any time shows the exact balance between available supply and recorded rights and permits of the immediate settlement of the question of whether there is water available to meet the requirements of each application in the future as it is filed for approval. This system practically delegates to the officers administering the Act the power to prevent the probability of future disputes between the holders of water rights by refusing

to approve any application which it is considered might tax any source of supply beyond its capabilities and thus cause friction between recorded rights; and, although this method of dealing with the public may seem drastic, it is held to be reasonable that the Crown should not undertake to dispose of more water than it can deliver. It must be admitted that the introduction of this system in the earlier days of irrigation development will tend to prevent waste of water in endeavoring to enforce or protect fictitious water claims by long drawn out legal contests. This is one of the principal reasons why there has not been more litigation over water rights in Canada.

The provisions of Sections 19 and 20 of the Irrigation Act regarding public notice and authorization of construction of works, and providing that the Minister may dispose of any protests against applications, have resulted in clearing many undertakings in their inception of objections and disputes which, if left for settlement later, would certainly have resulted in much annoyance, and, in many cases, serious inconvenience and litigation.

A fruitful cause of trouble with all undertakings necessitating the taking of land for rights of way is the question of the area to be taken and the price to be paid therefor. Under Sections 28 to 32 of the Act, possession is authorized and puts the holder in position to expropriate lands necessary for the right of way required and makes the ruling of the Minister final, as to the area necessary, the question of damages only being settled by arbitration. These provisions are also designed to and do prevent litigation.

The document conveying the right to use the water under the Irrigation Act is termed a license, and would perhaps be better designated as a water patent but for the fact that it does not convey any title to the water from the Crown, but simply a license to use the water subject to cancellation upon the failure to comply with certain conditions of the Act after the issuance of the certificate of license.[2] Hence it can not be called anything but a conditional title, not to water, but to its use. *The absolute title still remains in the Crown,* but the licensee has the right to the use of the water as long as he complies with the conditions imposed by the Act.

[2] See Sec. 193, or Secs. 33-48 of the Irrigation Act.

The license purports to transfer the use of a definite quantity of water for the irrigation of a defined area of land; but the licensee, in order to maintain his title to the use of the water, must live up to the provisions of the Act.

The definite quantity of water conveyed settles at once the question of the limit and extent of the right, and no loophole is left for advancing a claim that the right is defined by the size of the canal or ditch or area of the land to be irrigated or the rights of other claimants to the same water, as is the case under the loose laws of some of the States of this country. The stage at which the water is granted is also indicated and the means of determining the stage settled, so that disputes as to when a licensee is entitled to take water can not arise and, at the same time under the system of granting licenses against the three stages, viz., low water, high water, and flood stage, it is possible to grant rights to all the flow of water available for diversion without prospect of a dispute between the holders of such titles. Regardless of the state of the stream the licensee is entitled to just so much water and no more than is called for in his license and at the time stated therein; and, if there is a large surplus over and above the amount granted, he is prohibited by the criminal sections of the Act,[3] from taking or diverting any greater quantity of water than that actually granted by his license, under severe penalties and upon summary conviction.

Under the Irrigation Act the irrigation season and the duty of water are both fixed by the Minister,[4] as stated in the official bulletin:[5] "*Duty of water.*—The ratio between a given quantity of water and the area of land it will irrigate has been fixed at one hundred and fifty acres for each cubic foot of water per second flowing constantly throughout the 'irrigation season,' and all licenses are issued upon this basis. *Irrigation season.*—The portion of the year during which water may be used for irrigation purposes has been defined as a period from the 1st of May to the 30th of September."

Another important point is that the licensee, in order to main-

[3] See Sec. 200, or Secs. 58-61b of the Irrigation Act.

[4] See Sec. 199, or Sec. 54 of the Irrigation Act.

[5] See Bulletin No. 1, Irr. Series, Dept. of Int. of Canada, 1910, p. 10.

tain his title to the use of the water, must live up to the provisions of the Act. It will be noticed that the provisions of the Act for the cancellation of the license illustrates one of the marked points of difference between the Canadian laws and the laws of some of the Western States of this country relating to irrigation. Upon this subject Canada undoubtedly has the better laws. Under the most of the laws of the Western States the forfeiture of rights for nonuser or failure to comply with other provisions of the law must be treated as abandonment or enforced by legal process, which is capable of years of vexatious delays. The Irrigation Act,[6] upon the other hand, provides the simplest and most effective machinery for the cancellation of the certificate for nonuser, and the result is that the owners of water rights who live up to the provisions of the law receive ample protection in the enjoyment of these rights, without having to resort to the Courts to have them defined or enforced; such a thing as maintaining a right to water unless its beneficial use is continued is not possible under the Irrigation Act of these Provinces.

Sections 24 and 27 of the Irrigation Act[7] provide for fixing in the authorization for construction the time within which works must be completed. A "reasonable time" in this case is a definite time, fixed by the Minister. The question of the "reasonable time," as the same is known in the United States relative to the same question, is not known in Canada,[8] but the works must be completed within the time fixed by the Minister. It is true that for any unforeseen disaster, or for any other reason the Minister deems expedient, he may authorize an extension of the time within which the work may be commenced or completed. But this extension of time is also a definite time within which the works must be completed. This provision, strictly enforced, tends to compel the persons or companies applying for rights under this Act to go ahead and complete the construction within the time allowed. Otherwise, the application may be declared forfeited and the rights and works sold to other parties who will construct them. There is no taking up in that country of vested property rights and

[6] See Sec. 196, or Secs. 45-48 of the Irrigation Act.

[7] See Sec. 191.

[8] For Reasonable Time, see Secs. 733-741.

holding them for an indefinite time by doing a little or no work, with the hope of selling out to other parties with a profit.

Sections 28 to 32 of the Irrigation Act [9] provide for the taking of lands for the works of the applicant. Some of the features of the sections are decidedly peculiar, and would be called arbitrary in this country. Lands required for this purpose, in whomsoever they are vested, "whether in the Crown or in any other applicant or licensee, or in any railway company, or in any other person whomsoever," may be taken and acquired by the licensee. It will be noticed that under these provisions a larger enterprise can appropriate the works of a smaller one. To be sure, the policy of granting the application is left to the Minister and to the Department; and the terms and conditions upon which the request may be granted are also left to the same authority, as is also the question of the land to be taken; but under these provisions profitable and going concerns, although small, may be compelled to sell out to a large concern. Whether this ought to be permitted has often been questioned in this age of trusts. A man should not be compelled by law to sell out a going and profitable business to a larger company which, by acquiring these as well as other interests, afterward runs the business as a monopoly. But under the wise provisions of this Act and other Acts governing the subject, the question of monopoly seems to have not arisen in these Provinces.

Under Section 33 of the Irrigation Act [10] agreements must be entered into by the licensee with users of the water to use the whole supply the applicant applies for, otherwise the license is granted for the quantity only that is actually used. No water under this provision can be laid claim to unless it is actually to be used by the applicant or those who have contract with him.

Under Section 34 of the Act [11] licensees having priority of numbers are given the priority of right; and the settlement of all disputes between licensees is left to the Minister, who decides the question in a summary manner and at once executes his judgment by closing the gates of the licensee who is receiving an undue supply of water. Not only this, but under Section 60 of the Act [12] the person improperly diverting water may be tried upon a criminal charge and sentenced to pay a fine, or to imprisonment. These

9 See Sec. 192.
10 See Sec. 193.
11 See Sec. 193.
12 See Sec. 200.

two sections together almost entirely prevent the unlawful taking or stealing of water that is so common in the United States. A definite quantity of water in each case being awarded, it is easily determined by measurement whether or not any person is taking more than he is entitled to.

Section 38 of the Act [13] compels a licensee to sell any surplus water flowing in his works to any person applying therefor and tendering payment one month in advance at the regular price. This section tends to prevent any waste of water, in fact, the intent of the whole Act being that all the water shall be used if it is needed. This section applies only to the surplus water and does not interfere with the sale or use of the water by the regular methods.

Under Section 39 of the Act [14] the proceedings upon the complaint of a customer of a licensee are peculiar and drastic, and under the constitutions of the States of this country would be prohibited. The determination of the matter is left, in the first instance, to the executive officer—the Minister. He makes a certain order as he deems just in the premises. If the licensee fails to obey the order of the Minister, the matter is referred to the Judge of the Supreme Court, who hears and determines the matter in a summary manner, and shall order the licensee to proceed with all dispatch to take such measures as he may consider necessary in the premises. And it is provided that a refusal to obey the order shall be treated and punished as contempt of court.

Under Section 44 of the Act [15] the Governor in Council may, if in the public interests it is at any time deemed advisable so to do, take over and operate or otherwise dispose of the works of any licensee authorized by the Act. As the foundation of the title of the licensee to the water rights is but a license, the theory of the section is that the Governor may cancel the license at any time if it should be judged for the public good. This is simply a summary method of condemnation. But, of course, compensation must be paid for the works according to the procedure set forth in the section. This section would seem to the author to deter capitalists from taking hold of irrigation projects, because of the fear of the Government taking over the works should the Minister at any

[13] See Sec. 193.
[14] See Sec. 194.
[15] See Sec. 196.

time think it was for the public good. Capital is rather a particular creature. It will go into enterprises either as a permanent investment or with a view of selling out some time in the future, but it does not like to go into an enterprise when it is known that some time in the future it may be compelled to sell out.

Under Section 51 of the Act [16] any company or person authorized under the Act may acquire large tracts of land and a license for a great amount of water to irrigate the same. But in order to prevent a monopoly in lands and water, the company is compelled to dispose of such lands to others within fifteen years after acquiring the same, except 10 per cent of the total area of the land actually brought under cultivation or being used for farming, gardening, stock raising, etc., by the company. Any lands not so disposed of shall revert to the Crown. The result of this section will be that the large tracts of lands will be cut up into smaller farms which, under irrigation, will support a larger population.

Section 52 of the Act [17] requires each company to file a detailed statement of the affairs of the company each year. This makes a record in the hands of the Government officers of what each company is doing. It is a decidedly unique law, as far as irrigation matters are concerned, and more in line with what is required of banking and insurance companies in the United States. This section enables the officers to tell just how each company is standing at the date of the statement, financially and otherwise, whether they are complying with the law, and whether or not all of the available water supply is being utilized.

There is one subject provided for in the Irrigation Act that requires special attention, and that is the extreme judicial powers that are conferred upon the executive officers under the Act, and in particular the powers conferred upon the Minister. These officers are empowered to try civil cases and decide them under the law and evidence. They are also empowered to try criminal violators of the law in a summary manner, and if they find the defendant guilty, to either fine him or send him to jail, or both. These judicial powers conferred upon the executive officers named in the Act account in large measure for the fact that there are so few water cases which have been brought into the Courts. The only limitations upon the Minister are imposed in Section 54,

16 See Sec. 197.

17 See Sec. 197.

subdivision "i" of the Act,[18] and under this section he is given the power to impose penalties for the violation of any regulation made under the authority of the Act, or in other words, by himself, but which penalties shall in no case exceed a fine of two hundred dollars or three months' imprisonment, or both. There is no doubt that in many cases minor infractions of the law might be dealt with in as just and equitable manner and, indeed, much more expeditiously by these provisions of the law than by the Courts. But in the United States, under our Federal and State constitutions, these extreme judicial powers can not be conferred upon executive officers because of constitutional limitations. Even under the laws of Canada they may be counted as drastic, especially in a country that follows the common law as its foundation upon legal principles.

§ 237. **Saskatchewan and Alberta—Irrigation Act—Comparative study—Riparian rights.**—Before any irrigation legislation was enacted in Canada the Dominion Government sent a commissioner to the Western part of the United States to make a study of our irrigation and water laws. After visiting a number of States and examining into their system of laws, and attending a number of Irrigation Congresses held therein, Mr. John S. Dennis, the commissioner, upon his return presented a report in which the first recommendations were as follows:

"1. The total suppression of all riparian rights in water, so that the same, being vested in the Crown, may be distributed under well-considered Government control for the benefit of the greatest possible number.

"2. That having taken away this individual right, the Government is in duty bound to exercise that control of its distribution and use, which, while encouraging the investment of capital in the works necessary for its distribution, will protect the individual and result in the greater amount of public good.

"3. That water, owing to its use in irrigation, having become a commodity with defined monetary value, its sale, transfer, and use shall be hedged about with the same safeguards that are enacted regarding real estate or personal property."

18 See Sec. 199.

The Northwest Irrigation Act[1] was formed in accordance with the recommendations of this report, originally applying to the old Northwest Territories. And after the organization of the Provinces of Saskatchewan and Alberta out of what were portions of the old Northwest Territories, the Act as amended was made to apply to those Provinces and entitled the "Irrigation Act," discussed in previous sections. The sections of the Act as amended in 1906, referring to riparian rights, are numbers 6 to 11, inclusive, of the Irrigation Act.[2] Under these sections, it will be noticed that riparian rights were absolutely abolished, with the exception of those few rights which had vested at the time of the passage of the Act, and are limited to whatever the riparian owner "requires for domestic or industrial purposes." This was a wise measure, as there should be no conflicting laws in regard to water rights in a country where the diversion of the water of the rivers and streams for irrigation is necessary. In order to have such a country settled up irrigation must be practiced. In order to practice irrigation the water must be diverted from the streams and applied to the land. This is exactly the converse of the doctrine of riparian rights upon the subject, which is that the water must continue to flow in the streams as it was wont to flow by Nature.[3]

In these Provinces at the time the Act was passed, the land, with the exception of that which had been granted as subsidies to railway companies or alienated through homestead or pre-emption grants, sales, etc., all belonged to the Crown, and title to any of the water in the streams or other natural channels had only passed from the Crown in so far as the rights of riparian owners were concerned, and which rights were very small. So the conditions at this period were particularly favorable for the recognition of a law regarding the definition and use for the water supply for irrigation. The investigations into the subject led to the conclusion that the foundation provision necessary to an Act of this kind was that riparian rights should be abolished and the Government given a free hand to apportion or distribute the water and control its use in such a way that the greatest good to the greatest number would result therefrom. Therefore the Act pro-

1 See Sec. 185.
2 See Sec. 189.
3 For the Common Law of Riparian Rights, see Chaps. 21-28, Secs. 450, 451.

vided for the abolition of riparian rights and the vesting of title and control of all the water in one strong, central authority, the Crown, or the Government itself. It was also considered that in many of the States in the United States riparian rights had been abolished and the title to the water vested in the States; but in these States it was also found that there was much vacant land that still belonged to the Federal Government, and that under this condition it was impossible to so combine the land and the water owing to this divided authority and ownership as to secure the most beneficial results therefrom. Also, it was considered that in some of the States of this country riparian rights still existed, but in Canada, the Crown being the owner of both the land and the water, had the power and authority to make such rules as it saw fit in regard to the disposition of each. There is no doubt in the mind of the author but that one central authority being vested with the ownership and control of both the land and water makes it possible to also administer and dispose of the two as to secure the greatest possible benefit to the greatest number. And Canada, taking advantage of the almost untold confusion in some of the States resulting from this diversity of ownership of lands and water and contradictory laws governing the same, was wise in passing an Act abolishing the common law of riparian rights.[4] Thus Canada is also another Province of England that has abolished one of the fundamental laws of the Mother Country, where the same was not applicable to the physical conditions of the country. And still, some of the States of this Union, where the physical conditions are practically the same as in Canada, have, from a slavish following of precedence as laid down in the common law, retained this antiquated and obsolete principle of the common law of riparian rights. Had the United States taken the same precaution that the Canadian Government did relative to the title and disposal of its land and waters, or even as this Government did relative to its own lands, we would not now have the confusion in the matter of water rights that we have. Instead of that, this Government at an early date became vested with the title of all the public lands within its bor-

4 See, also, for the abolition of riparian rights, the Laws of Australia, Secs. 119-130; the Laws of India, Secs. 103-118; the Laws of Egypt, Secs. 100, 101.

ders and enacted definite and specific laws as to their disposal. At the same time the Government made no claim to the waters of the rivers and streams which flowed over its lands, but at an early day enacted a law that permitted any and all persons to take the waters from the streams and obtain a vested right to the use thereof, so long as the water was used for "mining, agriculture, manufacturing, or other purposes."[5] And, ultimately, this Government, still retaining the title to the public lands, granted statehood to the various States that now cover the whole of our Western domain, and at the same time turned over to these States the government and control of the waters that flowed within their respective boundaries. This has led each State to enact laws governing the subject of waters within their respective boundaries, and the result is, that the laws of each State are different from the laws of any other State. Of course, almost untold confusion and interminable litigation have resulted. And, finally, when this Government awoke to its necessities and passed the National Reclamation Act,[6] it in many instances finds its way blocked by the vested rights of individuals, by the laws of the different States, and by a general lack of a uniform system for the whole country. Truly the Canadian Government is to be congratulated upon passing such a law upon the subject of waters at such an early stage of the settlement of its western domain. And while the laws of the Canadian Provinces relating to irrigation are still in their infancy or formative period, and possibly defective in many respects, the guiding principle and the aim of those laws and their administration are security of title and the use of available water supply for irrigation in such a manner as to bring the greatest and most lasting benefits to the greatest number. It will be noticed that the Act is clear-cut and decisive and grants large powers to the administrative officers, larger than any that are granted to similar officers of our Western States. The result of this is that in 1904, Mr. John S. Hall, K. C., wrote the author: "I have not been able to find any proceedings or reports of cases, whether in British Columbia or in the Territories, where any conflict has arisen. This is largely due to the recent period within which irrigation has been practiced in these parts. I have no

[5] See Acts of 1866 and 1870, Secs. 611-619.

[6] For the National Reclamation Act, see Chap. 65.

doubt that when irrigation is more largely and universally applied, and more land taken up on which irrigation will be necessary and water scarce, numerous cases will arise. These, however, may not be very serious, on the ground that *all the water has now been appropriated and declared to be the property of the Crown or public, and a license to use the same can only be obtained from the Government.*"

And now, after the Act has been in force more than a decade, under date of March 20, 1912, Mr. F. H. Peters, the Dominion Commissioner of Irrigation, writes the author: "I would also say that there has been practically no litigation arising over conflicting rights under the Irrigation Act, and to my knowledge the Appellate Courts have had no occasion to construe the provisions of the Act. The only disputes which have arisen are, to my knowledge, as follows: One dispute *re* the defining of the source of supply, which was settled by arbitration. One dispute *re* rights of riparian owners, which also is shortly to be settled by arbitration. One dispute *re* the right of way of a ditch."

And in conclusion, from all the reports that the author has been able to obtain, the Dominion Government, the Executive Officers under the Government, irrigation and water companies, and last, but most important, the settlers and actual consumers of the water, are well satisfied with the workings of the Irrigation Act and the way it has been enforced. In fact, the settlers have abandoned the irrigation districts formed under the old Irrigation District Ordinance, preferring to have their rights looked after and supervised by the executive officers provided for by the Irrigation Act.

CHAPTER 11.

MODERN IRRIGATION IN THE UNITED STATES.

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§ 238. **Scope of chapter.**—In the preceding chapters of this part we have described the irrigation practices and laws of those foreign countries of the world, both ancient and modern, where that science has been and is practiced to the greatest extent.[1] In this chapter we will relate the beginning and history of the progress of the practice of that science in our own country, in modern times and by our own people. In the following chapter we will relate what is being done by the Indians in the various States of this country,[2] and how the practice of irrigation by them is tending toward their civilization and education.

§ 239. **The arid and semi-arid regions.**—The arid region of the United States is included within that portion of the United States west of the ninety-seventh meridian and extends to the Pacific Coast, and from the British possessions on the north to Mexico on the south. There are no sharply marked lines between the arid and humid areas; but between the two there lies a broad strip of land that is neither distinctively arid nor humid, which is called semi-arid or subhumid. Also within the so-called arid region there are more favored tracts of country, where crops can be raised in certain years without the aid of irrigation; these tracts may also be classified as semi-arid. Then, too, on the western edge of this region, along the Pacific slope, there are certain portions where there is an excessive precipitation, notably the western portions of Oregon and Washington, that may be called humid, while on the same slope in southern California, the rainfall is so small that this section may be classified strictly as arid. From this it may be seen that about two-fifths of the entire area of the United States lies within the arid or semi-arid regions. In a general way arid regions are taken as including those having an average annual rainfall of twenty inches or less. Throughout all of this section of the country there are different degrees, in which irrigation is necessary, from a point where, without its use, the land is absolutely uncultivable, to that where, if not irrigated, it may yet produce some return for the labor of the husbandman in the shape of puny and unreliable crops, but nothing like what it could and would do if water were used upon it. There are again other lands which,

1 See Chaps. 3-10. 2 See Chap. 12.

if not irrigated, will still produce the ordinary cereal crops to a more or less uncertain extent, but which, if water be used upon them at appropriate times, are thereby fitted to and will produce much more certain and larger and better crops than without it.[1] This is also true of certain portions of our country within what is known as the humid region. Larger, better, and more certain crops could be produced were the rainfall supplemented by the artificial application of water by way of irrigation.[2]

§ 240. **States included in the arid and semi-arid regions.**—Generally speaking, the States included within the arid region of the United States are: Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, and Wyoming, and the eastern portions of Oregon and Washington.[1] The States included within the semi-arid region are: Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas, and the western portions of northern California, and also the western portions of Oregon and Washington.[2]

Of course, some of these States are more completely arid than others, as for instance, Arizona and New Mexico are more arid than Washington or Oregon. On the other hand, no State can be called wholly arid, as there are spots in each where crops can be raised without irrigation. But in all of the above-named States there are vast tracts of land having a very fertile soil, that for the most part are wholly unproductive on account of the small precipitation. In these regions agriculture is impossible without the aid of irrigation, but with it, it can be made to produce surer crops and of even greater value, than can be produced in the best sections of the humid region. This condition of the arid region, and the imperative necessity for irrigation to render it productive, is

1 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56, Rev'g *Id.*, 68 Fed. Rep. 948.

For Ancient Irrigation in the United States, see Secs. 80-85.

2 For Supplemental Irrigation, see Sec. 29.

For Irrigation in the Eastern States, see Secs. 257-260.

1 For the particular features of these States and irrigation therein, see Part XIV, under the respective States.

2 For the particular features of these States and irrigation therein, see Part XIV, under the respective States.

a matter of such common knowledge that the Courts judicially take notice that land within this region will not produce agricultural crops without irrigation.[3] In the semi-arid region of the great plains, in some years of excessive precipitation, the humid region, which adjoins it on the east, moves westerly toward the foothills of the Rocky Mountains; while, during dry years, the greater part of the great plains west of the Missouri River becomes semi-arid or, for the time being, even arid.

The States above named now have a large population, and this population is rapidly being increased, largely due to the settlement of lands under the various irrigation projects. The country, under modern irrigation methods, is capable of sustaining a population many fold of that which it has at present. It is estimated that these new arid lands will, in the course of another century, sustain inhabitants to the number of nearly the whole of the present population of the United States. The production of this vast region in cereals alone is practically unlimited. And, under the various systems of irrigation to which this entire region, with its numerous streams, great valleys, and plains, is susceptible, it can not only support its own population, but also aid largely in supporting the population of the other portions of the country.

§ 241. The first of modern irrigation in the United States.—With respect to the development of the practice of irrigation and the relative development of the water and irrigation laws and customs, the arid portion of the United States may be divided into three sections. And, chronologically stated, the first in time of settlement comprises the Southern States of Arizona and New Mexico, and portions of California, which were settled by the Spaniards, and especially under the old Spanish missions, as early as the sixteenth century; second, the settlement of Utah and certain portions of the surrounding States by the Mormons, in 1847;

3 Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Paxton & Hershey Irr. Canal & Land Co. v. Farmers & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; Rev'g *Id.*, 68 Fed. Rep. 948; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Mud Creek Irr. Agr. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078.

and, third, the settlement of the Greeley Colony in Colorado, in 1870. Afterward followed various settlements throughout the arid West, down to the present time. The three earliest settlements were entirely independent of each other; and, in the order enumerated above, will be briefly described in the following sections of this chapter.[1] Prior to these settlements, however, irrigation had been largely practiced by the ancient natives, as related in a previous part of this work.[2]

§ 242. **Settlements by the Spaniards.**—The first settlements in the United States, where what may be termed modern irrigation was practiced, were in the States of California, New Mexico, and Arizona. This portion of the country was first possessed by Spain and afterward by Mexico, and the settlers derived their earliest ideas and methods of irrigation from those countries. The first irrigation practiced by white people was by the Spanish mission fathers in the sixteenth and seventeenth centuries. These fathers, while converting to Christianity and civilizing the Indians, planted and cultivated vineyards, orchards, and farms surrounding the missions. The mission at San Diego, California, was established in 1769, and one of the first things done was to construct a canal or acequia, for the purpose of conveying water to the growing crops and the orchards and vineyards that were planted from seeds and cuttings brought from Mexico. To this day about many of the old missions may be seen the old systems of reservoirs and acequias which were built by the Indians under the instructions of the Catholic missionaries, who had learned the value of irrigation in Mexico, as well as the best manner in which to divert the water from the natural streams and convey it to the point where it was to be used. The methods of irrigation in Spain were peculiarly applicable to the coast region of California and its interior valleys, and also to the valleys of the States of New Mexico and Arizona.[1] Until the coming of the Americans the water laws of this region were those of Spain and Mexico. Under them the waters of a

1 For Settlement by the Spaniards, see Sec. 242; by the Mormons, Secs. 243-246; and by the Greeley Colony, Sec. 248.

2 For Ancient Irrigation in the United States, see Secs. 79-85.

1 See Irrigation in California, Part XIV; Irrigation in New Mexico, Part XIV; Irrigation in Arizona, Part XIV.

stream were held to be a public trust, title to which could not be granted to any private person or corporation. Permission for use only could be given, and then only to the actual user and to the extent of the amount used.[2] The laws governing waters and their use for beneficial purposes were based upon the Civil Law, as modified by those of Mexico. And, in these sections of the country there are still in existence many of the old Spanish-Mexican rights owned by individuals, and also the pueblo rights owned by cities and municipalities, which subjects we will discuss in another chapter.[3]

§ 243. **The Mormons—First settlement.**—There is no question but that modern irrigation, as known in the arid region of the United States by white English speaking people, was begun by the Mormon pioneers in Utah, in 1847. They, by force of circumstances, had been led to make their homes in the very midst of the great arid West. The President of that people, Wilford Woodruff, in his speech before the first Irrigation Congress which met in Salt Lake City on the 15th to 17th of September, 1891, related the circumstances of the practice of the art which has reclaimed so many thousands of acres of barren lands in the West, and is destined to play such an important part in the future of this country. He stated the circumstances of this beginning as follows: "Fifty-one years ago, the twenty-fourth of last July, I entered this valley with one hundred and forty-three emigrants, or in other words, pioneers. We were led by President Young. This country that we arrived upon was called the Great American Desert, and certainly, as far as we could see, it did not deviate from that in the least. We found a barren desert here. There was no mark of the Anglo-Saxon race, no mark of the white man—everything was barren, dry, and desert. We pitched our camp a little to the southeast from here, about eleven o'clock in the day. We had a desire to try the soil, to know what it could produce. Of course, all this company—nearly the whole of us—were born and raised in the New England States, Vermont, Maine, Massachusetts, and

[2] See Irrigation in Mexico, Secs. 79, 175. For Pueblo Rights, see Secs. 581, 582.

[3] For the Civil Law, see Chap. 29, Secs. 552-584.

Connecticut, and had no experience in irrigation. We pitched our camp, put some teams on to our plows, and undertook to plow the earth, but we found that neither wood nor iron was strong enough to make furrows in this soil. It was like adamant; of course we had to turn water on it. We would have done anything. We went and turned out City Creek; we turned it over to our ground. When we came to put our teams upon it, of course, they sank down in the mud. We had to wait until this land dried enough to hold our teams up. We put in our crops and staid here. In the meantime President Young laid out this city, as you see it today, in the midst of sagebrush, without a house within hundreds of miles of us. Now, what I wish to say is this: You gentlemen come here today, you see the city, you go through the country. Here are thousands of miles, I might say, through these mountains filled with cities, towns, villages, gardens, and orchards, and the produce of the earth that sustains the people. Without this water, this irrigation for which you have met here today, this country would be as barren as it was in 1847, as we found it. Whoever occupies these lands has got to have the water to perform the work. We have had to learn by experience, and all that we have obtained in these mountains has been by irrigation."

§ 244. **The Mormons—The cause of the settlement and the condition of the country.**—The announced desire of the Mormon pioneers who settled in Utah in 1847 was to get a place so far away from other settlements that they might follow the teachings of their peculiar religion without interference from those not of their faith. The opposition that they had met in Ohio, Missouri, and Illinois had compelled them to take the long journey across the desert among hostile Indians, and finally brought them to the Great Salt Lake Valley. It certainly seemed that they had chosen wisely in their selection. It was then a thousand miles from the nearest settlements on the east, and almost as far from the California settlements on the west. What were considered almost impassable deserts surrounded it on all sides, The only white men who had visited the valleys theretofore were trappers and explorers. It was nominally under the sovereignty of Mexico, but in reality there was no established form of government. They were a law unto themselves for a number of years. At the close of the Mexi-

can War sovereignty passed to the United States, but still no government was established, except that by themselves. In addition to being without established government, the region to which they had come required a kind of agriculture new to what they were accustomed to and new to the kind that was practiced in the then United States. Irrigation engineering and irrigated agriculture were alike unknown to them. More than all this, there was no means of acquiring title to land in the region where they had settled, and what was afterward the Territory of Utah. Owing to these conditions, the Mormon settlers in the valley of the Great Salt Lake were pioneers indeed—settlers in a new country without established government, and requiring a new system of engineering and of agriculture. The absence of laws or established customs left them free to develop their institutions without the necessity of conforming to existing rules; while the church, which exercised authority over both religious and civil affairs, prevented those conflicts over titles to both land and water which would otherwise have arisen.[1]

These conditions remained until the settlement became a Territory, and, in 1896, a State, of the Union. The legislatures of both the Territory and State have kept pace with the more modern laws and systems for the government and control of waters; until today the State probably has as perfect a system of laws governing the subjects of waters and water rights as has any State in the country.[2]

§ 245. **The Mormons—Their policies and success.**—It was thus, on the 24th day of July, 1847, that the science of irrigation, in a somewhat primitive way, was first introduced by English speaking people in the very heart of the arid region of the United States.[1] From that time on, the Mormons realized that they could succeed in making a living and be able to remain in the country by building ditches, and diverting the water of the streams from their natural channels and applying it to the land for irrigation. It was an absolute necessity, and then their bare existence depended

1 See Irrigation in Utah, Secs. 243-246.

For some of the peculiar early Mormon laws, see Part XIV, Utah.

2 For the irrigation and water laws of Utah, see Part XIV.

1 See previous Secs. 243, 244.

upon it, and that, too, regardless of any of the comforts, luxuries, or profits which might thereafter be derived from this use of the water. As time progressed, however, their work along these lines became more systematized, and better methods were obtained, until at the present time the Mormon farmers are generally considered among the best irrigators in the country; and it may be said that they have all the comforts, and many of the luxuries, that can be found in any portion of the West.[2] Their policy caused them to spread out and to colonize the surrounding sections of the country, and for more than sixty years their settlements have extended for hundreds of miles from the central point at Salt Lake City.[3]

§ 246. **The Mormons—Co-operative system—Size of farms.**—The cause of the great success of the extensive systems of irrigated agriculture now found in the State of Utah was due mainly to co-operation, which was a dominant principle of the Mormon pioneers. It was beyond the power of one farmer to turn the mountain stream from its natural channel and spread it upon his land. Hence he joined with his neighbors, and, under one head, they constructed a larger ditch than the single individual would have done—in fact, one large enough to irrigate all of their lands. Another cause of success was the selection of a small farm which, with intensive cultivation of diversified crops, always produced a good and substantial living for the settler and his family, and at the same time permitted near neighbors by assembling the farmers' homes in close proximity or in convenient village centers. Thus the farmers were enabled to live in the villages and drive out each day to their farms in the vicinity. The villages were also laid out in large blocks and lots, and every farmer was expected to have his garden and orchard inside of the village. Even Salt Lake City was originally laid out in blocks containing ten acres, which were divided into eight lots of one and one-quarter acres each. Water was furnished for the irrigation of all of these lots without the business district; and throughout all portions of the resident districts today are some of the original lots, which are still culti-

[2] For the Effect of Irrigation upon the Individual, see Sec. 9.

[3] For Irrigation in Utah, see Part XIV.

vated by means of the old water rights acquired during the early days.

In the earlier days, the areas of the cultivated farms were small. This was due largely to the smaller ditches and canals that were then used. During the later years, the average of the cultivated irrigated farms is larger, due undoubtedly to the larger irrigation systems constructed throughout the entire State. This growth is shown by the various census reports as follows: The census of 1890 shows that there were, in 1889, 9,724 irrigated farms, including 263,473 acres, or the size of the average farm was 27 acres; that of 1900 shows that in 1899 there were 17,924 farms, including 629,293 acres, or the size of the average farm was 35.1 acres; that of 1910 shows that in 1909 there were 19,709 farms, including 999,410 acres, or the size of the average farm was 50.2 acres.

And, it must not be understood from the above that the State of Utah now is entirely Mormon and subject to their institutions and church. In many of the farming communities the residents are largely Mormon, but in many others, especially under the newer large irrigation projects, the residents are largely non-Mormon. The different classes of citizens live together in harmony; and, as far as business relations are concerned, one can not be told from the other.

§ 247. **The Greeley Colony—The first settlement.**—It was not until 1870 that the first co-operative and associated effort in the direction of irrigation outside of Utah was accomplished. However, irrigation had been practiced upon a small scale along the bottom lands in sections of what is now nearly every Western State and Territory prior to that date. Two years after the Mormons had settled in Utah, gold had been discovered in California, and the Overland Trail, with its various branches, had been established. Along this trail various stations had been erected, usually upon the banks of some stream. In the neighborhood of these stations a few settlers established themselves, and by means of simple furrows turned the water upon small patches of land, and by means of these individual efforts they raised certain crops, which were disposed of at high prices to those who were traveling to California in the rush for gold. These efforts were the sum total of all the irrigation enterprises, outside of those by the

Mormons in Utah, until the year 1870, when the Union Colony of Colorado, popularly called the Greeley Colony, was established on the eastern slope of the Rocky Mountains, upon the lands of which the town of Greeley is the center.

§ 248. **The Greeley Colony—Cause of the settlement.**—The settlement of the Mormons in Utah was the result of a religious immigration.[1] The Greeley settlement was the transplanting, in the then far West, of a New England town, originally based somewhat upon socialistic, or rather, communistic ideas. Nathan Cook Meeker was the father of this new enterprise, which was to mark the beginning of a new and different industrial development in Colorado. The place of its organization, strange as it may seem, was New York City. At the close of the war, Mr. Meeker was the agricultural editor of the New York *Tribune*. In 1868 he was commissioned by Horace Greeley to take a trip to the far West, and to give the readers of the *Tribune* a detailed description of the industrial system of the Mormons in Utah. Arriving at Cheyenne in the winter time, and heavy snows having fallen, he was compelled to defer his visit to Utah, and, instead, went south into Colorado. He remained in Colorado until the following fall, studying the situation, and then returned to New York City. During the summer of 1869, undoubtedly influenced by the reports of Mr. Meeker, Mr. Greeley visited Colorado and was at once interested in the conditions and possibilities of the country, and gave the proposition his personal support, as well as the backing of his powerful paper, and from that time on the call was, "Go West, young man." A few friends were got together and the enterprise was launched.

The issue of December 14, 1869, of the New York *Tribune* published a prospectus of the scheme, as well as an editorial endorsement written by Mr. Greeley himself. The result was somewhat unexpected to the promoters themselves. In response to the announcement several hundred people met at the Cooper Institute in New York in mass meeting, at which Horace Greeley presided, and organized the "Union Colony of Colorado," the technical name given to the company; a name, by the way, that has never been followed, in popular parlance at least, as it has always been known

1 For Settlement by the Mormons, see Secs. 243, 244.

as the Greeley Colony. The actual settlement of the colony was made in the spring of 1870, under the personal direction of Mr. Meeker. A committee had previously selected twelve thousand acres of railroad and government land, and when the settlers arrived everything was ready to begin operations. The first thing done was to establish a town and name it after the great sponsor of the enterprise, Greeley. The next thing, and as quickly as possible, was to construct a ditch on the south side of the creek, on the site of the one that now irrigates the lots in the town. Thus started the agricultural development of the State of Colorado. Without following the failures and eventual success of these settlers further, we will only add that the founding of the Greeley Colony marked the beginning of a new and different industrial development in Colorado, which had formerly been given over to the miner, the cattleman, the hunter, and the Indian.[2]

Many scientific experiments were made by the colonists, and the best methods, both for irrigation and cultivation, were sought out. The homes and civic institutions of the colony became the pride of the State, and its success inspired numerous undertakings of a similar character not only in the State of Colorado, but in other portions of arid America.

§ 249. **The Anaheim Colony, California.**—Early in the history of modern irrigation in California is the Anaheim Colony, which, about forty years ago, settled upon a body of land on the Santa Ana River, about twenty-five miles southeast of Los Angeles. This colony, co-operative in its inception, was composed of a party of Germans living in the city of San Francisco. They were all small tradesmen, mechanics, and laborers, and their small savings composed the capital that started the enterprise. Under the rules of the association each person, to become a member, paid the sum of $100, and further contributions in small monthly installments. This money was placed in a common fund and used for the purchase and improvement of a large tract of land. A part of the

[2] See Water-Supply and Irrigation Papers of the United States Geol. Survey No. 9; Irrigation Near Greeley, by David Boyd.

See, also, The Conquest of Arid America, by William E. Smythe, 1900, Chap. 2; Irrigation Institutions, by Elwood Mead, 1903, pp. 44, 45.

See, also, Irrigation in Colorado, Part XIV.

colony was sent on in advance to build the irrigation canals. The whole tract was then divided into twenty-acre farms to each member of the association, and planted by the advance guard in orchards and vineyards. The main body, in the meantime, remained in San Francisco and worked at their various occupations and thus earned the money that sustained the work in the field. Later, when the land was prepared for occupancy, the settlers came with their families, built their houses on their various tracts, and from that time on, worked their land as private property, and only the irrigation canals remained the property of the association. Co-operation, however, had served its purpose in enabling the settlers to obtain their land at first cost, and to have it improved and planted in the advance of their coming to occupy them. The community was thoroughly successful from the start, and demonstrated what could be done by means of intensive cultivation by means of irrigation. The success of the colony worked a revolution in the character of the people. Prior to the time of the settlement that section of the country had been a region of great ranches, where the cattle industry and the raising of grain had held complete sway. All this gave way to the small farm intensively cultivated, fruit trees, and vineyards. The success of this colony also led to the foundation of many other colonies throughout the State of California.[1]

§ 250. **Riverside Colony, California.**—In the year 1871 the Riverside Colony settled upon lands about seventy miles east of Los Angeles. The enterprise originated with Judge North of Knoxville, Tennessee, and, like most of the pioneer settlements, was composed of comparatively poor men. It was originally co-operative in its design, but later departed from that plan. About one hundred families were secured who could invest the sum of one thousand dollars for the purchase of land, and these were also joined by many industrious families who could invest a smaller amount. Land was first purchased from a Mexican, who owned one of the large sheep ranches in the vicinity, at the price of two dollars

1 See The Conquest of Arid America, by William E. Smythe, 1900, Chap. 3; Irrigation Institutions, Mead, 1903, p. 45.

For Irrigation in California, see Part XIV.

and a half an acre. The conditions were such that it required considerable money to take the water from the Santa Ana River and carry it to the land; in fact, the first canal required the sum of fifty thousand dollars to construct. Fortunately, the money was available, and the original canal was completed in the spring of 1871. The enterprise at this time resolved itself into a private corporation, owning both the land and the water. The land was now sold by the corporation to the settlers for the sum of twenty-five dollars per acre. This also included the right to purchase a certain amount of water per acre, for which there was also an annual charge for maintenance. From the first start the settlement of Riverside thrived, and it was destined to become the pioneer orange colony of California. In no other place in the United States have farm lands advanced in value as they have in Southern California. From a few dollars per acre, lands in the Riverside Colony have advanced to one thousand and even two thousand dollars per acre, and some years have earned a profit of fifty per cent on the higher figure. Many other colonies have settled in various parts of California, and, following the example set by the Anaheim and Riverside Colonies, have been very successful, until California has become noted not only for its mines, but also for its fruit and diversified farm industries.[1]

Without going into the details of other settlements throughout the arid West, we will now take up the subject of the growth of irrigation throughout the whole country.

§ 251. **Growth of irrigation, 1847-1880.**—It was a notable epoch in the development of the West when the Mormons settled in Utah and scattered their colonies from that point north, into Idaho, Wyoming, and Montana, and even into Canada, and south into New Mexico and Arizona, and also into Old Mexico. When the Mormons entered Salt Lake Valley in July, 1847, there were probably not more than a few hundred acres irrigated in what is now within the boundaries of the United States. These lands were irrigated by Indians, Mexicans, and at the California missions.[1]

[1] See Irrigation in California; The Conquest of Arid America, by Smythe, 1900, Chap. 3; Irrigation Institutions, by Mead, 1903, p. 45; U. S. Dept. of Agriculture, Experiment Stations Bulletin No. 100.

[1] See The Mormons, Secs. 243-246.

Another important epoch occurred when, twenty-three years after the Mormon settlement, the Greeley Colony was founded in Northern Colorado. The wonderful results shown by the Mormon communities, and the ultimate success attained by the Greeley Colony, attracted public attention and greatly stimulated the colony idea. As a consequence, between the years of 1870 and 1880, many organizations were formed for the purpose of bringing people in large bodies from the Eastern States, and even from Europe, and placing them upon small farms in various sections of the arid West. These farms, in the respective sections, were located near each other and supplied with water from a common ditch. Individual settlers throughout various parts of the country have also, by their own efforts, brought considerable tracts of land under irrigation, and thus, at many widely scattered points, and under different conditions, the science of irrigation has been introduced. There are no statistics concerning the area irrigated in 1870, but it is probable that in that year there were not more than 20,000 acres under irrigation in the whole of the United States.

From 1870 to 1880 there was an era of rapid development, mostly by means of small ditches, constructed by individuals and associations of farmers, so that at the end of 1880 there were probably over 1,000,000 acres under irrigation, but still there were no statistics upon the subject. Up to this period the United States Government had not considered the subject of sufficient importance to collect the data upon the subject and publish the same in its census of 1880.[2]

§ 252. Growth of irrigation (continued), 1880-1890.—Up to the year 1880 co-operative associations in irrigation enterprises had predominated. The success of these institutions throughout the West led to a wild rush of speculative enterprise similar in character to the mad rush to California for gold in the year 1849. It was during the decade from 1880 to 1890 that this "boom" in irrigation enterprises occurred. Large sums of money were obtained for irrigation works throughout different portions of the arid West by the sale of stocks and bonds, and great enterprises were launched, enormous reservoirs were projected, and canals of upward of one hundred miles in length planned, and, in some cases, built. Nearly

2 See United States Census, 1900, Part II, Agriculture, p. 801.

all of the large enterprises constructed during this period failed financially, and, although they aided in the extension of irrigation, they did not at that time enrich the investors. The main cause of this failure, in our opinion, was the failure of the promoters to secure settlers enough to permit of success. Many enterprises were started that were *bona fide* in character, having large tracts of land under their control and sufficient water to irrigate the same, and ample money borrowed to finance the project; and yet, in many cases, there was the most abject failure. The prospectuses of these companies stated that the settler could secure the land for such a sum per acre, that the water right could be secured for a certain sum, and knowing the number of acres that could be watered from the projected works and the company having control of both, it seemed simple enough to compute large profits to the investors. But many of these works, although possessing great merit, were failures because there were so many of them projected during the same period throughout the country that there were not settlers enough in the whole country willing to undergo the hardships of pioneer life to supply all of these enterprises. And it was from the settlers that these companies expected to obtain their revenue, and when these did not come, of course there was no revenue. Afterward many of these works were foreclosed by the bondholders or mortgagees and started again upon a new basis and have since succeeded, but the loss to the stockholders was a total one.

During the same decade of 1880-1890 there were other elements which entered into irrigation development and tended to give them a backset. These were the wild-cat projects promoted by "boomers," and absolutely having no merit, and those irrigation projects, which had some merit, but had not been carefully thought out or engineered. Of course, with the failure of the *bona fide* projects these "bubbles" burst, with the result that not only the stockholders lost everything, but also the bondholders and mortgagees, and the settlers as well. For in many instances the settlers were induced to move upon the land before the works were completed, or were only imperfectly completed; and, of course, the failure to get the water upon the land at the time promised by the company was ruination. to the settlers already upon the land and prevented others coming.

Fortunately for the country, and especially for the West, these times have passed, and from 1890 to the present, irrigation develop-

ment has progressed rapidly and upon a more substantial basis than were those projects mentioned above, which were launched during the decade of 1880-1890. However, we must not be understood as inferring that all of the projects launched during that period were bad, as they were not. Many of these enterprises survived all financial difficulties of those particularly critical years for these projects, and are now in existence and prospering as well as are the settlers who took up lands under them.

About the year 1890 the respective States, and the Territories also, took up the question in their legislatures, and enacted better laws for the government and distribution of the waters within their respective jurisdictions, better laws for the protection of the investors in these projects, and better laws for the protection of the settlers who settled under them. And, while these laws have been improved upon later, they, at that time, practically eliminated from these propositions the "boom" and "wild-cat" elements.

§ 253. Growth of irrigation (continued)—The eleventh census of 1890.—The eleventh census of the United States, published in 1890 was the first to devote attention to irrigation matters, and the statistics obtained show that in 1889 there were 3,631,381 acres irrigated on 54,136 farms in the arid region, with an average irrigation area of 67 acres per farm. This was divided among the several states of the arid region as follows:[1]

States and Territories	Number of Irrigators in 1889	Area irrigated in 1889, in acres	Average size of irrigated farms in acres, in 1889
Arizona	1,075	65,821	61
California	13,732	1,004,233	73
Colorado	9,659	890,735	92
Idaho	4,323	217,005	50
Montana	3,706	350,582	95
Nevada	1,167	224,403	192
New Mexico	3,085	91,745	30
Oregon	3,150	177,944	56
Utah	9,724	263,473	27
Washington	1,046	48,799	47
Wyoming	1,917	229,676	119
Sub-humid Region	1,552	66,965	43
Total	54,136	3,631,381	67

1 United States Census, 1890, Agriculture by Irrigation, p. 1.

It will be noticed that the average of the irrigated farms in Utah is the smallest, having but 27 acres, and the average for Nevada is the largest, having 192 acres.

In the semi-arid or subhumid region, which lies within the Great Plains east of the Rocky Mountains, statistics were also taken in the census of 1890 of the land under irrigation. There were in 1889 under irrigation 66,965 acres irrigated on 1,552 farms, with an average irrigated area of 43 acres per farm. This was divided among the several states of the semi-arid region as follows:[2]

States	Number of Irrigators in 1889	Area irrigated in 1889, in acres	Average size of irrigated farms in acres, in 1889
North Dakota	7	445	64
South Dakota	189	15,717	83
Nebraska	214	11,744	55
Kansas	519	20,818	40
Texas	623	18,241	29
Total	1,552	66,965	43

The above table shows in a general way an increase in the number of irrigators and in the acreage irrigated from north to south, which is due largely to the fact that conditions of summer aridity increase with the lower latitudes, and also to the greater density of population and more easily available water supply toward the south.

Omitting the subhumid states, in which irrigation at that time was considered exceptional, and confining the statistics to the States of the arid region where irrigation was a necessity, there were in 1889, 3,564,416 acres irrigated. This was almost exactly one-half of one per cent of the total land area of the States and Territories within the arid region and where irrigation was commonly practiced. The largest percentage by States was found in Colorado, reaching 1.34 per cent, and the smallest percentage irrigated among the arid States and Territories was in Arizona, where the area was less than one-tenth of one per cent.[3]

The area irrigated by artesian wells in 1889 and included in the totals set forth in the above tables was 51,896 acres. This was but

[2] United States Census, 1890, Agriculture by Irrigation, p. 2.

[3] United States Census, 1890, Agriculture by Irrigation, p. 2.

1.429 per cent of the total of the irrigated land for that year. The number of wells, the area irrigated in each State and Territory, appear in the following table:[4]

States and Territories	Total Number	Average depth in feet	Average disch. in gal. per minute	Wells used in Irrigation: Average area irrigated per well in acres	Wells used in Irrigation: Total area irrigated in acres
*Arizona	.....	.....	.....	.....	.....
California	3,210	248.00	164.00	18.63	38,378
Colorado	596	250.00	39.00	18.01	6,213
Idaho	28	83.00	11.00	13.21	185
Kansas	59	202.00	44.00	13.71	329
Montana	14	366.00	28.00	3.00	18
Nebraska	91	247.00	13.00	1.00	7
Nevada	33	215.00	6.00	1.00	20
North Dakota	461	196.00	21.00	2.00	20
Oregon	6	70.00	15.00	4.00	12
South Dakota	527	216.00	51.00	6.68	474
Texas	534	292.00	19.00	3.00	438
Utah	2,524	146.00	26.00	4.73	5,802
Washington	9	127.00	89.00	.....	.....
Wyoming	5	210.00	8.00	.....	.....
Total	8,097	210.41	54.43	13.21	51,896

*No data.

§ 254. Growth of irrigation (continued), 1890-1900—The twelfth census of 1900.—During the following decade, 1890 to 1900, the irrigated acreage in the United States doubled in extent. This was due not only to the construction of many new works, but also to the extension and enlargement of many canals already existing in 1889, and to the more complete irrigation of the lands then under ditch. The twelfth census of the United States, published in 1900, shows that in 1899 there were 7,263,273 irrigated acres on 102,819 farms in the arid region, with an average area of 70.64 acres per farm. The following table will show the division of the land among the several States and Territories, the amount irrigated from streams and wells and the percentage of increase as compared with the area irrigated in 1889:[1]

4 United States Census, 1890, Agriculture by Irrigation, p. 8.

1 United States Census, 1900, Agriculture, Part II, p. 830. The above table is for lands exclusive of Indian reservations, for which lands see Secs. 271-285.

States or Territories	Number of Irrigators 1899	Acreage 1899 From streams	Acreage 1899 From wells	Total 1899	Total 1889	Per cent increase
Arizona	2,981	184,422	974	185,396	65,821	181.7
California ...	25,611	1,293,366	152,506	1,445,872	1,004,233	44.0
Colorado	17,613	1,604,213	7,058	1,611,271	890,735	80.9
Idaho	8,987	602,324	244	602,568	217,005	177.7
Montana	8,043	951,154	.....	951,154	350,582	171.3
Nevada	1,906	504,034	134	504,168	224,403	124.7
New Mexico..	7,884	202,889	1,004	203,893	91,745	122.2
Oregon	4,636	388,111	199	388,310	177,944	118.2
Utah	17,924	624,186	5,107	629,293	263,473	138.8
Washington..	3,513	133,698	1,772	135,470	48,799	177.6
Wyoming	3,721	605,232	646	605,878	229,676	163.8
Total....	102,819	7,093,629	169,644	7,263,273	3,564,416	103.8

A comparison of the number of irrigators and of the number of acres irrigated, at the beginning and end of the decade of 1889-1899, shows that they both have approximately doubled. The number of irrigators in the arid States increased from 52,584 in 1889 to 102,819 in 1899, or 95.5 per cent;[2] and the number of acres increased from 3,564,415 to 7,263,273, or 103.8 per cent. The average size of the irrigated farm increased from 67 acres in 1889[3] to 70.64 in 1899. This increase is explained by the irrigation during those years of large areas on ranches, in forage crops and pasture. In the more thickly populated States, the number of irrigators increased more rapidly than the area brought under cultivation, showing a more marked tendency toward the subdivision of large irrigated tracts, and the cutting up of these into smaller farms devoted to fruit raising, garden, and general farming rather than the raising of forage crops.

In the semi-arid States and Territories the land irrigated shows a much larger percentage of increase in 1899 over the year 1889 than is shown in the arid region. There were in 1899 in this region 273,117 acres on 4,970 farms, with an average irrigated area of 54.95 acres per farm. This was divided among the several States of the semi-arid region as follows:[4]

[2] For the number of irrigators in 1889, see Sec. 253.

[3] See Sec. 253.

[4] United States Census, 1900, Agriculture, Part II, p. 867. The above table is of lands exclusive of Indian reservations, for which lands see Secs. 271-285.

States	Number of Irrigators 1899	Acreage 1899 From streams	Acreage 1899 From wells	Total 1899	Total 1889	Per cent increase
Kansas	929	21,711	1,909	23,620	20,818	13.5
Nebraska ...	1,932	147,695	843.	148,538	11,744	1,164.8
N. Dakota....	54	4,815	57	4,872	445	994.8
Oklahoma ...	124	2,620	139	2,759	.....	.....
S. Dakota....	606	38,453	5,223	43,676	5,717	177.9
Texas	1,325	49,267	385	49,652	18,241	172.2
Total....	4,970	264,561	8,356	273,117	66,965	307.8

Therefore the total acreage in the arid and semi-arid regions as reported in the twelfth census was 7,263,273 acres in the arid States and 273,117 in the semi-arid States, making a total of 7,536,390 acres. In addition to this there were reported 3,155 acres irrigated in the humid States, making a grand total of 7,539,545 acres under irrigation in the whole of the United States in 1899.[5]

It will be noticed in the table above that there was a rapid increase during the ten years ending with 1899 of the lands irrigated in the semi-arid region, the area irrigated in the latter year being more than three times as large as that watered in 1889. The rate of increase in the number of irrigators was not so large.[6]

It will also be noticed that the amount irrigated from wells was increased over three-fold in 1899 to that irrigated in 1889, the total acreage irrigated in the arid and semi-arid regions in 1889 being 51,896 acres; and in 1899 the acreage for the arid region being 169,644, and 8,356 for the semi-arid region, making a total of 178,000 acres in 1899.

Up to the year 1899 all the works were constructed and the water diverted from the streams entirely by private enterprise, no Government or State aid having been given up to that time, except that indirectly given by the Government through the Carey Act, which will be discussed in a later section.[7]

§ 255. Growth of irrigation (continued), 1900-1910.—During the decade of 1900-1910 the growth of irrigation in this country

5 Vol. 6, Agriculture, Part II, Twelfth Census Report, 1900, p. 819. See, also, for Irrigation in the Humid States, Secs. 257-264.

6 See Sec. 255.

7 See Carey Act, Chap. 67.

There is another possible exception, and that is in the State of Colorado, although no data are available. For State aid to irrigation enterprises, and for works constructed by the State of Colorado, see Part XIV.

exceeded any other previous decade. According to the preliminary census results of the thirteenth census, the number of farms irrigated in 1909 in the arid and semi-arid States was 157,862, as against 107,716 in 1899, or an increase of 46.6 per cent. The total number of acres irrigated in 1909 in the arid and semi-arid States was 13,739,499, as against 7,527,690 acres in 1899, or a total increase of 6,211,809 acres, or 82.5 per cent during the decade. It will be noticed that the thirteenth census report disregards the old classification of arid and semi-arid States and includes the States formerly in the semi-arid region in the previous census as "arid States." The cause of this great increase was largely due to the acreage brought under cultivation under the National Reclamation Service, extensions and new projects under the Carey Act, and extensions and new districts under State irrigation district laws.

There is also a very significant fact reported by the thirteenth census, and that is that enterprises already constructed, capable of supplying water for irrigation in 1910, were placed at 19,335,711 acres. The area included in all projects constructed and projected, but not entirely constructed, is placed at 31,112,110 acres. This indicates that the growth of irrigation in this country for the next two decades at least will increase in about the same ratio that it increased during the last decade.

§ 256. The thirteenth census of 1910.—Under the classification made by the thirteenth census for 1910, including the semi-arid with the arid States, is to be found the following:

Table 5—Acreage Irrigated in 1909, Classified by Type of Enterprise: Arid States.

State	Total	United States Reclamation Service	United States Indian Service	Carey Act
Arid States	13,739,499	395,646	172,912	288,553
Arizona	320,051	138,364	19,386	.....
California	2,664,104	400	3,490	.....
Colorado	2,792,032	16,600	1,020	485
Idaho	1,430,848	47,500	3,426	162,418
Kansas	37,479	6,953	.....	.....
Montana	1,679,084	14,077	67,417	9,648
Nebraska	255,950	30,536	300	.....
Nevada	701,833	30,000	2,597	.....
New Mexico	461,718	13,398	24,007	.....
North Dakota	10,248	1,610	.....	.....
Oklahoma	5,402	.....	.....	.....
Oregon	686,129	22,000	429	24,750
South Dakota	63,248	5,613	50	.....
Texas (exclusive of rice)	164,283	.....	.....	.....
Utah	999,410	.....	11,520	5,000
Wyoming	1,133,302	12,905	4,270	36,252
Washington	334,378	55,690	35,000	.....

Table 5—Continued.

State	Irrigation Districts	Co-operative Enterprises	Commercial Enterprises	Individual and Partnership Enterprises
Arid States	533,142	4,646,039	1,444,806	6,258,401
Arizona	.....	101,025	80	61;196
California	173,793	779,020	746,265	961,136
Colorado	115,304	1,273,141	159,457	1,226,025
Idaho	140,930	628,102	44,872	403,600
Kansas	.....	27,372	.....	3,154
Montana	4,912	329,426	62,544	1,191,060
Nebraska	76,448	78,605	24,834	45,227
Nevada	.....	78,966	8,864	581,406
New Mexico	.....	264,411	15,600	144,212
North Dakota	.....	.....	.....	8,638
Oklahoma	.....	2,000	.....	3,402
Oregon	1,500	149,985	77,387	410,078
South Dakota	.....	13,601	6,300	37,684
Texas (exclusive of rice)	.....	41,186	73,440	49,657
Utah	8,455	681,760	70,227	222,448
Washington	.....	81,122	66,911	95,655
Wyoming	11,800	116,317	87,935	813,823

In the same States as above named it is also reported that the acreage enterprises already constructed were capable of irrigating in 1910 under the above classifications as follows: Total, 19,335,711; under the United States Reclamation Service, 786,190; United States Indian Service, 376,576; Carey Act, 1,089,677; Irrigation Districts, 804,951; Co-operative Enterprises, 6,194,677; Commercial Enterprises, 2,416,516, and under Individual and Partnership Enterprises, 667,124 acres.

And in the same States the acreage included in enterprises already constructed or under construction in 1910 classified by the same type of enterprise as above is reported as follows: Total, 31,112,110; United States Reclamation Service, 1,973,016; United States Indian Service, 879,068; Carey Act, 2,573,874; Irrigation Districts, 1,589,865; Co-operative Enterprises, 8,845,437; Commercial Enterprises, 5,096,337; Individual and Partnership Enterprises, 10,154,513 acres.

Table 8—Acreage Irrigated, 1909, Classified by Source of Water Supply: Arid States.

State	Total	Streams		Wells	
		Gravity	Pumped	Flowing	Pumped
Arid States	13,739,499	12,783,121	157,728	125,590	308,043
Arizona	320,051	300,067	7,711	1,489	6,096
California	2,664,104	2,235,067	29,965	55,818	276,595
Colorado	2,792,032	2,745,035	13,248	5,171	3,111
Idaho	1,430,848	1,383,718	18,685	1,172	705
Kansas	37,479	35,469	20	2	1,959
Montana	1,679,084	1,624,656	7,963	207	55
Nebraska	255,950	254,105	18	.....	139
Nevada	701,833	661,299	463	150	37
New Mexico	461,718	397,059	1,533	48,877	5,952
North Dakota	10,248	7,153	1,614	.....	1
Oklahoma	5,402	5,219	50	.....	69
Oregon	686,129	643,281	3,585	155	1,305
South Dakota	63,248	47,122	540	1,448	8
Texas (excl. of rice)	164,283	75,496	59,149	3,710	6,199
Utah	999,410	954,800	2,559	4,100	300
Washington	334,378	301,341	9,085	3,227	5,437
Wyoming	1,133,302	1,112,234	1,540	64	75

Table 8—Continued.

State	Reservoirs	Lakes		Springs	Total irrigated with pumped water
		Gravity	Pumped		
Arid States	98,193	58,121	12,517	196,186	478,288
Arizona	487	570	.....	3,631	13,807
California	16,410	15,896	2,574	31,779	309,134
Colorado	16,091	422	634	8,320	16,993
Idaho	732	4,622	1,535	19,679	20,925
Kansas	2	.....	.....	27	1,979
Montana	22,614	5,617	5	17,967	8,023
Nebraska	1,002	.....	.....	686	157
Nevada	138	500	406	38,840	906
New Mexico	1,272	862	.....	6,163	7,485
North Dakota	1,280	.....	.....	200	1,615
Oklahoma	20	28	.....	16	119
Oregon	3,279	22,915	821	10,788	5,711
South Dakota	13,535	200	.....	395	548
Texas (exclusive of rice)	6,203	.....	458	13,068	65,806
Utah	568	1,671	.....	35,412	2,859
Washington	299	4,698	6,084	4,207	20,606
Wyoming	14,261	120	.....	5,008	1,615

It is also reported that in the States above named there were irrigation works constructed as follows, to wit: Number of independent enterprises, 54,669; total length of ditches, 125,615 miles; of this 87,336 miles were main ditches, and 38,279 miles were laterals. There were also 6,933 reservoirs, having a capacity in acre-feet of 12,872,256. Also there were 5,070 flowing or artesian wells and 14,544 pumped wells used for irrigation. The number of pumping plants is stated at a total of 13,951, with an engine capacity of 207,241 horse-power, and capable of pumping 9,918,755 gallons per minute.

The cost of irrigation enterprises in the same States is set forth as follows: Total cost, 1910, $304,699,450, as against $67,482,261 in 1899, and $29,611,000 in 1889, showing an increase of 127.9 per cent in 1899 over 1889, and the total amount of increase in 1910 as against 1899 was $237,217,189, or 351.5 per cent.

In the same States it is shown that the average cost of irrigation enterprises per acre served, based on the acreage irrigated in 1909, was $22.18; based on the acreage enterprises were capable of irrigating in 1910 was $15.76 per acre. In 1899 it was $8.89 per acre, and in 1889 it was $8.15 per acre.

The average cost per acre for operation and maintenance for the years 1889 was $1.07; 1899, $0.38; 1909, $1.07.

The per cent of acreage irrigated represented by different types of water rights in the States named is given as follows: Riparian rights, 2.1; appropriation and use, 34; notice filed and posted, 16.2; adjudicated rights, 35.3; permits from States, 6.7; certificates from States, 5.7.

§ 257. **Irrigation in the humid States.**—There are a great many farmers who place dependence upon irrigation even in the humid portion of the United States. The exact number of these and the acreage irrigated have been somewhat difficult to ascertain, for the reason that irrigation is so widely practiced in a small way that it is almost unknown by this term. In nearly every city, town, village, and well-settled suburb of the country the watering of lawns and gardens is carried on as a matter of course. However, as a general thing, the people do not designate this as irrigation, yet such is the case. Sometimes the line between watering in this way and the systematic irrigation of larger fields is very difficult to draw, and thousands of instances of watering of market gardens, even of considerable size, are overlooked simply because this operation is not designated as irrigation. The distinction between sub-irrigation and drainage is also one which is very difficult to make.[1] Many lands in the humid region which are low and naturally too wet for successful tilling have been made productive by systems of drains. These are operated in such a way that they serve to irrigate the land by subsurface means; the drains are checked in times of drought to hold up the water, and give more moisture to the lands, and are opened wide to drain away superfluous moisture. This is in effect a method of irrigation that is practiced in nearly all of the central humid States. In a number of the humid States there are regular systems of ditch drainage. These systems are used as an adjunct of the rainfall. There is no State in the Union but that at times in the summer there are long spells of continued drought. During these periods the irrigation systems are used as a sort of insurance for the maturity of the crops. That this is a wise provision has been proven for many reasons.[2]

§ 258. **Irrigation in the humid States (continued.)**—According to the popular conception, the field for irrigation is only the arid or

1 For Sub-Irrigation, see Sec. 36. For Drainage, see Sec. 38.

2 For Supplemental Irrigation, see Sec. 29.

semi-arid region in the western portion of this country, and does not extend to the humid States of the eastern and central portion of the country, where the supply of moisture is considered sufficient for the growth of crops. The distribution of the rainfall is so uncertain throughout the humid portion of the country that crops in this region often suffer from drought. The distribution of rain is by no means uniform, even in adjoining counties, and in certain localities, owing to the topography, certain lands fail to receive many of the showers which fall on the surrounding country. Sometimes the rain falls too plentifully and the ground is flooded, and at other times for long spells there is no rain at all, and unless irrigation is used in some method many of the crops, especially garden truck and small berries, are burnt up and entirely lost. It is not uncommon to see farmers making frantic efforts to save their crops from destruction by hauling water and sprinkling from barrels and watering pots. The water applied in this manner is too small in quantity to be of any service and very costly. Therefore as a result of this condition, and following somewhat the example set in the West, in many portions of the humid East are to be found quite a number of economical and successful methods of irrigation adapted to humid conditions.

In the humid region the advantages to be gained from irrigation are limited to certain crops. Such field crops as timothy, clover, wheat, rye, oats, and corn are not particularly affected by droughts of short duration. The value of such crops will usually lie between $15 and $30 per acre, and an extensive system of irrigation would hardly pay. In the case of truck crops it is entirely different. The value of a single crop will often be $200 to $1,500 per acre, and usually two or three crops are raised in a season. Failure to provide sufficient moisture during any continued period of hot weather may result in great damage to the crop. Irrigation also matures these crops earlier, when they will bring the best prices.

In addition to the truck gardens there are in many localities in the humid region in which there are low meadows lands which may be cheaply irrigated, and these two types of irrigation constitute the present field for irrigation in the humid East. From investigations by the Department of Agriculture of the Government of 125 irrigated meadows in four counties in Pennsylvania, it was found that the total area covered something over 800 acres, showing that

meadow irrigation was a well established practice in that region. And in 41 cases where an estimate of the yield from 270 acres not irrigated is compared with the same number of cases and the same acreage of irrigated land, it was found that the irrigated land produced 570 tons, and the non-irrigated land 270 tons, thus showing that irrigation fully doubles the yield.[1]

From investigations of the Government and the data furnished by the reports relative to irrigation in the humid States it seems that the irrigation of meadows and truck farms is an established and profitable practice in the humid States, while the irrigation of field crops is not practiced to any great extent.

§ 259. **Irrigation in the humid States (continued)—Twelfth census, 1900.**—The twelfth census was the first in which any attempt was made to ascertain the number of irrigators and the acreage irrigated in the humid region. And the result of these statistics for the year 1899 shows that the number of irrigators in the Eastern humid States were 429, the acreage irrigated 3,155, the cost of the systems $288,681, and the value of the products produced on these lands was $426,805. These were divided among the Eastern humid States as follows:[1]

States	Number of Irrigators	Acreage irrigated	Cost of systems	Value of products
Connecticut	56	471	$ 16,113	$ 9,925
Florida	180	1,538	232,388	302,870
Maine	11	17	2,170	2,555
Massachusetts	28	134	14,680	31,325
New Jersey	8	73	2,831	8,720
New York	10	68	1,872	5,675
Pennsylvania	134	814	15,627	33,220
Rhode Island	2	40	3,000	32,515
Total	429	3,155	$288,681	$426,805

There are also many other States within the humid region wherein irrigation is practiced, and of which no enumeration was made in the twelfth census report. These are Illinois, Michigan, Minnesota,

[1] U. S. Dept. of Agriculture, Office Experiment Stations, Bulletin No. 167, 1906, Irrigation in the North Atlantic States.

[1] See Twelfth Census of the United States, 1900, Agriculture, Part II, pp. 875-877.

Wisconsin, Ohio, and a number of the other Northern States. And in the South there are the rice-growing States, which were enumerated in the twelfth census of 1900.[2]

§ 260. **Irrigation in the humid States (continued)—Thirteenth census of 1910.**—According to the preliminary census results of the thirteenth census of 1910, there were 2,228 irrigated farms in the States included within what is known as the humid region of the United States, not counting the rice-growing States. In the twelfth census of 1900, 429 were reported.[1] The acreage reported irrigated by the census of 1910 is 28,919 acres, as against 3,155 acres reported in the census of 1900.[2] This shows a much larger gain proportionately than is shown in any one of the arid States. It also shows that the farmers of the Eastern States, especially those who are cultivating the soil by intensive methods for truck gardening and fruit, are taking advantage of the benefits of irrigation as an adjunct to the natural rainfall. In other words, they are using the water of the natural streams as supplemental to the natural rainfall.[3]

§ 261. **Irrigation in the rice-growing States—Louisiana.**—The first growers of rice in the United States were the Acadians, French settlers from Nova Scotia, who were driven from their homes at the time that England took over that land from France, in 1755. They were a simple pastoral people, who for nearly one hundred and fifty years following their exile lived in their new southern home, in what is now the State of Louisiana. Their principal source of livelihood was their cattle and agriculture, and rice was a common product of the farm. At that time irrigation was unknown in this section, and the Acadian farmer depended wholly upon the rainfall for the water necessary to flood his rice fields, as well as for his other agricultural crops. Viewed from the stand-

2 For Irrigation in the Rice-Growing States, see Secs. 261-264.

See, also, Irrigation in the North Atlantic States, Aug. J. Bowie, Jr., Agent and Expert, 1906, Bulletin No. 167, Office of Experiment Stations, U. S. Dept. of Agriculture; Annual Report Irrigation and Drainage Investigations for 1904, Separate No. 7, U. S. Dept. of Agriculture.

1 See the Twelfth Census of U. S., Vol. 6, Agriculture, Part II, p. 875.

2 See census report, *supra*, pp. 819, 875.

3 For Supplemental Irrigation, see Sec. 29.

point of the value of the returns, early rice-growing in Louisiana offered no attractions for that capital which, in recent years, has developed vast bodies of land not formerly cultivated by the Acadians, and which were believed by them to be entirely worthless except for grazing purposes. There was little improvement in the cultivation of rice so long as the farmer depended upon the rainfall for the floods which moistened his fields. This was also particularly true so long as he confined his labors to the low alluvial lands along the sluggish bayous. His methods of cultivation were too primitive to permit of progress. However, the success of the rice farmers of the South may, in a way, be traced to the experiments of the Acadians, and their success convinced other and more ambitious settlers who went to Louisiana after the Civil War that the business of rice-growing could be made profitable. The necessity of sufficient water at the critical period in the growth of the crop was made plain, and they supplied the deficiency by irrigation. The heavy rains were not allowed to drain off into the bayous, but were dammed back and stored by levees, and the water thus held was saved until it was needed by the growing rice, when the levees were cut and the water allowed to flow over the fields below. But when there was no rain the crop suffered and sometimes failed entirely. This step, although in advance of the earlier method, did not greatly increase the acreage, because of the uncertainty of the water supply. The continued demand for American rice made the crop a profitable one, could one be sucessfully harvested. And then the farmers went one step farther.

§ 262. **Irrigation in the rice States (continued)—States east of the Mississippi River.**—In those States to the east of the Mississippi River rice is successfully being grown by irrigation, although the industry seems to have got its start from an independent source from that in those States to the west of that river. In 1694 a Spanish vessel, being storm-bound, put into the port of Charleston harbor. The captain of the vessel gave to one of the citizens of Charleston, Thomas Smith, a handful of rough rice. Smith took the grain and planted it in his garden. The plants thrived and bore abundantly. Smith gave some of the seed to his neighbors, and they also planted it and were successful in raising crops. The

planting continued, and the colonists cultivated the grain with great care, until at length from that single handful of rough rice was developed the famous Carolina rice, now known the world over. At the present time rice is grown in all the Gulf and South Atlantic States, which include the States of Alabama, Georgia, Mississippi, North Carolina, and South Carolina.

Most of the water used in the cultivation of rice in the States east of the Mississippi River is supplied from rivers. Rice here is cultivated less than 15 or more than 30 miles from the sea, following the meanders of rivers. The limits of this 15-mile belt are determined on the sea side by the presence of salt water in the river, and on the inland side by the point at which there is no longer a sufficient tide for irrigating and draining the rice lands. A two-foot tide is taken as a minimum for this drainage and irrigation. On streams near the sea, where the water is too brackish to be used, and on lands above tidewater, the planter must depend upon some other source for his water. To irrigate such lands water is taken from inland lakes and reservoirs; sometimes the water is pumped upon the lands and sometimes the lands are drained by pumps. The methods of irrigation are various, and often crude; in fact, the system of the colonial planter is still in use in many places.

The development of the industry of growing rice in the South Atlantic and Gulf States has been so rapid within the last few years that laws and institutions have not kept pace with the industry, and already serious loss has resulted from the failure of those States to provide for the establishment and protection of titles to the use of water. Although they are old States, irrigation is a new use to which water is put. The western principle of priority has to a large extent been disregarded. Streams have been over-appropriated, and early investors and appropriators, who should have been protected in their use of the water, have been made to suffer by the water being taken by later comers, who should have been prevented from diverting the water until the earlier users were supplied. The laws of these States will be discussed in their proper places.[1]

[1] See United States Dept. of Agriculture, Office of Experiment Stations, Bulletin No. 113, 1902, Irrigation of Rice in the United States; also, see Annual Report of Irrigation and Drainage Investigations, 1904, Separate No. 7; also, United States Census, 1900, Agriculture, Part II, p. 877.

§ 263. Irrigation in the rice States (continued)—The use of pumping plants.—Investigation of the soil of the prairie lands elevated from 10 to 70 feet above the bayous, and experiments in rice-growing thereon, during exceptionally wet seasons, forced the conclusion that these lands were better adapted for rice culture than the lower bottom lands, provided the water could be supplied. There was plenty of fresh water in the bayous near at hand, and the problem was how to get it upon the land. Small steam pumps were first used to raise the water from the coulees, which were dammed and allowed to fill during the winter. Later, after experiments with various styles of pumps, the large centrifugal pump was adopted, which was a pronounced success. Two styles of pumps are now in general use, the centrifugal and rotary pumps, having discharge pipes which range in diameter from 12 to 60 inches, and which elevate from the bayous to the flume above from 20 to 100 or more cubic feet per second.

The effect of the successful irrigation on prairie lands for growing rice in Louisiana has been that these lands that were worth about $1 per acre and no market even at that price, have risen in value to $50 or $60 per acre, and even higher. Another effect has been that the industry has spread to the States of Texas and Arkansas, in which States the raising of rice has become a profitable industry.[1]

§ 264. Irrigation in the rice-growing States (continued)—Census reports of 1900 and 1910.—The twelfth census report of 1900 was the first that mentioned the irrigation of rice in the Southern

[1] See Irrigation of Rice in the United States, by Frank Bond and George H. Keeney, Agents and Experts; Irrigation Investigations, 1902, Bulletin No. 113, Office Experiment Stations, U. S. Dept. of Agriculture; Irrigation in Southern Texas, Annual Report of Irrigation and Drainage Investigations, 1904, pp. 347-505, Separate No. 6, same as last above; also, Separate No. 5; Rice Irrigation in Louisiana, Texas, and on the Prairie Land of Arkansas, Annual Report of Irrigation and Drainage Investigations, 1904, pp. 509-565, Separate No. 7, same as last above; Cost of Pumping from Wells for the Irrigation of Rice in Louisiana and Arkansas, by W. B. Gregory, Professor of Experimental Engineering, Tulane University of Louisiana, 1908, Bulletin No. 201, same as last above; Mechanical Tests of Pumping Plants Used for Irrigation and Drainage in Louisiana, by W. B. Gregory, Bulletin No. 183, 1907, same as last above; Rice Irrigation, Twelfth Census of the U. S., 1900, Agriculture, Part II, pp. 874, 877-879.

States, and in that the details are very meager. The acreage devoted to the culture of rice by this means are not given, and only some of the results in certain States.[1]

The preliminary census results of the thirteenth census, however, go into the matter of irrigation in the rice-growing States more in detail and report 4,320 irrigated farms in what is known as the rice belt of the Southern States, with a total irrigated acreage of 694,730. The cost of all plants, which are very largely in the nature of pumping plants, for the utilization of water in the irrigation of rice in this belt, is stated at the sum of $12,877,352.

§ 265. The water supply—The extension of the irrigated area.—As was said in the first edition of this work,[1] the acreage at that time could be regarded as approaching the maximum possible limit with the then available supply of water and the method of utilizing it. As a general statement it may be said at the present time that throughout the arid region there is scarcely a stream of small size from which water can be conducted upon arable land, that is not utilized to its utmost capacity during the irrigation season. To be sure, in a great many parts irrigation is in the first steps of development, not yet having advanced much beyond the simple and wasteful methods of using the water.[2]

The simple but very important fact that the area which can be irrigated is dependent upon the amount of water flowing in the streams, is often ignored in the general discussions of irrigation and its possibilities. It is often taken for granted that simply because there are vast areas of fertile land along a river, some of which has been irrigated profitably, larger and larger areas will, with the progress of settlement, be brought under cultivation to an indefinite extent. The assumption can not be correctly made that since a river of a certain locality drains a large area its waters must be proportionately abundant. It is unfortunately the case that many rivers of the arid region occupy a prominent place upon the map, but carry a very small amount of water for at least the cropping period of the year, and then the water is all utilized or needed for the land now wholly or in part under cultivation.

1 See Twelfth Census Report of the United States, 1900, Part II, Agriculture, pp. 874, 877-879.

1 See Sec. 28.

2 See Wasting Water, Secs. 911-916.

Although in any watershed there is but a definite and usually limited supply of water, as compared with that which might be used, the maximum extent of irrigated lands in the country has been by no means reached.[3]

There are five methods by which the irrigated area may be largely increased in the country. Some of these methods may not apply to certain particular sections, but usually one or more will apply to all sections of the country. These methods are as follows:

First, the enactment of more stringent laws in many of the States to prevent waste,[4] coupled with laws regulating the duty of water.[5] The result of these laws is a greater economy in the use of water and the covering a larger area of land with the same amount.

The second method is the storing of more of the flood or storm waters of the nonirrigating season so that it can be used when needed for irrigation.

Third, more artesian basins are constantly being discovered, and more wells sunk, and thus the irrigated area is also being extended. In the decade of 1889 to 1899, more than three times the number of artesian wells were sunk that existed, all told, prior to that period.[6] These wells now irrigate certain lands that were either formerly barren, or they help out with the irrigation of lands that were only partially irrigated before. Of course, the sinking of wells should be coupled with stringent laws to prevent the wasting of their waters. Many of the States have such laws.[7]

Fourth, the largest increase in acreage now being brought under cultivation by irrigation is the construction of vast systems to hold back and divert the waters of the larger rivers of the country. These systems are being constructed under the National Irrigation Act by the Government,[8] and also by private enterprises, usually taking advantage of the Carey Act.[9] Thousands of acres are now being reclaimed by these works, which, of course, require the expenditure of a vast amount of capital. But even

[3] For the estimated future possibilities, see estimate from the Thirteenth Census Report, 1910, Sec. 260.

[4] See Wasting Water, Secs. 911-916.

[5] See Duty of Water, Secs. 902-908.

[6] See Census Report, 1900, Sec. 254. For Artesian Basins and Wells, see Secs. 1166-1184.

[7] For the artesian well laws of the respective States, see Part 14.

[8] See National Irrigation Act, Chap. 65.

[9] See Carey Act, Chap. 67.

in the face of what has been done by these great works, the large rivers of the country remain comparatively untouched. But the time is fast approaching when their forces will be called upon, even to their utmost capacity, to assist in irrigation as one of the great necessities of the country.

The fifth method might almost be classified with the second, described above; this is the storage of waters, but by means of forestry. This includes the protection of the present forests and reforestation of now denuded tracts of land. The subject of forests, as related to stream flow, has been discussed in a previous chapter of this work.[10] And, as there seen, natural forests form the best reservoirs known to man. They hold back the water in times of flood and permit it to percolate down to the streams in time of drought.

§ 266. **The present condition of the laws of irrigation in the different States.**—It is left to each State to enact its own laws upon the subjects of waters, water rights, or the use of water.[1] And, although the modern irrigation codes enacted in many of the States are a great improvement upon their old laws,[2] in many of them much remains to be done by way of legislation. The laws concerning water and water rights vary exceedingly. In some of the States the common law rights of a person who owns land adjoining a stream or through which it runs are abolished; in others they are allowed. This of course brings about a conflict between those who claim the water by right of appropriation and the riparian owners, who claim, by virtue of ownership, the right to have the stream flow as it was wont, in its natural channel, undiminished in quantity and undeteriorated in quality. Then, again, in the construction of irrigating ditches, a very small proportion are constructed by outside capital, but are dug by the irrigators themselves, acting individually and taking the water directly from the natural streams, or in co-operation, by several farmers joining their rights and digging a ditch, and then each individual taking from the canal to the extent of his right. Thus the ownership is almost wholly within the hands of the farmers, and the administration of water, if the general lack of system can be

10 See Chap. 2, Secs. 40-62.

1 See Sec. 593.

2 For the water codes of the respective States, see Part XIV.

called such, is wholly within the control of men who are directly benefited. Owing to the multiplicity of ditches deriving water from the same source or stream, and the many separate interests involved, there constantly arise conflicts between irrigators as to the distribution of water, especially during seasons when the supply is scanty. Disputes of this character are settled sometimes by private arrangement, but more often by recourse to the courts. The expense of lawsuits for the maintenance of water rights is a heavy burden to the farmer, and there is a widespread complaint of the unstability of the value of property. As the land is absolutely worthless in portions of the arid region without water, the commencement of a lawsuit perhaps involving his entire water right causes the value of the land to fluctuate to a greater or less degree, and as the practice of irrigation increases and there is each year a greater demand for water, this is more and more likely to occur. The necessity for better methods of settling disputes and of conferring titles to use of water is beginning to be strongly insisted upon by the farmer, for he now appreciates that the whole value of his land depends upon an absolutely unimpeachable claim to sufficient water to raise his crops. There arises in the minds of all who are cognizant of the facts in the case, a question as to why this condition of insecurity has been allowed to exist, and why the magnificent water resources of many of the rivers of this Western country have been allowed year after year to go to waste. There are also reservoir sites in abundance, plenty of flood waters to fill them, vast tracts of fertile land needing this water. Besides these, there is a legion of irrigators quarreling with each other for the possession of the small amount of water available during the critical season of the year. Why do not these men devote their energies to saving the flood waters, thus improving their own lands and making possible the development of vast additional tracts? The answer to the question is plain. It is all due to the fact that irrigation has grown up without any order or system, each man or group of irrigators taking all the water to be had and caring little for the needs of others.

§ 267. **The divided jurisdiction over lands and waters.**—In the early days, the chief interest of the various States and Territories

of the arid region was in mining and in cattle raising, and very little attention was given by the public at large or by the legislatures or by Congress to the needs and development of agriculture, so that wasteful systems of water distribution have grown up and foisted themselves upon the communities, preventing free action and even obscuring the clear view of greater benefits to be derived by radical improvements. It will now take years to eradicate this evil, owing to the law of vested rights, whereas if the United States Government had taken the matter in hand when the water of streams first began to be used for this purpose, undoubtedly a better and at least a uniform system would have been adopted.

It seems strange in looking back over the history of irrigation that the Congress of the United States should have enacted such uniform and explicit laws in relation to the disposal of public lands, and should have allowed this indispensable incident to those lands to remain wholly unprovided for. If a uniform system had at first been adopted by the Government for the disposal of the waters of the natural streams flowing over the public domain the difficult questions that now arise would have been avoided.[1]

The British Provinces have done better in this respect than has our Government, especially those in Canada and in Australia. At an early period in their history of irrigation they enacted laws which absolutely controlled the waters and their use, as well as laws for the acquisition of the title to lands.[2] At first our Government was undoubtedly the owner of both lands upon the public domain, and also the waters flowing thereover. Now a great portion of the public domain is still owned by the general Government, while the waters flowing within the respective States are either claimed by the States as their property, or are at least controlled by them. And, furthermore, each State does control the waters and their use in its own peculiar manner. No State can require that another State shall adopt certain laws governing waters. Even the Congress of the United States can not demand this nor enact laws for their government. A State may adopt

1 For the history of the Arid Region Doctrine of appropriation, see Chap. 32, Secs. 595-626.

2 For Irrigation in Canada, see Chap. 10, Secs. 177-237.

For Irrigation in Australia, see Chap. 6, Secs. 119-130.

the common law of riparian rights, or it may adopt the Arid Region Doctrine of appropriation. "Congress can not enforce either rule upon a State."[3]

§ 268. **The necessity for irrigation in this country.**—So far as the practice of irrigation in this country is concerned, no such serious questions as those mentioned in some of the previous chapters of this work have ever entered into the consideration of the subject. All of the present population of this country could exist from the products of the humid regions, and that, too, if the science of irrigation had never been practiced here. The question of warding off, or the protection from actual famine has never yet been considered as a national issue in this country, as has been the case in both Egypt, India, and China.[1] So, in this country, irrigation has never entered into the question of the life and death struggle for existence that it has in the more densely populated countries of the Old World. But as the country becomes more thickly populated, it remains for future generations to see what part irrigation will take in the struggle of humanity.

Thus far in the United States the practice of the science of irrigation has been more from the standpoint of increasing profits and the comforts of life, or from the speculative standpoint, than from a great national necessity. To be sure, it has been practiced to make barren lands bring forth crops; and also to make other lands more productive, but the persons who cultivated these lands might have selected others within the rain belt of the country, and have raised thereon sufficient crops to have made their living. But it is the future generations that are being prepared for. They will eventually receive the greatest benefits. And so, silently, and almost without the knowledge of the people living in the eastern portion of this country, about one-tenth of the population of this country have gone upon that portion of

[3] Mr. Justice Brewer, in the case of Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

For the power of a State to govern the waters within its boundaries, see Secs. 586-594.

[1] For Irrigation in Egypt, see Secs. 65-68, 88-102; in India, Secs. 70, 103-118; in China, Secs. 69, 168-170.

the United States lying outside of what is known as the rain belt, west of the 100th meridian, into what is known as the great arid region, and have been laying the broad foundations upon which posterity and the future generations of this country will have to depend upon largely for their living. In that portion of the country the artificial application of water to the soil is in a greater or lesser degree necessary for the production of crops; but, when so applied, the crop results are such as are almost unheard of in the eastern portion of the country. Thus the "Irrigation Empire" has grown up in this country without its magnitude and vast possibilities being known until within the last few years. To date, the great majority of the irrigation projects have been constructed by private enterprise. And it was not until the last decade that the National Government made any effort to assist in the construction of these works, when it passed the National Reclamation Act in 1902.[2] And, even now, although there are many large rivers either within the arid region, or large rivers in such proximity that their waters may be brought within the arid region, and there are yet millions of acres of uncultivated arable land upon which these waters can be utilized, no great general scheme, such as was projected many years ago in India and is now being projected in Egypt by the English Government, has ever been undertaken by our Government. This is simply from the fact that this country has not needed it in the struggle for existence. In those countries they were needed from the very necessities of their conditions. What may not our Government also do, when bare necessity urges it to further action?

§ 269. **The future of irrigation in the United States—A National question.**—The day is certainly fast approaching when the public will understand that irrigation is not only the concern of the arid region, but of the whole United States—that it is not only necessary in order to render a part of the country habitable, but is indispensable as a means of supporting the rapidly increasing population of the arid region itself, as well as aiding in sustaining the population of the East. Instead of a narrow sectional question, irrigation is becoming more and more each year a broad national problem.

2 For the National Reclamation Act, see Chap. 65.

There are vast tracts of arable land in the West still unsupplied with water, and it is a question of making use of the available water supply in order to bring these lands into cultivation that is of the most vital importance at the present time. As we stated in the first edition of this work would be the case, the general Government has been compelled to take steps for the construction of storage reservoirs and for great works necessary for the utilization of the waters of the great rivers of the country.[1] This the Government is accomplishing under the authority of the National Reclamation Act.[2] These works, as a general thing, are larger in design than private capital is willing to undertake. Also, by means of the Carey Act,[3] private capital is given the opportunity, under the supervision of the States, to construct these works; and, under the scheme, the settler acquires title to both the land and the water right. In nearly all of the States of the West, projects under the Carey Act have been and now are being constructed, and, to date, the State of Idaho is leading in these projects.[4] Many projects financed entirely by private capital, and which come under neither of the above-named Acts, have been and are now being constructed in every State of the West. All this tends toward the settlement and development of the "arid West."

The troublesome questions concerning water rights have, during the past fifteen years, become more settled and uniform. The law governing the title to real property has been practically settled for hundreds of years. The law governing the title to water for irrigation has been in existence but fifty years, and although it is by no means settled, it is becoming more so each year. The modern tendency is toward the end that every acre of irrigated land must have a title to the water that irrigates it. Every stream which is diverted and utilized for irrigation must be divided among a multitude of users. The waters of every stream that runs through two or more States must in time be apportioned between those States. The rivers or other bodies that separate or run through the lands of this country and adjoining nations must be apportioned between the two countries. All of these

1 Kinney on Irrigation, 1st Ed., Sec. 36.

2 See Chap. 65.

3 See Chap. 67.

4 For Irrigation in Idaho, see Part XIV.

matters are bound to be settled in time. The condition and activity in irrigation matters place a peculiar emphasis on the need of the settlement of the laws and policies which are for all future time to control the use of the waters of our Western streams, and to determine who are to have the right to their use.

During the last decade many of the States enacted drastic laws upon the subject of waters and water rights, but there is still very little uniformity between the laws of the different States.[5] The laws of the States of California and of Wyoming and Utah are entirely different. In some respects they should be different, as the physical conditions of the respective States differ. There is, however, a commendable tendency upon the part of the respective legislatures to abrogate, as far as vested rights will permit, the common law of riparian rights, or to limit and define those rights, and in all cases to make the right to the use of a certain amount of water depend upon its actual application to some beneficial use or purpose. The new water and irrigation codes of the respective States met the ideas of their respective legislatures, and while, in a number of cases, they are not the best laws which should have been enacted, they are the best laws that could have been enacted at that time; and time and experience will bring about the enactment of amendatory laws, which will more nearly meet the requirements of all parties interested.

The future outlook for the development of this Western country is bright, indeed. And, as further development and settlement can only come by bringing into cultivation by the means of irrigation the millions of acres still uncultivated, the future of irrigation and irrigation projects is also bright.

§ 270. Future of irrigation—Secretary Hitchcock's report.—In concluding this chapter, I will add that it has been sufficiently demonstrated that irrigation is an absolute necessity to a great portion of the arid region. In the course of a few years it will be recognized as a great National necessity. The demands for the products of this country are year by year becoming greater and greater, both from within and without. This country will be compelled to meet those demands.

5 For the water and irrigation laws of the respective States, see Part XIV.

In summing up the whole subject of irrigation, its present condition and future needs, nothing more concise and direct has been written upon the subject that the report of the Secretary of the Interior, Honorable Ethan Allen Hitchcock, to the President, dated November 21, 1901. This report was made before the National Irrigation Act was passed, and sums up the situation as it then existed, and what would be necessary in the future if any great amount of the arid public lands were to be reclaimed. He said, in part:

"Briefly stated, the results of the examination of the extent to which arid lands can be reclaimed by irrigation show that, while one-third of the United States is still vacant, there are relatively few localities where homes can now be made. This is not because the soil is barren or infertile, but on account of the difficulty of securing an adequate water supply. There is water to be had, but this water is mainly in large rivers, from which it can be taken only by great structures, or the supply comes in sudden floods and can not be utilized until great reservoirs have been built. It is impossible for a laboring man or an association of settlers to build these great works.

"The pioneer coming to the arid region found many small streams from which water could be taken out upon agricultural land. He was able, through his own efforts, to irrigate a small farm and to make a home. These easily available waters have been taken, and a man can no longer secure a foothold, although there still remain 600,000,000 acres of vacant land. It is possible by water storage and by building diversion works from great rivers to bring water to points where such men can utilize it and can enjoy opportunities similar to those had by the earlier settlers. Unless this is done much of the country must remain barren, and thousands of men and women eager to become independent citizens must remain as wanderers or tenants of others.[1] . . .

"Enough work has been done by private capital to demonstrate the fact that water conservation and the diversion of large rivers is practicable, but, like many other works of great public importance, it can not be made a source of profit. . . .

[1] Upon this subject, also see First Edition of Kinney on Irrigation, 1893, Secs. 29-36.

"The argument has been presented that if the Government will not make it possible to bring water to these lands they should be turned over to the States; but the majority of the citizens who have studied the subject are opposed to such action, on the ground that the vacant public lands are the heritage of the people of the United States, and should be held for the creation of homes, and not made a subject of speculation, as has almost invariably been the case with lands donated to the States. The whole trend of enlightened public sentiment is in favor of an expansion of industries and commerce internally through wise action by the National Government rather than attempting to get rid of the duties and opportunities of ownership by giving away this valuable property.

"Two distinct conditions are to be clearly distinguished in the problem of water conservation for the development of the West. On the one hand, there are localities where the agricultural land along the rivers has been brought under irrigation, and there is a demand for water to an extent far exceeding the supply, and where all of the flood water, though stored, would not suffice to satisfy the demands of the lands now partially tilled. The other contrasting condition is where there still remain vast bodies of public land for which water can be provided by means of reservoirs or by diversion from large rivers whose flow can not be used. Here the construction of works of reclamation in no way affects lands now in private ownership. Between these two extremes are all varieties of intermediate conditions, but these may be arbitrarily classed with one or the other.

"In the first case reservoirs, if constructed, must be treated in the same way in which other public works having to do with rivers and harbors are managed. The water conserved should be used to increase the flow of the streams during the season of drought, regulating the volume so that it can be utilized to the best advantage, according to the laws and customs prevailing in the locality. This is comparable to the conditions where the outlet of a harbor has been improved without reference to the benefits to the owners of the docks around the shores.

"Under the other condition, where there are unappropriated waters flowing to waste which can be brought within reach of public land, it is possible to make provisions such that the Government can be reimbursed for its expenditure. The lands to be benefited

by such works should be reserved for homestead entry only in small tracts, each being subject to the payment, before title is finally passed, of a sum equivalent to the cost of storing or conserving the water, such payment to be made, if desired, in installments extending over a number of years. Water should be brought to the point where the settlers can, with their own labor or by cooperation, construct ditches and laterals to reclaim the desert land. . . . In this manner thousands of the best class of citizens in the country would be permanently located in prosperous homes upon what is now a desert waste.

"It has been estimated that the western half of the United States would sustain a population as great as that of the whole country at present, if the waters now unutilized were saved and employed in irrigating the ground. . . .

"The water for irrigation should be distributed in conformity with the laws of the State and without interference with any vested rights which have already accrued. . . .

"The investigations which have been carried on demonstrate that, looking at the matter from all sides, there is no question now before the people of the United States of greater importance than the conservation of the water supply and the reclamation of the arid lands of the West, and their settlement by men who will actually build homes and create communities."

CHAPTER 12.

IRRIGATION ON INDIAN RESERVATIONS.

§ 271. Scope of chapter.
§ 272. The condition of Indian lands—The present policy of the Government.
§ 273. The principal factors in the civilization of the Indian.
§ 274. Irrigation by different tribes in Arizona.
§ 275. Irrigation by different tribes in California.
§ 276. Irrigation by different tribes in Colorado.
§ 277. Irrigation by different tribes in Idaho.
§ 278. Irrigation by different tribes in Montana.
§ 279. Irrigation by different tribes in Nevada.
§ 280. Irrigation by different tribes in New Mexico.
§ 281. Irrigation by different tribes in Oregon.
§ 282. Irrigation by different tribes in Utah.
§ 283. Irrigation by different tribes in Washington.
§ 284. Irrigation by different tribes in Wyoming.
§ 285. The effect of irrigation upon the Indian.

§ 271. Scope of chapter.—A description of modern irrigation in the United States would not be complete without mentioning the progress of the American Indian in this respect.[1] This chapter will be devoted to that subject, and to the progress and education of the Indians by this means.

§ 272. The condition of Indian lands—The present policy of the Government.—Except in the cases of a few tribes that have tilled the soil since the first arrival of the white man, the progress of the Indian in all forms of agriculture has largely taken place within the last thirty years, and this through the instrumentality of the Government; and, even among the agricultural tribes, governmental supervision has greatly improved their economic condition. In undertaking to educate the Indian and make him a self-supporting citizen, the Government has met with many obstacles. One of the principal drawbacks to self-support through agricultural operations is the poor and unfavorably located land of many of the reservations. In many instances the Indians were driven

1 For Modern Irrigation in the United States, see Chap. 11, Secs. 238-270.

back from the better lands by the cupidity of the white man in selecting and settling upon them. In other cases the Indians themselves were to blame in selecting land which they thought no white man would desire, no thought then being given to the advantages and natural resources for agriculture, the only thought being to secure good hunting grounds. However, through the appropriations of Congress, much of the land on the reservations has been improved, and many of the arid tracts have been reclaimed for cultivation by the construction of irrigation systems.

Although the natural tendency of the Indian is to lead a nomadic life, those who know him best unite in recognizing his capacity for work and education. He has strength and endurance, and, once convinced that his efforts in tilling the soil will repay him, he is usually willing to work. Notwithstanding the numerous difficulties there has been a steady progress toward civilization in the past two decades on most of the reservations. A number of the tribes are now peaceable, self-supporting agriculturists, wearing the clothes of the white man, and able to speak, read, and write the English language. It has been ascertained that the Indian who works is on the high road to civilization, and it has been the policy of the Government during the last few years to divide their lands in severalty and compel him, as far as possible, to work for his own living and that of those dependent upon him.

If the present policy of the Government is continued for a few years longer, under wise management and with the same results that it has attained in the past, it will be but a few years longer until the paternal restraints of the Government will be entirely removed and the Indian will take his place among the citizens of this Republic. In fact, this is already the condition in many sections of the country, and each year the "blanket Indians" are becoming scarcer.

The following is found in the report of the Commissioner of Indian Affairs to the Secretary of the Interior for the fiscal year ending June 30, 1911:[1]

"For successful cultivation of the lands on which most of the Indians live, in the West and Southwest, irrigation is a prerequisite. In the year 1910 I reported that over $5,000,000 had already been spent to bring a little more than 300,000 acres of Indian lands

[1] See above report, pp. 16 and 17.

under ditch. For the year 1911 Congress appropriated slightly in excess of $1,300,000, all but $259,000 of which was made reimbursable to the Treasury when the irrigated lands are in successful cultivation and the Indians have become self-supporting. In keeping with our determination to give the Indians every opportunity to become industrious, at least $145,000 of the year's expenditures by this office was paid to Indians for labor. Furthermore, the Reclamation Service, on the four projects it is constructing for the Indian Service, paid out $169,000 for Indian labor. . . . In addition to the irrigation works which the office directly conducts, the Reclamation Service, under a cooperative agreement, has in charge four extensive and important projects for Indians. . . . Reports from superintendents in all parts of the field show a general alertness concerning the Indians' water rights. Proper steps are being taken to establish permanently rights which might be called into question. For example, statements have been prepared regarding water claims for all pueblos in New Mexico and filed with the territorial engineer. It is worth noticing that the Pueblo Indians under the Albuquerque School utilize water for 8,000 acres and have 95 miles of ditches, which they have built themselves. In our efforts to vest adequate water rights in the Indians the State authorities frequently co-operate, as in Wyoming at the Wind River Reservation, where the State has extended the time for final proof to 1915 and 1916 because of the large amount of ditch construction necessary in the project, and at Uintah, Utah, where the legislature provided for an extension of time to 1919."

§ 273. **The principal factors in the civilization of the Indian.**—The two principal factors in the advancement of the Indian are the Indian Agent and the Government schools. The position of the Indian Agent is one of great responsibility and opportunity, and, if the confidence of the Indian be once gained, his influence over them is great. Hence it has been the care of the last few administrations in Indian affairs to see that the agents selected for the various reservations should be men of good character and executive ability and who know the Indian and his needs, rather than to appoint men for some political reasons. Experience has taught this Government that, in Indian affairs at least, there is no place for the man who is a professional politician only.

The Government schools give the Indian youth an elementary education, teach them the dignity and value of labor, the necessity for exertion for their livelihood, and especially the advantages of taking up individual allotments of land and becoming independent as individuals, rather than a strict adherence to the tribal relations. The school farms upon which the boys are required to work a portion of the time, furnish an opportunity for them to become familiar with the different varieties of farm labor. They are also taught how to construct irrigation ditches and to divert the water from the streams, and how to irrigate the various crops. In the higher schools they are taught engineering and how to construct irrigation works. All this has resulted in the utmost good to the Indian, and many tribes have become first-class, independent citizens; also many individuals have acquired renown as scholars, and even more have acquired wealth. When they have acquired this stage, it is the policy of the Government to release its form of paternal supervision. But until the Indians can attain to an independent station in life they must remain the wards of the Government.[1] And, surprising as it may seem, the best results along these lines have been attained in those portions of the country which are strictly within the arid region, and among tribes that were less susceptible to education and civilization. In the semi-arid region, the whites have been very slow in taking advantage of the benefits to be derived from irrigation;[2] the Indians upon reservations in that region have been much slower, and irrigation is not practiced to any great extent by them.

The projects, which have been and are now being constructed under the provisions of the National Reclamation Act,[3] are aiding the Indians in many localities. They are oftentimes employed as laborers, and are considered among the best workmen by the officers in charge. They are given individual allotments of land, and water is furnished from these projects with which to irrigate them. In fact, in many instances, the Indians are taught the science of irrigation by special agents employed by the Government

[1] See United States Census, 1900, Part II, Agriculture on Indian Reservations, pp. 717-740; Appropriation by Indians, Sec. 680.

[2] For Irrigation in the Semi-arid Region, see Secs. 239, 240, 252-256.

[3] See Chap. 65.

for that purpose. In the following sections of this chapter we will give in detail some of the results upon the subject of the civilization of the Indian by means of irrigated agriculture.[4]

§ 274. **Irrigation by different tribes in Arizona.**—Passing by all reference to the Indians who are located in the eastern or humid portions of the United States and confining our inquiry to the reservations in the arid part of the country, we will endeavor to describe some of the things that the various tribes of Indians have accomplished in the way of irrigated agriculture, and, incidentally, the reciprocal results upon the Indians themselves. All of the States in the arid region have Indian reservations, and our discussion therefore will be by States.[1]

The Indians of Arizona were among the earliest agriculturists on American soil.[2] The Spaniards, who explored this region about the middle of the sixteenth century, found them planting, sowing, and irrigating the fertile soil in their primitive manner. With the exception of the Apaches, the Indians of this State are all either agricultural or pastoral people. Practically none of the land on their reservations can be cultivated without irrigation, but by this method hundreds of acres of desert land have been converted into fruitful fields of grain and other crops. The greatest need of the Arizona Indians is the systematic and scientific development of the water supplies the reservations afford, although during the last few years there has been great improvement in this respect. As it is, the Indians of the State, with the exception of the Apaches, are practically self-supporting. In 1899, of the total number of farms in Arizona 30.4 per cent were owned or operated by Indians, but the total acreage of these farms constituted only 2.3 per cent of the total area of the farm land in the State.

The Colorado River Reservation is one of the best situated in the State, as far as land and water are concerned. It is the home of 558 Mohaves (of Yuman stock) and is situated in the extreme western portion of Arizona, contains an area of 376 square miles, and extends for sixty miles along the Colorado River. The resources of this reserve are very great, and it is estimated that

4 See Secs. 274-285.
1 See Secs. 275-284.
2 See Secs. 79-84.

nearly the entire valley can be irrigated, and thus support more than one-half of all the Arizona Indians. Part of this reservation extends across the Colorado River into California. The Government supplies 40 per cent of the support of these Indians. Steps are being taken to bring more land under cultivation and thus render them more self-supporting. Part of this tribe live in California, near Needles, and will be mentioned later.[3]

The Gila and Salt River Reservations, located in the south central part of Arizona, contain a total area of 631 square miles and are the home of the Pima Maricopa tribes, which are now practically inseparable, and in 1900 had a total population of 4,619. These Indians have been agricultural people from time immemorial. They are peaceable and industrious; they understand the cultivation of their crops by irrigation, and are practically independent. Owing to the construction of the Florence dam, those living near the Gila River were short of water for several years prior to 1900, but, owing to more recent arrangements, they are now better supplied. They raise all kinds of farm products common to that section of the country. The Florence dam was constructed to divert the water above their reservation and run it upon lands of the white settlers, and is another illustration of how the Indians have been robbed.

The Hopi Reservation is situated in the northeastern part of Arizona, adjoining the Navajo Reservation on the south and west, and contains an area of 3,863 square miles. These Indians are of Shoshonean stock, and since the white man has known them have been an agricultural and pastoral tribe, quiet and inoffensive. They live in compact villages and cultivate their lands on the outside, entirely by means of irrigation. In 1900 the total population was 3,807. They are very provident and entirely self-supporting. They raise the ordinary crops and also fruit. The majority of their farms are small, ranging in size from three to thirty acres. Their water supply is very limited and they still irrigate in the primitive Indian fashion.

The Navajo Reservation is situated in the northeastern part of Arizona and extends into Utah and New Mexico. It contains an area of 12,029 square miles. The greater part of the land is valueless, and that portion which can be utilized is best adapted for

[3] See Sec. 275.

grazing sheep and goats. Small patches of land are irrigated along the mountain streams. They are a pastoral people, and in 1890 had a population of 8,897. The Government supplies 10 per cent of their subsistence. The irrigation works are small, but since 1900 they have been assisted in this respect by the Government; however, they still lack an adequate system.

The Papago Indians are situated on two reservations, *the Papago or San Xavier,* and the *Gila Bend Reservations.* The former is situated in the extreme southern part of Arizona and has an area of 108 square miles. The latter is situated in the southwestern part of the State and contains an area of 35 square miles. The population in 1900 was 1,205, and they are practically self-supporting. They are industrious and economical, spending the money received from their produce on improving their land and water systems, improved machinery, and building homes. Much of the land under cultivation has been allotted and consists of small individual holdings. Their water supply is insufficient to irrigate all of their lands; however, they are adopting better methods of conservation of the supply and the irrigated land is being gradually extended.

The Fort Apache and San Carlos Reservations, the home of the Apache Indians, lie in the southeastern part of Arizona. Previous to 1897 they were united and known as the White Mountain Reservation. Fort Apache is the more northerly of the two reserves and contains an area of 2,628 square miles. The population on this reservation in 1900 was 1,876, the settlements being along the streams which water the narrow valleys. Much of their land is well adapted to grazing, and with proper irrigation facilities could be cultivated. The Apaches are naturally wild, nomadic, and warlike, having taken to peaceful pursuits only within recent years; but they now manifest a spirit of energy, characteristic of the tribe, in their efforts to earn a livelihood, and for the time that they have been at it have done remarkably well. The crudeness of their irrigation facilities constitutes a great drawback to their self-support, and at present the Government furnishes 20 per cent of their subsistence. But it will not be many years before they will be entirely self-supporting.

The San Carlos Reservation, upon which part of the Apaches live, has an area of 2,866 square miles; the land is arid and all

requires irrigation to produce crops. They have a population, including several hundred Mohaves, aggregating 3,065. During the last few years these Indians have also made great progress toward self-support, but the Government still furnishes 33 per cent of their subsistence.

The Walapi Reservation is located in the northwestern part of Arizona and has an area of 1,142 square miles. They had a population in 1900 of 620. Owing to the scarcity of water the land is practically worthless for either agriculture or stock raising, about 100 acres in all being cultivated. In order to gain a livelihood they find employment among the whites, and the Government supplies 25 per cent of their subsistence.

The Supai, or Havasupai Reservation is situated in the Grand Canyon Forest Reserve in the northerly part of Arizona, and contains 60 square miles. There is a population of 250 on this reservation, all of whom are self-supporting. They have plenty of water for irrigation and good soil, and every inducement to be an agricultural people.

§ 275. **Irrigation by different tribes in California.**—None of the California Indians knew anything of the irrigation of crops until the advent of the Spaniard, and, with the exception of the Mission Indians, they received their first instructions in this line when taken in charge by the United States Government. At the present time these Indians are located on twenty-six reservations. They have advanced rapidly in the ways of civilization and are nearly all self-supporting, rations being issued by the Government only to a few, who are old and infirm. They are in advance of the Indians of the plains in intelligence and civilization.

The Hupa Valley Reservation is located in the northwestern part of California and comprises an area of 155 square miles, and has a population of 1,112. The land of the reservation is principally timber land, the total agricultural area being about 1,000 acres of level valley land, black and rich, and very productive. The individual holdings are about thirty acres to the family. There are two tribes—the Hupa and Lower Klamath Indians. Practically every able-bodied man is engaged in farming and stock raising. As a tribe they are industrious and self-supporting. Many have received patents to their lands, and not only are they making a

living, but are also gaining considerable wealth. General farming is practiced and many have orchards of fruit-bearing trees of different varieties.

The Mission Indians will be described together. They are located on small reservations scattered over various parts of the State, but mostly in the southern portion. Their name was derived from their connection with the Spanish missions established in the latter part of the eighteenth century. Among them are found the representatives of a number of various tribes. Under the Spaniards they were taught to till the soil by means of irrigation and to support themselves by farming. The total population of the Mission Indians in 1890 was 2,856. Upon some of the reservations the rainfall is sufficient to produce crops without irrigation, while others would be practically worthless without it. *Morongo Reservation*, the largest and best of all, is provided with cement ditches constructed by the Government, while on other reservations where irrigation is carried on, the water is conducted in ditches of native construction. Upon all of these reservations the Indians have patterned after the methods of the whites and raise general crops, and many have orchards.

The Round Valley Reservation has an area of 59 square miles and is situated in the northwestern part of California. The valley land and the foothills constitute an excellent field for agricultural operations. On this reservation are located the remnants of nine tribes, with a total population in 1900 of 599. These Indians may well be classed as civilized, nearly all being engaged in farming and stock raising. All the land suitable for agriculture has been allotted, giving an acreage of about forty acres to the family. The soil is very rich and produces abundantly, and but very little of the land is irrigated.

The Tule River Reservation is located in the south central part of the State. It has 76 square miles of land and has a population of 143. These Indians are self-supporting and receive no aid from the Government. They raise good crops and irrigation is practiced to a considerable extent. Many good orchards are to be found and the tribe is quite prosperous.

The Yuma Reservation has an area of something over 71 square miles of land and is situated in the southeastern part of California, with a population in 1900 of 817. These Indians are the most primi-

tive of the Californian tribes in manners and customs. Without irrigation the land of their reservation is worthless for agricultural purposes. The Colorado River, receding after its annual overflow, leaves a section of very fertile bottom land, which the Indians plant in their very primitive manner by digging holes in the ground about ten inches in depth and three feet apart and putting in the seed. In this manner they plant a strip of from 50 to 100 acres, but give the crops no attention from the time they are planted until harvested; consequently only a small portion ever matures. They are being taught to better utilize the water from the river, which, if properly distributed, would insure fairly good crops.

§ 276. **Irrigation by different tribes in Colorado.**—The Colorado Indians have been slow to adopt agriculture as a means of a livelihood, for the reason that they are by nature averse to manual labor. Their reservations are few and comparatively insignificant, with the exception of the Southern Ute Reservation.

The Southern Ute Reservation is located in the extreme southwestern part of Colorado, has 870 square miles of land, and is occupied by several different branches of the Ute tribe. These bands are commonly known as the Southern Utes, and until recent years were considered as "blanket Indians," as they lived almost entirely upon the support furnished by the Government and by hunting and fishing. The indifference which they have always manifested toward education has been a great drawback to their advancement. However, some of these bands have become interested in agriculture, and during more recent years have made remarkable advancement along that line. No part of the reservation can be cultivated without irrigation, but where water can be had the soil is well adapted to agriculture. *The Moache and Capote* bands reside upon the eastern portion of the reservation, which is well supplied with irrigation facilities. These two bands are the most industrious and, of course, have made the greatest progress toward civilization. They have accepted the land in allotments and are making good progress in bringing it under cultivation. There are now in operation four large canals, aggregating more than thirty miles in length, together with many smaller ditches. The work is gradually being extended and new

land is constantly being reclaimed for cultivation. When the irrigation systems of these Indians are fully developed they will undoubtedly become self-supporting. At present the Government furnishes 25 per cent of their subsistence. They raise the crops usual to the farmers of that section of the country and get good prices for everything that they raise.

The Wiminuche Utes constitute more than one-half of the tribe located on the reservation and occupy its western half. They have no water supply and consequently little opportunity to improve the land. When the allotments were made by the Government these Indians refused them and elected to hold the western lands in common. Their condition is becoming more deplorable each year, and until their part of the reservation is furnished with an irrigation system the Wiminuche Utes will remain entirely dependent upon Government rations for their support.

§ 277. **Irrigation by different tribes in Idaho.**—Like most tribes of the Northwest, the Indians of Idaho had no knowledge of agriculture previous to the coming of the white man. All of these Indians now, however, are located on land capable of cultivation and are receiving instruction in agriculture by means of irrigation from the Government. The most of these Indians having relinquished a portion of their lands to the Government, they are now able, from the proceeds, to buy all necessary implements and equipment.

The Coeur d'Alene Reservation is located in the northwest part of Idaho and has 404,480 acres, and in 1900 had a population of 752. The tract is well watered, with rich soil, and constitutes a fine body of agricultural land, requiring very little irrigation to produce abundantly. Material progress has been made from year to year in the improvement of their farms, many of which compare favorably with the farms of neighboring white men.

Fort Hall Reservation is in the southeastern part of Idaho and has 1,331 square miles, occupied by the Bannock and Shoshoni Indians, with a population in 1900 of 1,387. The Indians ceded a portion of these lands to the Government and accepted allotments for themselves. The ceded portion has been opened up for settlement. The Government has constructed an irrigation system for the Indians which is being operated with great success.[1] Nearly

[1] Fourth Annual Report of the Reclamation Service, 1904-1905, p. 163.

all of these lands require irrigation to produce crops. These Indians, especially the Bannocks, have been rather backward in adopting the ways of the white man. However, the interest manifested in farming has been increasing in the last few years, and, with the assistance given by the Government in constructing the irrigation system, will soon become entirely self-supporting; however, in 1900 the Government was furnishing 30 per cent of their subsistence.

The Lemhi Reservation has 100 square miles in the eastern part of the State, occupied by several tribes, with a total population in 1900 of 486. There are about 5,000 acres suitable for agriculture, provided irrigation be practiced. These Indians are honest, peaceable, and kindly disposed, but far from civilized, as they cling to their native customs. The Government employs farmers to instruct them, and great improvement has been made during the last few years. The acreage cultivated by the individual Indians ranges from five to sixty acres. With the aid of stock raising, to which the country is adapted, they will in time become self-supporting. In the meantime the system of irrigation on the reservation, with the aid of the Government, is gradually being extended.

The Nez Perce Reservation now exists only in name. The original area comprised 746,651 acres, situated in the northwestern part of Idaho. In 1895, 542,000 acres were ceded to the Government and most of the remainder allotted to the Indians. The allotted land is well adapted to both agriculture and to pasturage, yielding abundantly without much irrigation. In the allotment each individual Indian received 80 acres of agricultural land or, in some instances, 160 acres of grazing land. As a tribe they are earnest, energetic, and progressive people, and are gradually dropping tribal customs for those of civilization. They are entirely self-supporting. From the rentals of their lands they receive more than $20,000 a year, and 68 per cent of their subsistence is furnished by cash annuity. The majority of them cultivate from 10 to 30 acres each, and a few as high as 100 to 300 acres.

§ 278. Irrigation by different tribes in Montana.—Montana, once a famous hunting-ground and battle-field, is now the quiet home of many Indian tribes, all of which are adopting the customs and occupations of the white man. However, at the present

time more than half of the subsistence of the Montana Indians is furnished by the Government; but, owing to their progress, this will be reduced in the near future.

The Blackfeet Reservation is located in the northwestern part of Montana and has an area of 2,750 square miles, and in 1900 had a population of 2,256. Stock raising has been their principal occupation. The eastern part of the reservation and the country immediately east of it is adapted to irrigation. However, up to date, irrigation on this reservation has been neither systematic nor scientific. Here and there the Indians, with the assistance of an engineer to run the lines, have done considerable ditch work. Many of the ditches are out of repair, and others entirely worthless. The necessity of irrigation grows more apparent each year. The Government has taken the matter in hand and established school farms, and the Indians have rapidly adapted themselves to the new methods. Under the National Reclamation Act the Government is constructing the Milk River project, which will bring under irrigation a large area included in the reservation. This will be of great assistance to these Indians, as they are industrious and disposed to advance. At the present time the Government furnishes 50 per cent of their subsistence.

The Crow Reservation, situated in the southern part of Montana, formerly comprised an area of 5,475 square miles, and in 1900 had a population of 2,660. This region is exceedingly arid and requires irrigation for successful farming. The valleys of the Big Horn and Little Horn contain extensive areas of rich agricultural land and an abundant supply of water, which can be easily conveyed to the land. As a tribe the Crows are peaceable and intelligent. Agriculture is their principal pursuit, and in it they are making great progress; but great credit is also due them for labor on the Government irrigation works. All earth work of the system, with the exception of rock cutting, has been performed by them. The Government furnishes 25 per cent of their subsistence and annuity payments of 25 per cent more. The most important step toward the civilization of the Crow Indians is the Crow Reservation project, being constructed under the National Reclamation Act, which when completed will provide every family with sufficient agricultural land for its self-support. This system ranks among the finest in the United States in point of construction and

area covered by ditch, the work being of the most permanent character. The policy of the Government in employing Indian labor has been of the greatest benefit to the Indians, as, besides providing employment, it has taught them habits of industry, and has also given them a knowledge of irrigation which they could have acquired in no other way. Being required to earn their money, they have come to know its value. Government farmers have charge of farm schools and the greatest interest is taken in them, and they are fast becoming a civilized people and will soon be entirely self-supporting. Under an Act of Congress approved April 27, 1904, the Crow Indians ceded to the United States a strip of land including the northern part of their reservation, embracing about 1,100,000 acres. The Indians on the ceded strip are to have a reasonable time within which to elect whether to remain there by taking allotments or to remove to the diminished reservation. After the completion of the allotments to the Indians the residue of the ceded land is to be subject to withdrawal and disposal under the Reclamation Act, in so far as irrigation projects are found therein. Already the Government has taken up several projects under the Reclamation Act to reclaim lands that lie both in the ceded and unceded portions of the Crow Reservation. These are the Crow Reservation project, the Fort Custer subproject, the Huntley project, the Waco-Sanders subproject, and the Big Horn subproject.[1] It has been found from experience that by allotting the land to individual Indians, greater interest is taken and better results obtained than by the tribal or communal system. The communal system takes away all sense of personal responsibility and individual interest, which are essential elements of success, with these Indians, as well as all others.

The Flathead Reservation has an area of 2,240 square miles in the western part of Montana, occupied by five tribes having a total population in 1900 of 2,142. Progress in civilization differs widely here; a large number are educated and self-supporting and have comfortable and modern homes, while others are backward and densely ignorant, and very poor. There is no regular system of irrigation on the reservation, and much of the land under cultivation lies along the creek bottoms, requiring little or no irriga-

1 See Fourth Annual Report of the Reclamation Service, 1904-1905, pp. 209, 225-228.

tion to grow successful crops, or is located where small individual ditches have been made and upon which water can be turned with but little labor. None of the higher land can be cultivated successfully without irrigation. There is plenty of water for the reservation if properly utilized, and steps are being taken to establish a better irrigation system. Approximately 500,000 acres of land are cultivable. At present the Government furnishes a considerable percentage of their sustenance.

Fort Belknap Reservation is in the northern part of Montana and has an area of 840 square miles, occupied by two tribes—the Grosventre and Assiniboin—with a total population in 1900 of 1,312. These Indians are making good advancement toward civilization by abandoning their nomadic habits for quiet and peaceful pursuits. Tribal life has been largely broken up and nearly every head of a family has his own home and farm. However, the Government rations constitute 65 per cent of their support. They have a large amount of good land and plenty of water for the same, but little attempt has been made at irrigation, and the results have been unsatisfactory. Attempts are now being made to improve their situation.

The Fort Peck Reservation has an area of 2,775 square miles in the northeastern part of the State, the Missouri River forming its western boundary. There are six distinct bands, all of the Siouxan stock, the total number in 1900 being 1,946. Agriculture is very uncertain without irrigation, and it is very difficult to get the water out upon the land. The number of acres devoted to farming by the individuals is very small, ranging from one to five acres. There is no system of irrigation on the reservation, and the efforts in this direction have been very slight.

The Northern Cheyenne Reservation has an area of 765 square miles in the southeastern part of Montana, and in 1900 had a population of 1,554. The larger number are poor and improvident and cling to their old customs. Approximately 20,000 acres on their reservation could be cultivated with sufficient irrigation, but the water supply is very limited. They are indifferent to agriculture and the Government practically furnishes their entire support.

§ 279. **Irrigation by different tribes in Nevada.**—None of the Indians of Nevada tilled the soil to any great extent before the

coming of the white man. The tribes inhabiting this State are all small, and, as a general thing, very poor. A number of them are entirely dependent upon the Government for their subsistence. There has been considerable improvement, however, during the last few years in their manner of living, and especially along agricultural lines.

The Duck Valley Reservation has an area of 488 square miles in the extreme northern part of Nevada, and in 1900 had a population numbering 439 of the Paiute Indians. There are 40,000 acres of arable land that can be cultivated profitably for hay and forage, but, on account of the altitude being 6,000 feet, the seasons are short, and general agriculture is attended with but partial success. The water supply for irrigation is also very unreliable, being mountain streams. Sometimes they are very high, and at other times very low, and during the long, dry summers there is very little water, if any. The Government furnishes 30 per cent of their support. This will be gradually lessened, as the Indians are good workers, and if given a fair opportunity will be self-supporting in a few years.

The Pyramid Lake Reservation is in the western part of Nevada, and has an area of 503 miles, the larger part being taken up by Pyramid Lake. It is also inhabited by the Paiutes, and in 1900 had a population of 705. There are less than 20,000 acres available for agriculture. They are contented and industrious Indians, taking kindly to farming and stock raising, and are practically self-supporting, as the Government furnishes but five per cent of their subsistence. The irrigation facilities are not only very unreliable, but are wholly inadequate to the needs of these Indians. Owing to their uncertainty they prefer to work for white farmers rather than to cultivate their own land, until provided with a reliable supply of water for irrigation. Efforts are being made to improve the present system. This should be done, as these Indians are worthy of some attention in this respect, and if done they will become entirely self-supporting.

The Walker River Reservation is in the western part of Nevada and has an area of 498 square miles, and in 1900 also had a population of 392 Paiute Indians. Walker Lake takes out a considerable part of the land. About one-third of the land is fit for agriculture. Like the other Indians of this tribe, they are industrious

and are slowly progressing toward civilization, making good farmers, stockmen, and laborers. The old and infirm are the only ones supported by the Government. They have been greatly benefited by the Walker River project, which has been constructed under the National Reclamation Act.[1] Their lands have not been allotted, but are parceled out to those who manifest a desire to cultivate them.

§ 280. **Irrigation by different tribes in New Mexico.**—*The Jicarilla Apache Reservation* is situated in the extreme northern part of New Mexico, and has an area of 650 square miles, and in 1900 had a population of 829. These Indians were formerly wild and nomadic, like the Indians of the plains, but have been caused, through the encroachment of the white man, to settle down and adopt the ways of civilization. From instruction at the hands of the Government they are learning to depend upon the products of the soil for their support. Some of their land can be cultivated without irrigation, but the greater portion of the land requires it. Their irrigation system is still crude, but by the aid of the Government it is being improved. The Government still furnishes a considerable portion of their support.

The Pueblo Reservations are 19 in number, and are scattered largely throughout the north central part of New Mexico. Strictly speaking, they are not reservations, being grants of the Spanish Government confirmed by United States patents, and their total area is 1,081 square miles, and in 1900 having a population of 6,602, being collected for the most part in villages or pueblos, usually located in the midst of their farm land. These Indians, contrary to the Apaches last mentioned, possessed a distinct civilization of their own. They tilled the soil and were a peaceable agricultural people long before the Spaniard set foot on the American continent. Though very poor they are practically self-supporting, requiring aid from the Government only in very dry seasons. No crops can be raised without irrigation, which has been practiced in a primitive manner from earliest times. Their systems of irrigation are crude, but in ordinary seasons furnish a water supply sufficient to mature crops. The majority of the Pueblo farmers have from 10 to 30 acres under cultivation, a few as high as 60 and 80 acres. The land

1 See Fourth Annual Report of the National Reclamation Service, p. 266.

is not allotted, but parceled out to each head of a family, the community as a whole holding the title in common. At present their methods are very crude, and when they learn the value of improved machinery, their economic condition will undoubtedly be improved.

The Zuni Reservation is in the extreme western part of New Mexico, and has an area of 336 square miles, and in 1900 had a population of 1,525. These Indians are kind, peaceable, and industrious, having been always a self-supporting agricultural people. They irrigate in their primitive manner, and keep their ditches in good repair. Their farms range in size from 10 to 20 acres, with a few containing from 30 to 40 acres. A great deal of their land is in fruit, especially peaches. Under instructions of the Government their condition is being greatly improved.

§ 281. **Irrigation by different tribes in Oregon.**—Today, in the State of Oregon there exist the remnants of a large number of tribes, representing more than ten distinct linguistic stocks. Nearly all of the reservation Indians are self-supporting, the Government assisting only the aged, blind, and helpless.

Grande Ronde Reservation is situated in the northern part of the State, and has an area of something over 93 square miles, and in 1900 a population of 402. Approximately 10,000 acres of land can be cultivated. While irrigation is not in general practice, these Indians would be better off if it was. The majority cultivate from 10 to 80 acres, and some as high as 150 acres. A great deal of their land is in garden and fruit. They are almost entirely self-supporting.

The Klamath Reservation lies in the high plateau region of south central Oregon, east of the Cascade Mountains. It has an area of 1,650 square miles, and a population in 1900 of 1,136. On account of the altitude, which averages over 4,000 feet, early frosts make agriculture very uncertain, but with irrigation the arid uplands produce good forage crops. The able-bodied have been self-supporting for a number of years, the Government assisting only the aged and helpless.

The Siletz Reservation is in western Oregon, and has 80 square miles, and in 1900 a population of 479, which consists of the remnants of 31 different tribes. Nearly all of the land has been allotted. They are intelligent and industrious, and nearly all self-supporting.

Government rations consist of 6 per cent and annuity payments 12 per cent of their subsistence. Irrigation is not practiced to any considerable extent.

The Umatilla Reservation has an area of 123 square miles in the northeastern part of the State. The total population in 1900 was 1,397. The majority of the Indian farmers cultivate from 50 to 100 acres each. However, many of the Indians prefer to rent their lands rather than farm for themselves.

The Warm Springs Reservation is in the central part of the State, and has an area of 725 square miles, most of which is rough and mountainous. It is occupied by several tribes, and in 1900 had a population of 837. There is very little irrigation practiced.

§ 282. **Irrigation by different tribes in Utah.**—Outside of the Navajo Reservation, which has been mentioned in the description of the reservations of Arizona, Utah has two Indian reservations. These are the Uinta Valley and Uncompahgre Reservations, and both are in the eastern part of the State.

The Uinta Valley Reservation had in 1900 an area of 3,186 square miles, and in 1900 a population of 1,637, which also included the Indians on the Uncompahgre Reservation, which adjoins. The valley is well watered and timbered. The land is exceedingly arid and crops can only be raised successfully by irrigation. The Indians have just begun to realize that industry is essential to their existence, and a continual improvement is noticed. Many of the Indians have farms under cultivation, and a few cultivate over 100 acres. All of the crops are raised by irrigation, and there are approximately 65 miles of ditch. However, in 1900 the Government furnished 60 per cent of their subsistence.

The Uncompahgre Reservation has all been opened up for settlement with the exception of about 20 square miles, which has been allotted to the Indians, and a reserve of mineral land by the Government. Some of these Indians refused to accept their allotments and wandered off to the Cheyenne Reservation in South Dakota. On the reservation those who accepted their allotments are taking hold and cultivating their lands. Some of their farms compare favorably with those of the white farmers in the same vicinity. Still the Government furnishes 45 per cent of their subsistence and annuity payments provide 10 per cent more. The greatest trouble

with the Indians on both of these reservations has been to induce them to work. But this is being rapidly overcome. A little more fostering care of the Government in the construction of irrigation systems and instruction in the manner of cultivation of their lands will place these Indians upon a self-supporting basis.

§ 283. Irrigation by different tribes in Washington.—The Indian population of Washington, although not as large as that of several States, is composed of numerous tribes. Many tribes have taken up agriculture and nearly all are self-supporting.

The Colville Reservation is in the northwestern part of the State, and has an area of 4,374 square miles, and in 1900 a population of 1,477. The land is well adapted to agriculture and stock raising, and most of the tribes have made good progress along these lines. However, Chief Joseph's band of Nez Percé are not progressive, and receive 50 per cent of their subsistence from the Government. Nearly all of this land requires irrigation in order to produce good crops. However, there is plenty of water for this, should a good system be adopted. The Okanogan project, under the National Irrigation Act, is being constructed on the northwest of the reservation. This will undoubtedly be of some assistance to these Indians.

The Spokane Reservation lies to the east of the Colville Reservation, and has an area of 240 square miles. These Indians as a tribe are thrifty and industrious, good agriculturists, and with a little more assistance from the Government would become independent. At present the Government furnishes five per cent of their subsistence. Part of their land does not require irrigation, but the greater portion of it does. Steps are now being taken to improve their irrigation system.

The Lummi Reservation has an area of three square miles in the northwestern part of the State, and in 1900 a population of 359. These Indians are entirely self-supporting, mostly from agriculture. Their land needs very little if any irrigation to produce crops.

The Makah Reservation is in the northwest part of the State, and has an area of 36 square miles, and in 1900 a population of 371. These Indians are self-supporting, but very poor. They have no irrigation system, and do not need one.

The Muckleshoot Reservation is in the central western part of the State, and has an area of five square miles, and in 1900 had a popu-

lation of 146. They are agriculturists, but the land needs no irrigation. They are entirely self-supporting.

The Quinaielt Reservation is in the western part of the State on the Pacific Ocean, and has an area of 350 square miles, and in 1900 had a population of 193. They are agriculturists and fishermen and all self-supporting. No irrigation is necessary.

The Swinomish Reservation is in the northwestern part of the State, and has an area of 11 square miles, and in 1900 had a population of 275. They are agriculturists and fishermen, and self-supporting.

The Tulalip Reservation is also in the northwestern part of the State on Puget Sound, and has an area of 14 square miles. As a general rule they are not agriculturists. No irrigation is practiced.

The Yakima Reservation is in the south central part of the State, and has an area of 1,250 square miles, and in 1900 had a population of 2,219. They are agriculturists, and where irrigation is practiced are making splendid progress. Under the direction of a surveyor they have of their own accord constructed a large number of ditches. Under the National Irrigation Act the Government is constructing two projects near this reservation, the Yakima Valley and Tieton projects. Ditches are being constructed through the reservation, and the Indians will be greatly benefited.[1] These Indians are entirely self-supporting and accumulating property. The lands have been allotted, and many of these Indians have large farms and comfortable homes.

§ 284. **Irrigation by different tribes in Wyoming.**—The only reservation in Wyoming is that of the Shoshone, which is located in the west central part of the State, and has an area of 2,868 square miles, and in 1900 had a population of 1,961. The Indians are of two tribes, the Shoshone or Snake Indians, and the Arapaho. The two tribes are nearly equal in number, but live entirely separate. Both tribes are peaceable, but their progress toward civilization has been exceedingly slow. The Government aid constitutes 75 per cent of their subsistence, and annuity payments 12 per cent. During the last few years they have taken a greater interest in agriculture. All of their land is exceedingly arid, and irrigation is necessary to

1 See Fourth Annual Report of the Reclamation Service, 1904-1905, pp. 337, 340.

raise crops. Since 1900 the Government has given considerable aid in the construction of adequate irrigation systems. Several canals over five miles in length have been constructed, in addition to many miles of ditching constructed by the Indians individually. The Government is now constructing what is called the Shoshone project under the National Reclamation Act.[1] These Indians will be greatly benefited when this project is completed.

§ 285. **The effect of irrigation upon the Indian.**—From many years of serious experience, this Government has finally discovered that the old method of herding a tribe or different tribes of Indians upon a common reservation and furnishing the greater portion of their subsistence was only retarding the civilization of the Indian, besides being annually a great expense. And, in addition to this, the Indians are like other people; where they are constantly kept together and under restraint, and with nothing to do to keep them busy, they continually brood over and discuss their real or fancied wrongs, and are oftener subject to outbreaks. At such times it has been hard to keep them upon their reservations; and oftentimes the soldiers have been called out to round them up and to force them to go back. These outbreaks have oftentimes caused loss of life and property; and, in addition to this, have had a bad effect generally upon the Indians themselves. Indians are like other human beings. Try to keep them in subjection by herding them together upon a common reservation and they either revolt or lapse into that sullen attitude and compel the Government to wholly support them. But give an Indian something to do, by which he can make a livelihood, and not be responsible to the general tribe for his earnings, and he will usually make a good workman, and sometimes save money.

The more modern policy of this Government in the treatment of the Western Indians by making them individual allotments of land, and, if need be, furnishing water for the same, and teaching them the modern methods of irrigation and agriculture, has done more toward their civilization during the last twenty years than was accomplished during all of the time prior to that period. As long

[1] See Second Annual Report of the Reclamation Service, pp. 507-510; Third Annual Report, 2d Ed., pp. 626-631; Fourth Annual Report, pp. 346-350.

as an Indian adheres to his tribal relation, and lives upon a common reservation, he in a way will depend more or less upon the Government for his support. But give a Western Indian a piece of land with a good water right, and let him know that they belong to him, and that his rights thereto will be protected, in others words, make it possible for him to make a good living, and he will usually do so. Individual ownership of land, individual rights and responsibility under the laws, and citizenship eventually, have practically civilized what were formerly some of the most savage Indians of the West. So, in spite of anything which may be said to the contrary, there are different methods of making a "good Indian."

In the report of the Commissioner of Indian Affairs to the Secretary of the Interior for the fiscal year ending June 30, 1911, is to be found the following:[1] "During the past year the efforts of the 6,000 persons who are in the Indian Service have been more harmoniously, intensively, and vigorously employed than ever before in preparing the Indians to assume their full responsibilities as Americans, the chief of which is self-support. There is nothing derogatory to previous years in this statement, because the fruits of the past year are the result, in some cases, of months, but in more cases of years, and of many years of growth. All activities employed in this steadily increasing encouragement of the Indians toward self-support are governed by the two main aims of the service—first, to prepare the Indians for the lifting of the Government's hand, and second, to lift the hand. The first aim covers all the things we are trying to do to prepare the Indians to bear their new responsibilities. Luckily the day has gone by when the sink-or-swim policy is the central idea in a great economic and sociological problem like Indian affairs; even more luckily the day has passed when an excess of sentiment could defend its position in robbing any human being of that strengthening process of mind and muscle which comes from bearing heavier and heavier, and often seemingly impossible, loads. In fine, we are working overtime to get the Indians ready. Under the second head comes the problems of how to let go, where Indians in one way or another have grown self-sufficing."

[1] P. 5.

PART III.

CLASSIFICATION, DEFINITIONS, AND THE NATURE OF WATERS.

CHAPTER 13.

CLASSIFICATION AND NATURE OF RUNNING WATERS.

§ 286. Scope of chapter.
§ 287. The classification of waters.
§ 288. The nature of running waters under the civil law.
§ 289. The nature of running waters under the common law.
§ 290. Public and private waters—Public waters.
§ 291. Private waters.

§ 286. **Scope of chapter.**—In this chapter we will classify the various running waters of the earth as far as may be necessary for the purposes of this work. We will also discuss, in a general way, their nature and the ownership which may be acquired in running waters.

§ 287. **The classification of waters.**—For the purposes of this work waters may be divided into the following classes:

- Waters.
  - Public or Navigable.
    - The Sea.
    - Great Inland Lakes.
    - Rivers actually Navigable.
    - Waters designated by the Statute of a State as public.
  - Private or Non-navigable.
    - Surface.
      - Rivers and Water Courses Non-navigable.
        - On the Public Domain of the United States.
        - On the Lands owned by a State.
      - Small Lakes and Ponds.
        - On the Public Domain of the United States.
        - On the Land owned by a State.
      - Flood or Storm Waters.
      - Swamps and Marshes.
      - Surface Water Proper.
    - Subterranean.
      - Underground Water Courses.
        - With known and Defined Channels.
        - With Undefined or unknown Channels.
        - The Underflow of Surface Streams.
      - Artesian Waters.
      - Percolating Waters.
        - Diffused Percolations.
        - Percolations tributary to Surface Water courses.
        - Those Tributary to Underground Reservoirs.
        - Seepage Waters.

§ 288. The nature of running waters under the civil law.—Without going into any lengthy discussion upon the subject of the nature of running waters under the civil law, which is only necessary from an academic standpoint, we will say that, under the Roman civil law, the running waters were considered as some of those things which had the name of *res communes*, and which under that law is termed by the civil law writers as "the negative community," and defined as the "things the property of which belongs to no person." [1] In the Institutes of Justinian, as translated by the Supreme Court of California, "they are the property of some one

[1] Liggins v. Inge, 7 Bing. 692, 5 Moore & P. 712, 9 L. J. C. P. 202; Geer v. Connecticut, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600.

or no one."[2] And, as translated from Prothier, the great French civil law writer, by the Supreme Court of the United States: "These things are those which the juris-consults called *res communes.* Marcien refers to several kinds—the air, the water which runs in the rivers, the sea and its shores."[3] And, as summed up in the Code Napoleon: "There are things which belong to no one, and the use of which is common to all."[4] The English common law adopted from the civil law this construction of *res communes,* but with the elimination of the "negative community" idea. In other words, it is held that such things as the air and running water are common property to all; that they belong to the State, the Crown, or to the public.[5] The civil law of waters so far as it concerns the subjects under discussion in this work will be discussed in other chapters.[6]

§ 289. **The nature of running waters under the common law.**—Under the common law, the running waters of the earth are neither lands, tenements, nor hereditaments, nor are they susceptible of absolute ownership. Water under this condition is a movable, wandering thing, and must of necessity continue common by the law of Nature.[1] It admits only of a temporary, transient, usufructuary property therein; and, if it escape for a moment, the right of a former possessor is gone forever, and he has no right to reclaim it. It is not capable of being sued for by the name of "water," or by calculation of its cubical or superficial measure, but the suit must be brought for the land that lies at the bottom, for so many acres of land covered by water.[2] The grant of a

2 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

3 Geer v. Connecticut, *supra;* Pothier, Traité du Droit de Propriete, No. 21.

See, also, Mason v. Hill, 5 Barn. & Adol. 1, 2 Nev. & M. 747, 2 L. J. K. B. N. S. 118; 110 Eng. Reprint, 692; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 20 Morr. Min. Rep. 466; affirming *Id.,* 150 Ind. 698, 50 N. E. Rep. 1125.

4 Code Napoleon, Art. 714.

For the Civil Law, see Chaps. 29, 30, Secs. 552-584.

For the Common Law of Riparian Rights, see Chaps. 21-28, Secs. 450-551.

5 See next Sec. 289.

6 See Chaps. 29, 30, Secs. 552-584.

1 That a water right is land, under the Arid Region Doctrine of appropriation, see Secs. 768-771.

For the Common Law of Riparian Rights, see Chaps. 21-28, Secs. 450-551.

2 2 Blackstone, Com. 18, and note; Runnington on Eject. 131.

In Race v. Ward, 4 El. & Bl. 708, 3. C. L. Rep. 744, 24 L. J. Q. B. N. S.

stream of water *eo nomine* will not pass the land over which the water runs.[3] Upon the other hand, the grant of a parcel of land passes the property in a stream of water which runs over it, as much as it does the property in the stones upon the surface.[4] As water is not land, neither is it a tenement, because it is not of a permanent nature, nor the subject of absolute property, unless reduced to actual possession. Hence, water, being neither land nor tenement, and in no possible sense real estate, is not embraced by a covenant of warranty.[5] However, when water is reduced to actual possession, it is property, and may be bought and sold, and have a market value; but it must be in actual possession, subject to control and management. Running water in natural streams is not property, and never was.[6] Even a government has no property in the *corpus* of the water while it is running in the natural streams. As was said in an early California case relative to property in the *corpus* of the water, "No such property is vested in the Government."[7]

§ 290. **Public and private waters—Public waters.**—The waters of the earth are divided by the authorities into two main classes,

153, 1 Jur. N. S. 704, 3 Wk. Rep. 240, Lord Campbell, C. J., said that an action for taking water, the property of the plaintiff, could not be supported unless the water were contained in a cistern or some other vessel in which he had placed it for his private use.

See, also, Year Book, Trin., 15 Ed. 4, fol. 29 A. pl. 7; Weekly v. Wildman, 1 Ld. Ray. 407; Manning v. Wasdale, 5 Ad. & El. 758, 1 Nev. & P. 172, 2 H. & W. 431, 6 L. J. K. B. N. S. 59; Blewett v. Tregonning, 3 Ad. & El. 554, 5 Nev. & M. 234, 1 H. & W. 431, 47 L. J. K. B. N. S. 223; Challenor v. Thomas, Yelv. (Metcalf's Ed.) 143; Woolrych, Law of Waters, 276, 295; Coke, Litt. 5; Johnson v. Rayner, 6 Gray, 107; Owen v. Field, 102 Mass. 90.

[3] Jackson v. Halstead, 5 Cow. 216; Egremont v. Williams, 11 Q. B. 688.

[4] Buckingham v. Smith, 10 Ohio, 288; Brown v. Kennedy, 5 H. & J. 195, 9 Am. Dec. 503; Canal Comrs. v. People, 5 Wend. 423; Elliott v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85.

[5] Mitchell v. Warner, 5 Conn. 497; see, for Water Rights, Secs. 757-774; see Water Courses, Secs. 301-311.

[6] Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. Rep. 354; but see ownership in ice, Riparian Rights, Sec. 493; Marsh v. McNider, 88 Iowa, 390, 55 N. W. Rep. 469, 20 L. R. A. 333, 45 Am. St. Rep. 240; as to the right of fishing, see Riparian Rights, Sec. 365.

See, also, Rockfeller v. Lamora, 83 N. Y. Supp. 289, 85 App. Div. 254.

[7] Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

designated as public and private waters.[1] The classification formerly depended upon the fact as to whether the waters were navigable or nonnavigable.[2] Under the common law, waters are deemed public only where the tide ebbs and flows, the proprietorship of which being in the sovereign. This is so for the reason that under that law waters are deemed navigable only to the extent of tidal waters; all waters above the reach of the tide are considered as nonnavigable, and hence private waters.[3] In England, as was said in the case of The Genesee Chief v. Fitzhugh,[4] "Tide waters and navigable waters are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones"; and writers on the subject "took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river." But in this country, owing to the great size of our rivers, the rule as to public waters has been greatly extended so as to include all waters which are actually navigable, even though they are above tide waters. Hence it follows that all rivers and streams, which are of sufficient capacity for useful navigation, are public, and are subject to the same general rights which the public exercise in highways by land.[5]

The same rule governs in the distinction between public and private lakes and ponds. If the lake is navigable in fact, its waters and bed belong to the State, in its sovereign capacity, and hence they are public waters.[6] In fact, the division of waters into navigable and nonnavigable is merely a method of dividing them into

1 See classification, Sec. 287.

2 For Navigable Waters, see Chap. 16, Secs. 346-349.

3 Cobb v. Davenport, 32 N. J. Law (3 Vroom) 369.

4 53 U. S., 12 How. 443, 13 L. Ed. 1058.

5 Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110.

For Rights of Navigation, see Secs. 341-357; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584.

6 Lamprey v. Metcalf, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718, 18 L. R. A. 679, and note; Gouverneur v. National Ice Co., 134 N. Y. 355, 31 N. E. Rep. 865, 18 L. R. A. 695, and note, 30 Am. St. Rep. 669; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110.

As to the ownership of the beds of great lakes, see Secs. 327, 328.

public and private waters, which is the more natural classification.[7] In the Western States of this country, during the last twenty-five years another class has been added to the so-called public waters. These are the waters which have been dedicated to the State or public either by constitutional provision or by statutory enactment. In these States which have such provisions the waters flowing within their respective boundaries belong to the State or to the public, and, therefore, may properly be designated as public waters. This dedication of waters to a State will be discussed in a subsequent chapter.[8]

In this country, therefore, public waters include the sea,[9] the great inland lakes,[10] rivers actually navigable,[11] and waters which are designated by the constitution or statute of a State as public.[12]

§ 291. **Private waters.**—At common law private water courses and other bodies of water are not navigable, and the general public have no rights in them. To this class of water courses belong that vast number of inland fresh-water, nonnavigable rivers and streams that are to be found in every portion of this country, emptying their waters into the larger rivers and streams, which in turn empty into the sea. It is with this class of rivers and streams that our main subject has most to deal. They are the feeders and sources of the large rivers, and their general characteristics are the same in all respects. They have beds and the water; but they have banks instead of shores. The banks are often more definitely marked, and usually elevated to a greater height than is the case of the shores of tidal rivers. The current always flows in the same direction, which is different in a river whose current is influenced by the tide. And, except in times of great freshets or extraordinary floods, the water does not rise high enough to overflow their banks. However, these fresh-water, nonnavigable rivers, although not subject to the daily fluctuations of the tide, may rise and fall periodically at certain seasons of the year, and thus have well-defined

7 Lamprey v. Metcalf, *supra*.

8 See Chap. 18, Secs. 372-389.

9 For definition and description, see Sec. 293.

See, also, the classification under Sec. 287.

10 See Sec. 295.

11 See Secs. 344-347.

See, also, Chap. 16, Secs. 341-357.

12 See Chap. 18, Secs. 372-389.

high and low water marks. The high water mark is the line which the river impresses upon the soil by covering it for periods sufficient to deprive it of vegetation and to destroy its value for agriculture. The low water mark is the point to which the river or stream recedes at its lowest stage.

In this country there is one exception to the common law distinction between public and private waters, and that is in the Western States, which have dedicated all of the waters flowing or lying on their respective boundaries to the State or public, referred to in the previous section.[1] In such a case the waters of a small nonnavigable stream are as much public waters as are those of a stream which are actually navigable.[2] Therefore for the purposes of this work, disregarding the above distinction, which will be fully discussed in another chapter,[3] private or nonnavigable waters are divided into the general divisions of surface and subterranean waters. Surface waters are again subdivided into the following classes: Rivers and water courses nonnavigable,[4] small lakes and ponds,[5] flood or storm waters,[6] swamps and marshes,[7] and surface water proper.[8] Subterranean waters are also divided into the following general classes: Underground water courses,[9] artesian waters,[10] and percolating waters.[11] Underground water courses are again divided into the following subdivisions: Those having known and defined channels,[12] those having unknown or undefined channels,[13] and the underflow of surface streams.[14]

Owing to the recent scientific investigations and the court decisions based thereon what were formerly classed as percolating waters, without any distinction as to class, are now divided into the following classes: Diffused percolations,[15] percolations tributary to surface water courses,[16] those tributary to underground reser-

1 See Sec. 290.
See, also, Secs. 372-389.
2 For the dedication of waters to a State, see Secs. 372-389.
3 For the Dedication of Waters, see Chap. 18, Secs. 372-389.
For classification, see Sec. 287.
4 See Secs. 301-311.
5 See Sec. 297.
6 See Sec. 319.
7 See Sec. 317.
8 See Sec. 318.
9 See Sec. 323.
10 See Secs. 1166-1184.
11 See Secs. 1185-1211.
12 See Secs. 1154-1163.
13 See Secs. 1164, 1185-1211.
14 See Secs. 1161-1163.
15 See Secs. 1188-1190.
16 See Secs. 1193-1196.

voirs or catchment basins,[17] and seepage waters.[18] These subjects will all be discussed in subsequent sections of this work.[19] The right to waters after they have been severed from the running streams or other sources of water supply will also be discussed in subsequent chapters of this work.[20]

17 See Secs. 1197-1205.
18 See Secs. 1207, 1208.
19 See notes above.
For Subterranean or Underground Waters, see Part 10, Chaps. 59-62, Secs. 1148-1211.
20 See Secs. 773, 774.

CHAPTER 14.

DEFINITIONS AND DESCRIPTION OF WATERS.

§ 292. Scope of chapter.
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§ 294. Lakes—Definition—Description.
§ 295. Great lakes.
§ 296. Lakes—Public and private.
§ 297. Small lakes—Distinction between lakes and water courses.
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§ 302. Water courses—General characteristics.
§ 303. Water courses—Essential characteristics of—The channel.
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§ 307. Water courses—At times may be dry.
§ 308. Rivers as water courses.
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§ 311. Tributaries to natural water courses.
§ 212. Ravines as natural water courses—"Wet weather arroyos."
§ 313. Springs and their relation to water courses.
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§ 315. Sloughs as natural water courses.
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§ 317. Swamps and marshes.
§ 318. Surface waters proper.
§ 319. Flood or storm waters.
§ 320. "Developed water"—Description of.
§ 321. "Surplus waters"—Definition and description.
§ 322. "Waste water"—Definition and description.
§ 323. Subterranean or underground waters—Classification.

§ 292. Scope of chapter.—As different laws apply to different classes of waters, it is necessary to know of what those classes consist. Therefore in this chapter we will define the various classes of waters and give a brief description of the same as far as pertinent to the main subject of this work.

In this chapter, however, we will simply classify subterranean or underground waters, leaving their description and a discussion as

to the rights which may be acquired therein to a subsequent part of this work.[1]

The subject of navigable waters will also be fully discussed in a separate chapter, as far as that subject relates to the main subject under discussion in this work.[2]

§ 293. The sea—Jurisdiction—Shore.—The sea is the first of importance of the public or navigable waters. As the present work will have very little to do with the sea, but slight reference need be made to it here. It is the ocean, the great mass of water which surrounds the land, and which probably extends from pole to pole, covering nearly three-quarters of the globe. Waters within the ebb and flow of the tide are considered the sea.[1] A very large body of salt water communicating with the ocean is also called a sea, as the Mediterranean Sea. Also a very large inland body of salt water is called a sea, as the Caspian Sea. The high seas include the whole of the seas below high water mark and outside of the body of the country.[2] In modern times, the ownership of the sea is common to all nations, and any nation or person has ordinarily an equal right to navigate or fish therein, and to land upon the sea shore.[3] We are accustomed to regard the territorial limits of any country bounded by the ocean at the shore line. This is not always the case, and, while it is true, as a general conception, that the sea is under no nation's sway, yet, by a common usage, which has long since passed into international law, the territorial jurisdiction of every nation bordering on the sea extends to a distance of one marine league from the shore. This limit of sovereign jurisdiction has been established to secure defense, to prevent smuggling, to prevent criminals from hovering upon the coast, to prevent crime; and, generally speaking, jurisdiction over the contiguous sea territory exists for the security of the adjacent State and its people.[4]

1 For Subterranean or Underground Waters, see Chaps. 59-62, Secs. 1148-1211.

For the classification of subterranean waters, see Secs. 287, 1152.

2 For Navigable Waters, see Chap. 16, Secs. 341-357.

1 Bouvier Law Dic., Sub. Sea; 1 Kent Com. 26, 27; Angell on Tide Waters, 44; Hale, De Jure Maris; Gould on Waters, 3d Ed., Secs. 1-29.

2 Couls. & Forbes on Waters, Sea, Tidal and Inland.

3 1 Bouvier, Inst. 173.

4 Manchester v. Massachusetts, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559.

The jurisdiction of a nation also

Beyond that the sea is like the air; it is no man's possession; it is no nation's territory; it rolls ungoverned by human ordinance except as to the ships thereon, and they are floating tracts of nationality.[5]

The shore or *litus* of the sea has been defined as the tract of land which may be a parcel of a manor, but is *prima facie* in the Crown, lying along the tide water over which the tide flows between the ordinary high tide and the line of lowest tide.[6] The presumption is that the shore belongs to the Crown or State, and the burden of proof is upon those who claim below the high water mark.[7] The words "flats," "strand," "beach," "waste," and "tide-lands" are at times used as terms synonymous with the word "shore."[8] In this connection there is a distinction which must be noted between the word *litus* or shore, and the word *ripa* or bank, the former being the land, which is covered and uncovered by the flow and reflow of the tide, and the latter being the dry land above the flow of the tide. The word bank is also applied to the side of a river or other

extends to gulfs and bays, if they are practically separated from the sea by the configuration of the coast. —Hall on Int. Law, Sec. 41; Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 App. Cas. 394.

5 1 Kent Com. 26, 29-31; U. S. v. Rodgers, 150 U. S. 249, 37 L. Ed. 1071, 14 Sup. Ct. Rep. 109; Davis on Int. Law, 37.

See, also, upon the question of the jurisdiction over the sea: Phillimore on Int. Law, p. 186; Bowyer, Modern Civil Law, p. 64; Vattel, Law of Nations, Bk. 1, Chap. 23; Bynkershoek, Qu. Pub. Juris, 61; 1 Azuni, Marit. Law, 185, 204; Selden, Mare Clausum, Bk. 1, Chap. 19; Ulpian, Bk. 2, Chap. 30; Ortolan, Diplomatic de la Mer, liv. 2, Chap. 8; Calvo, Droit International, liv. 5, Secs. 199-201; The Twee Gebroeders, 3 C. Rob. 336; The James G. Swan, 50 Fed. Rep. 108; U. S. v. The Jane Gray, 77 Fed. Rep. 908; Woolrych on Waters, p. 77.

6 Hall, Seashore, 9; 1 Farnham on Waters, Sec. 45c; Galveston City Surf Bathing Co. v. Heidenheimer, 63 Tex. 559; Mobile v. Eslava, 9 Port. (Ala.) 597, 33 Am. Dec. 325; Maynard v. Puget Sound Nat. Bank, 24 Wash. 455, 64 Pac. Rep. 754; Snow v. Mt. Desert Island Real Estate Co., 84 Me. 14, 24 Atl. Rep. 429, 17 L. R. A. 280, 30 Am. St. Rep. 331; Erskine v. Moulton, 66 Me. 276; King v. Young, 76 Me. 76, 49 Atl. Rep. 596; Stevens v. King, 76 Me. 197, 49 Am. Rep. 609; Providence Steam Engine Co. v. Providence etc. Co., 12 R. I. 348; 34 Am. Rep. 652; Church v. Meeker, 34 Conn. 421; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155.

7 Royal Fishery of the Banne, Sir John Davies, 149; Gould on Waters, 3d Ed., Sec. 27, and cases cited; 1 Farnham on Waters, Secs. 45c-47a, and cases cited.

8 Gould on Waters, 3d Ed., Sec. 28, and cases cited.

water course and is further discussed in another section of this chapter.[9]

§ 294. **Lakes—Definition—Description.**—There are various definitions of the word "lake," found in the dictionaries, text books, and court decisions. None of these definitions seem to be complete, but from them all we may formulate one. A lake may be defined as a natural body of water, fresh or salt, occupying a basin or hollow of the earth, of greater or less depth and area, and may or may not have a current or single direction of flow.[1] Usually, however, they are bodies of standing water with no current, or an imperceptible one, with some portion of their bottoms below the bottoms of their outlets. But the mere fact that there is a current from a higher to a lower level does not make that a river or water course which otherwise would be a lake; so, also, the fact that a river swells out into a broad, pond-like sheet, with a current, does not make that a lake which otherwise would be a river.[2] Some lakes have no surface outlet at all, notably Great Salt Lake, a body of exceedingly salt water eighty miles in length and sixty miles in width.[3]

Whether or not a certain body of water is a lake is a question of fact to be submitted as such to the court or jury. In a recent case in California it was held that an objection to a question asked expert witnesses, whether, in their opinion, a certain body of water is a lake was well taken, upon the ground, the facts and conditions having been fully described, the matter was not properly the subject of expert testimony.[4]

9 For the essential characteristics of a natural water course, see Secs. 303-306.

1 See Jones v. Lee, 77 Mich. 35, 43 N. W. Rep. 855; Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. Rep. 661.

Lake—A large and extensive collection of water contained in a cavity or hollow of the earth. It is larger than a pond.—Webster.

Lake—A large inland body of water having no immediate connection with the sea.—Worcester.

The Roman jurist, Ulpian, defines a lake as a body of perpetual water.—Ware, Roman Water Law, Sec. 59.

2 See Callis on Sewers, 82; Woolrych on Sewers, 81; Angell on Water Courses, 1878, Sec. 4f; State v. Gilmanton, 9 N. H. 461, 14 N. H. 476; Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Rice v. Ruddiman, 10 Mich. 125; Phinney v. Watts, 8 Gray, 269, 69 Am. Dec. 288.

3 Under the civil law, according to Ulpian, a lake, a pond, or a canal may be public.—Ware, Roman Water Law, Sec. 59.

4 Duckworth v. Watsonville etc. Co.,

The principal distinction between a lake and a water course is that a lake is a body of practically standing water, while one of the principal characteristics of a water course or stream is that there must be a flow of running water.[5]

§ 295. **Great lakes.**—Great inland lakes come under our classification of public navigable waters, concerning which this work has little to do, and a passing notice in this connection will suffice.[1] In this country great navigable lakes are regarded as public property, and are not susceptible of private ownership any more than the sea.[2] Hence, under our laws, the title to these great bodies of navigable water remains in the public, and it requires a specific grant to enable a person to maintain a claim to title to either the bed of the lake or to the body of the water itself.[3] When a lake lies between two countries or nations, the boundary line between them runs along its middle line, and each nation has title to that portion of the lake on its side of the line.[4] This rule may be changed by treaty,[5] or by cession by the sovereign owners. The three-mile limit

158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338.

For the appropriation of water from lakes, see Sec. 650.

For riparian rights on lakes, see Secs. 474, 475.

5 For the essential characteristics of a water course, see Secs. 303-306.

See, also, Duckworth v. Watsonville etc. Co., *supra;* Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. Rep. 661; Trustees of Schools v. Schroll, 120 Ill. 509, 12 N. E. Rep. 243, 60 Am. Rep. 575. See, also, small lakes, Sec. 297.

1 For the definition of the word "lake," see Sec. 294.

2 3 Kent Com., note, 429a.

The term "high seas," as used in Sec. 5346, Rev. Stat. of the U. S., 1878; 1 Fed. Stat. Ann. 1905, p. 511, is applicable to the open, unenclosed waters of the Great Lakes. U. S. v. Rodgers, 150 U. S. 249, 37 L. Ed. 1071, 14 Sup. Ct. Rep. 109.

See, also, The Genesee Chief v. Fitzhugh, 53 U. S., 12 How. 443, 13 L. Ed. 1058; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed 1018, 13 Sup. Ct. Rep. 110; Mali v. Hudson County Jail Keeper ("Wildenhus's Case"), 120 U. S. 12, 30 L. Ed. 566, 7 Sup. Ct. Rep. 385; Halleck, Int. Law, Chap. 8, p. 172, Sec. 26.

3 As to title to beds of lakes, see Sec. 327.

See Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 838.

4 Vattel, Law of Nations, Book 1, Chap. 22; Thorson v. Peterson, 10 Biss. 530, 9 Fed. Rep. 517; The Sultana v. Chapman, 5 Wis. 463.

5 See U. S. v. Peterson, 64 Fed. Rep. 145. By a treaty between the United States and Great Britain the boundary was fixed at a certain line through Lake Huron.

as being the boundary of the respective countries is not applicable to lakes.[6] The navigation of a lake of this character is open to both countries, but each may enforce its own laws as far as its territorial limits go.[7] Concurrent jurisdiction over the whole body of such a lake is asserted by each nation and accorded by the other.

§ 296. **Lakes—Public and private.**—As has been said, small lakes are distinguishable from large lakes as far as their general characteristics are concerned only in size; yet the laws which govern them and the soil under their waters are radically different. The distinction in this country between public and private lakes depends in most States entirely upon the size and navigability of the particular lake and its relation to other waters which flow into it or with which it is connected. Hence, it follows that a lake which is not actually useful for navigation, although of considerable size, may be termed a private lake and be private property.[1] Upon an examination of the authorities upon this subject, it will be found that they hold differently in different States; some holding that the

[6] Biglow v. Nickerson, 70 Fed. Rep. 113, 17 C. C. A. 1, 34 U. S. App. 261, 30 L. R. A. 336; The Grace, 4 Can. Exch. 283; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Dunlap v. Commissioners, 108 Pa. 607.

[7] Edson v. Crangle, 62 Ohio St. 49, 56 N. E. Rep. 647; The Norway v. Jensen, 52 Ill. 373; Dougan v. Champlain Transp. Co., 56 N. Y. 1.

[1] In Smith v. New York, 68 N. Y. 552, it was held that, by statute, the State's title to its navigable waters is in trust for the owners of the upland as well as for the public, and the State can only convey the soil under such water, whether they are lakes or tide waters, to the owner of the adjoining land.

In Cobb v. Davenport, 32 N. J. L. 369, 380, it was held that the soil under the waters of fresh water lakes within the State of New Jersey is in the riparian proprietor and not in the State.

In Pennsylvania, a pond is not a private pond which covers the soil of a person who stocks it with fish and also the soil of others. It is an entirety, and the whole or none is private.—Reynolds v. Commonwealth, 93 Pa. St. 458.

See, also, Benscoter v. Long, 157 Pa. St. 208, 27 Atl. Rep. 674; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Rumsey v. New York etc. R. Co., 114 N. Y. 423, 21 N. E. Rep. 1066; *Id.*, 125 N. Y. 681, 25 N. E. Rep. 1080; *Id.*, 130 N. Y. 88, 28 N. E. Rep. 763; Wright v. Eldred, 46 Hun, 12; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242; Ledyard v. Ten Eyck, 36 Barb. 102; disapproved in Gouverneur v. National Ice Co., 57 Hun, 474, 11 N. Y. Supp. 87; Rev'd in 134 N. Y. 355, 31 N. E. Rep. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Trustees of Schools v. Schroll, 120 Ill. 509, 12 N. E. Rep. 243, 60 Am. Rep. 575.

riparian owner whose lands adjoin an inland lake or pond takes only to the water's edge at low water mark, and others that he takes to the center of the lake or pond.

But with lakes of this class which are actually navigable, as with rivers,[2] the public have the right of navigation, paramount to all other rights of riparian owners, if they are needed and used for that purpose. And this right of navigation must not be disturbed either by drainage of the lake or by obstructions in the same.[3] This alike is the rule of the civil law,[4] and the common law of England.[5]

Also under the American law, as a part of the common law of the country, arising out of public necessity, convenience, and common consent, the public have the right to use the rivers and lakes and all parts of them for navigation, although they are not strictly private waters. If they are actually navigable in fact they are subject to this right of the public for the purpose of highway and navigation when they can be employed in travel, trade, or commerce. Such waters are treated as *publici juris* in so far as they may be properly used for such purposes in their natural state. The public right, however, arises only in case of their navigability. And whether they are navigable or not depends entirely upon their capacity for a substantial use for that purpose.[6]

2 For navigable rivers, see Secs. 343-346.

For the protection of the navigable capacity of waters, see Secs. 347-357.

3 The title to the bed of the river, lake, or sound in such cases, and all special privileges and advantages incident thereto may vest and remain in the owner thereof, subject only to the public right of navigation. He may use the land and whatever is incident to it, including the water over it, in such lawful ways as he will. The limited right of the public is paramount and must not be abridged.—State v. Narrows Island Club, 100 N. C. 477, 5 S. E. Rep. 411, 6 Am. St. Rep. 618; Broadax v. Baker, 94 N. C. 678, 55 Am. Rep. 633; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242, distinguishing State v. Glenn, 7 Jones (N. C.), 321.

4 Monongahela Bridge Co. v. Kirk, 46 Pa. 112, 84 Am. Dec. 527; Gaston v. Mace, 33 W. Va. 14, 10 S. E. Rep. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Goodwill v. Police Jury, 38 La. Ann. 752.

5 Smith v. Andrews, 2 Ch. 678, 65 L. T. N. S. 175; Grant v. Oxford Local Board, L. R. 4, Q. B. 9, 38 L. J. M. C. N. S. 39, 19 L. T. N. S. 378, 17 Week. Rep. 76; Woolrych on Waters, p. 40; Higgins on Water Courses, 73; Hale, De Juris Maris, Ch. 3; Phear, Water Rights, 13, 41.

6 See 1 Farnham on Waters, Sec. 23, and the cases cited.

For the protection of navigation, see, also, Chap. 16, Secs. 341-357.

For riparian rights, see Chaps. 21-28, Secs. 450-551.

§ 237. Small lakes—Distinction between lakes and water courses.—It is with small lakes and the rights to the waters therein that this work has more to do.[1] Our general definition of lakes is broad enough to include small lakes. These lakes differ in no respect from great lakes, except as to size and, usually, navigability. The question of navigability usually determines the extent of the rights of riparian owners, which will be discussed in a subsequent chapter of this work.[2]

The courts have been called upon to distinguish between water courses and lakes.[3] The weight of authority is to the effect that, if water of a stream or water course spreads out so that the current becomes imperceptible or is entirely lost, it becomes a lake or pond, and is no longer a water course. So, it is held, that a small stream which spreads out into a body of water varying from 35 to 65 rods in width and with a length of three miles, which after heavy rains is filled with water, but during the dry season the water disappears and it becomes a bog or marsh, here and there covered with water and a growth of wild vegetation, navigable in ordinary stages only with canoes and skiffs, and which is almost if not wholly without current, is not a water course in that place, but a lake.[4] The principal distinction between a pond or lake and a stream or water course is that in the former case the water is, in its natural state, substantially at rest. And this is so, independent of the size of the one or the other. So, a body of fresh water five or six miles long, a mile wide in some places, fed by springs, having no connection with any stream except by a slough which is dry in summer, and without any natural current, is a lake.[5] But, as has been said, the presence of some current is not enough, alone, to change a lake into a stream,[6] nor will the swelling of the stream into a broad sheet of water, in itself, make it a lake.[7]

1 For the appropriation of water from lakes, see Sec. 650.

For riparian rights on lakes, see Sec. 474.

2 See Chap. 16, Secs. 341-357.

For Great Lakes, see Sec. 295.

3 See water courses, Secs. 301-311.

4 Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. Rep. 661.

5 Trustees of Schools v. Schroll, 120 Ill. 509, 12 N. E. Rep. 243, 60 Am. Rep. 575; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338.

6 See Sec. 294.

See, also, Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425.

7 Trustees v. Schroll, *supra*.

§ 298. **Ponds—Definition and description.**—Ponds are of two kinds, natural and artificial. A natural pond has all of the physical characteristics of a small lake, and the terms "lake" and "pond" are frequently used interchangeably. A pond as defined by Webster is "a confined or stagnant body of fresh water," and it is the body of the water which comprises the pond.[1] The word "pond" is indefinite. It may mean a natural pond or an artificial one raised for any purpose, either permanent or temporary.[2] The controlling distinction between a stream and a pond or lake is that in the former the water has a natural motion, or, in other words, a current, while in the latter the water is, in its natural state, substantially at rest.[3] Hence, a body of water half a mile long and a quarter of a mile wide in the broadest part, fed by two streams, which has no current, and the bed of which is shaped like the bowl of a spoon, with a depth of sixteen feet in places, and a sluggish outlet four feet in depth, is a pond or lake, as distinguished from a stream or river.[4] An artificial pond created by a milldam includes the dam.[5] Hence a finding of the height of the water in a pond is equivalent to finding the height of the dam.[6] In respect to title, the law divides natural fresh-water ponds into two classes: The small ponds pass by an ordinary grant of land, and the large are exempted from the operation of such a grant, for the reasons that private ownership stops at the water's edge of the sea and its estuaries. Tide waters and large ponds are public waters.[7]

1 Rockland Water Co. v. Camden, 80 Me. 544, 15 Atl. Rep. 785, 1 L. R. A. 388.

Ulpian defines a pond as a temporary body of still water, which generally gathers in winter.—Ware, Roman Water Law, Sec. 59.

2 Waterman v. Johnson, 13 Pick. 261.

Callis speaks of a pond as if it were always artificial.—Callis on Sewers, 82. See, also, Woolrych on Sewers, 81.

For the appropriation of waters from ponds. See Sec. 560.

3 Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 800, 838, 16 Fed. Rep. 823; Trustees of Schools v. Schroll, 120 Ill. 509, 12 N. E. Rep. 243, 60 Am. Rep. 575.

See, also, Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. Rep. 661; Foss v. Johnstone, 158 Cal. 109, 110 Pac. Rep. 294.

4 Gouverneur v. National Ice Co., 57 Hun. 474, 11 N. Y. Supp. 87; rev'd in *Id.* 134 N. Y. 355, 31 N. E. Rep. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669.

5 Jackson v. Vermilyea (N. Y.), 6 Cow. 677.

6 Hutchinson v. Chicago & N. W. R. Co., 37 Wis. 582; Aken v. Parfrey, 35 Wis. 249; Smith v. Moodus Power Co., 35 Conn. 392.

7 Concord Mfg. Co. v. Robertson,

In a recent case in California it was held that, under Section 830 of the Civil Code, in the case of a nonnavigable pond, a grantee took to the middle of the pond, unless a different intent appears from the patents.[8] As is the case of small lakes, this is the rule adopted in most jurisdictions, and also the rule adopted by the Supreme Court of the United States, where the State Courts uphold this right.[9]

In other States, however, the rule is different, and the grantee takes only to the edge of the pond.[10] This is a question to be determined by each State as an incident to a grant by the Government. "Whatever incidents or rights attach to the ownership of property conveyed by the Government will be determined by the States."[11] This subject, however, will be more thoroughly discussed in another portion of this work.[12]

§ 299. Ponds—Colonial "great ponds."—In colonial times in Massachusetts and Maine the term "great ponds" was used to indicate those ponds of more than ten acres which were not before the year 1647 appropriated by private persons. Where they were not so appropriated, by colony ordinance, they were made to lie

66 N. H. 1, 25 Atl. Rep. 718, 18 L. R. A. 679, and cases cited.

See, also, riparian rights in ponds as to boundaries and ownership, Sec. 474.

8 Foss v. Johnstone, 158 Cal. 119, 110 Pac. Rep. 294.

See, also, Chapman v. Polack, 70 Cal. 484, 11 Pac. Rep. 764; Seaward v. Malotte, 15 Cal. 304; Vance v. Fore, 24 Cal. 436; Powers v. Jackson, 50 Cal. 429.

9 Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1053, 11 Sup. Ct. Rep. 380; Cragin v. Powell, 128 U. S. 691, 32 L. Ed. 566, 9 Sup. Ct. Rep. 203; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210.

10 Grant v. Hemphill, 92 Iowa 218, 59 N. W. Rep. 263, 60 N. W. Rep. 618; Carr v. Moore, 119 Iowa, 152, 93 N. W. Rep. 52, 97 Am. St. Rep. 292; Schlosser v. Hemphill, 118 Iowa, 452, 90 N. W. Rep. 842; Wright v. Council Bluffs, 130 Iowa, 274, 104 N. W. Rep. 492, 114 Am. St. Rep. 412.

11 Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 800, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 442, 11 Sup. Ct. Rep. 819; Kean v. Calumet etc. Co., 190 U. S. 452, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651; Hardin v. Shedd, 190 U. S. 508, 47 L. Ed. 1156, 23 Sup. Ct. Rep. 685; Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1053, 11 Sup. Ct. Rep. 380; Cragin v. Powell, 128 U. S. 691, 32 L. Ed. 566, 9 Sup. Ct. Rep. 203; St. Paul etc. R. Co. v. Schurmeir, 74 U. S. 7 Wall. 272, 19 L. Ed. 74.

12 For the ownership of the soil under fresh nonnavigable waters, see Secs. 328-332.

in common for the public use.[1] These ordinances seem to have been the foundation of a local common law in these two States which has led to a course of decisions with regard to the title of lakes and ponds at variance with the general common law, and which have been followed in some of the other States.[2]

When the Colony of Massachusetts, 250 years ago, reserved to public use her "great ponds" probably only fishing and fowling were in mind; but, with the growth of the community and its general progress these public reservations of certain waters, with reference to special uses only, became capable of many others, which are held to be within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all as they arise.[3]

§ 300. **Pools—Definition and Description.**—As a body of water a pool may be defined as a small body of standing water. By the Latin word, *stagnum*, a pool consists of both land and water, and therefore, in a conveyance of land upon which there is a pool, both the water and the land pass.[1] As a portion of a river or water course, it may be defined as a place in the channel where the water is temporarily partially at rest, as a fishing pool.[2]

1 Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 800, 838; Paine v. Woods, 108 Mass. 160; Commonwealth v. Vincent, 108 Mass. 441; *Id.* v. Weatherhead, 100 Mass. 177; *Id.* v. Alger, 7 Cush. 53; *Id.* v. Tiffany, 119 Mass. 300; West Roxbury v. Stoddard, 7 Allen 158; Hittinger v. Eames, 121 Mass. 539; Tudor v. Cambridge Water Works, 1 Allen, 164; Barrows v. McDermott, 73 Me. 441; Fay v. Salem Aqueduct Co., 111 Mass. 27; Berry v. Raddin, 11 Allen, 577; Brastow v. Rockport Ice Co., 77 Me. 100; Gage v. Steinkrauss, 131 Mass. 222; Rowell v. Doyle, 131 Mass. 474; Fernald v. Knox Woolen Co., 82 Me. 48, 19 Atl. Rep. 93, 7 L. R. A. 459; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 24 N. E. Rep. 774, 7 L. R. A. 613; Attorney Gen. v. Revere Copper Co., 152 Mass. 444, 25 N. E. Rep. 605, 9 L. R. A. 510.

2 Hardin v. Jordan, *supra.*

3 Lamprey v. State and Metcalf, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; West Roxbury v. Stoddard, 7 Allen, 158.

1 Johnson v. Rayner, 6 Gray, 107; Coke Litt. 5; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55; Bacon, Abr. Grants, H 3; Comyns, Dig. Grant, E 5.

Callis defines a pool as "a mere standing water, without any current at all." Callis, Sewers, p. 82.

2 Hart v. Hill (Pa.), 1 Whart. 124; Bennett v. Boggs, 3 Fed. Cas. 221; Tinicum Fishing Co. v. Carter, 61 Pa. (11 P. F. Smith) 21, 100 Am. Dec. 597.

§ 301. Natural water courses—In general—Definition.—There are many rights of riparian proprietors,[1] appropriators,[2] in and to natural water courses, and to the waters naturally flowing therein. Hence, in order to determine the nature and extent of the rights which may be acquired, it is necessary to know of what a water course consists. To maintain rights in a water course it must be made to appear that the water usually flows in a certain direction and by a regular, natural channel, with a bed, banks, or sides. They must be distinguished from artificial water courses as being formed entirely by Nature, while artificial water courses are formed by the works of man.[3] In its legal sense, it consists of a bed, banks, sides, or walls, and a current of water. It is a

1 For Riparian Rights, see Secs. 450-551.

2 For the Arid Region Doctrine of Appropriation, see. Chap. 31, Secs. 585-594.

3 For Artificial Water Courses, see Sec. 316.

But the fact that a stream having all the characteristics of a water course is deepened artificially does not change its character. Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425.

The term "natural water course" has a broader and more comprehensive meaning than the word "river." In its most general sense it means a course or channel in which water flows.

Worcester: 1. Any channel or passage for water. 2. A running stream of water; a natural stream, including rivers and rivulets.

Webster: 1. A stream of water; a river or brook. 2. A channel or canal for the conveyance of water, especially in draining lands. 3. A running stream of water having a bed and banks; the easement one may have in the flowing of such stream in its accustomed course.

Century Dict.: A water course, as defined by law, means a living stream, with definite banks and channel, not necessarily running all the time, but fed from more permanent sources than mere surface water.

See, also, Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. Rep. 316, 1 Silvernail App. 546; Joliet & C. R. Co. v. Healy, 94 Ill. 416; 116 U. S. 119, 29 L. Ed. 607, 6 Sup. Ct. Rep. 352; Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45, 38 Am. St. Rep. 330; Erwin v. Erie R. Co., 98 App. Div. 402, 90 N. Y. Supp. 315, 186 N. Y. 550; Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169.

A water course consists of bed, banks, and water; yet water need not flow continually; and there are many water courses which are sometimes dry.—Angell on Water Courses, 1877, Sec. 4, and notes.

Every river consists of (1) the bed, (2) the water, (3) the banks or shores; and it also has a current. It is a *water course* from the point where the water comes to the surface and begins to flow in a channel until it mingles with the sea, the arms of the sea, lakes, etc.—Gould on Waters, 1891, Sec. 41, and notes.

living stream confined to a channel, usually flowing in a particular direction, and usually discharging itself into some other stream or body of water, but not necessarily flowing all of the time, for there are water courses which are sometimes dry.[4] It is a natural, living stream, and includes rivers, creeks, brooks, runs, and rivulets.[5]

There is a much more general definition of a water course, which has been adopted by some of the Courts, and which is: A water course is a condition created by a stream of water having a well-defined and substantial existence.[6]

4 That a water course may be sometimes dry and still not lose its identity, see Sec. 307.

For rivers, see Sec. 308.

For streams, see Sec. 309.

5 Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45, 38 Am. St. Rep. 330; Porter v. Armstrong, 129 N. C. 101, 39 S. E. Rep. 799; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410; Weis v. City of Madison, 75 Ind. 241, 39 Am. Rep. 135; Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Eulrich v. Richter, 41 Wis. 318, 37 Wis. 226; Barkley v. Wilcox, 88 Iowa, 47, 55 N. W. Rep. 77; Case v. Hoffman, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; *Id.* 100 Wis. 314, 72 N. W. Rep. 390, 74 N. W. Rep. 220, 75 N. W. Rep. 945, 44 L. R. A. 728; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. Rep. 316; Arthur v. Grand Trunk R. Co., 22 Ont. App. Rep. 89, aff'g Beer v. Stroud, 19 Ont. Rep. 10.

The unity of a water course is preserved throughout its entire course, and it begins where the water comes to the surface and continues to flow in a channel until it mingles with the sea. Lehigh Coal & Nav. Co. v. Pocono Spring Water Ice Co., 7 Northhampton Co. Rep. 350; Luther v. Winnissimet Co., 9 Cush. 171; Jones v. Wabash, St. L. & P. R. Co., 18 Mo. App. 251; Wagner v. Long Island R. Co., 2 Hun, 633, 5 Thomp. & C. 163, 5 N. Y. Sup. Ct. 163, app. dismissed in 70 N. Y. 614; Chicago, K. & N. R. Co. v. Steck, 51 Kan. 737, 33 Pac. 601; Kislinski v. Gilboy, 19 Pa. Super. Ct. 453.

Mr. Justice Brewer, in Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241, said: "For a water course there must be a channel, a bed to the stream, not merely lowland or depression in the prairie over which the water flows. It matters not what the width or depth may be, a water course implies a distinct channel; a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream; and such flow must be necessary to prevent the flooding of a considerable tract of land."

See, also, Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N. W. Rep. 946; Ventura Land & Pr. Co. v. Meiners, 136 Cal. 284, 68 Pac. Rep. 818, 89 Am. St. Rep. 128.

6 Schlicter v. Phillipy, 67 Ind. 201; Hill v. Cincinnati, W. & M. R. Co., 109

In the law text books and in the Court decisions there are to be found many definitions of the term "water course," but the definition that comes nearest to meeting our views is to be found in the opinion of a recent Idaho case, and is as follows: "A water course is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream which is ordinarily a moving body of water." [7]

§ 302. Water courses—General characteristics.—There have been various attempts by the Courts and writers in the past to distinguish between water courses and rivers and streams, but the great weight of authority treats these terms as synonymous, and for the purposes of this work we will continue to so treat them. Those who desire to investigate the subject further, we

Ind. 511, 10 N. E. Rep. 410; Town v. Missouri P. R. Co., 50 Neb. 768, 70 N. W. Rep. 402; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Eulrich v. Richter, 37 Wis. 226, 41 Wis. 318; Earl of Egremont v. Williams, 11 A. & E. N. S. 688, 63 Com. L. Rep. 687; Morrison v. Bucksport & B. R. Co., 67 Me. 353; Ashley v. Woolcott, 11 Cush. 192; Shelby County Comrs. v. Castetter, 7 Ind. App. 309, 33 N. E. Rep. 986; New York, C. & St. L. R. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. Rep. 541; Rice v. City of Evansville, 108 Ind. 7, 9 N. E. Rep. 139, 58 Am. Rep. 53; Maxwell v. Shirts, 27 Ind. App. 529, 61 N. E. Rep. 754, 87 Am. St. Rep. 268; Hoyt v. City of Hudson, 27 Wis. 656, 9 Am. Rep. 473.

See, also, Hastie v. Jenkins, 53 Wash. 21, 101 Pac. Rep. 495; Brown v. Schneider, 81 Kan. 486, 106 Pac. Rep. 41, 135 Am. St. Rep. 396; Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Morrissey v. Chicago etc. Co., 38 Neb. 406, 56 N. W. Rep. 946; Hinkle v. Avery, 88 Iowa 47, 55 N. W. Rep. 77, 45 Am. St. Rep. 224; West v. Taylor, 16 Ore. 165, 13 Pac. Rep. 665; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; City of Paola v. Garman, 80 Kan. 702, 103 Pac. Rep. 83; Hill v. Cincinnati etc. Co., 109 Ind. 511, 10 N. E. Rep. 410; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737; Quinn v. Chicago etc. R. Co., 23 S. D. 126, 120 N. W. Rep. 884; Larimore v. Miller, 78 Kan. 459, 96 Pac. Rep. 852; Shiveley v. Hume, 10 Ore. 76; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S. 214; Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 102 Pac. 728; Anderson etc. Co. v. McConnell (Nev.), 133 Fed. Rep. 581.

[7] Hutchinson v. Watson Slough D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

respectfully refer to our note.[1] As far as their physical characteristics are concerned, the only difference between rivers, streams, creeks, brooks, runs, and rivulets is their size and volume. They are all water courses, and come within our definition given above. A rivulet flowing from a spring of water, if it has a clear and well-defined channel, and a regular flow in that channel, is none the less a water course, although it is not equal in volume to a river.[2] In fact, the characteristics of a water course are easily

1 Mr. Angell treats all running water (not tide waters) as water courses; although he says that they are commonly denominated as "rivers" or "rivulets" according to their magnitude. Angell on Water Courses, 1877, Secs. 3-4f, and notes.

See, also, authorities cited under the last section, No. 301.

See, also, Woolrych on Sewers, 51; *Id.* Law of Waters, 40; Callis on Sewers, 77; Locke, cited in Johns. Dict., 4th Ed., "River"; Hale's Treatise, De Jure Maris; Phear, Rights of Water, p. 31; Starr v. Child, 20 Wend. 149; Gavit v. Chambers, 3 Ohio 495; Rex v. Oxfordshire, 1 B. & Ad. 289, 20 Eng. C. L. 389, 109 Eng. Reprint 794; Howard v. Ingersoll, 17 Ala. N. S. 780, reversed, 54 U. S., 13 How. 381, 14 L. Ed. 189; Morgan v. Livingston, 6 Mart. (La.) 119; Shields v. Arndt, 4 N. J. Eq. (3 Green, Ch.) 234; Wagner v. Long Island R. Co., 5 N. Y. Sup. Ct. 163, 2 Hun, 633; Gillett v. Johnson, 30 Conn. 180; Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Reynolds v. McArthur, 27 U. S., 2 Peters 417, 7 L. Ed. 470; Kauffman v. Griesemer, 26 Pa. St. 407, 67 Am. Dec. 437; Rex v. Trafford, 1 B. & Ad. 874, 20 Eng. C. L. 389, 8 Bing. 204, 21 Eng. C. L. 272, 109 Eng. Reprint 1011; Queen v. Derbyshire, 2 Q. B. 745, 114 Eng. Reprint 290; Rex v. Whitney, 3 Ad. & El. 69, 7 C. & P. 208; Abraham v. Great Northern R. Co., 16 Q. B. 586, 597, 71 Eng. C. L. 584, 20 L. J. Q. B. N. S. 322, 15 Jur. 855, 5 Eng. L. Eq. Rep. 258; Menzies v. Breadalbane, 3 Wilson & Shaw 234, 243.

In Benson v. Connors, 63 Iowa 670, 19 N. W. Rep. 812, where the Court, finding that there was a "water channel," a "natural channel" and the "natural flow of water therein" held conclusive that it was a natural stream and not a mere surface channel.

See, also, McHardy v. Ellice, 1 Can. App. 628, 39 Q. B. (Can.) 546, 37 *Id.* 580; Palmer v. Waddell, 22 Kan. 352; Ashley v. Wolcott, 11 Cush. 192; Gibbs v. Williams, 25 Kan. 214; Serrin v. Grefe, 67 Iowa 196, 25 N. W. Rep. 227; Chicago R. R. Co. v. Morrow, 42 Kan. 339, 22 Pac. Rep. 413.

2 Wheatley v. Baugh, 25 Pa. (1 Casey) 528, 64 Am. Dec. 721, 13 Morr. Min. Rep. 374; Child v. Starr, 4 Hill (N. Y.) 369; Jack v. Martin, 12 Wend. (N. Y.) 311; affd. 14 Wend. 507; Pyle v. Richards, 17 Neb. 182, 22 N. W. Rep. 370; Wolf v. Crothers, 21 Pa. Co. Ct. 627.

To constitute a water course, the size of the stream is not important; it may be very small. Luther v. Winnissimet Co., 9 Cush. 171; Mitchell v. Bain, 142 Ind. 604, 42 N. E. Rep. 230; Town v. Missouri Pac. R. Co., 50 Neb. 768, 70 N. W. Rep. 402; Mor-

recognized, as are most physical objects, and if the question is left to be decided by a jury as a question of fact, there will be little difficulty in any case.[3] But to constitute a water course there must be a supply which is permanent in the sense that similar conditions will always produce a flow of water in the same channel, and that the conditions recur with some degree of regularity, so that they establish and maintain for considerable periods of time a running stream.[4] Hence a water course does not include surface water conveyed from higher to lower levels for limited periods, during the melting of snow, or during or soon after a heavy fall of rain, through hollows or ravines, which at all other portions of the seasons are entirely dry. These occasional bursts of water, which, in times of freshet, or of melting of ice or snow, descend from the hills and inundate the country, have none of the characteristics of a water course, according to our definition given above.

A water course, in the legal sense of the term, does not necessarily consist merely of the stream as it flows within the banks which form the channel in ordinary stages of high water. But, when in times of ordinary high water the stream, extending beyond its banks, is accustomed to flow down over the adjacent lowlands in a broader, but still well-defined stream, it has none the less the character of a water course and the law relating to water courses is applicable, rather than that relating to mere surface water.[5] Whenever surface water flows in one continuous, well-marked channel it becomes a water course, if this flow becomes regular each season.[6] So, if the waterflow continues only

rissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N. W. Rep. 946; McHardy v. Ellice, 37 U. C. Q. B. 580, rev'd in 1 Ont. App. Rep. 628.

The existence of a water course may be settled by a decree of court. Benson v. Connors, 63 Iowa 670, 19 N. W. Rep. 812.

3 Vernum v. Wheeler, 35 Hun 55.

4 Mann v. Retsof Min. Co., 49 App. Div. 454, 63 N. Y. Supp. 752.

5 Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A. N. S. 214.

6 Borman v. Blackmon, —— Ore. —, 118 Pac. Rep. 848; Angell on Water Courses, Sec. 4 and note; Gavit's Adm'rs v. Chambers, 3 Ohio 496; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135.

See Hoyt v. Hudson, 27 Wis. 656, 661, 9 Am. Rep. 472, in which Mr. Chief Justice Dixon of the Supreme Court in the opinion said: "The term 'water course' is well defined. There must be a stream usually flowing in a particular direction, though it need not flow continually. It may

long enough to dispose of the water which has fallen after a rain, or if the surface drained is so limited that the water can not assume the character of a stream, it is not a water course.[7] But in some cases the Courts have not distinguished between water courses and drain-ways with that degree of particularity which is required by the great weight of authority, apparently holding that there could be no right of drainage unless there was a water course by means of which it could be effected.[8] However, if a water course exists, its character is not changed by being con-

sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in the land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water courses." Washburn on Easements, 209, 210; Shields v. Arndt, 4 N. J. Eq. (3 Green's Ch.) 234; Rice v. Evansville, 6 West Rep. 244; Luther v. Winnissimet Co., 9 Cush. 171; Briscoe v. Drought, 11 Ir. C. L. Rep. 250; Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; Rev'g *Id.*, 9 Ala. N. S. 780; Ashley v. Wolcott, 11 Cush. 192; Flagg v. Worcester, 13 Gray 601; Parks v. Newburyport, 10 Gray 28; Reynolds v. McArthur, 27 U. S. 2 Peters 417, 7 L. Ed. 470; Dickinson v. Worcester, 7 Allen 19; Gannon v. Hargadon, 10 Allen 106 (Mass.), 87 Am. Dec. 625; Rawston v. Taylor, 33 Eng. L. & Eq. 428, 25 L. J. Exch. N. S. 33, 11 Exch. 369, 4 Week. Rep. 290; Broadbent v. Ramsbotham, 11 Exch. 602, 25 L. J. Exch. N. S. 115, 4 Week. Rep. 290, 34 Eng. L. & Eq. 553; Bangor v. Lansil, 51 Me. 521; Earl v. DeHart, 12 N. J. Eq. 280, 72 Am. Dec. 395.

[7] Morrison v. Bucksport & B. R. Co., 67 Me. 353; Fryer v. Warne, 29 Wis. 511. But see Briscoe v. Drought, 11 Ir. C. L. Rep. 250. See Surface Water, Sec. 318. See Drainage, Sec. 38.

A water course exists where "there was a quantity of water regularly passing, considerable except in droughts, in one, and only one, direction; not squandering and wandering over the surface as surface water does, but in a defined channel, over a bed between banks, through a channel cut by waters long ago." Neal v. Ohio R. Co., 47 W. Va. 316, 34 S. E. Rep. 914.

[8] Sheehan v. Flynn, 59 Minn. 436, 61 N. W. Rep. 462, 26 L. R. A. 632; McClure v. Red Wing, 28 Minn. 186, 9 N. W. Rep. 767, approved in Taubert v. St. Paul, 68 Minn. 519, 71 N. W. Rep. 664.

It has been held that a fixed course over which surface water from adjoining land is uniformly discharged at a definite point is a water course, within the rule prohibiting one from filling up a water course so as to impede the flow from the adjoining lands, though the course has no well-

fined in an artificial channel.[9] A water course may lose its character, if water ceases to flow in it for the prescriptive period.[10] A land owner, as far as his rights are concerned, may, by his conduct, estop himself from disputing the existence of a water course.[11] It is held that a water course need not necessarily empty into some other stream or other body of water, but that the water may sink into cavities or be lost by percolation.[12] In some of the States a water course has been defined by statute.[13] It is only upon natural water courses that riparian rights may exist.[14]

§ 303. **Water courses—Essential characteristics of—The channel.**—According to the great weight of authority, the essential characteristics of a water course are: A channel, consisting of well-defined bed [1] and banks,[2] and a current of water.[3] Many of the cases go to the extent that without all three of these characteristics there can be no water course.[4]

defined beds and banks. Ribordy v. Murray, 177 Ill. 134, 52 N. E. Rep. 325.

9 Stanchfield v. Newton, 142 Mass. 110, 7 N. E. Rep. 703; Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; Murphy v. Kelly, 68 Me. 521; Schafer v. Herb, 7 Robt. 222.

10 Ostrom v. Sills, 28 Can. S. C. 485, affirming 24 Ont. App. Rep. 526.

11 Neal v. Ohio River R. Co., 17 W. Va. 316, 34 S. E. Rep. 914. But see Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875.

12 Parke County v. Wagner, 138 Ind. 609, 38 N. E. Rep. 171.

13 For the statutes of the respective States upon this subject, see Part 14.

14 Chancellor Walworth, in Child v. Starr, 4 Hill (N. Y.) 369; Missouri Pac. R. Co. v. Wren, 10 Kan. App. 408, 62 Pac. Rep. 7.

See, also, for riparian rights, Chaps. 21-28, Secs. 450-551.

For artificial water courses, see Sec. 316.

1 For the bed, see Sec. 304.

2 For the banks, see Sec. 305.

3 For the current, see Sec. 306.

Mr. Angell says that it consists of bed, banks, and water. Angell on Water Courses, 1877, Sec. 4.

See previous Secs. 301, 302.

4 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Beer v. Stroud, 19 Ont. Rep. 10; Ferris v. Wellborn, 64 Miss. 29, 8 So. Rep. 165; Livingston v. McDonald, 21 Iowa 160, 89 Am. Dec. 563; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410; Barnes v. Sabron, 10 Nev. 217, 4 Morr. M. Rep. 673; Schlicter v. Phillipy, 67 Ind. 201; Bangor v. Lansil, 51 Me. 521; Wagner v. Long Island R. Co., 2 Hun. (N. Y.) 633, 5 N. Y. Sup. Ct. 163; Lessard v. Stram, 62 Wis. 112, 22 N. W. Rep. 285, 51 Am. Rep. 715; Hoyt v. City of Hudson, 27 Wis. 656, 9 Am. Rep. 473; Razo v. Varni, 81 Cal. 289, 22 Pac. Rep. 848; Carpenter v. Board of Commissioners, 56 Minn. 513, 58 N. W. Rep. 295.

The channel is the deeper part of the water course, usually eroded out by the action of the water, and where the main current of the water flows. In other words, it is the passageway between the banks through which the water flows.[5] The term "natural channel" includes not only all channels through which, in the existing conditions of the country, water naturally flows, but also new channels through which, by changes in the conformation of the country occurring by some local disturbance, the water is under natural laws discharged.[6] The channel, in turn, is divided into its bed and banks.[7] The rule is, that in order to have a water course there must be a channel; it has even been held that where there was a channel, there was a water course, although it carried no water except in times of heavy rains and of melting snows, thus forming what is termed a torrential stream.[8] Upon the other hand, it is held that no water course exists if the channel is absent.[9] And where the water flows merely over the low land, a bog, or a slough, it is not a water course.[10] Neither does water oozing from a spring, through soft and spongy ground, consti-

5 Benjamin v. Manistee River Imp. Co., 42 Mich. 628, 4 N. W. Rep. 483.

6 Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. Rep. 143.

See, also, Los Angeles Cem. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Conniff v. San Francisco, 67 Cal. 45, 7 Pac. Rep. 41.

7 For bed and banks, see Secs. 304, 305.

8 York v. Davidson, 39 Ore. 81, 65 Pac. Rep. 819.

See, also, Conniff v. San Francisco, 67 Cal. 45, 7 Pac. Rep. 41.

9 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Missouri Pac. R. Co. v. Wren, 10 Kan. App. 408, 62 Pac. Rep. 7; Palmer v. Waddell, 22 Kan. 352; Chicago, K. & W. R. Co. v. Morrow, 42 Kan. 339, 22 Pac. Rep. 413; Gibbs v. Williams, 25 Kan. 214, 37 Am. St. Rep. 241; McGillivray v. Millin, 27 U. C. Q. B. 62; Razzo v. Varni, 81 Cal. 289, 22 Pac. Rep. 848; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

10 Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090; Chicago, K. & W. R. Co. v. Morrow, 42 Kan. 339, 22 Pac. Rep. 413; Barnes v. Sabron, 10 Nev. 217, 4 Morr. M. Rep. 673; Union Pac. R. Co. v. Dyche, 31 Kan. 120, 1 Pac. Rep. 243; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 678; Geddis v. Parrish, 1 Wash. St. 587, 21 Pac. Rep. 314; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Ft. Morgan L. & C. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Town v. Missouri Pac. R. Co., 50 Neb. 768, 70 N. W. Rep. 402; Platte Valley Irr. Co. v. Buckers Irr. M. & Imp. Co., 25 Colo. 77, 53 Pac. Rep. 334.

However, in the case of Cederburg v. Dutra, 3 Cal. 572, 86 Pac. Rep. 838, the Court held that where water flowed in a slough having well de-

tute a water course before it arrives at some definite channel.[11] If, however, the natural channel commences at the very source or springhead, where the water first manifests itself, no matter how small the flow, it is a water course.[12] A stream does not cease to be a water course and become mere surface water because at a certain point it spreads over a level meadow several rods in width and flows for a distance without banks before flowing in a definite channel.[13] In every case the channel must be definite and permanent; at times the channel may be dry; at others it may not be able to hold all of the water that flows down from above, but in any case, when under certain conditions water does flow through the channel, the recurrence of those conditions must always produce a flow of water therein.

§ 304. Water courses—Essential characteristics—The bed.—The channel of a natural water course [1] is itself divided into the *alveus* or bed, and the *ripa* or banks or sides.[2] This is true whether the stream be salt or fresh, navigable or nonnavigable.[3] The bed may be defined as that portion of a water channel of a water course which carries the water of the same at its ordinary stage. In other words, in high water the bed may be much more than submerged; in extremely low water, or where there is no water running at all, it may not be; but it is that portion of the channel which is more commonly covered with water and of which

fined banks, such slough constituted a water course though at some points the channel spread out and was quite shallow.

See, also, sloughs, Sec. 315.

11 Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Meyer v. Tacoma L. & P. Co., 8 Wash. 144, 35 Pac. Rep. 601; Southern Pac. R. Co. v. Durfour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92; Angell on Water Courses, 1877, Secs. 108b, 108p.

But see New York, C. & St. L. R. Co. v. Hamlet Hay Co., 149 Ind. 344, 47 N. E. Rep. 1060, 49 N. E. Rep. 269.

12 Angell on Water Courses, 1877, Sec. 108q; Dudden v. Guardians of Clutton Union, I. H. & N. 627, S. C. 26 L. J. Exch. N. S. 146, 38 Eng. L. & Eq. 526.

See, also, previous section, No. 302.

13 Harrington v. Demaris, 46 Ore. 111, 77 Pac. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S. 756; Anderson etc. Co. v. McConnell (Nev.), 133 Fed. Rep. 581; Miller & Lux v. Madera C. & Irr. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S. 391.

1 For the channel, see Sec. 303.

2 For the banks, see Sec. 305.

3 For shore, see Sec. 293.

the soil is so occupied by the stream as to be wrested from vegetation which grows only upon the land. By a close examination of the bed and banks of a natural water course one may readily distinguish the exact line of demarcation between them.[4] It can also be readily ascertained where the presence and action of water are so common and usual, and so long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks, not only in respect to the vegetation, but also in respect to the soil itself.[5] In all cases the bed of a stream is a natural object, and is to be sought for not merely by the application of abstract rules, but as other natural objects are sought for and found, by the distinctive appearance they present.

The following is the somewhat imperfect definition of the bed of a water course: "The bed, which is a definite, and commonly a permanent, channel, is the characteristic which distinguishes the water of a river from mere surface drainage flowing without definite course or certain limits, and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form part of the realty, and belong exclusively to the owner of the realty."[6] The "high-water mark" of a water course means what its language imports—a high-water mark or the highest level of the bed. It is co-ordinate with the limit of the bed of the water course, and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes. It does not include low lands which, although subject to frequent overflow, are valuable as meadows and pasture.[7]

[4] See Houghton v. Chicago etc. R. Co., 47 Iowa 370; Alabama v. Georgia, 64 U. S. 23 How. 505, 16 L. Ed. 556; Pulley v. Municipality No. 2, 18 La. 278; Haight v. City of Keokuk, 4 Iowa 199; Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435; Dayton v. Cooper Hydraulic Co., 10 Ohio S. & C. P. Dec. 192.

[5] Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; Rev'g 17 Ala. N. S. 780.

[6] Paine Lumber Co. v. U. S., 55 Fed. 854; Eulrich v. Richter, 37 Wis. 226, 41 Wis. 318; Carpenter v. Board of Commissioners, 56 Minn. 513, 58 N. W. Rep. 295.

Under the statutes of Virginia the bed of a river includes the shores and the whole space through which the stream flows. Town of Ravenswood v. Fleming, 22 W. Va. 52, 46 Am. Rep. 485.

Where a distinct channel is not worn in the soil it is not the bed of a river. Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241.

[7] Carpenter v. Board of Commissioners, 56 Minn. 513, 58 N. W. Rep. 295.

§ 305. Water courses—Essential characteristics—The banks.—As we have seen, the channel of a water course must also have its banks; the word shores, *littora,* is often improperly used when referring to the banks of rivers and water courses, and especially to fresh water rivers. In referring to that portion of a river where the tide ebbs and flows, the word "shore" is allowable, but not otherwise. A river in which the tide does not ebb and flow has no shores in a legal sense.[1] The word "shore" is strictly applicable only to the space between ordinary high and low water mark on a tidal river, the sea, or a lake; but it is sometimes loosely used with reference to fresh water rivers, either as synonymous with the bank, or as denoting that portion of the bank which touches the margin of the stream at low water.[2]

The banks of a water course are the elevations of land which confine the waters to their natural channel when they rise to the highest point at which they are confined to a definite course and channel.[3] According to the civil law definition as given by Ulpian, the banks of a water course, or river, are those banks which contain the river in the rigor of its normal course. If, owing to rains, or the sea, or some other cause, the river has expanded, the banks are unchanged.[4] However, it is not essential to a water course that the banks shall remain unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between the bed and the banks. The banks, also, as was said of the bed of a water course,[5] are natural objects, subject to an endless variety of change, and the law can not fix the limits of the variations of these or other natural objects.[6]

1 See Worcester's Dict., Sub. Shore; Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45, 38 Am. St. Rep. 330.

See, also, for shores, Sec. 293.

2 Handley v. Anthony, 18 U. S. 5 Wheat. 374, 5 L. Ed. 113; Dutton v. Strong, 66 U. S. 1 Black. 23, 17 L. Ed. 29; Stone v. Augusta, 46 Me. 127; McCulloch v. Wainright, 14 Pa. St. 171; Lacy v. Green, 84 Pa. St. 514; Child v. Starr, 4 Hill 369; Starr v. Child, 20 Wend. 149.

3 Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; rev'g 17 Ala. N. S. 780; Highway Commrs. v. Madison County, 125 Ill. 9, 17 N. E. Rep. 147; Starr v. Child, 20 Wend. 149; State v. Gilmanton, 9 N. H. 461, 14 N. H. 467; McCullough v. Wainright, 14 Pa. St. 171.

4 Ware, Roman Water Law, Sec. 21.

5 See Sec. 304.

6 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Bassett v. Salisbury Mfg. Co., 43 N. H. 569,

§ 306. Water Courses—Essential characteristics—The current or flow.—According to the almost unanimous weight of authority, one of the necessary essentials of a water course, is not only water from a definite source of supply, but it must be running water. The water must have a current.[1] There must be a definite source of water supply, which is permanent in the sense that similar conditions will always produce a flow of water, and that these conditions recur with some degree of regularity, so that they establish and maintain for considerable periods of time a running stream.[2] As we have seen in a previous section,[3] in order to constitute a water course, there must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes.[4] This is true in its

82 Am. Dec. 179; Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; rev'g 17 Ala. N. S. 780.

1 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Morrison v. Officer, 48 Ore. 569, 87 Pac. Rep. 896; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. Rep. 1091, 18 Am. St. Rep. 158; Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; West v. Taylor, 16 Ore. 165, 13 Pac. Rep. 665.

2 Mann v. Retsof Min. Co., 49 App. Div. 454, 63 N. Y. Supp. 752; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Barkley v. Wilcox, 86 N. Y. 140, 19 Hun 320, 40 Am. Rep. 519; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. Rep. 316; Gregory v. Bush, 64 Mich. 37, 8 Am. St. Rep. 797, 31 N. W. Rep. 90.

In Shields v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234, it is said: "There must be water as well as land, and it must be a stream usually flowing in a particular direction. It need not flow continually, as many streams in this country are, at times, dry."

"When water has a definite source, as a spring, and takes a definite channel, it is a water course." Pyle v. Richards, 17 Neb. 181, 22 N. W. Rep. 370.

See, also, Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Lassard v. Stram, 62 Wis. 112, 22 N. W. Rep. 284, 51 Am. Rep. 715; Town v. Missouri Pac. R. Co., 50 Neb. 768, 70 N. W. Rep. 402; Eulrich v. Richter, 37 Wis. 228, 41 Wis. 318.

3 See Sec. 301.

4 See surface water, Sec. 318; Hoyt v. City of Hudson, 27 Wis. 656, 9 Am. Rep. 473; Case v. Hoffman, 100 Wis. 314, 72 N. W. Rep. 390, 44 L. R. A. 728, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; Blohowak v. Grochoski, 119 Wis. 189, 96 N. W. Rep. 551; Morrison v. Bucksport & B. R. Co., 67 Me. 353; Los Angeles Cem. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; Luther v. Winnissimet Co., 9 Cush. 171; Vernum v. Wheeler, 35 Hun. (N. Y.) 55; Lawton v. South Bound R. Co., 61 S. C. 548, 39 S. E. Rep. 752; Benson v. Chicago & A. R. Co., 78 Mo. 504;

strict sense, but surface water may collect from so large a drainage area and be so continuous in its flow as to form the definite source of supply for a water course below.[5] Again, the regular and definite source of supply of the water for a water course may be springs, especially where the flow is strong enough to assume the character of a stream.[6] This is not so if the water from the spring

St. Louis, I. M. & S. R. Co. v. Schneider, 30 Mo. App. 620; Town v. Missouri Pac. R. Co., 50 Neb. 768, 70 N. W. Rep. 402; Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N. W. Rep. 946; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410; Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; City of Paola v. Garman, 80 Kan. 702, 103 Pac. Rep. 83; Schlicter v. Phillipy, 67 Ind. 201; Bangor v. Lansil, 51 Me. 521; Wagner v. Long Island R. Co., 2 Hun (N. Y.) 633, 5 N. Y. Sup. Ct. 163; Lessard v. Stram, 62 Wis. 112, 22 N. W. Rep. 284, 51 Am. Rep. 715; New York etc. Co. v. Speelman, 12 Ind. App. 372, 40 N. E. Rep. 541; Shively v. Hume, 10 Ore. 76; Sierra County v. Nevada County, 155 Cal. 1, 99 Pac. Rep. 371; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

5 Arthur v. Grand Trunk R. Co., 22 Ont. App. 89; McKinley v. Union County, 29 N. J. Eq. 164; Beer v. Stroud, 19 Ont. Rep. 10; Kelly v. Dunning, 39 N. J. Eq. 482; Eulrich v. Richter, 41 Wis. 318, 37 Wis. 226; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Palmer v. Waddell, 22 Kan. 352; Hill v. Cincinnati, W. & M. R. Co., 109 Ind. 511, 10 N. E. Rep. 410; Briscoe v. Drought, 11 Ir. C. L. Rep. 250.

As was said in the case of Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727, "The term 'water course' does not include water descending from the hills, down the hollows and ravines, without any definite channel, only in times of rain and melting snow, but where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through the long deep gullies or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel, which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a water course, and to be governed by the same rules."

See, also, Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395; McClure v. City of Red Wing, 28 Minn. 186, 9 N. W. Rep. 767; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; West v. Taylor, 16 Ore. 165, 13 Pac. Rep. 665.

6 Pyle v. Richards, 17 Neb. 182, 22 N. W. Rep. 370; Jack v. Martin, 12 Wend. (N. Y.) 311, 14 Wend. 507; Mitchell v. Bain, 142 Ind. 604, 42 N. E. Rep. 230; Wolf v. Crothers, 21 Pa. Co. Ct. Rep. 627; Brosnan v. Harris, 39 Ore. 148, 65 Pac. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Wheatley v. Baugh, 25 Pa. (1 Casey) 528, 64 Am. Dec. 721, 13 Morr. Min. Rep. 374; Wilkins v. McCue, 46 Cal. 656; Shenandoah etc. Co. v. Morgan, 106 Cal.

flows only in times of rain, which occur at irregular periods, and the flow continues only long enough to dispose of the water which has fallen.[7]

And, again, the source of supply may be the channel which affords an outlet to the water of a pond or lake, even where the pond itself is formed by surface water.[8] The water of a water course must have a current; in other words, it must be running water. The flow of the water must be usually in one direction and by a regular channel having both a source and mouth.[9] If the water spreads out so that the current becomes imperceptible or is lost, the water becomes a lake or pond, and is no longer a water course.[10] Indeed, the controlling distinction between a water course and a pond or a lake is, that in the former case the water has a natural motion, or a current, while in the latter the water is, in its natural state, substantially at rest. And this is so, independent of the size of the one or the other.[11] If the current continues, the mere fact that a stream spreads out does not change its character as a water course.[12] So, also, the exit of a lake, with a sensible cur-

409, 39 Pac. Rep. 802; County of Sierra v. County of Nevada, 155 Cal. 1, 99 Pac. Rep. 371.

7 Morrison v. Bucksport & B. R. Co., 67 Me. 353; Fryer v. Warne, 29 Wis. 511.

8 Neal v. Ohio River Co., 47 W. Va. 316, 34 S. E. Rep. 914; Hastie v. Jenkins, 53 Wash. 21, 101 Pac. Rep. 495, where it is said: "As we have seen, the testimony in this case shows that this was a water course and an outlet of this lake. It does not matter whether it be called a swag or a swamp or a creek, or whether its course be straight or crooked. The channel in this case was shown to have well-defined banks, and it is shown that the creek was the natural outlet for the water of the lakes, and that the waters flowing through said channel all reached a common place."

9 Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45, 38 Am. St. Rep. 330.

10 See Lakes, Secs. 295-297. See Ponds, Secs. 298, 299; Trustees of Schools v. Schroll, 120 Ill. 509, 12 N. E. Rep. 243, 60 Am. Rep. 575.

11 See, also, Ne-pee-nauk v. Wilson, 96 Wis. 290, 71 N. W. Rep. 661.

12 Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Case v. Hoffman, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; *Id.*, 100 Wis. 314, 72 N. W. Rep. 390, 74 N. W. Rep. 220, 75 N. W. Rep. 945, 44 L. R. A. 728; Mansfield v. Ross, 4 New Zealand, L. R. S. Ct. 290. See Lakes, Secs. 294-297; Mitchell v. Bain, 142 Ind. 604, 42 N. E. Rep. 230. See Ponds, Secs. 298, 299; Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. Rep. 339, 8 Am. St. Rep. 668; Gillett v. Johnson, 30 Conn. 180; Shield v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234; West v. Taylor, 16 Ore. 165, 13 Pac.

rent toward a gravel-bed, where the water sinks and finds its way by rapid percolation through the gravel, is a water course. Nor does the fact that for a portion of its course the water flows underground destroy its character as a water course.[13] Upon the other hand, a hollow or ravine without a permanent flow of water is not a water course, although, at times, from rains or melting snow, water may flow therein.[14] Neither is a swale nor swamp nor bog, although there may be a permanent supply of water, unless there is a perceptible current and flow of the water in a certain direction.[15] Again, for the reason that there is no permanent flow or source of permanent water supply, depressions in prairies due to the rolling character of the ground are not water courses.[16]

§ 307. **Water courses—At times may be dry.**—We have stated before that a water course does not include surface water conveyed from a higher to a lower level, for limited periods, through no definite channel, during periods of extraordinarily high water;[1] neither is it an essential characteristic of a water course that the

Rep. 665; Blohowak v. Grochoski, 119 Wis. 189, 96 N. W. Rep. 551; Anderson etc. Co. v. McConnell, Nev., 133 Fed. Rep. 581; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S. 391.

13 Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199. See Subterranean Waters, Sec. 323; Washington County Water Co. v. Garver, 91 Md. 398, 46 Atl. Rep. 979; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Case v. Hoffman, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; *Id.* 100 Wis. 314, 72 N. W. Rep. 390, 74 N. W. Rep. 220, 75 N. W. Rep. 945, 44 L. R. A. 728; Platte Valley Irr. Co. v. Buckers Irr. & M. Co., 25 Colo. 77, 53 Pac. Rep. 334.

14 Los Angeles etc. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169.

For ravines as water courses, see Sec. 312.

15 Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 738; Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090; Parizek v. Hinek, 144 Iowa 563, 123 N. W. Rep. 180; Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139.

For swales and swamps, see Secs. 314, 317.

16 Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Rice v. City of Evansville, 108 Ind. 7, 9 N. E. Rep. 139, 58 Am. Rep. 53; Eulrich v. Richter, 37 Wis. 226, 41 Wis. 318; Rait v. Furrow, 74 Kan. 101, 85 Pac. Rep. 934, 6 L. R. A., N. S. 157. But see Quinn v. Chicago etc. R. Co., 23 S. D. 126, 120 N. W. 884.

1 See Secs. 301, 302.

See, also, Surface Water, Sec. 318.

flow of the stream must be continuous. In other words, no extraordinarily large or minimum amount of water is required. But at times a water course may be entirely dry; however, it must have a well defined and substantial existence. Those who are acquainted with the streams and water courses of the arid Rocky Mountain region of this country, draining as they do steep, mountainous areas with their swift currents, running over gravelly and rocky bottoms, know that often in the dry summer months many of them are entirely dry, at least upon the surface. All of them, nevertheless, have well defined beds, channels, banks, and currents of water, at least the greater portion of the year, and are in every respect water courses to which water rights may attach. But it would be plainly impracticable in this western part of the country to require that, in order to constitute a water course upon which rights may attach, there must be a continuous, uninterrupted, and perennial flow of water during the entire year, and from year to year. Hence the requirement of the law is that in order to constitute a water course the stream need not flow all of the time.[2]

2 The stream need not flow continuously in order to constitute a water course. Spink v. Corning, 61 App. Div. 84, 70 N. Y. Supp. 143; Rex v. Oxfordshire, 1 Barn. & Ad. 289, 8 L. J. K. B. 354, 20 Eng. C. L. 389, 109 Eng. Reprint 794; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. Rep. 1091, 18 Am. St. Rep. 158; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737; Shields v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234; West v. Taylor, 16 Ore. 165, 13 Pac. Rep. 665; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N. W. Rep. 946, 57 N. W. Rep. 522; Rose v. St. Charles, 49 Mo. 509; Shively v. Hume, 10 Ore. 76; Reynolds v. McArthur, 27 U. S. 2 Pet. 417, 7 L. Ed. 470.

In Simmonds v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727, the Court held, that a water course is a stream of water usually flowing in a particular direction, with well defined channel and banks, but the water need not flow continuously, as the channel may sometimes be dry; but this does not include the water descending from the hills without any definite channel, only in times of melting snow and ice. But the Court also held, where water owing to the hilly or mountainous configuration of the country accumulates in large quantities from rains and melting snows, and at regular seasons descends through gullies or ravines upon the lands below and in its onward flow cuts out through the soil a well defined channel which bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial during such seasons, such a stream is to be considered a water

The question as to what constitutes a water course is of great importance, and the subject has been discussed by many Courts of last resort, not only of the States and Territories of the arid region, but also of the Eastern States. In Barnes *v.* Sabron, which is a leading case upon the subject, Mr. Chief Justice Hawley, in rendering the opinion of the Court, said: "It appears from the testimony that Current Creek is partly supplied, at certain seasons of the year, from springs having their rise and flow along its banks and bed, but mostly from melting snow on the mountain. There is no regularity as to the quantity of water, for, to quote the language of several of the witnesses, 'no two seasons are alike,' the amount of water flowing being dependent upon the character of weather during the preceding winter. After a cold winter, when deep snows have fallen, the water flows in greater quantity and for a longer time than after an open winter, with but little snow; hence, the amount of water varies in the summer season—according to different statements made by different witnesses—from nothing to five thousand inches. There is conflict of evidence as to the real character of this stream; the conflict, however, is principally confined to the question, whether the water therein 'continuously flows.' The fact that should have been found by the Court below was whether or not Current Creek was a natural water course or a surface stream. To ascertain that fact it was not necessary to determine whether the water was continuously flowing. 'A water course,' says Angell, 'consists of bed, banks, and water; yet the water need not flow continually, and there are many water courses which are sometimes dry. There is, however, a distinction to be taken in law between a regularly flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which in times of freshets or in times of melting of ice or snow, descend from the hills and inundate the country. . . . The finding 'that the same is supplied at certain seasons of the year from the snows on the mountains above the valley, and from the springs having their rise and flow along

course, and governed by the same rules.

See, also, Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Los Angeles Cem. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Sierra County v. Nevada County, 155 Cal. 1, 99 Pac. Rep. 371.

See, also, Subterranean Waters, Sec. 323; Chaps. 59-62, Secs. 1148-1211.

the banks and bed of the same' (being sustained by the evidence) gives to this creek the character of a natural water course, in so far as finding one is involved. It is well settled that in order 'to maintain the right to a water course or brook it must be made to appear that the water usually flows in a certain direction, and by a regular channel with banks or sides. It need not be shown to flow continually, . . . and it may be dry; but it must have a well defined and substantial existence.' "[3]

In an action to prevent the diversions of the water from a stream used by the plaintiff for irrigation purposes, it is no defense that the stream is dry during the summer months.[4]

§ 308. **Rivers as water courses.**—The word "river" has a more narrow and less comprehensive meaning than the term "water course." In the common acceptation of the word, "river" means the larger streams of flowing water, while the term "water course" includes all streams regardless of their size, however great or however small. Hence it follows that all rivers are natural water courses, but all water courses could not be termed rivers. A river must have all of the essential characteristics of a water course; these have been discussed in our previous sections.[1] It

[3] Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

See, also, Angell on Water Courses, Sec. 4; Shively v. Hume, 10 Ore. 76; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Palmer v. Waddell, 22 Kan. 352; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Hanson v. McQue, 42 Cal. 303, 10 Am. Rep. 299; Dickinson v. Worcester, 7 Allen 19; Shields v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234; Gillett v. Johnson, 30 Conn. 180; Luther v. Winnissimet Co., 9 Cush. 171; McUmber v. Godfrey, 108 Mass. 219; Ashley v. Wolcott, 11 Cush. 192; Gannon v. Hargadon, 19 Allen 106, 87 Am. Dec. 625; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Buffum v. Harris, 5 R. I. 243; Earl v. DeHart, 12 N. J. Eq. 280, 72 Am. Dec. 395; Parks v. Newburyport, 10 Gray 28; Flagg v. Worcester, 13 Gray 601; Eulrich v. Richter, 41 Wis. 318, 37 Wis. 226; Hoyt v. City of Hudson, 27 Wis. 656, 9 Am. Rep. 473; Kelly v. Dunning, 39 N. J. Eq. 482; Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Jones v. Wabash etc. R. Co., 18 Mo. App. 251.

[4] Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

See, also, Larimore v. Miller, 78 Kan. 459, 96 Pac. Rep. 852; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[1] See Secs. 303-306.

Mr. Justice Wayne in delivering the opinion of the Supreme Court of the United States, in the case of Howard v. Ingersoll, 54 U. S. 13 How. 381, 14

must have a bed, banks, and a stream of running water from its source to its mouth, and, in addition thereto, be of a considerable size.[2] There seems to be no complete definition of the word "river" in any Court decision. But the definitions given in the opinions were evidently given with reference to some particular point to be decided in the cases and do not give a general legal definition of the word. The word "river" may be defined in its legal sense as a considerable stream of water that has a current of its own, pent in on each side by walls or banks, and flowing from its source at a higher level, to its mouth below, where it empties into the sea, a lake, or other water.[3] It is a river from

L. Ed. 189, 17 Ala. N. S. 780, upon the question of the meaning of the word "river," said: "When the commissioners used the words 'bank' and 'river,' they did so in the popular sense of both. When the banks of rivers were spoken of those boundaries were meant which contained their waters at their highest flow, and in this condition they make what is called the bed of the river. They knew that rivers have banks, shores, water, and a bed; and that the outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low, at its highest or lowest period. It neither takes in overflowed land beyond the bank, nor includes swamps nor low grounds liable to be overflowed, but reclaimable for meadows or agriculture or which being too low for reclamation, though not always covered with water, may be used for cattle to range upon as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of the lands, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. 'Such a line may be found upon the bed of every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river in any stage of water. With such an understanding of what a river is as a whole, from its parts, there is no difficulty in fixing the boundary line in question."

2 See Water Courses, Secs. 301-307.

3 The word "river" is derived from the Latin "*rivus.*" "*Rivus est locus per longitudinem depressus quo aqua decurrat.*" Ulpian's Dig. "*De Rivis.*"

The word "river" is used constantly by the Latin authors in a sense that implies a current from a source to a mouth. "*Rivorum a fonte deductio.*" Cicero. "*Omnia flumina atque rivos qui ad mare pertinebant.*" Caesar.

Ulpian, the Roman jurist, makes the following unique distinction between a river and a brook: "A river is distinguished from a brook, either by its size or by the opinions of those living along it." See Ware, Roman Water Law, Sec. 17.

Webster: River. A large stream of water flowing in a channel on land toward the ocean, a lake, or another

the point where the water comes to the surface and begins to flow in a channel, until it mingles with the sea or other water. It may sometimes be dry.[4]

In the case of Reynolds *v.* McArthur, Mr. Chief Justice Marshall in rendering the opinion of the Court upon the proposition advanced by some that the *source of a river* must be considered as commencing at that point in its channel from which water flows at all seasons of the year, in opposition thereto, said: "Is this proposition so invariably true as to become a principle of law? We think it is not. A stream may acquire the name of a river, in the channel of which at some season of extreme drought no

river; a stream larger than a rivulet or brook.

Worcester: A large inland stream of water flowing into the sea, a lake, or another river; a stream larger than a brook.

Cent. Dict.: A considerable body of water flowing with a perceptible current in a certain course or channel, usually without cessation during the entire year.

Imp. Dict.: A large stream of water flowing through a certain portion of the earth's surface, and discharging itself into the sea, a lake, a marsh, or another river.

A river is defined to be a body of water of no specific dimensions, larger than a brook or rivulet, a running stream pent in on each side by walls or banks. Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189, 17 Ala. N. S. 780; Alabama v. Georgia, 64 U. S. 23 How. 505, 16 L. Ed. 556; Shelby Co. Comrs. v. Castetter, 7 Ind. App. 309, 33 N. E. Rep. 986, 34 N. E. Rep. 687.

For other definitions, see People v. Gold Run D. & Min. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Gavit's Adm'rs v. Chambers, 3 Ohio 495; Starr v. Child, 20 Wend. (N. Y.) 149; Harland & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435; State v. Gilmanton, 14 N. H. 467, 9 N. H. 461; The Garden City, 26 Fed. Rep. 766; Berlin Mills Co. v. Wentworth's Location, 60 N. H. 156; Dudden v. Guardians of Clutton Union, 1 Hurl. & N. 627, S. C. 26 L. J. Exch. N. S. 146, 38 Eng. L. & Eq. 526; Gallup v. Tracy, 25 Conn. 10; Stanchfield v. City of Newton, 142 Mass. 110, 7 N. E. Rep. 703; Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45, 38 Am. St. Rep. 330; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. Rep. 316, 1 Silvernail Ct. App. 546; Joliet & C. R. Co. v. Healy, 94 Ill. 416, 116 U. S. 191, 6 Sup. Ct. Rep. 352, 29 L. Ed. 607. By Code of Alabama, Johnson v. State, 74 Ala. 537. Under Sec. 5346 U. S. Rev. Stat. 1878, 1 Fed. Stat. Ann. 1905, p. 511, U. S. Comp. St. 1901, p. 3630, *Ex parte*, Byers, 32 Fed. Rep. 404.

4 Ulpian, the Roman jurist, says, that some rivers are perennial; some are torrential. A perennial river is one which flows continually. A torrential river is one which flows in cold weather. If, however, a river which has flowed perennially dries up during a certain summer, it is none the less perennial. Ware, Roman Water Law, Sec. 18.

water flows. For a great portion of the year, part of a stream may flow in great abundance, in which during a very dry season we may find only standing pools. It would be against all usage to say that the general source of the river was at that point in its channel from which the water always flows."[5] But in order to be within the above definition, it must appear that the water usually flows in a particular direction, and has a regular channel, with bed, banks, or sides. It is distinguished from a lake by its being confined in channel banks, which give it substantially a single course throughout, while a lake occupies a basin of greater or less depth, and may or may not have a single prevailing direction.[6] However, it bears the name of river where the waters flow and reflow with the tide, as well as where the current is always

[5] 27 U. S. 2 Peters 417, 7 L. Ed. 470.

[6] See Lakes, Secs. 294-297.

See Ponds, Secs. 298-300; Jones v. Lee, 77 Mich. 35, 43 N. W. Rep. 855.

See Water Courses, Secs. 301-307; Chasemore v. Richards, 7 H. L. Cas. 349, 5 H. & N. 983, 59 L. J. Exch. N. S. 81, 7 Week Rep. 685, 2 H. & N. 168; Rawstrom v. Taylor, 11 Exch. N. S. 369, 33 Eng. L. & Eq. 428, 25 L. J. Exch. N. S. 33, 4 Week Rep. 290; Broadbent v. Ramsbotham, 11 Exch. 602, 34 Eng. L. & Eq. 553, 25 L. J. Exch. N. S. 115, 4 Week Rep. 290; Luther v. Winnissimet Co., 63 Mass. (9 Cush.) 171; Ashley v. Wolcott, 11 Cush. 192, 195; Parks v. Newburyport, 10 Gray 28, in which the Court held that the passage of water from rain and melting snows for twenty years gives no right to its continuance, as no action will lie for the interruption of mere surface drainage.

See, also, Flagg v. Worcester, 13 Gray 601; Dickinson v. Worcester, 7 Allen 19; Wheeler v. Worcester, 10 Allen 591; Gannon v. Hargadon, 10 Allen 106; Bates v. Smith, 100 Mass. 181; Emery v. Lowell, 104 Mass. 13; Morrill v. Hurley, 120 Mass. 99; Bassett v. Company, 43 N. H. 578; Coffman v. Griesemer, 26 Pa. St. 407; Earle v. Hart, 1 Beas'l 280, 283, 12 N. J. Eq. 280; State v. Gilmanton, 9 N. H. 461, 14 N. H. 476; Bangor v. Lansil, 51 Me. 521; Greeley v. Maine Central R. Co., 53 Me. 200; Morrison v. Bucksport R. Co., 67 Me. 353; Buffum v. Harris, 5 R. I. 243; Earl v. DeHart, 1 Beas'l 280, 12 N. J. Eq. 280; Bowlsby v. Speer, 31 N. J. L. 351; Gillham v. Madison R. Co., 49 Ill. 484; Shields v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234; Beard v. Murphy, 37 Vt. 99; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Eulrich v. Richter, 37 Wis. 226, 41 Wis. 318; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Shively v. Hume, 10 Ore. 76; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Geddis v. Parrish, 1 Wash. St. 587, 21 Pac. Rep. 314; Crewson v. Grand Trunk R. Co., 27 Q. B. (Can.) 68; New Albany R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60; Schlicter v. Phillipy, 67 Ind. 201; Greencastle v. Hazelett, 23 Ind. 186.

in one direction.[7] The term "river" is not limited to the main channel of the stream, but includes the different channels or creeks separating or flowing around intervening islands in the stream, though by local usage such channels or creeks receive different names.[8] A river does not include lands beyond the banks which are covered in times of freshet or extreme floods, or swamp or low grounds which are liable to overflow, but are reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon as natural or uninclosed pasture.[9] The word "river" in a grant which provides that the land extends to a nonnavigable river, and is bounded by it, will be presumed to mean the center or thread of the stream, if there is no limitation in the terms of the grant itself.[10] A State Court may take judicial notice of the location and course of a river frequently mentioned in the statutes of the State.[11]

§ 309. **Streams as water courses.**—The word "stream" has a number of meanings, but the only one with which we are concerned is the meaning which is nearly, if not quite, synonymous with the term "water course." It is defined as a running water, a flow of water, a current, a water course, a river, a brook, a rivulet.[1] It does not include the waters of a lake.[2] But, as is the

7 Rex v. Oxfordshire, 1 B. & Ad. 289, 20 Eng. C. L. 389, 8 L. J. K. B. 354, 109 Eng. Reprint 794; Rex v. Trafford, 1 B. & Ad. 874, 8 Bing. 204, 21 Eng. C. L. 272, 109 Eng. Reprint 1011.

8 Schermerhorn v. Hudson River R. Co., 38 N. Y. 103.

See the case of McHardy v. Ellice Twp. (Can.) 37 U. C. Q. B. 580, distinguishing a river from a creek.

For Creeks, see Sec. 310.

9 Paine Lumber Co. v. U. S., 55 Fed. Rep. 854; State *ex rel.* Citizens Electric Lighting and Pr. Co. v. Longfellow, 169 Mo. 109, 69 S. W. Rep. 374.

10 See Riparian Rights, Secs. 450-551; Paine v. Woods, 108 Mass. 160; State v. Gilmanton, 9 N. H. 461, 14 N. H. 467; Mariner v. Schulte, 13 Wis. 692; State of Indiana v. Milk, 11 Fed. Rep. 389, 11 Bis. 197; Clement v. Burns, 43 N. H. 609; Boston v. Richardson, 95 Mass. 13 Allen 146; Banks v. Ogden, 69 U. S. 2 Wall. 57, 17 L. Ed. 818.

11 De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. Rep. 610, 46 Am. St. Rep. 237.

1 Illinois Cent. R. Co. v. Chicago, 173 Ill. 471, 50 N. E. Rep. 1104, 53 L. R. A. 408; French v. Carhart, 1 N. Y. 1 Comst. 96, 4 How. Prac. 181; Long v. Boone County, 36 Iowa 60.

2 Trustees of Schools v. Schroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575; Hardin v. Jordan, 140 U. S. 371,

rule as to other water courses, a stream does not cease to be a water course and become mere surface water because at a certain point it spreads out over a level meadow and flows for a distance without defined banks before again flowing in a definite channel.[3]

In its ordinary signification, the word "stream" implies a continuous current in one direction, and does not describe a creek or inlet in which the tide ebbs and flows twice a day on the same level.[4] In the case of Munson v. Hungerford,[5] streams are divided into three classes: (1) Arms of the sea, in which the tide ebbs and flows. These belong to the public. (2) Streams which are navigable. In these the people have the right of eminent domain for the purposes of navigation and commerce, and the riparian owner has also a qualified right to the bed of the stream and the water which flows over it, subordinate to the superior rights of the public. To this class may be added such streams as have been declared by statute to be a public highway. (3) Streams which are so small, shallow, or rapid as "not to afford a passage for the king's people," as Lord Hale expresses it. These streams are altogether private property.[6] As to boundaries, the word "stream" as used in a deed, as is the case where other nonnavigable water courses are named, passes the title to the center of the stream, unless otherwise limited by the terms of the conveyance itself.[7]

§ 310. **Creeks, brooks, and rivulets as water courses.**—The word "creek" has two distinct meanings: First, a cove, bay, or inlet,

35 L. Ed. 428, 11 Sup. Ct. Rep. 838; Gouverneur v. National Ice Co., 57 Hun. 474, 11 N. Y. Supp. 87; rev'd 134 N. Y. 355, 31 N. E. Rep. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669.

For distinction between pond and lake, and river or stream, see Secs. 294-307.

3 Cairo, V. & C. R. Co. v. Brevoort, 62 Fed. Rep. 129, 25 L. R. A. 527. See, also, Secs. 301, 302.

4 Murdock v. Stickney, 62 Mass. (8 Cush.) 113; Johnson v. State, 114 Ga. 790, 40 S. E. Rep. 807.

5 6 Barb. (N. Y.) 265.

6 See, also, as to the construction of the word "stream," Adams v. Farmer, 1 E. D. Smith, 588; Miller v. Black Rock Sps. Imp. Co., 99 Va. 747, 40 S. E. Rep. 27, 86 Am. St. Rep. 924; Armfield v. State, 27 Ind. App. 488, 61 N. E. Rep. 693.

7 See Riparian Rights, Secs. 450-551.

See Water Courses, Secs. 301-307; White's Bank of Buffalo v. Nichols, 64 N. Y. 65; Varick v. Smith, 9 Paige 547; City of Boston v. Richardson, 95 Mass. 13 Allen 146; Babcock v. Utter, 40 N. Y. (Keyes) 397, 1 Abb. Dec. (N. Y.) 27, 32 How. Prac. 439.

either of the sea or of a river;[1] second, a small river, a rivulet, a small stream of running water.[2] It is with this latter class that this work has the most to deal. The only difference between a creek and a river is the size and navigable qualities. The same may be said as to the difference between a creek and a brook or rivulet, with the exception of the question of navigation. They are all similar in character and are all water courses.[3] A Canadian Court distinguishes between a river and a creek, upon the theory that a creek is a simple stream and that a river is formed by the uniting of several streams.[4] Riparian rights attach to these small streams, where such rights are allowed, and their waters may be appropriated for beneficial uses and purposes.[5]

§ 311. **Tributaries to natural water courses.**—To be tributary to a thing is to contribute to that thing. Hence the tributaries of natural water courses may be defined as all water courses and streams, both surface and subterranean, which contribute their waters, in however small amounts, to the flow of the main streams.[1] Percolating waters may also be tributary to a natural water course, as will be discussed under that class.[2] A lake may be tributary to a water course, and *vice versa*.[3] Springs are usually tributaries to water courses, or tributary to tributaries thereof.[4] As to whether or not certain waters are tributary to others is a question of fact to be determined, as are other facts and circumstances of a case;

1 Schermerhorn v. Hudson R. Co., 38 N. Y. 103.

2 Bentner v. Platner, 6 Ohio 504.

3 See Secs. 301-307.

4 McHardy v. Ellice (Can.), 37 U. C. Q. B. 580, 1 Can. App. 628, 29 Q. B. (Can.) 546.

5 For what waters may be appropriated, see Secs. 641-669.

For the Arid Region doctrine of appropriation, see Chap. 31, Secs. 585-594.

For Riparian Rights, see Chaps. 21-28, Secs. 450-551.

For "wet weather arroyos," see Sec. 312.

See, also, Kroeger v. Twin Buttes R. Co., 13 Ariz. 348, 114 Pac. Rep. 553.

1 For rights in tributaries, see Sec. 649.

2 See Secs. 1193-1196.

3 New Whatcom v. Fairhaven, 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Cole v. Richards Irr. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.* 158 Cal. 206, 110 Pac. Rep. 927; Buckers Irr. Mill & Imp. Co. v. Platte Val. Irr. Co., 28 Colo. 187, 63 Pac. Rep. 305.

4 Beaverhead Canal Co. v. Dillon Elec. Light & P. Co., 34 Mont. 135, 85 Pac. Rep. 880; Rait v. Furrow, 74 Kan. 101, 85 Pac. Rep. 934, 6 L. R. A., N. S. 157.

they may be determined by evidence of experiments.[5] But this fact having been once determined, the presumption is that the waters of a tributary will reach the main stream either by surface or by subterranean flow.[6]

Upon the subject of the right to the use of the waters of tributaries, the general rule is that the stream system is to be taken as a whole, in which the upper tributaries are integral parts; and the one having the right to the waters of the main stream has also the right to that of its branches, and to all other tributaries to the full extent of his valid claim, and that, too, whether these be streams, springs, or subterranean waters.[7] As tributaries are themselves water courses or other waters, and have been discussed under their respective heads in this chapter, and as the rights which may be acquired in the waters of tributaries will be discussed hereafter, nothing further need be said on that subject here.[8]

5 "In view of the range of the discussion in the briefs, we suggest that there is no insurmountable difficulty in determining the question of fact in this case by actual physical tests," etc. Wilson v. Collin, 45 Colo. 412, 102 Pac. Rep. 20.

6 Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568.

7 See cases cited in notes above.

For right to the use of waters of tributaries, see Secs. 355, 649.

For the appropriation of the waters of tributaries, see Sec. 649.

For the underflow of surface streams, see Secs. 1161-1163.

For percolations tributary to surface water courses, see Secs. 1193-1195.

For percolations tributary to underground reservoirs, see Secs. 1197-1204.

See, also, Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Evans D. Co. v. Lakeside D. Co., 15 Cal. App. 119, 108 Pac. Rep. 1027; Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Priest v. Union etc. Co., 6 Cal. 170; Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Malad etc. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Low v. Rizor, 25 Ore 551, 37 Pac. Rep. 82; Tonkin v. Winzell, 27 Nev. 88, 73 Pac. Rep. 593; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Salina Creek v. Salina Stock Co., 7 Utah 456, 27 Pac. Rep. 578; Howcroft v. Union etc. Co., 25 Utah 311, 71 Pac. Rep. 487; Whitmore v. Utah Fuel etc. Co., 26 Utah 488, 73 Pac. Rep. 764; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.* 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

8 For rights in tributaries, see Secs. 355, 649.

§ 312. Ravines as natural water courses—"Wet weather arroyos."—A ravine may be a water course, but it is not always the case. A ravine is a deep and narrow hollow, usually worn by a stream or torrent of water. It is a gorge or cleft, usually found in the uplands or mountainous country.[1] Of course, if a ravine has all of the essential characteristics of a water course, as described in previous sections,[2] it is one; but if it is lacking in any one of these requisites, it is not one. A ravine, from the banks of which and into which the water flows from springs throughout the year, is a water course.[3] This is true should the ravine have any other permanent water supply. But, as a usual thing, ravines have the channel but not the water supply. Where there is a flow of surface water from rains and the melting of snows at regular seasons, and such has been immemorially the case, it is a natural water course.[4] But a water course does not include holes, gullies, or ravines in land, in which mere surface water from rain or melting snow, at irregular periods, is discharged through them from a higher to a lower level, and which at other times are destitute of water. In the absence of a permanent source of water supply there can be no water course in its legal sense.[5]

1 A ravine is a long, deep, and narrow hollow worn by a stream or torrent of water; a long, deep, and narrow hollow or pass through mountains. Long v. Boone County, 36 Iowa 60.

See Los Angeles Cem. Ass'n v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Palmer v. Waddell, 22 Kan. 352; Denver, T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322.

For appropriation from canyons, gorges and ravines, see Sec. 651.

2 See Essential Characteristics of a Water Course, Secs. 302-307.

3 Maxwell v. Shirts, 27 Ind. App. 529, 61 N. E. Rep. 754, 87 Am. St. Rep. 268.

4 Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

5 Gregory v. Bush, 64 Mich. 37, 31 N. W. Rep. 90, 8 Am. St. Rep. 797; Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; Hoyt v. City of Hudson, 27 Wis. 656, 9 Am. Rep. 473; Rice v. Evansville, 108 Ind. 7, 9 N. E. Rep. 139, 58 Am. Rep. 53; Eulrich v. Richter, 37 Wis. 226, 41 Wis. 318; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. Rep. 316; Benson v. Chicago & A. R. Co., 78 Mo. 504; Jones v. Wabash, St. L. & P. R. Co., 18 Mo. App. 251; Lessard v. Stram, 62 Wis. 112, 22 N. W. Rep. 284, 51 Am. Rep. 715; Murray v. Dawson, 19 U. C. C. P. 314; Wagner v. Long Island R. Co., 2 Hun (N. Y.) 633, 5 N. Y. Sup. Ct. 163; Dean v. Gray, 22 U. C. C. P. 202; Los Angeles Cem. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Shields v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234; Kansas City & E. R. Co. v. Riley, 33 Kan. 374, 6 Pac. Rep. 581; Butler v.

The distinguishing feature between a ravine and a water course is the permanent water supply. If there is not a permanent water supply, at least at frequent intervals, it is but a ravine; but if there is, it is a water course. As was said in an Oregon case: "Where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the lands below, and in its onward flow carves a distinct and well-defined channel, which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a water course, and to be governed by the same rules."[6] Owing to the rather indefinite definition of ravines and gullies as water courses, and their frequent occurrence in this intermountain country of the West, the statutes of many of the States provide that the waters of ravines and gullies are those to which rights may be acquired, and they are declared to be public waters.[7] And, under the statute of New Mexico it is held in a recent case, that "wet weather arroyos" are, in effect, water courses, although for the greater portion of the year they are dry, the water flowing therein only during the wet seasons, the Court saying: "While the term 'water course,' used in the statute, probably as defined and used in England and the Eastern States, would not cover wet weather arroyos, yet, in view of local conditions, which must have been within the knowledge and contemplation of the legislature, and, in view of its

Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Bangor v. Lansil, 51 Me. 521; Abbott v. Kansas City, St. J. & C. B. R. Co., 83 Mo. 271, 53 Am. Rep. 581; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Robinson v. Shanks, 118 Ind. 125, 20 N. E. Rep. 713; Middlesborough Town Co. v. Helwig, 14 Ky. L. Rep. 430; Barkley v. Wilcox, 86 N. Y. 140, 19 Hun 320, 40 Am. Rep. 519; Chicago, K. & W. R. Co. v. Morrow, 42 Kan. 339, 22 Pac. Rep. 413; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Hagge v. Kansas City S. R. Co., 104 Fed. Rep. 391; Gray v. Schriber, 58 Mo. App. 173; Los Angeles Cem. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

[6] Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; McClure v. City of Red Wing, 28 Minn. 186, 9 N. W. Rep. 767.

See, also, for the appropriation of water from ravines, Sec. 651.

[7] For the statutes of the various States upon the subject, see Part 14.

For the appropriation of waters from ravines, see Sec. 651.

use of that expression in connection with the words 'stream of water,' we think the legislature intended, by the use of that expression, to include any well-defined channel or arroyo in which surface or flood waters flow in times of heavy rain." [8]

§ 313. **Springs and their relation to water courses.**—Springs may be defined as those places where water issues naturally from the surface of the earth and the principal sources of natural water courses.[1] No matter how small the stream flowing from a spring, if it flows with some degree of regularity in a well defined channel, it is a water course. However, if the water simply rises to the surface of the ground and does not flow therefrom, it may be a spring, but its waters are treated as subterranean waters, and not as those of a water course.[2] Bogs occasioned by seepage water, from which no water flows on the surface, are not springs.[3] In order to protect the rights of owners of land upon which springs rise, the statutes of many of the Western States provide to the effect that they shall have the first right to the use of the waters

8 Kroeger v. Twin Buttes R. Co., 13 Ariz. 348, 114 Pac. Rep. 553.

1 See Water Courses, Secs. 301-311.

See, also, Rait v. Furrow, 74 Kan. 101, 85 Pac. Rep. 934, 6 L. R. A., N. S. 157.

2 For rights in the waters of springs, see Sec. 648; Cohen v. La Canada Water Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.* 151 Cal. 680, 91 Pac. Rep. 584.

See, also, Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Wolf v. Crothers, 21 Pa. Co. Ct. 627; Brosnan v. Harris, 39 Ore. 143, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Miller v. Black Rock Springs Imp. Co., 99 Va. 747, 40 S. E. Rep. 27, 86 Am. St. Rep. 924; Case v. Hoffman, 100 Wis. 314, 72 N. W. Rep. 390, 74 N. W. Rep. 220, 75 N. W. Rep. 945, 44 L. R. A. 728; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Harrington v. Demaris, 46 Ore. 111, 82 Pac. Rep. 14, 1 L. R. A., N. S. 756, modifying 46 Ore. 111, 77 Pac. Rep. 603; Orient M. Co. v. Freckleton, 27 Utah 125, 74 Pac. Rep. 652; Wilkins v. McCue, 46 Cal. 656; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587; Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415; Straight v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Morrison v. Officer, 48 Ore. 569, 87 Pac. Rep. 896; Church v. State, —— Wash. ——, 117 Pac. Rep. 711; Mason v. Yearwood, 58 Wash. 276, 108 Pac. Rep. 608; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S. 1065; Youngs v. Regan, 20 Idaho 275, 118 Pac. Rep. 499.

See, also, for the appropriation of waters of springs, Sec. 648.

3 Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090.

to the extent of their actual needs before others can claim any right to their waters.[4]

§ 314. **Swales and their relation to natural water courses.**—As was said of ravines,[1] swales may or may not be water courses. It depends entirely upon the fact as to whether or not they have all of the essential characteristics which go to make up a water course.[2] A swale may be defined as a tract of low and unusually wet land. It is a slight depression or valley, as a plain or moor, often wet and covered with rank vegetation.[3] As a general proposition, it may be said that a swale is lacking in some characteristic necessary for a water course. It usually has the water supply, but not the channel or current. In order to constitute a water course there must be a stream flowing usually in the same direction and in a definite channel. Hence it follows that a low body of wet land, without either channel or perceptible current, is not a water course.[4] In fact, it is the almost unanimous doctrine that swales are not, in their strict legal sense, water courses.[5] But

[4] For the statutes of the various States upon the subject, see Part 14.

For the appropriation of waters from springs, see Sec. 648.

[1] See Sec. 312.

[2] See Secs. 301-307.

[3] Webster's New Int. Dict. 1911. Subject, Swale.

[4] Los Angeles Cem. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375.

A depression or swale which varies in width from 75 feet to 80 feet, with a depth of 6 inches to 2½ feet, and is cultivated when the water is not there, is not a water course. Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169.

See, also, Jones v. Wabash, St. L. & P. R. Co., 18 Mo. App. 251; Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Byrne v. Keokuk & W. R. Co., 47 Mo. App. 383; Carroll County v. Bailey, 122 Ind. 46, 23 N. E. 672; St. Louis, I. M. & S. R. Co. v. Schneider, 30 Mo. App. 620; Robinson v. Shanks, 118 Ind. 125, 20 N. E. Rep. 713.

But see Lambert v. Alcorn, 144 Ill. 313, 33 N. E. Rep. 53, 21 L. R. A. 611; McClure v. Red Wing, 28 Minn. 181, 9 N. W. Rep. 767; Taubert v. St. Paul, 68 Minn. 519, 71 N. W. Rep. 664; Earl v. DeHart, 12 N. J. Eq. 280, 72 Am. Dec. 395; McKinley v. Union County, 29 N. J. Eq. 164; Shane v. Kansas City, St. J. & C. B. R. Co., 71 Mo. 237, 36 Am. Rep. 480.

[5] See cases cited *supra*.

See, also, Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Kansas City & E. R. Co. v. Riley, 33 Kan. 374, 6 Pac. Rep. 581; Wharton v. Stevens, 84 Iowa 107, 50 N. W. Rep. 562, 15 L. R. A. 630, 35 Am. St. Rep. 296; Wagner v. Long Island R. Co., 2 Hun, 633, 5 N. Y. Sup. Ct. 163; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Ashley v. Wolcott, 11 Cush. 192; Shields v. Arndt, 4 N. J. Eq. (3 Green Ch.) 234; Bark-

upon the other hand, where water which has accumulated from springs, rains, and melting snows, and which has flowed for several miles between regular banks of a well-defined water course which empties into a lake, from which the water flows through water ways, testified to as "swales," "marshes," "depressions," or "hollows," and through which the water flows into a bay or the sea, the water ways referred to are water courses, and the water therein is not mere surface water.[6]

§ 315. Sloughs as natural water courses.—A slough is defined as a place of deep mud, a quagmire, a morass.[1] In law it has been defined as an arm of a river apart from the main channel.[2] It is a "side channel from a river."[3]

A slough is usually formed by the water of a water course overflowing its banks and running to lands lower than the banks, and there remaining either until it evaporates, or later in the season, when the stream is at a lower stage, it runs back into the stream.[4] Again, where a part of the water of a stream in its downward course diverges from the main channel and returns to it lower down, it is usually called a slough, and especially if in its separate course it runs with a slow current and through low lands.[5] As to whether or not a slough is, in its legal sense, a water course, the same rules must be applied as those applied to other streams. It was held in a recent case in California, that where water flows in a slough having well-defined banks leading from a river to a creek, it constitutes a water course, although at some

ley v. Wilcox, 86 N. Y. 140, 19 Hun 320, 40 Am. Rep. 519; Chicago, K. & W. R. Co. v. Morrow, 42 Kan. 339, 22 Pac. Rep. 413.

6 West v. Taylor, 16 Ore. 165, 13 Pac. Rep. 665; Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Gillett v. Johnson, 30 Conn. 180; Palmer v. Waddell, 22 Kan. 352; Shields v. Arndt, 4 N. J. Eq. (3 Green Ch.) 245.

See, also, Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Shively v. Hume, 10 Ore. 76; Angell on Water Courses, Sec. 4.

1 Webster: Slough.

2 Dunlieth & Dubuque Bridge Co. v. Dubuque County, 55 Iowa, 558, 8 N. W. Rep. 443.

3 Webster's New Int. Dict., 1911, subject, Slough.

4 Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. Rep. 625, 2 Am. St. Rep. 775; Hagge v. Kansas City etc. Co., 104 Fed. Rep. 391.

5 Black River Imp. Co. v. La Crosse Booming & Transp. Co., 54 Wis. 659, 11 N. W. Rep. 443, 41 Am. Rep. 66.

points the channel spreads out and is quite shallow.[6] As a general proposition, however, sloughs without original water of their own are not water courses, upon which riparian rights, etc., may attach.[7] Neither are they recognized as water courses which a railroad company, in the construction of its roadbed, may not fill up without openings for water which may seek an outlet in times of extraordinary rainfalls.[8] However, in an Oregon case,[9] the Court charged the jury in substance that if they found from the testimony that the waters of a certain creek flowed through a slough, and had been doing so for more than 20 years, that such slough was the channel of the creek. Again, in a recent California case, it was held that the waters of a slough must be regarded as a part of the river and were subject to the same rules of law in connection with the river as those of the river.[10] This was upon the theory that when the river was high it was really a part of the river, and the taking of the water from the slough will affect the flow of the river; and when the river was low, by taking water from the slough it also drew water from the river.

§ 316. Artificial water courses.—Artificial water courses include all man-made ditches, canals, tunnels, flumes, or other artificial conduits constructed for the purpose of conveying water.[1] They may be constructed for the purpose of conveying water to the place of use, as in the case of irrigation; or, upon the other hand, they may be constructed to convey water away from the land, as in the case of drainage. Their principal characteristic is their entire artificial construction. These artificial water courses are not governed by the laws of natural water courses, either at

6 Cederburg v. Dutra, 3 Cal. App. 572, 86 Pac. Rep. 838.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 917, 10 Pac. Rep. 674; Green v. Carrotto, 72 Cal. 267, 13 Pac. Rep. 685.

See Essential Requisites of a Water Course, Secs. 301-307.

7 Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. Rep. 625, 2 Am. St. Rep. 775; Hagge v. Kansas City etc. R. Co., 104 Fed. Rep. 391; Jones v. Wabash, St. L. & P. R. Co., 18 Mo. App. 251; St. Louis, I. M. & S. R. Co. v. Schneider, 30 Mo. App. 620.

8 See cases last note, *supra*.

9 Tucker v. Salem Flouring Mills Co., 15 Ore. 581, 16 Pac. Rep. 426.

10 Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

1 For Rights in Artificial Water Courses, see Secs. 473, 662.

common law or under the Arid Region doctrine of appropriation.[2] The most common artificial water courses are ditches and canals, used in conducting waters either to or away from lands, and many thousands of which are to be found throughout this western country.[3] A water pipe through which water is conducted from a reservoir to a mill has been held to be an artificial water course.[4] So, also, where all the waters flowing through a tunnel are derived from drainage of a mine and of the country between the mine and the mouth of the tunnel, and from pumpings into the tunnel from lower levels, such tunnel is an artificial water course.[5]

§ 317. Swamps and marshes.—The words "swamp" and "marsh" are oftentimes used as synonymous and may be defined as wet, spongy land; soft, low ground, saturated, but which may or may not be covered with water.[1] A swamp or marsh, having none of the essential characteristics of a water course,[2] can not be considered as such.[3] And, therefore, they are governed by other laws than are water courses.[4] It is therefore held that neither can the water of swamps be appropriated as such under the doc-

2 3 Farnham, Waters and Water Rights, 823-829, and cases cited; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Arkwright v. Gell, 5 Mees & W. 203, 2 Horn & H. 17, 8 L. J. Exch. N. S. 201; Sampson v. Hoddinott, 1 C. B. N. S. 590, 26 L. J. C. P. N. S. 148, 3 Jur. N. S. 243, 5 Week. Rep. 230, 87 E. C. L. 590; Fox River Flour Co. v. Kelley, 70 Wis. 298, 35 N. W. Rep. 744.

See, also, as to riparian rights, Secs. 450-551; ditches and canals, Secs. 824-836; rights of way over private lands, Chap. 52, Secs. 972-993; rights of way over public lands, Secs. 927-971.

3 For property in ditches and canals, see Secs. 833, 834.

4 Standart v. Round Val. W. Co., 77 Cal. 399, 19 Pac. Rep. 689; Farmer v. Ukiah Water Co., 56 Cal. 11.

5 Cardelli v. Comstock Tun. Co., 26 Nev. 284, 66 Pac. Rep. 950.

See, also, as to artificial water courses, Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. Rep. 436, 50 L. R. A. 836, and note, 74 Am. St. Rep. 859.

1 Wet, spongy land; soft, low ground, saturated, but not usually covered with water; mostly ground away from the shore. Webster's Int. Dict., 1911, subject, Swamp.

2 For the essential characteristics of a water course, see Secs. 301-311.

3 Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139; Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090.

4 Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Lux. v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

trine of appropriation,[5] nor do riparian rights attach to swamps.[6] But where the evidence in a case shows that a certain stream of water was a water course, it does not matter whether it be called "a swag, or a swamp, or a creek, or whether its course is straight or crooked," and the law of water courses applies.[7]

§ 318. **Surface waters proper.**—There is another class of waters to which reference has been made in our discussion of water courses and their essential requisites, which we must now define, and these are surface waters proper. We have also seen that a water course is a permanent stream of water running in a well-defined channel, with a bed and banks.[1] In a future portion of this work we will see that by virtue of the ownership of the banks of a water course certain rights attach to a water course in favor of the owners; that in the arid region, by the appropriation of the waters of a water course certain rights are acquired by the appropriator to the use of the water for beneficial purposes.[2] These rights are both species of property, and many times of enormous value. They can not be interfered with by persons other than the owners, or by the public. These property rights do not attach to surface water, for the reason that surface water is a vagrant, wandering thing, with no definite locality, or course. Hence, in order to determine whether or not such rights do attach, it becomes necessary, in the first place, to determine whether there is a permanent water course, or whether the water is mere surface water.

"Surface water" may be defined as water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well-defined and substantial existence.[3] It

5 Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090.

6 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

For the reclamation Acts of the respective States, see Part XIV.

7 Hastie v. Jenkins, 53 Wash. 21, 101 Pac. Rep. 495.

1 Secs. 301-311. Surface water as such can not be appropriated. See Sec. 654.

2 See Riparian Rights, Secs. 450-551.

See Doctrine of Appropriation, Secs. 585-594.

See, also, Injunctions; Damages from Surface Waters.

3 Brandenburg v. Zeigler, 62 S. C. 18, 39 S. E. Rep. 790, 89 Am. St. Rep. 887, 55 L. R. A. 414; Cairo, V. & C. R. Co. v. Brevoort, 62 Fed. Rep. 129, 25 L. R. A. 527; Lawton v. South

continues to be surface water, no matter from what source it comes, until it reaches either some well-defined channel, or some permanent lake or pond, and then it ceases to be surface water and becomes the water of a water course, or a lake or pond, as the case may be.[4] The sources of surface water are rains, melting snows, occasional outbursts of water, which in times of freshets or melting snows descend from the mountains and inundate the country, and the moisture of wet, spongy, springy, or boggy ground before it forms a defined channel.[5] Where water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water, although it has its source in springs.[6] In some States it is held that water overflowing the banks of a stream is surface water;[7] in one sense it is surface water, but the weight of authority classifies such waters as flood waters, and as a part of the stream.[8] Surface water escapes by surface drainage, evaporation, and percolation.[9] In fact, the chief characteristic of surface water is its inability to maintain

Bound R. Co., 61 S. C. 548, 39 S. E. Rep. 752; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262.

4 Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. Rep. 429; Gillett v. Johnson, 30 Conn. 180; Hinkle v. Avery, 88 Iowa, 47, 55 N. W. Rep. 77, 45 Am. St. Rep. 224.

5 Lawton v. South Bound R. Co., 61 S. C. 548, 39 S. E. Rep. 752; Neal v. Ohio R. Co., 47 W. Va. 316, 34 S. E. Rep. 914.

6 White v. Sheldon, 35 Hun 191; Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. Rep. 726, 57 Am. Rep. 73; Alcorn v. Sadler, 66 Miss. 221, 5 So. Rep. 694; Hawley v. Sheldon, 64 Vt. 491, 24 Atl. Rep. 717, 33 Am. St. Rep. 941; Town v. Missouri Pac. R. Co., 50 Neb. 768, 70 N. W. Rep. 402; Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 483, 24 L. T. N. S. 402, 19 Week. Report, 569; Gillett v. Johnson, 30 Conn. 180; Hinkle v. Avery, 88 Iowa 47, 55 N. W. Rep. 77, 45 Am. St. Rep. 224.

7 See Flood Waters, Sec. 319; Edwards v. Missouri, K. & T. R. Co., 97 Mo. App. 103, 71 S. W. Rep. 366; Abbott v. Kansas City, St. J. & C. B. R. Co., 83 Mo. 271, 53 Am. Rep. 581; Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N. W. Rep. 946; 57 N. W. Rep. 522; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. Rep. 429; O'Connell v. East Tennessee, V. & G. R. Co., 87 Ga. 246, 13 S. E. Rep. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246; Jean v. Pennsylvania Co., 9 Ind. App. 56, 36 N. E. Rep. 159; Shane v. Kansas City, St. J. & C. B. R. Co., 71 Mo. 237, 36 Am. Rep. 480.

8 See Flood Waters, Sec. 319; Cairo V. & C. R. Co. v. Brevoort, 62 Fed. Rep. 129, 25 L. R. A. 527.

9 Bunderson v. Burlington, B. & Q. R. Co., 43 Neb. 545, 61 N. W. Rep. 721.

its identity and existence as a water course or other body of water,[10] and it escapes by the natural surface drainage of the land from a higher to a lower level, and by evaporation and percolation.[11] When, however, surface waters reach and become a part of a natural water course,[12] or collect in a pond or lake, in considerable quantities,[13] they lose their character as surface waters and come under the rules governing water courses,[14] or lakes and ponds.[15] In each case the question as to whether or not particular water is surface water, or belongs to some other class, is one of fact, to be determined by the circumstances attending its source and continued existence. In an Ohio case,[16] it was said that "surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel, in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and then it becomes running water of a stream and ceases to be surface water." [17]

Surface waters are not governed by the same rules of law which govern the waters of water courses or permanent bodies of water. No riparian rights attach, and the Arid Region doctrine of appro-

10 Gray v. McWilliams, 98 Cal. 157, 32 Pac. Rep. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Gray v. Schriber, 58 Mo. App. 173.

11 Curtiss v. Ayrault, 47 N. Y. 73; Boynton v. Gilman, 53 Vt. 17; Rawstron v. Taylor, 33 Eng. L. & Eq. 428, 25 L. J. Exch. N. S. 33, 11 Exch. N. S. 369, 4 Week. Rep. 290.

12 Case v. Hoffman, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; *Id.*, 100 Wis. 314, 72 N. W. Rep. 390, 74 N. W. Rep. 220, 75 N. W. Rep. 945, 44 L. R. A. 728; Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. Rep. 726, 57 Am. Rep. 73; Dudden v. Clutton Union, Guardians, 1 Hurlst. & N. 627, S. C. 26 L. J. Exch. N. S. 146, 38 Eng. L. & Eq. 526.

13 Neal v. Ohio River R. Co., 47 W. Va. 316, 34 S. E. 914; Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. Rep. 726, 57 Am. Rep. 73; Alcorn v. Sadler, 66 Miss. 221, 5 So. Rep. 694; Hyatt v. Albro, 121 Mich. 638, 80 N. W. Rep. 641; Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199.

14 See Water Courses, Secs. 301-311.

15 See Lakes, Secs. 294-297.

See Ponds, Secs. 298, 299.

16 Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. Rep. 429.

17 See, also, Broadbent v. Ramsbotham, 11 Exch. 602, 25 L. J. Exch. N. S. 115, 4 Week. Rep. 290, 34 Eng. L. & Eq. 553; Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395; Jones v. Hannovan, 55 Mo. 462; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Palmer v. Waddell, 22 Kan. 352; Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. Rep. 726, 57 Am. Rep. 73.

priation does not apply. A landowner may, however, capture surface water while it is flowing over his land and impound the same in a reservoir or other receptacle, and the water becomes his absolute property so long as it remains under his control, and no one may interfere therewith.[18] But the law of appropriation, as the same is understood in this western country, does not apply. There is no permanent and definite source of supply which can be maintained by the landowner; and, even if it usually drains over the same lands, there is nothing to prevent the upper landowners from cutting off the supply or impounding it upon their lands.[19]

§ 319. **Flood or storm waters.**—By the great weight of authority, as well as reason, flood waters are not classified as surface waters. In legal parlance "flood waters" may be defined as those waters, caused by the melting of snow or rains, which swell and overflow the banks of the water courses, and overflow lands not usually covered even in times of high water of the streams. If the water forms a continuous body with the water flowing in the ordinary channels, or if it departs from such channels *animo revertendi*, presently to return when the waters recede, it is flood water and to be regarded as the waters of the streams, and treated in law as such.[1] Flood waters are divided by the authorities into two classes, as follows: "Ordinary floods" and "extraordinary floods."

18 King v. Chamberlain, — Idaho —, 118 Pac. Rep. 1099; Vanderwork v. Hewes, 15 New Mex. 439, 110 Pac. Rep. 567.

19 For the right to capture surface waters, see Sec. 654.

1 Fordham v. Northern Pac. R. Co. 30 Mont. 421, 76 Pac. Rep. 1049, 66 L. R. A. 556, 104 Am. St. Rep. 729; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. Rep. 429, where the Court said that it is difficult to see upon what principle the flood waters of a river can be likened to surface water.

See, also, O'Connell v. East Tennessee, V. & G. R. Co., 87 Ga. 246, 13 S. E. Rep. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246; Sulens v. Chicago, R. I. & P. R. Co., 74 Iowa 659, 38 N. W. Rep. 545, 7 Am. St. Rep. 501; Moore v. Chicago, B. & Q. R. Co., 75 Iowa, 263, 39 N. W. Rep. 390; Burwell v. Hobson, 12 Grat. 322, 65 Am. Dec. 247; Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. Rep. 339, 8 Am. St. Rep. 668; Jones v. Seaboard Air Line R. Co., 67 S. C. 181, 45 S. E. Rep. 188; Spellman v. Portage, 41 Wis. 126, 48 N. W. Rep. 210; Carriger v. East Tennessee, V. & G. R. Co., 7 Lea, 388; Curtis v. Eastern R. Co., 98 Mass. 428; Barden v. Portage, 79 Wis. 126; 48 N. W. Rep. 210; West. v. Taylor, 16 Ore. 165; 13 Pac. Rep. 665; Mitchell v. Bain, 142 Ind. 604, 42 N. E. Rep. 230.

For the appropriation of flood or storm waters, see Sec. 653.

An ordinary flood is one, the repetition of which, although at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream, have been anticipated. An extraordinary flood is one of those unexpected visitations whose coming is not foreseen by the usual course of Nature, and whose magnitude and destructiveness could not have been anticipated and prevented by the exercise of ordinary foresight.[2] By the common law, flood water overflowing the banks of a stream is a part of the stream, although not flowing in the channel.[3] The decisions in this country are in hopeless conflict upon the subject, and can not be reconciled, as those of certain States are diametrically opposed to those of others. Indiana,[4] Missouri,[5] Kansas,[6] and Washington[7] treat the flood waters of the streams as surface waters, to be dealt with as such, according to the rule prevailing in those States.[8] But in the later cases, especially since the questions of appropriation of waters for beneficial uses have arisen, the Courts hold that flood waters of rivers and streams are not surface waters, but constitute a constituent part of such streams.[9]

2 Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A. N. S. 214, citing 13 Am. & Eng. Ency. of Law, 2d Ed. p. 686.

See, also, for damages from floods; act of God as relief from liability.

3 King *ex rel.* Bridgewater v. Trafford, 1 Barn. & Ed. 874; Trafford v. King, 8 Bing. 204, 2 Cromp. & J. 265, 1 Moore & S. 401; Broadbent v. Ramsbotham, 11 Exch. 602, 25 L. J. Exch. N. S. 115, 4 Week. Rep. 290, 34 Eng. L. & Eq. 553.

4 Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Cairo & V. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Cairo & V. R. Co. v. Houry, 77 Ind. 364; Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205; Jean v. Pennsylvania R. Co., 9 Ind. App. 56, 36 N. E. Rep. 159.

5 McCormick v. Kansas City, St. J. & C. B. R. Co., 57 Mo. 433; Kenney v. Kansas City, P. & G. R. Co., 74 Mo. App. 301; Schneider v. Missouri P. R. Co., 29 Mo. App. 68.

6 Missouri Pac. R. Co. v. Keys, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249.

7 Cass v. Dicks, 14 Wash. 75, 44 Pac. Rep. 113, 53 Am. St. Rep. 859.

8 See, also, Morris v. Council Bluffs, 67 Iowa, 343, 25 N. W. Rep. 274, 56 Am. St. Rep. 343, where it is said that "overflowed water is an outlaw, tending to interfere with the legitimate use of the land which it overflows," and that such water is practically surface water. This decision is not in accord with some of the later decisions of Iowa cited in our last note.

In Nebraska, it was first held that the flood waters of a stream were surface waters. Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N. W. Rep. 946, 57 N. W. Rep. 522.

9 Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. Rep. 540, 68

In the majority of the States it is held that these flood, storm, or overflow waters are still a part of the streams, and to be treated as such. The Federal Courts also take this view of the matter, and the United States Circuit Court for the District of Indiana refused absolutely to follow the decisions of the Supreme Court of that State respecting this subject. The Supreme Court, in Taylor v. Fickas, and subsequently, held that the flood waters are surface waters.[10] The Federal Court, in Cairo, V. & C. R. Co. v. Brevoort,[11] held that the flood waters constitute the waters of the rivers and are not surface waters.[12] When once surface water has found its way to the beds of well-defined water courses it ceases to possess any of the characteristics of surface water,[13] and the mere fact that for the time being the regular channels of the streams are not large enough to carry all of the water that comes down does not change the rule.[14] However, flood water may become surface water. Where water which had been a part of a stream has wandered away from it and entirely lost its connection therewith, and has spread over the adjoining country and settled in low places and has become stagnant, it can no longer be treated as a part of the stream, and the rules governing water courses can no longer be applied to it, but the rules as to surface water are applicable.[15] And again, surface water may become the water of a water course, when it is turned back into the stream.[16] In the Western States flood waters are usually treated as a part of

Am. St. Rep. 602, 108 Am. St. Rep. 647; Crawford Co. v. Hall (Hathaway), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 641.

10 64 Ind. 167, 31 Am. Rep. 114.

11 62 Fed. Rep. 129, 25 L. R. A. 527.

12 See, also, Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. Rep. 82; California Pas. & Ag. Co. v. Enterprise C. & L. Co., 127 Fed. Rep. 741; Fifield v. Spring Val. W. Works, 130 Cal. 552, 62 Pac. Rep. 1054.

See, also, for the appropriation of flood or storm waters, Sec. 653.

13 Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 So. Rep. 212; Jones v. Hannovan, 55 Mo. 462.

14 Barden v. Portage, 79 Wis. 126, 48 N. W. Rep. 210; Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. Rep. 540, 68 Am. St. Rep. 602; Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. Rep. 339, 8 Am. St. Rep. 668; New York & St. L. R. Co. v. Hamlet Hay Co., 149 Ind. 344, 47 N. E. Rep. 1060, 49 N. E. Rep. 269; Jones v. Seaboard Air Line R. Co., 67 S. C. 181, 45 S. E. Rep. 188.

15 Munkres v. Kansas City, St. J. & C. B. R. Co., 72 Mo. 514; O'Connell v. East Tenn., V. & G. R. Co., 87 Ga. 246, 13 S. E. Rep. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246.

16 Sulens v. Chicago, R. I. & P. R. Co., 74 Iowa, 659, 38 N. W. Rep. 545,

the streams or water courses, to which the law of appropriation applies.[17]

§ 320. **"Developed water"—Description of.**—There is another class of waters, which belongs to none of the classes of natural waters, defined and described in the preceding sections of this chapter, and concerning which we will have considerable to say in the subsequent portions of this work, and this class is called "developed waters." These waters may be defined as those which have been discovered and developed through the agency of man, and which, under ordinary conditions, would not have appeared at the surface, or have contributed to the flow of any stream or body of water.[1] These waters, coming from the depths of the earth's surface, are properly originally subterranean.[2] The rights to these waters will be hereafter discussed, and here it need only be stated that the one who discovers and develops such waters generally has the first right to them, provided that his claim is accompanied by a beneficial use of the same, and that, too, even to the extent of their recapture from the stream into which they are permitted to flow.[3] But, upon the other hand, if these developed waters are permitted to escape, without any intent of their recapture, they are treated as abandoned, and others may acquire a right to their use.[4]

§ 321. **"Surplus water"—Definition and description.**—Surplus water may be defined as the water which remains in any stream or body of water after all those who are first entitled to the use of its waters have been fully supplied, and there is still some water remaining unclaimed and unappropriated. The right to the appropriation of the surplus waters will be discussed in other

7 Am. St. Rep. 501; Moore v. Chicago, B. & Q. R. Co., 75 Iowa, 263, 39 N. W. Rep. 390.

17 For the appropriation of flood waters, see Sec. 653.

For the storage of floor waters, see Chap. 46, Secs. 837-846.

1 For Developed Waters, see Secs. 1205, 1206.

2 For Subterranean Waters, see Secs. 1148-1211.

3 For the Recapture of Water, see Secs. 798-800.

For the right to use a natural stream as a means of the conveyance of water, see Sec. 832.

4 For Abandonment of Water, see Chap. 56, Secs. 1099-1117.

portions of this work.[1] In passing it may be said that a great portion of the litigation involving water rights in the West has grown out of disputes as to the rights of prior and subsequent appropriators.[2]

§ 322. **"Waste water"—Definition and description.**—Waste water may have three meanings, as follows: First, water that is actually wasted or not needed by the claimant thereto;[1] second, water which, after it has served the purpose of the lawful claimant thereto, has been permitted to run to waste or to escape;[2] and third, water which, from unavoidable causes, escapes from the ditches, canals, or other works of the lawful claimants.[3] These subjects will be subsequently discussed.

§ 323. **Subterranean or underground waters—Classification.**—Subterranean or underground waters may be defined as those waters which flow, percolate, or lie under the surface of the earth, and are not visible to the eye without exploitation.[1] In order to discuss the question of subterranean or underground waters together, outside of the bare classification of such waters here, we will defer all definitions and a description of their characteristics to another part of this work.[2] Subterranean or underground waters are divided by the later authorities into three main classes: First, subterranean water courses or streams, which in turn are subdivided into independent subterranean water courses and the underflow of surface streams;[3] second, artesian waters;[4] and, third, percolating waters, which in turn are subdivided into four classes: (1) Diffused percolating waters; (2) percolating waters tributary to surface water courses, or to other bodies of surface waters; (3) percolating waters tributary to underground reservoirs, or catchment basins; and, (4) seepage waters.[5]

1 For the Rights of Subsequent Appropriators, see Secs. 783-786.

2 For the Rights of Prior Appropriators, see Secs. 776-782.

For the Priority of Right, see Sec. 776.

1 For the Economical Use and Suppression of Waste, see Chap. 49, Secs. 874-916.

2 See Sec. 661.

3 For the right to these waters, see Secs. 912, 913.

1 See Secs. 1148-1211.

2 For the classification and definitions of the different classes of subterranean or underground waters, see Part 10, Secs. 1152, 1155, 1187.

3 See Secs. 1154-1161.

4 See Sec. 1167.

5 See Secs. 1185-1211.

PART IV.

RIGHTS OF THE PUBLIC IN WATERS AND WATER COURSES.

CHAPTER 15.

MISCELLANEOUS PUBLIC RIGHTS.

§ 324. Scope of part and chapter.
§ 325. Ownership of the beds—Tide waters—Under common law.
§ 326. Ownership of the beds—Tide waters—Rule in the United States.
§ 327. Ownership of the beds—Great Lakes.
§ 328. Ownership of the beds—Fresh water navigable rivers—Rule under the common law.
§ 329. Ownership of the beds—Fresh water navigable rivers—Rule in the United States.
§ 330. Title to beds—Public land States—State may adopt either rule.
§ 331. Title to beds—Public land States—The rule in the States.
§ 332. Meandered bodies of water—Title between the lines.
§ 333. Ownership in the water—In general.
§ 334. The right to the use of the water does not depend upon the ownership of the bed.
§ 335. Right of access to public waters—From the land side.
§ 336. Right of access to public waters—Obstructions from the water side.
§ 337. Right of the public to gather ice.
§ 338. Right of a State to divert water for power purposes.
§ 339. Right of a State to divert water from a stream for irrigation.
§ 340. Miscellaneous rights of the public.

§ 324. Scope of part and chapter.—As we have seen in previous chapters of this work, waters are divided into public and private,[1] largely depending as to whether or not they are navigable or nonnavigable. In public waters the general public have certain rights in the beds,[2] banks, or shores, as the case may be,[3] and also

[1] For classification, see Sec. 287. See, also, Sec. 290.

[2] See Secs. 325-331.

[3] See Secs. 293, 325, 326.

in the waters of streams or other bodies of water.[4] In this part of this work it is proposed to discuss the rights which the public have in and to public waters and water courses, and other bodies of water, so far as they affect the main subject of this work. Among these rights may be found the title or ownership of the beds of rivers or other bodies of water,[5] the right of navigation,[6] the right of fishing and hunting,[7] and the rights of the public or State in and to the waters within the boundaries of a certain State, where such waters have been dedicated to the State or public.

In the present chapter we will discuss the title or ownership of the beds or shores of public waters, and other miscellaneous rights that the public have in and to so-called public waters.[8]

§ 325. Ownership of the beds—Tide waters—Under common law.—A body of water does not consist of the water alone, but also of the basin or channel which holds it.[1] All of these natural elements which go to make up a water course are subject to some kind of ownership, either by the State or by the individual. At common law the beds and soil of all tide waters belong to the Crown, or to the State. This is also true of all public rivers, to the extent of the ebb and flow of the tide; to that point only are they deemed, under the common law, navigable, and hence public.[2] This is the present law of England.[3] Waters subject to the influ-

4 See Secs. 288, 289, 333-337.

5 See Secs. 328-332.

6 See Chap. 16, Secs. 341-357.

7 See Chap. 17, Secs. 358-371.

8 See, also, for riparian rights, Chaps. 21-28, Secs. 450-551.

1 See Essentials of a Water Course, Secs. 301-312.

See, also, Secs. 293-300.

2 For the distinction between public and private waters, see Secs. 287, 290.

See, also, Hale, De Juris Maris, 111, 16 Am. Rep. 54; Lyon v. Fishmonger's Co., L. R. I. App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

3 Gould on Waters, Secs. 4, 5, 10, and cases cited; Regina v. Keyn, 2 Exch. D. 63, 13 Cox. C. C. 403, 46 L. J. M. C. N. S. 17; Royal Fisheries of the Banne, Sir John Davies, 149; Bulstrode v. Hall, 1 Sid. 149; Fitzwalter's Case, 1 Mod. 105; Colchester v. Brooke, 7 Q. B. 339, 15 L. J. Q. B. N. S. 59, 9 Jur. 1090; Illinois Cent. R. Co. v. State, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; People v. New York & S. I. F. Co., 68 N. Y. 71; Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, citing Kinney on Irr., 1st Ed., Sec. 51; Dana v. Jackson St. Wharf Co., 31 Cal. 118, 89 Am. Dec. 164; Weber v. Harbor Commissioners, 85 U. S. 18 Wall. 57, 21 L. Ed. 798; City of Hoboken v. Pennsylvania R. Co., 124 U. S. 656,

ence of the tide are considered arms of the sea, and the ownership is in the Crown because they partake of its nature. This ownership, however, is subject to the rights of the public to the use of these waters for navigation, and other rights which will be discussed. It is well settled that the Crown can grant its rights in these tide waters only subject to the rights of the public. This was true even before statutes were passed to that effect.[4] But this proposition has been further strengthened by the passage of certain statutes, which prevent the Crown making any grant of these waters except upon conditions imposed by Parliament.[5] However, with the consent of Parliament, the land under the water may be granted for purposes, so far as such use will be more advantageous than the rights of the public.[6] All waters, with the exception of tide waters, under the common law in England and Ireland, were considered private, and were so treated; and hence it follows that the lands under these waters were considered and treated as private lands.[7]

§ 326. Ownership of the beds—Tide waters—Rule in the United States.—The rule in the United States as to the ownership of the beds of tide waters is similar to the present rule in England. The title is in the respective States where or through which such waters lie or run; each State, as sovereign, has succeeded to the rights which the Crown formerly possessed in all such waters, and in the soil underneath the water itself. Mr. Gould in his work on waters says upon the subject: "At the time of the Revolution, when the people became sovereign, the respective States succeeded to the title of the Crown in the tide waters within their territorial limits, and to such rights therein as had been previously granted to the local governments established under the royal sanction. Public rights in navigable waters were not affected or impaired by this change of title, and the powers acquired by the States were

31 L. Ed. 543, 8 Sup. Ct. Rep. 643; Turner v. People's Ferry Co., 22 Blatchf. 272, 21 Fed. Rep. 93.

4 Attorney Gen. v. Tomline, L. R. 12 Ch. Div. 214, L. R. 14 Ch. Div. 58, 49 L. J. Ch. N. S. 377, 42 L. T. N. S. 880, 28 Week. Rep. 870, 44 J. P. 617.

5 See Stat. 1 Anne, Ch. 7; also, 10 George IV, Ch. 50.

6 Lowe v. Govett, 3 Barn. & Ad. 863, 1 L. J. K. B. N. S. 224; Furman v. New York, 5 Sanf. 16; affirmed in 10 N. Y. 567.

7 For riparian rights, see Secs. 450-551.

those which in England, and in this country previous to the Revolution, could have been exercised by the king alone, or by him in conjunction with Parliament."[1] The bed or soil of these waters is held by the people of the State in their character as sovereign in trust for the public uses for which they are adapted.[2] As was well said in a recent Oregon case:[3] "At common law the bed of navigable rivers was owned by the king, who held the title for the benefit of the common people. The immigrants to the American Colonies brought with them to our shores the principles of the common law, and when the independence of the United States was declared the rights of the citizens to the beds and waters of navigable bodies of water became vested in them as a rule of property, subject, however, to the superior right of navigation." And no alienation of such property by the State which does not recognize and is not in execution of this trust is permissible.[4] But as this work has very little to do with tide waters, we will pass the subject with the statement of the above propositions.

1 Gould on Waters, Sec. 32, and cases cited.

See, also, Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; 17 Ala. N. S. 780; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997; Pollard v. Hagan, 44 U. S. 3 How. 212, 11 L. Ed. 565; McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; People v. New York & S. I. F. Co., 68 N. Y. 71; Illinois Cent. R. Co. v. Illinois, 146 U. S. 377, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441; Rundle v. Delaware & Raritan Canal Co., 55 U. S. 14 How. 81, 14 L. Ed. 335; Home of Aged v. Commonwealth, 202 Mass. 422, 89 N. E. Rep. 124, 24 L. R. A. N. S. 79.

2 Illinois Cent. R. Co. v. Illinois, *supra*.

3 Micelli v. Andrus, — Ore. —, 120 Pac. Rep. 737.

4 Pollard v. Hagan, *supra;* Den *ex dem.* Russell v. The Jersey Co., 56 U. S. 15 How. 426, 14 L. Ed. 757; Mumford v. Wardell, 73 U. S. 6 Wall. 423, 18 L. Ed. 756; Weber v. State Harbor Comrs., 85 U. S. 18 Wall. 57, 21 L. Ed. 798; McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; Manchester v. Massachusetts, 139 U. S. 260, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559; Smith v. Maryland, 59 U. S. 18 How. 71, 15 L. Ed. 269; Stockton v. Baltimore & N. Y. R. Co., 32 Fed. Rep. 9; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, rev'g 16 Fed. Rep. 823; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; United States v. Mission Rock Co., 189 U. S. 391, 47 L. Ed. 865, 23 Sup. Ct. Rep. 606, holding the State of California has absolute title to the soil under the tide waters within the limits of the State.

See, also, Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210.

§ 327. Ownership of the beds—Great Lakes.—As we have seen,[1] it is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, subject to the rights of the public. Our large fresh water lakes are wholly unprovided for by the common law, and hence the rule was extended to include them in the class of public waters.[2] Under the common law, in England and Ireland, all lakes are considered private property, owing, undoubtedly, to the fact that they are all small.[3] This doctrine respecting tide waters, originating in the common law, has been enlarged and extended in the United States so as to include the lands covered by the fresh water of the Great Lakes. These waters possess all of the general characteristics of open seas, except in the freshness of their waters, and the absence of the ebb and flow of the tide. In all other respects they are inland seas. And, as was said by Mr. Justice Field, in the case of Illinois Cent. R. Co. v. Illinois, "There is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion of and sovereignty over lands cov-

1 Secs. 325, 326.

2 For riparian rights on lakes and ponds, see Secs. 329-332.

Canal Com. *et al.* v. People, 5 Wend. 423, 446; Canal Appraisers v. People, 17 Wend. 571, 597, 616, 621; 3 Kent. Com. 429, note 430a; Kingman v. Sparrow, 12 Barb. 201, rev'd N. Y. 242, 4 How. Prac. 367; King v. Smith, 4 Doug. 441; Ledyard v. Ten Eyck, 36 Barb. 102. In Fletcher v. Phelps, 28 Vt. 257; Jakeway v. Barrett, 38 Vt. 316, 323, and Austin v. Rutland R. Co., 45 Vt. 215, 17 Fed. Rep. 466, it was held that lands bounded on Lake Champlain extend to the edge of the water at low water mark; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; State v. Gilmanton, 9 N. H. 461, 14 N. H. 467; Waterman v. Johnson, 13 Pick. 261; Hogg v. Beeman, 41 Ohio St. 81; Sloan v. Biemiller, 34 Ohio St. 492; People *ex rel.* Moloney v. Kirk, 162 Ill. 138, 45 N. E. Rep. 830, 53 Am. St. Rep. 277; Champlain etc. R. Co. v. Valentine, 19 Barb. 484.

3 Devonshire v. Pattinson, 20 Q. B. Dec. 263; Holford v. Bailey, 8 Q. B. 1000; Pery v. Thornton, 23 L. R. Ir. 402. See remarks of Gray, J., in Pain v. Woods, 108 Mass. 160, 169 (1871), citing Duke (ed. 1805), 8, 129; Marshall v. Ulleswater Steam Navigating Co., 3 B. & S. 732; 113 Eng. C. L. 732, 742, citing Hale, De Jure Maris, Ch. 1; Hunt on Boundaries and Fences (2d Ed.), 19; Greyes' Case, Owen, 20; Somerset v. Fogwell, 5 B. & C. 875 (E. C. L. R. Vol. II); Pollenfen v. Crispin, 1 Vent. 122; Bell's Law

ered by the fresh water of these lakes."[4] Hence it follows, that the common law doctrine limiting the ownership of waters and the soil under them in the State to those waters only which are under the influence of the tide has been repudiated in this country, as far as the Great Lakes are concerned. And, in this country, the principle which retains title in the public extends to all lakes which are capable of navigation.[5] The title of the riparian proprietors on these Great Lakes extends to low-water mark;[6] but the title below the high-water mark is subject to public use, so that the absolute title of the riparian owner extends only to the high-water mark.[7] The Great Lakes of this country are not in any appreciable respect affected by the tide, and yet on their waters a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. The public being so extensively interested in the use of such waters, the ownership and possession of the soil under these waters can not be permitted, except by license of the States, which alone can exercise such dominion over these waters as will insure freedom in their use so far as consistent with the public interests. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.[8]

of Scotland, 171; Com. Dig. Prerogative (D. 50); 3 App. Cas. 641; S. C. R. 10 C. L. 398, 412; 2 L. R. Ir. 118.

[4] 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110.

[5] McCue v. Bellingham Bay Water Co., 5 Wash. 156, 31 Pac. Rep. 461; Delaplaine v. Chicago & N. W. R. Co., 42 Wis. 214, 24 Am. Rep. 386; Diedrich v. Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399; Revell v. People, 177 Ill. 468, 52 N. E. Rep. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Zeller v. Southern Yacht Club, 34 La. Ann. 838; People v. Silberwood, 110 Mich. 103, 67 N. W. Rep. 1087, 32 L. R. A. 694; Buffalo etc. R. Co. v. Goderich, 21 U. C. Q. B. 97.

[6] Lincoln v. Davis, 53 Mich. 375, 19 N. W. Rep. 103, 51 Am. Rep. 116; Miller v. Mendenhall, 43 Minn. 95, 44 N. W. Rep. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219; Union Depot Street R. & Transp. Co. v. Brunswick, 31 Minn. 297, 17 N. W. Rep. 626, 47 Am. Rep. 789.

[7] People *ex rel.* Burham v. Jones, 112 N. Y. 597, 20 N. E. Rep. 577.

See riparian rights, Secs. 450-551.

[8] Illinois Cent. R. Co. v. Illinois, *supra.*

§ 328. Ownership of the beds—Fresh water navigable rivers—Rule under the common law.—The modern rule in England as to the ownership of fresh water navigable rivers is that the riparian owners own the beds of the streams, subject to the rights of the public to use the streams for navigation. Upon an examination it will be found that with respect to the property in large rivers, which being navigable in fact resemble tidal rivers, and being fresh partake of the nature of small nonnavigable streams, there is a great conflict of both the early and more recent authorities as to whether the river is to be held as private property or belonging to the Crown, State, or public. Bracton, the Chief Justice of England in the reign of Henry III and one of the earliest writers upon this subject, says that "all rivers are public, and that the Crown or public has the right of fishing therein and the use of the banks." He makes no distinction between those rivers which are navigable in fact and those which are not.[1] It is charged that Bracton follows the civil law, but from whatever source this theory comes, it is not the modern common law rule,[2] which is, as held in the case of Murphy v. Ryan,[3] that beyond the point to which the tide ebbs and flows, even in a river actually navigable and so used by the public, the soil is *prima facie* in the riparian proprietors. And the English law has become settled in accordance with this view, that the title of the riparian owners extends to the center of all nontidal streams, whether the same are actually navigable or not; but this title is subject to the general right of navigation of the public. In respect to this right, the common law authorities also differ, as to whether prescription is the ground upon which the right of navigation in these waters depends, or whether all tidal and fresh rivers which are navigable in fact are common highways

1 Gould on Waters, Secs. 46-79; 1 Ld. Raym. 726, 6 Mod. 163; Bracton, Lib. 1, Ch. 12, pp. 7 and 8; Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, citing Kinney on Irr., 1st Ed., Sec. 53; Lyon v. Fishmonger's Co., L. R. 1 App. Cas. 682; Hale, De Jure Maris, Ch. 111.

2 Gould on Waters, Sec. 47; Angell on Water Courses, Sec. 551.

For rule of civil law, see Justinian, 1st Lib. 11, Tit. 1, Sec. 4, which is as follows: "By the law of nations the use of the banks is *as public as the rivers*: therefore all persons are at equal liberty to land their vessels, unload them, and to fasten ropes to trees upon the banks, *as to navigate upon the river itself.*"

3 Ir. R. 2 C. L., 143.

and, *prima facie, publici juris.* But from whatever source the right of the public to navigation is derived, this may be stated as the common law rule, that all rivers entirely above the influence of the tide, if they are so large as to be navigable in fact, for the passage of vessels and boats, are, as well as the tidal rivers, under the servitude of the public interest, and the public have the paramount right to use the same as highways.[4] But as to the ownership of the beds of these rivers, private ownership is the rule in England, notwithstanding the fact that the rivers are navigable and have been immemorially navigated for commerce and other purposes.[5] The right which the public has in such a river is substantially a mere easement to use the river for the purposes of navigation similar to the right the public may have to passage along a public road or footpath through a private estate.[6]

4 Price v. Scotcher, 9 Q. B. D. 162; Tilbury v. Silva, 45 Ch. D. 98, 62 L. T. N. S. 254; Ewing v. Colquhoun, 2 App. Cas. 839; Dwyer v. Rich, Ir. 4, C. L. 424; Miller v. Little, 2 L. R. Ir. 304; Lord Hale, De Jure Maris et Portibus.

In the case of Bath River Navigation Co. v. Willis, 2 Cases of Ry. & Canals, 7, where an act of Parliament had been passed, authorizing certain persons to use a certain part of the River Avon for navigation, and to use the banks as towing paths, the Court held that satisfaction should first be given to the owners of the land abutting on the river. Also, see Ball v. Herbert, 3 T. R. 253; Hargreaves v. Diddams, L. R. 10 Q. B. 582, 44 L. J. M. C. N. S. 178, 32 N. T. L. S. 600, 23 Week. Rep. 828; Bristow v. Cormican, 3 App. Cas. 641, 666; Bloomfield v. Johnson Ir. R. 8, C. L. 68; Devonshire v. Pattison, 20 Q. B. D. 263; King v. Montague, 4 B. & C. 598, 6. Dowl. & R. 616, 4 L. J. K. B. 21; Coulson & Forbes on Waters, Secs. 92, 93, 94; Hale, De Jure Maris, Ch. 1, 2, 3; Hargreaves Law Tracts, 6, 8, 9; Williams v. Wilcox, 8 Ad. & El. 314, 332, 3 Nev. & P. 606, 1 W. W. & H. 477, 7 L. J. Q. B. N. S. 229; Royal Fishery of River Banne, Davies R. 149.

Lord Hale explains this question in his De Jure Maris, as follows: That all rivers above the tidal point are regarded as public, not in reference to the property in the soil or the bed of the river, but only in reference to public use for navigation. Thus, the riparian proprietors have title to the bed of the rivers, and the rights of fishery in rivers of this class, subject to this right of navigation. Gould, Chap. IV; Colchester v. Brooks, 7 Q. B. 339; Callis on Sewers, 78, and cases above cited.

5 Murphy v. Ryan, Irr. Rep. 2 C. L. 143, 16 Week. Rep. 678; King v. Wharton, Holt 499, 12 Mod. 510; Doremus v. Paterson, 65 N. J. Eq. 711, 55 Atl. Rep. 304; Woolrych on Waters, p. 44.

See, also, riparian rights, Secs. 450-551.

6 Ewing v. Colquhoun, L. R. 2 App. Cas. 839.

§ 329. **Ownership of the beds—Fresh water navigable rivers—Rule in the United States.**—In the fresh water navigable rivers of the United States, the public have the right of navigation and other rights which we will discuss in this chapter, although the rule as to the ownership of the beds of these streams differs in many of our States. Many of these rivers are navigable for great distances above the flow of the tide; indeed, for hundreds of miles, and by the largest vessels used in commerce. They are all public rivers under our classification,[1] in the sense that the public have certain rights in them, which it does not have in nonnavigable or private streams, and that, to, whether or not any specific rule has been adopted by the constitutions or statutes of those States through which or by the side of which these waters flow. After the American Revolution the absolute right to all navigable rivers and soils under them, within each State, was held by its people for their common use, subject only to the rights since surrendered by the Constitution to the general Government.[2] Therefore, each State may, by its constitution or by its statute, adopt whatever rule it sees fit, as to the public or private ownership of these streams and the beds thereof. Some of the States have done so. Most of the States, however, have merely adopted the common law by general statutory provisions, and by so doing they declared the title to the bed of fresh water streams to be in the riparian proprietors.[3] In this country the modern common law rule relative to the ownership of the soil under fresh water navigable rivers has been followed as the law of many States, and the riparian owners own the soil to the center of the stream.[4] In general this rule is in force in all of the New England States, where the rivers of this class are comparatively unimportant, and the soil under navigable nontidal rivers is held to be private property, the title to which

1 See Sec. 287.

2 Morris v. U. S., 174 U. S. 196, 43 L. Ed. 946, 19 Sup. Ct. Rep. 649; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, rev'g 16 Fed. Rep. 823.

3 For the power of a State to adopt such laws relative to the government of waters and water courses as it sees fit, see Sec. 593.

4 Ingraham v. Wilkinson, 4 Pick. 268, 16 Am. Dec. 342; Commissioners' Canal Fund v. Kempell, 26 Wend. 404; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Adams v. Pease, 2 Conn. 481; Commonwealth v. Alger, 7 Cush. 53; Walker v. Board of Public Works, 16 Ohio 540; Barnes v. Racine, 4 Wis. 454.

is in the riparian owners.[5] The English rule is also adopted in New Jersey, Delaware, Maryland, Georgia, and in Michigan and

[5] *Connecticut*—Adams v. Pease, 2 Conn. 481; Bissel v. Southworth, 1 Root 269; Welles v. Bailey, 55 Conn. 292, 10 Atl. Rep. 565, 3 Am. St. Rep. 48; Warner v. Southworth, 6 Conn. 471; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; Enfield Bridge Co. v. Hartford R. Co., 17 Conn. 40, 42 Am. Dec. 716; Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462.

New Hampshire—Scott v. Wilson, 3 N. H. 321; Claremount v. Carlton, 2 N. H. 371, 9 Am. Dec. 88; Rix v. Johnson, 5 N. H. 520, 22 Am. Dec. 472; Norway Plaines Co. v. Bradley, 52 N. H. 86; Kimball v. Schoff, 40 N. H. 190; State v. Gilmanton, 9 N. H. 461, 14 N. H. 467; Greenleaf v. Kilton, 11 N. H. 530; Connecticut River Lumber Co. v. Olcott Falls Co., 65 N. H. 290, 21 Atl. Rep. 1090, 13 L. R. A. 826; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718, 18 L. R. A. 679; State v. Canterbury, 28 N. H. 195; Nicholls v. Suncock Mfg. Co., 34 N. H. 345; Clement v. Burns, 43 N. H. 609; Thompson v. Androscoggin River Imp. Co., 54 N. H. 545; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584.

Maine—Pejepsco Proprietors v. Cushman, 2 Me. 94; Berry v. Carle, 3 Me. 269; Morrison v. Keene, 3 Greenl. 474; Lincoln v. Wilder, 29 Me. 169; Spring v. Russell, 7 Me. 273; Simpson v. Seavey, 8 Me. 138, 22 Am. Dec. 228; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; Nickerson v. Crawford, 16 Me. 245; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Knox v. Chaloner, 42 Me. 150; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655, 31 Me. 360; *Id.*, 55 U. S. 14 How. 568, 14 L. Ed. 545; Mansur v. Blake, 62 Me. 38; Strout v. Millbridge Co., 45 Me. 76; Veazie v. Dwinel, 50 Me. 497; Holden v. Robinson Mfg. Co., 65 Me. 215.

In Granger v. Avery, 64 Me. 292, it was held that the owner of the lands on both sides of a river, above tide water, owned also the islands therein.

In Bradford v. Cressey, 45 Me. 9, it was said that in this country, in consequence of the greater size and navigable character of many of our rivers, the common law doctrine of riparian proprietors has been modified to some extent, and in many instances restricted to nonnavigable fresh water rivers.

Rhode Island—Hughes v. Providence etc. R. Co., 2 R. I. 493; Olney v. Fenner, 2 R. I. 211, 57 Am. Dec. 711.

Massachusetts—Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; King v. King, 7 Mass. 496; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Hatch v. Dwight, 17 Mass. 286, 10 Am. Dec. 145; Ingraham v. Wilkinson, 4 Pick. 268, 16 Am. Dec. 243; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; Waterman v. Johnson, 13 Pick. 261; Bardwell v. Ames, 39 Mass. 22; Hopkins Academy v. Dickinson, 9 Gush. 544; Commonwealth v. Alger, 7 Cush. 53; McFarlin v. Essex Co., 10 Cush. 304, 309; Blood v. Nashua R. Co., 2 Grey 137, 61 Am. Dec. 444; Boston v. Richardson, 13 Allen 146, 154; Commonwealth v. Vincent, 108 Mass. 441; Deerfield v. Arms, 17 Pick. 41, 28 Am. Dec. 276; Knight v. Wilder, 2 Cush. 199, 48 Am. Dec. 660.

Vermont—Fletcher v. Phelps, 28 Vt. 257; Newton v. Eddy, 23 Vt. 319.

Wisconsin, except as to streams included in the original United States Survey, and then the owners of the adjacent lands take *at least* to the water's edge, subject always to the public right of navigation.[6] The common law rule is also followed in Illinois,

[6] St. Paul etc. R. Co. v. Schurmeir, 74 U. S. 7 Wall. 272, 19 L. Ed. 74; Middleton v. Prichard, 4 Ill. 510, 38 Am. Dec. 112; Wright v. Day, 33 Wis. 260; Delaplaine v. Chicago R. Co., 42 Wis. 314.

New Jersey—Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356, 385; Gough v. Bell, 22 N. J. L. 441; Bell v. Gough, 23 N. J. L. 624; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997; Rundell v. Delaware Canal Co., 1 Wall. Jr. 275; Fed. Cas. No. 12,139; Atty. Gen. v. Delaware R. Co., 27 N. J. Eq. 1, 631; Society v. Low, 17 N. J. Eq. 19; Cobb v. Davenport, 32 N. J. L. 369, 380.

Delaware—Delaney v. Boston, 2 Harr. (Del.) 489; Bickell v. Polk, 5 Harr. 325.

Maryland—Ridgley v. Johnson, 1 Bland Ch. 316; Baltimore v. McKim, 3 Bland Ch. 453; Browne v. Kennedy, 5 H. & J. 195, 9 Am. Dec. 503; Binney's Case, 2 Bland Ch. 99; Casey v. Inloes, 1 Gill. 430, 39 Am. Dec. 658; Day v. Day, 22 Md. 530; Goddsell v. Lawson, 42 Md. 348; Chapman v. Hoskins, 2 Md. Ch. Dec. 485.

Georgia—Young v. Harrison, 6 Ga. 130, 141; Jones v. Water Lot Co., 18 Ga. 539; Stanford v. Mangin, 30 Ga. 355; Hendrick v. Cook, 4 Ga. 241.

But in some of the above cases, it does not seem clear whether the term, "navigable" is used in its common law sense, or not. Navigable waters have been the subject of considerable legislative enactments in this State. See code 1882, Sec. 2229. See, also, Moses v. Eagle Mfg. Co., 62 Ga. 455.

Michigan—Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Norris v. Hill, 1 Mich. 202; Ryan v. Brown, 18 Mich. 196; Clark v. Campau, 19 Mich. 325; Watson v. Peters, 26 Mich. 508; Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Thunder Bay B. Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Maxwell v. Bay City Bridge Co., 41 Mich. 453, 466, 2 N. W. Rep. 639; Backus v. Detroit, 49 Mich. 110, 13 N. W. Rep. 380, 43 Am. Rep. 447; Lincoln v. Davis, 53 Mich. 375, 19 N. W. Rep. 103, 57 Am. Rep. 116; Jones v. Lee, 77 Mich. 35, 43 N. W. Rep. 855; Turner v. Holland, 65 Mich. 453, 33 N. W. Rep. 283; Fletcher v. Thunder Bay B. Co., 51 Mich. 277, 16 N. W. Rep. 645; Weber v. Pere Marquette Boom Co., 62 Mich. 626.

Exceptions—Twogood v. Hoyt, 42 Mich. 609; Rice v. Ruddiman, 10 Mich. 125; Pere Marquette Boom Co. v. Adams, 44 Mich. 403, 6 N. W. Rep. 857; Clute v. Fisher, 65 Mich. 48, 31 N. W. Rep. 614.

But see La Plaisance Bay Harbor Co. v. Monroe, Walk. (Mich.) 155, where the court held "that the beds of all meandered streams and navigable waters belong to the State," which doctrine has been overruled, and the doctrine of the common law as to ownership is now the settled law of the State. See Lorman v. Benson, 8 Mich. 18, 17 Am. Dec. 435.

Wisconsin—Jones v. Pettibone, 2 Wis. 308; Stevens Point Boom Co. v. Reilly, 44 Wis. 295, 46 Wis. 237, 49

where no reservation is made by the Government.[7] Ohio also holds that the owners of lands situated upon this class of streams own the river beds, subject to the public right of navigation.[8]

But in Pennsylvania, North Carolina, and Virginia, it has been determined that the common law does not prevail, and that the ownership of the bed or soil of all rivers which are navigable in fact for any useful purpose of trade or agriculture, whether tidal or fresh water, is in the State. The ebb and flow of the tide has been held not to be the real test of the navigability of a river. If

N. W. Rep. 978; Cohn v. Wausau Boom Co., 47 Wis. 314, 2 N. W. Rep. 546; Walker v. Shepperdson, 4 Wis. 486, 2 Wis. 384, 60 Am. Dec. 423; Kimball v. Kenosha, 4 Wis. 321; Cobb v. Smith, 16 Wis. 661; Wood v. Hustis, 17 Wis. 416; Yates v. Judd, 18 Wis. 118; Wisconsin R. Imp. Co. v. Lyons, 30 Wis. 61; Arimond v. Green Bay Co., 31 Wis. 316; Olson v. Merrill, 42 Wis. 203; Diedrich v. N. W. Ry. Co., 42 Wis. 248; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. Rep. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123.

Exceptions—Wright v. Day, 33 Wis. 260; Delaplaine v. Chicago R. Co., 42 Wis. 214, 24 Am. Rep. 386; Menasha Wooden Ware Co. v. Lawson, 70 Wis. 600, 36 N. W. Rep. 412.

Indiana—Stenson v. Butler, 4 Blackf. 285; Gentile v. State, 29 Ind. 409; Ross v. Faust, 54 Ind. 471, 475, 23 Am. Rep. 655; Dawson v. James, 64 Ind. 162; Bainbridge v. Sherlock, 29 Ind. 364, 95 Am. Dec. 644. It will be seen from an examination of the above authorities that in this State the ownership of the bed of a fresh-water navigable stream is somewhat in doubt.

[7] *Illinois*—Middleton v. Prichard, 3 Scam. 510, 38 Am. Dec. 112; Ensminger v. People, 47 Ill. 384, 95 Am. Dec. 495; Canal Trustees v. Haven, 10 Ill. 5 Gilman 548; Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295; People v. St. Louis, 10 Ill. 5 Gilman 351, 48 Am. Dec. 339; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Illinois v. Illinois Cent. R. Co., 33 Fed. Rep. 730; Houck v. Yates, 82 Ill. 179; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196.

See, also, Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838; rev'g 16 Fed. Rep. 823, in which the Court held: "That it depends upon the laws of each State to what extent the prerogative of the State to lands under the water shall extend." Brooklyn v. Smith, 104 Ill. 429, 44 Am. Rep. 90; Piper v. Connelly, 108 Ill. 646; Griffin v. Johnson, 161 Ill. 377, 44 N. E. Rep. 206; Rock Island etc. Co. v. Leisy Brewing Co., 174 Ill. 547, 51 N. E. Rep. 527; Bellefontaine Imp. Co. v. Nedringhaus, 181 Ill. 426, 55 N. E. Rep. 184, 72 Am. St. Rep. 269; St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941, 11 Sup. Ct. Rep. 337.

[8] Gavit v. Chambers, 3 Ohio 491; Lamb v. Rickets, 11 Ohio 311; Blanchard v. Porter, 11 Ohio 138, Walker v. Board of Public Works, 16 Ohio 540; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255; Niehaus v. Shepherd, 26 Ohio St. 40; Sloan v. Biemiller, 34 Ohio St. 492, 512; Day v. R. R. Co., 44 Ohio St. 406, 7 N. E. Rep. 528.

a river be deep enough for sea vessels to navigate to and from the ocean, it is a navigable stream and held to be public, and the boundary of the adjacent land is not the thread or middle of the channel, but the edge of the water, at low-water mark.[9] In the following States the authorities are divided upon the subject. In New York the earlier decisions hold that the common law rule does not apply,[10] but the later decisions adopt the common law rule,

9 *Pennsylvania*—Carson v. Blazer, 2 Binney 475, 4 Am. Dec. 463, Cooper v. Smith, 9 S. & R. 26, 11 Am. Dec. 658; Shrunk v. Schuylkill Nav. Co., 14 S. & R. 71; Hart v. Hill, 1 Whart. 124; Ball v. Slack, 2 Whart. 508, 30 Am. Dec. 278; Coovert v. O'Conner, 8 Watts 470; Bird v. Smith, 8 Watts 434, 34 Am. Dec. 483; Dalrymple v. Mead, 1 Grant's Cas. 197; Zimmerman v. Union Canal Co., 1 Watts & S. 346; Jones v. Janney, 8 Watts & S. 436, 443, 42 Am. Dec. 309; Bailey v. Miltenberger, 31 Pa. St. 37; Baker v. Lewis, 33 Pa. St. 301, 75 Am. Dec. 598; Flanigan v. Philadelphia, 42 Pa. St. 219; Monongahela Bridge Co. v. Kirks, 46 Pa. St. 112, 84 Am. Dec. 527; McKeen v. Delaware Canal Co., 49 Pa. St. 424; Tinicum Fishing Co. v. Carter, 61 Pa. (11 P. F. Smith) 21, 100 Am. Dec. 597; Wainright v. McCullough, 63 Pa. St. 66; Zug v. Commonwealth, 70 Pa. St. 138; Poor v. McClure, 77 Pa. St. 214; Fisher v. Haldeman, 20 How. 186, 15 L. Ed. 879; Simpson v. Neill, 89 Pa. St. 183; Rundell v. Del. Canal Co., 1 Wall. Jr. 275, Fed. Cas. No. 12,139; Fulmer v. Williams, 122 Pa. St. 191, 10 Atl. Rep. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88.

North Carolina — Authorities conflicting—Wilson v. Forbes, 2 Dev. 30; Ingraham v. Threadgill, 14 N. C. 3 Dev. 59; Collins v. Benbury, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722; Smith v. Ingram, 7 Ired. 175; Gilliam v. Bird, 30 N. C. 8 Ired. 280, 49 Am. Dec. 379; Fagan v. Armistead, 33 N. C. 433; Lewis v. Keeling, 46 N. C. 299, 62 Am. Dec. 169; State v. Dibble, 4 Jones 107; Ward v. Ellis, 6 Jones L. 183; State v. Glenn, 52 N. C. 7 J. L. 321; Cornelius v. Glenn, 52 N. C. 7 J. L. 512; Skinner v. Hettick, 73 N. C. 53; State v. Pool, 74 N. C. 402, 407; State v. Tomlinson, 77 N. C. 528.

In State v. Narrow Island Club, 100 N. C. 477, 5 S. E. Rep. 411, 6 Am. St. Rep. 618, the Court said, in speaking of waters: "The public right arises only in case of their navigability; whether they are navigable or not, depends upon their capacity for substantial use, as indicated. They can be so used for the free passage of vessels; the public have only the right of navigation. The title of the bed of the river, lake, or sound in such case, and all special privileges and advantages incident thereto vest and remain in the owner thereof, subject only to the public easement."

Virginia—Norfolk City v. Cooke, 27 Gratt. 430; Mead v. Haynes, 3 Rand 33; Home v. Richards, 4 Call 441, 2 Am. Dec. 574; French v. Bankhead, 11 Grat. 136; Richards v. Home, 2 Wash. (Va.) 36; Martin v. Beverley, 5 Call. 444.

10 Palmer v. Mulligan, 3 Caines 307, 2 Am. Dec. 270; People v. Platt, 17 Johns. 195; Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249; Canal

even as to such rivers as the Hudson, with the exception of the Mohawk and the Niagara Rivers.[11] Also in South Carolina, the earlier cases held that the common law rule was inapplicable to the condition of the State,[12] but in the later cases the Courts hold that the rule does apply.[13] The same may be said of Kentucky.[14] In Mississippi, also, in the earlier cases, there was a conflict of opinion; but the later cases adhere to the common law rule.[15]

Appraisers v. People, 5 Wend. 423; People v. Canal Appraisers, 13 Wend. 355, 17 Wend. 571; People v. Seymour, 6 Cowan 579; *Ex parte* Jenkins, 6 Cowan 518, 16 Am. Dec. 447; Arthur v. Case, 1 Paige (N. Y.) 447; Varick v. Smith, 5 Paige 137, 9 Paige 547, 28 Am. Dec. 417; Starr v. Child, 20 Wend. 149, 5 Denio 599, 4 Hill 369; Jackson v. Hilstead, 5 Cowan (N. Y.) 216.

11 Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407; Rev'g 8 Hun 292, in which the Court held that a fresh water stream is the private property of the riparian owners, in which the public have an easement only for navigation and for floating logs and timber, a right of passage, and nothing more, as in a common highway, and the proprietor has a right to use the land and water of the stream in any way not inconsistent with the easement. Pierpont v. Loveless, 72 N. Y. 211, 4 Hun 696; Mott v. Mott, 68 N. Y. 246, 8 Hun 474; Morgan v. King, 35 N. Y. 454, 18 Barb. 277; 30 *Id.* 9; Buffalo Pipe Line Co. v. N. Y. R. Co., 10 Abb. N. Cas. 107, 116, note. As to the Hudson, see Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Canal Appraisers v. People, 17 Wend. 571; People v. Canal Appraisers, 33 N. Y. 461; Crill v. Rome, 47 How. P. 398; People v. Gutchess, 48 Barb. 656; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Kingman v. Sparrow, 12 Barb. 201.

12 In Cates v. Wadlington, 1 McCord, 580, 10 Am. Dec. 699, it was held that a river merely capable of being navigable was private. In Jackson v. Lewis, Cheves, S. C. 259, the law is considered in doubt.

13 McCullough v. Wall, 4 Rich. 68, 86, 53 Am. Dec. 715; Boatwright v. Bookman, Rice, 447; Noble v. Cunningham, McMull, Ch. 280; Jackson v. Lewis, Cheves, 259; State v. Hickson, 5 Rich. 447; State v. Columbia, 27 S. C. 137, 146; Shands v. Triplet, 5 Rich. Eq. 76, 79.

14 As to early cases see Louisville v. U. S. Bank, 3 B. Mon. 138, 143; Thurman v. Morrison, 14 B. Mon. 367; Morrison v. Thurman, 17 B. Mon. 249, 66 Am. Dec. 153; Hawesville v. Lander, 71 Ky. 8 Bush. 679; Trustees v. Wagnon, 1 A. K. Marsh. 243; Cockrell v. McQuinn, 4 T. B. Mon. 62; Bruce v. Taylor, 2 J. J. Marsh, 160; Hart v. Rogers, 9 B. Mon. 418, 422. Late cases: Berry v. Snyder, 3 Bush. 266, 274, 96 Am. Dec. 219; Williamsburg Boom Co. v. Smith, 84 Ky. 372; Kentucky Lumber Co. v. Green, 87 Ky. 257, 8 S. W. Rep. 439; Louisville Bridge Co. v. Louisville, 81 Ky. 189; Miller v. Hepburn, 8 Bush. 326.

15 Magnolia v. Marshall, 39 Miss. 109; Morgan v. Reading, 3 S. & M. 366; Commissioners Homochitto River v. Withers, 29 Miss. 21.

§ 330. Title to beds—Public land States—State may adopt either rule.—In 1845, in the case of Pollard v. Hagan,[1] the Supreme Court of the United States declared that the shores of all navigable waters, and the soil under them, were not granted by the Constitution to the United States, but were reserved to the States respectively; and that the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. The reason for this rule, as set forth by Mr. Justice McKinley, who rendered the opinion of the Court, was that to give to the United States the right to transfer to a citizen the title to the banks and the beds under navigable rivers, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States has been invested by the Constitution. This case, although itself deciding as to the title to the soil under a tidal stream, has been construed to apply to all navigable streams. And, in harmony with the principles of that case, it has been decided that all such navigable waters and the land under them in the public domain of the United States within the Territories, while subject to be disposed of by Congress, under trust for the public use, were yet held by the United States to be transmitted to the new States to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original States.[2] Hence, it is

1 43 U. S. 3 How. 212, 11 L. Ed. 565.

2 That each State has the power to make such laws governing the waters flowing within its boundaries and their use, see Secs. 374, 593.

That the title to the soil under fresh water navigable waters is governed by the laws of the respective States, see the following cases: Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997; Pollard v. Kibbe, 50 U. S. 9 How. 471, 13 L. Ed. 220; Hallett v. Beebe, 54 U. S. 13 How. 25, 14 L. Ed. 35; U. S. v. Pacheco, 69 U. S. 2 Wall. 587, 17 L. Ed. 865; Smith v. Maryland, 59 U S. 18 How. 74, 15 L. Ed. 270; Weber v. State Harbor Comrs., 85 U. S. 18 Wall. 57, 21 L. Ed. 798; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; St. Louis v. Myers, 113 U. S. 566, 28 L. Ed. 1131, 5 Sup. Ct. Rep. 640; Manchester v. Massachusetts, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep.

left entirely to the respective States, formed out of these Territories, as to whether the navigable rivers and streams, together with the soil under them, within their respective jurisdictions, shall, in accordance with the principles of the common law, belong to the riparian owners;[3] or, whether the common law shall be entirely abrogated in this respect by their constitutions, statutes, or by the construction of their Courts as to whether or not the common law is inapplicable to the conditions, needs, and necessities of the respective States; and in the latter case for the States to retain the title to the soil under these rivers in trust for the public, and with no right of alienation or disposition of such property by the State which does not recognize and is not in execution of the trust.[4] And, as a necessary consequence of the ownership by the States, in trust,

210; St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941, 11 Sup. Ct. Rep. 337; San Francisco v. Leroy, 138 U. S. 656, 34 L. Ed. 1096, 11 Sup. Ct. Rep. 364; Knight v. Land Assn., 142 U. S. 161, 35 L. Ed. 974, 12 Sup. Ct. Rep. 258; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. Ed. 85, 15 Sup. Ct. Rep. 991; Mumford v. Wardell, 73 U. S. 6 Wall. 423, 18 L. Ed. 756; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, reversing 16 Fed. Rep. 823; Withers v. Buckley, 61 U. S. 20 How. 84, 15 L. Ed. 816; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Gutierres v. Albuquerque Land etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 New Mex. 177, 61 Pac. Rep. 357; Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487, 7 Sup. Ct. Rep. 313; Strader v. Graham, 51 U. S. 10 How. 82, 13 L. Ed. 337; The Montello, 87 U. S. 20 Wall. 430, 22 L. Ed. 391; Boquillas Cattle Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; Whitaker v. McBride, 197 U. S. 510, 49 L. Ed. 857, 25 Sup. Ct. Rep. 530; Weems etc. Co. v. People's etc. Co., 214 U. S. 345, 53 L. Ed. 1024, 29 Sup. Ct. Rep. 661; Lowndes v. Huntington, 153 U. S. 1, 38 L. Ed. 615, 14 Sup. Ct. Rep. 758; Jackson v. Chew, 25 U. S. 12 Wheat. 153, 6 L. Ed. 583; McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015, 5 Sup. Ct. Rep. 652; Kean v. Calumet Canal etc. Co., 190 U. S. 452, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349, 42 L. Ed. 497, 18 Sup. Ct. Rep. 157; Mobile Transp. Co. v. Mobile, 128 Ala. 335, 30 So. Rep. 645, 64 L. R. A. 333, 86 Am. St. Rep. 143.

[3] For title to the beds of streams under common law, see Secs. 328, 329.

[4] Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110.

of all of the navigable waters and the land under them within their jurisdictions, it has been decided that rights in and incident to such navigable waters are to be determined solely with reference to the law of the State in which such navigable waters are situated.[5] It is true that in the case of St. Paul & Pac. R. Co. v. Schurmeir,[6] there is some *dictum* that "the better opinion is, that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is that all such rivers shall be deemed to be and remain public highways." But it will be noticed that in this case the Supreme Court of the United States simply affirmed the rule as established in the State of Minnesota, relative to this subject, and affirmed the decision of the Supreme Court of that State in the same case.[7] As to the expression, "the better opinion," we will add that it could hardly be in the face of the cases cited in our notes, leaving this subject entirely to the respective public land States. As to the express provision that all such rivers shall be deemed to be and remain public highways, the Court referred to the Act of May 18, 1796, as re-enacted on March 3, 1803,[8] which simply provides that: "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways." What the case really decided was that on these streams the riparian proprietors had the right of access along their lands, and that their title extended *at least* to the water's edge. This we deem to be the correct rule, as it gives the owners all the incidents of riparian proprietorship to the use of the water, including river frontage, with right of access to and from the adjoining land, and also gives them the right of accretions, so that they are not separated from the edge of the water of the river.[9] And, in

[5] Kean v. Calumet Canal & I. Co., 190 U. S. 452, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651.

See, also, cases above cited.

[6] 74 U. S. 7 Wall. 272, 19 L. Ed. 74.

[7] 8 Minn. 113, Gil. 88, 83 Am. Dec. 770.

[8] 1 Stat. L. 468; 2 Stat. L. 235; 6 Fed. Stat. Ann. 1905, p. 787; Rev. Stat. of U. S., Sec. 2476.

[9] See, also, Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. Ed. 984; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210, in which the Court said: "In this case we accept the view of the Supreme Court of California in its opinion *as expressing the law* of that State, 'that the Sacramento River being navigable in fact, the title of the plaintiff extends no further than the edge of the

the face of the statute cited, this can be done without impairing the right of the public to the use of the streams for navigation purposes, and that, too, whether the riparian owner has title to the beds of these streams, or whether his title extends only to the water's edge.

§ 331. **Title to beds—Public land States—The rule in the States.**—Having seen in the preceding section [1] that it is left entirely with each State to adopt such a rule as to the ownership or title to the soil under fresh water navigable waters as it sees fit, in this section we will discuss what the public land States have done in that respect. Some of the public land States have adopted one rule of ownership of the beds of fresh water navigable streams, and some another. In adopting the common law rule without any qualification or modification, it is equivalent to declaring that the title of the beds of fresh water navigable streams is in the riparian owners.[2] However, the States may, by their constitutions, statutes, or even by the decisions of their Courts as to the applicability of the common law in this respect within the boundaries of the respective States, adopt any doctrine which they see fit.[3] Many of the States of the arid region have entirely repudiated the doctrine of riparian rights; and, of course, as the right of ownership of the soil under a navigable stream is one of the riparian rights, this has gone with the rest. Other States, notably California, have repudiated the common law as to the ownership of the soil under these streams, but adhere to the common law doctrine as to their flow of water.[4] In Alabama, by a compact between that State and the United States, when it was admitted to the Union,

stream'; citing Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.''

See, also, Dutton v. Strong, 1 Black 23, 66 U. S. 35, 17 L. Ed. 29; Jones v. Soulard, 65 U. S. 24 How. 41, 16 L. Ed. 604; Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302; Braxon v. Bressler, 64 Ill. 488.

1 See Sec. 330.

2 See Riparian Owners, Secs. 476-482.

3 See as to the common law not applicable to the arid West, Secs. 588-594.

4 Green v. Swift, 47 Cal. 536; Cardwell v. Sacramento Co., 79 Cal. 347, 21 Pac. Rep. 763; Wright v. Seymour, 69 Cal. 122, 10 Pac. Rep. 323; Foss v. Johnstone, 158 Cal. 119, 110 Pac. Rep. 294; Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. Rep. 65.

See, also, Cal. Pol. Code, Secs. 2349, 2875; Cal. Civ. Code, Sec. 670; 1 Kerr's Cyc. Codes, pp. 545, 680; 2 Kerr's Cyc. Codes, p. 629.

the navigable rivers were dedicated to public use, so that they could not subsequently be placed in private ownership.[5] In Arkansas it is held that a riparian owner on a fresh water navigable stream who derives his title from the Government takes to the high-water mark only, and not to the middle of the stream.[6] In Florida, it was first held that the State was the owner of the beds of all navigable streams,[7] but by the Act of the legislature of 1856, the State vested all title between the low-water mark and the channel of these streams in the riparian proprietors.[8] In the State of Idaho, in the recent case of Johnson v. Johnson,[9] the Supreme Court, by a legislative decision, and contrary to the great weight of authority, especially in the Western States, announced and adopted the doctrine that a riparian owner upon the streams of that State, both navigable and nonnavigable, takes title to the bed of the stream to the thread of the same, subject, however, to an easement for the use of the public.[10] This places Idaho in

See, also, United States v. Mission Rock Co., 189 U. S. 39, 47 L. Ed., 865, 23 Sup. Ct. Rep. 606.

Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210, affirming the rule laid down in the same case by the Supreme Court of California, 71 Cal. 134, 11 Pac. 873, and in Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. 674, that where, by the terms of a patent, land is bounded by a navigable river, the title extends no further than to the edge of the stream. See, also, People v. Gold Run D. & M. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. Rep. 1152.

See, also, California, Part 14.

5 Mobile v. Eslava, 9 Port. (Ala.) 597, affirmed 41 U. S. 16 Pet. 234, 10 L. Ed. 948, in which it was held that upon the admission of the State of Alabama it was provided that "all navigable waters within said State shall remain public highways, free to the citizens of said State, and of the United States, without any tax, impost, or toll therefor, imposed by the State."

See, also, Hess v. Cheney, 83 Ala. 251, 3 So. Rep. 791; Magee v. Hallett, 22 Ala. 699; Pollard v. Kibbe, 1 Ala. 403; Bullock v. Wilson, 2 Porter (Ala.), 436; Kennedy v. Bebee, 8 Ala. 909; Hagan v. Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 269; Boulo v. New Orleans, M. & T. R. Co., 55 Ala. 480; Stein v. Ashby, 24 Ala. 521; Essis v. Carey, 20 Ala. 725; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Peters v. New Orleans R. Co., 56 Ala. 528; Williams v. Glover, 66 Ala. 189; Walker v. Allen, 72 Ala. 456; Sullivan v. Spotswood, 82 Ala. 163, 2 So. Rep. 716.

6 St. Louis, I. M. & S. R. Co. v. Ramsey, 53 Ark. 314, 13 S. W. Rep. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195.

7 Bucki v. Cone, 25 Fla. 1, 6 So. Rep. 160; State v. Black River Phosphate Co., 27 Fla. 276, 9 So. Rep. 205.

8 Rivas v. Solary, 18 Fla. 122.

9 14 Idaho, 561, 95 Pac. Rep. 499, 24 L. R. A., N. S. 1240.

10 For the better rule, see dissenting opinion of Mr. Justice Sullivan in Johnson v. Johnson, *supra*.

the position of rejecting riparian rights as to the flow and use of the water of streams, but retaining the riparian right as to the ownership of the soil under the water of streams. In Iowa it is held that the test of navigability is the capacity of the streams, and that State holds the title to the beds of all navigable streams.[11] Kansas also adheres to the same doctrine.[12] The same may be said of the States of Minnesota,[13] Missouri,[14] Nebraska,[15]

See, also, Lattig v. Scott, 17 Idaho 506, 107 Pac. Rep. 47.

11 McManus v. Carmichael, 3 Iowa 1; Kraut v. Crawford, 18 Iowa 549; 87 Am. Dec. 414; Haight v. Keokuk, 4 Iowa 199; Grant v. Davenport, 18 Iowa 179; Tomlin v. Dubuque, B. & M. Co., 32 Iowa 106, 7 Am. Rep. 176; Moffatt v. Brewer, 2 G. Greene 348; Musser v. Hershey, 42 Iowa 356; Houghton v. Chicago, D. & M. R. Co., 47 Iowa 370; Renwick v. Davenport & N. W. R. Co., 49 Iowa 664, affirmed in 102 U. S. 180, 26 L. Ed. 51; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; but see Ingraham v. Chicago, D. & M. R. Co., 34 Iowa 249; Brown v. Cunningham, 82 Iowa 512, 48 N. W. Rep. 1042, 12 L. R. A. 583.

12 Woods v. Fowler, 26 Kan. 682, 40 Am. Rep. 330, was an action by the owner of lands bordering on the Kansas River, to restrain certain parties from cutting and removing ice formed opposite his land. The stream had once been used for navigation, but had subsequently been declared nonnavigable by the legislature; and the Court, by Brewer, J., delivering the opinion, declared that "the act of the Legislature did not extend to the riparian owner's title to the thread of the river, and that the title to the soil being in the State, and the stream being a public highway, ownership of the ice would rest in the general public, or in the State, as the representative of the public."

See, also, Kreger v. Fogarty, 78 Kan. 541, 96 Pac. Rep. 845.

13 Schurmeier v. St. Paul R. Co., 10 Minn. 82, 102, 88 Am. Dec. 59, 74 U. S. 7 Wall. 272, 19 L. Ed. 74. In the opinion of Castner v. The Dr. Franklin, 1 Minn. 73, the Court said: "The navigation of small streams has been embarrassed and impeded by individual ownerships and improvements. Lands bounded by navigable rivers have carried, as incidents to this circumstance, the exclusive right to the soil to the middle of the stream, and where they were united in the same person on both sides of the river, such person has exercised exclusive control of the entire channel adjacent."

See, also, Union Dept. St. R. & Transfer Co. v. Brunswick, 31 Minn. 297, 17 N. W. Rep. 626, 47 Am. Rep. 789; Miller v. Mendenhall, 43 Minn. 95, 44 N. W. Rep. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219.

See, also, *In re* Minnetonka Lake Imp. Co., 56 Minn. 513, 58 N. W. Rep. 295, 45 Am. St. Rep. 494.

14 Benson v. Morrow, 61 Mo. 345; Lamme v. Buse, 70 Mo. 463; Meyers v. St. Louis, 8 Mo. App. 266, 82 Mo. 367; Perkins v. Adams, 132 Mo. 131, 33 S. W. Rep. 778; Rees v. McDaniel, 115 Mo. 145, 21 S. W. Rep. 913; Hahn v. Dawson, 134 Mo. 581, 36 S. W. Rep. 233; Jones v. Soulard, 65 U. S. 24 How. 41, 16 L. Ed. 604.

See, also, Cooley v. Golden, 117 Mo. 33, 23 S. W. Rep. 100, 21 L. R. A. 300.

15 Kinkead v. Turgeon, 74 Neb. 573, 104 N. W. Rep. 1061, 1 L. R. A.,

Nevada,[16] Oregon,[17] and Washington.[18] In Tennessee it was first held that the soil was in the State, where the rivers were actually navigable.[19] But it is now held that the title is in the riparian owners in all streams except those which are navigable for sea-going vessels, which is in the State.[20] In the following States the common law of riparian rights is rejected *in toto*: Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming.[21] As the ownership of the beds of fresh water streams navigable in fact is one of the riparian rights, it follows that this right was

N. S. 762, 109 N. W. Rep. 744, 7 L. R. A., N. S. 316, 13 Am. & Eng. Ann. Cas. 43, where the Court held that the title to the bed of a navigable river in Nebraska is in that State, and the rights of a riparian proprietor on such stream are bounded by the banks of the river. See, also, cases cited.

16 Shoemaker v. Hatch, 13 Nev. 261, where it was held that the water course, and not the meander line by which it is surveyed, is the boundary of a fractional subdivision of land.

17 Mipto v. Delancy, 7 Ore. 377, where the Court held that where a navigable river was meandered in making the public survey, and the United States has granted land bounded by the meandered line, the grantee takes the river. The stream, and not the meander line, is the true boundary of the riparian owner. Weis v. Oregon Iron Co., 13 Ore. 496, 11 Pac. Rep. 255; Moor v. Willamette Transp. Co., 7 Ore. 355; Johnson v. Knott, 13 Ore. 308, 10 Pac. Rep. 418; Parker v. West Coast Packing Co., 17 Ore. 510, 515, 21 Pac. Rep. 822, 5 L. R. A. 61; Shaw v. Oswego Iron Co., 10 Ore. 371, 45 Am. Rep. 146; Salem Imp. Co. v. McCourt, 26 Ore. 93, 41 Pac. Rep. 1105; State v. Portland etc. Co., 52 Ore. 502, 95 Pac. Rep. 722, 98 Pac. Rep. 160; Coquille v. Johnson, 52 Ore. 547, 98 Pac. Rep. 132, 132 Am. St. Rep. 716.

18 Palmer v. Peterson, 56 Wash. 74, 105 Pac. Rep. 179.

19 Elder v. Burrus, 6 Humph. 358, 367, in which Mr. Justice Thorley said: "Shall it be held that the interest of the community of England requires that their navigable streams should belong to the Crown as public property, but that in all the States bordering on the Mississippi and its mighty tributaries, these great and important highways, by which such an amount of merchandise of every kind and description is annually sent to market, shall belong to private individuals because the tide does not ebb and flow in them? Surely not, unless we are compelled by positive law to so maintain."

20 Stuart v. Clark, 2 Swan 9, 58 Am. Dec. 49; Goodwin v. Thompson, 15 Lea 209, 54 Am. Rep. 410; Irwin v. Brown, 12 S. W. Rep. 340; Bowman v. Wathen, 2 McLean 376, Fed. Cas. No. 1740; Martin v. Nance, 3 Head 649; Holbert v. Edens, 5 Lea 204, 40 Am. Rep. 26; Posey v. Jones, 7 Lea 102; Sigler v. State, 66 Tenn. 7 Baxt. 493; Roberts v. Cunningham, Mart. & Y. 67; Sighs v. State, 7 Baxter 493; Memphis v. Overton, 3 Yerger 387.

21 As to rejection of riparian rights, see Secs. 585-594, and authorities cited.

also rejected and the ownership of the beds of these streams is in the States under whose jurisdiction these waters flow. It will be noticed that these States are within the extreme arid portion of the United States, where the navigable rivers are few and as a general thing small. But, regardless of the rule adopted by the respective States as to the ownership of the soil under these waters, the public has the right of navigation of these streams and the other rights, which will be discussed hereafter.[22]

§ 332. **Meandered bodies of water—Title between lines.**—There is another class of fresh water navigable streams which requires more than a passing notice here, and that is the class of streams of this nature which have been meandered by the Government. The meander lines were made under the authority of the Federal Government in the course of the survey of the public lands, when the same were being prepared for settlement, and consist of a surveyed line around lakes and other similar bodies of water, and also along the sides of rivers and other water courses when they were of such size that they could not be conveniently included in the measurement of the land by the regular survey in sections and townships and ranges. As far as the rights of the Government are concerned, when it meanders any body of water or a water course and sells the adjoining lands to settlers, and the water is navigable, the title to the bed or soil between the meandered lines vests in the State within which it lies, to be used by the State in trust for all of the people. These meander lines are supposed to follow the banks of the streams and are run to show the sinuosities of the streams, although often, through the carelessness of the Government surveyors, or even through fraud upon their part, they do not always follow the banks or the edge of the high water. At times, in fact, there is a considerable strip of land between the meandered line and the high-water line, and the question has often arisen as to whom this belongs, especially after the fractions of land down to the meandered line have been sold to *bona fide* settlers. Regardless of the cause of any discrepancy, with the sale of these lands within a State by the Government, down to the meander lines, all title of the Government passes, the land included within the fraction down to the meander line to the settler, and

22 For right of navigation, see Secs. 341-357.

the land between the meander line and the high-water line to the State. With the title passes away all authority or control of the executive department of the Government over the land on both sides of the meander line, and over the title which it has conveyed. As was said by the Supreme Court of the United States in the case of Moore v. Robbins,[1] "It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, cancel or annul the instrument which he has made and delivered," as to permit the Government to claim the land between the meander line and the high-water mark, after it has conveyed the land down to the meander line to a settler.[2] It then devolves upon the State to declare the rule of law as to the ownership both of the bed of the stream itself and the strip of land between the meander line and the high-water line. The title of the grantee will extend to the point allowed by the State laws, so that, in case the rule of the State is that his title extends to the thread of the stream, it will extend to that point.[3] And again, when the rule of the State is that the title of the riparian owner stops with the high-water line and that the actual bed of the stream is in the State, the grantee of the Government takes only to that line.[4] But whatever may be the rule of the State as to the ownership of the beds of the streams, it is well settled that meander lines are not intended as boundaries, but that either the thread or the high-water line of the body of water will be regarded as the true boundary.[5]

1 96 U. S. 530, 24 L. Ed. 848.

2 See, also, Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 442, 11 Sup. Ct. Rep. 819; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, reversing 16 Fed. Rep. 823; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Murphy v. Kirwan, 103 Fed. Rep. 104, 83 Fed. Rep. 275, 28 C. C. A. 348; Richardson v. U. S., 100 Fed. Rep. 714; Pollard v. Hagan, 44 U. S. 3 How. 212, 11 L. Ed. 565; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548.

3 Hanson v. Rice, 88 Minn. 273, 92 N. W. Rep. 982.

See, also, common law theory of riparian rights, Secs. 450-551.

4 For ownership of the beds of streams and other bodies of water, see Secs. 326-331.

5 Jefferis v. East Omaha Land Co., 134 U. S. 178, 33 L. Ed. 872, 10 Sup. Ct. Rep. 518; Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 442, 11 Sup. Ct.

§ 333. Ownership in the water—In general.—There can be no absolute title to the *corpus* of the water of a stream or other body of water, either by the public, State, or individual, so long as it is flowing naturally.[1] As we have seen, there may be an absolute title to the bed and banks of a water course or other body of water,[2] but the water itself is never stationary; and, so long as it remains in its natural course, it can not be brought into the possession of any one, and hence it follows that there can be no absolute title to it. It is like the air—a naturally flowing substance, incapable of absolute ownership.[3] Justinian says that the things common to mankind by the law of Nature, are the air, running water, the sea, and consequently the shores of the sea.[4] However, a right may be acquired to the use of running water, or a certain amount of running water, which the law will regard and protect as property.[5] Further than this the law will not, because it can not, go. As well might the law attempt to apportion a certain amount of the air in the atmosphere to one State, or to one individual, as to attempt to apportion a certain

Rep. 819; St. Paul & P. R. Co. v. Schurmeir, 74 U. S. 7 Wall. 272, 19 L. Ed. 74, 10 Minn. 82, 88 Am. Dec. 59.

1 See Riparian Rights, Secs. 450-551.

See Appropriation of Water, Secs. 585-756.

See, also, Secs. 288, 289.

2 See Secs. 325-332.

For rights of the riparian owners in the water, see Sec. 455.

3 Acton v. Blundell, 12 M. & W. 324, 13 L. J. Exch. N. S. 289; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S. 359; Los Angeles v. Baldwin, 53 Cal. 469; Dalton v. Bowker, 8 Nev. 190; Owen v. Field, 102 Mass. 104; Baltimore v. Appold, 42 Md. 442; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 299; Pollett v. Long, 56 N. Y. 200, 58 Barb. 20; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Bliss v. Kennedy, 43 Ill. 67; Druley v. Adam, 102 Ill. 177; Cooper v. Williams, 4 Ohio 253, 22 Am. Dec. 745; McCord v. High, 24 Iowa 336; Meyers v. St. Louis, 8 Mo. App. 266, 82 Mo. 367; Merritt v. Parker, Coxe 460, 1 N. J. L. 526; Mayor v. Commissioners, 7 Pa. St. 348; 2 Black. Com. 18; Callis on Sewers, 268.

See, also, Sec. 455, for rights of riparian owners in the water.

4 Justinian, Inst., D. 1, T. 8, C. XLI, T. 1, Sec. 1.

5 Kidd v. Laird, 15 Cal. 162, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

That a water right is property, see Secs. 768-770.

amount of running water. Water, in its natural condition, is constantly moving. It flows by or through one man's property today, and by or through another's tomorrow. Today it is in one State and tomorrow it is in another. Yet we often hear or see the expression of ownership in running water; this is especially true in the Court decisions. There may be a right to use the water, but there can be no absolute ownership of its *corpus*. Neither sovereign nor subject can have any greater than a usufructuary right in running water.[6]

§ 334. **The right to the use of the water does not depend upon the ownership of the bed.**—The right of the State or the public, or of an individual, to use the waters of natural streams does not depend upon the title or ownership of the beds of the streams. At common law it depends upon the ownership of the *ripa* or bank by the riparian owner.[1] As we shall see when we come to the discussion of the Arid Region doctrine of appropriation, no ownership is required either in the bed of the stream or the bank in order to acquire a right to the use of the water. So, when we come to the use of the water of the natural streams, it makes no difference as to whether the title of the soil under the water is in the State or in the riparian owner, this use is governed by other rules of law.[2] The right of the individual, under the law of this country, is also subject to the rights of the public to navigate all waters which may be used for that purpose, and the other rights of the public, which we will discuss in this chapter.[3] Where the State owns the bed, the right of the State to use the water is subject to the rights of the individual riparian owners. The only advantage which comes to the State by virtue of this ownership, is that the water, so far as it can be used within its bed, is subject to the common use of all citizens who can gain access to it. The State can not remove such waters from their courses nor pollute it to the extent that causes injury to the riparian owners whose lands

6 Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

1 For riparian rights, see Secs. 450-551.

2 For the Arid Region doctrine of appropriation, see Chap. 31, Secs. 585-594.

3 See Secs. 334-340. Fulmer v. Williams, 122 Pa. 191, 15 Atl. Rep. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88; Hudson River R. Co. v. Loeb, 30 N. Y. Super. Ct. (7 Roberts) 418.

it flows by or across. The State can only use such quantities of the water for special purposes as can be used without affecting the character of the water body. All public bodies of water and the land covered by them, are held by the State within which or by which they flow in trust for all the people, who alike have the benefit thereof in navigation, fishing, boating, and the like.[4] Hence the State has no such title to the water of a public stream that it can sell the exclusive right either to the water itself, or to the enjoyment of its use to one person. But the water must be left free for the common use of all the citizens as it was in a state of nature. The power of the State over public waters within its boundaries is limited to the enactment and enforcement of such reasonable police regulations as may be deemed necessary to preserve the common right of all.[5] Hence it follows that the State may regulate the mode of navigation, and hunting and fishing, the time and manner of taking ice, the quantity of water which may be withdrawn from the common mass, and any other matters which the good of the public requires.[6] The legislatures of the respective States may, for the good of the public, subordinate one public use to another, and declare the order of the uses for which the water may be used, if there is not water enough to satisfy all demands;[7] this is also true in those States in the Western portion of this country where the law of appropriation prevails.[8] The ownership of these bodies of

[4] Fuller v. Shedd, 161 Ill. 462, 44 N. E. Rep. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356.

[5] McLennen v. Prentice, 85 Wis. 427, 55 N. W. Rep. 764; Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Newark Aq. Bd. v. Passaic, 45 N. J. Eq. 393, 18 Atl. Rep. 106; Priewe v. Wisconsin St. Land & Imp. Co., 93 Wis. 534, 67 N. W. Rep. 918, 33 L. R. A. 645, 103 Wis. 537, 79 N. W. Rep. 780; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. Rep. 185; Pitkin v. Olmstead, 1 Root 217; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Rossmiller v. State, 114 Wis. 169, 89 N. W. Rep. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910; Stockton v. Baltimore & N. Y. R. Co., 32 Fed. Rep. 9; Woodruff v. North Bloomfield Gravel Min. Co., 8 Sawy. 628, 16 Fed. Rep. 25, 9 Sawy. (U. S.) 441, 18 Fed. Rep. 753.

[6] Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

[7] Bailey v. Philadelphia, W. & B. R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; Mullen v. Penobscot Log-Driving Co., 90 Me. 555, 38 Atl. Rep. 557.

[8] Order in which appropriations may be made, see Secs. 791-794.

public water being in the State, in trust for all of the people, it is the duty of the legislature to enact such laws as will best preserve its use for all persons, and for all purposes.[9] As was held in a recent Iowa case,[10] the public right which every inhabitant may exercise is not confined to any particular use of these waters, and therefore the Court held that the legislature may forbid the taking of ice from a stream the title to which is in the State, in favor of a public use for skating and other sports.[11] We will now discuss some of the uses which may be made of public or navigable waters, by the State or general public.

§ 335. **Right of access to public waters—From the land side.**—One of the requisites of public waters is that there must be a right of access of the public to those waters. This is true whether the public claims the right to the waters for navigation,[1] fishing,[2] cutting ice,[3] or any other use of the waters, in which the public claim to have rights. Hence a body of water, although navigable in itself, is not public if it lies wholly within the lands of an individual, or can not be reached by the public without trespassing upon private property.[4] If an individual have land adjoining a body of public water, he may reasonably refuse permission to have the public in general, or any person go over it to approach the water unless there be a public way over it.[5] In fact a statute attempting to give a

9 Commonwealth v. Gilbert, 160 Mass. 157, 35 N. E. Rep. 454, 22 L. R. A. 439; Commonwealth v. Perley, 130 Mass. 469; Organ v. State, 56 Ark. 267, 19 S. W. Rep. 840; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. Rep. 805, 32 L. R. A. 380.

10 Park Comrs. of Des Moines v. Diamond Ice Co., 130 Iowa 603, 105 N. W. Rep. 203, 3 L. R. A., N. S. 1103.

11 See, also, Cook v. Burlington, 30 Iowa 94, 6 Am. Rep. 646; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110.

1 Right of Access to Navigable Streams, see Sec. 344.

2 See Secs. 358-368.

3 See Sec. 337.

4 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A., N. S. 275; Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951, 14 L. R. A. 386.

For Access to Waters for Navigation, see Sec. 344; Angell, Tidewaters, Sec. 28; White v. Whittier, 2 Dane, Abr. 712; Bickel v. Polk, 5 Harr. (Del.) 325.

5 Magnolia v. Marshall, 39 Miss. 110; Rowell v. Doyle, 131 Mass. 474; West Roxbury v. Stoddard, 7 Allen 158; Coolidge v. Williams, 4 Mass. 140; Paine v. Woods, 108 Mass. 160; Cortelyou v. Van Brundt, 2 Johns. 357, 3 Am. Dec. 439; Stetson v. Bangor, 60 Me. 313; Allen v. Jay, 60 Me. 124, 12 Am. Law Reg., N. S. 497, 11 Am. Rep. 185; Brastow v. Rockport

right of way to cross private lands to reach public waters is unconstitutional, upon the ground of taking private property without compensation.[6] And so, it was held by the Supreme Court of Massachusetts in the case of Slater v. Gunn,[7] that the use for more than 100 years, of a well-known and well-defined roadway from a public road to a public body of water, by hunters, fishermen, picnic parties, and by whomsoever chose, without objection and without obstruction, does not establish a way by dedication or prescription, where it does not appear that such use was not with the express or implied permission of the owners of the land. In fact, so strict is the law upon this subject and so careful is it to protect private rights, that there seems to be but one exception to this rule whereby the public may be justified in passing over the private lands of an individual, to reach public waters, and that is in the case of a wreck of a vessel in those waters; and that is based upon the necessity of the case, and upon the theory of the common law that the king was the owner of the wreck, and he has the right of way over any man's land to his wreck.[8] Rights of way may be acquired over private lands by license, grant, prescription, or dedication; or highways may be laid out, and acquired by eminent domain, to afford access to the water by the public.[9] In fact, the proper access to a public stream should be by a highway; the stream should be a continuation of the highway, to which the public have full rights. And, a public road laid out to a public body or stream of water becomes a public landing

Ice Co., 77 Me. 100; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; New England Trout & Salmon Club v. Mather, 68 Vt. 338, 35 Atl. Rep. 323, 33 L. R. A. 569; Freedom v. Norris, 128 Ind. 377, 27 N. E. Rep. 869; Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951, 14 L. R. A. 386.

The Massachusetts colonial ordinance gave a right to any one to go to a great pond on foot through uninclosed lands, provided that he could not cross lands in crop. Barrows v. McDermott, 73 Me. 441.

[6] New England Trout & Salmon Club v. Mather, 68 Vt. 338, 35 Atl. Rep. 323, 33 L. R. A. 569.

[7] 170 Mass. 509, 49 N. E. Rep. 1017, 41 L. R. A. 268.

[8] Anonymous, 6 Mod. 140; Hetfield v. Baum, 35 N. C. (13 Ired. L.) 394, 57 Am. Dec. 563.

[9] Parsons v. Clark, 76 Me. 476.

If a highway is laid out to a river the owner of the soil can not by filling out in front of the street obstruct the public right of way to the river. Newark Lime & C. Mfg. Co. v. Newark, 15 N. J. Eq. 64; People v. Lambier, 5 Denio 9, 47 Am. Dec. 273; *Re* Wells Ave., 22 N. Y. S. R. 648, 4 N. Y. Supp. 301; Jersey City v. Morris Canal & Bkg. Co., 12 N. J. Eq. 545; Hoboken Land & I. Co. v. Hoboken, 36 N. J. L. 540.

at its termination, and piers constructed at the ends of such streets are mere extensions of the highways, the title to which is vested in the public.[10]

§ 336. **Right of access to public waters—Obstructions from the water side.**—The right of access to public waters is a property right and usually in the riparian owner;[1] and, therefore, it is held that the State itself can not make or authorize to be made any obstruction upon the water side of navigable waters, which will prevent the riparian owner from having free access from his land to the stream or from the stream to his land, unless it be done under the exercise of the power of eminent domain for a public use, and upon just compensation made therefor.[2] This is the rule adopted by the most of the States, and, as we believe, the correct one. This subject, however, comes properly under the subject of riparian rights and will be more thoroughly discussed in a subsequent portion of this work.[3] It is held in an early case in California: "The State can not make or authorize to be made an obstruction in navigable waters in front of any proprietor, which will prevent his having free access by water to his land, unless it be done in the exercise of its power to take private property for such use and

10 North Hemstead Highway Comrs. v. Queens County, 17 Wend. 9; *Re* New York C. & H. R. Co., 77 N. Y. 248; Dana v. Craddock, 66 N. H. 593, 32 Atl. Rep. 757.

1 For Riparian Rights, see Secs. 450-551.

2 Yates v. City of Milwaukee, 77 U. S. 10 Wall. 497, 19 L. Ed. 984, where it is held that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the river and the right to make a landing, wharf, or pier for his own use or for the use of the public, of which the owner can not be deprived, except for a public use and upon just compensation.

See, also, San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 Pac. Rep. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72, 1 Am. & Eng. Ann. Cas. 182; Eldridge v. Cowell, 4 Cal. 80; Case v. Toftus, 39 Fed. Rep. 730, 5 L. R. A. 684; Sullivan Timber Co. v. City of Mobile, 110 Fed. Rep. 187; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Shepard v. Coeur d'Alene Lumber Co., 16 Idaho 293, 101 Pac. Rep. 591; Small v. Harrington, 10 Idaho 499, 79 Pac. Rep. 461; Kamm v. Norman, 50 Ore. 9, 91 Pac. Rep. 448, 11 L. R. A., N. S. 290, 126 Am. St. Rep. 689; State *ex rel.* Denny v. Bridges, 19 Wash. 44, 52 Pac. Rep. 326, 40 L. R. A. 593, and note; Mashburn v. St. Joe Imp. Co., 19 Idaho 30, 113 Pac. Rep. 92.

3 For riparian rights, right of access, see Sec. 540.

compensation made therefor."[4] The question as to whether compensation should be granted to a riparian owner, whose right of access is taken for the improvement of navigation, is left entirely to State law.[5] In England it was held that no compensation need be given to riparian owners in the improvement of navigation, upon the ground that there could be no riparian rights in navigable streams.[6]

§ 337. **Right of the public to gather ice.**—The right of the public to gather ice from streams and other bodies of water, deemed public in their nature, is not co-ordinate with the right of the public to navigate those waters.[1] A stream may be public in so far as the right of the public to navigate the same, whether the State or a riparian owner owns the soil under the water, depending entirely whether the stream is in fact actually navigable.[2] The rule govern-

[4] Eldridge v. Cowell, 4 Cal. 80. That the above proposition is the common and better rule, see, also, Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. Ed. 984; San Francisco Savings Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 Pac. Rep. 822, 66 L. R. A. 242, 103 Am. St. Rep. 72, 1 Am. & Eng. Ann. Cas. 182.

See, also, Denny v. Bridges, 19 Wash. 44, 52 Pac. Rep. 326, 40 L. R. A. 593, and note; Shepard v. Coeur d'Alene etc. Co., 16 Idaho 293, 100 Pac. Rep. 591; Bigham Bros. v. Port Arthur etc. Co., 100 Tex. 192, 97 S. W. Rep. 686, 13 L. R. A., N. S. 656, reversing *Id.*, 91 S. W. Rep. 848; Mashburn v. St. Joe Improvement Co., 19 Idaho 30; 113 Pac. Rep. 92; Kamm v. Norman, 50 Ore. 9, 91 Pac. Rep. 448, 11 L. R. A., N. S. 290, 126 Am. St. Rep. 698; United States v. Mission Rock etc. Co., 189 U. S. 391, 47 L. Ed. 865, 23 Sup. Ct. Rep. 606.

That the New York decisions are opposed to the above view, see Gould v. Hudson River R. Co., 6 N. Y. 552; People v. Tibbets, 19 N. Y. 523; People *ex rel.* Loomis v. Canal Appraisers, 33 N. Y. 461; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Sage v. New York, 154 N. Y. 61, 47 N. E. Rep. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592; Langdon v. New York, 93 N. Y. 129.

[5] See United States v. Mission Rock etc. Co., 189 U. S. 391, 47 L. Ed. 865, 23 Sup. Ct. Rep. 606; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, reversing 16 Fed. Rep. 823; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Shively v. Bowlby, 152 U. S. 49, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548.

[6] The King v. Directors of Bristol Dock Co., 12 East 429, 104 Eng. Reprint 167.

See, also, Crawford etc. Co. v. Hathaway, 67 Neb. 329, 60 L. R. A. 889, 93 N. W. Rep. 781, 108 Am. St. Rep. 647; Cohen v. United States, 162 Fed. 364.

[1] See Right of Navigation, Chap. 16, Secs. 341-357.

[2] For streams actually navigable, see Secs. 343-346.

ing the gathering of ice is that the title to the ice is in the one owning the title to the soil under the water. If the soil belongs to the riparian owner he has the exclusive right to the ice; and, upon the other hand, when the ownership of the soil is in the State or public, the right to the ice is given to all who can gain access to it, without trespassing upon private lands.[3] Although it is held that the State has no title to the ice which may accumulate on public waters, in the sense that it can go into the ice business and sell for its own emolument, and that the only title which it has is one in trust for all the people, it has such a right that it may regulate the taking of the ice by the people, the same as it may prescribe reasonable regulations governing other uses by the public of public waters.[4] And hence it is held that it is within the power of the legislature of a State to substitute one public use for that of another, without its being an invasion of a right of property.[5] A somewhat extreme case involving this principle was recently decided in Iowa, where it was held that the legislature could forbid the taking of ice

3 See, for right of access, Secs. 335, 336, 344.

See Appropriation of Water for Ice Ponds, Sec. 699.

See Riparian Owner's Right to Take Ice, Sec. 493; Brown v. Cunningham, 82 Iowa 512, 48 N. W. Rep. 1042, 12 L. R. A. 583; Brastow v. Rockport Ice Co., 77 Me. 100; Cummings v. Barrett, 10 Cush. 186; West Roxbury v. Stoddart, 7 Allen 158; Gage v. Steinkrauss, 131 Mass. 222; Barrows v. McDermott, 73 Me. 441; Rossmiller v. State, 114 Wis. 169, 89 N. W. Rep. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910; Rowell v. Doyle, 131 Mass. 474; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Fay v. Salem & D. Aqueduct Co., 111 Mass. 27; Hittinger v. Eames, 121 Mass. 539; Tudor v. Cambridge Waterworks, 1 Allen 164; Ham v. Salem, 100 Mass. 350; Commonwealth v. Vincent, 108 Mass. 441; People's Ice Co. v. Davenport, 149 Mass. 322, 21 N. E. Rep. 385; McFadden v. Haynes & D. Ice Co., 86 Me. 319, 29 Atl. Rep. 1068; Woodman v. Pitman, 79 Me. 456, 10 Atl. Rep. 321, 1 Am. St. Rep. 342; Sanborn v. People's Ice Co., 82 Minn. 43, 84 N. W. Rep. 641, 51 L. R. A. 829, 83 Am. St. Rep. 401.

4 Barrows v. McDermott, 73 Me. 441; Woodward v. Pitman, 79 Me. 456, 10 Atl. Rep. 321, 1 Am. St. Rep. 342; Rossmiller v. State, 114 Wis. 169, 89 N. W. Rep. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910; Commonwealth v. Gilbert, 160 Mass. 157, 35 N. E. Rep. 454, 22 L. R. A. 493; Commonwealth v. Perley, 130 Mass. 469; Organ v. State, 56 Ark. 267, 19 S. W. Rep. 840; Bittenhouse v. Johnston, 92 Wis. 588, 66 N. W. Rep. 805, 32 L. R. A. 380; Cooley's Const. Lim., 6th Ed., p. 643.

5 Cooley's Const. Lim., 6th Ed., p. 666; McManus v. Carmichael, 3 Iowa 1; Cook v. Burlington, 30 Iowa 94, 6 Am. Rep. 649; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110.

from a stream, the title to which was in the public, in favor of a public use for skating and other sports.[6]

§ 338. **Right of a State to divert water for power purposes.**—It is beyond the power of a State to appropriate to itself the riparian or other rights in waters for the sole purpose of creating a water power to be leased for manufacturing purposes, even under its right of eminent domain.[1] As said by the Supreme Court of the United States, "This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."[2] However, we have seen that the State may take the water of streams to aid in navigation, and when so taken, should power be created as an incident to the improvement of the navigation, it need not be permitted to go to waste, but it may be sold or leased by the State.[3]

§ 339. **Right of State to divert water from a stream for irrigation.**—Under the common law, the State or public have no right to divert the waters of streams, or other bodies, for the purpose of irrigation. Water, as we shall see,[1] under certain circumstances, may be diverted from the streams and used for irrigation as a riparian right by individuals, but even this is straining the strict construction of the common law as it originated in England. One of the fundamental principles of the common law respecting water rights is, that the water must flow in the channel of the stream where it was wont to flow by Nature.[2] But, for the State or public, at common law, to divert the waters of a stream for the purpose of selling or leasing water for irrigating lands, no such thing is known at common law. However, in India, one of the British provinces, in

[6] Park Comrs. of Des Moines v. Diamond Ice Co., 130 Iowa 603, 105 N. W. Rep. 203, 3 L. R. A., N. S. 1103.

See, also, Bailey v. Philadelphia, W. & B. R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; Mullen v. Penobscot Log-Driving Co., 90 Me. 555, 38 Atl. Rep. 557.

[1] For eminent domain, see Secs. 1059-1098.

[2] Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173; *Id.*, 90 Wis. 370, 61 N. W. Rep. 1121, 28 L. R. A. 443, 48 Am. St. Rep. 937.

[3] See, also, Water Rights for Power Purposes, Secs. 695, 847-855.

[1] See Irrigation as a Riparian Right, Secs. 498-525.

[2] See Riparian Rights, Secs. 450-551.

this respect we find that the common law rule is entirely abrogated, and the State does it all; not only constructing all of the irrigation works, but by a system of leases for a term of years, collects the water rates.[3] Again, as we will see, by constitutional or legislative enactments, in many of the Western States, all waters within the State are dedicated to the State or public.[4] This gives the State the right, at least, of supervision and control of all waters within its jurisdiction. Again, we find that it is within the power of many of the States to construct irrigation works, and divert the water as a right to make internal improvements, and sell or lease the same to individuals. The Supreme Court of Colorado held that public reservoirs constructed by the State for the storage of water for irrigation and domestic purposes are "internal improvements" within the meaning of the Act of Congress, providing that five per cent of the proceeds of the sale of agricultural lands lying within the State of Colorado shall be paid to the State for the purpose of making such internal improvements, and that the fund could be used for the purpose of diverting water from natural streams for the purpose of irrigation.[5] And the Supreme Court of Colorado again held,[6] that a system of reservoirs and canals, authorized by statute for the purpose of storing and delivering water to all within reach thereof, for application to beneficial uses specified by the State constitution, is fairly embraced within the statutory phrase, "internal improvement." In fact, in some portions of the arid West, water is so scarce, and its careful husbanding for irrigation and other beneficial uses so important, that legislative action, wisely directed and properly guarded, may become the foundation of a domestic or internal improvement second to no other in its public importance. Hence it follows, that a State, under its general power of internal improvement, has the right to construct reservoirs and irrigation systems and to divert the waters of the natural streams into these systems for the use of the general public, the same as it has the power to construct roads, or to build bridges. It must be

3 For irrigation in India, see Chap. 5, Secs. 103-118.

4 See Dedication of Waters to a State, Chap. 18, Secs. 372-389.

5 *Re* Internal Improvement Fund, 12 Colo. 285, 21 Pac. Rep. 484.

As to the right of a State to construct systems of canals and reservoirs, see, also *Re* Canal Certificates, 19 Colo. 63, 34 Pac. Rep. 274; *Re* Internal Improvements, 18 Colo. 317, 32 Pac. Rep. 611.

6 *Re* Internal Imp. Fund, 12 Colo. 285, 21 Pac. Rep. 438.

added, however, that in this, as in other cases, there must be no invasion of the rights of prior appropriators, or other rights which have vested in and to the waters of the streams from which the diversion is made.

§ 340. **Miscellaneous rights of the public.**—There are also a number of other rights which the public have in waters, and with which we have to deal. But as these will be discussed in separate chapters, a bare mention of them in this place will suffice. There is the right that the public have to navigation,[1] especially as that right has conflicted, or may conflict in the future, with the right of irrigation, or other appropriations of water for beneficial uses. There is the right that the general public have in the fishing and hunting in and on the public waters, and the exclusive rights that fishing and shooting clubs may acquire in public waters.[2] Also the police powers of a State to regulate the destruction of fish by irrigation ditches will be discussed.[3] Then there is the dedication of the waters of a State by State constitutional or statutory provisions, and the effect of such a dedication.[4] The right of the State, or public, to divert water for irrigation and other beneficial purposes will receive attention,[5] as well as the right of cities and towns to acquire and protect water rights for municipal purposes.[6] The right of cities and towns to use the natural streams for sewer outlets will be treated under the general subject of pollution of waters.[7] It will be our endeavor in these discussions to keep as close to the main subject of the Western theory of appropriation of waters for beneficial purposes as possible. But, in order to trace the origin of this theory, or in order to draw comparisons between the Western theory of waters and those of the common or civil law, it will be necessary, at times, to discuss the subject from those standpoints.

1 See Chap. 16, Secs. 341-357.
2 See Chap. 17, Secs. 358-371.
3 See Sec. 371.
4 See Chap. 18, Secs. 372-389.
5 See Chap. 68.
6 See Chap. 71.
7 See Chap. 58, Secs. 1133, 1134.

CHAPTER 16.

THE RIGHT OF NAVIGATION.

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§ 343. The public right of navigation—Rule in the United States.
§ 344. Stream need not be navigable entire year—Access.
§ 345. For what purposes waters are navigable.
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§ 352. Protection of navigation by Congress—Prohibiting the obstruction of navigation—Construction of Acts.
§ 353. The destruction of the navigability of streams.
§ 354. Navigation as against irrigation.
§ 355. Navigation as against irrigation—Interference with tributaries.
§ 356. Right to use water from navigable streams for irrigation.
§ 357. Diversion of water in public streams for navigation.

§ 341. Scope of chapter.—It is not the purport of this work to go into the questions of navigation, or of maritime law, to any great extent; and, hence, except so far as to the questions of the right of the public to use all navigable waters in this country for that purpose, and the prohibition of the law against the placing of obstructions in navigable waters, and the destruction of water courses capable of being navigated, we will leave these subjects to others to discuss. Therefore, in this chapter we will discuss the right of the public to navigate the navigable waters of this country only so far as they relate to the main subject-matter of this work—irrigation and water rights—especially in this Western country.[1]

§ 342. The public right of navigation—Early rules.—The right to navigate the navigable bodies of water of the earth has descended

1 See, also, for the right of appropriation of the waters of navigable streams, Secs. 354-357, 663. For riparian rights in navigable waters, see Sec. 469.

to us from the very earliest times. This right not only included the waters of the sea, the great inland bodies of water such as lakes and inland seas, but also the rivers and water courses, which were capable of floating vessels and boats in the assistance of commerce and other purposes, and that, too, whether the soil under those waters was owned by the Crown, the State, or by private individuals. This right to the use of waters has been recognized by all nations, and from the earliest civilization. It is generally regarded as an inherent public right needing no legislative sanction. These waters of the earth have been counted in all ages and by all people as highways for all legitimate purposes of trade and transportation, and for use by all the people or the public in common. As was said in the French civil law, "Rivers, the banks of rivers, and highways are things public, the use of which is common to all persons, according to the respective laws of countries. And this kind of thing does not appertain to any particular persons."[1]

By the law of ancient Rome, upon which the French law was based, we find that not only the rivers were declared public for navigation, but also the banks thereof, where the same could aid in the navigation of the rivers, and were declared as public as the rivers themselves, although the title to the banks might be in those who possessed the lands adjoining the rivers.[2] In the Pandects we also find the praetor's interdict, "Do nothing on the banks of a public river, or in the stream, neither put anything on the banks or in the stream, whereby the landing or the navigation is made worse."[3] Coming down more nearly to our own times, we find that this public use of rivers and all navigable waters has been preserved. By the early common law of England, which law has formed the basis of our own laws, we find that only tidal waters were in law deemed navigable and public.[4] The term "navigable" was used in a strictly legal sense, and was held to be synonymous with the word "tidal" when applied to waters.[5] However, the tidal test

[1] The French Civil Law, Cushing's Ed., 1850, Vol. I, Sec. 150.

[2] Justinian, Inst. D. T. 8, C. XLI, T. 1, Sec. 4. See, also, Cooper's Ed. 1841, p. 68.

[3] D. 43, 12, I. Also, Roman Water Law, Ware, Sec. 16.

[4] See definitions of public and private waters, Secs. 290, 291, 296.

[5] 3 Kent. Com. 13th Ed. 413, 414; Miles v. Rose, 1 Marsh. 313, 5 Taunt. 705, 1 Eng. C. L. Rep. 240; Royal Fisheries of the Banne, Davies Rep. 149; Ward v. Creswell, Willes Rep. 268; Warren v. Mathews, 6 Mod. 73; Carter v. Murcot, 4 Burr. 2162, 98 Eng. Rep. F. R. 127; Carson v. Blazer, 2 Bin. 475 (Pa.), 4 Am. Dec. 463;

of navigability was only a *prima facie* one at common law, tidal waters being held, in many instances, as nonnavigable;[6] and, upon the other hand, although at common law no waters are deemed navigable above the ebb and flow of the tide,[7] we find that in England itself, dating back to the very earliest reports, many rivers above the influence of the tide were declared to be navigable in fact and subject to the rights of the public for that purpose.[8] It is said that

Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 10. The Genesee Chief v. Fitzhugh, 53 U. S. 12 How. 443, 13 L. Ed. 1058, where the Court said that under the common law "tide water and navigable water are synonymous terms."

6 Woolrych on Waters, p. 411; Mayor of Lynn v. Turner, Cowper 86. In Miles v. Rose, *supra*, Mr. Chief Justice Gibbs said: "The flowing of the tide, though not absolutely inconsistent with the right of private property in the creek, is strong *prima facie* evidence of its being a public navigable river." See, also, Rex v. Montague, 4 B. & C. 598, in which Mr. Justice Bailey says: "The strength of this *prima facie* evidence must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purpose of commerce, it would be but natural to conclude that it has been a public navigable one, but if it is a petty stream, navigable only at certain periods of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel." See, also, McManus v. Carmichael, 3 Iowa 1.

Sullivan v. Spotswood, 82 Ala. 163, 2 So. Rep. 716; Simpson v. Seavey, 8 Me. 138, 22 Am. Dec. 228; Glover v. Powell, 10 N. J. Eq. 211; State v. Pacific Guano Co., 22 S. C. 50; Groton v. Hurlbert, 22 Conn. 178; Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186.

7 The Royal Fishery of the Banne, Davies Rep. 149; Angell on Water Courses, 6th Ed., Sec. 542; Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295; Schultes, Aquatic Rights 133.

8 19 Assize, p. 63, pl. 6; 22 Assize, p. 106, pl. 93; Hale, De Jure Maris, Chs. 1, 2; Williams v. Wilcox, 8 Ad. & El. 314, 3 Nev. & P. 606, 7 L. J. Q. B. N. S. 229, 1 W. W. & H. 477; Smith v. Andrews, 2 Ch. 678, 65 L. T. N. S. 175; Pierse v. Fanconberg, 1 Burr. 292; Grant v. Gordon, Mor. Dic. 12,822, cited in L. R. 2 App. Cas. 872.

In Blount v. Layard, 2 Ch. 681, a case decided in 1891, Bowen, J., in speaking of the navigability of the River Thames, said: "We are dealing with the Thames, which is not a tidal river at the place in question. But, on the other hand, it is a navigable river, that is, all of the queen's subjects have the right of passing and repassing on it, and it is what is called in the old books a 'King's stream,' by which is meant not that the soil must belong to the king, *but that it is a highway*, and that the king is the natural guardian and conservor of the commodious and convenient passage of the river by his subjects."

Leconfield v. Lonsdale, L. R. 5 C. P. 665, 39 L. J. C. P. 305, 23 L. T. N. S. 155, 18 Week. Rep. 1165; Hind v. Manfield, Noy 103; Hindson v. Ashby, 2 Ch. 1, 65 L. J. Ch. N. S.

the right to navigate waters above the reach of the tide was acquired by actual user and prescription.[9] Hence it follows that in England no body of water is deemed *prima facie* navigable, where it was above the ebb and flow of the tide, but any such portion of a river which was in fact navigable, even above the influence of the tide, might be proven so with the burden of proof upon him who asserted that to be a fact. There has been a great deal of discussion among the law writers and in the court decisions as to just what bodies were deemed navigable at common law.[10]

Without going into that question to any great extent, but simply referring to the authorities, we will say that the present rule in England under the common law is practically the same as the rule in this country, that is to say: All tide waters in both countries are *prima facie* deemed to be navigable; and all waters in both countries, above the reach of the tide, which are proven to be actually navigable may be so declared and so used by the public for that purpose. The confusion of the authorities upon this subject was caused undoubtedly by the failure to distinguish between the streams which are actually navigable, and those in which the title is in the Crown or public, under the common law. As we have seen in a previous section, the title to the soil in the Crown was limited to those under waters subject to the influence of the tide, and the use of the water was public because he held the entire title in trust for the public.[11] But whatever may be the distinction it

515, 74 L. T. N. S. 327, 45 Week. Rep. 252, 60 J. P. 484; Ball v. Herbert, 3 T. R. 253.

9 In England prescription is considered to be the true foundation of the right of passage above tide waters. Woolrych on Waters, 2d Ed. 40.

See, also, Delaney v. Boston, 2 Har. (Del.) 489; Brubaker v. Paul, 7 Dana (Ky.) 428, 32 Am. Dec. 111; Ingram v. Police Jury, 20 La. Ann. 126; Berry v. Carle, 3 Me. 269; Binney's Case, 2 Bland Ch. (Md.) 124; Scott v. Wilson, 3 N. H. 321; State v. Gilmanton, 14 N. H. 461, 478, 14 N. H. 476; Shaw v. Crawford, 10 Johns. 236; Canal Appraisers v. People, 5 Wend 423, 444; Pearsall v. Post, 20 Wend. 111, 22 Wend. 425; Wheeler v. Spinola, 54 N. Y. 377; State v. Thompson, 2 Strob. (S. C.) 12, 47 Am. Dec. 588; Stump v. McNarry, 5 Humph. (Tenn.) 363, 42 Am. Dec. 437. But it has been held that user alone is not sufficient to establish the fact of dedication to the public. Munson v. Hungerford, 6 Barb. 265; Curtis v. Kessler, 14 Barb. 511.

10 See authorities cited in last two notes.

11 See title to the soil at common law, Secs. 325-328.

See, also, Stuart v. Clark, 2 Swan 9, 58 Am. Dec. 49; Morgan v. King, 30 Barb. 9; Gerrish v. Proprietors of Union Wharf, 26 Me. 384, 46 Am.

does not affect the right of the public to a public easement for the purpose of navigation in the waters.[12]

§ 343. **The public right of navigation—Rule in the United States.**—Whatever may have been the fine distinctions as to the navigability or nonnavigability of waters under the common law, in this country they have all been abolished.[1] It has been settled by a long line of decisions that the navigable waters of the United States are those which are actually navigable in fact and which by themselves or by their connections with other waters, for a period long enough to be of commercial value, are of sufficient capacity to float water craft for the purposes of commerce, trade, transportation, or even pleasure, between this country and foreign countries, or between the States of this country, or between different points in the same State. And, if a body of water is actually navigable, for the purposes mentioned, it is public water, and the public have the right to use the same for navigation; for, as we have seen, in our definitions, the term "navigable waters" is synonymous with the term "public waters."[2] As we have said, by the common law of

Dec. 568; Murphy v. Ryan, Ir. Rep. 2 C. L. 143, 16 Week. Rep. 678; Cox v. State, 3 Blackf. 193 (Ind.).

12 *Re* State Reservation, 37 Hun 537; People *ex rel.* Howell v. Jessup, 28 App. Div. 524, 51 N. Y. Supp. 228; Flanagan v. Philadelphia, 42 Pa. 219.

1 Escanaba etc. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. Ed. 442, 2 Sup. Ct. Rep. 185, where the Court held that the common law rule of the navigability of waters, that they are subject to the ebb and flow of the tide, has long since been discarded. Vessels larger than any which existed in England when that test was established, now navigate rivers and inland lakes of this country for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the bed of the streams, as in some States it governs in that matter.

Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82, 88 Am. Dec. 59; aff'd 74 U. S. 7 Wall. 272, 19 L. Ed. 74; Queen v. Meyers, 3 U. C. C. P. 318; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655; People *ex rel.* Loomis v. Canal Apprs. 33 N. Y. 461; Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249.

The common law rule, making the ebb and flow of the tide the test of navigability is not now applicable in the United States. Weise v. Smith, 3 Ore. 446, 8 Am. Rep. 621; Hodges v. Williams, 95 N. C. 331; compare Felger v. Robinson, 3 Ore. 455; The Daniel Ball, 77 U. S. 557, 19 L. Ed. 999; The Montello, 11 Wall. 411, 20 L. Ed. 191; Chicago v. McGinn, 51 Ill. 272; McManus v. Carmichael, 3 Iowa 1; Bucki v. Cone, 25 Fla. 1, 6 So. Rep. 160.

2 See Sec. 290; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct.

England the test of navigability of a body of water was the ebb and flow of the tide, but that rule never prevailed in this country because it was inapplicable to our conditions. Here some of our streams are navigable by the largest vessels used in commerce, in some instances for more than a thousand miles above the flow of the tide. The great rivers are the arteries, and the smaller streams the veins or feeders of our internal system of navigation. In England, where the common law rule originated, the streams above the flow of the tide are few in number and capable of floating only the smaller vessels as they are constructed today. And, as we shall see in a subsequent portion of this work, in adopting the common law, we in this country adopted only that portion

Rep. 210; Rhea v. Newport etc. R. Co., 50 Fed. Rep. 16; The Genesee Chief v. Fitzhugh, 53 U. S. 12 How. 443, 13 L. Ed. 1058; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; The Montello, 87 U. S. 20 Wall. 430, 22 L. Ed. 391, where the Court held that those rivers must be regarded as public navigable rivers in law which are navigable in fact; Miller v. Mayor etc. of N. Y., 109 U. S. 385, 27 L. Ed. 971, 3 Sup. Ct. Rep. 228; Bucki v. Cone, 25 Fla. 1, 6 So. Rep. 160.

Waters of a river navigable in fact, although the bed is owned by a riparian owner, are public waters of the State. Willow River Club v. Wade, 100 Wis. 86, 76 N. W. Rep. 273, 42 L. R. A. 305, and note; Little Rock M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; People *ex rel.* Canal Apprs. v. Loomis, 33 N. Y. 461; Browne v. Scofield, 8 Barb. 239; Ingram v. Police Jury, 20 La. Ann. 226; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

The distinguishing test between those rivers which are entirely private property and those which are private property subject to the public use and enjoyment consists in whether they are susceptible or not of use as a common passage for the public. People v. Platt, 17 Johns. 195, 8 Am. Dec. 382; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Ten Eyck v. Warwick, 75 Hun 562, 27 N. Y. Supp. 536; Walker v. Allen, 72 Ala. 456; Lewis v. Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655; State v. Narrows Island Club, 100 N. C. 477, 5 S. E. Rep. 411, 6 Am. St. Rep. 618; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

If a stream is capable in its natural condition of being profitably used for any kind of navigation, its use to that extent is subjected to the general rules of law relating to navigation. Weise v. Smith, 3 Ore. 445, 8 Am. Rep. 621; Wood v. Fowler, 26 Kan. 382, 40 Am. Rep. 330; St. Louis etc. R. Co. v. Ramsey, 53 Ark. 314, 13 S. W. Rep. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195, where it was held that actual navigability is in law the test of a navigable stream; American River Water Co. v. Amsden, 6 Cal. 443; Gaston v. Mace, 33 W. Va. 14, 10 S. E. Rep. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848.

which was applicable to our system of government and the physical conditions of our country.[3] In fact, in this country, relative to the public use of our inland waters, we have more closely followed the Roman civil law than the common law. By the civil law all waters in which the flow was perennial were *publici juris*, or belonged to the public, and were navigable by the public, if they were capable of being navigated in the common sense meaning of that term. In some States the doctrine of the civil law in this respect has been carried to its utmost limit, and the rule to be deduced from its authorities, and in our opinion the better rule, is, that all streams are deemed navigable which are capable in their natural state and in their ordinary volume of water of transporting to market the products of the fields, forests, and mines.[4]

In other words, to meet the test of navigability as understood in the American law, a water course or other body of water should be susceptible of being used for purposes of commerce, or possess a capacity for valuable floatage in the transportation to the market of the products of the country through which it flows. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoret-

3 For the common law not applicable to our conditions, in certain cases, see Secs. 585-594.

4 Ten Eyck v. Warwick, 75 Hun 572, 27 N. Y. Supp. 536; Monongahela Bridge Co. v. Kirk, 46 Pa. 112, 84 Am. Dec. 527; Flanagan v. Philadelphia, 42 Pa. 219; Gaston v. Mace, 33 W. Va. 14, 10 S. E. Rep. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Goodwill v. Police Jury, 38 La. Ann. 752; Commonwealth v. Vincent, 108 Mass. 441; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; Rowe v. Granite Bridge Co., 21 Pick. 344; Murdock v. Stickney, 62 Mass. (8 Cush.) 113; Attorney Gen. v. Woods, 108 Mass. 436, 11 Am. Rep. 380; Waters v. Lilly, 4 Pick. 145, 16 Am. Dec. 333; Genesee Chief v. Fitzhugh, 53 U. S. 12 How. 443, 13 L. Ed. 1058; The Daniel Ball v. U. S., 77 U. S., 10 Wall. 557, 19 L. Ed. 999; McManus v. Carmichael, 3 Iowa 1; Woolrych on Waters, p. 40; see, also Justinian, Inst. Lib. 2, T. 1; Digest, Lib. 43, T. 12, 13, 14; Domat, Civil Law, Bk. I, Tit. 3, Arts. 1, 2; Code Napoleon, Bk. 2, Tit. 2, c. 2, Arts. 556, 560-563; Bk. 2, Tit. 2, c. 3; Ordinances of Louis XIV, S. 3, Art. 5.

See, also, Kregar v. Fogarty, 78 Kan. 541, 96 Pac. Rep. 845, where it was held that the fact that a Government surveyor had meandered the banks of a river was evidence that the river was navigable, but not conclusive of that fact.

See, also, Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171, 20 Sup. Ct. Rep. 124; State *ex rel.* Pealer v. Superior Court, 58 Wash. 565, 109 Pac. Rep. 340.

ical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable condition of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; if nonnavigable a portion of the year, the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water in certain portions, or without the connection with other navigable waters, without profitable utility, will not render a water course navigable in the legal sense so as to submit it to public servitude; nor will the fact that it is sufficient in certain limited localities for pleasure boating or to enable hunters and fishermen to float their skiffs or canoes, although these uses may be included. To be navigable, a water course must have a useful capacity as a public highway for transportation.[5]

§ 344. **Stream need not be navigable entire year—Access.**—But, upon the other hand, in order to be navigable the stream or other body of water need not be actually navigable all of the year; however, for a considerable portion of the year it must be capable of navigation. It is a well-known fact that many of the larger streams of this and other countries, at certain periods of the year, or at certain periods during certain years, become so dry that they are incapable of being navigated to any extent. But there must be sufficiently regular and continued periods of navigable capacity to make the streams of commercial or other importance; and, when they are in this condition the public have the right to use them for that purpose.[1] But all streams or other bodies of

[5] Harrison v. Fite, 148 Fed. Rep. 781, 78 C. C. A. 447; Kregar v. Fogarty, 78 Kan. 541, 96 Pac. Rep. 845; Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed. Rep. 680, 33 C. C. A. 233, 62 U. S. App. 644; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Brown v. Chadborne, 31 Me. 9, 1 Am. Rep. 641; Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178; Wethersfield v. Humphrey, 20 Conn. 218; Rowe v. Granite Bridge (21 Pick.), 38 Mass. 344; Gaston v. Mace, 33 W. Va. 14, 10 S. E. Rep. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Neaderhouser v. State, 28 Ind. 257; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Trullinger v. Howe, 53 Ore. 219, 97 Pac. Rep. 549, 99 Pac. Rep. 880, 22 L. R. A., N. S. 545.

[1] State *ex rel.* United Tanners Timber Co. v. Superior Court, 60 Wash. 193, 110 Pac. Rep. 1017; Kalama etc. Co. v. Kalama Driving Co., 48 Wash.

water, which have the requisite volume of water only occasionally as the result of freshets and for brief periods, are not navigable, so as to give the public rights therein for that purpose.[2] In order to be a public body of water it must be accessible to the public, and have a terminus by which the public can enter it and another from which they can leave it. Hence, creeks which open in navigable waters, but merely lead into private lands, are not public navigable waters.[3] But a stream to be public need not necessarily be a highway leading from one county to another.[4]

612, 94 Pac. Rep. 469, 22 L. R. A., N. S. 641, 125 Am. St. Rep. 948; State *ex rel.* Wilson v. Superior Court, 47 Wash. 397, 92 Pac. Rep. 269; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. Rep. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Gaston v. Mace, 33 W. Va. 14, 10 S. E. Rep. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Hot Springs etc. Co. v. Rivercomb, 106 Va. 176, 55 S. E. Rep. 580, 9 L. R. A., N. S. 894; Olson v. Merrill, 42 Wis. 203; Little Rock M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Colchester v. Brook, 7 Q. B. 339, 15 L. J. Q. B., N. S. 59, 9 Jur. 1090.

Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199, where the Court held that a stream 100 feet wide and three feet deep, which, during annually recurring freshets, for a period of 25 years, has been profitably used for floating logs to market, is a public highway for that purpose, the Court distinguishing between the use for floating logs, and for general commercial purposes, and holding that the title to the soil was in the land owner, but subject to the right of the public to use the stream for the purpose of floating logs and timber.

See, also, East Hoquiam Boom & Log Co. v. Neeson, 20 Wash. 142, 54 Pac. Rep. 1001; Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 8 Pac. Rep. 904; Smith v. Fonda, 64 Miss. 551, 1 So. Rep. 757; Holden v. Robinson Mfg. Co., 65 Me. 215; Olive v. State, 86 Ala. 88, 4 L. R. A. 33; Harold v. Jones, 86 Ala. 274, 5 So. Rep. 438, 3 L. R. A. 406; Felger v. Robinson, 3 Ore. 455; Sigler v. State, 7 Baxt. 493; Hallock v. Suitor, 37 Ore. 9, 60 Pac. Rep. 384; De Camp v. Thompson, 16 App. Div. 528, 44 N. Y. Supp. 1014; Lewis v. Coffee Co., 77 Ala. 190, 54 Am. Rep. 55; Thunder Bay Boom Co. v. Spechley, 31 Mich. 336, 18 Am. Rep. 184.

The mere fact that logs, poles, and rafts are floated down a stream occasionally, and in times of high water, does not make it a navigable river. U. S. v. Rio Grande Dam etc. Co., 174 U. S. 707, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

2 Morrison Bros. v. Coleman, 87 Ala. 655, 6 So. Rep. 374, 5 L. R. A. 384; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Boykin v. Shaffer, 13 La. Ann. 129; Hains v. Welch, 14 Ore. 319, 12 Pac. Rep. 502; People *ex rel.* Ricks Water Co. v. Elk River Mill & Lum. Co., 107 Cal. 221, 40 Pac. Rep. 531, 48 Am. St. Rep. 125; Cardwell v. Sacramento Co., 79 Cal. 347, 21 Pac. Rep. 763.

3 See, also, for right of public to access to public waters, Secs. 335, 336.

For right of riparian owner to

§ 345. **For what purposes waters are navigable.**—As we have said, following the civil law, the rule in this country is, that all waters which are actually navigable in fact are navigable in law, and may be used by the public for that purpose.[1] In this connection just what constitutes the test of navigability becomes important, when considering the rights of the public, the rights of riparian owners, and also the rights of the claimants to the waters of the streams or other bodies of water. In our definition we have stated that waters, in order to be navigable by the public, must have the capacity to float water craft for the purposes of commerce, trade, transportation, or even pleasure.[2] This right of the public includes not only such waters which have the capacity for the sailing of vessels or boats, but also includes all smaller streams, which are merely floatable for rafts or logs, without being bound into rafts.[3] In the Western States, therefore, where the floating

access, see Sec. 540; Chisolm v. Caines, 67 Fed. Rep. 285; State v. Duncan, 1 McCord, L. 404; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242; Manigault v. Ward, 123 Fed. Rep. 707.

But see Den *ex rel. dem.* Murry v. Sermin, 8 N. C. (1 Hawks) 56; Heyward v. Farmers' Min. Co., 42 S. C. 138, 19 S. E. Rep. 963, 20 E. Rep. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702.

Where the public could only gain access through an irrigating ditch to a navigable body of water which was entirely closed by plaintiff's land, it was held that it was not a public navigable body of water, and that the plaintiff was entitled to an injunction against parties attempting to navigate the water. Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A., N. S. 275.

4 Commonwealth v. Charlestown, 1 Pick. 180, 11 Am. Dec. 161.

1 See previous Sec. 344.

2 See Sec. 343.

3 Deddrick v. Wood, 15 Pa. 9; Stuart v. Clark, 2 Swan 9, 58 Am. Dec. 49; Carlson v. St. Louis Dam and Improv. Co., 73 Minn. 128, 75 N. W. Rep. 1044, 41 L. R. A. 371, and note, 72 Am. St. Rep. 610.

The true test in determining the right of the public in the use of a stream is whether or not inherently and in its nature it is capable of being used for floatage. If it is an easement in favor of the public it exists whether it has been used by the public or not. Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Ames v. Port Huron Log Driving & Boom Co., 11 Mich. 139, 83 Am. Dec. 731; Falls Mfg. Co. v. Oconto etc. Co., 87 Wis. 134, 58 N. W. Rep. 257; Felger v. Robinson, 3 Ore. 455; Weise v. Smith, 3 Ore. 446, 8 Am. Rep. 621; Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584; see, also, Gerrish v. Brown, 51 Me. 256, 81 Am. Dec. 569; Whisler v. Wilkinson, 22 Wis. 572; Sellers v. Union Lum. Co., 39 Wis. 525; Cohn v. Wausau Boom Co., 47 Wis. 314, 2 N. W. Rep. 546; Palmer v. Mulligan, 3 Caines R. 308, 2 Am. Dec. 270; Shaw v. Oswego Iron Co., 10 Ore. 371, 45 Am. Rep. 146; Willow River Co. v. Wade, 100 Wis. 86, 76 N. W. Rep.

of logs to market is a common industry, the right of such floatage is protected both by the statutes of the respective States and by the decisions of the Courts.[4] All waters which are capable of floating the products of the country to a market are public highways, and are navigable within the rule subjecting navigable streams to public use.[5] Nor is it necessary that the purposes of navigation of a stream be confined to those of trade or commerce, but, it is held, that one of the purposes for which it may be used is that of pleasure. Navigability for pleasure is as sacred in the eyes of the law as navigability for any other purpose.[6] However, in our opinion, it is better to count the use for pleasure as but one of the purposes for which a stream may be deemed as navigable. It must be of considerable

273, 42 L. R. A. 305, and note; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641, where the Court held that when a stream is inherently and in its natural state capable of being used for the floating of vessels, boats, rafts, or logs, the public easement exists.

But it is held that would be going too far to extend the doctrine to streams which have the capacity to float only single logs. American River Water Co. v. Amsden, 6 Cal. 443; Sellers v. Union Lum. Co., 39 Wis. 525; Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. Rep. 697.

4 Kamm v. Norman, 50 Ore. 9, 91 Pac. Rep. 448, 11 L. R. A., N. S. 290, 126 Am. St. Rep. 698; Potlatch etc. Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, 118 Am. St. Rep. 233; State *ex rel.* United Tanners etc. Co. v. Superior Court, 60 Wash. 193, 110 Pac. Rep. 1017; Flinn v. Vaughn, 55 Ore. 372, 106 Pac. Rep. 642.

See, also, Injunctions Against Logging, Chap. 81; Damages from Logging, Chap. 83.

5 Whisler v. Wilkinson, 22 Wis. 572; Goodwill v. Police Jury, 38 La. Ann. 752; Olson v. Merrill, 42 Wis. 203; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Ames v. Port Huron Log Driving & Boom Co., 11 Mich. 139, 83 Am. Dec. 731; Keator Lum. Co. v. St. Croix Boom Corp., 72 Wis. 62, 38 N. W. Rep. 529, 7 Am. St. Rep. 837; Watkins v. Doris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199; Shaw v. Oswego Iron Co., 10 Ore. 371, 45 Am. Rep. 146.

6 Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. Rep. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541, where it was held that as population increases and towns and cities are built up in their vicinity, these waters will be still more used by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which can not now be enumerated or even anticipated; and that to hand these waters over to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which can not, perhaps, be now even anticipated.

See, also, Attorney Gen. v. Woods, 108 Mass. 436, 11 Am. Rep. 380; Browne v. Scofield, 8 Barb. 239; Gould on Waters, 3d Ed. 112.

size in order to be navigable for this purpose;[7] and, if it has a sufficient capacity for this purpose, it should be of a capacity for other purposes.[8] To be navigable, so as to entitle the public to the free use of the same, a body of water must be capable of navigation in its natural state, without the necessity of any improvement or artificial aid by man. A stream which can only be made navigable or floatable by artificial means is not a public highway.[9]

§ 346. Navigability, how determined.—The courts will take judicial knowledge that certain waters are navigable and that others are not, where these matters are of general knowledge and within the limits of their jurisdiction.[1] In fact, upon this as upon

7 Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. Rep. 491.

A stream 40 feet wide and four feet deep at high water, lasting about three months of the year, and at other times from six inches to two feet deep, and which has never been used for purposes of navigation, except by rowboats to a limited extent for pleasure, is not a navigable stream. Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178.

8 See Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A., N. S. 275.

9 East Hoquiam Boom & Log Co. v. Nesson, 20 Wash. 142, 54 Pac. Rep. 1001; De Camp v. Thompson, 16 App. Div. 528, 44 N. Y. Supp. 1014; Nutter v. Gallagher, 19 Ore. 375, 24 Pac. Rep. 250; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525; Haines v. Hall, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609; Smith v. Carlow, 114 Mich. 67, 72 N. W. Rep. 22; Rowe v. Granite Bridge Corp., 21 Pick. 344; Bourke v. Davis, L. R. 44 Ch. Div. 110, 62 L. T. N. S. 34, 38 Week. Rep. 167; Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. Rep. 491; State v. Baum, 128 N. C. 600, 38 S. E. Rep. 900; Weatherfield v. Humphrey, 20 Conn. 218; Burke County v. Catawba Lum. Co., 116 N. C. 731, 21 S. E. Rep. 941, 47 Am. St. Rep. 829; American River W. Co. v. Amsden, 6 Cal. 443; Banks v. Frazier, 111 Ky. 909, 23 Ky. L. Rep. 1197, 64 S. W. Rep. 983; U. S. v. Rio Grande Dam & Irr. Co., 9 N. M. 303, 51 Pac. Rep. 674; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Weise v. Smith, 3 Ore. 446, 8 Am. Rep. 621; Ten Eyck v. Warwick, 75 Hun 562, 27 N. Y. Supp. 536; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308; Whelan v. McLachlan, 16 U. C. C. P. 102; Boale v. Dickson, 13 U. C. C. P. 337; Ward v. Warner, 8 Mich. 508; Ligare v. Chicago M. & N. R. Co., 166 Ill. 249, 46 N. E. Rep. 803.

1 For what are navigable streams, see Secs. 343, 345; U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, rev'g *Id.*, 9 N. M. 303, 51 Pac. Rep. 674; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; Hensler v. Hartman, 16 Abb. N. C. 176, note; Clark v. Cambridge A. Irr. & Imp. Co., 45 Neb. 798, 64 N. W. Rep. 239; The Appollon, 22 U. S. 9 Wheat. 362, 6 L. Ed. 111; Peyroux v. Howard,

other subjects, the Court will usually take notice of whatever ought generally to be known within the limits of their jurisdiction.[2] But the Courts will not take judicial knowledge at what particular point on a stream between its mouth and its source navigability ceases. Such a matter is one requiring evidence and to be determined by proof.[3] Where the navigability of a stream is disputed it resolves itself into a question of fact for the jury to decide,[4] even though the tide ebbs and flows at the point in question.[5] If, however, the facts are found by the jury, the question as to whether the stream is navigable is then for the Court to decide as a matter of law.[6] In the proof of a case involving the navigability of a certain fresh body of water not already held to be navigable, the burden is upon the one asserting that the stream is navigable.[7] However, the rule is otherwise as to tidal waters, as all tidal waters are deemed *prima facie* navigable, and the burden of proof is upon the one alleging that they are not navigable.[8] Also, where a Court has found that a certain body of water is navigable, until that decision is overruled the question is considered settled; and, as between the original parties, is *res judicata*.[9] There

32 U. S. 7 Pet. 324, 8 L. Ed. 700; The Montello, 78 U. S. 11 Wall. 411, 20 L. Ed. 191; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330.

2 Greenleaf on Ev., Secs. 4, 5, and 6; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; King v. Haddock, Andrews, 137; New England Trout & Salmon Club v. Mather, 68 Vt. 338, 35 Atl. Rep. 323, 33 L. R. A. 569.

3 U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 2d Appeal, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428.

4 Southern R. Co. v. Ferguson, 105 Tenn. 552, 59 S. W. Rep. 343, 80 Am. St. Rep. 908; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; Sherman v. Sherman, 18 R. I. 504, 30 Atl. Rep. 459.

5 Jones v. Johnson, 6 Tex. Civ. App. 262, 25 S. W. Rep. 650.

6 Morgan v. King, 30 Barb. 9.

7 Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178, 83 Am. St. Rep. 821; Olive v. State, 86 Ala. 88, 5 So. Rep. 653, 4 L. R. A. 33; Walker v. Allen, 72 Ala. 456; Alabama Sipsey River Nav. Co. v. Georgia P. R. Co., 87 Ala. 154, 6 So. Rep. 73; Morrison v. Coleman, 87 Ala. 655, 6 So. Rep. 374, 5 L. R. A. 384; Gaston v. Mace, 33 W. Va. 14, 10 S. E. Rep. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Gwaltney v. Scottish Car. Tim. Co., 111 N. C. 547, 16 S. E. Rep. 692.

8 Sullivan v. Spotswood, 82 Ala. 163, 2 So. Rep. 716; Jones v. Johnson, 6 Tex. Civ. App. 262, 25 S. W. Rep. 650.

9 Sherman v. Sherman, 18 R. I. 507, 30 Atl. Rep. 459.

are a great many streams and other bodies of water which, upon the facts, have been decided to be navigable, and which are unnecessary to enumerate here. Many of these waters are held to be public navigable waters of the United States,[10] and others are held to be public navigable waters of a State.[11]

Many of the streams of the country have also been declared navigable by the legislatures of many States. As we have also seen, Congress, in the ordinance for the government of the Northwest Territory, provided that certain streams should be and remain public highways.[12] In some States statutes provide that all streams which have been meandered and returned as navigable by the surveyors of the United States Government should be deemed navigable.[13] The land law of Texas of 1837, Sec. 42 (Hart. Deg. Art. 1878), enacts that all streams of the average width of 30 feet shall be considered navigable, within the meaning of the Act, as far as they retain the average width.[14] The effect of these statutes declaring a stream navigable is peculiar. Where the streams are in fact actually navigable, they are simply declaratory, and give no additional rights which were not possessed before their enactment.[15] But in jurisdictions where there is such a statute the Courts hold that whether or not a river is navigable is a question of fact, that in no manner depends upon whether or not the legislature had declared the river navigable.[16]

10 For public waters of the United States, see Secs. 348-353.

11 For public waters of a State, see Sec. 348.

12 See Sec. 347; Caster v. The Dr. Franklin, 1 Minn. 73; State v. Wabash Paper Co., 21 Ind. App. 167, 48 N. E. Rep. 653, 51 N. E. Rep. 949.

13 Jones v. Pettibone, 2 Wis. 308; Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61.

14 Horton v. Pace, 9 Tex. 81.

See, also, Selman v. Wolfe, 27 Tex. 68.

15 Little Rock, M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Depew v. Wabash & E. Canal, 5 Ind. 8.

16 Martin v. Bliss, 5 Blackf. 35, 32 Am. Dec. 52; Murray v. Preston, 106 Ky. 561, 50 S. W. Rep. 1095, 90 Am. St. Rep. 232; Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. Rep. 277; Jones v. Pettibone, 2 Wis. 308; Olive v. State, 86 Ala. 88, 5 So. Rep. 653, 4 L. R. A. 33, where the Court held that a statute declaring a river to be a public highway, can not have the effect to make it a public highway, unless it is navigable in point of fact, without making compensation to riparian owners, damaged by the use of the stream for navigation.

See, also, Angell on Water Courses, Sec. 541; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58; Walker v. Board of Public Works, 16 Ohio 540; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655, 31 Me. 360.

In fact, under the law of eminent domain, the legislature of a State has not the right, without making compensation, to destroy the property of individuals situated upon a water course, in making it navigable, when it is not so by nature; or in appropriating such a water course to a public use by artificial erections and improvements.[17] For, as was said in the case of Hutton v. Webb,[18] a navigable water course is not created by legislation, and it can not be abolished by legislation; and it was held that the rights of the riparian owners can not be destroyed without just compensation.

The definition of a navigable stream given by the Supreme Court of Oregon in Felger v. Robinson,[19] and approved in and reaffirmed in Hallock v. Suitor,[20] and adopted in a very recent decision of Idaho in Northern R. Co. v. Post Falls Lumber and Mfg. Co.,[21] is a correct definition, and is in harmony with the general trend of the decisions of the country dealing with navigable and floatable streams. This definition is as follows: "We hold the law to be that any stream in this State is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose, and that it is not necessary that they be navigable the whole year for that purpose to constitute them such. If, at high water, they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact, to be determined, as any other question of fact, by a jury. Any stream in which logs will go by the force of the water is navigable."[22]

In the case of Duluth Lum. Co. v. St. Louis Boom & Imp. Co., 5 McCrary 382, 17 Fed. Rep. 419, it was held that a statutory declaration does not make a stream a navigable water of the United States unless it is so in fact.

17 See cases *supra;* State v. Pool, 74 N. C. 402; see, also, 75 N. C. 597; Binney's Case, 2 Bland Ch. 158; Allison v. Davidson (Tenn. Ch. App.), 39 S. W. Rep. 905; Spring v. Russell, 7 Me. (Greenl.) 273; Monongahela Nav. Co. v. Coon, 6 Pa. St. 383, 47 Am. Dec. 474; Coovert v. O'Connor, 8 Watt (Pa.) 470; Partridge v. Eaton, 63 N. Y. 482.

18 124 N. C. 749, 33 S. E. Rep. 169, 126 N. C. 897, 36 S. E. Rep. 341, 59 L. R. A. 33.

19 3 Ore. 455.

20 37 Ore. 9, 60 Pac. Rep. 384.

21 — Idaho —, 119 Pac. Rep. 1098.

22 See, also, to the same general effect, the cases as follows: Powell v. Springston Lumber Co., 12 Idaho 723, 88 Pac. Rep. 97; Potlatch Lumber Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, 118 Am. St. Rep. 233; La Veine v. Stack-Gibbs Lumber Co., 17 Idaho 51, 104 Pac. Rep. 666, 134 Am. St. Rep. 253; Mashburn v. St. Joe Improvement Co., 19 Idaho 30, 113 Pac. Rep. 92.

§ 347. The right of navigation reserved by the Government.—During the formative period of this Government the founders were very careful to reserve all of the waters of the country which could be used for highways by navigation for that purpose. In 1787, in the ordinance for the government of the territory of the United States northwest of the Ohio River, it was provided: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor."[1] After the adoption of the Constitution of the United States by the Act of May 18, 1796,[2] re-enacted by the Act of March 3, 1803,[3] it was provided that: "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways." This later Act having been in force from almost the first after the organization of our Government, it in effect reserves the use of all these navigable waters for navigation by the public from all grants to riparian owners upon these waters, and that, too, whether the soil under these waters was deemed to be in the riparian owners or in the State, according to the rule adopted within the respective jurisdictions.[4]

§ 348. The navigable waters of the United States and of a State distinguished.—But there are two classes of public navigable waters—the navigable waters of the United States, and the navigable waters of a State. The navigable waters of the United States, within the meaning of the various Acts of Congress relating thereto, and over which Congress has full and complete jurisdiction, may be defined as those waters which form, in their ordinary condition

See, also, Moore v. Sanborne and Brown v. Chadbourne, *supra*, and Com'rs of Burke County v. Catawba Lumber Co., 116 N. C. 731, 21 S. E. Rep. 941, 47 Am. St. Rep. 829.

1 See Ordinance of 1787, for government of Northwest Territory, Art. IV, 8 Fed. Stat. Ann., 1905, p. 22; 1 U. S. Comp. Stat., 1901, p. lxi.

2 6 Fed. Stat. Ann., 1905, p. 787; 2 U. S. Comp. Stat., 1901, p. 1567; 1 Stat. L. 468, U. S. Rev. Stat., 1878, Sec. 2476.

3 *Id.*, 2 Stat. L. 235.

4 See for ownership of soil under navigable waters, Secs. 328-332.

by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[1] In contradistinction from the navigable waters of the United States, the navigable waters of a State are those waters which do not form such a highway for commerce with other States or foreign countries, in themselves or by their connection with other waters, and are only navigable between different places within the same State, and over which the State has full and complete jurisdiction.[2]

A body of water wholly within the boundaries of a single State, or one which is navigable only within a State, and one which can not be visited by vessels coming from or going to, by continuous voyages, navigable waters of other States, is not a navigable body of the United States, and is not within the jurisdiction of Congress.[3] Wherever in its course the stream ceases to be navigable

1 20 Op. Atty. Gen. 101; The Daniel Ball v. U. S., 77 U. S. 10 Wall. 557, 19 L. Ed. 999; U. S. v. Burlington & H. C. Ferry Co., 21 Fed. Rep. 331; U. S. v. The Montello, 78 U. S. 11 Wall. 411, 20 L. Ed. 191; same case on another appeal, 87 U. S. 20 Wall. 430, 22 L. Ed. 391; Cardwell v. American River Bridge Co., 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. Rep. 423.

For the purpose of founding admiralty jurisdiction a canal may be held to be navigable water of the United States, if it comes within the definition of such water. *Ex parte* Boyer, 109 U. S. 629, 27 L. Ed. 1056, 3 Sup. Ct. Rep. 434; Perry v. Haines (The Robert W. Parsons), 191 U. S. 17, 48 L. Ed. 73, 24 Sup. Ct. Rep. 8.

See, also, Miller v. New York, 109 U. S. 385, 27 L. Ed. 971, 3 Sup. Ct. Rep. 228; U. S. v. Moline, 82 Fed. 592; Wallamet Iron Bridge Co. v. Hatch, 9 Sawy. 643, 19 Fed. Rep. 347; Newport & C. Bridge Co. v. U. S., 105 U. S. 470, 26 L. Ed. 1143; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. Ed. 442, 2 Sup. Ct. Rep. 185; St. Joseph Co. v. Pidge, 5 Ind. 13; Lawton v. Comr., 40 Fed. Rep. 480, 7 L. R. A. 55; The Hazel Kirk, 23 Blatchf. 292, 25 Fed. Rep. 601.

2 U. S. v. The Montello, 78 U. S. 11 Wall. 411, 20 L. Ed. 191, where it was held that the Acts of Congress, providing for the enrollment and license of vessels only apply to the vessels employed upon the navigable waters of the United States, and that Congress has not provided any regulations governing commerce between different places within a State, except so far as it is conducted in vessels on the navigable waters of the United States.

See, also, Manigault v. Ward, 123 Fed. 707; Leovy v. U. S., 177 U. S. 621, 44 L. Ed. 914, 20 Sup. Ct. Rep. 797; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242.

3 Depew v. Wabash & E. Canal, 5 Ind. 8; Neaderhouser v. State, 28 Ind. 257; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655; Kilbourn Mfg. Co., 1 Abb. (U. S.) 158, 1 Biss. 546, Fed.

for commerce between States its national character as public waters of the United States terminates, and above that point it is within the exclusive jurisdiction of the State within which the stream flows.[4] However, as we have seen, whether these waters are regarded as the navigable waters of the United States or those of the State within which they are found, if they are navigable in fact, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade or travel is or may be conducted in the customary modes of trade or travel on water, they must be regarded as public navigable waters in law.[5] And the jurisdiction of the general Government over interstate commerce and its natural highways vests in the Government the right to take all needed measures to preserve the navigability of all navigable waters of the country, even against any State action.[6]

§ 349. **Use of waters for navigation—A paramount right.**—We now come to the discussion of the relative rights, under the laws of this country as they now stand, of the public to use the waters of the navigable streams and other bodies of water for navigation, as compared with the uses of the same waters for other great industrial enterprises, especially where these uses tend to interfere with or destroy the natural navigation of the waters.

Our conclusions upon this subject are, that where the waters in question are public waters of the United States, as the same are defined in a previous section,[1] that the right of the public to navigate such bodies of water is paramount and superior to all other rights to use such waters; and, where such other uses tend to injure or destroy the navigation of bodies of water naturally navigable, such uses must give way to the rights of navigation. But, where the waters are strictly public navigable waters of a State, the rela-

Cas. 17,978; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242; Peters v. New Orleans, M. & C. R. Co., 56 Ala. 528; Groton v. Hurlburt, 22 Conn. 178.

[4] Neaderhouser v. State, 28 Ind. 257; Egan v. Hart, 45 La. Ann. 1358, 14 So. Rep. 244; Hamilton v. Vicksburg, S. & P. R. Co., 34 La. Ann. 970, 44 Am. Rep. 451; Ingraham v. Chicago, D. & M. R. Co., 34 Iowa 249.

[5] As to what waters are actually navigable and public, see Secs. 343-346; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Rhea v. Newport etc. R. Co., 50 Fed. Rep. 16.

[6] U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428.

[1] See Sec. 348.

tive right of navigation with other uses depends upon the laws of that State. However, where the streams and bodies of water are tributary to the navigable waters of the United States, and their use above would tend to injure or destroy the navigation of the rivers below, then, in that case, the uses above must give way to the rights of navigation. And, as there are very few streams in the interior portion of this country which are not directly or indirectly tributary to the navigable waters of the United States, this is a most important question that is liable to arise in the future, and will be discussed separately in another section.[2] As we have noticed, in a previous section, from the very formation of this Government, its founders, and afterward Congress, have jealously guarded these navigable waters as highways for the use of all of the people, and in which every one has an equal right. The Act passed on the 18th of May, 1796, providing that all the navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways, is still in full force and effect.[3] And, as all of the States which go to make up the arid region of this country were formed out of public lands of the United States, with the possible exception of Texas, it follows that the navigable waters of the United States within these States must remain and be deemed public highways.[4]

2 See Sec. 355.

3 See 6 Fed. Stat. Ann., 1905, p. 787; 2 U. S. Comp. Stat., 1901, p. 1567; 1 Stat. L. 468; Rev. Stat. of U. S., 1878, Sec. 2476.

4 This is true of all the States which go to make up the arid region in which there are navigable rivers. The State owns the soil under them, and the riparian owner's boundaries are limited by the banks, and such streams have all the general characteristics of public navigable waters. Packer v. Bird, 71 Cal. 131, 11 Pac. Rep. 873, aff'd 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. St. Rep. 80; Shoemaker v. Hatch, 13 Nev. 261; Minto v. DeLancy, 7 Ore. 337; Moore v. Willamette Transp. Co., 7 Ore. 308; Johnson v. Knott, 13 Ore. 308, 10 Pac. Rep. 418; Parker v. West Coast Packing Co., 17 Ore. 510, 21 Pac. Rep. 822, 5 L. R. A. 61; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; Haight v. Keokuk, 4 Iowa 199; Tomlin v. The Dubuque B. & M. Co., 32 Iowa 106.

That the public right of navigation is a right paramount to all others in navigable waters, see Sec. 349.

See, also, Musser v. Hershey, 42 Iowa 356, 361; McManus v. Carmichael, 3 Iowa 1; Delaware etc. R. Co. v. Stump, 8 Gill & J. (Md.) 479, 510, 29 Am. Dec. 561; Post v. Munn, 4 N. J. L. 61, 7 Am. Dec. 570; Davis v. Jenkins, 5 Jones (N. C.) 290;

Other uses of waters of navigable waters of the United States[5] are entirely subject to the right of navigation, and, where such uses seriously interfere or destroy that right they must give way to it, in any proceeding brought on behalf of the Government, and the fact be proved that the navigation was injured or destroyed by such uses. This is true, even though the State where the injury was done authorized by law such uses of the water or the obstructions in streams whereby the navigable capacity of the stream was injured or destroyed. As a general rule it may be stated that no State by legislation can destroy or authorize the destruction of the capacity of a body of water for navigation, unless such water is completely and absolutely within its jurisdiction, or navigable waters of the State.[6] And, whatever may be its powers with respect to waters over which it has absolute dominion, it certainly can not destroy rights which belong equally to other

Hodges v. Williams, 96 N. C. 331, 59 Am. Rep. 242; Flanagan v. Philadelphia, 42 Pa. St. 219, in which was held the right of navigation in all rivers actually navigable is the paramount right of every citizen.

See Cobb v. Bennett, 75 Pa. St. 326, 15 Am. Rep. 752.

In England, the right of navigation is paramount to any right of property in the Crown, and the latter can not make a grant inconsistent with it. Colchester v. Brooke, 7 Q. B. 339, 15 L. J. Q. B. N. S. 59, 9 Jur. 1090; Williams v. Wilcox, 8 A. & E. 314, 3 Nev. & P. 606, 1 W. W. & H. 477, 7 L. J. Q. B. N. S. 299.

So, also, the right is superior to that of fishery. Anonymous, 1 Camp. 517, and note; Lewis v. Keeling, 1 Jones (N. C.) 299, 62 Am. Dec. 168; Moulton v. Libby, 37 Me. 472, 59 Am. Dec. 57; Mason v. Mansfield, 4 Cranch 580, Fed. Cas. No. 9243; Commonwealth v. Chapin, 5 Pick. 41, 16 Am. Dec. 386; Steamboat "Globe" v. Kurtz, 4 Greene (Iowa) 433; Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695.

The Vancouver, 2 Sawy. 381, Fed. Cas. No. 16,838, in which the Court held that a wire cable laid across the Wallamet River, as a guy on which to run a ferry boat, is not an unlawful obstruction to navigation unless it actually prevents or renders hazardous the navigation of the river by others. Milwaukee Gas Light Co. v. "Gamecock," 23 Wis. 144, 99 Am. Dec. 138; Scott v. Chicago, 1 Biss. 510, Fed. Cas. No. 12,526; Castello v. Landwehr, 28 Wis. 522; Gates v. Northern Pac. Ry. Co., 64 Wis. 64; Chicago v. McGinn, 51 Ill. 266, 2 Am. Rep. 295; Felger v. Robinson, 3 Ore. 458; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; Davis v. Winslow, 51 Me. 297; Gerrish v. Brown, 51 Me. 256; Browne v. Scofield, 8 Barb. 243; Morgan v. King, 18 Barb. 288; Deidrich v. N. W. Ry. Co., 42 Wis. 203; Weise v. Smith, 3 Ore. 446, 8 Am. Rep. 621; Thunder Bay v. Speechly, 31 Mich. 336, 18 Am. Rep. 184.

[5] For the distinction, see Sec. 348.

[6] As to streams within a State tributary to navigable waters of the United States, see Sec. 355.

States, to what is sometimes termed in the books as "easement" of navigation.[7] And it may be considered as the settled law, that waters navigable in themselves in a State, and connecting with other navigable waters so as to form a waterway to other States or foreign nations, can not be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by Congress.[8]

§ 350. Protection of navigation—Bridge Acts of Congress of March 3, 1899, and March 23, 1906.—By the River and Harbor Appropriation Act of March 3, 1899,[1] Congress provided, as follows:

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in

[7] The Clinton Bridge Co., 1 Woolwrych 150, Fed. Cas. No. 2900.

See, also, Ewing v. Colquhoun, L. R. 2 App. Cas. 839.

While the term "easement" is used quite generally in books as applied to the right of the public to navigation upon all streams capable of the same, it must be understood rather in the popular than in a strictly legal sense. In Barnard v. Hinkley, 10 Mich. 459, Christiancy, J., says: "Nor do we think the right of navigation in a public river can with propriety be treated as real estate vested in the public or the State for the benefit of every individual who may have occasion to use it. It is a public right, but we see no reason to call it real estate; it is sometimes called a 'public easement,' but we do not think it comes within the meaning of the term easement, as used to designate an incorporeal hereditament, as a right of way belonging to one person or estate, over the lands of another."

[8] Const. U. S., Art. 1, Sec. 8, Cls. 2, 4, 17; Sec. 9, Cl. 5; Sec. 10, Cl. 2; Art. 6, Cl. 1; Harmon v. Chicago, 147 U. S. 396, 37 L. Ed. 216, 13 Sup. Ct. Rep. 306, reversing 140 Ill. 374, 29 N. E. Rep. 732; Sinnot v. Davenport, 63 U. S. 22 How. 227, 16 L. Ed. 243; Hatch v. Wallamet Bridge Co., 7 Sawy. 127, 6 Fed. Rep. 326; Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 6 L. Ed. 23; Moran v. New Orleans, 112 U. S. 69, 28 L. Ed. 653, 5 Sup. Ct. Rep. 38; Brown v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. Ed. 678; Guthrie v. McConnel, 2 Ohio Dec. 157, 1 West. Law Month. 593; Cass County v. Chicago, B. & Q. R. Co., 25 Neb. 348, 41 N. W. Rep. 246, 2 L. R. A. 188; Pennsylvania v. Wheeling & B. B. Co., 54 U. S. 13 How. 518, 14 L. Ed. 249; St. Joseph County v. Pidge, 5 Ind. 13; Thompson v. People *ex rel.* Taylor, 23 Wend. 537; Columbus Ins. Co. v. Peoria Bridge Assn., 6 McLean 70, Fed. Cas. No. 3,046; Jolly v. Terre Haute Draw-Bridge Co., 6 McLean 237, Fed. Cas. No. 7,441; U. S. *ex rel.* Jones v. Fanning, Morris (Iowa) 348.

[1] 6 Fed. Stat. Ann., 1905, pp. 804-821, Secs. 8-20; 3 U. S. Comp. Stats., 1901, p. 3540; 30 Stat. L. 1150.

For the construction of this Act, see Secs. 352, 353.

any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. *Provided,* That such structures may be built under the authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. *And, provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structures, unless the modification of said plans has been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress to the *navigable capacity* of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside of established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning of the same."

Sec. 11 provides for the establishment of harbor lines and displacements by fillings, etc.

Sec. 12 provides for the penalty for the violations of the Act and the removal of such obstructions, in the following language:

"Sec. 12. That every person and every corporation that shall

violate any of the provisions of Sections 9, 10, and 11 of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of said Section 11, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars, nor less than five hundred dollars, or by imprisonment (in case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the Court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any Circuit Court exercising jurisdiction in any district in which any such structures may exist, and proper proceedings may be instituted, under the direction of the Attorney General of the United States."

Sections 13 to 20 relate to other subjects than those under discussion of this work.

By the amendatory and supplemental Act of March 23, 1906, entitled, "An Act to regulate the construction of bridges over navigable waters,"[2] Congress still further provided for the construction of bridges over navigable waters by providing, in Section 1 of said Act, as follows:

"Sec. 1. That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after the completion of the structure, unless the modification of such plans has been previously submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

Sec. 5 of the Act prescribes severe penalties for the failure or

[2] Supp. Fed. Stat. Ann., 1909, p. 600; 34 Stat. L. 84.

refusal to comply with the lawful order of the Secretary of War or the Chief of Engineers, made in accordance with the provisions of the Act.

§ 351. **Protection of navigation—The Dam Acts of Congress of March 3, 1899, June 21, 1906, and June 23, 1910.**—Congress has the undoubted power to grant the right to construct a certain dam across a certain navigable river or other navigable waters of the United States. But under the Act of March 3, 1899, such a dam can not be lawfully constructed, or its construction commenced, "until the consent of Congress shall have been obtained, and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War."[1] By the supplemental and amendatory Act of June 21, 1906,[2] entitled, "An Act to regulate the construction of dams across navigable streams," Congress still further provided for the construction and the regulation of the construction of dams across the navigable waters of the United States. But by the Act of June 23, 1910, the law relative to the construction of dams was entirely amended, to provide, as follows:[3]

"Section 1. That when authority has been or may hereafter be granted by Congress, either directly or indirectly, or by any official or officials of the United States, to any persons, to construct and maintain a dam for water power or other purpose across or in any of the navigable rivers of the United States, such dam shall not be built or commenced until the plans and specifications for such dam and all accessory works, together with the drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject have been submitted to the Secretary of War and the Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such dam and accessory works; and when the plans and specifications for any dam to be constructed under the provisions of this Act have been approved by the Chief

[1] For Act of March 3, 1899, see 6 Fed. Stat. Ann., 1905, p. 805; 3 U. S. Comp. Stat., 1901, p. 3540; 30 Stat. L. 1151.

[2] Supp. Fed. Stat. Ann., 1909, p. 604; 34 Stat. L. 386.

[3] For the Act of June 23, 1910, see Supp. U. S. Comp. Stat. 1911, p. 1558; 36 Stat. L. 593.

of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans or specifications, either before or after completion of the structure, unless the modification of such plans or specifications has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War: *Provided,* That in approving the plans, specifications, and location for any dam, such conditions and stipulations may be imposed as the Chief of Engineers and the Secretary of War may deem necessary to protect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and operate, without expense to the United States, in connection with any dam and accessory or appurtenant works, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress at any time may deem necessary in the interests of navigation, in accordance with such plans as they may approve, and also that whenever Congress shall authorize the construction of a lock or other structures for navigation purposes in connection with such dam, the persons owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches, and shall grant to the United States free water-power or power generated from water-power for building and operating such constructions: *Provided further,* That in acting upon said plans as aforesaid the Chief of Engineers and the Secretary of War shall consider the bearing of said structure upon a comprehensive plan for the improvement of the waterway over which it is to be constructed, with a view to the promotion of its navigable quality and for the full development of water-power; and, as a part of the conditions and stipulations imposed by them, shall provide for improving and developing navigation, and fix such charges for the privilege granted as may be sufficient to restore conditions with respect to navigability as existing at the time such privilege be granted, or reimburse the United States for doing the same, and for such additional or further expense as may be incurred by the United States with reference to such project, including the cost of any investigations necessary for approval of plans and of such supervision of construction as may be necessary in the interests of the United States: *Provided further,* That the Chief of Engineers

and the Secretary of War are hereby authorized and directed to fix and collect just and proper charge or charges for the privilege granted to all dams authorized and constructed under the provisions of this Act which shall receive any direct benefit from the construction, operation, and maintenance by the United States of storage reservoirs at the head waters of any navigable streams, or from the acquisition, holding, and maintenance of any forested watershed, or lands located by the United States at the headwaters of any navigable stream, wherever such shall be, for the development, improvement, or preservation of navigation in such streams in which such dams may be constructed.

"Sec. 2. That the right is hereby reserved to the United States to construct, maintain, and operate, in connection with any dam built in accordance with the provisions of this Act, a suitable lock or locks, booms, sluices, or any other structures for navigation purposes, and at all times to control the said dam and the level of the pool caused by said dam to such extent as may be necessary to provide proper facilities for navigation.

"Sec. 3. That the persons constructing, maintaining, or operating any dam or appurtenant or accessory works in accordance with the provisions of this Act, shall be liable for any damage that may be inflicted thereby upon private property, either by overflow or otherwise. The persons owning or operating any such dam or accessory works, subject to the provisions of this Act, shall maintain, at their own expense, such lights and other signals thereon and such fishways as the Secretary of Commerce and Labor shall prescribe, and for failure so to do in any respect shall be deemed guilty of a misdemeanor and subject to a fine of not less than $500, and each month of such failure shall constitute a separate offense and subject such person to additional penalties therefor.

"Sec. 4. That all rights acquired under this Act shall cease and be determined if the person, company, or corporation acquiring such rights shall, at any time, fail, after receiving reasonable notice thereof, to comply with any of the provisions and requirements of the Act, or with any of the stipulations and conditions that may be prescribed as aforesaid by the Chief of Engineers and the Secretary of War, including the payment into the Treasury of the United States of the charges provided for by Section 1 of this Act: *Provided,* That Congress may revoke any rights conferred in pur-

suance of this Act whenever it is necessary for public use, and, in the event of any such revocation by Congress, the United States shall pay the owners of any dam and appurtenant works built under the authority of this Act, as full compensation, the reasonable value thereof, exclusive of the value of the authority or franchise granted, such reasonable value to be determined by mutual agreement between the Secretary of War and the said owners, and in case they can not agree, then by proceedings instituted in the United States Circuit Court for the condemnation of such properties: *And provided also,* That the authority granted under or in pursuance of the provisions of this Act, shall terminate at the end of a period not to exceed fifty years from the date of the original approval of the project under this Act, unless sooner revoked as herein provided or Congress shall otherwise direct: *Provided, however,* That this limitation shall not apply to any corporation or individual heretofore authorized by the United States, or by any State, to construct a dam in or across a navigable waterway, upon which dam expenditures of money have heretofore been made in reliance upon such grant or grants.

"Sec. 5. That any persons who shall fail to comply with the lawful order of the Secretary of War and the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any persons who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and, in addition to the penalties above described, the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such dams and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such dam and accessory works as an obstruction to navigation at the expense of the persons owning or controlling such dam, and suit for such expense may be brought in the name of the United States against such persons and recovery had for such expense in any Court of competent jurisdiction. Said provision as to recovery of expense shall not apply wherever the United States has been previously reimbursed for such removal; and the removal

of any structures erected or maintained in violation of the provisions of this Act, or the order or direction of the Secretary of War or the Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the Circuit Court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Chief of Engineers or the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any dam under this Act, the cause or question arising may be tried before the Circuit Court of the United States in any district in which any portion of said obstruction or dam touches.

"Sec. 6. That whenever Congress shall hereafter, by law, authorize the construction of any dam across any of the navigable waters of the United States, and no time for the commencement and completion of such dam is named in said Act, the authority thereby granted shall cease and be null and void, unless the actual construction of the dam authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act.

"Sec. 7. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all dams which may be constructed, in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions.

"Sec. 8. That the word 'persons' as used in this Act shall be construed to import both singular and plural, as the case demands, and shall include corporations, companies, and associations. The word 'dam' as used in this Act shall be construed to import both the singular and the plural, as the case demands."

§ 352. Protection of navigation by Congress—Prohibiting the obstruction of navigation—Construction of Acts.—It was held in some of the earlier cases, and in the face of the Federal statute as it then stood, that until Congress acted upon the subject, the legislature of any State had the power to authorize the obstruction

of any navigable waters within its borders by the authorization of the construction of dams, bridges, or other structures.[1] But by Sections 8 to 20 of the River and Harbor Appropriation Act of March 3, 1899,[2] which Act superseded the Act of September 19, 1890,[3] Congress, evidently alarmed by the numerous dams and bridges constructed under the authority of the States, which constituted obstructions to the navigable waters of the United States, spoke in no uncertain tones upon the subject, and enacted a general law forbidding the placing of any of such constructions in any

1 Cardwell v. American Bridge Co., 9 Saw. 662, 19 Fed. Rep. 562, Aff'd 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. Rep. 423; Milnor v. New Jersey R. Co., 6 Am. Law. Reg. 6, Fed. Cas. No. 9,620; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. Ed. 442, 2 Sup. Ct. Rep. 185; Oregon City Transp. Co. v. Columbia Bridge Co., 53 Fed. Rep. 549.

See, also, for cases bearing upon the question of the unlawful obstruction of the navigable waters of the United States the following: United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. St. Rep. 80; United States v. North Bloomfield etc. M. Co., 81 Fed. Rep. 243; The Debris Cases, 18 Fed. Rep. 752; Newport etc. Co., 105 U. S. 470, 26 L. Ed. 1143; Luxton v. North River etc. Co., 153 U. S. 525, 38 L. Ed. 808, 14 Sup. Ct. Rep. 891; United States v. Moline, 82 Fed. Rep. 592; United States v. Milwaukee etc. Co., 5 Biss. 410, Fed. Cas. No. 15,778; Pennsylvania etc. Co. v. Wheeling etc. Bridge Co., 59 U. S. 18 How. 421, 15 L. Ed. 435; Miller v. New York, 13 Blatchf. 469, Fed. Cas. No. 9,585; Trullinger v. Howe, 53 Ore. 219, 97 Pac. Rep. 549, 99 Pac. Rep. 880, 22 L. R. A., N. S. 545; Stockton v. Baltimore etc. R. Co., 1 Interstate Commerce Rep. 411, 32 Fed. Rep. 9; The Clinton Bridge Case, 1 Woolwrych 150; Charnley v. Shawano Water etc. Co., 109 Wis. 563, 85 N. W. Rep. 507, 53 L. R. A. 895; Ogdensburg v. Lovejoy, 2 Thomp. & C. 82, 58 N. Y. 662; Southern R. Co. v. Ferguson, 105 Tenn. 552, 59 S. W. Rep. 343, 80 Am. St. Rep. 908; State v. Portland etc. Co., 52 Ore. 502, 95 Pac. Rep. 722, 98 Pac. Rep. 160; Renwick v. Morris, 7 Hill 575; Ogdensburg v. Lovejoy, 2 Thomp. & C. 82, 58 N. Y. 662; Chicago v. Laflin, 49 Ill. 172; Atty.-Gen. *ex rel.* Mann v. Revere Copper Co., 152 Mass. 444, 25 N. E. Rep. 605, 9 L. R. A. 510; Olive v. State, 86 Ala. 88, 5 So. Rep. 652, 4 L. R. A. 33; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; Collins v. Howard, 65 N. H. 190, 18 Atl. Rep. 794; Knox v. Chaloner, 42 Me. 150; Veazie v. Dwinel, 50 Me. 497.

2 6 Fed. Stat. Ann., 1905, pp. 804-821; 3 U. S. Comp. Stat., 1901, p. 3540; 30 Stat. L. 1150.

For full text of the Act as far as it relates to the construction of dams, etc., over navigable streams, see Sec. 351.

3 For text of Act of September 19, 1890, see Note 6, Fed. Stat. Ann., 1905, p. 805; 26 Stat. L. 453.

of the navigable waters of the United States, which include the navigable rivers, unless the same should be directly authorized by Congress, and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War, and provided for severe penalties against the violations of the provisions of the Act. The Act as originally passed in 1890, forbade the creation of any such obstruction "not affirmatively authorized by law"; and, therefore, it was held by the Supreme Court of the United States, that if the obstruction was authorized by the law of a State, it did not come within the condemnation of the section, and such obstructions to the navigable waters of the United States might be constructed.[4] But by the superseding Act of March 3, 1899,[5] the wording of the law was changed, and it was made unlawful to construct or commence the construction of any such obstructions of any of the navigable waters of the United States "until the consent of Congress to the building of such structures shall have been obtained and until the plan for the same shall have been submitted and approved by the Chief of Engineers and by the Secretary of War." This effectually disposed of the question of the right of a State to pass an Act authorizing such obstructions to any of the navigable waters of the United States.

But Congress did not stop with the Act of March 3, 1899,[6] but by the Act of March 23, 1906,[7] Congress placed still further restrictions and regulations upon the construction of bridges over the navigable waters of the United States, after the right to construct the same has been affirmatively granted by an Act of Congress, which construction must be subject at all times to the approval, rules, and regulations imposed by the Chief of Engineers and the Secretary of War. Also by the Act of June 21, 1906,[8] as amended and supplemented by the Act of June 23, 1910.[9] Also by the Act of June 21, 1906,[10] to regulate the construction of dams across navi-

[4] United States v. Bellingham Bay Boom Co., 176 U. S. 211, 44 L. Ed. 437, 20 Sup. Ct. Rep. 343; United States v. Hall, 63 Fed. Rep. 472, 11 C. C. A. 294, 21 U. S. App. 402; United States v. Burnes, 54 Fed. Rep. 351; Northern Pac. R. Co. v. U. S., 104 Fed. Rep. 691, 44 C. C. A. 135, 59 L. R. A. 80.

[5] See references, *supra*.

[6] For text of Act, see Sec. 350.

[7] Supp. Fed. Stat. Ann., 1909, p. 600; 34 Stat. L. 84.

[8] For text of Act, see Supp. Fed. Stat.Ann., 1909, p. 604; 34 Stat. L. 386.

[9] Supp. U. S. Comp. Stat., 1911, p. 1558; 36 Stat. L. 593.

[10] For text of Act, see Sec. 351.

gable waters of the United States, after an Act has been passed by Congress permitting the construction of such a dam, it is made unlawful to construct or commence the construction across any of the navigable waters of the United States, until the plans and specifications for its construction, together with the drawings of the proposed construction and such map of the proposed location have been submitted to the Secretary of War and Chief of Engineers for their approval, and until they shall have been approved by them. Rights are also reserved by the United States to maintain navigation through the dams by means of locks and other works necessary. The owners and persons in control of such dams must at all times comply with all of the provisions and requirements of the Act and with the stipulations and conditions that may be prescribed by the Chief of Engineers and the Secretary of War; otherwise a forfeiture of the rights acquired is worked. Severe penalties are also prescribed for a failure to comply with the provisions of the Act, and "the lawful order of the Secretary of War and the Chief of Engineers."

As we view the matter, Congress has covered the whole question prohibiting any obstructions being placed in the navigable streams of the United States, whereby the capacity for navigation is diminished. Whatever may be said in reference to obstructions existing at the time of the passage of the Acts, especially of that of March 3, 1899, under the authority of the State statutes, it is obvious that by the Act of that date and the later Acts regulating the construction of bridges and dams, that Congress means that hereafter no State, corporation, or individual, under the authority of a State, or on their own accord, shall interfere with the navigation of any stream or other body of water of the United States, without the condition of first obtaining national assent. Nor do we have to rely entirely upon the wording of the statute for our interpretation. Fortunately, the Supreme Court of the United States has construed the Act of March 3, 1899,[11] as constitutional in recent cases, notably the case of the Union Bridge Co. v. United States.[12] And in that case it was held that legislative and judicial powers are not unconstitutionally delegated to the Secretary of War by the provisions of the Act, empowering that official, after a hearing of

11 See reference, *supra*.

12 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367.

the parties interested, as provided for in Section 18, as to a bridge over a navigable waterway of the United States being an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably safe, easy, and unobstructed;[13] and, further, that the requiring the alterations or changes in a bridge over such waters is not a taking of private property for public use, for which the Federal Constitution requires compensation to be made, but is merely incidental to the exercise by the Government of its power to regulate commerce among the States.[14] And Mr. Justice Harlan, in delivering the opinion of the Court, said: "In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even created under the sanction of a State."

We will now take up the question of the destruction of the navigability of streams by other means than by obstructions at points where such streams are actually navigable.[15]

§ 353. **The destruction of the navigability of streams.**—There are other methods of destroying the navigable capacity of a body of water than by the construction of bridges, or dams, at navigable points, which we have discussed in previous sections.[1] Dams may be constructed higher up on the stream than the point of navigability, which hold the water back that would otherwise naturally flow down and add to the flow in the navigable portion. The waters of the streams themselves may be diverted from their natural channels and conducted to either other channels, or practically con-

13 See, also, New Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341; West Chicago St. Ry. Co. v. Illinois, 201 U. S. 506, 50 L. Ed. 845, 26 Sup. Ct. Rep. 518; Monongahela Bridge v. United States, 216 U. S. 177, 54 L. Ed. 435, 30 Sup. Ct. Rep. 356; North Shore Boom Co. v. Nicomen Boom Co., 212 U. S. 406, 53 L. Ed. 574, 29 Sup. Ct. Rep. 355.

14 See, also, Buttfield v. Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. Rep. 349; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495; U. S. v. Moline, 82 Fed. Rep. 592; Chatfield Co. v. New Haven, 110 Fed. Rep. 788; Scranton v. Wheeler, 179 U. S. 141, 45 L. Ed. 126, 21 Sup. Ct. Rep. 48.

15 See Secs. 354-356.

1 See Secs. 350-352.

sumed, as far as the flow of the stream is concerned, by the use of the water—notably for irrigation—thereby lessening the flow of the navigable portion of the stream. The waters from the tributaries of the stream may be diverted from their natural course to such an extent that the capacity for the navigation of the main river may be partially or wholly destroyed. All of these must in time give way to the paramount right of navigation, unless Congress makes some radical changes in the law as it now stands, based upon the theory of the relative importance of interests. In the Western portion of this country the navigable streams are few, and the navigation not very extensive on them. In many portions the agricultural interests are far more important than the navigation. In fact, there can be very little navigation without the agricultural products; and, upon the other hand, all agriculture depends upon the water from the streams. It is true that there has never been any serious conflict between these interests. But as the years go on and the country becomes more and more settled up, this conflict between these two interests will become sharper and sharper, as more water is taken from the rivers or their tributaries, and hence less water is permitted to flow down the river which may be used for navigation purposes. In fact, in many of the Western rivers, which formerly were considered navigable, there is already a notable change toward the impairment of navigation during the summer season when the water is needed the most for both uses. Now the question is, where is this conflict to end? Is the inferior navigation of these few and small streams to give way to the march of progress, resulting in the settling up of these vast tracts, and the cultivation of more land, requiring more water to properly cultivate? Or is navigation, like the dog in the manger, to stop all this progress, and remain of paramount right as the law is today? Or are there to be established in this country comprehensive systems of waterways, similar to those of other countries, notably in India [2] and Italy? [3] Here, by comprehensive schemes of river improvement, both navigation and irrigation are regarded as co-ordinate industries. The agricultural interests are not impaired by the reservation of the water for navigation, but the land is cultivated under the most intensive methods; and at the same time the navigation is main-

[2] For irrigation in India, see Chap. 5, Secs. 103-118.

[3] For irrigation in Italy, see Chap. 8, Secs. 144-159.

tained by systems of narrow and deep channels, locks, and dams, great care being taken to return all surplus water to the channels, and other provisions, necessary to the maintenance of both industries. It is true that we have made vast progress in our laws regulating waters during the last decade. It is also true that our laws have not yet arrived at the acme of perfection as far as all interests are concerned.

In a preceding section of this work, we discussed the subject, from an economic standpoint, of irrigation as an aid to navigation.[4] By systems of reservoirs and the storage therein of the storm or flood waters of the navigable rivers of the country at the time when such waters are not needed for either navigation or irrigation, and when such waters would otherwise run to waste, and by letting down these waters during periods of drought, the navigable capacity of our rivers can be immensely increased, and, at the same time a great quantity of these waters be used for the purpose of the irrigation of lands. But the trouble now is that these storage systems are not to any great extent constructed. Therefore, the waters of the streams have to be diverted directly from them during the irrigation period, which is the same period that the water is the lowest in the navigable streams and needed the most for that use. But the diversion of great quantities of water from the rivers and their tributaries during the summer months can have only the physical effect of lowering the waters in the rivers below during that same period, and thereby injuring the navigable capacity of those rivers. It is true that a certain portion of the water so diverted and used finds its way back into the streams, and, eventually, to the lower or navigable portions of the rivers. But it is also true that a great portion of the water is evaporated,[5] transpired,[6] or is lost in the soil.[7] And there being the greatest demand for water at the same season of the year, as the situation now stands, there is bound to be a greater or less conflict of interests, which must be eventually adjusted in some manner.

We will now take up the subject of the relative rights of navigation and irrigation as the law now stands in this country.[8]

[4] See Sec. 12.
[5] See Secs. 26, 27.
[6] See Sec. 28.
[7] See, also, Sec. 23.
[8] See Secs. 354-356.

§ 354. Navigation as against irrigation.—As we have said, the jurisdiction of the general Government over interstate commerce and its natural highways vests in the Government the absolute right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against the action of any State. Congress, upon the other hand, as we view the law upon the subject, has the full power to pass such laws as will eventually destroy navigation. In other words, the jurisdiction of all waters of the United States is entirely vested in Congress, and it may pass such acts relative to them as it sees fit, entirely regardless of the laws passed by any State legislature, and regardless of any particular industries affected in any locality.[1] Congress has seen fit to place the navigation of all the public waters of the United States paramount to all other uses of water.[2] We have referred to the Act passed in 1796, shortly after the formation of our Government, declaring that all navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways.[3] That Act is still in full force and effect. It is true that later, by the Act of July 26, 1866,[4] Congress recognized, so far as the United States is concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water, which customs, laws, and decisions were in direct contravention of the common law theory, that the lower riparian owner might insist upon the continuous flow of the stream as it was wont to flow.[5] The Act of July 9, 1870,[6] was still a further recognition of this right. Also, in 1877, an Act was passed for the sale of desert lands,[7] granting the right of appropriation of water from the streams, and

1 See Secs. 348, 350-353.

2 As to what are public waters of the United States, see Sec. 348.

3 Fed. Stat. Ann., 1905, p. 787; 2 U. S. Comp. Stat., 1901, p. 1567; Rev. Stat. of U. S., Sec. 2476; 1 Stat. L. 468, 2 Stat. L. 235.

See, also, Sec. 347.

4 7 Fed. Stat. Ann., 1905, p. 1090; 2 U. S. Comp. Stat., 1901, p. 1437; Rev. Stat. of U. S., 1878, Sec. 2339; 14 Stat. L. 253.

See, also, Secs. 611-619, where this Act is more thoroughly discussed.

For copy of Act, see Sec. 611.

5 For common law theory, see Secs. 543-547.

6 7 Fed. Stat. Ann., 1905, p. 1096; 2 U. S. Comp. Stat., 1901, p. 1437; Rev. Stat. of U. S., 1878, Sec. 2340; 16 Stat. L. 218.

For copy of Act, see Sec. 615.

For copy of Act, see Sec. 615.

7 6 Fed. Stat. Ann., 1905, p. 392; 2 U. S. Comp. Stat., 1901, p. 1549; 19 Stat. L. 377.

For copy of Act, see chapter on Desert Lands, Chap. 66.

that "the water of all lakes, rivers, and other sources of water supply upon the public lands *and not navigable,* shall remain and be held free for irrigation, mining, and manufacturing purposes subject to existing rights. Also on March 3, 1891, an Act was passed repealing a prior Act in respect to timber culture, Section 18 of which provided [8] that the provisions therein granted should not be construed to interfere with the control of waters for irrigation and other purposes under the authority of the respective States or Territories. Then came the Reclamation Act of June 17, 1902,[9] whereby the Government itself went into the business of the construction of irrigation works in the Western portion of this country; Section 6 providing that the title to and the management and operation of the reservoirs and works shall remain in the Government until otherwise provided by Congress. In none of these Acts is there any express right given to appropriate the waters of any navigable body of water of the United States, or in any way interfere with the navigable capacity of any of these waters. In one of these Acts the navigable waters were expressly reserved, notably the Act of 1877, from these appropriations. And, as was said by the Supreme Court of the United States, in the case of the United States v. Rio Grande Dam & Irrigation Co.,[10] "to infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits."

[8] 6 Fed. Stat. Ann., 1905, p. 508; 2 U. S. Comp. Stat., 1901, p. 1570; 26 Stat. L. 1101.

For copy of Act, see Sec. 937.

See, also, Secs. 937-950.

There is nothing in this Act or its purposes which was intended to affect the control or supervision of the navigable waters of the United States. Such control and supervision are vested in the Secretary of War. Hence the Act confers on the Secretary of the Interior no power to grant a right to construct dams across the Rio Grande River for the purpose of checking the flow of the water and distributing it for irrigation purposes. 21 Op. Atty. Gen. 518.

See, also, U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.,* 2d Appeal, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428.

[9] 7 Fed. Stat. Ann., 1905, p. 1098; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388.

For copy of Act, see Chap. 65, on National Reclamation Act.

[10] 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.,* 184 U. S.

Upon the other hand, Congress has passed Acts directly forbidding the interference with the navigable capacity of any of the navigable waters of the United States. By the Act of September 19, 1890,[11] as amended by the Act of March 3, 1899,[12] it is expressly provided, that the creation of any obstruction *not affirmatively authorized by Congress, to the navigable capacity* of any of the waters of the United States was thereby prohibited; and the section further provides that it shall not be lawful to alter or modify the course, location, condition, or capacity of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning of the same. Section 12 of the Act provides for severe penalties against any person or corporation violating any of the provisions of Section 10. But Congress did not stop here; by the Act of March 23, 1906,[13] and that of June 21, 1906,[14] as the latter Act was amended by that of June 23, 1910,[15] Congress provided that no bridge or dam, which would form an obstruction over navigable waters, should be constructed, until the plans and specifications for their construction should be approved by the Chief of Engineers and the Secretary of War, and a permit granted for the construction of the same, and both Acts providing for severe penalties for the violation of their terms.

It is evident that Congress, perceiving that the old rule that a State could authorize any obstructions to the navigability of a stream or body of water of the United States until interfered with by Congress,[16] was gradually leading to the destruction of the inland waterways of the country as far as the purposes of navigation were concerned, and that the time had come that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by

416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428.

11 See 6 Fed. Stat. Ann., 1905, p. 805, note; 3 U. S. Comp. Stat., 1901, p. 3540, note; 26 Stat. L. 454, Sec. 10.

12 6 Fed. Stat. Ann., 1905, p. 813, Sec. 10; 3 U. S. Comp. Stat., 1901, p. 3541; 30 Stat. L. 1151, Sec. 10.

For copy of Act, see Sec. 350.

See, also, Secs. 351, 352.

13 Fed. Stat. Ann. Supp., 1909, p. 600; 34 Stat. L. 84; Supp. U. S. Comp. Stat., 1912.

14 Fed. Stat. Ann. Supp., 1909, p. 604; 34 Stat. L. 386; Supp. U. S. Comp. Stat., 1912.

15 Supp. U. S. Comp. Stat., 1911, p. 1558; 36 Stat. L. 593.

For copy of this Act, see Sec. 351.

16 See Sec. 352.

any State tending to destroy the navigability of any of these waters without the explicit consent of the Government. By the Act of March 1, 1911,[17] entitled, "An Act to enable any State to co-operate with any other State or States, or with the United States, for the protection of watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable streams," Congress took advanced steps for the protection of navigation.[18] It is the purpose of the Act to purchase lands which have passed into private ownership, where, by conserving the forests upon such lands, it will tend to regulate and conserve the navigability of navigable rivers. The Act, although intending to apply more especially to the Eastern States, where such lands are mostly in private ownership, is of general application and applies to all portions of the country.

§ 355. **Navigation as against irrigation—Interference with tributaries.**—The interference with the flow of water of the tributaries of a river or other body of water may interfere with its navigable capacity. The Acts of March 3, 1899, Section 10,[1] as supplemented by the Act of March 23, 1906,[2] relating to bridges and dams, and the Acts of March 3, 1899,[3] as supplemented and amended by the Act of June 21, 1906,[4] and the amendatory Act of June 23, 1910,[5] relating only to dams, not only prohibit any obstruction to navigation, but also any obstruction or interference with the *navigable capacity* of any of the waters coming within the definition of the navigable waters of the United States; and anything whatever done, or however done, which tends to destroy the navigable capacity of these waters, is within the terms of the prohibition of the Acts. It is a well-known fact, that most of the small streams of this country, although they in themselves may or may not be navigable, are tributaries of the navigable waters of the United States. It is also a

[17] U. S. Comp. Stat., Supp. 1911, p. 652; 36 Stat. L. 961.

[18] For the provisions of the Act, see Sec. 422.

[1] 6 Fed. Stat. Ann., 1905, p. 813; 3 U. S. Comp. Stat., 1901, p. 3540; 30 Stat. L. 1151. For copy of section, see Sec. 350.

See, also, Sec. 351.

[2] Supp. Fed. Stat. Ann., 1909, p. 600; 34 Stat. L. 84.

See, also, Secs. 350.

[3] 6 Fed. Stat. Ann., 1905, p. 805; 3 U. S. Comp. Stats., 1901, p. 3540; 30 Stat. L. 1151.

[4] Supp. Fed. Stat. Ann., 1909, p. 604; 34 Stat. L. 386.

[5] Supp. U. S. Comp. Stat., 1911, p. 1558; 36 Stat. L. 593.

well-known fact that a navigable body of water may have its capacity for navigation partially, or even wholly destroyed by the diversion of the waters of its tributaries. This is especially true where the diversion is for the purpose of irrigating lands, where a great portion of the water is consumed. In fact, this has been the experience with a number of the navigable rivers of the western portion of this country where a great deal of the waters of the upper portion of the rivers themselves and their tributaries have been taken out from their natural channels for the purpose mentioned. That the taking the water out of the tributaries reduces the flow of the water in the main stream is a fact too well known to need discussion here. This fact is also generally recognized by all of the States, where the law of appropriation is in force, and where it is held that the appropriation of the waters of a stream for the purpose of irrigation is an appropriation of the tributaries of the stream to the full extent of the original appropriation, and that later comers can not take the water of the tributaries of the stream to the injury of the prior appropriator of the main stream.[6]

Under the statutes of the United States as they are now in force, and as the same are construed by the courts, the irrigation interests, as developed under the laws of the separate States, are not only threatened with serious impairment of their progress in the future, but also interests already in existence are threatened. It must be conceded, as was held by the Supreme Court of the United States, in United States v. Rio Grande Dam & Irrigation Co., that the jurisdiction of the general Government over interstate commerce and its natural highways vests in Congress the right to take all needed measures to preserve the navigability of the navigable water courses of the United States, *even against any State action.* There was also another point decided by the court in the case and that was, that in the absence of specific authority from Congress a State can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least, as may be necessary for the beneficial uses of the Government property; thus holding that the Government could maintain the common law theory as to the flow of the waters in a stream, where the Government itself was a riparian owner, although by the law of the State an appropriation and diversion of

[6] See Appropriation from Tributaries, Sec. 649.

the waters of the stream could be made. These doctrines were again reiterated in a second appeal of the same case, and again in the case of Kansas v. Colorado, as being powers granted to Congress under the Constitution for the protection of the navigability of the navigable waters of the United States.[7] And, in the first decision rendered by the Court in the Rio Grande dam case, the Court held that the Acts of Congress, which permit the appropriation of waters,[8] in aid of the mining industries and for the reclamation of lands, do not authorize the appropriation of the waters of the source of navigable streams above the point of navigability, to such an extent as to destroy or seriously injure their navigability; and, further, the Court, by Mr. Justice Brewer, upon the subject of appropriating waters from the tributaries of navigable streams, said: "To hold that Congress, by these Acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable water course in derogation of the interests of all the people of the United States, *is a construction which can not be tolerated.* It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to be the intent of Congress." The Court also held that in such a case it would be the right of the Attorney General to institute proceedings to enjoin such an appropriation. Also in the Kansas v. Colorado case Mr. Justice Brewer, for the Court, also stated: "If, in the present case, the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge."

[7] See Const. of U. S., Art. 1, Sec. 8, Cls. 2, 4, 17; Sec. 9, Cl. 5; Sec. 10, Cl. 2; Art. 6, Cl. 1; U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; same case on second appeal, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, Secs. 348-353; Union Bridge Co. v. U. S., 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367, and cases cited; Montgomery v. Portland, 190 U. S. 89, 47 L. Ed. 965, 23 Sup. Ct. Rep. 735.

See, also, as to Government as riparian owner, Sec. 480.

[8] For a review of these statutes, see Sec. 354.

The conclusions which must be drawn from the present state of our Federal statute laws, and as the same have been construed by the Supreme Court of the United States, are irresistible to the effect that any interference of whatsoever nature with the waters of a river, or other body of water, which are public navigable waters of the United States, whereby the navigable capacity of the water is destroyed or injured may be enjoined by the Government and all obstacles to the natural flow of the water may be removed; and that, too, whether the interference and obstacles are at a point where the water is itself navigable, or higher up above the point of navigability, or are on the tributary streams which go to make the navigable body of water or water course. In a recent Act of Congress,[9] wherein it is provided for the purchase of lands along the watersheds of navigable streams in order, by way of conserving the forests to also conserve the navigable capacity of navigable streams, Congress has definitely asserted its right to the waters on such lands. By Section 10 it is provided: "And no right, title, interest, or claim in or to any lands acquired under this Act, *or the waters thereon*, or the products, resources, or use thereof after such lands have been so acquired, shall be initiated or perfected, except as in this section provided." And the section in no way provides whereby the right to waters or their use may be acquired by private parties. This Act is general in its effect and applies to the Eastern and Western portions of the country.

§ 356. Right to use water from navigable streams for irrigation.—As the converse to the proposition that the flow of water of the navigable streams of the United States must not be interfered with, where that interference tends to injure or destroy the navigable capacity thereof, as discussed in previous sections,[1] the waters of any navigable stream may be appropriated and used for beneficial purposes, where the laws of the States wherein the appropriation is made permit the same and the appropriation does not tend to interfere with the navigable capacity of the stream.[2] This,

9 See Act of March 1, 1911, Public, No. 435; U. S. Comp. Stat. Supp. 1911, p. 652; 36 Stat. L. 961.

For the provisions of the Act, see Sec. 422.

1 See Secs. 349-354.

2 See what waters may be appropriated, Secs. 641-669.

of course, includes an appropriation for the purpose of irrigating lands.[3] But as to the navigable waters of the United States, this right of appropriation for irrigation is limited to the superior power of the general Government to preserve uninjured the navigable capacity of those waters.[4] But, upon the other hand, if the diversion of the waters of these rivers, or their tributaries, in no way impairs the right that the public have of navigating them, there is no doubt but that the water may be diverted from a navigable river for irrigation, or any other useful purpose.[5] The navigable waters of a State, as distinguished from those of the United States,[6] are wholly under the jurisdiction of the State wherein they are found. It is entirely within the powers of the legislature of the State to preserve these waters for navigation; or, provided their diversion does not interfere with the navigable capacity of navigable waters of the United States, within the ruling of the Rio Grande dam case,[7] these waters may be diverted and used for the irrigation of lands.[8]

§ 357. Diversion of water in public streams for navigation.—The State, or public, has no right, at common law, to divert the waters from one public stream for the purpose of aiding navigation

[3] U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, where Mr. Justice Brewer, in referring to the Acts of Congress authorizing the appropriation of water for mining and irrigation purposes in derogation of the common law rule, said: "This legislation must be interpreted in the light of existing facts—that all through the mining region in the West were streams not navigable, *whose waters could safely be appropriated* for mining and agricultural industries, *without serious interference* with the navigability of the rivers into which these waters flow." And the Court further held that the navigable capacity of navigable rivers must not be interfered with, by the interference with the waters of the upper portions of the rivers or their tributaries.

As to the Acts of Congress referred to, see discussion in Secs. 347-352.

[4] U. S. v. Rio Grande Dam & Irr. Co., *supra*, also, *Id.*, 2d appeal, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428.

[5] Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758; Miller v. Enterprise Co., 142 Cal. 208, 75 Pac. Rep. 770; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

[6] For distinction, see Sec. 348.

[7] See *supra*.

[8] Even in order to preserve the navigable waters of a State, the public must have an access to these waters. Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A., N. S. 275.

As for right of access, see Sec. 344.

in another stream, or in a canal, where such diversion injures the rights of the riparian owners below. The State has no greater right in this respect than a private owner, and one of the fundamental rules of the common law is that an upper riparian owner has no right to consume or divert the water to the injury of the lower riparian owners. However, we find that even in the early history of the country it has been a common practice to divert the water from one stream for the purpose of aiding the navigation of another, or for the purpose of entirely supplying canals constructed for the sole purpose of navigation. Hence, it follows that in those States which have most strenuously followed the common law theories of waters, there must have been a modification of the common law to that extent.[1] But the rule is that the State is liable to the lower riparian owners if it takes water from a stream for supplying a canal.[2] We find, however, that some States have gone to a much further extent, and hold that the right of a State to improve a stream as a highway, and for the purpose of aiding its navigation, is superior to the rights of riparian owners, and it may take and divert, absolutely without compensation, so much of the water of a stream as may be required to improve its navigation.[3] This is upon the theory that a State is the owner of the water itself; but, as we have seen, neither the State nor an individual can be the absolute owner of the water of a stream,[4] but that the extent of the ownership is a right to its use. Of course, the right of navigation being a public use, the State may acquire the right to divert the water of a stream and turn it either into

1 For common law theories of riparian rights, see Secs. 450-551; Lakeside Paper Co. v. State, 45 App. Div. 112, 60 N. Y. Supp. 1081.

2 Lakeside Paper Co. v. State, *supra*.

3 Patten Paper Co. v. Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. Rep. 1121, 63 N. W. Rep. 1019, 28 L. R. A. 443, 48 Am. St. Rep. 945; see, also, *Id.*, 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173; Black River Imp. Co. v. La Crosse Booming & Transp. Co., 54 Wis. 659, 11 N. W. Rep. 443, 41 Am. Rep. 66; Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126; Aff'd, 20 How. 84 U. S., 15 L. Ed. 816; Cameron Furnace Co. v. Pennsylvania Canal Co., 2 Pearson 208; People v. Tibbetts, 19 N. Y. 523; Crill v. Rome, 47 How. Pr. 398.

4 As to the ownership of water, see Secs. 288, 289, 333.

another stream to aid in its navigation, or into a canal constructed for that purpose, by eminent domain, upon payment to the owners of just compensation.[5]

[5] Lakeside Paper Co. v. State, 45 App. Div. 112, 60 N. Y. Supp. 1081; Herron v. Rathmines & R. Imp. Comrs., A. C. 498, 67 L. T. N. S. 658, where the Court held that the water of a stream could be diverted for the purposes of a canal, provided that compensation reservoirs were constructed for the benefit of the riparian owners.

CHAPTER 17.

RIGHT OF FISHING AND HUNTING.

§ 358. Scope of chapter.
§ 359. In general—Property in fish and game.
§ 360. Public right—Under common law.
§ 361. Public right—General rule in the United States.
§ 362. Public right—Power of legislature to make rule.
§ 363. Public right—State grant of exclusive privileges.
§ 364. Public right—Limited by prescription.
§ 365. Private—Riparian rights.
§ 366. Right where declaration is made that waters are public.
§ 367. Right where declaration is made that waters are public—Hartman v. Tresise.
§ 368. Exclusive right of fishing and hunting clubs.
§ 369. Police powers of a State to regulate and protect fishing and hunting.
§ 370. Police powers of a State to regulate obstructions in streams.
§ 371. Destruction of fish by means of irrigation ditches.

§ 358. Scope of chapter.—In order to have this subject together we will discuss the right of fishing and hunting, or fowling, in and on both the public and private waters of this country. The right of the general public and the right of the individual to fish and hunt will be discussed. And in this chapter we will discuss the right of the riparian owners, although this latter strictly belongs to the subject of riparian rights, which right will be discussed in another chapter.[1] Herein we will also take up the subject of fishing and hunting clubs, especially as to their right to maintain exclusive reservations of waters for that purpose.[2]

§ 359. In general—Property in fish and game.—There is no difference in principle and authority between fishing and hunting in or on waters. The right to hunt the wild fowl and all game which inhabit or fly over the surface of the waters is as valuable to the individual as his right to fish in these waters. The authorities, which sustain and protect him in the exercise of the one, may also be invoked with equal force as to the other. As was said

1 For riparian rights, see Chaps. 21-28, Secs. 450-551. See, also, Sec. 365.

2 See Sec. 368.

by the Supreme Court of Michigan in the case of Ainsworth v. Munoskong Hunting and Fishing Club,[1] "We are unable to draw any distinction between them."[2] According to all the elementary civil and common law writers, fish and game being wild animals, their ownership, so far as they are capable of ownership, is in the State for the benefit of all of its people in common, and no private person has any interest whatever in any of the wild creatures of the earth, air, or water, until he has taken them into his own possession, dead or alive.[3] The general common law right of fishing was taken from the civil law. The fish swimming at large under the civil law belong to the negative community, that is, to no one; they are *"ferae naturae."*[4] The natural right to fish and hunt exists in every individual, except so far as restrained by provisions of law,[5] and one who has captured any fish or wild bird or animal becomes the owner thereof.[6]

§ 360. Public right—Under common law.—Under the common law, as enforced in England at the present time, the general public have, *prima facie,* a common right of fishing and hunting, or fowling, in all tidal waters, or, in other words, all waters the title

1 153 Mich. 185, 116 N. W. Rep. 992.

2 See, also, State v. St. Clair F. & S. Club, 127 Mich. 580, 87 N. W. Rep. 117; Lincoln v. Davis, 53 Mich. 375, 19 N. W. Rep. 103, 51 Am. Rep. 116.

3 Geer v. State, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600, affirming 61 Conn. 144, 22 Atl. Rep. 1012, 13 L. R. A. 804, 3 Inters. Com. Rep. 732, and cases cited.

4 The fish in the sea, rivers, lakes, and other natural bodies of water, being in their natural freedom, are things which belong to no one; the fisherman acquires the property in the fish only which he catches and reduces to possession. Pothier, Traité du droit de Propriété. Opera, Tom. 8, p. 137; Shultes on Aquatic Rights, p. 1.

See, also, the case of Swans, 7 Cole Rep. 15b, 77 Eng. Reprint 435; 11 Blackstone Com. 395.

That running waters also belong to the negative community at civil law, see Sec. 288.

See, also, State v. Mallory, 73 Ark. 236, 83 S. W. Rep. 955, 67 L. R. A. 773; *Ex parte* Kenneke, 136 Cal. 527, 69 Pac. Rep. 261, 89 Am. St. Rep. 177; Cummings v. People, 211 Ill. 392, 71 N. E. Rep. 1031; American Express Co. v. People, 133 Ill. 649, 24 N. E. Rep. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641; State v. Gallop, 126 N. C. 979, 35 S. E. Rep. 180; *Ex parte* Maier, 103 Cal. 476, 37 Pac. Rep. 402, 42 Am. St. Rep. 129; State v. Repp, 104 Iowa 305, 73 N. W. Rep. 829, 40 L. R. A. 687.

5 2 Blackstone Com. 403.

6 *Id.;* Churchward v. Studdy, 14 East. 249, 104 Eng. Rep. F. R. 596; Taber v. Jenny, 1 Sprague (U. S.), 315, 23 Fed. Cas. No. 13,720; Ghen v. Rich, 8 Fed. Rep. 159.

to the soil under which is in the Crown.[1] In this country the rule as to all tidal waters is the same as in England, and no one can maintain an exclusive privilege to fish or fowl in any portion of such waters unless he has acquired it by grant or prescription.[2] In fact, under a strict construction of the common law rule, the right to fish in, or to hunt on certain waters, in the absence of grants or prescription, is in harmony with the ownership of the soil under those waters; if the title to the soil is in the State, the right to fish or hunt is in the public; but, upon the other hand, if the title to the soil is in the riparian owner, he has this right.[3] Again, under the common law, as we have seen, the title to the soil under non-tidal, although in fact navigable, waters is in the riparian owners;[4]

1 For title to the soil under tidal waters, see Secs. 325, 326; Murphy v. Ryan, Ir. Rep. 2 C. L. 143, 16 Week. Rep. 678; Royal Fishery of the Banne, Davies, 149; Carter v. Murcot, 4 Burr. 2162; Regis v. Stimpson, 32 L. J. M. C. N. S. 208, 4 Best & S. 207, 9 Cox C. C. 356, 10 Jur. N. S. 41; 16 Vin. Abr., Title Piscary (B); Woolrych on Waters, p. 76; Schultes Aquatic Rights, 17; Angell on Water Courses, Sec. 65a; 3 Kent Com. 412, 413; Malcolmson v. O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

2 For authority of State to grant special privileges, see Sec. 368; Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764; Wooley v. Campbell, 37 N. J. L. 163; Parker v. The Cutler Mill-Dam Co., 20 Me. 353, 37 Am. Dec. 56.

Browne v. Kennedy, 5 Harr. & J. (Md.) 195, 9 Am. Dec. 503; Moulton v. Libbey, 37 Me. 472; Collins v. Benbury, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, Rev'g, 16 Fed. Rep. 823.

3 See rights of riparian owners to fish and hunt, Sec. 365.

See, also, irrigation as interfering with fishing and hunting, Secs. 370, 371; Legoe v. Chicago Fishing Co., 24 Wash. 175, 64 Pac. Rep. 141; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. Rep. 185; DeMers v. Sandy Spit Fish Co., 24 Wash. 584, 64 Pac. Rep. 799; Diana Shooting Club v. Lamoreaux, 114 Wis. 44, 89 N. W. Rep. 880, 91 Am. St. Rep. 898; Sterling v. Jackson, 69 Mich. 488, 37 N. W. Rep. 845, 13 Am. St. Rep. 405; People v. Collison, 85 Mich. 105, 48 N. W. Rep. 292; Niles v. Cedar Point Club, 85 Fed. Rep. 45, 29 C. C. A. 5, 54 U. S. App. 668; Slingerland v. International Contracting Co., 43 App. Div. 215, 60 N. Y. Supp. 12; Gerhard v. Worrell, 20 Wash. 492, 55 Pac. Rep. 625; Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. Rep. 661; Schulte v. Warren, 218 Ill. 108, 71 N. W. Rep. 661, 75 N. W. Rep. 783; Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A., N. S. 275; State v. Lake St. Clair Shooting Club, 127 Mich. 580, 87 N. W. Rep. 117; Hittinger v. Eames, 121 Mass. 539; West Roxbury v. Stoddard, 7 Allen (Mass.) 158.

4 See Sec. 328; Adams v. Pease, 2 Conn. 481; Chenango Bridge Co. v.

and the owners also have the exclusive right of fishing in these waters.[5] This, as we shall see, is not the rule in the United States in the case of navigable nontidal rivers, except in those States which follow strictly the common law rule.[6] In this country, in the case of waters nontidal, but navigable in fact,[7] the right to fish and fowl is generally in the public, irrespective of the technical ownership of the bed.[8]

§ 361. Public right—General rule in the United States.—The general rule in this country is that the right of hunting and fishing by all the members of the public is not confined to tidal waters, but has been extended to all of the public waters of the country, which, as we have seen, are those waters that are navigable in fact.[1] The strict construction of the common law has not been followed to any great extent as to this right, except as to tidal waters;[2] and, in general, the public have this right, irrespective of the ownership of the bed over which these waters flow.[3] This right, however, is subject to the paramount right of navigation.[4]

Paige, 83 N. Y. 178, 38 Am. Rep. 407; Atty. Gen. *ex rel.* Muskegon Boom Co. v. Evert Boom Co., 34 Mich. 462; June v. Purcell, 36 Ohio St. 396; McFarlin v. Essex Co., 10 Cush. 304.

5 McFarlin v. Essex Co., 10 Cush. 304, where the Court held, that in all waters, not navigable, in *the common law sense*, that is to say not subject to tidal influence, the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers the right of the soil is in the owners of the land bounding upon it, although it might in fact be navigable. Waters v. Lilly, 4 Pick. 145, 16 Am. Dec. 333; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386.

In Lincoln v. Davis, 53 Mich. 375, 19 N. W. Rep. 103, 51 Am. Rep. 116, it was held that the riparian proprietors upon all fresh water streams had the exclusive right of fishing opposite their land.

See, also, Hart v. Hill, 1 Whart. 124; Beckman v. Kreamer, 43 Ill. 447, 19 Am. Dec. 146; Gould on Waters, Sec. 182.

6 See Sec. 361.

7 For what constitutes navigable waters, see Secs. 343-346.

8 See Sec. 361.

1 For definition of public waters, see Sec. 290.

As to what constitutes navigable waters, see Secs. 343-346.

2 See Sec. 343.

3 Willow River Club v. Wade, 100 Wis. 86, 76 N. W. Rep. 273, 42 L. R. A. 305, where the plaintiff owned the land on both banks of the stream, and hence owned the bed of the stream, it was held that the public had the right to fish. Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; State v. St. Clair F. & S. Club, 127 Mich. 580, 87 N. W. Rep. 117; Bodi v. Winous Point Shooting Club, 57 Ohio 226, 48 N. E. Rep. 944; Sloan v. Biemiller, 34 Ohio St. 492; Hardin v. Jordan, 140 U.

There are certain exceptions to the general rule which modify the right of the general public in this respect. These exceptions may be denominated as: Legislative enactment changing the rule in certain States;[5] exclusive rights granted to individuals or corporations on a portion of these waters;[6] and prescription.[7] With these exceptions it may be said that if the public have the right to pass over the waters of this country by the ordinary modes of navigation, not in aid of commerce merely, but also for pleasure,[8] and have the right of access for that purpose,[9] they have also the right to take fish in those waters by any way common to all, and permitted under the laws of the State wherein those waters are situated. The public have the right to kill or capture ducks or other wild fowl, resting or feeding on navigable waters, or flying over them. They have the right to call such wild fowl by all the devices known to sportsmen and not prohibited by statute, from the air or land, upon or over these public waters, and there, in the

S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838; Rev'g, 16 Fed. Rep. 823; Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. Rep. 661; Bickel v. Polk, 5 Harr. (Del.) 325; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Wilson v. Inloes, 6 Gill. 121; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

The dissenting opinion of Campbell, J., and Morse, J., in Sterling v. Jackson, 69 Mich. 488, 37 N. W. Rep. 845, 13 Am. St. Rep. 405, was later, in 1901, adopted and quoted with approval by the Supreme Court of Michigan in State v. St. Clair F. & S. Club, 127 Mich. 580, 87 N. W. Rep. 117.

See, also, Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. Rep. 362, 45 L. R. A. 475; Packard v. Ryder, 144 Mass. 440, 11 N. E. Rep. 578, 59 Am. Rep. 101; Lincoln v. Davis, 53 Mich. 375, 19 N. W. Rep. 103, 51 Am. Rep. 116; Morris v. Graham, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. Rep. 1045, 9 L. R. A. 807, 23 Am. St. Rep. 393; Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997, 18 N. J. L. 495.

4 Lewis v. Keeling, 46 N. C. 299, 62 Am. Dec. 168; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. Rep. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807; Colchester v. Brooke, 7 Q. B. 339, 9 Jur. 1090, 15 L. J. Q. B. 59, 53 E. C. L. 339.

5 See Sec. 362.

6 See Sec. 363.

7 See Sec. 364.

8 See navigation for pleasure, Sec. 345.

9 For the right of access, see Secs. 335, 336.

See Bolsa etc. Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A., N. S. 275, holding that a lawful mode of access must be obtained by the public before the right may be exercised.

seasons allowed by the statute, to kill or capture the same.[10] But, upon the other hand, where the waters are not navigable in fact, but are what are known as private waters, there is no question but that the riparian owners have the exclusive right of fishing and hunting, not as a privilege, but as a property right.[11] But in a recent case decided by the Supreme Court of the United States it was held that the Government, by a treaty with the Indians, had the power to reserve to them the right of fishing and hunting, as against the rights of subsequent grantees upon the banks of the stream.[12] The Court, by Mr. Justice McKenna, said: "The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future States, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.'" But the Court further held that the State had the power to make all reasonable regulations as to the method of taking the fish.

§ 362. **Public right—Power of legislature to make rule.**—We have seen in a previous section that it was within the power of the legislature of a State to adopt either rule as to whether the title to the soil under navigable or public streams should be in the State or should vest in the riparian owner.[1] In the case of Barney v. Keokuk,[2] the Supreme Court of the United States held that the beds of all streams navigable in fact vested in the new States upon their admission into the Union, and that "if they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." So, also, we can say that the right to fish and hunt in or on these waters is largely left to the laws adopted in the respective States.[3] As we have seen, the strict rule of the common

10 See cases cited in last note.

11 For riparian rights as to fishing and hunting, see Sec. 365; Jackson v. Lewis, Cheves L. 259; Waters v. Lilly, 4 Pick. 145, 16 Am. Dec. 333.

12 United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

1 See Secs. 329, 330.

2 94 U. S. 324, 24 L. Ed. 224.

3 See Right of Riparian Owner to Fish, Sec. 365; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Illinois Cent. R. Co. v. Chicago, 173 Ill. 471, 50 N. E. Rep. 1104, 53 L. R. A. 408;

law has not been adopted in many of the States as to the ownership of the soil under these waters,[4] and hence it follows that the common law rule as to the fisheries in these waters has not always been followed. In fact, different rules have been adopted in different States relative to public fishing in nontidal waters, which at times are not consistent with the common law rule, or with each other. In Wisconsin, it is held that fishing in a navigable river against the protest of the owner of the bed and banks of the stream is not trespass.[5] And in the State of Washington, the right of fishing remains in the owner of the bank of a navigable stream, although he does not own the bed; and it is held that the public have only an easement over the streams, and that the taking of fish therefrom would be trespass against the riparian proprietor.[6] It is even settled that the right of regulation and control of the fishing and hunting by the several States in the interest of the public, permits, in any State, legislation that secures the benefits of this public right to its own inhabitants only, upon the ground that the rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several States do not include, in favor of the inhabitants of any State, rights in the common property of other States.[7] The legislature of a State may, as was held in a Michigan case, dedicate a portion of its public waters as a public fishing and hunting ground, and prohibit acts which would tend to injure the purpose for which the dedication was made.[8] Or, as was held in California, the

Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997.

See, also, as to police power of States, Sec. 369; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838; rev'g 16 Fed. Rep. 823; Willow River Club v. Wade, 100 Wis. 86, 76 N. W. Rep. 273, 42 L. R. A. 305; Commonwealth v. Hilton, 174 Mass. 429, 54 N. E. Rep. 362, 45 L. R. A. 475.

4 See Sec. 330.

5 Willow River Club v. Wade, 100 Wis. 86, 76 N. W. Rep. 273, 42 L. R. A. 305, where the Court followed the rule of navigability.

6 Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178.

7 McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; Wharton v. Wise, 153 U. S. 155, 38 L. Ed. 669, 14 Sup. Ct. Rep. 783; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230; Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432, 19 Sup. Ct. Rep. 165; Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. Rep. 362, 45 L. R. A. 475.

8 People v. Silberwood, 110 Mich. 103, 67 N. W. Rep. 1087, 32 L. R. A. 694; Atty. Gen. v. Burrell, 31 Mich. 25; Sterling v. Jackson, 69 Mich. 488,

State, always, of course, subject to the paramount control of the general Government touching matters of navigation and commerce, has the right to sell into private ownership any of these water-covered lands, the limitation upon its power in this regard being that such sales shall be in aid of, at least not in derogation of, its trust to preserve the navigable waters for the use of the public.[9]

Hence it follows that the rights of the public to fishing in the public inland streams and other bodies of water are fixed by the rule of law adopted in each State, regardless of the questions of navigability or ownership of the soil under the waters. Where the waters are not navigable in fact there is no dispute that the riparian owners have the exclusive right.[10]

§ 363. Public right—State grants of exclusive privileges.—In England, under the common law, at first the Crown had the right to grant exclusive rights to the fishing and hunting in and on certain portions of the public waters. This was considered a perquisite of the Crown, to be used and disposed of for his benefit.[1] But later, this right was vested in Parliament by Magna Charta, and since that time, by the weight of authority, the Crown has no power to grant exclusive rights in fishing and hunting in the public waters, which, as we have seen in that country, are only the tidal and navigable waters.[2] In this country, when the American Colo-

37 N. W. Rep. 845, 13 Am. St. Rep. 405.

9 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A. N. S. 275.

See, also, Public Right of Navigation, Secs. 342, 343.

10 See the rights of riparian owners, Sec. 365; Jackson v. Lewis, Cheves L. 259; Waters v. Lilly, 4 Pick. 145, 16 Am. Dec. 333.

1 Royal Fisheries of the Banne, Davies, 149; Bracton, Lib. 2, Chap. 12; Freeman, English Const., 2d Ed., p. 139; Malcomson v. O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

2 See Secs. 325, 360; Carlisle v. Graham, L. R. 4 Exch. 361, 38 L. J. Exch. 226, 21 L. T. Rep. N. S. 133, 18 Week. Rep. 318; Somerset v. Fogwell, 5 B. & C. 875, 8 D. & R. 747, 5 L. J. K. B. O. S. 49, 29 Rev. Rep. 449, E. C. L. R. Vol. II, 719; Meisner v. Fanning, 3 Nova Scotia 97; Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. Rep. 362, 45 L. R. A. 475; Tinicum Fishing Co. v. Carter, 61 Pa. St. (11 P. F. Smith) 21, 100 Am. Dec. 597; Neill v. Devonshire, 8 App. Cas. 153, 31 Week. Rep. 622; Northumberland v. Houghton, L. R. 5 Exch. 127, 39 L. J. Exch. 66, 22 L. T. N. S. 491, 18 Week. Rep. 495; Malcolmson v. O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 653.

By some authorities, however, it is held that Magna Charta had no effect,

nies revolted and acquired their freedom, they acquired all the powers, not only of the Crown, but also of Parliament. These rights were granted in the colonial charters, to be held for the benefit of the inhabitants; and, when the Government was formed, they remained in the several States then forming the Union, and were granted to those States which were afterward admitted.[3] Hence it follows that the several States of this country, by their legislatures, have the power, unless restricted by their respective constitutions, to grant several or exclusive rights of fishing and hunting in or on a portion of the public waters within their jurisdictions.[4] The grant of this right, however, is subject to the paramount rights of navigation.[5] Such a grant must be strictly

and that the Crown may grant an exclusive right of fishery. Brookhaven v. Strong, 60 N. Y. 56; Rogers v. Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; Matter of Provincial Fisheries, 26 Can. Sup. Ct. 444.

3 Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997; McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; Dill v. Wareham, 7 Met. 438; Commonwealth v. Alger, 7 Cush. 53; Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764; Pollard v. Hagan, 44 U. S. 3 How. 212, 11 L. Ed. 565; Smith v. Maryland, 59 U. S. 18 How. 71, 15 L. Ed. 269; Manchester v. Massachusetts, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559; Arnold v. Mundy, 6 N. J. L. (1 Holst.) 1, 10 Am. Dec. 356; Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. Rep. 362, 45 L. R. A. 475.

For exclusive rights of fishing and hunting clubs, see Sec. 368.

For title to soil under navigable waters, see Secs. 329, 330.

4 Heckman v. Swett, 107 Cal. 276, 40 Pac. Rep. 420, aff'g 99 Cal. 303, 33 Pac. Rep. 1099; Commonwealth v. Weatherhead, 100 Mass. 175; Stannard v. Hubbard, 34 Conn. 370; Munson v. Baldwin, 7 Conn. 168; Halleck v. Davis, 22 Wash. 393, 60 Pac. Rep. 1116; Adams v. Pease, 2 Conn. 481; Walker v. Stone, 17 Wash. 578, 50 Pac. Rep. 488; Preble v. Brown, 47 Me. 284; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Rowe v. Smith, 48 Conn. 444; Commonwealth v. Vincent, 108 Mass. 441; Proctor v. Wells, 103 Mass. 216; Wooley v. Campbell, 37 N. J. L. 163; Brookhaven v. Strong, 60 N. Y. 56; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493.

Held contrary to the Constitution of New York in Slingerhead v. International Con. Co., 43 N. Y. App. Div. 215, 60 N. Y. Supp. 12.

See, also, Fagan v. Armistead, 33 N. C. 433; Jones v. Jones, 2 N. C. 488; Halleck v. Davis, 22 Wash. 393, 60 Pac. Rep. 1116; Walker v. Stone, 17 Wash. 578, 50 Pac. Rep. 488; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Dammon v. Hawaii, 194 U. S. 154, 48 L. Ed. 916, 24 Sup. Ct. Rep. 617; Russell v. Association of the Jersey Co., 56 U. S. 15 How. 426, 14 L. Ed. 757; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997, 18 N. J. L. 495.

5 For paramount right of navigation, see Sec. 349; Sterling v. Jack-

construed, and an intention to part with any portion of the right of the public will not be presumed unless it was clearly the intent to make such a grant.[6] In fact, in all public waters, whether within or beyond the ebb and flow of the tide, there can be no restriction upon the authority of a State, other than that of its own constitution, to regulate the public right of fishing and hunting in or on these waters, or to make grants of exclusive rights, which do not impair other rights already vested, either public or private.[7] And, of course, it must follow that where these grants are valid the general public will be excluded from fishing or hunting in or on these waters.

§ 364. **Public right—Limited by prescription.**—The unorganized public can not acquire the right of fishing or hunting either by grant or prescription, since the public can not prescribe or accept a grant.[1] Upon the other hand, the public right to hunting and fishing may be limited by a prescriptive right of an individual in navigable public waters, which may be acquired by the long, exclusive, and uninterrupted enjoyment of such right.[2] But this

son, 69 Mich. 488, 37 N. W. Rep. 845, 13 Am. St. Rep. 405, that a grant by the State of Michigan was valid, subject only to the right of the public to navigate the waters, and that the plaintiff had the exclusive right to use the waters of a bay for fowling purposes. But see State v. St. Clair F. & S. Club, 127 Mich. 580, 87 N. W. Rep. 117.

See, also, Post v. Munn, 4 N. J. L. 61, 7 Am. Dec. 570; Brookhaven v. Strong, 60 N. Y. 56; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493; Colchester v. Brooke, 7 Q. B. 339, 9 Jur. 1090, 15 L. J. Q. B. 59, 53 E. C. L. 339; Beatty v. Davis, 20 Ont. 373.

6 Sutter v. Heckman, 1 Alaska 81; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Lowndes v. Dickerson, 34 Barb. (N. Y.) 586; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997, 18 N. J. L. 495; Brink v. Richtmyer, 14 Johns. (N. Y.) 255; Hierlihy v. Loggie, 8 N. Brunsw. 204; Wilson v. Codyre, 27 N. Brunsw. 320; Johnson v. Bloomfield, Ir. R. 8 C. L. 88.

7 Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. Rep. 362, 45 L. R. A. 475; Nickerson v. Bracket, 10 Mass. 212; Russell v. Russell, 15 Gray 159; Arnold v. Munday, 6 N. J. L. (1 Holst.), 10 Am. Dec. 356; Brown v. De Groff, 50 N. J. L. 409, 14 Atl. Rep. 219, 7 Am. St. Rep. 794.

As to exclusive rights of fishing and hunting clubs, see Sec. 368.

1 Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951, 14 L. R. A. 386; Rogers v. Benton, L. R. Q. B. 26; Merwin v. Wheeler, 41 Conn. 23; Pearsall v. Post, 22 Wend. 425.

2 Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951, 14 L. R. A. 386; Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250; Carter v. Murcot, 4 Burr. 2162, 98 Eng. Rep. F. R. 127;

right, being based upon the supposition that a previous grant has been made, every presumption is against it, and in order to maintain such a right it must be clearly proved.[3] And it must appear in the evidence that all others have been kept out of the place claimed for the exclusive right by the claimant and his grantors from fishing and hunting in any manner.[4] As to prescription as against a private right, it is well settled that the exclusive right of fishing and hunting in or on another man's waters may also be acquired by prescription, by an actual and exclusive occupation and enjoyment of the fishing or hunting, adverse to the riparian proprietor, and continued for the period required by the statute of limitations.[5] If the right has been once acquired by prescription, either as against the public or private rights, it may pass as an appurtenant to the owner's estate.[6]

§ 365. **Private—Riparian rights.**—Among the rights of riparian owners, in those States where the same are in force, may be mentioned the rights of fishing and hunting. And the general rule is that in and on all nonnavigable waters, where the title to the soil is in the riparian owners, they and they alone have the exclusive right of fishing and hunting in and on the waters opposite or on their lands to the extent of their riparian ownership in the soil under those waters.[1] The extent of the riparian owner's right in

Delaware etc. R. Co. v. Stump, 8 Gill. & J. 479, 29 Am. Dec. 561; Brookhaven v. Strong, 60 N. Y. 56; Gould v. James, 6 Cow. 369; Rogers v. Jones, 1 Wend. 237, 29 Am. Dec. 493; Fagan v. Armistead, 33 N. C. 433; Jackson v. Lewis, Cheves 259; Lord Advocate v. Lovat, 5 App. Cas. 273; McDougall v. Advocate, L. R. 2 H. L. Sec. 431.

3 Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57; Melvin v. Whiting, 13 Pick. 184; Gould v. James, 6 Cow. 369; Edgar v. English Fisheries, 23 L. T. Rep. N. S. 732; Jackson v. Lewis, Cheves (S. C.) 259; Freary v. Cooke, 14 Mass. 488; Westfall v. Van Anker, 12 Johns. (N. Y.) 425; Collins v. Benbury, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722.

4 State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; Tinicum Fishing Co. v. Carter, 61 Pa. St. (11 P. F. Smith) 21, 100 Am. Dec. 597.

5 McFarlin v. Essex Co., 10 Cush. 304, 309; Freary v. Cooke, 14 Mass. 488; Nickerson v. Bracket, 10 Mass. 212; Rolle v. Whyte, L. R. 3 Q. B. 286, 8 B. & S. 116, 37 L. J. Q. B. 105, 17 L. T. N. S. 560, 16 Week. Rep. 593; Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951, 14 L. R. A. 386; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333.

6 Rogers v. Allen, 1 Campb. 309, 10 Rev. Rep. 689.

1 For other rights of riparian owners, see Secs. 450-551.

See Hale De Jure Maris, Chap. 1, 5; Angell on Water Courses, Secs.

this respect is to the middle or thread of the stream, where he owns upon one side only, and the entire stream where he owns both sides, and up and down the stream as far as his land extends.[2] The nature of a fishery is real and not personal property; it passes with a grant of the soil.[3] Hence it follows that the right

61-76; Hargrave's Law Tracts, 256; Gould on Waters, Sec. 182; 3 Kent Com. 409, 417; Royal Fishery of the Banne, Davies, 149; Gould v. James, 6 Cowan 369; Hart v. Hill, 1 Whart. 124; Hooker v. Cummings, 20 Johns. 90; Freary v. Cooke, 14 Mass. 488; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; People v. Platt, 17 Johns. 195, 8 Am. Dec. 382; Smith v. Miller, 5 Mason 191, 22 Fed. Cas. No. 13,080.

State v. Mallory, 73 Ark. 236, 83 S. W. Rep. 955, 67 L. R. A. 773, where the Court held that the legislature of a State can not forbid a nonresident land owner from fishing and hunting on his property, within the State, while according such privileges to resident land owners, as being contrary to the fourteenth amendment of the Federal Constitution forbidding denial of equal protection of the laws, and the deprivation of property without due process of law.

See, also, Hall v. Alford, 114 Mich. 165, 72 N. W. Rep. 137, 38 L. R. A. 205; Lincoln v. Davis, 53 Mich. 375, 19 N. W. Rep. 103, 51 Am. Rep. 116; Sterling v. Jackson, 69 Mich. 488, 37 N. W. Rep. 845, 13 Am. St. Rep. 405.

The right to fish and fowl is a part of the soil, and can not be acquired except by grant, and does not exist in an easement granted for a highway only. L. Realty Co. v. Johnson, 92 Minn. 363, 100 N. W. Rep. 94, 66 L. R. A. 439; Lamprey v. Danz, 86 Minn. 317, 90 N. W. Rep. 578; Brookhaven v. Strong, 60 N. Y. 56; Cobb v. Davenport, 32 N. J. L. (3 Vroom.) 369, 380; Smith v. Rochester, 92 N. Y. 463, 4 Pick. 145, 44 Am. Rep. 393; Bingham v. Salene, 15 Ore. 208, 14 Pac. Rep. 523, 3 Am. St. Rep. 152; State v. Shannon, 26 Ohio St. 423, 38 Am. Rep. 599; State v. Gallop, 126 N. C. 979, 35 S. E. Rep. 180; Payne v. Sheets, 75 Vt. 335, 55 Atl. Rep. 656; Beatty v. Davis, 20 Ont. 373; Long Point Co. v. Anderson, 19 Ont. 487.

The right of fishery in nonnavigable streams is in the riparian owners, and one through whose land such stream flows may maintain a fence across it. Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 293, 54 L. R. A. 178.

2 Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; Commonwealth v. Alger, 7 Cush. 53; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; Rexroth v. Coon, 15 R. I. 35, 23 Atl. Rep. 37, 2 Am. St. Rep. 863; *Re* Ah Chong, 6 Sawy. 451, 2 Fed. Rep. 733; Heckman v. Swett, 99 Cal. 303, 33 Pac. Rep. 1099; Brink v. Richtmyer, 14 Johns. 255; People v. Platt, 17 Johns. 195, 8 Am. Dec. 382; State v. Mallory, 73 Ark. 236, 83 S. W. Rep. 955, 67 L. R. A. 773.

3 Royal Fishery of the Banne, Davies, 149; Woolrych on Waters, p. 110; Queen v. Robertson, 6 Can. S. C. 52; *Re* Provincial Fisheries, 1 Fost. & F. 492; Cobb v. Davenport, 32 N. J. L. (3 Vroom.) 369, 380, 33 N. J.

of a riparian owner to fish in the water of a private river running by or through his land is not a riparian right in the nature of an easement, but strictly a right of property.[4] The right of fishing and hunting being real property, it may be acquired by deed,[5] or it may be leased from the owner, either with or without the soil, and with such restrictions and limitations as the owner may see fit to impose. And, this right being a right *profit a prendre*, or profit in the land, unless expressly reserved in the deed, it passed with a grant of the land.[6] The exclusive right of fishing and hunting may be lost by the owner of the land by prescription.[7] However, a right to fish and hunt not being an easement, but a *profit a prendre* which can not be acquired by a use or custom, except as connected with the real property, or in technical language, can not be prescribed for in gross, but only in a *que* estate, it can not be acquired except so far as it may be gained by adverse

L. 223, 97 Am. Dec. 718; McFarlin v. Essex Co., 10 Cush. 304, 309.

4 Queen v. Robertson, 6 Can. S. C. 52.

But see United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662, where the Court held that the right of the Indians to fish in a river might be reserved in a treaty as against the rights of the riparian proprietors as subsequent grantees of the Government.

5 Beckman v. Kreamer, 43 Ill. 447, 92 Am. Dec. 146; Treat v. Parsons, 84 Me. 520, 24 Atl. Rep. 946; Wyman v. Oliver, 75 Me. 421; Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400; Butrick v. Tilton, 155 Mass. 461, 29 N. E. Rep. 1088; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; Cobb v. Davenport, 32 N. J. L. (3 Vroom.) 369, 380, 33 N. J. L. 223, 97 Am. Dec. 718; Jackson v. Halstead, 5 Cow. (N. Y.) 216; Devonshire v. Pattinson, L. R. 20 Q. B. D. 263, 57 L. J. Q. B., N. S. 189, 58 L. T. Rep. N. S. 392, 52 J. P. 276.

The rule as to hunting is the same as that of fishing. See Bingham v. Salene, 15 Ore. 208, 14 Pac. Rep. 523, 3 Am. St. Rep. 152, where the Court held, that a grant of "the sole and exclusive right, privilege, and easement to shoot, take, and kill" wild fowl on the "lakes and sloughs and waters" of the grantor, executed to the grantees, "their heirs and assigns for ever," was a grant of a *profit a prendre*, and not a mere license revocable at the pleasure of the grantor.

See, also, Weber v. Lee, 9 Q. B. D. 315, 47 J. P. 4, 51 L. J. Q. B. 485, 47 L. T. Rep. N. S. 215, 30 Week. Rep. 866.

6 See cases cited *supra*.

See, also, Lee v. Mallard, 116 Ga. 18, 42 S. E. Rep. 372; Mathews v. Treat, 75 Me. 594; Smith v. Miller, 5 Mason 191, 22 Fed. Cas. No. 13,080; Pannell v. Mill, 3 C. B. 625, 11 Jur. 109, 16 L. J. C. P. 91, 54 E. C. L. 625; Sherrard v. Gascoigne, 22 Q. B. 279, 69 L. J. Q. B. 720, 82 L. T. Rep. N. S. 850, 48 Week. Rep. 557.

7 See Sec. 364; Turner v. Hebron, 61 Conn. 175, 22 Atl. Rep. 951, 14 L. R. A. 386.

possession as a personal right by some individual or corporation which is competent to hold title to land.[8]

§ 366. Right where declaration is made that waters are public.—As we have seen, it is within the power of the legislatures of the States of the Union to determine the ownership of the soil under the waters within their respective jurisdictions, whether it shall remain in the State as it is when a State is admitted, or whether the title shall vest in the riparian owners.[1] We shall also see that it is within the power of a State to determine what use shall be made of the waters within their respective jurisdictions; whether the common law rules of riparian rights shall be adhered to, or whether the rule of appropriation shall prevail. When this rule has been so declared, either in the constitution of a State, or by legislative enactment, it is the law upon that subject within that jurisdiction, subject always to the law that the navigable capacity of the public waters of the United States must not be interfered with.[2] Many of the States in the arid and semi-arid regions of the United States have made this declaration, some in their constitutions and others by legislative enactment. In many of these States the declaration has been made to the effect that all waters within their jurisdictions are the property of the State, or the public.[3] The question, then, before us is, What effect does this declaration have upon the fishing and hunting within those States having made this declaration? The answer to this question must be that all streams and other waters, having been dedicated to the public either by provisions in the constitutions of these States or by Acts of their legislatures, become public waters; and that, too, whether they are navigable or nonnavigable, or whether it be the law of the State that the ownership of the bed of these waters re-

8 Goddard, Easements, p. 6; Washburn, Easements, pp. 7, 125, Sec. 20; Merwin v. Wheeler, 41 Conn. 14; Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; Sale v. Pratt, 19 Pick. 191; Gateward's Case, 6 Coke 159b; Grimstead v. Marlow, 4 T. R. 718, 2 Rev. Rep. 512.

1 See Sec. 330; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224.

2 See Secs. 347-356; U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 255.

For navigation, see Chap. 16, Secs. 341-357.

3 For declarations of the respective States, see Secs. 377-386.

main in the State or vest in the riparian owners. It is the waters themselves which are declared public, and therefore all incidents to those waters, which are necessary to the free and full enjoyment and use of the public in those waters are also dedicated to the public use; as, for example, the right to have those waters flow in their natural channels, when they may best serve the public there, and the right of the public of ingress and egress along these streams, and that, too, regardless of the ownership of the beds of these waters. The waters of the smallest water course or other body of water, under this solemn declaration, are as much public waters as though they were subject to the ebb and flow of the tide, or capable of navigation by the largest vessels afloat. Hence it follows that the public or individual members of the public, as long as these waters remain in their natural channels, have the right to use the streams and lakes for fishing and hunting from boats, where the waters are capable of floating them, and if not, they have the right of wading the streams; they have the right to erect blinds or other fishing or hunting devices on these waters; to entice the wild fowl to these waters and there to shoot or fish. The public have this right so long as they can gain access to these waters, by highways or other routes, without trespassing upon the banks or other lands of the private owners; or so long as they do not interfere with a more beneficial use of the waters provided by the laws of the State. So in those States which have made the dedication of all their waters to the public, the right of fishing and hunting is preserved to the general public to even a greater extent than in those older States where the rights of riparian ownership often interfere.[4] The State being the owner of these waters, it is, of course, within its power to declare the paramount use, or the order of uses to which the waters within its jurisdiction shall be put. As, for example, the legislature may declare that the use of water for irrigation, upon diversion, shall be paramount to all other uses. But until the water is diverted from its natural streams it may be used for fishing and hunting, as above set forth, so long as this use does not in any way interfere with the use of the water for irrigation, or some other use of the water declared by the leg-

[4] For rights of riparian owners to hunt and fish, see Sec. 365.

For rights to establish exclusive fishing and shooting preserves in these States, see Secs. 363-368.

islature to be paramount to the right of fishing and hunting on those waters. But, as stated by the Colorado Court, "As between those claiming either a public or private right of fishery in our natural streams and those asserting the superior constitutional right of appropriation, the latter, in case of conflict, must prevail."[5] And in Utah it was held, that as long as other rights were not interfered with a land owner was entitled to change the course of a natural stream which flowed over his premises and construct fish-ponds in the old bed, permitting the water diverted into his fish-ponds to run undiminished and unpolluted back into the stream.[6] As a general rule the right of fishing and hunting on waters in the Western States follows the title to the waters. If the title is in the public, the public have that right, which right lasts only until some appropriator has made a diversion of the waters for some more useful purpose prescribed by the statute. If, however, the waters of the streams have not been declared to be public waters, as is the case where the common law is adhered to, the riparian owners have the exclusive right. If the title to the waters is in the public, but the title to the beds of the streams is in the riparian owners, the right of fishing and hunting follows the title to the waters, and hence, the public have that right.[7]

But this question should be considered from another point of view. In all of those States which have made this dedication to the public of the waters, fish and game laws have been enacted. Great sums of money, in some of these States amounting to hundreds of thousands of dollars, have been collected by the taxation of all the taxable property of the States, and have been expended in stocking with fish these waters dedicated to the public and in protecting them and the game flying over and inhabiting the waters. Statistics show that the most of this money collected by taxation comes from the cities of these States and from property not on these waters; they also show that a very small proportion of the farms through which these public waters flow are owned by people inhabiting the cities. It seems to us that no one should

5 Hartman v. Tresise, 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

6 State v. Barker, 37 Utah 345, 108 Pac. Rep. 352, 27 L. R. A., N. S. 1138.

7 Lee v. Mallard, 116 Ga. 18, 42 S. E. Rep. 372; Teed v. Halstead, 5 Cow. 216.

contend for an instant that this money, belonging to all of the people of the State, collected by taxation and expended for the improvement and protection of these fishing and hunting grounds, was collected and expended for the sole benefit of the ranchmen, who, by fortunate circumstances, owned lands bordering on these public waters; or that it was for fishing and shooting clubs, or for individuals who were able to purchase lands bordering upon some stream, and that, upon the other hand, the great mass of the public must be excluded from fishing and hunting upon these waters so solemnly dedicated to the public. It seems to us that all the law, justice, and equity is with the right of the public to use these waters in accordance with the views set forth in the premises of this argument. And, whatever may be said in regard to the vested rights of those who acquired these lands before the Act of dedication was passed, those who acquired after the dedication certainly took their lands subject to the rights in the waters imposed by the dedication.

§ 367. Right where declaration is made that waters are public—Hartman v. Tresise.—Since writing all of the preceding section, we discovered the case of Hartman v. Tresise,[1] which formerly had been overlooked, and we will say that after carefully studying the majority opinion, written by Mr. Justice Campbell, we have no reason to change our views upon this important question, as stated in the preceding section. For a decision, which, in the face of constitutional and statutory law, overturned the rights of all the public in favor of the favored few, this decision certainly ought to go down to posterity as a leading case. The facts in that case were that in 1876, when Colorado was admitted to the Union, the following constitutional provision was adopted: "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."[2] And in 1903 the legislature, in furtherance of this provision of the constitution, passed the following: "That the public shall have the right to fish in any stream in this State, stocked at public expense, subject to actions

1 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872.

2 Colorado Const., Sec. 5, Art. 16.

in trespass for any damage done property along the banks of any such stream."[3] The plaintiff was the owner, and in possession of lands which were patented after the adoption of the constitution and Colorado's admission as a State, and, of course, the title was subject to the constitutional provision. The defendant, a citizen of Colorado, waded into a natural stream where it ran through the plaintiff's land, for the sole purpose of fishing, which he succeeded in doing against the objection and protest of the plaintiff, the stream having been previously stocked with fish at the expense of the State. The plaintiff brought an action in trespass against the defendant for breaking into plaintiff's close. The defendant amply justified his act under the provision of the constitution and the Act of 1903, above quoted. The trial Court dismissed the action upon the ground that "defendant, as one of the citizens of this State, was only exercising the right granted to him by the general assembly under the constitution." Upon appeal, the Supreme Court reversed the judgment of the District Court, with mandatory instructions to enter a judgment in favor of the plaintiff, upon the theory of the common law that the plaintiff owning the land on both sides of the stream owned the bed, and had the exclusive right of fishing in the stream, to the extent that it flows through his lands; and, second, "the legislature can not make lawful a trespass by one man upon the lands of another by providing that if any damage is thereby done a recovery therefor may be had." The decision, therefore, held that the Act of 1903 was unconstitutional.

Mr. Justice Bailey of the Court wrote a dissenting opinion in the case, concurred in by Mr. Justice Steele, and this dissenting opinion contains all the logic, reason, law, and equity in the case, and should have been the decision of the Court. He first traces the history of the right of fishing and hunting from the time of the Angles and Saxons down to the common law of England; he shows how, under this law, these rights of the public to hunt and fish were first confined to the waters under the influence of the tide, because these at that time were the only public waters. He shows how, afterward, in this country these rights were extended to all waters even above the tide, as far as a boat could travel and the waters were in fact navigable, because these waters, being navi-

[3] Sess. Laws, Colo., 1903, Chap. 112, p. 233.

gable, were public waters. Then, referring to the provision of the Colorado constitution quoted above, wherein the water of every natural stream, not appropriated, was declared to be the property of the public, and the same was dedicated to the use of the people of the State, he adds: "The act of fishing is not necessarily connected with the act of navigation. Their (the streams) being navigable made them public, and their being public gave the right of fishery. So that it ought not to be said that fishing is limited to navigable streams. Navigation is only one of the ways by which a stream may be made public. *There is no higher authority for making a stream public than the declaration of the people themselves in their compact of organization dedicating it to the use of the people.*" The opinion then goes on to show that the riparian rights in the several States are dependent upon the State laws,[4] and that by various Acts of the legislature down to the one of 1903 the legislature of the State had treated the streams as public, not only in the use of the water, but also in the use of their beds. The opinion then goes on to show that the sum of $311,500 of the people's money had been expended by the State authorities for the stocking, maintenance, and protection of fish in these public waters, which will be confiscated from the people to the sole benefit of a few landed proprietors, and finally concludes his argument with, "I, for one, am not willing to consent that this property and these rights may be taken by judicial repeal from the people in whom they are vested by the constitutional grant and given to the individual proprietors and club lessees by judicial enactment."[5] Mr. Justice Bailey was undoubtedly correct in his views, and, although it is within the power of the constitutional convention and the legislature of a State to declare what policy the State shall pursue relative to the ownership of the beds of streams and the use of the waters flowing therein, this policy once having been declared by the constitution, followed up by legislative enactments, it is not for the Courts to legislate and declare an entirely new policy and overturn the old rule as laid down by the constitution and the legislature.[6] And the right of the general

[4] Citing Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Kenyon v. Knipe, 46 Fed. Rep. 309.

[5] For rights of fishing and shooting clubs, see Sec. 368.

[6] For powers of a State as to the ownership of the waters in the State, see Secs. 372-389.

public to fish in all waters dedicated or declared to be public waters should be maintained until those waters are diverted from their natural sources and applied to some of the more beneficial uses provided for by the statute.

§ 368. **Exclusive right of fishing and hunting clubs.**—Throughout this whole country there are to be found fishing and hunting clubs which claim the exclusive rights of the hunting and fishing within certain areas of waters. The question now is, What rights, if any, have these clubs to the exclusive fishing and hunting superior to the rights of the general public? It is our view that these rights differ in the different States, and in the different localities of a State, according to the policy of the States declared by their constitutions or legislatures relative to the ownership of the beds of the waters, and the uses of the waters themselves. In those jurisdictions where riparian owners have the exclusive right of hunting and fishing on certain waters which run through or border their lands, there is no reason in law or equity why a fishing and shooting club may not also acquire the exclusive right. As we have seen, the right of hunting and fishing, being in the nature of real property, may be acquired by deed;[1] the right may be leased from the owner of the right, or it may be exercised under a license from him.[2] It may be acquired by prescription.[3] This right may be also acquired from the State by means of a special grant, and the grantee will then have the exclusive right of the hunting and fishing. This grantee may be a hunting and fishing club; and, if so, it and its members will have all of the exclusive privileges which an individual would have. This is the rule, regardless of how the State acquired the lands; whether they were acquired under the law that upon its admission as a State it became vested with the title to the beds of all navigable waters, or whether by some Act of Congress the State became vested with certain lands, as, for example, the Swamp Land Act of 1850. The State upon being vested with these lands has the absolute right of disposal, by absolute grant, lease, or license; provided, of course, the navigable waters of the United States are in no way impaired. Where these grants have been made under authority of law, the wisdom of the

1 See Sec. 360.
2 See Sec. 361.
3 See Secs. 361, 364.

measure and those things in respect thereto, which indicate that the legislature did not properly guard the interests of the public, do not concern the merits of a case brought to enforce such an exclusive right.[4] Upon the other hand, unless the right of a club is acquired in some of the methods mentioned, it or its members can not, by simply going upon certain waters and laying claim to certain portions thereof, acquire an exclusive right to the hunting and fishing thereon. To hunt and fish in and upon the navigable waters is a public right of which any citizen may avail himself, subject to the game laws of the State and the exceptions above mentioned. The right to hunt is as valuable to the individual as his right to fish, and the authorities which sustain and protect him in the exercise of the one may be invoked with equal force as to the other.[5] And, where parties have a right to hunt or fish in or on these waters of a State, it is not a bare legal right, interference with which causes no substantial injury, but is a right of sufficient dignity to move a Court of Equity to protect it by injunction.[6]

There are other States where these questions have already arisen and are liable to arise in the future, and these are those States which have declared by their constitutions or by Acts of their legislatures to the effect that the title to all the waters within their respective jurisdictions is in the public. In these States, as well as in the other States, upon their admission to the Union, the beds of the navigable waters and the waters themselves vested in the States, and were subject to disposal and use according to the laws adopted. But, by making the declaration that all the waters within the State were the property of the public, the State did dispose of

4 Diana Shooting Club v. Lamoreaux, 114 Wis. 44, 89 N. W. Rep. 880, 91 Am. St. Rep. 898; Sterling v. Jackson, 69 Mich. 488, 37 N. W. Rep. 845, 13 Am. St. Rep. 405.

5 Ainsworth v. Munoskong Hunting and Fishing Club, 153 Mich. 185, 116 N. W. Rep. 992; State v. St. Clair Fishing and Shooting Club, 127 Mich. 580, 87 N. W. Rep. 117.

6 Ainsworth v. Munoskong Hunting & Fishing Club, *supra;* Heckman v. Swett, 107 Cal. 276, 40 Pac. Rep. 420, aff'g 99 Cal. 303, 33 Pac. Rep. 1099; Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 4 L. R. A., N. S. 275; Wilson v. Hill, 46 N. J. Eq. 367, 19 Atl. Rep. 1097; Cherry Point Fish Co. v. Nelson, 25 Wash. 558, 66 Pac. Rep. 55; Womer v. O'Brien, 37 Wash. 9, 79 Pac. Rep. 474; Fitzgerald v. Firbank, 2 Ch. 96, 66 L. J. Ch. 529, 76 L. T. Rep. N. S. 564; Bingham v. Salene, 15 Ore. 208, 14 Pac. Rep. 523, 3 Am. St. Rep. 152; Stannard v. Hubbard, 34 Conn. 370.

them, and to the public. As long as this declaration remains in full force and effect the exclusive right of fishing and hunting can not be acquired by a club, or even by a riparian owner, where his lands were acquired subject to the dedication, and where access to any waters may be obtained without trespassing upon the lands of the owner of the banks. The public are the owners of these waters and all the incidents thereto, which include the beds of the streams over which these waters flow; and the citizen of one of these States has not only the right to go where he can by boat, but he may also wade the beds of the streams and there fish or hunt. To declare any other rule is to deprive the general public of their rights and give them to the individual or club.[7]

As to the policy of a State conferring exclusive grants of fishing and hunting to clubs organized for these purposes, which, until the grant, belong to all the citizens of the State alike, I am firmly of the belief that it is wrong, especially where these waters are stocked, maintained, and protected at the expense of the public. As was said by Mr. Justice Morse, in rendering the dissenting opinion in the case of Sterling v. Jackson,[8] which opinion was adopted afterward by the same Court in the case of State v. St. Clair Fishing Club:[9] "I can not give my judicial sanction to the practical selling out of the public waters—the navigable streams of this State—for purposes of fishing and fowling to a favored few, to be stocked and replenished year by year at the expense of the public, and the

[7] See discussion upon this subject in Secs. 366, 367.

See, also, Hartman v. Tresise, 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872, and dissenting opinion therein.

For the States which have the dedication of waters to the public, see Secs. 372-389.

The legislature has the right to control the subject of fishing and hunting and riparian rights. Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, Rev'g 16 Fed. Rep. 823; Willow River Club v. Wade, 100 Wis. 86, 76 N. W. Rep. 273, 42 L. R. A. 305.

Those States which hold the doctrine of State title to the public waters deny any redress for the injury to riparian rights, for the reason that they do not recognize the existence of such rights. Lewis, Em. Domain, Sec. 85.

In those States which have made this dedication, there is no difference between navigable and nonnavigable streams in the matter of hunting and fishing. Boorman v. Sunnuchs, 42 Wis. 233; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541.

[8] 69 Mich. 488, 37 N. W. Rep. 845, 13 Am. St. Rep. 405.

[9] 127 Mich. 580, 87 N. W. Rep. 117.

shutting off of the great mass of the people, who bear the burden of such expense, from a right and enjoyment as dear to some of them, at least, as it can be to any riparian owner along such streams, or any member of a club or syndicate which has leased such owner's premises." It was said in a recent California case,[10] relative to the creation of monopolies for gun clubs, as related to the use of waters for the purposes of irrigation: "It may be conceded that the Courts have recognized the right of gun clubs to practically create a monopoly in wild game over large areas of land, and have protected them in a so-called private proprietorship and limited dominion over such portions of the common property of the people of the State as they may induce to stay upon such preserves by feeding them and maintaining ponds therein. It may also be conceded that an exclusive right to hunt upon such preserves has also been held to be a species of property, and injunctions have been issued to prevent interference with the full exercise of such rights.[11] But, while the maintenance of such duck ponds no doubt contributes greatly to the enjoyment of the owner of the hunting privilege, it will scarcely be contended that this is a use of the water which is beneficial to the land. Neither does it follow that because the Courts have recognized such exclusive hunting privileges they must support the owners thereof in an encroachment upon another more necessary common right of the public, that of the conservation of the subterranean waters of the State for domestic uses and purposes of irrigation."

§ 369. Police powers of a State to regulate and protect fishing and hunting.—It is well established that by reason of a State's jurisdiction and control over the waters within its boundaries, and over the fish and game, it is within the police power of a State legislature, subject, of course, to constitutional restrictions, to enact such general and special laws as may be necessary for the regulation and protection of the fish and game within its boundaries, and found in or on the waters of the State.[1] This is also the rule

10 *Ex Parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

11 Citing Kellogg v. King, 114 Cal. 378, 46 Pac. Rep. 166, 55 Am. St. Rep. 74.

1 Geer v. State, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600; People v. Truckee Lum. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; *In re* Delaware River, 131 App. Div. 403, 115 N. Y. Supp. 750; Hooker v. Cum-

as to other game not connected with waters, but with that subject we have nothing to do. This dominion of a State, by means of its police powers, of protecting its sovereign rights in the fish and game in and on the waters within its jurisdiction, and their preservation for the common enjoyment of its citizens, is not restricted to their protection only when found in what may be held to be navigable or otherwise public waters. It extends to all natural waters within the State, public or private, wherein fish are accustomed to resort for spawning purposes, or the wild fowl for the purposes of breeding or protection, and through and to which they have the freedom of passage from the public fishing and hunting grounds of the State. And the Courts hold that to the extent that waters are the common passageway for fish, or are the common resorts for water fowl, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all the laws regulating the rights of fishing and hunting.[2] So the legislature has the authority to reg-

mings, 20 Johns. 90, 11 Am. Dec. 249; People v. Doxtater, 75 Hun 472, 27 N. Y. Supp. 481; affirmed in 147 N. Y. 723, 42 N. E. Rep. 724; State v. Beardsley, 108 Iowa 396, 79 N. W. Rep. 138; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Parker v. People, 111 Ill. 581, 53 Am. Rep. 643.

2 Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499, aff'g *Id.* 119 N. Y. 226, 23 N. E. Rep. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813, in which the Supreme Court of the United States held that it is the duty of a State to preserve the fisheries of the State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish.

See, also, Cottrill v. Myrick, 12 Me. 222; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; *Ex Parte* Maier, 103 Cal. 476, 37 Pac. Rep. 402, 42 Am. St. Rep. 129; People *ex rel.* Ricks Water Co. v. Elk River Mill & L. Co., 107 Cal. 24, 40 Pac. Rep. 521, 48 Am. St. Rep. 125; Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140; State v. Snover, 42 N. J. L. 341; Williams v. Blackwall, 2 Hurlst. & C. 33, L. J. Exch. N. S. 174 Jur. N. S. 579, 8 L. T. N. S. 252, 11 Week. Rep. 621; Smith v. Levinus, 8 N. Y. 472; Wyndehamer v. People, 378; Holyoke Water Power Co. v. Lyman, 82 U. S. 15 Wall. 500, 21 L. Ed. 133; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; Commonwealth v. Essex Co., 13 Gray 239; Inland Fisheries Comrs. v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247; Hart v. Albany, 9 Wend. 571, 24 Am. Dec. 165; People v. Truckee Lum. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, and note; *Ex Parte* Bailey, 155 Cal. 472, 101 Pac. Rep. 441, 132 Am. St. Rep. 95; Portland etc. Co. v. Benson, 56 Ore. 147, 108 Pac. Rep. 122.

ulate the taking of fish and game and to provide severe penalties for a violation of the regulations;[3] this may be fine, imprisonment, and a forfeiture of the fish and game taken. Statutes may be enacted regulating the time when it may or may not be lawful to fish or hunt;[4] and also regulating the method by which the fish and game may or may not be taken.[5]

A State has also the power to make it an offense to have in possession, for the purpose of transportation beyond the State, fish or game which have been lawfully taken within the State during the open season.[6] A State law is valid which confers the exclusive right of fishing and hunting upon its citizens to the exclusion of nonresidents.[7] There are many other laws which may be enacted under the police powers of a State, which it is not necessary to mention here. But there are two subjects which should be mentioned in this connection, and these are: The authority of a State to regulate the construction of all obstructions in a stream, so that the fish may pass and repass, as, for example, dams con-

See, also, *Ex Parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

[3] Burnaham v. Webster, 5 Mass. 266.

[4] Gentile v. State, 29 Ind. 409; Ruther v. Harris, L. R. 1 Exch. Div. 97, 45 L. J. M. C. N. S. 103, 33 L. T. N. S. 825; State v. Beal, 75 Me. 289; Commonwealth v. Wentworth, 15 Mass. 188; Commonwealth v. Look, 108 Mass. 452; *Ex Parte* Hewlett, 22 Nev. 333, 40 Pac. Rep. 96; State v. Smith, 61 Vt. 346, 17 Atl. Rep. 492.

[5] Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499, affirming 119 N. Y. 226, 23 N. E. Rep. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813.

In a recent case in California it was held that it was immaterial to those accused of guilt whether they acted as fishermen, merchants, or merchants' employees; the sole question being whether they took part in the illegal fishing in violation of the Pen. Code, Sec. 634, prohibiting fishing with certain nets. People v. Russo, 8 Cal. App. 636, 97 Pac. Rep. 700.

See, also, Commonwealth v. Prescott, 151 Mass. 60, 23 N. E. 729; State v. Mrozinski, 59 Minn. 465, 61 N. W. Rep. 560, 27 L. R. A. 76; State v. Lewis, 134 Ind. 250, 33 N. E. Rep. 1024, 20 L. R. A. 52; McGowan v. Larsen, 66 Fed. Rep. 910, 14 C. C. A. 178, 29 U. S. App. 554.

See, also, the case of United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662, where the Court held that although a treaty with the Indians fixed in the riparian land such easements as entitled the right to be exercised, that it did not "restrain the State unreasonably, if at all, in the regulation of the right."

[6] Geer v. State, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. Ed. 793.

[7] State v. Harrub, 95 Ala. 176, 10 So. Rep. 752, 15 L. R. A. 761, 36 Am. St. Rep. 195.

But see State v. Mallory, 73 Ark. 236, 83 S. W. Rep. 955, 67 L. R. A. 773.

structed for the diversion of the water from the streams for irrigation and power purposes; and laws prohibiting the destruction of fish by unlawful means, as by permitting them to be carried over lands by ditches used in irrigating these lands. These two subjects will be discussed in separate sections.[8]

§ 370. Police powers of a State to regulate obstructions in streams.—At common law riparian proprietors can not place obstructions in a stream which will interfere with the passage of fish up and down the streams, although such streams may be nonnavigable and are entirely subject to private ownership.[1] In this country it is within the police power of a State, through its legislature, to enact statutes to protect the passage of migratory fish up and down streams, and that, too, regardless of the fact as to whether the streams are to be deemed public or private. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all the laws regulating the right of fishery.[2] In many States the maintenance of dams or other obstructions to the free passage of fish is an indictable offense.[3] But in all parts of this country dams in streams are required for industrial pursuits of many kinds. Dams must be built for the diversion of water for power purposes; they must also be built for the diversion of water for irrigation. These are legitimate pursuits, and for their full accomplishment certain obstructions must be placed in the streams, which, to a certain extent at least, obstruct the passageway of fish. How can all of these in-

8 For regulating obstructions in streams, so that fish may pass, see Sec. 370.

For the unlawful destruction of fish by irrigation ditches, see Sec. 371.

1 Weld v. Hornby, 7 East. 195, 3 Smith 244, 8 Rev. Rep. 513; Murphy v. Ryan, 2 Ir. Rep. C. L. 143, 16 Week. Rep. 678; Sutherland v. Ross, 3 App. Cas. 736.

2 People v. Truckee Lum. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Cottrill v. Myrick, 12 Me. 222; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; Smith v. People, 46 Ill. App. 130; Summers v. People, 29 Ill. App. 170; Commonwealth v. Alger, 7 Cush. 53; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Hyde v. Russell, 2 Cush. 251.

3 Hamilton v. Donnegall, 3 Ridgeway 276; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; Chase v. Baker, 59 N. H. 347.

dustries be preserved without injuring each other to the least possible extent? It has been discovered that if a passageway is constructed through the dam, consisting of a series of stairs, that the fish will ascend the streams, practically the same as though there was no obstruction. Hence it follows that the right of fishery, as well as the right to use the water of a stream for power and irrigation purposes, being all entitled to public protection, are subject to legislative regulation and control. Therefore, it is within the power of the legislature of a State to enact laws compelling the owners of dams on all streams within the State to construct and maintain adequate fishways for the free passage of fish, and to make it a criminal offense not to do so, after due notice.[4] And the weight of authority holds that this is true, notwithstanding such dam or other obstruction has been maintained for the usual period for prescription.[5] We will only add in this connection that in this country the statute books of almost all of the States show the solicitude of their respective legislatures to protect and maintain the fisheries in this country by preserving a free passage through all dams and other obstructions in the streams and rivers which flow within their respective jurisdictions; this is not only true in those rivers which are visited by fish from the ocean, but also in the smaller streams. In nearly every State of the arid region of this country are statutory provisions, which provide that the builders and owners of dams constructed in any of the rivers and streams for the purpose of diverting water for irrigation or otherwise, shall construct suitable fishways, so that the fish may have as free a passage as possible up and down these streams.[6]

4 Holyoke Water Power Co. v. Lyman, 82 U. S. 15 Wall. 500, 21 L. Ed. 133, affm'g 104 Mass. 446, 6 Am. Rep. 247; State v. Meek, 112 Iowa 338, 84 N. W. Rep. 3, 51 L. R. A. 414, 84 Am. St. Rep. 342; State v. Beardsley, 108 Iowa 396, 79 N. W. Rep. 138; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Swift v. Falmouth, 167 Mass. 115, 45 N. E. Rep. 184; State v. Griffin, 89 Mo. 49, 1 S. W. Rep. 87; Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; Commonwealth v. Essex Co., 13 Gray 239; State v. Stover, 42 N. J. L. 341; Doughty v. Conover, 42 N. J. L. 193; West Point Water Power Co. v. State, 49 Neb. 218, 66 N. W. Rep. 6.

5 Parker v. People, 111 Ill. 581, 53 Am. Rep. 643; Cottrill v. Myrick, 12 Me. 222; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; Weld v. Hornby, 7 East. 195, 3 Smith K. B. 244, 8 Rev. Rep. 513.

But see Woolever v. Stewart, 36 Ohio St. 146, 38 Am. Rep. 569.

6 For the statutes providing for fishways, see the subject under the various States, Part XIV.

§ 371. **Destruction of fish by means of irrigation ditches.**—There is another important question which comes strictly within the police power of a State, and which in the Western portion of this country is too often overlooked, and that is the prevention of the enormous destruction of fish, especially by means of irrigation canals and ditches. These irrigation canals are many times taken out of streams which are inhabited by mountain trout, salmon, and other valuable food and game fishes. By leaving the intakes of these canals open the water from the stream rushes in and is conveyed to the fields which it is used to irrigate. With this water many fish go also, which swim along the main canals and the laterals, and finally into the smaller ditches, and are thrown upon the irrigated fields, where they perish. In some places this practice is carried on purposely, under the idea that the fish make a good fertilizer for the land. In other places this is practiced as a unique method of catching fish.[1] Again, in places, there is the practice of draining canals, at times of cleaning them out, or at other times, by shutting off the water at the intake and permitting the water already in the canals to drain out, the fish are caught in a trap, and are to be found by thousands floundering about in the pools at the bottom, where they are either taken out with pitchforks or other implements, or are allowed to perish where they are. There is absolutely no question but that it is within the police power of a State to prevent the wanton destruction of its fish and game. A law is valid which forbids the killing of fish by poison or explosives,[2] or by the pollution of a stream by means of refuse from sawmills,[3] or other deleterious substances which will either destroy the fish or drive them from the streams.[4] And, therefore, a law is valid, and strictly within the police power of a State, which provides that the intakes of all canals and ditches, where the water is diverted from the natural streams for the purpose of irrigation or other uses, the owner of such ditch or works shall cause to be constructed wire screens to prevent the fish in

1 See Lobdell v. Hall, 3 Nev. 507.

2 Keoun v. State, 64 Ark. 231, 41 S. W. Rep. 808.

3 People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183.

4 Cartwright v. Canandaigua Gaslight Co., 32 Hun 403; State v. Kroenert, 13 Wash. 644, 43 Pac. Rep. 876; State v. American Forcite Powder Mfg. Co., 50 N. J. L. 75, 11 Atl. Rep. 127; Blydenburgh v. Miles, 39 Conn. 484; Stead v. Tillotson, 64 J. P. 343, 69 L. J. Q. B. 240, 48 Week. Rep. 431.

the streams from going down the canals and being destroyed as related above. It may be said that the legislatures of the most of the States have such provisions on their statutes, but the dearth of the cases which have got to the Courts of last resort testify to the fact that these statutes are not very strenuously enforced. It is claimed by some that it imposes a hardship upon the canal owners if the law is enforced; that the screens fill up with the leaves and brush; that holes are broken through the screens by the driftwood, and that the fish jump over the screens and so get into the canals; and that there are other difficulties. In reply to this, I will only add that the law does not require impossibilities. But a little more activity upon the part of fish and game wardens in looking after this particular subject would preserve vast quantities of fish that are now being wantonly destroyed and wasted, and would save a great expense to the State, which had formerly stocked these streams with these very fish.

CHAPTER 18.

DEDICATION BY A STATE OF ITS WATERS.

§ 372. Scope of chapter—Jurisdiction of a State over its waters—Terms of dedication.
§ 373. Cause leading up to dedication.
§ 374. Powers of a State to dedicate its waters.
§ 375. Powers of a State to dedicate its waters—Limitations to the rule.
§ 376. Early dedications.
§ 377. States which have dedicated their waters.
§ 378. Dedication by California—Partial by constitution and total by late statute.
§ 379. Dedication by Colorado—Total dedication by the constitution.
§ 380. Dedication by Idaho—Total dedication by constitution and statute.
§ 381. Dedication by Montana—Partial.
§ 382. New Mexico—Total dedication by the constitution and statutes.
§ 383. Dedication by North Dakota—Total by the constitution.
§ 384. Dedication by Washington—Partial by the constitution.
§ 385. Dedication by Wyoming—Total dedication by the constitution.
§ 386. Statutes of States not having constitutional provisions.
§ 387. Effect of dedication by the States—Different doctrines.
§ 388. Effect of dedication—As against the rights of the United States.
§ 389. Other effects of dedication.

§ 372. Scope of chapter—Jurisdiction of a State over its waters—Terms of dedication.—We have seen in previous sections [1] that, in this country it is within the power of a State to declare whether the ownership of the soil under its waters shall remain in the State, or shall vest in the riparian owners.[2] We shall also see, in a future portion of this work, that under the common law the right to the use of waters depends largely upon the ownership of the land through which, or adjoining which, the waters flow in their natural channels.[3]

In this chapter we shall attempt to show that the common law in many of the Western States has been modified by a declaration either in their respective constitutions or by legislative enactment, to the effect that the waters within such respective jurisdictions are "the property of the State" or "the property of the public." Respecting the declaration that the waters are "the

1 See Secs. 329, 330.
2 See Sec. 330.
3 See Secs. 451, 458.

property of the State" or "the property of the public," the Courts hold that these two terms are synonymous. As was said by the Court: "There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public and that it is the property of the State."[4] What is really meant by the above expressions is that the running water is *publici juris*, or open to the people of the respective States for appropriation for beneficial uses or purposes. As was said in a Wyoming case: "Under the rule permitting the acquisition of rights by appropriation the waters become, perforce, '*publici juris.*'"[5] Again, in a Federal case arising in Colorado, Judge Hallett said: "The waters of flowing streams are *publici juris*—the gift of God to all His creatures." It is further held that by the use of either phrase the State in its sovereign capacity, as the representative of the public or the people, is vested by such dedication with the jurisdiction and control of the waters flowing within its boundaries.[6] It, therefore, follows that the office of the State is regulative and administrative, and that the State acts in its sovereign capacity rather than owner.[7] Also in Kansas v. Colorado,[8] wherein it was held that the power of the State to regulate and control the waters without interference was paramount, and that, too, without an intimation of an actual State ownership. This ownership or jurisdiction of a State over its waters must always be considered subject to the rights and jurisdiction of the United States over what are known as the navi-

4 Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

5 Willey v. Decker, 11 Wyo. 498, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

6 Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

7 See Robertson v. People *ex rel.* Soule, 40 Colo. 119, 90 Pac. Rep. 79; Farmers etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365, wherein it is held that the term "public waters" refers to all the waters running in the natural channels of the streams within the State; that the State may by proper legislation regulate the appropriation and use thereof, and the private rights authorized by law were simply relative to the use of the public waters and not an ownership in them, at least while they were flowing in their natural channels.

See, also, White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Fort Lyons etc. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37;

8 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

gable waters of the United States for the purpose of protecting their navigable capacity,[9] and also the rights of the United States as a riparian owner on waters is a subject which will be discussed in future sections of this work.[10]

§ 373. **Cause leading up to dedication.**—The greater portion of the arid region of the United States was acquired from Mexico by the treaty of Guadalupe Hidalgo in the year 1848. After that treaty, the United States, being the sole owner of the land, was also the sole owner of the waters thereon, and had full power to deal with them as it saw fit. That the United States did not then deal with these waters and establish a uniform system was undoubtedly because this section of the country was generally regarded as valueless, and not worth the trouble of Congress to enact specific laws regulating the control and use of waters. However this may be, it is to be regretted that Congress did not then act. Immediately upon the cession of the territory in question the United States, being the owner of both the land and the waters, and having adopted the rule of the common law governing the subject of waters, became what is known in law as the sole riparian proprietor of all the water courses and the waters flowing therein, and all other rights were assimilated by the common law rule.[1] But the greater portion of this territory being hot, dry, and very arid, it was soon found that the common law rule of riparian rights was not in all respects applicable to the existing conditions, owing largely to the fact that, under that law, the water of a stream must flow as it was wont to flow by Nature, within the channel of the stream.[2] And this, coupled with the further fact that in this region which, prior to the treaty with Mexico, had been sparsely settled in certain localities, a different custom relative to the use of the waters had been in vogue for many years, whereby the waters of the streams, in order to meet the necessities of supporting life, had been diverted from their natural channels and used in the irrigation of the lands, thus changing the region from one which was entirely barren to one which could even be made,

9 For right of navigation, see Chap. 16, Secs. 343-346.

10 For the rights of the United States as a riparian owner, see Sec. 480.

1 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

2 For riparian rights, see Secs. 450-551.

and since has been made, luxuriously habitable.[3] This custom which has been referred to sprang from the laws of Mexico, the former owner of the country; and Mexico in turn, with some modification, had adopted the civil law rule relative to the control, use, and jurisdiction of waters.[4]

Owing to the climatic conditions, the search for gold, and the exceeding fertility of the soil, settlers were attracted to these arid regions, and the use of the water by diverting it from its natural channels and applying it to some beneficial purpose continued. When the population of certain sections had increased to such an extent as to make it practicable, Territorial governments were formed, including certain portions of this region, and these were followed by State governments. In the constitutions of these States the common law was adopted so far as it was applicable to the existing conditions, and, upon the subject of waters, in many of the States, at the very time of the adoption of their constitutions, all of the claims to the waters within the State were under the custom of appropriation, and very few, if any, claims were made under the common law rule of riparian ownership. So, in a number of these States, in the constitutions themselves, there was a provision made dedicating all the waters within the State to the public, or to the State. This was evidently done in order to counteract the provisions of the common law adopted in another portion of the constitution, and to sanction the custom, as far as possible for a State constitution to sanction it, of the law of appropriation for beneficial purposes. Other States which had not adopted constitutional provisions of this nature, and some which had, also adopted legislative enactments to the same effect, declaring all waters within their boundaries the property of the State or public.[5] It will be noticed that the dedications to the public most absolute in their terms are in the constitutions and laws of those States which are physically the most arid, the intent evidently being to abolish the common law theory of riparian rights as far as possible.[6] By this doctrine it is seen that the title to the

[3] For the history of the development of the Arid Region doctrine, see Secs. 595-626.

[4] For the rule of the civil law, see Secs. 552-584.

[5] For the terms of the dedication in the various States, see Secs. 376-386.

[6] For the express terms of these dedications, see Secs. 379-386.

For the history and intent of these dedications, see Farm Investment v.

use of the water is in the public, or the State, which in turn, under its regulative or police powers, may prescribe by legislative enactment the details as to how an individual or corporation may acquire the right to the use of a portion of the water. This rule is called the doctrine of State control,[7] as distinguished from the doctrine of Governmental control, or the claim that the right to the waters on the public lands is vested in the United States, and not in the State, and that the appropriators derive their title to them directly from the United States, and not from the State, for the reason, as was recently said by the Supreme Court of Washington, the waters are "utterly beyond the power or control of State legislatures."[8] Coming down to the rights of the appropriator, in a jurisdiction where there has been an absolute dedication of its waters either to the public, as is the case in Colorado,[9] or to the State, as is the case in Wyoming,[10] it is held that the appropriator secures a right of use, which has been held, with

Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Smith v. Deniff, 23 Mont. 65, 24 Mont. 20, 57 Pac. Rep. 557, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Ft. Morgan Land & Canal Co. v. South Patte Ditch Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Re* Adjudication of Water Rights in Dist. No. 33 (D. C. Colo.), 1 Denver Legal Adv. 300; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 Pac. Rep. 332; Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504; aff'd 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Suffolk Gold Min. & M. Co. v. San Miguel Consol. Min. & M. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; Crawford Co. v. Hall, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914; Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74; Mohl v. Lamar Canal Co., 128 Fed. Rep. 776; Union M. & M. Co. v. Dangberg, 2 Sawyer 450 Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; 81 Fed. Rep. 73; Anderson v. Bassman, 140 Fed. Rep. 14; Cruse v. McCauley, 96 Fed. Rep. 369; Biglow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

7 For doctrine of State control, see Chap. 68.

8 Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091.

9 For dedication in Colorado, see Sec. 379.

10 For dedication in Wyoming, see Sec. 385.

good reason, to amount to a property right, and not a title to the running water itself,[11] except, it may be, to such quantity as shall from time to time be lawfully diverted into his own ditches. The title to the water of the appropriator fastens, not upon the water while flowing along its natural channel, but upon the use of a limited amount thereof for beneficial purposes in pursuance to an appropriation lawfully made and continued. The appropriation is made upon the basis that the public or State is the owner of the waters, and is protected, instead of impaired, by the constitutional dedication.[12]

§ 374. **Powers of a State to dedicate its waters.**—A State has full power to dedicate all the waters within its boundaries to the public, and then prescribe by proper legislation how the public, or any individual or corporation as a part of the public, may use those waters. This power of a State is subject to two exceptions—the right of navigation,[1] and the riparian rights of the general Government in the lands still owned by it.[2]

In preceding sections we have seen that it is within the power of each State to make such a rule relative to the ownership of the soil under nontidal navigable rivers as it sees fit, and whether it shall remain in the State or vest in the riparian owners.[3] So, too, each State has the absolute power, subject to the above limitations, to regulate and control all the waters flowing within its boundaries, and the use of such waters. Hence it follows that the system of laws which may be adopted, regulating and controlling the distribution and use of waters, is left entirely to the State wherein they are found. Each State may determine by its legislature for itself whether the common law rule of riparian rights, the rule of the civil law that all waters are *publici juris*,[4] or the Arid Region Doctrine of appropriation, as the same is known and in force in

11 For title to water, see Secs. 288-290, 333.

12 Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

1 For right of navigation, see Chap. 16, Secs. 341-357.

2 For right of the Government as a riparian owner, see Sec. 388.

For the ownership of the water itself, see Secs. 288-290, 333.

3 See Secs. 328-332.

4 For the common law of riparian rights, see Chaps. 21-28, Secs. 450-551.

For the civil law, see Chaps. 29, 30, Secs. 552-584.

the Western portion of this country, shall prevail.[5] This being the undoubted rule of law, it gives the State full power and jurisdiction over the waters flowing or lying within the boundaries of

[5] That each State has the power to adopt such rule governing waters and their use, see, also, Sec. 593.

For the doctrine of State control or State administration, see Chap. 68.

See, also, the following cases: Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 957, 27 Sup. Ct. Rep. 655; Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997; Pollard v. Hagan, 44 U. S. 3 How. 212, 13 L. Ed. 220; Pollard v. Kibbe, 50 U. S. 9 How. 471, 13 L. Ed. 220; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; St. Louis v. Myers, 113 U. S. 566, 28 L. Ed. 1131, 5 Sup. Ct. Rep. 640; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, rev'g 16 Fed. Rep. 823; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349, 42 L. Ed. 497, 18 Sup. Ct. Rep. 157; Kean v. Calumet Canal & Imp. Co., 190 U. S. 452, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171, affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S. 208, 101 Am. St. Rep. 953; Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7, affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368; Telluride etc. Co. v. Rio G. W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178, where the Court held that the validity of an appropriation of waters within any State is made by the Federal statutes a question of State law.

Whitaker v. McBride, 197 U. S. 510, 49 L. Ed. 857, 25 Sup. Ct. Rep. 530; Basey v. Gallagher, 86 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; McGilvra v. Ross, 215 U. S. 70, 54 L. Ed. 95, 30 Sup. Ct. Rep. 27; United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Bean v. Morris, 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703, affirming *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519, where the United States Supreme Court said: "The State of Montana has full legislative power over Sage Creek while it flows within that State."

"The extent of riparian rights belonging to pueblos or persons receiving such patents is a matter of local or general law." Los Angeles Farming & Milling Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452, dismissed for want of jurisdiction.

For same case below, see 152 Cal. 645, 93 Pac. Rep. 869, 1135.

any State, and its legislature may adopt such laws as it sees fit regulating the distribution and use of the waters, and among these may be a dedication of all the waters within a State to the State or to the public.[6]

We also find that it is within the police power of a State to protect the waters within its boundaries. As was said by Mr. Justice Holmes, in the case of Hudson County Water Co. v. McCarter,[7] "It is recognized that the State as quasi sovereign and representative of the interests of the public, has a standing in Court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." Thus we find that from the very organization of the Government the full control and jurisdiction over all streams and other waters, and the beds or soil under those waters, was left entirely to the States then going to make up this Government; and to the States, which were afterward admitted to the Union, were given equal rights in this respect. Hence it follows that a State, either in its constitution or by legislative enactment, may provide that all the waters within its boundaries shall become the property of the public, and such a provision has the effect of a solemn dedication of these waters to the public, to be regulated and controlled as the State legislature may see fit, subject to the two exceptions above mentioned and vested rights at the time of such dedication.

§ 375. Powers of a State to dedicate its waters—Limitations to the rule.—As we stated in the previous section,[1] the power of a State to dedicate the waters flowing within its boundaries is subject to two limitations: First, the power of the general Government to preserve the navigable capacity of the navigable waters of the United States; and, second, the rights of the general Government as a riparian owner in those waters adjoining lands and reservations still owned by it. We have discussed the first limitation in a separate chapter,[2] and there stated to the effect that the

6 For the law of State control, see Chap. 68.

7 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529.

1 See Sec. 374.

2 For the right of the Government to protect the navigable capacity of the navigable waters of the United States, see Chap. 16, Secs. 349-356.

general Government of the United States had reserved the power to protect the navigable capacity of the public waters of the United States, even as against all State action.[3] The jurisdiction of the United States over the navigable waters of the United States, and over the public lands and reservations and the waters running through them, vests in the Government the right to take all needed measures, not only to preserve the navigability of the water courses of the country, but also to reserve such waters as may be necessary to preserve those lands from becoming barren wastes, especially those lands which have been set apart as Indian reservations, occupied and inhabited by the Indians, and the water used in irrigating them, even against the action of any State in dedicating those waters to the public. That the Government has not always exercised its rights in these respects, and has permitted certain State doctrines to grow up relative to the ownership and jurisdiction of these very waters, will be discussed in a subsequent portion of this work.[4] Whether the Government will make any further claims upon these waters for any other than the purposes mentioned remains to be seen, but we are firmly of the opinion that it may, as far as any State dedication is concerned. Such a dedication by a State to itself, as far as the general Government is concerned, to the extent at least of the above limitations and reservations, is of no effect, and the Government may step in and claim its rights in the face of a State dedication.

There is another limitation in the power of a State to dedicate its waters to itself or to the public, which will be discussed in another portion of this work, and that is in the case of the dedication of waters known as interstate waters.[5] It was at least strongly intimated in the case of Kansas v. Colorado,[6] in the face of the constitutional dedication of all the waters within its boundaries by the State of Colorado to the public, that the waters of the Arkansas River, which rises in Colorado and flows down through Kansas, could not all be claimed by the State of Colorado, and that the time might come when such waters might have to be apportioned between the two States upon some equitable basis.

3 See Secs. 343, 352.

4 For the growth of the irrigation systems in the Western States, see Chap. 11, Secs. 238-264.

5 For interstate waters, see Chap. 64.

6 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

§ 376. **Early dedication.**—We find that long before the Western theory of appropriation was thought of, and before this Government was formed, certain waters were dedicated by the Colonies to the public, and this gave the public the right to make common use of these waters the same as they could use any of the other public waters. Massachusetts, by the Colonial ordinance of 1641 to 1647, dedicated the title of all ponds within its jurisdiction containing more than ten acres to the public.[1] Upon the formation of the Government, and since, this was counted as a reservation of these waters in the public, which had the right to make common use of them, including the right to fish, gather ice, and also to use the water for domestic, agricultural, and manufacturing purposes, so long as the water of the pond was not drawn below its natural level.[2] This rule, adopted in Massachusetts, was followed in other States at an early day, notably Maine[3] and New Hampshire.[4] As we shall see in the following sections, the Western States have, in the main, availed themselves of this power of dedication, either by constitutional provisions or by legislative enactment.[5]

§ 377. **States which have dedicated their waters.**—A number of the States, especially in the Western portion of this country, have declared, either in their constitutions or by legislative enactment, or both, that all the waters within the respective States are the property of the public or of the State. The language of these provisions adopted in the various States varies somewhat; and, in order to have a full understanding as to the effect of these provisions, we will discuss the entire subject in this chapter. Those States which have constitutional provisions upon this subject are California,[1] Colorado,[2] Idaho,[3] Montana,[4] New Mexico,[5] North

1 See Sec. 299.

2 Potter v. Howe, 141 Mass. 357, 6 N. E. Rep. 233; West Roxbury v. Stoddard, 7 Allen 158; Atty. Gen. *ex rel.* Mann v. Revere Copper Co., 152 Mass. 444, 25 N. E. Rep. 605, 9 L. R. A. 510; Watuppa Res. Co. v. Fall River, 147 Mass. 548, 18 N. E. Rep. 465, 1 L. R. A. 466.

3 Auburn v. Union Power Co., 90 Me. 576, 38 Atl. Rep. 561, 38 L. R. A. 188.

4 Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718, 18 L. R. A. 679.

5 See Secs. 377-385.

1 See Sec. 378.

2 Sec. 379.

3 Sec. 380.

4 Sec. 381.

5 Sec. 382.

Dakota,[6] Washington,[7] and Wyoming.[8] Some of these States, as will be noticed, have both constitutional provisions and legislative enactments. Those States which have adopted provisions of this nature by legislative enactment only, are Arizona, Nebraska, Nevada, Oklahoma, Oregon, South Dakota, and Utah.[9] We will now take up these provisions in detail of the various States in the order named. It will be noticed that the extent of the dedication varies greatly according to the language used in the respective States.

§ 378. **Dedication by California—Partial by the constitution and total by late statute.**—The constitution of California, in Article 14 provides upon the subject under discussion as follows:

"Sec. 1. The use of all water now appropriated, or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulations and control of the State, in the manner prescribed by law." The rest of the section applies to the fixing of rates of compensation to be collected for the use of water supplied to any city, town, or the inhabitants thereof.

"Sec. 2. The right to collect rates of compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise and can not be exercised except by authority of and in the manner prescribed by law."

It will be noticed by the above provisions of the constitution there was but a limited dedication to the public. The provisions apply only to *all waters now appropriated, or that may be hereafter appropriated, for sale, rental, or distribution,* and these were declared to be a public use. They do not apply to the water running in the streams not appropriated, neither do they apply to the water appropriated by private individuals or corporations for their own use.[1] They do not give the general public any additional rights in the fishing or hunting of the streams or any other rights which the public have in what are known in law as public waters, except subjects hereinafter mentioned. Neither do they in any way interfere with the riparian rights so strenuously insisted upon in the

6 Sec. 383.
7 Sec. 384.
8 Sec. 385.
9 For these provisions, see Sec. 386.

1 Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S. 359.

State of California. It was not left to the legislature to say whether the waters appropriated for sale, rental, or distribution should be a public use or not, but the constitution itself declares them to be such, and then makes the use subject to the regulation and control of the legislature.[2] As was said in the case of Merrill v. Southside Irrigation Co.,[3] "The evident intent of the framers of our constitution was to strike a blow at monopolies which had grown up out of the sale, rental, and distribution of water, and, by declaring such use a public use to bring it within the control of the local authorities in municipalities where the burdens of the system were most onerous." The provisions, however, are general, and apply to all parties supplying water, and not merely to those who have acquired the ownership thereof by appropriation on the public lands. This phase of the provisions of the constitution will be more thoroughly discussed in a subsequent portion of this work, under the subjects of water rates,[4] and public service corporations.[5]

Again, under these provisions it is held that the distribution of water to farming communities under the district irrigation law of the State is a public use.[6] It will be observed that there is a very marked distinction between the provisions of the constitution and those of Colorado, where all water within the State, not theretofore appropriated, upon the adoption of the constitution, was "declared to be the property of the public."[7] But the legislature of California, evidently alarmed because of the threatened appropriation of certain waters within the State and their diversion for use in other States, by the Act of April 8, 1911, amending section 1410 of the Civil Code,[8] provided that: "All water or the use of water

2 People v. Stephens, 62 Cal. 209.

3 112 Cal. 426, 44 Pac. Rep. 720.

4 See Chap. 69.

5 See Companies and Corporations, Chaps. 572-577.

6 See, for California District Law, Sec. 1390; Fallbrook Irr. District v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56, reversing *Id.*, 68 Fed. Rep. 948.

See, also, for right of eminent domain under the Cal. Const., Part XIV, California.

7 For the constitutional provisions of Colorado, see Sec. 379.

See, also, Fresno Canal & Irr. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87. See San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

For the construction by the Courts of the California Constitution, see Part XIV.

8 Supp. Kerr's Codes, 1911, p. 584; Stats. and Amdts., 1911, p. 421.

See, also, sections under California, Part XIV.

within the State of California is the property of the people of the State of California," etc.[9] This provision contains an absolute dedication of the waters of the State to the people of the State.

§ 379. Dedication by Colorado—Total dedication by the constitution.—The State of Colorado, in its constitution, went to a much greater extent in the matter of dedicating its waters to the public than did California.[1] Article 16 of the Colorado constitution provides as follows:

"Sec. 5. The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

"Sec. 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied." The rest of the section relates to priorities and order of uses.

This provision makes the waters of every natural stream within the State of Colorado, public, or *publici juris*, "the gift of God to all His creatures."[2] They are dedicated to the use of the people, to be used by them in such manner as other public waters may be used by the people. However, this use of the people must be deemed subject to two limitations upon the part of the United States, and one provided for in the provision of the Colorado constitution itself, quoted above. The limitations upon the part of the United States are, that the navigable capacity of the navigable waters of the United States,[3] and the right of the United States, as the owner of lands bordering on a stream, within the State, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the Government property, must not be impaired.[4] The limitation provided for in the constitution is that of appropriation for beneficial purposes; but, until the waters are appropriated

9 For rest of section, see California, Part XIV.

1 For the partial dedication by California, see Sec. 378.

2 Mohl v. Lamar Canal Co., 128 Fed. Rep. 776.

3 As to what are navigable waters of the United States, see Sec. 348.

4 United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, Sec. 388.

and diverted from the streams, they belong to the public. No stronger words could have been used in the dedication of any right to the people than were used in this provision of the constitution. After an appropriation has been made, of course, the water belongs to the party appropriating it; but, as long as the waters flow in their natural streams, the general public have the same rights in them that are accorded to the public in all other public waters.[5] The office of the State is then regulative, under its police powers, and the legislature is authorized to pass such laws, regulating the use of the waters, so long as they remain public, or after they become private by virtue of an appropriation, as will not impair the rights of the public, or conflict with the constitutional provision.[6] But in this connection, the Colorado Court has held that such a constitutional provision can not give an appropriator of water for irrigation a priority as against appropriators for other purposes, acquired prior to its adoption.[7]

5 For the rights of the public in public waters, see Secs. 324-340.

6 Roberson v. People *ex rel.* Soule, 40 Colo. 119, 90 Pac. Rep. 79; Schilling v. Rominger, 4 Colo. 100; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Coffin v. Left Hand D. Co., 6 Colo. 443; White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37.

See, also, right of State to fix rates for water, Secs. 1368-1385.

See, also, right of public to hunt and fish in and on public waters, Secs. 361-363.

See, also, right to hunt and fish on the public waters, Chap. 17, Secs. 358-371; U. S. Freehold Land & Em. Co. v. Gallegos, 1 Denver Legal Adv. 412; Ft. Morgan Land & Canal Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

7 Colorado Mill & El. Co. v. Larimer & W. Irr. Co., 26 Colo. 47, 56 Pac. Rep. 185.

See, also, Crippen v. White, 28 Colo. 298, 64 Pac. Rep. 184, where the Court held that by the adoption of the common law by the Colorado constitution it did not include the doctrine of riparian rights, since that doctrine was wholly inapplicable in that State.

See, also, as to preference uses, Broadmoor Dairy & Live Stock Co. v. Brookside W. & Imp. Co., 24 Colo. 541, 32 Pac. Rep. 792; Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Montrose Canal Co. v. Loutsenheizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532.

For the construction of the Wyoming constitution where the dedication is to the "State," see Sec. 385.

For the further construction of the Colorado constitution by the Courts, see Chap. 87.

But see Hartman v. Tresise, 36

The construction of the Federal Court has not always been consistent with the construction of the State Courts, relative to the extent of the dedication of the waters of the State to the public, as provided for by the constitution. In the case of Schwab v. Beam,[8] Hallett, District Judge, held that there was nothing in the constitution of Colorado, or in the law relating to irrigation, which modifies or changes the rule of common law that for manufacturing, mining, or mechanical purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subjacent owners in their natural channel. He held that the waters of a certain stream were appropriated when certain placer mining claims were located, "and the owner of the claims is entitled to have them *ut currere solebat*, without diminution, subject to the reasonable use of other riparian owners higher up on the course of the stream."[9]

§ 380. **Dedication by Idaho—Total dedication by constitution and statute.**—Idaho expressly establishes the law of prior appropriation as the law of that State, by the following constitutional provisions in Article 15:

"Sec. 1. The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, also all water originally appropriated for private use, but which, after such appropriation, has heretofore been made, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law." Sections 2 to 6 of Article 15 also provide that

Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872; also see dissenting opinion in same case by Mr. Justice Bailey, which opinion we deem to be the correct exposition of the law upon the subject. See, also, Sec. 367.

See, also, for the construction of the Colorado constitution, by other Courts, San Diego Flume Co. v. Souther, 90 Fed. 164; Fresno Canal & Irr. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Wyatt v. Larimer & Weld Irr. Co., 1 Colo. App. 480, 29 Pac. Rep. 906, where the Court held that the expression in the constitution, "property of the public," means that the State holds the title to the waters, in trust for the appropriators. Wilterding v. Green, 4 Idaho 773, 75 Pac. Rep. 134.

[8] 86 Fed. Rep. 41.

[9] See, also, Hartman v. Tresise, 36 Colo. 146, 84 Pac. 658, 4 L. R. A., N. S. 872.

the right to collect water rates is a franchise; that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that priority of appropriation gives the better right; the regulation of priorities as to the uses of water; that the legislature may provide a mode for fixing rates for water.[1]

The statutes of Idaho also contain the following provision: "All waters of the State when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, are declared to be the property of the State."[2]

By the Supreme Court of the State it was held that the constitutional provisions did not pretend to assume the control of or interfere with private property rights, but declares that the *use* of all such waters, whether theretofore or thereafter appropriated, is a public use and under the control of the State.[3] The dedication in the constitution has been defined by the Supreme Court in the following language: "In this connection it should be remembered that a dedication within the purview of the constitution is commensurate only with the character and kind of the waters dedicated and the use and regularity of the use to which they are applied."[4] It is well to note at this point the inconsistency of the Idaho laws in respect to the waters of the State, and the ownership of the soil or beds under the water courses and streams. After abolishing all of the common law theories as to riparian rights by constitutional and legislative provisions, and contrary to the weight of authority on meandered streams,[5] the Supreme Court of Idaho, in a bit of judicial legislation, declares that in that State the doctrine is announced that a riparian owner upon the streams of that State, *both navigable* and non-navigable, takes to the thread of the stream, subject, however, to an easement for the use of the public.[6]

1 See, for Laws of Idaho, Part XIV.

2 Rev. Codes of Idaho, 1908, Sec. 3240; Civil Code of Idaho, 1901, Sec. 2625.

3 Wilterding v. Green, 4 Idaho 773, 75 Pac. Rep. 134; Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

4 Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

See, also, Bear Lake etc. Co. v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

5 For ownership of the beds of navigable meandered streams in public land States, see Secs. 330-339.

6 Johnson v. Johnson, 14 Idaho 561, 95 Pac. Rep. 499, 24 L. R. A., N. S. 1240; Lattig v. Scott, 17 Idaho 506, 107 Pac. Rep. 47.

§ 381. **Dedication by Montana—Partial.**—The constitutional provision of Montana upon this subject is the same as that of California, with the exception of the last clause relative to rights of way. Article 3, section 15, provides as follows:

"Sec. 15. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."

This provision, as was the case in the California constitution,[1] contains a dedication of but a portion of the waters within the State to the public. As was said in the case of Smith v. Deniff,[2] "The use of the appropriated water is made a public use."[3] The opinion is somewhat inconsistent with itself, for in an earlier portion the Court says, "The State of Montana has by necessary implication assumed to itself the ownership, *sub modo*, of the rivers and streams of this State."

§ 382. **New Mexico—Total dedication by the constitution and statutes.**—Article 16 of the new Constitution of New Mexico, after providing for the recognition of all existing rights, in Section 2, also provides: "The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public," etc.[1] By the Act of the Territorial legislature of 1907, it was also provided: "All natural waters flowing in the streams and water courses, whether such be perennial, or torrential, within the limits of the Territory of New Mexico, belong to the public and are subject to appropriation for beneficial use."[2]

1 For provision in Cal. Const., see Sec. 378.

2 23 Mont. 65, 57 Pac. Rep. 557; 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737.

3 See, also, Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. Rep. 757.

1 For the other provisions of the New Mexico constitution, see Part XIV.

2 Laws, 1907, Chap. 49, p. 71, Sec. 1. For the construction of the New Mexico statutes, see Part XIV.

See, also, Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312.

§ 383. Dedication by North Dakota—Total by the constitution.—In the constitution of North Dakota in Article 17 may be found the following:

"Sec. 210. All flowing streams and natural water courses shall forever remain the property of the State for mining, irrigating, and manufacturing purposes."[1]

In the statutes of the State we also find the following: "All waters within the limits of the State from all sources of water supply belong to the *public*, and, except as to navigable waters, are subject to appropriation for beneficial use." It will be noticed that in the constitution the word "State" is used, while in the statute is found the word "public."[2]

§ 384. Dedication by Washington—Partial by the constitution.—The Washington constitution provides as follows:

"Art. 21. The use of the waters of this State for irrigation, mining, and manufacturing purposes shall be deemed a public use."

This, as will readily be seen, is but a partial dedication of but a portion of the waters to the public, the water used for irrigation, mining, and manufacturing purposes. There is nothing granted to the public except the use of the water appropriated for the purposes mentioned in the article, and when the waters are used for these purposes this use is declared to be a public one.[1] It was held by the Supreme Court of the State that the above section of the constitution is in conflict with the due process clause of the Federal Constitution to the extent of taking private property for uses essentially private.[2]

1 See for construction, Biglow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570, where it was held that the declaration of State ownership of all its waters did not prevent the existence of riparian rights.

2 See, upon this subject, Sec. 372.

1 See Eminent Domain, Secs. 1059-1098.

2 Tacoma Industrial Co. v. White River Power Co., 39 Wash. 648, 82 Pac. Rep. 150, 2 L. R. A., N. S. 842.

See Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, where the Court held that the doctrine of appropriation of water in that State applies only to the public lands, and not to lands which have become private property.

See, also, Nielson v. Spooner, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Prescott Irr. Co. v. Flathers, 20 Wash. 154, 55 Pac. Rep. 635, where it was held that the condemnation of land for an irrigation ditch constitutes a public use; Kalez v. Spokane Valley etc. Co., 42 Wash.

§ 385. Dedication by Wyoming—Total dedication by the constitution.—The constitution of Wyoming upon this subject, as found in Articles 2 and 8, is as follows:

"Sec. 31. Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved." Sections 32 and 33 then provide for the right of eminent domain, which will be discussed in a subsequent portion of this work.[1]

"Art. 8, Sec. 1. The water of all natural streams, springs, lakes, or other collections of still water within the boundaries of the State are hereby declared to be the property of the State." Sections 2, 3, 4, and 5 provide for the State control, priority of appropriation, water divisions, and the duties of the State engineer, which subjects will also be hereafter discussed.[2]

The constitution of Wyoming contains the most elaborate provisions upon the subject of waters of any of our States, and as far as the dedication is concerned, as set forth in Article 8, Section 1, *supra*, it largely follows the constitution of the State of Colorado, and the dedication to the State is absolute, although it goes to a greater extent in including the waters of springs, lakes, and other collections of still water. Another distinction is that under the Colorado constitution the rights of the public are made subject to the right of appropriation, while under the Wyoming constitution the rights of the State are not subject to anything, but are under the full control of the State. In fact the right of appropriation may be denied "when such denial is demanded by the public interests."[3] The entire control as provided for in Article 2, Section 31, is left absolutely in the State. Another distinction, which may be called one without a difference, is the fact that the dedication in the Colorado constitution runs to the people, while in Wyoming, it runs to the State. The ownership of the State is for the benefit of the public or people. By either phrase, "property of the public" or

43, 84 Pac. Rep. 395, holding that the State can make use of the waters or body of a navigable lake and confer rights of irrigation therein.

For the further construction of the Washington constitution and statutes, see Part XIV.

1 See Chap. 55, Secs. 1059-1098.

2 See, for State Control, Chap. 68. Also, for the laws of the State of Wyoming, see Part XIV.

3 Art. 8, Sec. 3.

"property of the State," the State, as representative of the public or the people, is vested with the jurisdiction and control of the waters named in the constitution in its sovereign capacity.[4] As a result of the above provisions in the constitution, the State of Wyoming has declared in as strong language as it is possible for a State constitution to declare, that the right to the use of the waters within the State depends upon the prior appropriation for beneficial purposes; and that the common law doctrine of riparian rights in the natural streams and other waters does not prevail in that State. "The waters become perforce *publici juris*."[5] The rights of the State, or public, under the Wyoming constitution, are also subject to the rights of the General Government to maintain the navigable capacity of all the navigable waters of the United States,[6] and the right to the use of the water flowing through Government lands, as may be necessary for the Government property.[7] In the adoption of both this and the Colorado constitution, the rights of the Government seem to have been entirely overlooked.[8]

§ 386. **Statutes of States not having constitutional provisions.**—The most of the States and Territories of the arid West have statutory provisions upon the subject of declaring the waters within their respective jurisdictions the property of the public, or of the

4 Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, citing Kinney on Irr., 1st Ed., Secs. 51, 53; Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914.

See, also, McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 999; Bell v. Gough, 23 N. J. L. 624, where the Court said, "The sovereign is trustee for the public"; Miller v. Mendenhall, 43 Minn. 95, 44 N. W. Rep. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487; 3 Am. St. Rep. 603.

For the dedication to the public by Colorado, see Sec. 379.

5 Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

6 For the Right of Navigation, see Secs. 341-356.

7 For effect of dedication as against the rights of the United States, see Sec. 388.

See, also, United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 41, 51 L. Ed. 953, 27 Sup. Ct. Rep. 655.

8 See Sec. 379.

State, besides those States having constitutional provisions to that effect, which have been discussed in the preceding sections.[1]

In the statutes of Arizona, we find the following: "All rivers, creeks, and streams of running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining as hereinafter provided." [2]

The Nebraska statute has the following declaration of State ownership: "The water of every natural stream not heretofore appropriated, within the State of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the State, subject to appropriation as hereinbefore provided." [3] Before the passage of the above Act Nebraska had adopted the common law rule of waters, and it was held in the case of Crawford County v. Hall,[4] that the Irrigation Acts of 1889 and 1895 abrogated the law of private riparian rights as theretofore existing, but that the Acts could not, and did not, have the effect of abolishing riparian rights which had already accrued.[5]

In Nevada there was the following: "All natural water courses and natural lakes and the waters thereof which are not held in private ownership belong to the State, and are subject to regulation and control by the State." [6] Also later it was provided that all waters not held in private ownership were declared to "belong to the public," and the use thereof a public use.[7] And also, again, to the same effect by the Act of 1907 practically the same provisions were re-enacted. "All natural water courses and natural lakes and the waters thereof which are not held in private ownership, belong to the State, and are subject to appropriation for beneficial uses." [8]

The statutes of Oklahoma upon the subject of dedication declare

1 For Constitutional Provisions, see Secs. 378-385.

2 Rev. Stat. Arizona, 1901, Sec. 4174 (Civil Code).

For construction of section, see Boquillas Land & Cattle Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504; aff'd, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453.

3 Comp. Stats. Neb., 1911, Sec. 6450.

For the construction of the Nebraska statutes, see Part XIV.

4 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889.

5 See, also, Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

See, also, Part XIV, Nebraska.

6 Comp. Laws Nevada, 1900, Sec. 354.

7 Nevada Stats. 1903, p. 24, Sec. 1.

8 Nevada Stats. 1907, p. 30; Rev. Laws Nevada, 1912, Sec. 4672.

For construction, see Reno Smelting Co. v. Stevenson, 20 Nev. 269, 21 Pac.

as follows: "The unappropriated waters of the ordinary flow or underflow of every running stream or flowing river, and the storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State of Oklahoma in which by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided."[9] This is a dedication of but a part of the waters of the State, or the waters of that portion of the State where irrigation is needed.

Upon this subject the Oregon statutes contain the following: "All water within the State from all sources of water supply belongs to the public."[10] "The use of the water of the lakes and running streams of the State of Oregon, for general rental, sale, or distribution for purposes of irrigation, and supplying water for household and domestic consumption, and watering of live stock upon dry lands of the State, is a public use, and the right to collect rates or compensation for such use of said water is a franchise."[11] It is also further declared: "The use of the water of the lakes and running streams of the State of Oregon for the purposes of developing the mineral resources of the State and to furnish electric power for all purposes, is declared to be a public beneficial use and a public necessity," etc.[12]

The South Dakota statute has the declaration as follows: "All waters within the limits of the State from all sources of water supply belong to the public, and, except as to navigable waters, are

Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289.

For the construction of the Nevada statutes, see Part XIV.

9 Comp. Laws of Oklahoma, 1909, Sec. 3915.

For the other laws of Oklahoma and their construction, see Sec. 96.

See Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856.

10 Lord's Oregon Laws, Sec. 6575.

11 Lord's Oregon Laws, Sec. 6525; Bellinger & Cotton, Stat. Oregon, 1902, Sec. 4993.

See, also, for the Oregon statutes and their construction, Part XIV.

See, also, Umatilla Irr. Co. v. Barnhart, 22 Ore. 391, 30 Pac. Rep. 37.

12 Lord's Oregon Laws, Sec. 6551; Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031; City of McMinnville v. Howenstein, 56 Ore. 451, 109 Pac. Rep. 81.

subject to appropriation for beneficial use."[13] It will be noticed that this section is the same as the statutory provision of North Dakota.[14]

The Texas law has gone to a somewhat further extent than some of the States mentioned, its statutes providing as follows: "The unappropriated waters of the ordinary flow of every running or flowing river or natural stream, and the storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State of Texas in which, by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided."[15] It will be noticed that the statute of Texas is peculiar in that there is an absolute dedication of all the waters to the public only for a portion of the State. This is due to the difference in the physical conditions in different portions of the State.[16]

The Utah statutes provide: "The water of all streams and other sources in this State, whether flowing above or under ground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof."[17]

"The use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use."[18]

§ 387. Effect of dedication by the States—Different doctrines.—It will be noticed that in the dedication to the State, or public, the constitutions and statutes of the respective States, quoted in the

13 Session Laws, 1905, Chap. 132, p. 201.

See Lone Tree Co. v. Cyclone Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596.

14 For the dedication by North Dakota, see Sec. 383.

15 Sayles' Civil Stats. Texas, 1900, Sec. 2138, Art. 3115.

See, also, statutes of Oklahoma, *supra*.

For the statutes of Texas and their construction, see Sec. 101.

16 See Part XIV.

17 Comp. Laws of Utah, 1907, Sec. 1288x18.

18 Comp. Laws of Utah, 1907, Sec. 1288x21.

See Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686.

For the statutes of Utah and their construction, see Sec. 102.

preceding sections, vary greatly in the terms used.[1] In California, prior to the enactment of the amendment of Section 1410 of the Civil Code in 1911,[2] there was but a partial dedication of but a portion of the waters of the State, while in Colorado and Wyoming there are constitutional provisions containing a dedication of all the waters in the respective States to the public or State, in language as strong as can be made. Barring the recent dedication by the State of California, as it is too early to note the effect, these two States may be cited as the two extremes, involving the subject of the dedication of its waters by a State. As to the remaining States named, some follow in certain features the California dedication, and others Colorado and Wyoming, while still others take positions somewhere between, depending largely as to whether or not it was the object to abolish the common law of riparian rights.[3]

As we have seen, it is left to each State to adopt whatever rule it sees fit relative to the use and control of the waters within its jurisdiction, so long as the rights of the Government are in no way impaired.[4] And, as there was no general rule or guide upon the subject which a State was bound to follow, each State has adopted a rule of its own. In fact, there are no two States where the laws are the same. Some States may follow California in their main features, others may follow Colorado, but it will be discovered that each State has independent features of its own; and hence it follows that no State has a rule which in all of its features will apply to any other State. The different grants in the dedications of the waters, of course, give different rights to the use of those waters, either by the public or by individuals. And these dedications, either being in the constitutions or by positive legislative enactment, are the fundamental laws upon the subject, and they themselves being different, have led to the enactment of different laws and different systems in various States. There are, however, many features in common, which will be discussed in the subsequent portions of this work. But to speak of the California rule or doctrine, or the Colorado rule or doctrine, is incorrect, unless the expression is used in the popular sense, except as the

1 See Secs. 378-386.

2 See Supp. Kerr's Codes, 1911, p. 584; Stats. and Amdts., 1911, p. 421. See, also, Part XIV.

3 For Riparian Rights, see Secs. 450-551.

4 See Secs. 330, 354-356.

same may apply to the particular States of California or Colorado themselves, as each State has a rule or doctrine of its own. There is, however, the doctrine of State control or the State administration of waters, which is based upon the dedication of the waters within a State, either to the State itself or to the public, and has been adopted by many of the Western States. But even the laws of State control differ greatly in the different States. Different rights are granted, different methods of the appropriation of water provided for, and entirely different powers given to the State officers who administer the law upon the subject. This subject, however, will be more thoroughly discussed in future portions of this work.[5]

The effect of the dedication of the waters of a State to the State or to the people confers no ownership of title in the running waters flowing within such respective jurisdictions. Neither the United States, a State, nor an individual can, under the law, acquire any absolute ownership or title to the waters flowing in their natural channels. As has been discussed in previous sections, the only right that can be acquired by any one is usufructuary. Again, such a dedication confers upon the State no absolute title or right even to the use of such waters. The public ownership, if any distinction is made, is rather that of sovereign than that of a proprietor. Therefore, such a declaration confers upon the State the power of administration or regulation of the waters flowing within its boundaries, and also the power of regulating the appropriation and use of such waters as between the respective individual claimants thereto. In other words, the State acts under these terms of dedication in its sovereign capacity only, and not as proprietor or owner of the water. As was said in a leading Wyoming case upon the subject:[6] "The obvious meaning and effect of the expression, that the water is the property of the public, are that it is the property of the people as a whole. Whatever title, therefore, is held in and to such waters resides in the sovereign as the representative of the people. The public ownership, if any distinction is material, is rather that of sovereign than proprietor. That own-

5 For the doctrine of State control or State administrative laws, see Chap. 68.

For the statutes of the various States upon the subject, see Part XIV.

6 Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. Rep. 210.

ership, however, is subject to a particular trust or use, specially defined in the statutes and in the constitutions."[7]

In a Montana case,[8] it is said: "The common law rule as to the rights of riparian owners would apply, were it not for the fact that the State of Montana has by necessary implication assumed to itself the ownership, *sub modo*, of the rivers and streams of this State." The expression, "*sub modo*," as used in this connection is, to say the least, indefinite, and there has been considerable speculation as to its intended meaning. The Supreme Courts of Montana and North Dakota, which States, as we have seen, have declarations of State ownership, hold that such a declaration is not antagonistic to and does not prevent the existence of riparian rights.[9]

§ 388. **Effect of dedication—As against the rights of the United States.**—The adoption in the constitution of a State, or the enactment by its legislature, of a provision that all the waters within the State are the property of the State or the public, can in no way affect the rights of the United States in and to those waters, but all rights acquired by the State must be subject to the rights of the general Government. These rights of the United States, which have been defined by the Supreme Court are: First, the right of the United States, as owner of the public lands, or reservations for any purpose, bordering on the streams, to the continued

7 See, also, Fort Lyon etc. Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365; Roberson v. People *ex rel.* Soule, 40 Colo. 119, 90 Pac. Rep. 79; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; Bear Lake etc. Co. v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

8 Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

9 Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Bigelow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570, wherein it is said: "Such rights are under the protection of the fourteenth amendment to the Federal Constitution, which protects property against all State action that does not constitute due process of law. It follows that Sec. 210 of the State constitution would itself be unconstitutional in so far as it attempted to destroy those vested rights of property, if it should by construction be given a scope sufficiently wide to embrace such matters. For this reason we feel constrained to hold despite its broad language that Sec. 210 was not framed to devest the rights of riparian owners in the waters and beds of all natural water courses in the State."

flow of their waters; so far, at least, as may be necessary for the beneficial uses of the Government property, and that, too, whether these uses consist of what are known as the common law uses of riparian rights, or uses by appropriation of the waters for irrigating lands, or other beneficial uses. Second, the dedication is limited by the superior power of the general Government to secure unimpaired the navigable capacity of all navigable streams within the limits of the United States.[1]

Relative to the first proposition, we shall see that the Government has all the rights of a private riparian owner in the waters which flow through the vast tracts of public lands and reservations owned by it.[2] This is upon the theory that the Government was the first owner of both the lands and the waters, and as such owner the riparian rights had vested before the lands had passed to private ownership or State rights had intervened. While these lands were within the boundaries of a Territory, the United States, being the only government which can impose laws upon them, has the entire dominion, or sovereignty, National and municipal, Federal and State, over all the Territories and the lands and waters within their boundaries, so long as they remain in a territorial condition.[3] And hence it follows that the dedication by a State constitution, or by legislative enactment, of all its waters to the public can only be effective as to those waters in which the United States has no interest. Again, in the recent case of Winters v. United States,[4] the Supreme Court of the United States took a still more advanced position. This case arose in the State of Montana and involved the rights of citizens of that State to divert and appropriate for irrigation the waters of Milk River, as against the rights of the Indians living upon a Government reservation, to appropriate the waters of the same river, also for the purpose of irrigation. The Court in holding that the claim of the Government

1 United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 41, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Winters v. United States, 207 U. S. 564, 22 L. Ed. 340, 28 Sup. Ct. Rep. 208; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548.

2 See, for Government as a Riparian Owner, Sec. 480.

3 See United States v. Winans, *supra*, and cases cited.

4 *Supra*.

for the Indians was valid, said: "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and *could not be.*" This reservation of the waters was made, according to the record in the case, on May 1, 1888, and the State, upon its admission in 1889, acquired no right to the waters so reserved by its constitutional provision of dedication. And the Court further held that the reservation in the agreement with the Indians, whereby the waters of Milk River were not subject to appropriation by the citizens and inhabitants of Montana was *not* repealed by the Act of Admission, upon the theory advanced by the appellants, that otherwise the State would not be admitted "upon an equal footing with the original States."

In the case of United States v. Conrad Inv. Co.,[5] the Circuit Court for the District of Montana held that the creation of an Indian reservation by the United States operated as a reservation of so much of the waters of a creek running through the land as might, *at any time in the future,* be required and could be utilized in carrying out the purposes of the treaty with the Indians; and that so long as the Government was administering the affairs of the Indians, it had the right to determine, as an administrative question, the quantity of water required and to take the same when and where it deemed necessary, the rights of any others to appropriate the water *being subject to such paramount right.*[6] However, a State has full power to enact such laws as it sees fit, regulating and controlling the waters within its boundaries as far as its own internal affairs are concerned and the rights of its citizens. Congress can not enforce any rule in this respect upon any States.[7]

In fact, Congress itself, in the Act of June 2, 1902,[8] commonly known as the National Reclamation or Irrigation Act, recognized this right. And, in Section 8, it was provided, that nothing in the

5 156 Fed. Rep. 123.

6 This case was affirmed by the Circuit Court of Appeals, for which see Conrad Inv. Co. v. United States, 161 Fed. Rep. 829, 88 C. C. A. 647.

See, also, Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910; 108 Am. St. Rep. 697; Crawford Co. v. Hall, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Richardson v. United States, 100 Fed. 714; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

7 Kansas v. Colorado, *supra.*

8 7 Fed. Stat. Ann. 1905, p. 1098; U. S. Comp. Stat. Supp. 1905, p. 349; 32 Stat. L. 388. For copy of the Act, see Chap. 65.

For the National Reclamation Act, see Chap. 65.

Act should be construed as affecting or intending to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, and that the Secretary of the Interior in carrying out the provisions of the Act should proceed in conformity with such laws.

A State, therefore, has the power to dedicate its waters to itself or to the public, as far as its own rights in those waters are concerned, and to regulate the use between its citizens. But to hold that a State constitutional convention or a State legislature could virtually appropriate all the waters flowing over the public domain and belonging to the United States to itself, and acquire a good title thereto, would be too much like holding that an individual could make a deed to himself of other people's property and acquire a good title thereto. But, as far as its own internal affairs are concerned, and the control and jurisdiction of the waters within the State among its own citizens, such a dedication in a State constitution is the fundamental law of the State.[9]

§ 389. Other effects of dedication.—As against all existing rights of the general Government, a dedication provision in a State constitution, or legislative enactment, has no effect whatever.[1] The Government can not be devested of its rights in that manner. But, as between the citizens of a State, or individuals or corporations of another State, claiming certain water rights within the boundaries of the State, a constitutional provision to this effect is the fundamental law. The statutory provision must also be considered the law upon the subject, so far as they do not conflict with the

[9] See, also, the Act of March 1, 1911, Public, No. 435, U. S. Comp. Stat. Supp., 1911, p. 652; 36 Stat. L. 961, providing for the purchase of private lands along the watersheds of navigable streams in order to conserve their navigability, and wherein it is provided in Section 10, "And no right, title, interest, or claim in or to any lands acquired under this Act, *or the waters thereon*, or the products, resources, *or use thereof*, shall be initiated or perfected, except in this section provided." And it nowhere provides in the section for the acquisition of water rights in waters flowing over these lands.

For the provisions of this Act, see Sec. 422.

[1] For dedication as against rights of Government, see Sec. 388.

For how the Government has disposed of part of its rights to water, see Arid Region doctrine, Secs. 611-626.

State constitution and the Constitution of the United States. In fact, the only advantage which a constitutional provision has over one enacted by the legislature upon this subject is that it is more liable to stand, being harder to repeal than an Act of the legislature, and the declaration in the Constitution itself that the use of the water is a public one, and therefore laying the foundation for an action in condemnation by virtue of the right of eminent domain.[2] Another effect of an absolute dedication of this nature is the abrogation of riparian rights. But, as we have seen, the terms of the dedication in the different constitutions vary greatly,[3] hence, the extent of the abrogation of the common law of riparian rights also varies. In some of the States certain features of the common law are retained and others abolished. California endeavors to sustain both the common law doctrine of riparian rights and the doctrine of appropriation *in toto*. Idaho declares the use of its waters to be public, but retains the common law theory of the ownership of the beds of the streams.[4]

There are other features in other States which are neither consistent with the common law doctrine, the doctrine of appropriation, nor with each other, nor, in a number of cases, with themselves. All of which goes to show that the law of waters in this Western country is by no means settled, as some of us are led to believe. It is generally conceded, however, that the adoption of a constitutional or legislative provision making all the flowing streams and other waters forever the property of the public, or State, will not be held to have destroyed riparian rights, which had vested prior to the passage of such provision.[5] As was held in the case of Crawford Co. v. Hall,[6] the legislative enactment to this effect did not have the result of abolishing vested rights of riparian proprietors, but affected only such rights as might have been acquired in the future under the law as theretofore existing.[7] To hold other-

2 For Eminent Domain, see Chap. 55.

3 See terms of dedication, Secs. 378-386.

4 See Johnson v. Johnson, 14 Idaho 561, 95 Pac. Rep. 499, 24 L. R. A. N. S. 1240.

5 Biglow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570; McGhee Irr. D. Co. v. Hudson, 85 Tex. Civ. App. 587, 22 S. W. Rep. 398; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758.

6 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

7 See, also, Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A.

wise would be to hold that one could be deprived of his property without due process of law, which would be in direct conflict with the Federal Constitution, that great safeguard of the rights of property, as against legislative encroachment.

910, 108 Am. St. Rep. 697; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Rossmiller v. State, 114 Wis. 169, 89 N. W. Rep. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910, in which the Court said: "The legislature has no such arbitrary power, under our constitutional system, as that of changing the nature of the ownership of property by a mere fiat. It can no more accomplish that result in that way than it can change the laws of Nature by legislative declaration." Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Colorado Mill & El. Co. v. Larimer D. & Irr. Co., 26 Colo. 47, 56 Pac. Rep. 185; Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, where the Court held that no property right in waters, already accrued, prior to the adoption of the constitutional provision, is impaired.

PART V.

ACQUISITION AND DISPOSAL OF LANDS AND WATERS BY THE UNITED STATES.

CHAPTER 19.

ACQUISITION OF LANDS AND WATERS BY THE UNITED STATES.

§ 390. Scope of chapter and part.
§ 391. Public domain—Definition.
§ 392. Public lands—Definition.
§ 393. Power of the United States to acquire lands—Treaty-making power.
§ 394. Power of the United States to acquire lands—Treaty-making power—Louisiana Purchase.
§ 395. How the United States acquired its lands—Treaties with England.
§ 396. How the United States acquired its lands—Cession from the original States.
§ 397. Acquisition by treaty—Treaty with France—Louisiana Purchase.
§ 398. Acquisition by treaty—Treaties with Spain—Floridas—Philippines and Porto Rico.
§ 399. Acquisition by treaty—Treaties with Mexico—Guadalupe Hidalgo and the Gadsden Purchase.
§ 400. Power to acquire lands by purchase.
§ 401. Cession of the Hawaiian Islands.
§ 402. Acquisition by treaty—Title taken subject to prior land grants.
§ 403. Acquisition by treaty—Title taken subject to prior land grants—Spanish and Mexican grants.
§ 404. Title taken subject to Indian right of occupancy.
§ 405. Indian right of occupancy—Indian lands thrown open to settlement.
§ 406. Acquisition of waters—Ownership originally in the United States.
§ 407. Public lands of the States.

§ 390. **Scope of chapter and part.**—It is necessary at this point in our work, in order to understand the very foundation of the title to the waters of the arid region, to go back and trace the source of the title to the same, to the time of their acquisition by the Government of the United States; and, as this can be done only in connection with the lands over which they flow, the two will

be treated together in the present chapter. It is proposed in this chapter to discuss the power of the United States to acquire lands, how the various portions of this country were actually acquired, the power of the general Government to dispose of its lands, and how they were and now are being disposed of. We will also discuss the jurisdiction over the lands and waters upon the public domain of the United States, and after their primary disposal to individuals and companies.

In the present chapter we will treat of the subject of the acquisition of the lands by the United States, and in the following chapter we will treat of their disposal.[1]

§ 391. **Public domain—Definition.**—The term, "public domain," in its broadest sense, comprehends all lands and waters in the possession or ownership of the United States, and including lands owned by the several States, as distinguished from lands possessed or owned by private individuals or corporations.[1] The public domain of the United States, of course, includes all lands owned by the United States, whether the same are "public lands,"[2] or have been set aside for some particular purpose by the Government, such as for military, Indian,[3] or forest reservations.[4] It is even held that the phrase, "public domain," applies to town lots and town sites which have been segregated by law and the rights of occupancy sold to individual citizens of an Indian nation.[5]

Therefore, strictly speaking, the term, "public domain," includes all lands the title to which is still in the United States, or in some State, although the right of possession is in individuals or companies. However, we will add that this distinction has not always been followed by legislation or by the Courts. In many Acts both of Congress and of the legislatures of the States the terms, "public domain" and "public lands," are used as synony-

1 See Chap. 20, Secs. 408-449.

1 Winters v. United States, 143 Fed. Rep. 740, 77 C. C. A. 666, citing Kinney on Irrigation, 1st Ed., Sec. 124.

For public domain of Texas, see Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. Rep. 865.

2 For Public Lands, see Sec. 392.

3 For Military Reservations, see Sec. 415.

For Indian Reservations, see Secs. 404, 405, 415.

4 For Forest Reservations, see Secs. 416-425.

5 Rush v. Thompson, 2 Ind. Ter. 557, 53 S. W. Rep. 333.

mous, and describe such lands as are subject to sale or other disposal under general laws.[6]

§ 392. **Public lands—Definition.**—The term, "public lands," only embodies such lands as are subject to sale or other disposition by the United States under general laws.[1] It is a well settled principle that land, once reserved by the Government or appropriated for any special purpose, ceases to be a part of the public lands, and in all grants or proclamations declaring public lands open to settlement the portion already reserved is always excepted, though the exception is not specifically mentioned.[2]

The rule is also well settled by a long line of decisions, that when public lands have been surveyed and placed on the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent to a particular lot or tract is to be regarded as the equitable owner thereof, and

6 Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963, 21 Sup. Ct. Rep. 690; Kuechler v. Wright, 40 Tex. 600.

1 Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963, 21 Sup. Ct. Rep. 690; Barden v. Northern P. R. Co., 145 U. S. 535, 36 L. Ed. 806, 12 Sup. Ct. Rep. 856; Mann v. Tacoma Land Co., 153 U. S. 273, 38 L. Ed. 714, 14 Sup. Ct. Rep. 820; Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86; Doolan v. Carr, 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228; United States v. McLaughlin, 127 U. S. 428, 32 L. Ed. 213, 8 Sup. Ct. Rep. 1177; Northern Pac. R. Co. v. McCormick, 89 Fed. Rep. 659; Rierson v. St. Louis & S. F. R. Co., 59 Kan. 32, 51 Pac. Rep. 901; Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523; United States v. Elliot, 7 Utah 389, 26 Pac. Rep. 1117; Oregon Short L. R. Co. v. Fisher, 26 Utah 179, 72 Pac. Rep. 931; State v. Kennard, 56 Neb. 254, 76 N. W. Rep. 545; *Id.*, 57 Neb. 711, 78 N. W. Rep. 282; United States v. Garretson, 42 Fed. Rep. 22; State v. Cumberland T. & T. Co., 52 La. Ann. 1411, 27 So. Rep. 795; Heydenfeldt v. Daney Gold M. Co., 10 Nev. 290, 93 U. S. 634, 23 L. Ed. 995; Anderson's Law Dict., Sub. Public Land; Bouvier's Law Dict., Sub. Public Land.

2 Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264; Winters v. United States, 143 Fed. Rep. 740, 74 C. C. A. 666, citing Kinney on Irr., 1st Ed., Sec. 124; Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440; Leavenworth etc. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; United States v. Stone, 69 U. S. 2 Wall. 525, 17 L. Ed. 765; United States v. Blendaur, 128 Fed. Rep. 910, 63 C. C. A. 636, rev'g 122 Fed. Rep. 703; State v. Cumberland T. & T. Co., 52 La. Ann. 1411, 27 So. Rep. 795; Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523; Hartmann v. Warren, 70 Fed. Rep. 946.

the land is no longer public or open to location.[3] No lands, wherein the Indian title to occupancy has not been extinguished, are public.[4] The United States, as proprietor, merely also owns and holds possession of certain lands within the boundaries of the several States and Territories for its own use for military reservations, public buildings, and other purposes. These are in no sense of the term "public lands," but are owned and possessed by virtue of the powers vested by the Constitution for the use of the Government. The public lands of the United States all lie within the boundaries

3 Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86, where the Court held that when public lands have been open to private acquisition, a person who complies with all the requisites to entitle him to a patent in a particular lot is to be regarded as the equitable owner thereof, and the land is no longer open to location; and that the public faith had become pledged to him, and any subsequent grant of the land to another party is void, unless the first location or entry be vacated and set aside; Lytle v. Arkansas, 50 U. S. 9 How. 314, 13 L. Ed. 153; Stark v. Starr, 73 U. S. 6 Wall. 402, 18 L. Ed. 925, where it was held that the right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued; and when in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claims.

See, also, Frisbie v. Whitney, 76 U. S. 9 Wall. 187, 19 L. Ed. 668; The Yosemite Valley Case, 82 U. S. 15 Wall. 77, 21 L. Ed. 82; Union Pac. R. Co. v. McShane, 89 U. S. 22 Wall. 444, 22 L. Ed. 747; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Barden v. Northern Pac. R. Co., 145 U. S. 535, 36 L. Ed. 806, 12 Sup. Ct. Rep. 856; Yakima County v. Tullar, 3 Wash. T. 393, 17 Pac. Rep. 885.

4 Leavenworth etc. R. Co. v. United States, 92 U. S. 723, 23 L. Ed. 634, where it was held that the Indians have the unquestionable right to the lands they occupy, until the title to the same be extinguished by a voluntary cession to the Government.

See, also, United States v. Carpenter, 111 U. S. 347, 28 L. Ed. 451, 4 Sup. Ct. Rep. 435; Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523; Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264; Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963, 21 Sup. Ct. Rep. 690; Cherokee Nation v. Georgia, 30 U. S. 5 Pet. 1, 8 L. Ed. 25; United States v. Cook, 86 U. S. 19 Wall. 591, 22 L. Ed. 210, where it was held that the right of the Indians to occupancy is as sacred as that of the United States to the fee; Missouri etc. R. Co. v. Roberts, 152 U. S. 114, 38 L. Ed. 377, 14 Sup. Ct. Rep. 496; Winters v. United States, 143 Fed. Rep. 740, 74 C. C. A. 666; aff'd, 207 U. S. 564, 53 L. Ed. 340, 28 Sup. Ct. Rep. 207.

See, also, for Indian Title of Occupancy, Secs. 404, 405.

of the several States and Territories, and, to a certain extent, are subject to the local laws thereof.[5]

§ 393. **Power of the United States to acquire lands—Treaty-making power.**—The right of the Federal Government to acquire lands is sustained by several decisions of the Supreme Court of the United States, as a necessary accompaniment of the power to make treaties. The authority given by the Constitution is, that the President of the United States "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."[1] From this, it may be readily seen, the power to make treaties is given in general terms by the Constitution, without any description of the objects intended to be embraced by it; and consequently it was designed to include all those questions which, in the ordinary intercourse of nations, are usually made subjects of negotiations and treaty, and which are consistent with the nature of our institutions and with the relation between the States and the United States. And since the acquisition and disposal of territory between nations is one of the most common subjects of ordinary intercourse, it follows that the treaty-making power of the United States has authority to make negotiations with other nations concerning the acquisition of additional territory by purchase or otherwise.[2]

The United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual terms of peace, and for that purpose has the power of other sovereign nations.[3] Also, until the year 1871, the

[5] See Secs. 448, 449.

For the list of the so-called public land States, see Sec. 439.

[1] Constitution of the United States, Art. 2, Sec. 2, Cl. 2.

[2] Upon the subject of the treaty-making power, see Holmes v. Jennison, 39 U. S. 14 Pet. 540, 10 L. Ed. 579; Holden v. Joy, 84 U. S. 17 Wall. 211, 21 L. Ed. 523; Santo's Case, 2 Brock. U. S. 493, 7 Fed. Cas. No. 4,016; Pierce v. State, 13 N. H. 536.

[3] Dorr v. United States, 195 U. S. 140, 49 L. Ed. 128, 25 Sup. Ct. Rep. 808; Nelson v. United States, 30 Fed. Rep. 112; United States v. Nelson, 29 Fed. Rep. 202; American Ins. Co. v. 356 Bales of Cotton, 26 U. S. 1 Pett. 511, 7 L. Ed. 242, where it was held that the Constitution of the United States confers absolutely on the government of the Union the power of making war and of making treaties, *consequently that Government possesses the power of acquiring territory, either by conquest or by treaty;* 1 Kent Com. 165, 166; Story Const., Sec. 1508, and cases cited; Annals of

power to make treaties with the Indian tribes was coextensive with the power to make treaties with foreign nations.[4] Not only does the Constitution grant to the United States the power to acquire territory under the treaty-making power, but the Constitution also implies the power to acquire territory by cession or conquest, and the power carries with it all proper and incidental power.[5]

§ 394. Power of the United States to acquire lands—Treaty-making power—Louisiana Purchase.—It was by the treaty-making power alone that the United States had the authority to acquire the Louisiana lands. In 1803 the United States Minister to France conducted a treaty with Napoleon the First, whereby the immense Territory of Louisiana was to be ceded to the United States upon the payment of $15,000,000. The treaty was sent to the Senate by President Jefferson for ratification, and in his accompanying message he advised that it be adopted without debate, which has been taken by some to clearly indicate that he believed the United States Government had no power under the Constitution to acquire land. Such an opportunity was not to be lost and the Senate ratified the treaty in compliance with the message of the President. But later this view of Mr. Jefferson has been clearly shown, under the cases cited, to be erroneous, on the ground that the authority to acquire land is one of the most necessary and essential accompaniments of the treaty-making power.[1]

As to the relative extent of the treaty-making power and of the power of Congress, see Foster v. Neilson,[2] in which Mr. Chief Justice Marshall, in delivering the opinion of the Court, said: "A treaty is in its nature a contract between two nations, not a legis-

Congress, 14th Cong., 1st Session, 1815, 1816, pp. 489, 526, 539, 564; Works of Hamilton, 1 Vol., pp. 501-528; Annals of Congress, 4th Cong., 1st Session, 1795, 1796, p. 760; Calhoun's Works, p. 202; People v. Gerke & Clark, 5 Cal. 381, 384; Duer Const. Jur., p. 228 *et seq.*

See, also, Alexander Hamilton, in the Federalist, No. LXXV; Ware v. Hylton, 3 U. S. 3 Dall. 199, 1 L. Ed. 568; Foster v. Neilson, 27 U. S. 2 Pet. 253, 7 L. Ed. 415.

4 Cherokee Nation v. Georgia, 30 U. S. 5 Pet. 1, 8 L. Ed. 25.

See, also, for Indian Right of Occupancy, Secs. 404, 405.

5 Peacock v. Republic of Hawaii, 12 Hawaii 27.

For the Cession of Hawaii, see Sec. 401.

1 See, also, cases cited under Secs. 393, 395, 397-399; 2 Bruce's American Commonwealth, 62.

2 27 U. S. 2 Pet. 253, 7 L. Ed. 415.

lative Act. It does not *generally* effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an Act of legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation impart a contract—when either of the parties engage to perform a certain, a peculiar Act—the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the Court."[3] And it has also been held by the Supreme Court from the very foundation of the Government, that the United States could dispose of the fee simple to the public lands; hence, *a fortiori*, the Government must have a perfect right and title to the same before it could so dispose of them.[4]

§ 395. How the United States acquired its lands—Treaties with England.—In order that one may obtain a clearer understanding of the general source of title of the United States to lands and waters this subject will be very briefly traced.

The English possessions in America were not claimed by right of conquest, but by right of discovery; and all discoveries made by persons acting under the authority of that Government were

[3] See, also, upon this subject, Cherokee Nation v. Georgia, 30 U. S. 5 Pet. 1, 8 L. Ed. 25; United States v. Arredondo, 31 U. S. 6 Pet. 691, 8 L. Ed. 547; Williams v. Suffolk Ins. Co., 38 U. S. 13 Pet. 415, 10 L. Ed. 226; Lattimer v. Poteet, 39 U. S. 14 Pet. 4, 10 L. Ed. 328; Pollard's Lessee v. Files, 43 U. S. 2 How. 591, 11 L. Ed. 391; Pollard's Lessees v. Hagan, 44 U. S. 3 How. 212, 11 L. Ed. 565; Luther v. Borden, 48 U. S. 7 How. 1, 12 L. Ed. 581; La Roche v. Jones, 50 U. S. 9 How. 155, 13 L. Ed. 85; Fellows v. Blacksmith, 60 U. S. 19 How. 366, 15 L. Ed. 684.

[4] Buttz v. Northern Pac. R. Co., 119 U. S. 55, 30 L. Ed. 330, 7 Sup. Ct. Rep. 100; Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440, where the Court held that the right of the United States to dispose of the fee of lands occupied by Indian tribes, has always been recognized by that Court from the foundation of the Government.

For Indian Title of Occupancy, see Secs. 404, 405.

For Rights of Indians to Appropriate Water, see Sec. 680.

for the benefit of that nation, and not for the benefit of such persons individually. The same may be said relative to sections of the country discovered by individuals under the authority of other European nations, that the lands discovered were for the benefit of the respective nations. And, according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes, in the New World, were regarded as mere temporary occupants of the soil; and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.[1] Whatever forbearance may have been sometimes practiced toward the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found entirely uninhabited. The Revolution having taken place by which the power of England over the Colonies was shaken off by the Treaty of 1783, the English possessions in that territory, which is now included within the boundaries of the United States, became the property of the several States, from the fact that they were united, at that time, only by the Articles of Confederation, and the Federal Government had not been formed.[2]

In 1846, by a compromise with England, the Northwest corner of the United States was added to the public domain. Both countries claimed the tract by right of discovery. And, in the negotiations pending the settlement of the dividing line, England demanded that the Columbia River be the division, while the United States demanded "Fifty-four Forty, or fight." When, however, England agreed to an extension of the dividing line, which had been fixed east of the mountains, of the 49th parallel to the Pacific, the Government assented, rather than contend for territory of which it had little knowledge, and the 49th parallel was then agreed upon.[3]

§ 396. How the United States acquired its lands—Cession from the original States.—One of the methods by which the United States acquired title to its public domain was by cession from the

1 Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997; Johnson v. McIntosh, 21 U. S. 8 Wheat. 543, 5 L. Ed. 681.

2 For Treaty of 1783, and construction thereof, see 7 Fed. Stat. Ann., 1905, p. 565, and cases cited.

3 For Treaty of 1846, and construction thereof, see 7 Fed. Stat. Ann., 1905, p. 587, and cases cited.

original States. Several of the thirteen original States, after the organization of the Government, claimed the title to vast tracts of territory, which extended far into the interior of the country and equaled, in several cases, many times the present size of the State laying claim to the same. Thus Virginia, at one time, laid claim to all territory north and west of the Ohio River. Afterward this land was ceded by New York, Virginia, Massachusetts, and Connecticut to the United States, and the Northwest Territorial Government was organized, from which the States of Ohio, Indiana, Illinois, Michigan, and part of Minnesota were formed.[1] After the adoption of the Constitution many of the original States ceded vast tracts of lands to the United States, which lands became a part of the public domain, to which the general Government held the fee by force of the deeds of cession, the Constitution, and by the statutes enacted for that purpose. By this means the Government became simply the proprietor of these lands and now holds them only as such proprietor where they are located in the States created out of the territory ceded to it, and not by any municipal sovereignty or right of eminent domain which it may be supposed that it possessed.[2]

§ 397. Acquisition by treaty—Treaty with France—Louisiana Purchase.—Other vast areas of country which went to make up the public domain of the United States were acquired by treaties with and purchases from other countries. In 1803 France ceded

1 Langdeau v. Haines, 88 U. S. 21 Wall. 521, 22 L. Ed. 606; Morton v. Nebraska, 88 U. S. 21 Wall. 660, 22 L. Ed. 639; Wallace v. Parker, 31 U. S. 6 Pet. 680, 8 L. Ed. 543; Jones v. Van Zant, 46 U. S. 5 How. 215, 12 L. Ed. 122; Strader v. Graham, 51 U. S. 10 How. 82, 13 L. Ed. 337; Pennsylvania v. Wheeling Bridge Co., 59 U. S. 18 How. 421, 15 L. Ed. 435; Bates v. Brown, 72 U. S. 5 Wall. 710, 18 L. Ed. 535; Messenger v. Mason, 77 U. S. 10 Wall. 507, 19 L. Ed. 1028; Clinton v. Englebrecht, 80 U. S. 13 Wall. 435, 20 L. Ed. 659.

2 Pollard v. Hagan, 44 U. S. 3 How. 212, 11 L. Ed. 565. The United States now holds the public lands in the new States by force of deeds of cession and the statutes connected with them, and not by any municipal sovereignty, which may be supposed they possess or have received by compact with the new States for that particular purpose.

See, also, Clark v. Smith, 38 U. S. 13 Pet. 195, 10 L. Ed. 123; Fort Leavenworth etc. R. Co. v. Lowe, 114 U. S. 525, 29 L. Ed. 264, 5 Sup. Ct. Rep. 995; Bagnell v. Broderick, 38 U. S. 13 Pet. 436, 10 L. Ed. 235; United States v. Maxwell Land Grant, 121 U. S. 325, 30 L. Ed. 949, 7 Sup. Ct. Rep. 1015, aff'g 26 Fed. Rep. 118;

to the United States, for the sum of $15,000,000, all that territory which now forms the State of Louisiana, parts of Alabama and Mississippi, all of Arkansas, Missouri, Iowa, part of Minnesota, all of the Dakotas, Nebraska, Kansas, part of Oklahoma, and parts of Montana, Wyoming, and Colorado.[1] And as Spain also laid claim to part of this territory between the Mississippi and Perdido Rivers wrongfully, as the United States contended, in the year 1810 President Madison issued a proclamation directing the forcible occupation and possession of this territory by the United States, and possession was accordingly taken.

On the 1st of October, 1800, a secret treaty was made at St. Ildefonso between Spain and Bonaparte, then First Consul, by which Spain agreed, on certain conditions to be performed, to retrocede to the French Republic, "the Colony or Province of Louisiana, with the same extent that it now has, in the hands of Spain, and that it had when France possessed it, and such as it ought to be after the treaties subsequently entered into, between Spain and the other States." The ambiguity of the last expression was the cause of the subsequent misunderstanding between Spain and the United States. Did it mean that Spain was to retrocede to France all the territory which the latter had formerly possessed, under the name of Louisiana, or only so much as remained after the separation of West Florida therefrom and the cession thereof to Great Britain? The United States contended for the former construction and Spain for the latter.[2]

United States v. Repentigny, 72 U. S. 5 Wall. 211, 18 L. Ed. 627; McMicken v. United States, 97 U. S. 204, 24 L. Ed. 947; Schulenberg v. Harriman, 88 U. S. 21 Wall. 44, 22 L. Ed. 551.

1 For copy of the Treaty for the cession of Louisiana, see 7 Fed. Stat. Ann. 1905, p. 542.

2 For the construction of the United States Supreme Court upon the subject of the Spanish title to these lands, see United States v. Reynes, 50 U. S. 9 How. 127, 13 L. Ed. 74; Davis v. Police Jury, 50 U. S. 9 How. 280, 13 L. Ed. 138; United States v. D'Autrive, 51 U. S. 10 How. 609, 13 L. Ed. 560; United States v. Lynde's Heirs, 78 U. S. 11 Wall. 632, 20 L. Ed. 230; New Orleans v. DeArmas, 34 U. S. 9 Pet. 224, 9 L. Ed. 109; Foster v. Neilson, 27 U. S. 2 Pet. 253, 7 L. Ed. 415; United States v. Arredondo, 31 U. S. 6 Pet. 691, 8 L. Ed. 547; United States v. Percheman, 32 U. S. 7 Pet. 51, 8 L. Ed. 604; United States v. Philadelphia and New Orleans, 52 U. S. 11 How. 609, 13 L. Ed. 834; Strother v. Lucas, 37 U. S. 12 Pet. 410, 9 L. Ed. 1137; Montault v. United States, 53 U. S. 12 How. 47, 13 L. Ed. 887; United States v. Castant, 53 U. S. 12 How. 437, 13 L. Ed. 1056.

The United States did not acquire

It will be noticed that a large portion of the territory acquired by the United States under the Louisiana Purchase is in what is known as the semi-arid region.[3]

§ 398. Acquisition by treaty—Treaties with Spain—Floridas—Philippines and Porto Rico.—On February 22, 1819, a treaty with Spain was concluded, which was proclaimed two years later on February 22, 1821, by which Spain, in consideration of the assumption by the United States of claims against that Government of certain citizens of this Government, to an amount not exceeding the sum of $5,000,000 and the exoneration of Spain from all demands in the future, on account of such claims, ceded to the United States the Floridas and all interests that she claimed in the disputed portion of Louisiana, formerly ceded by France.[1] By another treaty with Spain, concluded at Paris December 10, 1898, and proclaimed April 11, 1899, Spain ceded to the United States the Island of Porto Rico and other islands in the West Indies, the Island of Guam in the Ladrones, and also the archipelago known as the Philippine Islands.[2]

§ 399. Acquisition by treaty—Treaties with Mexico—Guadalupe Hidalgo and the Gadsden Purchase.—By the treaty concluded February 2, 1848, and proclaimed July 4, 1848, and known as the treaty of Guadalupe Hidalgo, Mexico ceded to the United States the tracts of land embracing the Pacific Highlands, from the Gila River to the forty-second parallel, and from the Texas border and the Rocky Mountains to the Pacific Ocean.[1] The land acquired by

entire possession of the country until 1813, although portions of it were occupied in 1810; McMicken v. United States, 97 U. S. 204, 24 L. Ed. 947.

For Treaty of St. Ildefonso between Spain and France, see 7 Fed. Stat. Ann. 1905, p. 546.

3 For the States making up the semi-arid region, see Sec. 239.

1 For terms of the treaty and construction, see 7 Fed. Stat. Ann. 1905, p. 810, and cases cited.

See, also, United States v. Texas, 162 U. S. 1, 40 L. Ed. 867, 16 Sup. Ct. Rep. 725.

2 For terms of treaty and construction, see Fed. Stat. Ann., 1905, p. 814, and cases cited.

For irrigation and water laws in Porto Rico, see Part XIV.

For irrigation and water laws in the Philippine Islands, see Part XIV.

1 For Treaty of Guadalupe Hidalgo and construction thereof, see 7 Fed. Stat. Ann. 1905, p. 694, and cases cited.

this treaty includes the greater portion of the arid region of the United States, to which this work more particularly applies.[2]

The Treaty of 1848, however, did not include any portion of Texas, which, prior thereto in 1835, had declared its own freedom as "The Republic of Texas," and on December 29, 1845, was admitted into the United States.[3] Afterward, by the treaty concluded December 30, 1853, and proclaimed June 30, 1854, Mexico, by what is known as the Gadsden Purchase, sold to the United States the Messilla Valley, south of the Gila River to the present southern boundary of the United States. The consideration paid for this land was the sum of $10,000,000.[4]

§ 400. **Power to acquire lands by purchase.**—As discussed in the previous sections of this chapter,[1] the United States has full power to acquire lands by treaty, cession, or by purchase from other countries. It also has the power to purchase lands for the needs and necessities of the Government, through its proper officials, and, when authorized by Congress, from the individual land owners of the country itself.[2] One of the most important Acts of Congress, providing for the purchase of lands from individual landowners, is that of March 1, 1911,[3] which provides for the purchase and acquisition of lands along the watersheds of navigable streams, in order to conserve the navigable capacity of such streams.[4]

§ 401. **Cession of the Hawaiian Islands.**—The United States has acquired another group of islands which are of the utmost value

2 For the civil law introduced in this country by the Spanish and Mexicans, see Secs. 577-583.

See, also, Irrigation in Mexico, Sec. 175.

3 See McKinney v. Saviego, 59 U. S. 18 How. 235, 15 L. Ed. 365; Basse v. Brownsville, 87 U. S. 20 Wall. —, 22 L. Ed. 420.

See, for Irrigation in Texas, Part XIV.

4 For terms and construction of the Gadsden Treaty, see 7 Fed. Stat. Ann., 1905, p. 704.

See, also, Ely v. United States, 171 U. S. 220, 43 L. Ed. 142, 18 Sup. Ct. Rep. 840.

1 See Secs. 393-399.

2 See, for provisions for the acquisition of lands in the National Reclamation Act, Chap. 65.

3 Public, No. 435, 62d Congress, 1st Session; U. S. Comp. Stat. Supp., 1911, p. 652; 36 Stat. L. 961.

For provisions of the Act, see Sec. 422.

4 For the protection of navigation, see Secs. 349-356.

and where irrigation is very largely practiced.[1] The Hawaiian Islands were acquired by the United States by cession and by the Joint Resolution of July 7, 1898, accepted by the United States. As far as necessary here, the said Joint Resolution provided, as follows:

Preamble.—"Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every kind and appurtenance thereunto appertaining; therefore—

"Section 1. That said cession be accepted, ratified, and confirmed, and that the Hawaiian Islands and their dependencies be, and are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America."[2]

Until this resolution was signed by the President, the Republic of Hawaii possessed all the attributes of sovereignty; on the consummation of annexation all the rights of sovereignty were relinquished by the Republic and granted to the United States. During the period taken by the Federal Government to perfect a new system all the functions of the Government remained for exercise by the existing Republic.[3] Though the resolution of annexation was passed July 7, 1898, the formal transfer was not made until August 12, 1898, when, at noon of that day, the American flag was raised over the Government house, and the Islands were ceded with appropriate ceremonies to a representative of the United States.[4]

1 For irrigation and water laws in the Hawaiian Islands, see Chap. 88.

2 3 Fed. Stat. Ann., 1904, p. 183; 30 Stat. L. 750.

3 Spencer v. McStocker, 11 Hawaii 58.

See, also, Peacock v. Republic of Hawaii, 12 Hawaii 27; *Ex parte* Ah Oi, 13 Hawaii 534; *Ex parte* Edwards, 13 Hawaii 32.

4 Hawaii v. Mankichi, 190 U. S. 197, 47 L. Ed. 1016, 23 Sup. Ct. Rep. 787.

§ 402. Acquisition by Treaty—Title taken subject to prior land grants.—The United States took title to all lands acquired by cession from the various States and countries, subject to two reservations, whether named specifically in the treaty or grant or otherwise: First, all *bona fide* grants to individuals, prior to the treaty or deed of cession, by the State or country then owning the land; and, second, the Indian title of occupancy. In regard to the first class, all the tracts granted, although at that time comparatively sparsely populated, were dotted over with land claims of private individuals. And the rights to private property, whether they consisted of the soil, or in rights of waters, or both, were not impaired by the change of sovereignty and jurisdiction. They were fully secured by the law of nations, and generally by treaty stipulations,[1] and the United States has always honored and protected all valid claims of this nature. The ownership of so much of the soil, or to certain rights of water, as was vested in an individual proprietorship, prior to the grant, did not pass to the Government. It only took the land subject to all equitable rights of private property therein which existed at the time of the transfer. Valid claims to lands or waters, or both, whether grounded upon an inchoate or perfected title were ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting any intrusion whatever upon the claimed lands or water rights until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was expected that many unfounded and fraudulent claims would be presented for confirmation, and as there was no way of separating them from those which were valid, without an investigation by a competent tribunal, Congress therefore shaped our legislation so that all lands to which a claim was attached should, until it was barred or passed upon, be excluded from any mode of acquiring them.[2]

1 As to the treaty stipulations, see treaties referred to with the various countries, Secs. 393-399.

See, also, United States v. Arredondo, 31 U. S. 6 Pet. 691, 8 L. Ed. 547; Menard v. Massey, 49 U. S. 293, 12 L. Ed. 1085; Glenn v. United States, 54 U. S. 13 How. 250, 14 L. Ed. 133; Heirs of De Vilemont v. United States, 54 U. S. 13 How. 261, 14 L. Ed. 138.

2 See Acts of Congress, 1811, 2 Stat. at L., pp. 664, 665, Secs. 6, 10.

§ 403. Acquisition by treaty—Title taken subject to prior land grants—Spanish and Mexican grants.—It had been the practice of Spain and Mexico to grant large tracts of land to individuals, sometimes as a reward for meritorious services, but generally, as land was plentiful and the population sparse, it was with a view to invite immigration and promote the settlement of the vacant territory. In the eager rush for gold to California and other portions of the West, many of the Spanish and Mexican grants were overlooked and trespassed upon.[1] It was not until the Act of Congress of March 3, 1851, that our Government undertook to discharge the obligation it had assumed, to adjust the property rights claimed under these Spanish and Mexican grants in the State of California.[2] This Act created a commission to pass upon them and allowed two years from that date within which to present claims. And, while these claims were pending, or settled adversely to the claimants, the lands covered by them were not "public lands" of the United States, and were excluded from all grants from the United States.[3] But, upon the other hand, a failure of any person claiming lands in California by virtue of any right or title derived from a Spanish or Mexican Government to present the same to the commissioners within the two years limited for that purpose, constituted an abandonment of his right,[4] and the lands included within such alleged claims became a part of the public lands.

The Act of July 22, 1854,[5] was more general in its character than that of 1851, and a method was provided for the investigation of all Spanish and Mexican grants in all the territory ceded to the United States, and also providing for a confirmation of all *bona fide* grants. Less than one hundred claims were finally confirmed under that Act in nearly thirty-seven years,[6] and then the

1 For the rush for gold to California, see Sec. 597.

2 For Act of March 3, 1851, see 9 Stat. L. 631.

3 Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769, where it was held that lands within the boundaries of an alleged Mexican or Spanish grant, which were then *sub judice*, are not public within the meaning of the Acts of Congress, under which the patent whereon the appellee's title rests, was issued; and to antedate the judicial rejection of a claim so as to render operative a grant which would otherwise be without effect, can not be sanctioned.

4 Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963, 21 Sup. Ct. Rep. 690.

5 10 Stat. L. 309.

6 Compiler's note, 1 Supp. R. S. 519.

Act of March 3, 1891, repealed and superseded it, and created a Court of Claims for this and other purposes.[7] Under these various Acts it has been the uniform holding of the Courts that all *bona fide* claims to land would be upheld, provided that the claimants complied with the provisions of the Acts and proved their titles to the grants in question.[8] But when the United States accepted the cession of the territory from Mexico, it did not assume any obligation to satisfy any pecuniary demands which an individual may have had against the Mexican Government. The United States took these lands with the treaty obligations to respect all rights of property which the respective governments respected, but it was under no obligation to right the wrongs which any government had theretofore committed.[9] The same principle for the

[7] For Act March 3, 1891, see 6 Fed. Stat. Ann., 1905, p. 48, and cases cited; also see 1 U. S. Comp. Stat. 1901, p. 764, 26 Stat. L. 854.

[8] United States v. Arredondo, 31 U. S. 6 Pet. 691, 8 L. Ed. 547; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Huff v. Doyle, 93 U. S. 558, 23 L. Ed. 975; Ryan v. Central Pac. R. Co., 99 U. S. 382, 25 L. Ed. 305; Quinn v. Chapman, 111 U. S. 446, 28 L. Ed. 476, where it was held that where land claimed as a part of a Mexican grant was, by the final survey of the confirmed grant, ascertained not to be a part of that grant, it then became subject to entry and preemption for the first time; Irvine v. Marshall, 61 U. S. 20 How. 558, 15 L. Ed. 994, where it was held that the term "property" in the treaty by which the United States acquired Louisiana, comprehends every species of title, incohate or complete, legal or equitable, and embraces rights which lie in contract executory as well as executed.

See, also, Bryan v. Kennett, 113 U. S. 179, 28 L. Ed. 908, 5 Sup. Ct. Rep. 407; Soulard v. United States, 29 U. S. 4 Pet. 511, 7 L. Ed. 938; Tameling v. U. S. Freehold etc. Co., 93 U. S. 644, 23 L. Ed. 998; Delassus v. United States, 34 U. S. 9 Pet. 117, 9 L. Ed. 71; United States v. Maxwell Land Grant Co., 121 U. S. 325, 30 L. Ed. 949, 7 Sup. Ct. Rep. 1015, aff'g 26 Fed. Rep. 118; Smith v. United States, 35 U. S. 10 Pet. 326, 9 L. Ed. 442; Slidell v. Grandjean, 111 U. S. 412, 28 L. Ed. 321, 4 Sup. Ct. Rep. 475.

[9] Cessna v. United States, 169 U. S. 165, 42 L. Ed. 702, 18 Sup. Ct. Rep. 314; United States v. Santa Fe, 165 U. S. 675, 41 L. Ed. 874, 17 Sup. Ct. Rep. 472.

In the case of Woodruff v. North Bloomfield Gravel Co., 8 Sawyer 628, 9 Sawyer 441, 18 Fed. Rep. 753, Mr. Justice Sawyer said: "A custom or usage attempted to be established whereby mining debris might be sent down to the valleys, devastating the lands of private owners, holding titles in fee from the Mexican Government, as old as the title of the United States, without first acquiring the right to do so, by purchase or other lawful means upon compensation paid, would be in direct violation both of the laws and con-

protection of the rights to land applies also to property rights in waters acquired under the French, Spanish, and Mexican laws, before California and other portions of the arid and semi-arid regions were acquired by the United States. They are entitled to and received complete protection under our laws.[10]

It therefore follows that a valid Spanish or Mexican grant was never a part of the public lands of the United States, but all the rights acquired in the lands or the waters are entitled to protection in the grantee or his successors in interest.[11] Other questions involving Spanish and Mexican grants will be discussed in other portions of this work.[12]

§ 404. **Title taken subject to Indian right of occupancy.**—The title of the United States to the lands acquired, as set forth in the preceding sections of this work [1] was subject to the Indian right

stitution of the State and of the Constitution of the United States."

10 See, for water rights under the French laws, Secs. 574, 576; under the Spanish laws, Sec. 572; under the Mexican laws, Secs. 576-583.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569; 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945.

See, also, the case of United States v. Parrott, 1 McAllister 271, Fed. Cas. No. 15,998, 7 Morr. Min. Rep. 335, involving the validity of a Mexican grant, and the right to work the mineral lands upon the public domain of the United States.

11 Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

See, also, Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674; Pope v. Kinman, 54 Cal. 3; Crystal Springs Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720, 20 Sup. Ct. Rep. 573, affirming *Id.*, 82 Fed. Rep. 114, 76 Fed. Rep. 114, 148; Los Angeles etc. Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; Boquillas etc. Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493, affirming *Id.*, 11 Ariz. 128, 89 Pac. Rep. 504; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418; Los Angeles v. Pomeroy, 124 Cal. 579, 57 Pac. Rep. 585, 188 U. S. 314, 23 Sup Ct. Rep. 395, 47 L. Ed. 487, 63 L. R. A. 471; Vernon Irrigation Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Merced M. Co. v. Biddle Boggs, 70 U. S. 3 Wall. 304, 18 L. Ed. 245; Waddingham v. Robledo, 6 N. M. 347, 28 Pac. Rep. 663.

12 For riparian right attached to Mexican grants, see Sec. 580.

For the right of appropriation on Mexican grants, see Sec. 583.

For the civil law of waters as modified by the Spanish and Mexicans, see Chap. 30, Secs. 577-583.

1 See Secs. 393-401.

of occupancy. The title to the lands where this right of occupancy has not been extinguished is now subject to that right. Nearly the whole of this country was originally claimed by various Indian tribes. It is true that but a very small proportion of the land was actually occupied by the Indians, who, in accordance with their nomadic customs, were here one day and there the next. But the whole country was practically parceled off by the various tribes, each claiming a certain tract. Any interference with the lands of one tribe by another led to Indian warfare. With the coming of the white man, with his superior intelligence and knowledge of business transactions, and largely supplemented, we will say, by his methods of warfare, the Indian tribes were driven farther and farther back from our Eastern coast, until they were mostly located on the lands which go to make up the Middle and Western States of this country. As we have seen, this portion of our country was then owned by France, Spain, and Mexico.[2] With the formation of this Government there was a disposition to accord the Indians more humane treatment. And, therefore from the adoption of our Constitution up to the Act of Congress of March 3, 1871, our dealings with the Indian tribes were by treaties between the United States upon the one part and the particular Indian tribe upon the other. And our Courts held that the power to make treaties with the Indian tribes was coextensive with the power to make treaties with foreign nations.[3] Thus, by means of treaties with the Indians, the right of occu-

2 See Secs. 394, 397-399.

3 Cherokee Nation v. Georgia, 30 U. S. 5 Pet. 1, 8 L. Ed. 25, where it was held that the Cherokees are a State. They have been uniformly treated as a State since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violations of their engagements or for any aggressions committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The Acts of our Government plainly recognize the Cherokee Nation as a State, and the courts are bound by these Acts.

See, also, United States v. Forty-three Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846; Holden v. Joy, 84 U. S. 17 Wall. 211, 21 L. Ed. 523; Graham v. United States, 30 Ct. Cl. 318; United States v. Reese, 5 Dill. 405, 27 Fed. Cas. No. 16,137; Maiden v. Ingersoll, 6 Mich. 373; Choctaw Indians, 13 Op. Atty. Gen. 354; *Ex Parte* Crow Dog, 109 U. S. 556, 27 L. Ed. 1030, 3 Sup. Ct. Rep. 396; United States v. Berry, 4 Fed. Rep. 779.

pancy of the Indians was in many cases extinguished and the United States acquired the absolute title to land, including both the fee and the right of possession.[4]

But by the Act of Congress of March 3, 1871,[5] Congress provided that, "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Thus, after an experience of a hundred years of the treaty-making system of government with the Indians, a new policy was determined upon. The Act in question took away the treaty-making power of the Indians and declared them, in effect, not to be independent nations, but wards of the United States, to be governed by Acts of Congress. However, all treaties made and ratified prior to the passage of the Act were not thereby invalidated or impaired.[6]

§ 405. **Indian right of occupancy—Indian lands thrown open to settlement.**—The legal title to Indian lands is in the United States, and is founded on discovery and grant to the Government, from the various States and foreign countries.[1] Until the Indian right of occupancy is extinguished, the United States has but the naked fee without the right of possession. Hence it is held by the high-

4 See cases cited in next Section, No. 405.

5 3 Fed. Stat. Ann., 1905, p. 357; Rev. Stat. U. S., 1878, Sec. 2079, 16 Stat. L., p. 566.

6 United States v. Kagama, 118 U. S. 375, 30 L. Ed. 228, 6 Sup. Ct. Rep. 1109; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. Ed. 299, 23 Sup. Ct. Rep. 216; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. Ed. 183, 23 Sup. Ct. Rep. 115; Choctaw Nation v. United States, 119 U. S. 1, 30 L. Ed. 306, 7 Sup. Ct. Rep. 25, 22 Ct. Cl. 476; Elk v. Wilkins, 112 U. S. 94, 28 L. Ed. 643, 5 Sup. Ct. Rep. 41; Cherokee v. So. Kan. R. Co., 135 U. S. 641, 34 L. Ed. 295, 10 Sup. Ct. Rep. 965; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041, 19 Sup. Ct. Rep. 722; *Ex Parte* Crow Dog, 109 U. S. 556, 27 L. Ed. 1030, 3 Sup. Ct. Rep. 396; United States v. Osborn, 2 Fed. Rep. 58; Truscott v. Hurlbut Land etc. Co., 73 Fed. Rep. 60, 19 C. C. A. 374, 44 U. S. App. 248; Lowe v. United States, 37 Ct. Cl. 413; Jaeger v. United States, 27 Ct. Cl. 278; Brown v. United States, 32 Ct. Cl. 432; Leighton v. United States, 29 Ct. Cl. 304, aff'd 161 U. S. 291, 40 L. Ed. 703, 16 Sup. Ct. Rep. 495, 31 Ct. Cl. 454.

For Irrigation by Indians, see Secs. 271-285.

1 See Secs. 393-401.

est authorities that a grant from the United States, made before the extinguishment of the Indian right, remains subject to that right, but the title becomes absolute in the grantee whenever the Indian right of occupancy is extinguished. The Indians themselves are deemed incapable of transferring their right to any other than to the United States. Chancellor Kent says on this subject of Indian titles:[2] "The title is in the United States by the treaty of peace with Great Britain, by subsequent cessions from France and Spain, and by cessions from the individual States; the Indians have only a right of occupancy, and the United States possesses the legal title subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase. The title of the European nations, which passed to the United States, to this immense territorial empire, was founded on discovery and conquest; and, by the European customary law of nations, prior discovery gave this title to the soil, subject to the possessory rights of the natives, which occupancy was all the right that European conquerors and discoverers, and the United States, as succeeding to their title, would admit to reside in the native Indians. The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country."[3]

As the Indians only hold the right of occupancy to their lands, it has been held by the United States Supreme Court that grants of land to private individuals made by Indian tribes can not be recognized in the Courts of the United States,[4] unless the pur-

2 Kent Com., p. 258.

3 See, also, Clark v. Smith, 38 U. S. 13 Pet. 195, 10 L. Ed. 123; Johnson v. McIntosh, 21 U. S. 8 Wheat. 543, 5 L. Ed. 681; Buttz v. Northern Pac. R. Co., 119 U. S. 55, 30 L. Ed. 330, 7 Sup. Ct. Rep. 100; Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440; 14 Op. Atty. Gen. 568; Thompson v. Doaksum, 68 Cal. 593, 10 Pac. Rep. 199.

See, also, cases cited under previous Section, No. 404.

4 Johnson v. McIntosh, 21 U. S. 8 Wheat. 543, 5 L. Ed. 681; United States v. Rillieux, 55 U. S. 14 How. 189, 14 L. Ed. 381; United States v. Gusman, 55 U. S. 14 How. 193, 14 L. Ed. 383; United States v. Cook, 86 U. S. 19 Wall. 591, 22 L. Ed. 210, where the Court held that as the Indians had only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber standing thereon, and that

chases were made at Indian treaties, held by the authority of and ratified by the United States. And in cases of this nature the purchase has been held good without any patent to the purchaser from the United States.[5] It has also been decided by the same authority that the Indians have the unquestionable right of possession of the lands which they occupy, until the right of occupancy shall have been extinguished by a voluntary cession to the Government,[6] and that until their title shall have been extinguished, the Indian lands are not "public lands" of the United States and are not open to settlement.[7]

The above principle is especially true where the lands have been reserved for the use of an Indian tribe by treaty. The treaty is notice that the land will be retained by the Government for the use of the Indians, and this purpose can not be defeated by the action of any officers of the General Land Office.[8] In a recent Utah case it was held that judicial notice of the opening of an Indian reservation in the State and the restoration of the unallotted lands included therein to the public lands would be taken by the Courts.[9] In Washington it is held that there can be no right of appropriation of the waters of a stream by one illegally occupying land on an Indian reservation prior to the opening of the reservation for settlement.[10]

The Indian title to occupancy remains in the Indians until such

every purchaser from them is charged with this notice.

For right of the United States to reserve the waters on the public domain to irrigate Indian lands, see Sec. 411.

5 Mitchell v. United States, 34 U. S. 9 Pet. 711, 9 L. Ed. 283; *Id.*, 40 U. S. 15 Pet. 52, 10 L. Ed. 658.

6 Leavenworth etc. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; Missouri etc. R. Co. v. United States, 92 U. S. 760, 23 L. Ed. 645; Cherokee Nation v. Georgia, 30 U. S. 5 Pet. 1, 8 L. Ed. 25; Jackson v. Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500.

7 Rector v. United States, 92 U. S. 698, 23 L. Ed. 690; United States v. Carpenter, 111 U. S. 347, 28 L. Ed. 451, 4 Sup. Ct. Rep. 435; United States v. Cook, 86 U. S. 19 Wall. 591, 22 L. Ed. 210, where the Court held that the Indian right of occupancy was as sacred as the title of the United States to the fee.

See, also, cases cited in the last Section and under Sec. 404.

8 United States v. Carpenter, 111 U. S. 347, 28 L. Ed. 451, 4 Sup. Ct. Rep. 435.

9 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1113.

10 Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028.

See, also, effect of the dedication by a State of its waters, as against the rights of the United States, Sec. 388.

lands are thrown open to settlement by the Government. Then, and not till then, do Indian lands become a part of the public lands of the United States. This is also true as to military and other Government reservations, with the exception of forest reservations.[11]

§ 406. Acquisition of waters—Ownership originally in the United States.—With the lands acquired as we have described in the previous sections,[1] the United States also acquired the ownership of the waters of the natural streams, lakes, and other bodies, as incidents to the soil. In other words, the United States was the sole riparian proprietor of both the lands bordering on the streams, and the waters flowing therein, with the exception of certain rights to the use of the waters that had vested in the Spanish and Mexican grantees before the territory was acquired by the Government.[2] As such owner of the water the Government had as good a title to the same as it is possible for any Government or power to acquire title in running waters.[3]

11 For the right of the Government to reserve lands, see Sec. 413.

For Forest Reservations, see Secs. 416-425.

See, also, Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1113; Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Story v. Woolverton, 31 Mont. 346, 78 Pac. Rep. 589; Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207, affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546; *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666; United States v. Conrad Inv. Co., 156 Fed. Rep. 130; *Id.*, 161 Fed. Rep. 829, 88 C. C. A. 647; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

1 See Secs. 393-401.

2 Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, affirming *Id.*, 6 Dak. 71, 50 N. W. Rep. 485; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207, affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546; *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666.

See, also, discussion relative to the California and Colorado theories as to the origin of right under the Arid Region Doctrine of appropriation, and cases cited, Secs. 627-640.

For power of Government to dispose of its waters, see Sec. 411.

3 For the title to the *corpus* of water, see Secs. 288, 289.

How the Government has disposed of its right to the running waters flowing over the public domain is one of the principal subjects for discussion of this work, and will be discussed under the various appropriate headings.[4]

§ 407. **Public lands of the States.**—The various States of the Union also have the power to acquire, own, and hold lands. To those States known as the "public land States," great tracts of land have been granted by the Federal Government for various purposes, which subject will be discussed in the following chapter.[1] A State also has the power to purchase or to condemn such lands as are needed by it to carry on its affairs. A State also has the power to dispose of its lands under laws enacted by its legislature, and to apply the funds received from such sale to the purpose for which the lands were originally granted.

In those States which hold to the doctrine of riparian rights a State may become a riparian owner in the waters flowing by or through such lands. In such a case the grantee of the State succeeds to the riparian rights.[2]

4 For the Act of Congress of 1866, and construction thereof, see Secs. 611-620.

For the Act of 1870, see Secs. 615-618.

For the Desert Land Act, see Chap. 66.

For the reservation of waters by the Government, see Secs. 388, 411.

For the disposal of the lands and waters, see Chap. 20, Secs. 408-449.

1 See Chap. 20, Secs. 408-449.

2 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

See, also, for a State as a riparian owner, Sec. 481.

For Appropriation of Water on State Lands, see Sec. 971, Part XIV.

CHAPTER 20.

DISPOSAL OF LANDS AND WATERS BY THE UNITED STATES.

§ 408. Scope of chapter.
§ 409. Power of the United States to dispose of its lands.
§ 410. Ownership of soil and water distinguished.
§ 411. Power of the United States to dispose of its waters.
§ 412. How the Government disposes of its lands—In general.
§ 413. Authority of the Government to make reservations and withdrawals.
§ 414. Disposal of public lands by way of reservations by the Government—Effect of reservations.
§ 415. Indian reservations—Disposal of Indian lands.
§ 416. Forest reservations—Act of March 3, 1891.
§ 417. Forest reserves—Act of March 3, 1891—Objects of the Act.
§ 418. Forest reservations—Act of March 3, 1891—What lands may be reserved—In general.
§ 419. Forest reservations—Character of lands which may be reserved.
§ 420. Forest reservations—How forest reserves are created.
§ 421. Forest reservations—Act of June 4, 1897—The administration of forest reserves or National forests.
§ 422. Forest reserves—Forest lands purchased by the United States to protect stream flow under Act of March 1, 1911—The National Forest Reservation Commission.
§ 423. Forest reserves—Transfer of control to the Department of Agriculture—Rights of way over reserves.
§ 424. Forest reservations—Rules and regulations—Criminal prosecutions.
§ 425. Forest reservations—Rules and regulations forbidding certain acts.
§ 426. The withdrawal and reservation of lands for power sites, irrigation, classification, and other purposes.
§ 427. Donations for internal improvement—Donations to railroads.
§ 428. Donations for internal improvements—Railway grants.
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§ 433. Disposal to individuals—Pre-emptions.
§ 434. Disposal to individuals—Homestead entries.
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§ 438. Disposal to individuals—Public and private sale.
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§ 441. Disposal to individuals—Coal lands.

§ 442. Coal lands—Surface agricultural entries thereon—Reservation of the coal.
§ 443. Coal lands—Right to make surface agricultural entries, selections, and withdrawals—Reservation of coal.
§ 444. Desert Land Act—Carey Act—National Reclamation Act.
§ 445. Rights to land attach, when.
§ 446. Pre-existing water rights not affected by Congressional grants.
§ 447. Grantee takes subject to conditions annexed to grant.
§ 448. Ownership and sovereignty distinguished—Jurisdiction.
§ 449. After title has passed from the United States lex loci sitae governs.

§ 408. Scope of chapter.—As the ownership of land is often accompanied with the ownership to certain rights to waters which originally flowed over the land, and the two subjects are usually closely connected, in the present chapter we will show how the United States has disposed of and is now disposing of its lands and waters upon the public domain.[1] In this chapter we will not discuss the subject of rights of way over the public domain, but will reserve that subject for another chapter.[2]

§ 409. Power of the United States to dispose of its lands.—All lands upon the public domain of the United States are the exclusive property of the United States, and may be disposed of to such persons, at such times, in such modes, and by such title, as this Government by its Congress may deem most advantageous and will best promote the public welfare. This principle has been recognized by constitutional authority, by legislation, and by the Courts from the very foundation of the Government. The Government of the United States has a perfect title to its public domain and an absolute and unqualified right of disposal.

Article 4, Section 3, Clause 2, of the Constitution of the United States, reads as follows:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

And hence it follows that as the complete authority to dispose of

1 For the acquisition of lands and waters by the United States, see the previous Chapter, 19, Secs. 390-407.

2 For rights of way over the public lands, see Chap. 51, Secs. 927-971.

the public domain is in Congress, under the power granted in the Constitution, no appropriation or disposal of lands can be made for any purpose but by the authority of an Act of Congress.[1]

Under the Federal Constitution, Congress is vested with the exclusive power to manage and dispose of the public lands. It may dispose of them in such manner, on such terms and conditions, and subject to such restrictions and limitations as in its judgment will best promote the public welfare.[2] Not only is the power of disposition of the public domain in Congress, but neither State nor Territorial legislation can, in any manner, modify or affect the right which the Government has through Congress to the primary disposal of the public land.[3] This right of the General Government has been uniformly reserved by solemn compacts upon the admission of new States into the Union, and has been recognized and scrupulously respected by the Courts of the sovereign States, within which large

1 Irvine v. Marshall, 61 U. S. 20 How. 558, 15 L. Ed. 994; U. S. v. Fitzgerald, 40 U. S. 15 Pet. 407, 10 L. Ed. 785; Gibson v. Chouteau, 80 U. S. 13 Wall. 92, 20 L. Ed. 534; Jourdan v. Barrett, 45 U. S. 4 How. 169, 11 L. Ed. 924; United States v. Grateot, 39 U. S. 14 Pet. 526, 10 L. Ed. 573, affirming 1 McLean, 454, Fed. Cas. No. 15,249; United States v. Maxwell Land Grant Co., 121 U. S. 325, 30 L. Ed. 949, 7 Sup. Ct. Rep. 1015, affirming 26 Fed. Rep. 118; Tameling v. U. S. Freehold etc. Co., 93 U. S. 644, 23 L. Ed. 998; United States v. Tichenor, 12 Fed. Rep. 415; Rose v. Buckland, 17 Ill. 309.

The words "dispose of" vest in Congress the power not only to sell but also to lease the lands of the United States; Leases on Mineral Lands on Isle Royal, 4 Op. Atty. Gen. 487.

2 Notes on the Constitution of the United States, by Thomas H. Calvert, in 9 Fed. Stat. Ann., 1906, p. 202.

See, also, Davidson v. Jordan, 47 Cal. 351; Farrington v. Wilson, 29 Wis. 383; Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. Ed. 409, 25 Sup. Ct. Rep. 211; Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

3 Irvine v. Marshall, 61 U. S. 20 How. 558, 15 L. Ed. 994; Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264; Gibson v. Chouteau, 80 U. S. 13 Wall. 92, 20 L. Ed. 534; Jourdan v. Barrett, 45 U. S. 4 How. 169, 11 L. Ed. 924; Seymour v. Sanders, 3 Dill. 437, Fed. Cas. 12,690; Russell v. Lowth, 21 Minn. 167, 18 Am. Rep. 389; Miller v. Little, 47 Cal. 348; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845, 6 Sup. Ct. Rep. 670; Cross v. Harrison, 57 U. S. 16 How. 164, 14 L. Ed. 889; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14371; Headley v. Coffman, 38 Neb. 68, 56 N. W. Rep. 701; Chapman v. Quinn, 56 Cal. 256; 11 U. S. 445, 28 L. Ed. 476, 4 Sup. Ct. Rep. 508; Kissell v. St. Louis Public Schools, 59 U. S. 18 How. 19, 15 L. Ed. 324.

portions of the public lands have been situated, and within which much of these lands is still remaining.

§ 410. **Ownership of soil and water distinguished.**—It must be borne in mind that it is a well-settled principle in the arid region that ownership in the soil is not necessary to an ownership in the waters running over and adjoining the land. Hence it follows, that a grant of land through which a stream runs or adjoins, may or may not pass any interest in the waters of the stream. In fact before the title to a tract of land passes from the Government to private parties all of the waters that naturally ran over the tract may have been appropriated by other parties and diverted from their natural course and conducted to other tracts, perhaps miles away; and the grantee of the lands in question is compelled to look to other streams, on other lands, for his supply of water. Under the decisions upon this subject the law is settled to mean this: When a grantee of the United States obtains title to a tract of land through or adjoining which a stream of water runs, and the waters of the stream have not hitherto been appropriated, the grantee's title is not subject to any possible appropriation, whereby his riparian rights are injured, which may be subsequently made by another party, unless the State or Territory in which the land is located has, by statutory enactments or court decision, abolished the common law of riparian rights. If the land granted before any appropriation has been made is upon the public domain, within the boundaries of a State, the riparian rights of the grantee must be determined and regulated wholly by the law of the State, over which Congress has no power whatever to legislate. And unless there is a State law upon the subject abolishing or modifying the common law of riparian rights within that State subsequent appropriators of the waters of the stream must take the water subject to all of those rights of the riparian grantee.[1]

1 Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732; *Id.*, 4 Pac. Rep. 426; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Lobdell v. Hall, 3 Nev. 507; Ophir S. M. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Robinson v. Imperial S. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370; Covinton v. Becker, 5 Nev. 281; Hobart v. Ford, 6 Nev. 77; Vansickle v. Haines, 7 Nev. 249; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Shoemaker v. Hatch, 13 Nev. 261; Dick v. Caldwell, 14 Nev. 167; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Crane

But upon the other hand, if the waters of a stream upon any part of the public domain, whether within the boundaries of a State or not, have been appropriated prior to the existence of any rights of a subsequent riparian grantee of the Government, then the riparian rights of the grantee are subject to the rights of the appropriators. And in States which have abolished the common law theories of riparian rights, the person who first actually appropriates, diverts, and uses the waters from any natural stream upon the public domain, for some beneficial purpose, has a perfect title to the same, and that too whether the appropriation is made prior or subsequent to any existing rights of a grantee of the Government. But these questions will be more thoroughly discussed in a future portion of this work.[2]

§ 411. **Power of the United States to dispose of its waters.**—As we have seen, the United States originally had a perfect title to all of the waters flowing upon the public domain with the exception of the use of certain waters the right to which had vested before the Government acquired the territory through which these waters flow.[1] Hence it follows that this Government had the right to dispose of these waters as it saw fit. Being the owner of the public domain, the United States originally had the power to dispose of any estate therein, or any incident or part thereof, either together or separately. The water flowing over the public domain is a part thereof, and the National Government had the right to sell or grant the same, or the use thereof, separate from the rest of the estate, under such terms and conditions as might have seemed proper.[2] And, where there is still water flowing in the natural streams, which

v. Winsor, 2 Utah 248; Munroe v. Ivie, 2 Utah 535; Fabian v. Collins, 3 Mont. 215; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Caruthers v. Pemberton, 1 Mont. 111.

For rights as between riparian owners and appropriators, see Secs. 810-823.

For riparian rights, see Secs. 450-551.

2 For rights of riparian proprietors, see Secs. 450-551.

For rights as between riparian proprietors and appropriators, see Secs. 810-823.

1 For rights of Spanish and Mexican grantees to the use of waters, see Secs. 578-580.

For United States title to the waters, see Sec. 406.

2 See Howell v. Johnson, 89 Fed. Rep. 556, where the Court said: "The water of an innavigable stream flowing over the public domain is a part thereof, and the National Government can sell or grant the same, or the use

is still unappropriated under some authority granted by Congress, the General Government may reserve such waters for its own use, or for the use upon Indian or other reservations. As was said by the Supreme Court of the United States in a case decided in 1908: "The power of the Government to reserve the waters and exempt them from appropriation under State Laws is not denied and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years."[3] And, as was said by the Supreme Court of Montana: "Prior to the time of the settlement upon the lands in question, and prior to the appropriation of the waters of Bear Creek by any one, both the land and the water were the property of the Government. When the Government established the reservation, it owned both the land included therein, and all the water running in the various near-by streams to which it had not yielded title. It was therefore unnecessary for the Government to 'appropriate' the water. It owned it already. All it had to do was to take and use it."[4]

In a Federal case arising in Idaho, it was said: "The appropriation of a part of those waters for the uses of the military post secured it in the use of the *portion* so appropriated, but it did not

thereof, separate from the rest of the estate, under such circumstances as may seem to it proper"; Cruse v. McCauley, 96 Fed. Rep. 369, where it is said: "As the United States then owns the waters which are incident to its lands, it can dispose of them separate from the lands if it chooses."

See, also, Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; Coquille M. & M. Co. v. Johnson, 52 Ore. 547, 98 Pac. Rep. 132, 132 Am. St. Rep. 716.

See Arid Region Doctrine of Appropriation, Secs. 585-594.

[3] Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207, affirming *Id.*, 148 Fed Rep. 684, 78 C. C. A. 546, affirming *Id.*, 143 Fed. Rep. 740.

See, also, United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, 74 C. C. A. 666; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662; Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429, 172 Fed. Rep. 615; Conrad Investment Co. v. United States, 161 Fed. Rep. 829, 88 C. C. A. 647; *Id.*, 156 Fed. Rep. 130; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

[4] Story v. Woolverton, 31 Mont. 346, 78 Pac. Rep. 589.

take from the others the right to make such appropriation above the reservation as would not interfere with its prior appropriation."[5] But we do not think that the rights of the Government are limited to this extent, and that the rights of the Government are better set forth in the dissenting opinion by Mr. Justice Gilbert, to the effect that the rights of the Government must be considered with reference to the possible uses that it thereafter might wish to apply the water.[6]

The Government is still the owner of the surplus of the waters flowing upon the public domain, or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. The Government has the same right of disposal of this water which it originally had with one exception. It can not dispose of a riparian right to the use of the water to a purchaser of the land bordering on the stream in those States where riparian rights have been abolished. The question of retaining or abolishing riparian rights has been left entirely with the respective States. Each State may determine for itself whether the common law rule in respect to riparian rights, or whether the Arid Region Doctrine of appropriation of waters for beneficial uses shall control. "Congress can not enforce either rule upon any State."[7] But in those States which have retained the common law of riparian rights as to the use of the waters of the natural streams and at the same time permit appropriations of waters for beneficial purposes, a Government grantee takes his riparian right to the use of the water with his grant to the land; provided, of course, that there was unappropriated water in the stream, at the time of the inception of his title to the land.[8] The United States also retains

[5] Krall v. United States, 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351.

[6] To the same effect see Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207, affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546, sustaining 143 Fed. Rep. 770, 74 C. C. A. 666.

[7] Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

See, also, Secs. 330, 388, 593, and cases cited.

[8] Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, affirming *Id.*, 6 Dak. 71, 50 N. W. Rep. 486.

For rights as between appropriators and Government grantees, see Secs. 804-809.

See, also, Secs. 810-823.

such a right to the waters in all States and Territories that it may prevent the appropriation and diversion where it is necessary to maintain unimpaired the navigable capacity of the navigable streams of the United States, even to the extent of enjoining the appropriation of the tributaries of such navigable streams and where such appropriations have been made under the local laws of the States wherein they flow.[9]

It therefore follows, as the result of the ownership by the United States of the waters flowing upon the public domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the face of any claim which may be made by the Government, *at least* to all the surplus or unused waters within such State.[10] In regard to the rights of the Government to the waters for use by means of the projects constructed under the provisions of the National Reclamation Act,[11] it has been held that, when the United States makes an appropriation of water, it does so under the same terms as a private individual, and must follow the law of the State where the appropriation is made.[12] This holding was simply the construction of Section 8 of the Act, which provides that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws" of the State where the appropriation was made. We believe that, owing to the fact that the title to the surplus waters flowing over the public domain is in the Government, Congress might have provided otherwise, and have successfully laid claim to the unappropriated waters for these projects by virtue of its ownership of them as above stated. But, having provided by the provisions of the Reclamation Act itself that in these projects the Government must submit itself to the laws of the respective States relative to the appropriation of water, in language which was plain and unambiguous, the Courts can not do otherwise than to sustain such express provision.

9 United States v. Rio Grande Dam & Irr. Co., *supra;* Kansas v. Colorado, *supra.*

For right to maintain navigation, see Secs. 349-356.

See, also, Navigation as Against Irrigation, Secs. 354-356.

10 For the effect of such a dedication as against the rights of the United States, see Sec. 288.

11 See Chap. 65.

12 Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429, 172 Fed. Rep. 615.

§ 412. How the Government disposes of its lands—In general.—It is not our purpose in this work to discuss at length all of the details of the methods by which the Government disposes of its lands; and we will do so only so far as to show how the waters of the rivers, streams, lakes, and other natural bodies which are upon these lands, and necessarily a part thereof, pass from the ownership of the United States to other and private ownership. And we think that it will not be out of place, at this point, to briefly discuss the different methods the United States has of disposing of its public domain, bearing in mind that a grant of the soil may or may not also carry with it certain rights in the waters flowing by or through the lands granted.[1]

In general we will say that the United States has three methods of disposing of its public domain: First, by special reservations for the use of the Government; second, by donations, the basis of the title to the land in these two cases being a Congressional Act, either special or general; and, third, by regular disposal through the General Land Office, the basis also being some Act of Congress contained in the general land laws, and, upon a compliance with such Act, a patent to the land is given to the grantee.

Bearing in mind the distinction which we have given in previous sections between the terms "public domain" and "public land,"[2] that the public domain includes all of the lands owned by the United States, but that the term "public land" only includes such lands as are subject to sale or disposal under some general law,[3] we will in the following sections endeavor to briefly describe how the United States has disposed of and is disposing of its public domain.

§ 413. Authority of the Government to make reservations and withdrawals.—The United States being the absolute owner and proprietor of all of its public lands and having the full power of disposal,[1] it has also the power to dispose of such lands as the Government by its Congress may from time to time provide. In fact the power of the General Government in this respect is pre-

1 See previous two Sections, Nos. 410, 411.

2 See Secs. 391, 392.

3 Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769.

1 For power of disposal of lands, see Sec. 409.

cisely the same as that of a private individual who owns a farm. He may sell all of his land or give it away. He may sell or dispose of a portion of the land, and reserve the remainder. He may sell certain incidents connected therewith, and still retain the title to all of the land itself, as, for example, would be the case where he sells off the timber growing thereon, the stone or gravel found in the soil, or the water rights connected therewith. Again, he may sell the land, and reserve for himself certain incidents. He may retain the title to the fee and may lease the land for agricultural purposes or for pasturage. He may prevent trespasses by others upon his land, for the purpose of cutting the timber thereon, or the running of stock thereon for pasturage.

The same may be said of the power of the Government to dispose of or to reserve for special purposes all or any portion of its public lands, or the incidents connected therewith. Congress may by special Acts create such reservations out of certain portions of its public lands, and that too when and where it sees fit. It may by general or special laws delegate the power to make such reservations to some executive officer of the Government, and the acts of such officers in making them are the acts of the Government, and will stand until revoked by Congress. And Congress may then devote such lands for reservations of another nature, or it may open them up for settlement. Congress may also protect all of its lands from trespass for any purpose, as is the case of the individual. It may also delegate the power to some executive officer of the Government to protect such lands from trespass, and the person who violates any rule or regulation of such officer in this respect, is guilty of trespass and may be prosecuted criminally and convicted, or he may be prosecuted civilly.[2]

2 United States v. Grimaud, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480, reversing *Id.*, 170 Fed. Rep. 205; Light v. United States, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485; United States v. Deguirro, 152 Fed. Rep. 568; United States v. Domingo, 152 Fed. Rep. 566; United States v. Bale, 156 Fed. Rep. 687; United States v. Rizzinelli, 182 Fed. Rep. 675.

That such rules were held to be valid for civil purposes, see Dastervignes v. United States, 122 Fed. Rep. 30, 58 C. C. A. 346, affirming *Id.*, 122 Fed. Rep. 30, 118 Fed. Rep. 199; United States v. Shannon, 160 Fed. Rep. 870; affirmed, 88 C. C. A. 52, 51 Fed. Rep. 863.

But before the decisions of the United States Supreme Court, cited *supra*, such regulations were held invalid in United States v. Blasingame, 116 Fed. Rep. 654; United States v.

For the reason that the Government has not always strictly sought to enforce its rights in the public lands, a mistaken idea has grown up in some portions of the West, and especially in the proximity of these lands by those who desired their use, that a sort of license had been granted by the Government that, until it had sold the lands, they might be used for the unlimited grazing of stock and sheep, and even that the timber thereon might be cut, and that too without any interference or the right to interfere with the same upon the part of the Government.[3] In other words, it was contended that simply because the Government did not always interfere with the use of its public lands, those who had theretofore, either illegally or under a mere license, so used the lands, still had a vested right to continue in their use, even after Congress had enacted positive laws, either absolutely prohibiting such use, or restricting it, and permitting the same under certain regulations, and under the supervision of the officers of the Government. It was even contended "that Congress can not constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the Act of 1891,[4] providing for the establishment of reservations, was void, so that what is nominally a reserve is, in law, to be treated as open and uninclosed land, as to which there still exists the implied license that it may be used for grazing purposes."[5] But this contention can not be maintained for the reason that the public lands of the United States are owned by the Government for the use and benefit of all its citizens alike regardless of locality. Legally, a citizen in New York has as great a right to the use of the public lands of Wyoming as has a citizen of that State, unless under some Act of Congress the citizens of Wyoming are granted some special privileges by reason of their proximity to such lands. As has been said by the Supreme Court

Matthews, 146 Fed. 306; Dent v. United States, 8 Ariz. 138, 71 Pac. Rep. 920, 8 Ariz. 413, 76 Pac. Rep. 455.

See, also, for forest reservations, Secs. 416-425.

For Indian Reservations, see Sec. 415.

For Reservations for Power Purposes, see Sec. 426.

[3] Buford v. Houtz, 133 U. S. 320, 33 L. Ed. 618, 10 Sup. Ct. Rep. 305.

[4] Authorizing the President to create forest reservations, 7 Fed. Stat. Ann., 1905, p. 310; U. S. Comp. Stat., 1901, p. 1537; 26 Stat. L. 1103.

See, also, for forest reserves, Secs. 416-425.

[5] Light v. United States, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485.

of the United States: "All the public lands of the Nation are held in trust for the people of the whole country.[6] It may deal with such lands precisely as a private individual may deal with his farming property. It may sell them or withhold them from sale.[7] And if it may withhold from sale and settlement, it may also, as an owner, object to its property being used for grazing purposes, for 'the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.'"[8]

It therefore follows that, whatever may be said in favor of the implied license by the tacit consent of the Government, *before* the

[6] United States v. Trinidad Coal & Coking Co., 137 U. S. 160, 34 L. Ed. 640, 11 Sup. Ct. Rep. 57.

[7] Camfield v. United States, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864.

[8] Light v. United States, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485, quoting from United States v. Beebe, 127 U. S. 342, 32 L. Ed. 123, 8 Sup. Ct. Rep. 1083.

See, also, Steele v. United States, 113 U. S. 128, 28 L. Ed. 952, 5 Sup. Ct. Rep. 396; Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264; Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. Ed. 409, 25 Sup. Ct. Rep. 211; Stearns v. Minnesota, 179 U. S. 223, 45 L. Ed. 162, 21 Sup. Ct. Rep. 73; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; United States v. Grateot, 38 U. S. 14 Pet. 526, 10 L. Ed. 573, affirming 1 McLean 454, Fed. Cas. No. 15,249; Jourdan v. Barrett, 45 U. S. 4 How. 169, 11 L. Ed. 924; Irvine v. Marshall, 61 U. S. 20 How. 558, 15 L. Ed. 994; Gibson v. Chouteau, 80 U. S. 13 Wall. 92, 20 L. Ed. 534; McCarthy v. Mann, 86 U. S. 19 Wall. 20, 22 L. Ed. 49; Van Brockline v. Tennessee, 117 U. S. 151, 29 L. Ed. 845, 6 Sup. Ct. Rep. 670; United States v. Insley, 130 U. S. 263, 32 L. Ed. 968, 9 Sup. Ct. Rep. 485; Redfield v. Parks, 132 U. S. 239, 33 L. Ed. 327, 10 Sup. Ct. Rep. 83; Camfield v. United States, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; Mann v. Tacoma Land Co., 153 U. S. 273, 38 L. Ed. 714, 14 Sup. Ct. Rep. 820; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Shannon v. United States, 160 Fed. Rep. 870, 88 C. C. A. 52; Fee v. Brown, 17 Colo. 510, 30 Pac. Rep. 340; affirmed in 162 U. S. 602, 40 L. Ed. 1086, 16 Sup. Ct. Rep. 875; Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; United States v. Cleveland & C. Cattle Co., 33 Fed. Rep. 323; Heckman v. Sutter, 119 Fed. Rep. 83, 55 C. C. A. 635; *Id.*, 128 Fed. Rep. 393, 63 C. C. A. 135; United States v. Grimaud, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480, rev'g *Id.*, 170 Fed. Rep. 205.

enactment of any Congressional Act prohibiting such use,[9] *after* such an Act has been passed, the citizens of any particular locality, or of any particular State, or of any particular class, have no more vested rights to the use of these public lands, on account of the actual previous use of them, than have the citizens of any other locality, or State, or class. After the passage of such an Act the merchant in the city of New York has the same legal right to their use as has the stock or sheep raiser in the State of Wyoming, unless, as has been said before, Congress should grant, as it has done relative to grazing on reservations,[10] special preference rights to their use by reason of proximity. Again, Congress has the full power to create reservations for all purposes, and to either grant the right to their use under certain restrictions, as has been done and is now being done in the case of forest reservations or National Forests, as they are called, or it has the absolute power to prohibit any use of any such reservations, as is the case in certain forest reservations where reforestation is taking place.[11]

§ 414. Disposal of public lands by way of reservations by the Government—Effect of reservations.—Under the Constitution, as we have seen, no disposition of the public lands can be made for any purpose but under the authority of an Act of Congress.[1] The appropriation of land by the Government is nothing more or less than the setting it aside for some particular use, and the disposition of the same for that purpose. So, whenever a tract of land shall have once been legally appropriated to any purpose of the Government, from that moment the land thus appropriated becomes severed from the mass of the public lands; and no subsequent law or proclamation or sale would be construed to embrace it or operate upon it, although no other reservation were made of it, unless, of course, it was clearly the intent of an Act of Congress to abolish the reservation, return the lands to the body of the public lands, and open the same for settlement or other disposition.[2] The selection

9 As was held in Buford v. Houtz, 133 U. S. 320, 33 L. Ed. 618, 10 Sup. Ct. Rep. 305.

10 See for forest reservations, Secs. 416-425.

11 For forest reservations, see Secs. 416-425.

1 Const., Art. 4, Sec. 3, Cl. 2. See, also, Sec. 409.

2 United States v. Fitzgerald, 40 U. S. 15 Pet. 407, 10 L. Ed. 785; Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264, where it was held that: An appropriation of land by the Gov-

of sites for the erection of fortifications, and for military and civil purposes is authorized by the Constitution and the Acts of Congress. Tracts of land for Indian [3] and forest reservations [4] are also authorized, and so also is the case of reservations for National Parks and many other objects concerning which it is not our purpose to go into in detail. The power to make the selections is usually committed to the President by Congress, and when made has the same legal validity as if it had been done by express enactment in each particular case. Also as the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties, a reservation of lands made at the request of a secretary, for purposes in his respective department, must be considered as made by the President of the United States, if within the terms of the Acts of Congress authorizing the selection of the reservation.[5]

After these reservations have been selected, if the lands com-

ernment is nothing more or less than setting it apart for some particular use. In the case before the Court there has been an appropriation of the land not only in fact, but in law, for a military post, for an Indian agency, and for the erection of a lighthouse. And also that by the Act of Congress of 1830, whensoever a tract of land shall have once been legally appropriated to any purpose from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law or proclamation or sale would be construed to embrace it, or to operate upon it, although no other reservation were made of it.

By the Act of Congress of 1830, all lands are exempted from pre-emption which are reserved from sale by order of the President of the United States. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Military posts belong to the War Department. A reservation of lands made at the request of the Secretary of War for purposes of his department must be construed as made by the President of the United States within the terms of the Act of Congress.

See, also, United States v. Railroad Bridge, 6 McLean 517, Fed. Cas. No. 16,114; City of Mobile v. Eslava, 41 U. S. 16 Pet. 250, 10 L. Ed. 948; United States v. Gear, 44 U. S. 3 How. 120, 11 L. Ed. 523.

3 For Indian reservations, see Sec. 415.

For irrigation by Indians, see Secs. 271-285.

For right to reserve water to irrigate Indian reservations, see Sec. 411.

4 For the National Forest reservations, see Secs. 271-283.

5 Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264.

See, for power to make National Forest selections in certain States taken from President except by special Act of Congress, Sec. 416.

prising them were part of the "public lands" of the United States, they are no longer considered such, but are considered as lands disposed of, and they can not be restored to the public lands without a special Act of Congress to that effect. And if any patents are issued, purporting to convey any lands, which have been formerly reserved by competent authority for any purpose whatever, it follows that the patents are inoperative to convey any title, and are absolutely void. The Courts have settled by a long line of decisions, that the issuing of a patent for public lands is a ministerial act, which must be performed according to law, and that where it has been issued without authority of law, whether fraudulently or otherwise, it is void.[6]

§ 415. **Indian reservations—Disposal of Indian lands.**—The setting aside of Indian reservations by the Government is a disposition of these lands as far as their being counted "public lands" is concerned.[1] They are still a part of the public domain,[2] but, strictly speaking, they are not a part of the public lands until they are opened up by the Government for settlement.[3] But, as the country is becoming more and more settled up and the demand for land is becoming greater, the modern policy of the Government is, as rapidly as possible, to make individual allotments to the Indians of a portion of the lands included in the reservations, and to open up the rest of the lands for settlement, or, in other words, to restore these lands to the body of the public lands of the United States. The object of this policy is for two purposes: First and foremost, the civilizing effect which this has upon the Indian; and second, the making available more lands for settlement.[4] We have

[6] Stoddard v. Chambers, 42 U. S. 2 How. 284, 11 L. Ed. 269; Minter v. Crommelin, 59 U. S. 18 How. 87, 15 L. Ed. 279, where the Court held that the presumption is that a patent issued is valid and passes the legal title.

See, also, Brush v. Ware, 40 U. S. 15 Pet. 93, 10 L. Ed. 672.

For rights of way through Government reservations, see Secs. 954-967.

[1] For the definition of "public lands," see Sec. 392.

[2] For distinction between "public domain" and "public lands," see Secs. 392, 393.

[3] Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1113; Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028.

See, also, for the Indian right of occupancy, Secs. 405, 406, and cases cited.

[4] For irrigation by the Indians, see Chap. 12, Secs. 271-285.

For the effect of irrigation upon the individual, see Sec. 9.

also seen in a previous section that the fee of all Indian lands is in the United States.[5] The right of the United States to dispose of the fee to lands occupied by the Indians has always been recognized from the very foundation of the Government. This disposition of the fee may be made even before the Indian right of occupancy has been extinguished, but in that case it is always subject to that right, and the legal title becomes absolute in the grantee, only when the Indian right is extinguished. The right of possession when abandoned by the Indians, attaches itself to the fee without further grant. However, it is true, that before the Indian right of occupancy is extinguished, and the land abandoned by the Indians, the grantee only takes the naked fee, and can not disturb the occupancy of the Indians;[6] that occupancy can only be interfered with or terminated by the United States.[7]

In a recent Utah case it was held that under the Compiled Laws of Utah of 1907, Secs. 1288x *et seq.* prescribing the procedure for the appropriation of public water, that an inceptive right to use such water upon or within an Indian reservation can be initiated or acquired by filing an application with the State Engineer, after the issuance of a proclamation to open the reservation and restore the lands to the public lands of the United States, but before such lands are subject to entry, provided that the application be made in good faith to appropriate the water for a beneficial use and not for speculation or monopoly.[8] Owing to the fact that under all the authorities, a water right is real property,[9] and as such real property it was a portion of the Indian reservation; and further under the rule the lands within a reservation are not subject to entry until after they have been formally opened for entry by the Land Department, we are constrained to believe that the ruling of

5 See Secs. 404, 405, and cases cited.

6 For Indian Right of Occupancy, see Secs. 404, 405.

For right of the Government to reserve waters to irrigate Indian lands, see Secs. 388, 411.

For Irrigation by Indians, see Secs. 271-285.

7 Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440; Johnson v. McIntosh, 21 U. S. 8 Wheat. 543, 5 L. Ed. 681; United States v. Cook, 86 U. S. 19 Wall. 591, 22 L. Ed. 210; Jackson v. Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500; Veeder v. Guppy, 3 Wis. 502; Portage City Case, 8 Op. Atty. Gen. 255; United States v. Nelson, 29 Fed. Rep. 202.

8 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

9 That a water right is real property, see Sec. 769, and authorities cited.

the Utah Court was erroneous and that the filing of the application for the appropriation of water upon the reservation with the State Engineer before the lands were opened for entry, was without jurisdiction.[10]

§ 416. Forest reservations—Act of March 3, 1891.—Section 24 of the Act of March 3, 1891, provides:[1]

Sec. 24. *Forest reserves may be set apart by the President.* "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."[2]

This was the first general Act of Congress authorizing the setting aside and reserving, in any State or Territory, the public forest lands. The Act provides that land may be set apart and reserved where it was either wholly covered with timber or only partially covered with timber or undergrowth, whether it was of commercial value or not. By this Act no specific reservation was created, but the whole matter rests in the discretion of the President. No provisions are made for the leasing of any portion of the reserves that may be created under the Act, neither are any provisions made for their improvement in any manner, nor for the use in any way of the lands nor of the timber thereon. Hence a great deal of dissatisfaction was caused in the States and Territories where these reservations were made, by the sudden shutting off of all use of these lands and of the timber. The residents had formerly had free access to the grazing on these lands and also to the use of the timber on the same, by the forbearance of the

10 See, also, Sec. 405, and cases cited.

1 7 Fed. Stats. Ann., 1905, p. 310, 2 U. S. Comp. Stat., 1901, p. 1537, 26 Stat. L. 1103.

2 But see the Act of March 4, 1907, providing that thereafter no forest reserve shall be created, nor shall additions be made to one theretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. Fed. Stat. Ann., Supp. 1907, p. 352; 34 Stat. L. 1270.

See, also, Act of June 25, 1910, 61st Congress, 2d Session, Chap. 421, Sec. 848.

Government and the implied license therefrom.[3] To have these vast tracts suddenly withdrawn and set aside as reservations and the use of the lands counted as trespass, required a considerable readjustment of affairs.[4] It will also be noticed that there were absolutely no provisions in the Act for the administration or management of these forest reservations, and no funds provided for their supervision or improvement. It was not until the Act of June 4, 1897, that provision was made for the administration of forest reserves set apart under the Act of March 3, 1891.[5]

§ 417. Forest reserves—Act of March 3, 1891—Objects of the Act.—The Act shows upon its face that the primary object of its passage was the preservation of the timber on the lands set apart as reservations. It had been called to the attention of Congress on a number of occasions, from the time of the failure of the forestry bill in 1871 to the date of the Act in question, that the timber upon the public domain was being wastefully and recklessly destroyed. Part of this destruction was due to trespass upon these lands, but the greater portion was due to previous Acts of Congress legitimizing this destruction. Owing to the fact that the passage of any Act which tended toward the protection of any timber upon the public domain of the United States was opposed by the parties interested, and that the greater number of the members of Congress were ignorant of the entire subject or supinely indifferent, this Act, although very imperfect, was probably the best that could have been passed at that time. It will be noticed that the provision was Section 24, the last section of an Act relating to entirely different subjects, and was undoubtedly a sort of a compromise measure.[1] However, this Act, as imperfect as it was, started the great work toward the preservation and use of our National Forests.

From a careful perusal of the Act, it can be readily determined

3 Buford v. Houtz, 133 U. S. 320, 33 L. Ed. 618, 10 Sup. Ct. Rep. 305.

For the authority to make reservations, see Sec. 413, and cases cited.

4 See, also, for trespass on forest reservations, Secs. 424, 425.

5 See 7 Fed. Stat. Ann., 1905, pp. 311-315; 2 U. S. Comp. Stat., 1901, p. 1538; 30 Stat. L. 34.

See, for text of Act, Sec. 421.

For rights of way over forest reserves or National Forests, see Secs. 954-963.

1 See Act as originally passed, 26 Stat. L. 1095.

that Congress had another purpose in view, in addition to that of simply protecting the timber. It will be noticed that under the Act lands may be reserved "wholly or in part covered with timber or undergrowth, whether of commercial value or not." It had been known for many years by scientists that the timber and undergrowth in the mountainous regions along the headwaters of rivers, streams, creeks, and ravines were a means provided by Nature to absorb and check the mountain torrents, and to retain and hold back the moisture for a long time after it had fallen and let it seep gradually down for the use of the country below as it was needed. Prior to the passage of the Act many members of Congress had discovered that the destruction of these forests had already had a disastrous effect upon the streams and rivers of this country. There was no longer the forest protection from the sudden and rapid melting of the winter's snows, and the precipitation was not absorbed as formerly; and some of the direct results of this were the drying up of the streams and rivers at the very time that they were needed the most for irrigation and other industries, by the running off of the precipitation almost immediately after it had fallen, and the resultant inundation of the valleys below, which destroyed the agricultural and other interests of whole communities, and even destroyed entire settlements in the lower portions of the country.[2] There is no doubt but there was in the minds of the Congressmen who voted for this measure the intent to protect the water supply, as well as the timber.[3]

"Public forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow."[4]

§ 418. Forest reservations—Act of March 3, 1891—What lands may be reserved—In general.—The Act of March 3, 1891,[1] provides that the President may set apart these National Forests in "any

2 See Results of the Destruction of the Forests, Secs. 54-57.

3 See, also, Circular of Instructions of May 15, 1891, 12 Land Dec. 499.

4 Rules and Regulations, April 4, 1900, 30 Land Dec. 24.

See, also, Forests as Related to Stream Flow, Chap. 2, Secs. 40-62.

See, also, Kinney on Forests, Forestry, and Forest Laws, a work which will be published shortly after this.

1 For text of Act, see Sec. 416.

part of the public lands wholly or in part covered with timber or undergrowth." The term "public lands," as used in the Act, has a somewhat different meaning than the same term in some of the other Acts of Congress. The term "public lands," in the majority of the Acts of Congress, has been construed many times by the Courts to mean only those lands, belonging to the United States, which "are subject to sale or other disposal under the general laws."[2] But the sense in which the term is used in the Act in question is more in the sense of "public domain" than in the strict sense of "public lands," as construed by the Courts.[3] Hence it follows that any lands owned by the United States, which are at the general disposal of the President by an executive order, may be reserved as a forest reservation, should the character of the lands come within those prescribed by the Act.[4]

2 For distinction between "public lands" and "public domain," see Secs. 391, 392.

See Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264; Leavenworth R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; Gibson v. Chouteau, 80 U. S. 13 Wall. 92, 20 L. Ed. 534; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Bardon v. Northern Pac. R. Co., 145 U. S. 535, 36 L. Ed. 806, 12 Sup. Ct. Rep. 856; Mann v. Tacoma Land Co., 153 U. S. 273, 38 L. Ed. 714, 14 Sup. Ct. Rep. 820; Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963, 21 Sup. Ct. Rep. 690; Hastings & Dak. R. Co. v. Whitney, 132 U. S. 357, 33 L. Ed. 363, 10 Sup. Ct. Rep. 112; The Yosemite Valley Case, 82 U. S. 15 Wall. 77, 21 L. Ed. 82; Simmons v. Wagner, 101 U. S. 260, 25 L. Ed. 910; Buxton v. Traver, 130 U. S. 232, 32 L. Ed. 920, 9 Sup. Ct. Rep. 509; 8 Op. Atty. Gen. 72; 10 *Id.*, 57; 11 *Id.*, 492; 17 *Id.*, 180; Op. Atty. Gen. Jan. 5, 1891, 12 Land Dec. 84; Kaweah Co-operative Colony, 12 Land Dec. 326.

3 The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the Court not to give such meaning to the words as would destroy the object and purpose of the law or lead to absurd results. U. S. v. Blendaur, 128 Fed. Rep. 910, 63 C. C. A. 636, reversing 122 Fed. Rep. 703.

See, also, United States v. Bisel, 8 Mont. 20, 19 Pac. Rep. 251; Heydenfeldt v. Daney G. & S. M. Co., 10 Nev. 290; *Id.*, 93 U. S. 634, 23 L. Ed. 995; Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440; Frost v. Wenie, 157 U. S. 46, 39 L. Ed. 614, 15 Sup. Ct. Rep. 532; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. Ed. 954, 22 Sup. Ct. Rep. 650; McFadden v. Mountain View M. & M. Co., 97 Fed. Rep. 670, 38 C. C. A. 354; State v. Kennard, 56 Neb. 254, 76 N. W. Rep. 545; *Id.*, 57 Neb. 711, 78 N. W. Rep. 282; Rierson v. St. Louis & S. F. R. Co., 59 Kan. 32, 51 Pac. Rep. 901.

4 The 15 townships of land in the Bitter Root Valley, Mont., formerly occupied by the Flathead Indians, which by Act of June 5, 1872, 17 Stat. L. 226, provided for the removal

But the executive department of the Government has no power to include, within and as a part of a forest reserve, lands within an abandoned military reservation turned over to the Secretary of the Interior, pursuant to law, for disposal under the Act of Congress, providing for the disposal of lands in abandoned military reservations. The Act of July 5, 1884,[5] provides that these lands shall be sold at public sale to the highest bidder, for cash, at not less than the appraised value thereof, nor less than $1.25 per acre. Thus there was a definite method of the disposal of these lands provided for. When Congress has made the special provision for the disposal of any class or character of lands, as in this case provided, it is an implied prohibition against their disposal in any other manner. Nor can it be accomplished indirectly by changing the character of the reservation.[6] The authority of the executive department is absolutely limited and controlled by the provisions of the Act of disposal.[7] So when the Act declares that, "Nothing herein contained shall interfere with the allotments to Indians heretofore and hereafter made," any inclusion of such lands is unauthorized and erroneous.[8] Of course, the President has no power to declare any lands a part of a National Forest, under this or any other Act, upon which there is a lawful claim.[9] Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands; and no subsequent law or proclamation or sale will be construed to embrace it, or to operate upon it, although no other reservation is made of it.[10]

of the Indians therefrom, were made subject to sale, and to which the homestead laws were extended by the Act of February 11, 1874, 18 Stat. L. 15, became a part of the general public domain, and, as such, were within the provisions of the Act of March 3, 1891, authorizing the President, by proclamation, to set apart forest reservations in "public lands." United States v. Blendaur, 128 Fed. Rep. 910, 63 C. C. A. 636, reversing 122 Fed. Rep. 703.

5 6 Fed. Stat. Ann., 1905, pp. 423-425; 2 U. S. Comp. Stat., 1901, p. 1607, 23 Stat. L. 103.

6 See Op. Atty. Gen., 35 Land Dec. 277, 33 Land Dec. 312; R. M. Snyder, 27 Land Dec. 82; Instructions July 20, 1904, 33 Land Dec. 130.

7 State of Utah, 30 Land Dec. 301.

8 Op. Atty. Gen., 32 Land Dec. 641; *Id.*, 559.

As to Indian allotments, see Secs. 272-285.

9 See authorities cited in note above.

10 See authorities cited in note above.

By the setting aside of these lands for forest reserves no vested rights of settlers, miners, or others, who had acquired title or who were in the process of acquiring title to certain portions of the land, can be interfered with. And the proclamation of the President creating these reservations contained the following clause: "Excepting from the force and effect of this proclamation all lands which may have been, prior to the date thereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith; provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, settlement, or location was made." [11]

§ 419. **Forest reservations—Character of lands which may be reserved.**—As to the character of lands which may be reserved under the Forest Acts, the Act of 1891 [1] provides that they must be public lands bearing forests, or lands wholly or in part covered with timber or undergrowth, whether of commercial value or not. In the instructions of the Secretary of the Interior, who retained jurisdiction of these lands under his general powers of supervision of the lands on the public domain,[2] special stress is made not only to reserve lands that are covered with timber, but also lands that were covered with undergrowth; and the special agents were instructed to describe such lands by natural drainage basins, where it was practicable, at the headwaters of rivers and along the banks of streams, creeks, and ravines, as a protection to the water supply.[3] This is undoubtedly within the scope of the Act, as one of the purposes of its enactment was to protect the water supply, and any lands that were of a character that by protecting the

11 Battlement Mesa Forest Reserve, 16 Land Dec. 190.

1 For copy of the Act, see Sec. 416.

2 See Instructions, Sept. 10, 1892, 15 Land Dec. 284.

3 See Instructions, May 15, 1891, 12 Land Dec. 499.

See, also, Purpose of Act, Sec. 417.

timber or undergrowth thereon would tend to protect the water supply are within the scope of the Act and may be reserved. While lands embraced within a National Forest may, under the Act of June 4, 1897,[4] be excluded, because shown to be more valuable for agricultural than for forest purposes, until formally restored to the public domain, such lands are not subject to further disposition. It was not intended by this Act to exclude from reservations small tracts here and there within the limits of a forest because of the fact that the tracts were not covered with timber.[5]

§ 420. **Forest reservations—How forest reserves are created.**—Under the Act of March 3, 1891, the President of the United States shall, by public proclamation, declare the establishment of such reservations.[1] However, it is not necessary for the President himself to sign a proclamation setting apart public lands as a forest reservation. Where the proclamation is made by the Secretary of the Interior it will be considered as having been done by the Secretary with the President's approval.[2] The regular routine of the establishment of these reservations has been that special agents of the Department of the Interior are detailed to make a thorough and careful personal examination of the lands in question and to secure all facts possible appertaining to the value of said lands for all uses, purposes, and requirements and report the same to the Secretary with their recommendation.[3] Should the knowledge be acquired by the agents that any particular tract or tracts of public timber land are being, or are likely at an early day to be despoiled of the timber, which should be preserved for climatic, economic, or other public reasons, and that the early reservation thereof is necessary, the agents must report the matter at once to the Secretary, stating their reasons for believing that necessity exists for early action. Upon the receipt of such a report, the

4 For text of Act, see Sec. 421.

5 Jared Woodbridge, 29 Land Dec. 531; E. S. Gosney, 29 Land Dec. 593.

1 See copy of Act, Sec. 416.

2 United States v. Blendaur, 122 Fed. Rep. 703; rev'd 128 Fed. Rep. 910, 63 C. C. A. 636.

See, also, Wilcox v. Jackson, 13 Pet. 38 U. S. 498, 10 L. Ed. 264; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; United States v. Macon County Court, 145 U. S. 202, 36 L. Ed. 544, 12 Sup. Ct. Rep. 921.

3 See Instructions to Special Agents, 12 Land Dec. 499.

Secretary, finding that a necessity exists for early action, acts upon the matter by withdrawing the lands, under a temporary order, from all entries, and then time is taken for a more extended examination as to their condition and the necessity for their withdrawal as forest reserves. Should the Secretary finally decide that the lands should be withdrawn as provided for under the Act, he makes his recommendations to the President, describing the lands as accurately as possible, and the President acts thereon.[4] However, should the Secretary or President decide that the lands should not be withdrawn under the Act, the temporary withdrawal is revoked and they are restored to the body of the public lands.[5] And again, where a forest reservation has been created by the President, under the Act of March 3, 1891, no Act of Congress is required to restore the land thus reserved to the public domain, but this may be done by the President.[6]

Since the Act of March 4, 1907,[7] no forest reserves can be created or additions made to one within the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act

[4] See Battlement Mesa Forest Reserve, 16 Land Dec. 190; as under the Act June 4, 1897, 7 Fed. Stat. Ann., 1905, p. 311; 2 U. S. Comp. Stat., 1901, p. 1538; 30 Stat. L. 34 (for text of Act, see Sec. 421), the mineral lands within a National Forest are always open to exploration and location, in the temporary withdrawal of the lands, mineral lands remain open. Instructions November 21, 1903, 32 Land Dec. 307.

[5] Lands embraced within a temporary order of withdrawal issued by the Department of the Interior with a view to creating a forest reservation under the Act of March 3, 1891, are by such order excluded from settlement and entry, pending final action by the President. Battlement Mesa Forest Reserve, 16 Land Dec. 190.

The proclamation of the President creating a National Forest takes effect from the first moment of the day when proclaimed, and selections made by a State on the same date, within the boundaries prescribed, are therefore subsequent to the proclamation and can have no effect to except the lands from the reservation. State of Utah, 33 Land Dec. 510; *Id.*, 33 Land Dec. 358; *Id.*, 33 Land Dec. 283.

As to the authority of the Secretary of the Interior to make a temporary withdrawal of public lands from entree, see Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; Riley v. Welles, 154 U. S. 578, 19 L. Ed. 648, 14 Sup. Ct. Rep. 1166.

[6] Op. Atty. Gen., 14 Land Dec. 209.

See, also, United States v. Railroad Bridge Co., 6 McLean 517; Grisar v. McDowell, 73 U. S. 6 Wall. 363, 18 L. Ed. 863; Bullard v. Des Moines & Ft. Dodge R. Co., 122 U. S. 167, 30 L. Ed. 1123, 7 Supp. Ct. Rep. 1149.

[7] Fed. Stat. Ann. Supp., 1907, p. 352, 34 Stat. L. 1270.

See, also, Sec. 423.

of Congress, and, of course, the routine above described does not now apply to those States.[8]

§ 421. **Forest reservations—Act of June 4, 1897—The administration of forest reserves or National Forests.**—It was not until more than six years after the Act of March 3, 1891, was passed authorizing the creation of forest reservations that any provision was made by Congress for their administration and use. In the meantime a number of these reservations had been created, beginning with that of the Yellowstone Park Timber Land Reserve, proclaimed by President Harrison on March 30, 1891, even down to as late as February 22, 1897.[1] Owing to the fact that large tracts of land in various States and Territories had been withdrawn from the public lands and their use in any way was prohibited by law, it caused great dissatisfaction. This condition was remedied, in a way, by the Act of June 4, 1897.[2]

This Act is from the Sundry Civil Appropriation Act of June 4, 1897, and, as far as applicable, is as follows:

Sec. 1. *Forest reservations—Revocation, modification, or suspension of executive proclamations.*—Provides that the sum of $150,000 be immediately available for the survey of the public lands that had then been or might thereafter be designated as forest reserves by Executive proclamation, under Section 24 of the Act of March 3, 1891,[3] and to include public lands adjacent thereto. *Provided,* that, to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests. *Provided,* that the Executive orders and proclamations dated February 22, 1897, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations be, and they are hereby, suspended and the lands embraced therein

[8] See, also, Act of June 25, 1910, 61st Congress, 2d Session, Chap. 421, p. 848, Sec. 2.

[1] See proclamations of Feb. 22, 1897, Nos. 19-31, 29 Stat. L. 893-912.

[2] 7 Fed. Stat. Ann., 1905, pp. 311-315, 2 U. S. Comp. Stat., 1901, p. 1538, 30 Stat. L. 34.

[3] See for text of Act, *ante,* Sec. 417.

restored to the public domain, the same as though said orders and proclamations had not been issued. *Provided further*, that lands embraced in such reservations not otherwise disposed of before March 1, 1898, shall again become subject to the operations of said orders and proclamations as now existing or hereafter modified by the President."

Paragraphs 2 and 3. *Surveys.*—The section then provides for the surveys, in detail, of these lands under the supervision of the Director of the Geological Survey, and under the instructions issued by the Secretary of the Interior.

Par. 4. *Purpose of forest reservations.*—"All public lands not heretofore designated and reserved by the President of the United States under the provisions of the Act approved March 3, 1891, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act shall be, as far as practicable, controlled and administered in accordance with the following provisions:

Par. 5. "No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the *purpose of securing favorable conditions of water flows*, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes."

Par. 6. *Protection against fires—Rules and regulations.*—"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside, or which may be hereafter set aside, under the said Act of March 3, 1891, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violations of the provisions of this Act or such rules and regulations shall be punished as provided for in the Act of June 4, 1888, amending Section 5388 of the Revised Statutes of the United States."

Par. 7. *Appraisal and sale of timber.*—"For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the *dead, matured, or large growth of trees* found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value, in such quantities to each purchaser as he may prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom."

This paragraph, as amended by the Act of June 6, 1900,[4] and the Act of June 30, 1906,[5] provides in detail for the advertisement and sale of the timber on all the forest reserves, and concludes with the provisions as to the payments for the timber so sold and that the money received shall be covered into the Treasury, and "such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make a report in writing to the Commissioner of the General Land Office and to the Receiver in the Land Office in which such reservation shall be located, of his doings in the premises."[6]

Par. 8. *Use of timber and stone by settlers, etc.*—"The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber shall be used within the State or Territory, respectively, where such reservations may be located."

Par. 9. *Egress or ingress of settlers within reservations.*—The ninth paragraph provides for a right of way for settlers residing

[4] 7 Fed. Stat. Ann., 1905, p. 313; 31 Stat. L. 661.

[5] Fed. Stat. Ann. Supp., 1909, p. 663; 34 Stat. L. 684.

[6] See 30 Stat. L. 35; 31 Stat. L. 661; 34 Stat. L. 684.

within forest reservations and ends with: "Nor shall anything herein prohibit any person from entering upon any such forest reservation for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. *Provided,* that such persons comply with the rules and regulations covering such forest reservations."

Par. 10. *Rights of settlers—Selection of lieu lands.*—"That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected. *Provided further,* that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." [7]

Par. 11. *Schools and churches on reservations.*—"The settlers residing within the exterior boundaries of such forest reservation, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church."

Par. 12. *Civil and criminal jurisdiction.*—"The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned, the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

Par. 13. *Use of waters.*—"All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under

[7] This section was repealed by the Act of March 3, 1905, 10 Fed. Stat. Ann., 1906, p. 406; 33 Stat. L. 1264.

the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

Par. 14. *Restoration to the public domain.*—Paragraph 14 provides for the restoration in certain cases to the public lands of lands formerly reserved, and ends with: "And any mineral lands, in any forest reservation, which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained."

Par. 15. *Modification or vacation of Executive orders.*—"The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve."

This Act, as will be noticed, still left the full management and control of these forest reserves with the Secretary of the Interior, while the scientific portion of the work was with the Bureau of Forestry in the Department of Agriculture.[8] For the reason of this divided jurisdiction, this Act, although a long start in the right direction, was not satisfactory, as far as its working operations were concerned. A great many reservations were created shortly after the Act was passed.[9] It is under the authority of the Act of March 3, 1891, and the Act of June 4, 1897, with the various supplementary and amendatory Acts passed since the latter Act, that practically all of the National Forests have been created and are now administered. But Congress has created some of these forests, and the Act of March 4, 1907, forbids the creation of National Forests in certain States, without an Act of Congress.[10]

8 See Sec. 423.

9 See proclamations of March 2, May 10, May 27, June 29, August 17, and September 19, 1898; also those of February 10, 1899; Nos. 5, 9, 11, 14, 18-20, 23, 24, 30 Stat. L., pp. 1767, 1771, 1773, 1776, 1780-1785, 1787, 1789.

See Act of February 1, 1905, where the administration of the National Forests was turned over to the Agricultural Department, 10 Fed. Stat. Ann., 1906, pp. 404, 405; 33 Stat. L., Chap. 288, p. 628. For text of said Act, see Sec. 955.

10 See Act of March 4, 1907, Fed. Stat. Ann. Supp., 1907, p. 359; 34 Stat. L. 1270. Also, see Sec. 420.

§ 422. Forest Reserves—Forest lands purchased by the United States to protect stream flow under Act of March 1, 1911—The National Forest Reservation Commission.—Owing to the destruction of the forests along the watersheds of this country and the resultant injuries to stream flow, as discussed in a previous chapter of this work,[1] Congress, by a recent Act, has taken an advanced step to purchase the forest lands along the streams, for the purpose of protecting and conserving the navigability of navigable rivers. This Act was passed more with the view of the acquisition of such lands in the Eastern States, where they are mostly in private ownership, but the Act is general in its effect and applies to all portions of the country.

By the Act approved March 1, 1911,[2] entitled, "An Act to enable any State to co-operate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," it was provided:

That the consent of Congress is thereby given to each of the several States to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and water supply of the States entering into such agreement or compact.

Sec. 2. The sum of $200,000 was appropriated to enable the Secretary of Agriculture to co-operate with any State or group of States, when requested to do so, in the protection from fire of the forested watersheds of navigable streams; and the Secretary of Agriculture is authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to co-operate in the organization of a system of fire protection on any private or State forest lands within such State or States and situated upon the watershed of a navigable river. *Provided,* "that no such stipulation or agreement shall be made with any State which has not provided by law for a system of forest fire protection. *Provided further,* that in no case shall the amount expended in any

1 For the relation of forests to stream flow, see Chap. 2, Secs. 40-62. For the protection of the navigable capacity of streams, see Secs. 349-356.

2 Public No. 435, 62d Congress, 1st Session; 36 Stat. L. 961.

State exceed in any fiscal year the amount appropriated by the State for the same purpose during the same fiscal year."

Sec. 3. For the fiscal year ending June 30, 1910, the sum of $1,000,000 was appropriated, and for each fiscal year thereafter a sum not exceeding $2,000,000 for use in examination, survey, and acquirement of lands located on the headwaters of navigable streams, or those which are being developed for navigable purposes. *Provided,* that the provisions of this section shall expire by limitation on the 30th of June, 1915.

Sec. 4. A commission, to be known as the "National Forest Reservation Commission" is created, said commission to consist of the Secretaries of War, Interior, and Agriculture, two members of the Senate to be selected by the President of the Senate, and two members of the House of Representatives, to be selected by the Speaker, and authorized to consider and pass upon such lands as may be recommended for purchase, as provided under Section 6 of the Act, and to fix the price or prices at which such lands may be purchased, and no purchase shall be made of any lands until such lands have been duly approved for purchase by said commission.

Sec. 5. The commission must annually report to Congress, not later than the first Monday in December.

Sec. 6. The Secretary of Agriculture is authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary for the regulation of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations. *Provided,* that before any lands are purchased, said lands shall be examined by the Geological Survey and a report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie.

Sec. 7. That the Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have been approved by the commission at the price or prices fixed by said commission. "*Provided,* that no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land

by the United States for the purpose of preserving the navigability of navigable streams."

Sec. 8. The title to the lands shall be satisfactory to the Attorney General and shall be vested in the United States.

Sec. 9. Such acquisition may, in any case, be subject to the reservation to the owner from whom title passes of the minerals and of the merchantable timber.

Sec. 10. Lands chiefly valuable for agriculture, which are included in such tracts acquired under the Act, may be sold as homesteads, at their true value, to actual settlers, under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, *ipso facto,* revert to the State in which the lands sold lie. "And no right, title, interest, or claim in or to any lands acquired under this Act, *or the waters thereon,* or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided."

Sec. 11. "That, subject to the provisions of the last preceding section, the lands acquired under this Act shall be permanently reserved, held, and administered as National Forest lands under the provisions of Section 24 of the Act approved March 3, 1891,[3] and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific National Forests, and so designate the same, as he may deem best for administrative purposes."

Sec. 12. The jurisdiction, both civil and criminal, over persons upon the lands acquired under the Act shall not be affected or changed by their permanent reservation and administration as National Forest lands, except so far as the punishment of offenses against the United States is concerned.

Sec. 13. That five percentum of all moneys received during any fiscal year from each National Forest into which the lands acquired under the Act may from time to time be divided shall be paid at the end of each year, by the Secretary of the Treasury, to the State in which such National Forest is situated, to be

[3] For the Act of 1891, see Secs. 416-418.

expended as the State legislature may prescribe, for the benefit of the public schools and public roads.

Sec. 14. That a sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of $25,000, is appropriated.

§ 423. **Forest reserves—Transfer of control to the Department of Agriculture—Rights of way over reserves.**—From 1886 to 1905 there were two departments of the Government that had jurisdiction over different branches of the subjects of forests and forestry, namely, the division afterward the Bureau of Forestry under the Department of Agriculture having charge of the scientific investigations,[1] and the Interior Department having charge of the administration, control, and surveys of the forest reserves, now the National Forests. This division of jurisdiction over the same subject matter caused great dissatisfaction among all parties interested. And in order to have the administration and control, together with the scientific portions of the work, under one head, the Act of February 1, 1905, was passed.[2] This Act is as follows:

Sec. 1. *Control of forest reserves transferred to Agricultural Department.*—"That the Secretary of the Department of Agriculture shall, from and after the passage of this Act, execute, or cause to be executed, all laws affecting public lands heretofore or hereafter reserved under the provisions of Section 24 of the Act entitled, 'An Act to repeal the timber-culture laws, and for other purposes,' approved March 3, 1891, and Acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands."

And, as the law now stands, and as construed by both the Secretary of the Interior and the Secretary of Agriculture, the latter Secretary has entire jurisdiction of all of the National Forests, except in matters of surveying and the passage of title, which matters are retained by the Secretary of the Interior. By letter of the Secretary of the Interior to the Secretary of Agri-

1 See Sec. 421.

2 Act of February 1, 1905, 10 Fed. Stat. Ann., 1906, pp. 404, 405; Supp. U. S. Comp. Stat., 1905, pp. 343, 344, Chap. 288; 33 Stat. L. 628.

culture, dated June 8, 1905, and concurred in by the latter Secretary on June 13, 1905, it is the opinion of the two Secretaries that the Agricultural Department is invested with jurisdiction, under the Act of February 1, 1905, to pass upon all applications under any law of the United States providing for the granting of permission to occupy and use lands in a forest reserve, which occupation or use is temporary in character only, and which, if granted, will in nowise affect or cloud the title of the United States, should the reserve be discontinued; but that the Department of the Interior retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land, with the further understanding that any permission or license granted by the Department of Agriculture is subject to any later disposal of the land by the Department of the Interior.[3]

The balance of the Act of February 1, 1905, provides, as follows:

Sec. 2. *Export of pulp wood, etc., from Alaska permitted.*—"That pulp wood or wood pulp manufactured from timber in the District of Alaska may be exported therefrom."

Sec. 3. *Selection of supervisors and rangers.*—"That forest supervisors and rangers shall be selected, when practicable, from qualified citizens of the States or Territories in which the said reserves, respectively, are situated."

Sec. 4. *Water rights granted for mining, etc., purposes.*—"That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated."

Sec. 5. *Use of funds received from sale of products.*—"That all

[3] See 33 Land. Dec. 609; also, see Instructions of August 2, 1905, 34 Land. Dec. 64.

For rights of way over forest reserves, see Secs. 954-965.

money received from the sale of any products or the use of any land or resources of said forest reserves shall be covered into the Treasury of the United States, and for a period of five years from the passage of this Act shall constitute a special fund, available until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of Federal forest reserves."

§ 424. **Forest reservations—Rules and regulations—Criminal prosecutions.**—Paragraph 6 of the Act of June 4, 1897, provides that the Secretary of the Interior shall make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of the Act or such rules and regulations shall be punished as provided for by Section 5388, Revised Statutes of the United States, as amended by the Act of June 4, 1888.[1]

Section 5388, as amended by the Act of June 4, 1888, referred to in the section, is as follows:

"Every person who unlawfully cuts, or aids, or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than $500, or be imprisoned not more than twelve months, or both, in the discretion of the Court."[2]

The Secretary of the Interior under the authority given him under the Act made certain rules and regulations, which remained in force as long as the administration of the National Forests remained with him, but after its transfer by the Act of February 1, 1905, it devolved upon the Secretary of Agriculture

1 Act of June 4, 1897, 7 Fed. Stat. Ann., 1905, pp. 311-315; 2 U. S. Comp. Stat., 1901, p. 1538; 30 Stat. L. 35. For text of Act, see Sec. 421.

2 Act of June 4, 1888, amending Sec. 5388 of the Revised Statutes, 7 Fed. Stat. Ann., 1905, pp. 296, 297, 3 U. S. Comp. Stat., p. 3649, 25 Stat. L. 166.

to make the rules and regulations as to the details of the forest management.[3] As will be noticed from an examination of Paragraph 6 of the Act of June 4, 1897, which is the law under which both Secretaries acted, the power conferred to make rules and regulations is very broad, and extends to all subjects to regulate *the occupancy and use of the National Forests and to preserve them from destruction.* The dignity of these rules and regulations, where they in no way contravene the statute, is equal to that of the laws themselves, for the statute makes a violation of either the law or the rules and regulations punishable, as is provided for in the Act of Congress of June 4, 1888, amending Section 5388, Revised Statutes of the United States, which imposes a punishment for timber destruction on a reserve by fine or imprisonment, or both.[4]

The constitutionality of the Act authorizing the Secretary to make rules, which in effect are laws, has been tested on nearly every phase of the question, and has been upheld, both as to civil [5] and criminal prosecutions.[6] That Congress has full power to

[3] See Act of February 1, 1905, 10 Fed. Stat. Ann., 1906, pp. 404, 405; Supp. U. S. Comp. Stat., 1905, pp. 343, 344; 33 Stat. L. 628.

For text of Act, see Sec. 423.

For rules and regulations made by the Secretary of the Interior, see 30 Land Dec. 23, 31 Land Dec. 173, 182, 225, 372.

For rules and regulations made by the Secretary of Agriculture, see The Use Book, 1907, Reg. 1-69.

See, also, the subsequent Use Books issued annually.

[4] See United States v. Shannon, 160 Fed. Rep. 870, 88 C. C. A. 52, 151 Fed. Rep. 863; Dastervignes v. United States, 122 Fed. Rep. 30, 58 C. C. A. 346, 118 Fed. Rep. 199; 22 Op. Atty. Gen. 266. But see Dent v. United States, 8 Ariz. 138, 71 Pac. Rep. 920, rev'g *Id.*, 8 Ariz. 413, 76 Pac. Rep. 455.

[5] United States v. Shannon, *supra;* Dastervignes v. United States, 122 Fed. Rep. 30, 58 C. C. A. 346, 118 Fed. Rep. 199; Curtin v. Benson, 158 Fed. Rep. 383.

[6] United States v. Grimaud, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480, revg. *Id.*, 170 Fed. Rep. 205; Light v. United States, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485; United States v. Deguirro, 152 Fed. 568; United States v. Domingo, 152 Fed. Rep. 566; United States v. Bale, 156 Fed. Rep. 687; United States v. Rizzinelli, 182 Fed. Rep. 675.

But the regulations were held invalid by other Federal Courts before the late decisions of the United States Supreme Court cited above, which decisions fixed the rule of law.

See United States v. Mathews, 146 Fed. Rep. 306; United States v. Blasingame, 116 Fed. Rep. 654; Dent v. United States, 8 Ariz. 138, 71 Pac. Rep. 920, rev'd *Id.*, 8 Ariz 413, 76 Pac. Rep. 455.

delegate the authority to make rules and regulations concerning the public domain and other questions is now no longer an open question. The earliest decision upon that point is the case of the United States v. Bailey,[7] where it was held that the regulation of the Secretary of the Treasury, under authority of an Act of Congress, permitting proofs of claims against the Government to be verified before any justice of the peace of any of the States, was a valid delegation of authority, and a person guilty of swearing falsely to such a claim before a justice of the peace of the State of Kentucky was held to be properly convicted of perjury in a Court of the United States.[8]

§ 425. Forest reservations—Rules and regulations forbidding certain acts.—As the Secretary of Agriculture has the authority to make rules and regulations regulating the uses of the National Forests, he also has the authority to make rules prohibiting cer-

For the power of Congress as to the disposal and control of the public lands, see, Jourdan v. Barrett, 4 How. 45 U. S. 169, 11 L. Ed. 924; Gibson v. Chouteau 80 U. S. 13 Wall. 92, 20 L. Ed. 534.

That the Act of June 4, 1897, is not an unauthorized delegation of legislative authority to the Secretary, see Dastervignes v. United States, 122 Fed. Rep. 30, 58 C. C. A. 346, 118 Fed. Rep. 199; Port Royal M. Co. v. Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 481; Locke's Appeal, 72 Pa. 491, 499, 13 Am. Rep. 716; United States v. Bailey, 9 Pet. 238, 255, 9 L. Ed. 113; Waymand v. Southard, 10 Wheat. 1, 43, 6 L. Ed. 253; Field v. Clark, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495; Caha v. United States, 152 U. S. 212, 38 L. Ed. 415, 14 Sup. Ct. Rep. 513; Bushnell v. Leland, 164 U. S. 684, 41 L. Ed. 598, 17 Sup. Ct. Rep. 209; Lake Shore & Mich. Southern R. Co. v. State, 165 U. S. 365, 41 L. Ed. 747, 17 Sup. Ct. Rep. 357; United States v. Ormsbee, 74 Fed. Rep. 207; United States v. Moline, 82 Fed. Rep. 592; Grady v. United States, 98 Fed. Rep. 239, 39 C. C. A. 42; Chatfield Co. v. New Haven, 110 Fed. Rep. 788.

A law which requires a license to herd and pasture sheep is not unconstitutional, and does not constitute an improper classification; Dastervignes v. United States, 122 Fed. Rep. 30, 58 C. C. A. 346, 118 Fed. Rep. 199; *Ex parte* Mirande, 73 Cal. 365, 14 Pac. Rep. 888; Flanigan v. County of Sierra, 122 Fed. Rep. 24, 58 C. C. A. 340.

7 34 U. S. 9 Peters 238, 9 L. Ed. 113.

8 This decision was approved and followed in the cases of United States v. Eaton, 144 U. S. 677, 36 L. Ed. 591, 12 Sup. Ct. Rep. 764; Caha v. United States, 152 U. S. 212, 38 L. Ed. 415, 14 Sup. Ct. Rep. 513; *In re* Kollock, 165 U. S. 526, 41 L. Ed. 813, 17 Sup. Ct. Rep. 444; Van Lear v. Eisele, 126 Fed. Rep. 823.

tain acts within the forests. In The Use Book of 1907 [1] there is a long list of specific acts which are forbidden and for which criminal action will lie. But as the Act of June 4, 1897,[2] makes any violation of the provisions of that Act, "or such rules and regulations" which shall be made by the Secretary, a criminal offense and punishable as provided for in the Act of June 4, 1888, amending Section 5388 of the Revised Statutes of the United States,[3] that is to say, by a fine of not more than $500, or by imprisonment not more than twelve months, or both, in the discretion of the Court, this list of acts forbidden was omitted from The Use Book of 1908. However, certain acts are specifically forbidden by the regulations of 1908.

Under the authority conferred upon him by Congress, as discussed in the previous sections,[4] the Secretary of Agriculture has promulgated certain rules and regulations forbidding certain acts within forest reserves or National Forests, among which, as far as applicable to the present work, are to be found the following:

"Regulation 19. The following acts within the National Forests are hereby forbidden:[5]

"(a) Squatting upon land within a forest, or making settlement, except in accordance with the Act of June 11, 1906.[6]

"(b) Building roads, trails, railways, or tramways, and constructing ditches, dams, canals, pipe lines, flumes, tunnels, or reservoirs without a permit, or in violation of the terms of a permit, except as otherwise allowed by law, and except upon patented land, or upon a valid claim consistent with the purpose for which it was initiated.

"(c) Erecting or conducting telephone, telegraph, or power lines, hotels, stores, sawmills, power plants, or other structures, or manufacturing or business enterprises, or carrying on any kind of work, except as allowed by law and National Forest regulations, and except upon patented land or upon a valid claim

1 Page 119, Reg. 64.

2 7 Fed. Stat. Ann., 1905, p. 312, Par. 6; 2 U. S. Comp. Stat., 1901, p. 1538; 30 Stat. L. 34.

For text of Paragraph 6, see Sec. 421.

3 7 Fed. Stat. Ann., 1905, pp. 296, 297; 3 U. S. Comp. Stat., 1901, p. 3649; 25 Stat. L. 166.

4 See Sec. 423.

5 The Use Book, 1908, pp. 44, 94.

6 Fed. Stat. Ann. Supp., 1909, p. 662; 34 Stat. L. 233, as amended May 30, 1908; 35 Stat. L. 554.

for the actual development of such claim, consistent with the purposes for which it was initiated.

"*Protection of Government property.*—Reg. 81. The following acts within National Forests are forbidden:

"(a) Willful destruction of or damage to any property belonging to or used by the United States for National Forest purposes.

"(b) The willful tearing down or defacing of any notice of the Forest Service."

It must be borne in mind, by those who use the National Forest lands or their products, that the violation of a rule or regulation promulgated by the Secretary of Agriculture is as much a criminal offense as the violation of the Acts of Congress themselves, for the reason that the Act of June 4, 1897, *supra*, makes the violation of the rules and regulations of the Secretary a criminal offense and punishable as above stated.[7]

§ 426. **The withdrawal and reservation of lands for power sites, irrigation, classification, and other purposes.**—One of the most recent Acts of Congress, and one in the line of the recent movement for the conservation of our natural resources, was the general power conferred upon the President of the United States to withdraw lands and reserve the same for water-power sites, irrigation, classification, *and other purposes*, as provided for by the Act of June 25, 1910.[1] The substance of this Act is as follows:

"That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, *or other purposes to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by Act of Congress."

It is further provided that all lands withdrawn under the provisions of the Act shall at all times be open for exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than

[7] See, also, Sec. 424. See, also, for rights of way over forest reservations, Secs. 954-966.

[1] 61st Congress, 2d Session, Chap. 421, p. 847; 36 Stat. L. 847.

coal, oil, gas, and phosphates. *Provided,* that vested rights will not be interfered with of any occupant, so long as such "occupant or claimant shall continue in diligent prosecution of said work." *And provided further,* that this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this Act. *And provided further,* that all valid land entries made prior to the Act are also recognized and the same may be proceeded with to patent. "*And provided further,* that hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Montana, Colorado, or Wyoming, except by Act of Congress."

The Enabling Act for the admission of New Mexico and Arizona contains somewhat unusual provisions for reservation from all grants of lands to the States of power sites.[2] These sections provide:

"There is hereby reserved to the United States and exempted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydroelectric use or transmission, and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State," and any attempted conveyance of the same shall be null and void.[3]

Also by the Act of June 25, 1910, relating to Indian allotments,[4] it was provided that the Secretary of the Interior is authorized, in his discretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project theretofore or thereafter to be authorized by Congress. *Provided,* that if no irrigation project shall be authorized prior to the opening of any

2 61st Congress, 2d Session, pp. 564, 575, Secs. 10, 28, Act of June 20, 1910.

3 See, also, for the constitution of Arizona, Part XIV.

For the constitution of New Mexico, see Part XIV.

4 61st Congress, 2d Session, Chap. 431, p. 855, Secs. 13, 14.

Indian reservation containing such power or reservoir sites the Secretary may, in his discretion, reserve such sites pending future legislation by Congress for their disposition, and he shall report to Congress all reservations made in conformity with the Act. The Secretary of the Interior is also authorized, after notice and hearing, to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site. *Provided,* that such Indian allottees whose allotments shall be so canceled shall be reimbursed for all improvements thereon. *Provided further,* that any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the area subject to irrigation by any such project.

§ 427. **Donations for internal improvement—Donations to railroads.**—Another method of the disposal of public lands is by way of donations for internal improvements. These are made by grants by Congress to corporations and States. One of the most common donations of this nature are those to aid in the construction of railroads. There was a time in the early history of the West when land was considered almost worthless and at the same time means of transportation were needed. Congress with a most lavish hand granted vast tracts of land as a bonus to aid in the construction of these roads, and not only granted the lands but also permitted the railroad companies to cut the timber from other lands than those granted to aid in the construction of the roads.[1] Of course these railroad grants expedited the construction of the roads and aided greatly in settling up great territories which were practically uninhabited, except by roving bands of Indians. But in the end the railroad companies were the greatest gainers. And it is to be regretted that these lands were disposed of in the lavish manner in which they were. The roads would have eventually come, without the land grants. And the chances are that today there would have been as many transcontinental roads and branches thereof had no land grants been made. In fact a number of the later roads constructed across the country are not land grant roads, but they seem to be successfully competing with those which had this apparent advantage.

[1] For the land grant to the Union Pacific R. Co., see 6 Fed. Stat. Ann., 1905, p. 720.

§ 428. Donations for internal improvements—Railway grants.—Every land grant for internal improvements is made under some Act of Congress and the nature and terms of any particular grant must be gathered from the Act itself, as the Act under which it is made is the law upon the subject.[1] There have been two methods exercised in granting lands in aid of railroads. One method is to grant direct to the company, and the other is to make the grant to the State in aid of railroads; and where this is done the State acquires nothing under the Act of Congress more than a mere naked trust, with power to transfer the lands specified in the grant to the company when it has complied with the necessary requirements.[2] But in either case the building of the road is the consideration for the grant.[3] As to the date when the title takes effect under these Congressional grants, the general rule is that it is of the date of the grant. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant.[4]

1 See Lester's Land Laws of the United States, 2d Ed.; Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. Ed. 1122, 5 Sup. Ct. Rep. 566; Mo., K. & T. R. Co. v. Kansas Pas. R. Co., 97 U. S. 491, 24 L. Ed. 1095; St. Paul etc. R. Co. v. Greenhalgh, 26 Fed. Rep. 563; Hannibal etc. R. Co. v. Smith, 76 U. S. 9 Wall. 95, 19 L. Ed. 599; Winona etc. R. Co. v. Barney, 113 U. S. 618, 28 L. Ed. 872, 5 Sup. Ct. Rep. 606.

2 Rice v. Minn. etc. R. Co., 65 U. S. 1 Black 358, 66 L. Ed. 147; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; Van Wyck v. Knevals, 106 U. S. 360, 27 L. Ed. 201, 10 Am. & Eng. R. Cases 664, 1 Sup. Ct. Rep. 336; Schulenberg v. Harriman, 88 U. S. 21 Wall. 44, 22 L. Ed. 551, as to right of railway company to cut timber from lands while the title to the same is in the State; Grinnell v. Chicago etc. R. Co. 103 U. S. 739, 26 L. Ed. 456; Cedar Rapids etc. R. Co. v. Courtright, 88 U. S. 21 Wall. 310, 22 L. Ed. 582; Williams v. Baker, 84 U. S. 17 Wall. 144, 21 L. Ed. 561; Kansas City etc. R. Co. v. Brewster Atty. Gen., 118 U. S. 682, 30 L. Ed. 281, 7 Sup. Ct. Rep. 66; Leavenworth etc. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634, where it was held that where a grant covered lands to which the Indians' right of occupancy had not been extinguished, that the Indians had the unquestioned right to the lands until their right of occupancy shall be extinguished by a voluntary cession to the Government.

For Indian right of occupancy, see Secs. 404, 405, 415.

3 Brewster v. Kansas City R. Co., 25 Fed. Rep. 243.

4 United States v. Detroit Timber & L. Co., 200 U. S. 321, 50 L. Ed. 499, 26 Sup. Ct. Rep. 282, affirming 131 Fed. Rep. 668, 67 C. C. A. 13; Leavenworth etc. R. Co. v. United States, 92 U S. 733, 23 L. Ed. 634; St. Paul M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. Ed. 767, 11 Sup. Ct. Rep. 168; St. Paul & P. R. Co. v. Northern P. R. Co., 139 U. S. 1, 35

§ 429. **Donations for internal improvement—Miscellaneous grants.**—Congressional grants of land for internal improvement have also been made for purposes other than that of aiding in the building of railroads. Grants have been made to assist in the improvement of river navigation,[1] for the building of wagon roads,[2] and the swamp land grants to the several States, to enable those States to construct levees and drains, and reclaim swamp and overflowed lands.[3] For these various objects Congress has donated vast tracts of land for the purpose of internal improvements, to assist in building up, settling, and making the country more habitable for man. But in making these donations Congress can not be supposed to exercise its liberality to the prejudice of pre-existing rights, which, though oftentimes imperfect, were still meritorious, and had just claims to legislative protection; and therefore, where any homestead, pre-emption rights, or claims in and to waters of natural streams and lakes or other similar rights have attached prior to the grant, they will be recognized and protected in pursuance of the constant policy of the government to protect those who, in good faith, have settled upon and improved any portion of the public lands.[4]

§ 430. **Donations for school purposes.**—Congress, by many Acts, passed at various times, has granted to all of the public land States and Territories a portion of the public lands within their respective boundaries for the use of the public schools of those States and Territories, and for other educational purposes.[1] In some of the States the sixteenth section in each township only was granted, but

L. Ed. 77, 11 Sup. Ct. Rep. 389; United States v. Southern Pac. R. Co., 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152.

1 Wolcott v. Des Moines etc. R. Co., 72 U. S. 5 Wall. 681, 18 L. Ed. 689; Dubuque etc. R. Co. v. Litchfield, 64 U. S. 23 How. 66, 16 L. Ed. 500.

2 Penga v. Munz, 29 Fed. Rep. 830; California & Oregon L. Co. v. Munz, 29 Fed. Rep. 837.

3 For swamp and overflowed lands, see 6 Fed. Stat. Ann., 1905, pp. 399-414, and authorities cited; 2 U. S. Comp. Stat., p. 1586; Act of September 28, 1850; 9 Stat. L. 520, as amended by Act of March 12, 1860, 12 Stat. L 3.

4 Lamb v. Davenport, 85 U. S. 18 Wall. 307, 21 L. Ed. 759; Rector v. Gibbon, 111 U. S. 276, 28 L. Ed. 427, 4 Sup. Ct. Rep. 605; United States v. Missouri R. Co., 37 Fed. Rep. 68.

1 Upon their admission to the Union Congress granted to each of the States of Illinois, Michigan, Missouri, Ohio, Wisconsin, and others the 16th section of each township for the purpose of aiding the public schools.

in many of those States and Territories formed out of the more arid region of the country both the sixteenth and thirty-sixth sections have been granted,[2] and in Utah sections 2, 16, 32, and 36 were granted.[3] And in all cases it is provided that where the sections prescribed in the various Acts are occupied by actual settlers prior to the survey of such lands, that other lands may be located to an equal amount, in lieu of the sections so occupied.

The legal right and title to these sections remain in the United States until they are officially surveyed; for until surveyed the sections and townships have no existence as such,[5] and hence all selections of lieu lands made by a State upon unsurveyed lands of the United States are held to be utterly void.[6] It is also held that where the land is surveyed, the title to the lands granted for the use of the public schools vests in the State at once upon the Act taking effect, as effectually as if a patent had been issued. And, hence, after lands have been selected by the State as indemnity school lands, and certified or listed as such by the proper officers of the United States, there can be no right of entry to such lands by individuals.[7] No subsequent law of Congress authorizing a sale of public lands can be construed to embrace such school lands.[8] However, the title to these lands being vested in the respective States, they alone can sell the same and give a perfect title thereto.[9] Congress has also granted large tracts of lands, to be selected by the

2 See 6 Fed. Stat. Ann., 1905, pp. 460-494, and authorities cited; 2 U. S. Comp. Stat., 1901, pp. 1381, 1452; Rev. Stat. of the U. S., 1878, Secs. 1946, 2275, 2276, 2377-2379.

3 6 Fed. Stat. Ann., 1905, p. 489; Supp. U. S. Comp. Stat., 1905, p. 318; Act of May 3, 1902, 32 Stat. L. 188.

4 6 Fed. Stat. Ann., 1905, p. 462; 2 U. S. Comp. Stat., 1901, p. 1381; Rev. Stat. of U. S., Secs. 2275, 2276.

5 Ferry v. Street, 4 Utah 521, 7 Pac. Rep. 712, 11 Pac. Rep. 571, App. Dis. 119 U. S. 385, 7 Sup. Ct. Rep. 231, 30 L. Ed. 439; Gaines v. Nicholson, 50 U. S. 9 How. 356, 13 L. Ed. 172; McNee v. Donahue, 142 U. S. 587, 35 L. Ed. 1122, 12 Sup. Ct. Rep. 211.

6 United States v. Cartner, 38 Fed. Rep. 1.

7 McCreery v. Haskell, 119 U. S. 327, 30 L. Ed. 408, 4 Sup. Ct. Rep. 176, where it was held that as between the State and the settler the party which first commences the proceedings required to obtain the title, if they are followed up to the final act for its transfer, is considered to have priority of right. The rule prevails in such cases, first in time, first in right; Howell v. Slauson, 83 Cal. 539, 23 Pac. Rep. 692; Durand v. Martin, 120 U. S. 366, 30 L. Ed. 675, 7 Sup. Ct. Rep. 587.

8 Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440.

9 Roberts v. Cooper, 20 How. 61 U. S. 467, 15 L. Ed. 969.

respective States, for other educational purposes than in aid of the public schools. State universities and agricultural colleges have also been benefited in this manner.

In all of these grants in aid of schools and colleges it is held by the Supreme Court of the United States that by the settled policy of the General Government, mineral lands are excluded.[10]

§ 431. Disposal by grants for townsites.—There are three methods by means of which public lands are disposed of for townsite purposes:

First.—The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, lands for townsite purposes, on the shores of harbors, at the junctions of rivers, at important portages, or any natural or prospective centers of population. Provisions are made for the survey of such lands selected into lots of suitable size, for the appraisement of the same at their cash valuation, their sale at public outcry to the highest bidder, and for the disposal of unsold lots at public sale or private entry, at not less than their appraised value. All such sales are to be conducted by the register and receiver of the land office, in that district, in accordance with the instructions of the General Land Office.[1]

Second.—In case parties have already founded, or may desire to found, a city or town on the public lands they may cause to be filed with the recorder of the county in which the same is situated a plat for not exceeding 640 acres, describing its exterior boundaries according to the lines of the public surveys, if the lands have been surveyed; also giving the name of such city or town, and exhibiting its streets, squares, etc., with measurements, and area of each municipal subdivision, the lots in which shall not exceed 4200 square feet, with a statement of the extent and general character of the

10 Ivanhoe M. Co. v. Keystone Con. M. Co., 102 U. S. 167, 26 L. Ed. 126; Sherman v. Buick, 93 U. S. 209, 23 L. Ed. 849.

1 6 Fed. Stat. Ann., 1905, p. 341; 2 U. S. Comp. Stat., 1901, p. 1455; Rev. Stat. U. S., 1878, Secs. 2380, 2381; Act of March 3, 1863, 12 Stat. L. 754.

Land reserved for Indian tribes is not a part of the "public lands," and is not subject to the Acts of Congress relating to townsites. King v. McAndrews, 111 Fed. Rep. 860, 50 C. C. A. 29.

For Indian right of occupancy, see Secs. 404, 405, 415.

improvements, such a map and statement to be verified under oath; and a verified transcript of the same, within 30 days after its filing, must be transmitted to the General Land Office, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land district a similar statement shall be filed with the register and receiver thereof. The President is then authorized to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder; and such lots that may not be thus disposed of shall thereafter be liable to private entry, at such price as the Secretary of the Interior may order from time to time. When such cities or towns are established upon unsurveyed lands, after the extension thereto of the public surveys, the extension limits of the premises may be adjusted according to those lines, where it can be done without interference with rights which may be vested by sale. Patents for all lands so disposed of shall issue as in ordinary cases.[2]

Third.—Whenever any portion of the public lands has been already or may be settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it is lawful for the corporate authorities thereof, or if it be unincorporated, for the judge of the County Court of the county, to enter at the proper land office, and at the minimum price, the land so settled and occupied "in trust for the several use and benefit of the inhabitants thereof, according to their respective interest"; the execution of this trust, as to the disposal of such lots in such town, and the proceeds of the sales thereof, is to be conducted under the regulations as may be prescribed by the legislative authority of the State or Territory in which the town may be situated.[3]

In no case, however, may townsites be located or any title acquired in that manner upon or to any known mineral lands, or to

[2] 6 Fed. Stat. Ann., 1905, p. 341; 2 U. S. Comp. Stat., 1901, p. 1455; Rev. Stat. of U. S., 1878, Sec. 2382; Act of July 4, 1864, 13 Stat. L. 343.

See Jones v. Petaluma, 36 Cal. 230; Alemany v. Petaluma, 38 Cal. 553; 2 Copp's Public Land Laws, 1011.

[3] 6 Fed. Stat. Ann., 1905, p. 344; 2 U. S. Comp. Stat., 1901, p. 1487; Rev. Stat. of U. S., 1878, Secs. 2387-2394; Act of March 2, 1867, 14 Stat. L. 541.

See, also, 2 Copp's Public Land Laws, 1012.

any valid mining claim or to the prejudice of any vested rights to water that naturally flows over or adjoins the premises.[4]

§ 432. **How the Government disposes of its lands—Through the General Land Office—To individuals.**—The United States, by general Congressional laws, also has a number of methods for the disposal of its lands upon the public domain to individuals. Among these Acts still in effect are the Homestead, Desert Land, Military Land Warrant, Public Sale, Timber Lands, Mineral and Coal Lands, Carey and National Reclamation Acts. Besides these there were the Pre-emption and Timber Culture Acts which have been repealed. All of these Acts provide for the disposal of the lands coming within the character named in the respective Acts through the General Land Office, and under rules promulgated by the Secretary of the Interior. These Acts, as a general thing, provide for the disposition of much smaller tracts of land than those which we have discussed in the previous sections, and to individuals, instead of railroad companies, States, or municipal corporations.[1] A short discussion of each of these Acts is necessary, especially in relation to the waters which flow through these lands. One must understand when the rights of the parties acquiring the lands first attached both as to the soil and the water. If the use of the water, which naturally runs through these lands, was acquired with the land, or was acquired separately from it by other parties, we must know how this came about. There are also many other questions as to the relationship of the soil and water which we will discuss.[2]

§ 433. **Disposal to individuals—Pre-emptions.**—One of the early methods which the Government had of disposing of the lands of the public domain was under the pre-emption laws. By the Act of June 2, 1862,[1] it was provided that all lands belonging to the

4 Deffenback v. Hawke, 115 U. S. 392, 29 L. Ed. 423, 6 Sup. Ct. Rep. 95.

Pre-existing water rights not affected by Congressional grants, see Secs. 446, 804-809.

1 See Secs. 428-431.

2 For rights between settlers and appropriators, see Secs. 810-823.

1 Rev. Stat. of U. S., 1878, Secs. 2257-2288; 6 Fed. Stat. Ann., 1905, pp. 278-285, note, and authorities cited; 2 U. S. Comp. Stat. 1379.

For original Act of June 2, 1862, see 12 Stat. L. 413. This Act superseded the Act of September 4, 1841, 5 Stat. L. 453.

United States, to which the Indian title had been or might thereafter be extinguished,[2] should be subject to the right of pre-emption, under the conditions, restrictions, and stipulations provided by law. The lands excluded from the right of pre-emption were, all Government reservations,[3] lands selected as sites for cities or towns,[4] lands actually settled for trade and business and not for agriculture, and lands on which are situated any known salines or mines.[5] The individuals entitled to take advantage of the law were, every person, being at the head of a family, a widow, or single person, over the age of 21 years, and a citizen of the United States, or having filed a declaration of intention to become such, except those persons who were the owners of 320 acres of land in any State or Territory; and those persons who quit or abandon their own land to reside on the public lands in the same State or Territory. The amount of land which might be entered was not more than 160 acres, and the method was for the pre-emptor to go upon the land and make his settlement first, then after this he must file his declaratory statement with the local land office, within 30 days after the settlement, if the land is surveyed and offered for sale, within three months if the land is surveyed but not offered for sale, and within three months, after the plat is filed in the district land office, if the land at the time of its settlement was unsurveyed, and not offered for sale. Within 30 months the claimant must have made his proof of settlement, residence, and improvements, and upon the payment of $1.25 per acre he was entitled to his patent. The right of the pre-emptor first attached to the land, if he complied with the law in other respects so as to secure his patent at the time of his settlement upon the land.[6]

2 For Indian right of occupancy, see Secs. 404, 405, 415.

3 For Government reservations, see Secs. 413-426.

4 For townsites, see Sec. 431.

5 For mineral lands, see Sec. 440.

6 In Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424, it was held that the party who took the initiatory step in such cases, if followed up to patent, was deemed to have acquired the better right as against others to the premises; and that where a party has settled upon public land with a view to acquire a right to pre-emption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local land officers, to receive his proofs of settlement, upon an erroneous opinion that the land was reserved from sale.

See, also, Johnson v. Towsley, 80 U. S. 13 Wall. 72, 20 L. Ed. 486; Moore v. Robins, 96 U. S. 530, 24 L. Ed. 848; Tyler v. Green, 28 Cal. 406, 87 Am. Dec. 130, and note; Gimmy v.

The pre-emption laws were repealed, by the Act of March 3, 1891,[7] with the exception of Sections 2275 and 2276, relating to school lands, and Section 2286, relating to pre-emption by counties for seats of justice. However, all *bona fide* claims lawfully initiated before the passage of the repealing Act might be perfected upon due compliance of law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if the repealing Act had not been passed. As to the right of the pre-emptioner as a riparian owner to the use of the waters of the natural streams and other bodies, flowing by or on his land, in those jurisdictions where those rights are allowed by the State law, they relate back to the first settlement upon the land in all cases where the claim went to patent. The rule in these cases and those of homestead claims is the same.[8]

§ 434. **Disposal to individuals—Homestead entries.**—One of the principal methods by which the United States has disposed and is disposing of its public lands is under the homestead law. This law is in many respects similar to the pre-emption law now repealed.[1] By this method a person who is competent may make an entry in the local land office of the land selected, not to exceed 160 acres, which is subject to homestead entries, and by improving and cultivating the same, and residing upon the land continuously for five years, and upon making final proof of such residence and improvements, is entitled to receive his patent, without the payment of any money except a small sum for office fees.[2] The present homestead laws are based upon the original Act of May 20, 1862.[3]

Culverson, 5 Sawy. 605, Fed. Cas. No. 5454.

This law has been construed many times by the Courts, but a discussion of these decisions is unnecessary in this work.

For water rights as between claimants and appropriators, see Secs. 810-823.

7 6 Fed. Stat. Ann., 1905, p. 285; 2 U. S. Comp. Stat., 1901, p. 1385; 26 Stat. L. 1097.

8 For homesteads, see Secs. 434, 435. For contests between settlers and appropriators as to water rights, see Secs. 810-823.

1 For pre-emption law, see Sec. 433.

2 For the homestead laws, see 6 Fed. Stat. Ann., 1905, pp. 285-331; 2 U. S. Comp. Stat., 1901, pp. 1386-1421; Rev. Stat. of U. S., Secs. 2289-2317.

See, also, 10 Fed. Stat. Ann., 1905. pp. 357-401; Fed. Stat. Ann. Supp., 1907, pp. 279, 288.

3 For original Act, see Rev. Stat. of U. S., Sec. 2289; 6 Fed. Stat. Ann., 1905, p. 286, note; 12 Stat. L. 392.

The Act, however, has been amended in many ways. But the sole purpose of the law as it was originally enacted and as it now stands has not changed; and that purpose is a free home to any citizen of the United States, who is eligible, and who desires by his industry to make one for himself and his family. The homestead settler is protected by the law from all debts contracted prior to the issuing of the patent, and State legislation can not interfere with this exemption.[4]

The law also provides that after a residence of 14 months, should the settler desire a patent, he may commute his homestead entry, by paying to the United States the minimum price for the land entered.[5]

By the Act of February 8, 1908, any person who, prior to the passage of the Act, had made an entry under the homestead laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the law as though such former entry had not been made, except in the case where the former entry was canceled for fraud.[6] A homestead claim is initiated by an entry of the land, which is effected by making an application at the proper land office, filing the required affidavit, and paying the office fees required by the statute.[7] But an inceptive right to make a homestead entry may be acquired even before the date of entry. Under the provisions of the Act of May 14, 1880,[8] it is provided

[4] Seymour v. Sanders, 3 Dill. 437; Fed. Cas. No. 12,690; Russell v. Lowth, 21 Minn. 167, 18 Am. Rep. 389; Weare v. Johnson, 20 Colo. 363, 38 Pac. Rep. 374; *In re* Daubner, 96 Fed. Rep. 805; State v. O'Neil, 7 Ore. 141; Page v. Peters, 70 Wis. 178, 5 Am. St. Rep. 156.

The policy of the Homestead Act looks to the holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the Government. Adams v. Church, 193 U. S. 510, 48 L. Ed. 769, 24 Sup. Ct. Rep. 512; Moss v. Dowman, 176 U. S. 413, 44 L. Ed. 526, 30 Sup. Ct. Rep. 429.

[5] 6 Fed. Stat. Ann., 1905, p. 317; 2 U. S. Comp. Stat., 1901, p. 1406; Act of March 3, 1891, 26 Stat. L. 1098; United States v. Freyberg, 32 Fed. Rep. 195; United States v. Howard, 37 Fed. Rep. 666; Thrift v. Delaney, 69 Cal. 188, 10 Pac. Rep. 475.

[6] For Act of February 8, 1908, see Supp. Fed. Stat. Ann., 1909, p. 545; 35 Stat. L. 40.

See circular, February 28, 1908, 26 Land Dec. 291.

[7] Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, affirming 6 Dak. 71, 50 N. W. Rep. 486.

[8] 6 Fed. Stat. Ann., 1905, p. 301; 2 U. S. Comp. Stat., 1393; 21 Stat. L. 141, 31 Stat. L. 683.

that any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application as was then allowed settlers under the pre-emption laws to put their claims on record, and that his rights shall relate back to the date of the settlement;[9] provided, of course, that he complies with the law and obtains a patent for the land. The settlement defeats all claims either to the land, or to the use of the water as a riparian right, between its date and the date of the filing of the homestead entry.[10] One of the most recent amendments to the homestead laws is the Act of June 22, 1910,[11], which permits entries to be made on the unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are lands valuable for coal, with a reservation to the United States of the coal in such lands and of a right to prospect for, mine, and remove the same. Therefore, as to the coal deposits in these lands, the patentee takes under his patent merely the surface right.[12] The last Act was that approved June 6, 1912,[13] and

9 Under Sec. 2264, U. S. Rev. Stat., 1878, in effect at this time, on lands surveyed and subject to private entry, the pre-emption claimant was required to file his declaratory statement within 30 days after the date of his settlement on the land.

Under Sec. 2265, on lands surveyed, but not yet proclaimed for sale, the claimant was required to make known his claim to the register of the proper land office, within three months from the time of settlement.

Under Sec. 2265, on unsurveyed lands, the claimant was required to file his statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement.

10 Sturr v. Beck, *supra;* Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836.

The purpose of this Act is to permit an inceptive right to be obtained under the homestead law in a manner other than by filing an entry for the land. Sproat v. Durland, 2 Okla. 24, 35 Pac. Rep. 682, 886; Reaves v. Oliver, 3 Okla. 62, 41 Pac. Rep. 353.

For rights as between settlers and appropriators of water, see Secs. 810-823.

11 For full text of Act, see Sec. 443.

12 Sixty-first Congress, 2d Session, Chap. 318, p. 583.

That this Act also applies to desert land entries, see Chap. 66.

That it applies to selections under the Carey Act, see Chap. 67.

That it applies to reservations under the National Reclamation Act, see Chap. 65.

13 Public, No. 179.

provides for but three years' residence upon the land, but also provides that certain portions must be cultivated before final proof.

§ 435. Disposal to individuals—Homestead entries—Enlarged homesteads.—By the Act known as the Enlarged Homestead Act of February 19, 1909,[1] it was provided that any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of the Act, in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico, 320 acres, or less, of non-mineral, non-irrigable, unreserved and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, that no lands shall be subject to entry under the provisions of the Act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. That any homestead entryman of lands of the character in the Act described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of the Act, contiguous to his former entry, which shall not, together with the original entry, exceed 320 acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry. Upon making proof, in addition to that under the regular Homestead Act, the entryman must prove that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and at least one-fourth so continuously cultivated, beginning with the third year of the entry. Regular homestead entries are not affected by the provisions of the Act and no entry made under this Act shall be commuted.

Section 6 of the Act is made applicable to Utah alone, and provides that, whenever the Secretary of the Interior shall find that any tracts of land in that State, subject to entry under the Act, which lands do not have upon them a sufficient supply of water suitable for domestic purposes as would make continuous residence

1 Supp. Fed. Stats. Ann., 1909, p. 560; 35 Stat. L. 639.

upon the lands possible, he may, in his discretion, designate such tracts of land, not exceeding the aggregate of 2,000,000 acres, and thereafter they shall be subject to entry under the Act *without the necessity of residence: Provided*, that in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof of the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section.[2] The original Act did not apply to the State of Idaho, but by the Act of June 17, 1910,[3] the right of making enlarged homestead entries was extended to that State, including the provisions of Section 6 above, originally applicable to Utah alone.

§ 436. **Disposal to individuals—Timber culture.**—In many parts of the public land States and Territories are great stretches of country, which in their natural condition, were without a tree. This was especially true in the Great Plains country and also in many portions of the arid West. In order to relieve the barren condition in this respect, and to establish forests throughout the country, where there were none, Congress in 1873 first provided that every person having a homestead on the public domain, who, at the end of the third year of his residence thereon, should have had, for two years, one acre of timber in a good thrifty condition, for each and every 16 acres of such homestead, should upon due proof of the fact receive his patent for such homestead, and thus relieve him of two years' required residence under the homestead laws. This Act was amended a number of times as a part of the homestead laws,[1] when by the Act of June 14, 1878,[2] all prior Acts upon the subject were superseded. This Act provided that any person having the requisite age and citizenship who should plant, protect, and keep in a healthy growing condition for eight years 10 acres of timber, on any quarter section of the public lands of the United States, or the same proportionate amount for entries of smaller

2 See, also, for dry farming, Chap. 66.

3 See 61st Congress, 2d Session, Chap. 298, p. 531.

1 See Secs. 2317, 2464-2468, Rev. Stat. of U. S., 1878; 6 Fed. Stat. Ann., 1905, p. 494, note, and authorities cited; 2 U. S. Comp. Stats., 1901, p. 1534.

2 6 Fed. Stat. Ann., 1905, p. 495, 496; 2 U. S. Comp. Stats., 1901, p. 1534; 20 Stat. L. 113.

acreage, might, upon the proof of such fact, receive a patent therefor. This Act was in full force and effect from 1878 until the passage of the Act of March 3, 1891, by which Act it was repealed.[3] The inception of a claim of this nature was the filing of the necessary application as provided for in Section 2 of the Act. No residence was required and a timber culture claim might be taken in addition to all other land claims.

§ 437. **Disposal to individuals—Bounty lands.**—Still another method of the disposal of the public lands is by the issuance of military land warrants for meritorious service in the various wars of this country. Military land warrants have been issued to individuals from time to time under various Acts of Congress, and the lands granted under them are called bounty lands.[1] The law provides that the lands for which warrants have been, or may be hereafter issued in pursuance of law, may be located in one body, according to the legal subdivisions of the public lands, upon any of the lands of the United States, subject to private entry at the time of such location and at the minimum price. The location of land under a military land warrant is more in the nature of a sale than a grant or donation and is disposed of through the General Land Office, and the term "all lands remaining unsold" is considered to except lands located under land warrants.[2] Under the law all military warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are assignable by deed or other instrument of writing.[3] The inception of the right to the land under these warrants attaches

[3] 6 Fed Stat. Ann., 1905, p. 497; 2 U. S. Comp. Stat., 1901, p. 1535; 26 Stat. L., 1905.

[1] For the various Acts of Congress, see 6 Fed. Stat. Ann., 1905, pp. 380-392; 2 U. S. Comp. Stat., 1901, pp. 1491-1501; Rev. Stat. of U. S., 1878, Secs. 2414-2446.

[2] Culver v. Uthe, 116 Ill. 643; affirmed, 133 U. S. 655, 33 L. Ed. 776, 10 Sup. Ct. Rep. 415, where the Court held that the giving of a military land warrant by the holder thereof to the proper officers of the Government, with directions that it be located in a designated tract of public land, constituted a sale of that tract within the meaning of that Act.

[3] 7 Op. Atty. Gen. 659; Johnston v. Fluetsch, 176 Mo. 452, 75 S. W. 1005; Bronson v. Kukuk, 3 Dill. 490, 4 Fed. Cas. 1,929; Durham v. Hussman, 88 Iowa 29, 55 N. W. 11; affirmed, 165 U. S. 144, 41 L. Ed. 664, 17 Sup. Ct. Rep. 253.

when the entry is made in any land office and the original owner or his assignee receives his certificate for the same.[4]

§ 438. Disposal to individuals—Public and private sale.—The United States may sell its lands at either public auction or at private sale.[1] By the Act of March 3, 1891,[2] the sale of the public lands by these methods is prohibited except abandoned military or other reservations and isolated and disconnected fractional tracts, which the Commissioner of the General Land Office is authorized to sell for not less than $1.25 per acre, and upon 30 days' notice.[3] The inception of the right of the parties purchasing land at sales of this nature attaches upon the purchase and payment for the land; the payment must be made the day of the purchase.

§ 439. The sale of timber lands under the Timber and Stone Act.—The Act of June 3, 1878, and its amendments,[1] authorizes the sale of the timber lands of the United States, within all the public land States.[2] This was the first Act of Congress which permitted an individual to purchase timber lands from the Government as such. The Act as originally passed applied only to the States of California, Oregon, and Nevada, and the then Territory of Washington. On August 4, 1902, the Act was amended to include

4 Gray v. Jones, 14 Fed. Rep. 83, 4 McCrary 515; Key v. Jennings, 66 Mo. 356; Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86; Stinson v. Geer, 42 Kan. 520, 22 Pac. Rep. 586.

1 6 Fed. Stat. Ann., 1905, pp. 331-334; 2 U. S. Comp. Stat., 1901, p. 1442; Rev. Stat. U. S., 1878, Secs. 2353-2357.

2 5 Fed. Stat. Ann., p. 331; 2 U. S. Comp. Stat., 1901, p. 1443; 26 Stat. L. 1099.

3 See, also, 6 Fed. Stat. Ann., 1905, p. 525; 2 U. S. Comp Stat., p. 1519; Rev. Stat. U. S., 1878, Sec. 2455; Act of February 26, 1895, 28 Stat. L. 687.

1 7 Fed. Stat. Ann., 1905, pp. 300-306; 2 U. S. Comp. Stat., 1901, pp. 1545-1547; 20 Stat. L. 89, 27 Stat. L. 348.

2 The public land States are those States wherein are still to be found lands belonging to the United States, which may be acquired by individuals under some Act of Congress. These States are Alabama, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming, Arizona, New Mexico, and the District of Alaska. In Ohio, Indiana, and Illinois the public land has practically all been disposed of, but at rare intervals the attention of the Land Department is called to some isolated tract the title to which is found to be in the Government. 6 Fed. Stat. 256, note; Circular of General Land Office of January 25, 1904.

all of the "public land States." The Act with its amendments provides as follows:

Sec. 1. *Sale of timber and stone lands.*—"That surveyed public land of the United States within the public land States, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to the citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of $2.50 per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided,* that nothing herein shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education or other purposes: *And provided, further,* that none of the rights conferred by the Act approved July 26, 1866, entitled 'An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes' shall be abrogated by this Act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of this Act; and such rights shall be expressly reserved in any patent issued under this Act."[3]

Sec. 2. *Application for purchase—Penalty for false swearing, etc.*—"That any person desiring to avail himself of the provisions of this Act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements,

[3] The Act of July 26, 1866, referred to in the text of the above Act, are Secs. 2338, 2339, 2341-2343, and 2477, U. S. Rev. Stat., 1878. See, also, 5 Fed. Stat., pp. 52, 53, 55, and the statutes relating to the Public lands, 6 Fed. Stat. 1905, p. 188, and also 2 U. S. Comp. Stat., 1901, pp. 1436, 1437.

except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this Act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he may acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he has paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

Sec. 3. *Publication of application—Proofs—Entry and patent—Objections.*—"That upon the filing of said statement, as provided in the second section of this Act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of 60 days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said 60 days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence; *first,* that said notice of the application prepared by the register aforesaid was duly published in a newspaper as therein required; *secondly,* that the land is of the character contemplated in this Act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of the said land, together with the fees of the register and receiver, as provided for in case of mining claims in the twelfth section of the Act approved May 10, 1872, the applicant may be permitted to enter said tract, and,

on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this Act by regulations to be prescribed by the Commissioner of the General Land Office."

Sec. 4. *Unlawful cutting of timber on public lands—Penalty—Exceptions.*—"That after the passage of this Act it shall be unlawful to cut, or cause, or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territories, or remove, or cause to be removed, any timber from said public lands, with the intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum of not less than $100 nor more than $1000: *Provided*, that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until 90 days after the passage of this Act."

Sec. 5. *Relief of persons prosecuted for cutting timber—Disposal of moneys collected.*—"That any person prosecuted in said States and Territories for violating Section 2461 of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the Court wherein said action is pending, of the sum of $2.50 per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *Provided*, that nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and con-

ditions as other persons, as provided hereinbefore in this Act: *And further provided,* that all moneys collected under this Act shall be covered into the treasury of the United States. And Section 4751 of the Revised Statutes is hereby repealed, so far as it relates to the States and Territories herein named."

Sec. 6. *Repeal.*—"That all Acts and parts of Acts inconsistent with this Act are hereby repealed."

The scope of this work will not permit our going into the discussion of the construction or the effects of this Act. All this will be taken up in a later work to be published shortly after the publication of the present work.[4] But we will here say this, that, although the Timber and Stone Act is still upon the statute books, this Act has been the source of more fraud and more unlawful destruction of the timber resources of this country, with its resultant damages, than almost any other Act of Congress, unless it be the companion Act known as the "Timber Cutting Act," approved upon the same day, June 3, 1878.[5]

§ 440. **Disposal to individuals—Mineral lands.**—It is not the purport of this work to go into all of the intricate questions involved in the subject of the disposal of the mineral lands of the United States. That subject would lead us into a discussion of mining laws and would require a separate work. Then, again, the subject has been most fully covered in those two most excellent but, unfortunately, rival works, by Mr. Lindley,[1] and Mr. Snyder.[2]

It was not until the Act of July 4, 1866, that Congress took any steps toward the disposal of the mineral lands of the public domain.[3] By that Act all mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, were declared to be free and open to exploration and purchase, and the land in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under the regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far

4 See Kinney on Forests, Forestry, and Forest Laws.

5 7 Fed. Stat. Ann., 1905, p. 297; 2 U. S. Comp. Stat., 1901, p. 1528; 20 Stat. L. 88.

1 See Lindley on Mines, 2d Ed.

2 See Snyder on Mines, 1902.

3 For Act of Congress of July 4, 1866, and amendments thereto, see 5 Fed. Stat. Ann., 1905, pp. 1-57; 2 U. S. Comp. Stat., 1901, pp. 1423-1441; Rev. Stat. U. S. Secs. 2318-2352.

as the same are applicable and not inconsistent with the laws of the United States. The most important amendment to the Act of 1866 was the Act of May 10, 1872, wherein it was prescribed that no location of a lode mining claim shall be made until the discovery of the vein or lode within the limits of the claim located, and that the size of each claim shall not exceed 1500 feet in length along the vein or lode, nor more than 300 feet on each side of the middle of the vein at the surface. A possessory title can always be maintained by the locators of all mining locations, so long as the locators comply with the laws of the United States and with the State, Territorial, and local regulations governing the same; and by so complying the locators shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.

One of the requirements of the Act of 1872 was that on each claim located after the tenth day of May, 1872, and until patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. The claims may be sold by the original locators at any time after the location thereof. The law also has detailed provisions as to how patents may be obtained for the claims, thus vesting the legal title in the locators or their assigns. The sum of $5 per acre must be paid for the land, upon proof that the laws, rules, and regulations have been complied with and that there are no adverse titles against the claims.

Claims usually called "placers," including all forms of deposits, excepting veins of quartz or other rock in place, are also made subject to entry and patent. Where such placer claims are upon the surveyed lands, they must conform to legal subdivisions with the United States system of public land surveys, and no such location shall include more than 20 acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; but no location of a placer claim, made after the ninth day of July, 1870, shall exceed 160 acres for any association of persons. Provisions are also made for patenting these claims, upon full compliance with the law and the payment at the rate of $2.50 per acre.

§ 441. **Disposal to individuals—Coal lands.**—Coal lands are also disposed of in the following manner. Every person above the age

of 21 years, of the requisite citizenship as above, or any association of persons severally qualified, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved, not exceeding 160 acres to each individual person, or 320 acres to such association, upon payment to the receiver of not less than $10 per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than $20 per acre for such lands as shall be within 15 miles of such road.[1]

§ 442. **Coal lands—Surface agricultural entries thereon—Reservation of the coal.**—It had long been recognized that many of the coal lands owned by the United States, especially those lying within the arid and semi-arid regions, were valuable not only for the coal which underlaid the surface, but also for agriculture upon the surface. But Congress took no step toward the segregation of these interests until the Act of March 3, 1909, wherein it was provided that, where land had once been entered as agricultural lands, if they were subsequently discovered and classified to be coal lands, the entryman, instead of losing all his rights to the same, might elect to receive a patent for the land covered by his entry, which should contain a reservation to the United States of all the coal in said lands, and the right to prospect for, mine, and remove the same. The full text of the Act of March 3, 1909, entitled, "An Act for the protection of the surface rights of entrymen,"[1] is as follows:

"That any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States

[1] 5 Fed. Stat. Ann., 1905, pp. 55-57; 2 U. S. Comp. Stat., 1901, pp. 1440-1442.

For the right to make agricultural entries on coal lands, see Secs. 442, 443.

[1] Supp. Fed. Stat. Ann., 1909, 563; 35 Stat. L. 844.

in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided*, that the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided, further*, that nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has heretofore made or shall hereafter make final proof, showing good faith and satisfactory compliance with the law under which his land is claimed, shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal."

This Act applies to desert land entries,[2] to selections made by the State under the Carey Act,[3] and to all other agricultural entries and selections by States.[4] But Congress did not stop with the above Act. By the Act of June 22, 1910, it provided that land which had already been classified as coal lands might be entered, selected, or withdrawn, as far as the right to the surface was concerned, and patented with a reservation of the coal and the right to mine the same.

§ 443. **Coal lands—Right to make surface agricultural entries, selections, and withdrawals—Reservation of coal.**—By the Act of June 22, 1910, entitled, "An Act to provide for agricultural entries on coal lands,"[1] it was provided that unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to entry under the homestead laws,[2] to entry under the

2 See for desert land entries, Chap. 66.

3 See Chap. 67; State of Wyoming, 38 Land Dec. 508.

4 Circular, 37 Land Dec. 528, 38 Land Dec. 181, 183, 576; Martin v. Gilbert, 38 Land Dec. 536; State of Utah, 38 Land Dec. 245.

1 Public—No. 227; 36 Stat. L. 583; 61st Congress, 2d Session, Chap. 318, p. 583.

2 See Secs. 434, 435.

Desert Land Act,[3] to selection under the Carey Act,[4] and to reservation under the National Reclamation Act, whenever such entry, selection, or withdrawal shall have been made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands.

The full text of said Act is as follows: That from and after the passage of this Act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert land law, to selection under Section 4 of the Act approved August 18, 1894, known as the Carey Act, and to withdrawal under the Act approved June 17, 1902, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than 160 acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February 19, 1909, entitled "An Act to provide for an enlarged homestead": *Provided,* that those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act.

Sec. 2. That any person desiring to make entry under the homestead laws or the desert land law, any State desiring to make selection under Section 4 of the Act of August 18, 1894, known as the Carey Act, and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act.

Sec. 3. That upon satisfactory proof of full compliance with the

[3] See Secs. 1287-1311. [4] See Secs. 1312-1336.

provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided,* that the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided, further,* that nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Approved, June 22, 1910.[5]

§ 444. **Desert Land Act—Carey Act—National Reclamation Act.**—There are three other Acts passed by Congress for the disposal of the public lands to individuals, popularly known as the

[5] For the construction of the above Act, see Louis Zuckman, 40 Land Dec. 25; John Wesley McClinton, 40 Land Dec. 26; Chris D. Miller, 40 Land Dec. 33.

Desert Land Act of March 3, 1877,[1] the Carey Act of August 18, 1894,[2] and the National Reclamation Act of June 17, 1902.[3] But, as these Acts relate not only to the disposal of the public lands, but also to the appropriation of the waters flowing over the public domain for their reclamation, they will be each discussed in separate chapters in all their phases in another portion of this work, and a bare reference to these Acts under this subject is sufficient.[4]

§ 445. **Rights to land attach, when.**—As the word "entry" is of frequent occurrence in this discussion its meaning should be fully explained. As applied to the disposal of the public lands, it means that act by which an individual acquires an inceptive right of record to a portion of the unappropriated land of the public domain by filing the necessary papers in the proper office.[1] However, an equitable right, as has been seen, may attach under certain circumstances upon the mere settlement of the land and before the filing of any papers at all. And the party who takes the first step, if followed up to patent, is deemed to have acquired the better right as against all others to the premises. The patent, which is afterward issued, relates back to the date of the initiatory act, and thus cuts off all intervening claimants, whether that act be an actual settlement upon the land itself or filing the necessary papers in the land office.[2] Other things being equal, he who has the priority of location has the superior right, applies to all conflicting Congressional grants and also to all conflicts between these grants and the claims of settlers.[3]

1 6 Fed. Stat. Ann., 1905, pp. 392-396; 2 U. S. Comp. Stat., 1901, 1548; 19 Stat. L. 377.

For text of Act and amendments, see Chap. 66.

For the scope and construction of the Act, see Chap. 66.

That the Act confirmed the doctrine of appropriation, see Secs. 622, 623.

2 6 Fed. Stat. Ann., 1905, pp. 397, 398; 2 U. S. Comp. Stat., 1901, p. 1554; 28 Stat. L. 422.

For text of Act and amendments, see Chap. 67.

For the scope and construction of the Act, see Chap. 67.

3 7 Fed. Stat. Ann., 1905, pp. 1098-1101; Supp. U. S. Comp. Stat., 1905, pp. 349-354; 32 Stat. L. 388.

For text of Act and amendments, see Chap. 65.

For scope and construction of Act, see Chap. 65.

4 See references, *supra*.

1 Chotard v. Pope, 25 U. S. 12 Wheat. 586, 6 L. Ed. 737.

2 Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424.

3 St. Paul etc. R. Co. v. Winona etc. R. Co., 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334; Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. Ed. 1122, 5 Sup. Ct. Rep. 566;

Homestead, pre-emption, or other claims, entered before the location of a railroad, though after the passage of the Land Grant Act, are not affected thereby.[4] The policy of the Federal Government in favor of settlers upon the public land has been liberal. It recognizes their superior equity, to become purchasers of a limited extent of land, comprehending their improvements, over that of any other person.

§ 446. **Pre-existing water rights not affected by Congressional grants.**—As has been stated, no pre-existing rights to land are affected by Congressional grants.[1] This is as true of pre-existing rights to waters that naturally flow over or adjoin these lands as it is of rights to the soil, whether there are any special reservations of these water rights in the grant itself or not. This law is based upon a common principle of justice, and in pursuance of the constant policy of the Government, through Congress and the Courts, to protect any *bona fide* rights which have attached prior to grant, of those who have in good faith settled upon and improved any portion of the public domain.[2] And it is generally provided in the granting Act that, where lands along the line of a proposed railway are already taken up, the company may take other lands in lieu thereof as indemnity.[3] But whether this right is provided for in the grant or not it is the established doctrine of the Courts that water rights, and rights of way of those who have constructed canals and ditches to be used for irrigation and in mining operations, and the right of all *bona fide* settlers upon the surveyed or unsurveyed portion of the public domain, are rights which the Government has by its conduct recognized and encouraged and is bound by that conduct to protect, even should these rights have accrued prior to the

Northern Pac. R. Co. v. St. Paul etc. R. Co., 26 Fed. Rep. 551.

4 See, also, Elmslee v. Young, 24 Kan. 732; Clements v. Warner, 65 U. S. 24 How. 394, 16 L. Ed. 695.

This subject will be more thoroughly treated under the subject of the doctrine of relation. See Chap. 40, Secs. 742-756.

1 See Secs. 402, 403.

2 Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621; Winona etc. R. Co. v. Barney, 113 U. S. 618, 28 L. Ed. 872, 5 Sup. Ct. Rep. 606; Burham v. Starkey, 41 Kan. 604, 21 Pac. Rep. 624.

3 Kansas Pac. R. Co. v. Atchison etc. R. Co., 112 U. S. 414, 28 L. Ed. 794, 5 Sup. Ct. Rep. 208; Winona etc. R. Co. v. Barney, *supra*.

See, also, grants to railroads, Secs. 427, 428.

Acts of 1866 or of 1870. And furthermore, Congress in making donations or grants to railroad companies can not exercise its liberality at the expense of pre-existing rights, which, though imperfect, are still meritorious, and have just claim to the protection of the legislature and the Courts.

§ 447. **Grantee takes subject to conditions annexed to grant.**—The United States as the proprietor of the public lands has, by virtue of its proprietorship, the absolute and unqualified right of disposal,[1] and neither a State nor a Territorial legislature can dictate, modify, or embarrass in any manner the right of Congress to the primary disposal of the public lands.[2] Also a stream or inland lake, incapable of being navigated, is naturally a part and parcel of the land, inseparably annexed to the soil, and as such, under the common law, passes to the grantee or patentee of the soil from the United States, unless certain conditions are annexed, either in the grant itself, or by some general Act of Congress prior to the grant affecting the land. The Federal Government as the proprietor of the public domain has the power to annex any conditions to grants which it sees fit. It may do this either in the grant or patent itself, conveying each particular portion of the public lands to its grantees and patentees, or it may by Congressional legislation adopt any general regulations or impose any conditions or limitations upon the title of all persons who acquire portions of the public lands from the United States. And the title so acquired will be held by the grantees, subject to such conditions or limitations.

Congress has provided by general statute that, "whenever, by priority of possession, rights to the use of water for mining, agricultural, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purpose herein specified, is acknowledged and confirmed."[3] Under this Act the rights of prior appropriators to the waters of the public

1 See Sec. 409.

2 Irvine v. Marshall, 61 U. S. 20 How. 558, 15 L. Ed. 994.

3 Act of Congress of July 26, 1866, 7 Fed. Stat. Ann. 1905, p. 1090; 2 U. S. Comp. Stat. 1901, p. 1437; Rev. Stat. U. S. 1878, Sec. 2339; 14 Stat. L. 253.

See, also, Secs. 611-614.

domain were recognized and confirmed and the grantees of the Government took their lands subject to those rights which had vested and accrued, although not specifically named in the patent. But Congress went still further in the Act of July 9, 1870.[4] It provided that: All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired. Also by another section of the Act of 1866, it was provided: "As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to complete their development; and these conditions shall be fully expressed in the patent."[5]

The patent spoken of is that issued by the United States to the purchasers of the public domain. Thus by a general statute Congress has provided for a right of way over the public lands for ditches and canals for all those who have made an appropriation of water before the lands were disposed of, and that all grantees of the Government who subsequently acquire portions of this land, shall take and hold this title *subject* to such existing rights of way; or that all grantees of public lands bordering upon a stream or lake shall hold their titles subject to any previously existing appropriation of water; or, further, that all grantees of the public lands shall take their titles, subject to the local customs or laws of the State within which the lands are situated concerning the uses of water for mining, irrigating, agricultural, and other purposes.[6] It must be borne in mind that these conditions and limitations to the title to

[4] 7 Fed. Stat. Ann. 1905, p. 1096; 2 U. S. Comp. Stat. 1901, p. 1437; Rev. Stat. U. S. 1878, Sec. 2340; 16 Stat. L. 218.

See, also, Secs. 615-618.

[5] 5 Fed. Stat. Ann. 1905, p. 52; 2 U. S. Comp. Stat. 1901, p. 1436; Rev. Stat. U. S. 1878, Sec. 2338; 14 Stat. L. 252.

See, also, People v. Dist. Ct., 11 Colo. 153; Woodruff v. North Bloomfield Gravel M. Co., 8 Sawy. 628, 16 Fed. Rep. 25, 18 Fed. Rep. 753; Jacob v. Day, 111 Cal. 577, 44 Pac. Rep. 243.

This section only provides for easements for the development of mines. Calhoon Gold M. Co. v. Ajex G. M. Co., 182 U. S. 509, 45 L. Ed. 1200, 21 Sup. Ct. Rep. 885; Amador Queen M. Co. v. Dewitt, 73 Cal. 482, 15 Pac. Rep. 74.

[6] Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Union M. & M.

the lands which originally belonged to the public domain are not confined to the immediate grantees of the Federal Government. If the grantee of the Government sells his land, his purchaser only acquires the same title that he himself had, and takes the land also subject to the same conditions and limitations.

§ 448. **Ownership and sovereignty distinguished—Jurisdiction.**—Running waters upon the public domain, or upon lands to which the United States still holds title, are subject and open to appropriation under the authority of the laws of the United States, which will be set forth in chapters of this work.[1] The title subsequent to the unappropriated waters still remains in the United States as the proprietor of the same.[2] These waters, although flowing upon the public domain of the United States, are located within the various States and Territories of the country; and, as the United States has left the entire jurisdiction over them to the States and Territories, they must be appropriated, used or transferred, according to the laws of that State or Territory through which the waters flow. Hence it follows that the United States has only the rights of a proprietor over these waters, and not the rights of a political sovereign.[3] A State may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation and other beneficial uses shall control. Congress can not enforce either rule upon any State.[4] The same may be said relative to the lands within any State but owned by the United States. Each State has full jurisdiction over

Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

See, also, Secs. 611-620, and authorities cited; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

1 See Arid Region Doctrine, Secs. 585-594; Congressional Laws upon the subject of waters, Secs. 596-626.

See, also, Secs. 627-640.

2 See Sec. 411.

3 Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

A State may change the common law rule, and permit the appropriation of waters for such purposes as it deems best. United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

4 Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655, and authorities cited.

the lands within its borders as political sovereign, although the proprietor of these lands may be the United States. This of course does not include the right of the United States to the disposal of its lands, which right is vested in Congress alone.[5] The power to enact laws governing both the land and waters within a State forms a part of the law concerning real property, and belongs exclusively to the jurisdiction of the respective States, and even Territories, so long as the laws of the same are not in conflict with the Constitution and laws of the United States.

In fact there are but a few places within the United States where the Government is both the proprietor and political sovereign, and these are fixed by the Constitution. By the sixteenth clause of the eighth section of the first article of the Constitution we find that power is given to Congress "To exercise exclusive legislation in all cases whatsoever over such district (not to exceed 10 miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." So within the District of Columbia, and other places purchased and used for purposes above mentioned, the municipal powers of the Government of every description are united and are the sole governing powers.[6] But these are the only cases within the United States in which all the powers are united in a single government. Even in cases of temporary Territorial organization a local government always exists, and the specific rules for the appropriation and use of waters, as forming a part of the law concerning real property, falls within the jurisdiction of the local laws, so long as they are not in conflict with those of the United States upon the subject. The United States is simply the proprietor of the public lands, outside of the few exceptions above noted. And whatever may be the rules adopted by the statutes or decisions of any particular State with reference to the rights of riparian owners and appropriators, still that doctrine, hereinafter described, as originating from the local customs of miners and sustained by the legisla-

[5] Kansas v. Colorado, *supra*.

[6] United States v. Hammond, 1 Cranch C. C. 15, 26 Fed. Cas. No. 15,293; Shoemaker v. United States, 147 U. S. 282, 37 L. Ed. 170, 13 Sup. Ct. Rep. 361; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. Ed. 873, 19 Sup. Ct. Rep. 580.

tion of Congress, is confined in its operation to the public domain of the United States, and all extension of this doctrine to other lands and other proprietors, and all additional rules, must necessarily proceed from the States themselves.[7]

§ 449.—After title has passed from the United States lex loci sitae governs.—The title to land or water having once passed from the United States, can be acquired or lost only in the manner prescribed by the law of the State where such land or water is situated, and the Federal Courts are bound to apply the laws and rules of the State in which the property is situated, and to decide the controversy as the State Court would.[1] And the United States Government has no power to lay down any rules of law that would be binding upon its grantees after they have acquired their title from the Government concerning the use to which the lands or water must be put. All such laws come clearly within the jurisdiction of the States. Before title has passed from the Government the United States has a perfect title to the public lands and an absolute and unqualified right of disposal. All the lands and waters of the Government not appropriated by competent authority before they were acquired by the Government are in the first instance the exclusive property of the United States, to be disposed of to such persons at such times, in such manner and by such titles as the Government may deem most advantageous to the public. The right of the Government has been uniformly reserved by solemn compact upon the admission of new States into the Union, and has always been recognized and respected by the various States within which large portions of the public lands of the United States have been located, and within which many of these lands are still remaining. The legislatures of the various States in which the public lands are situated have no power to interfere and to dictate to the United States, to whom, or in what manner, or by what title, the public lands shall be conveyed in the first instance. But after the title has once passed the law of the State wherein the land is situated alone prevails.[2]

[7] See Pomeroy Rip. Rights, Sec. 30.

[1] Walker v. Marks, 84 U. S. 17 Wall. 648, 21 L. Ed. 744; Board of Suprvs. v. United States, 85 U. S. 18 Wall. 71, 21 L. Ed. 771.

[2] Irvine v. Marshall, 61 U. S. 20 How. 558, 15 L. Ed. 994; Vansickle v. Haines, 7 Nev. 249; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; 8 Morr. Min. Rep. 90.

As to what laws shall determine this question the true rule is, that whenever the question in any Court, State or Federal, is, whether the title to the land, which has been once the property of the United States, has passed, that question must be decided by the laws of the United States; but that whenever, according to those laws, the title shall have passed from the United States to private parties, then that property, like all other property in the State, is subject to State legislation.[3] Hence, it must be borne in mind, that from the moment that tracts of land which were once public, which border upon a stream, and are situated within a State or Territory, have come into private ownership of patentees or grantees of the Government, all controversies as to their rights upon the subject as to whether their owners are riparian proprietors or otherwise must be determined and regulated wholly by the laws of the State or Territory in which the land is located, as Congress, after the title has once passed from the Government, has no power to legislate concerning the title of lands and the *incidents thereto* situated within a State.

3 Wilcox v. Jackson, 38 U. S. 13 Pet. 498, 10 L. Ed. 264.

See, also, Hudson Co. W. Co. v. McCarter, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529, where the Court upheld the legislature of New Jersey which passed an Act making it unlawful for any person or corporation to conduct any fresh waters of the State into another State for use therein.

PART VI.

THE COMMON LAW GOVERNING WATERS

CHAPTER 21.

THE NATURE OF RIPARIAN RIGHTS.

§ 450. Scope of chapters—Nature and extent of subject treated.
§ 451. Upon what riparian rights are based—The ownership of the bank.
§ 452. The nature of riparian rights—Natural rights.
§ 453. The nature of riparian rights—They are property and a part of the land itself.
§ 454. Nature of riparian rights—As hereditaments.
§ 455. The nature of riparian rights—The riparian owner's property in the water itself is merely usufructuary.
§ 456. The nature of riparian rights—Deprivation of right.

§ 450. Scope of chapters—Nature and extent of the subject treated.—It is not the intent of the present work to enter into an extended and detailed discussion of all the common law theories of riparian rights, which a riparian owner may have under that law in the water courses and other bodies of water, and the waters flowing therein. As far as public waters are concerned the rights of the public in and to the use of these waters have already been discussed in Part IV of this work.[1] However, we will go so far into the subject as to show how far the common law is applicable, or rather inapplicable, to the appropriation of the waters of the natural streams for the purposes of irrigation and other beneficial uses in the States of the arid and semi-arid regions of the Western portion of this country. Our discussion will also be largely confined to the rights of the riparian owners in and to those smaller streams of the country, known as private streams, or, in other words,

1 See Chaps. 15 and 16, inclusive.

those streams and bodies of water which in fact are not actually navigable and therefore public waters.[2]

§ 451. **Upon what riparian rights are based—The ownership of the bank.**—The common law rights of riparian proprietors are such as grow out of, or are connected with, their ownership of the banks of the streams and rivers, or other bodies of water. Since these riparian rights depend upon the land contiguous to the water courses, outside of the ownership of the beds of the streams, they are in general use. Certain rights, however, attach to what are known as private streams, which do not attach to public streams.[1] That this is so is significant from the fact that the word "*ripa,*" from which our word "riparian" comes, refers to the bank and not to the bed of a stream.[2] In the strict common law sense, "riparian" means the *ripa* or bank of a stream not navigable,[3] although the term is often used to indicate the banks of a large river, lake, or the sea as riparian property.[4]

2 For definitions of public and private waters, see Secs. 287-291.

For the right of navigation, see Chap. 16, Secs. 341-357.

For irrigation as a riparian right, see Chap. 26, Secs. 498-525.

For rights as between riparian owners and appropriators, see Secs. 810-823.

1 For ownership of the beds of public streams, see Secs. 328-332.

For ownership of the beds of private streams, see Secs. 537, 541.

For rights of riparian owners to fish and hunt on public and private waters, see Chap. 17, Secs. 360-365.

2 For definition of bank, see Sec. 305; Bouvier, Law Dict., Sub. Ripa; Delaplaine v. Chicago & N. W. R. Co., 42 Wis. 214, 24 Am. Rep. 386; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

3 Gough v. Bell, 22 N. J. L. 441, 21 N. J. L. 156.

For the shore, see Sec. 293.

4 Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

See, also, Mobile Transp. Co. v. Mobile, 128 Ala. 335, 30 S. W. Rep. 645, 64 L. R. A. 333, 86 Am. St. Rep. 143; Bardwell v. Ames, 39 Mass. 22 Pick. 333; Potomac Steamboat Co. v. Upper Potomac S. Co., 109 U. S. 672, 27 L. Ed. 1070, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15; French Glenn Live Stock Co. v. Springer, 35 Ore. 312, 58 Pac. Rep. 102, 185 U. S. 47, 46 L. Ed. 800, 22 Sup. Ct. Rep. 563.

The term "riparian proprietor" is used to indicate the owner of the *ripa* or bank bounded upon a water course or lake; Grant v. Hemphill, 92 Iowa 218, 59 N. W. Rep. 263, 60 N. W. Rep. 618; Gough v. Bell, 22 N. J. L. 441, 21 N. J. L. 156.

The words "riparian proprietor" have been carelessly extended from rivers and streams to the shores of the sea. If it is necessary to express the latter by a single adjective, the term "littoral proprietor" is more accurate. Commonwealth v. Roxbury,

Even the ownership of the bed of a stream, by a riparian proprietor, is but one of his riparian rights and grows out of his ownership of the bank. Hence it follows that whether or not a person is the owner of riparian rights depends entirely upon the fact as to whether or not he owns land which is contiguous to and touches upon the water.[5] The ownership of land only under the water does not give such rights.[6] "Riparian rights incident or appurtenant to no land can not exist."[7] And whether the contact with the water be lateral or vertical it is necessary that it should exist.[8] As was said in an early English case, "The rights of a riparian proprietor, as far as they relate to any natural stream, exist *jure naturae* because his land has, by nature, the advantage of being washed by the streams."[9] And, in order for an individual or corporation to own riparian rights, they must not only exist originally, by their land touching upon the stream, but they must also continue to exist in the same condition. Any interruption of the owner's land with the contact with the water will deprive him of his riparian rights. Thus the granting of a strip of land next to the water, or the laying out of a road or highway along the water, the title to which is in the public, will deprive the original owner of his riparian rights.[10] But the rule is otherwise if the fee of the highway remains in the abutting owner.[11] However, ri-

75 Mass. 9 Gray 451, and note; Boston v. Lecraw, 58 U. S. 17 How. 426, 15 L. Ed. 118; Fitzgerald v. Faunce, 46 N. J. L. 566, 17 Vroom 536.

5 Jones v. Johnston, 59 U. S. 18 How. 150, 15 L. Ed. 320; Bates v. Illinois Cent. R. Co., 66 U. S. 1 Black. 204, 17 L. Ed. 158; Clements v. Watkins Land Co., 36 Tex. 339, 82 S. W. Rep. 665; Johnston v. Jones, 1 Black. 209, 17 L. Ed. 117; McCarthy v. Murphy, 119 Wis. 159, 96 N. W. Rep. 531.

6 United States v. Morris, 24 Wash. L. Rep. 168; Lux v Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Weber v. State Harbor. Comrs., 85 U. S. 18 Wall. 57, 21 L. Ed. 798; Page v. Mayor, 10 App. Div. 294, 41 N. Y. Supp. 938; Turner v. People's Ferry Co., 22 Blatchf. 272, 21 Fed. Rep. 90.

7 Lake Superior Land Co. v. Emerson, 38 Minn. 406, 38 N. W. Rep. 200, 8 Am. St. Rep. 679.

8 Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch., N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming *Id.*, 2 Hurlst. & N. 168; Lord v. Commissioners of Sydney, 12 Moore, P. C. C. 473, 14 Eng. Rep. 991.

9 Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

10 Allen v. Munn, 55 Ill. 486.

11 Brooklyn v. Smith, 104 Ill. 429, 44 Am. Rep. 90.

See, also, Boulo v. New Orleans, M. & T. R. Co., 55 Ala. 480; Chesapeake

parian rights may vest in a person who is not the owner in fee of the land adjoining the water, but who is entitled to the exclusive possession of the land. Such a person is entitled to all of the riparian rights incident to the land.[12] Riparian rights also attach to lakes and ponds and are not dependent upon the existence of a current to the water. This subject, however, will be discussed hereafter.[13]

In general riparian rights are incident to the ownership of the banks of a stream, or the shores of some other body of water, which the riparian owner possesses exclusively, distinct from the rest of the public, by reason of the fact that his land is so situated that it touches the waters. All the facilities which the location of his land, with reference to the body of water, affords he has the right to enjoy for the purpose of gain or pleasure, and these oftentimes give property thus situated its chief value. It is evident from the nature of the case that these rights of user and of exclusion are connected with the land itself, grow out of the location, and can not be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark that these riparian rights are not common to the citizen at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. They may and

& O. Can. Co. v. Union Bank, 5 Cranch C. C. 509, Fed. Cas. No. 2654.

See, also, Furman v. New York, 5 Sandf. 16, affirmed in 10 N. Y. 567; People v. New York & S. I. Ferry Co., 68 N. Y. 71; Sage v. New York, 10 App. Div. 294, 41 N. Y. Supp. 938, affirmed in 154 N. Y. 61, 47 N. E. Rep. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592. In the facts of this case it appeared that the colonial governor of New York granted to New York City a strip of land around the entire island upon which the city is located, and the Court held that grants of land made by the King of Great Britain or by persons acting under his authority, before October 14, 1775, were ratified and confirmed by the constitution of 1777.

As to riparian rights on meandered waters, see Secs. 332, 459.

12 Hanford v. St. Paul & D. R. Co., 43 Minn. 104, 42 N. W. Rep. 596, 44 N. W. Rep. 1144, 7 L. R. A. 722; Lake Superior Land Co. v. Emerson, 38 Minn. 406, 38 N. W. Rep. 200, 8 Am. St. Rep. 679.

13 See Secs. 474, 475; Turner v. Holland, 65 Mich. 453, 33 N. W. Rep. 283.

do exist, though the fee in the bed of the river or lake be in the State. If the proprietor owns the bed of the stream or lake this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on the fact.

We find, however, that some of the early authorities hold that riparian rights are not based upon the ownership of the banks, but upon the ownership of the soil under the water. Mr. Angell says that the right of private property in a water course is derived "from, or is embraced by, the ownership of the soil over which it naturally passes."[14] But the better rule and the one which has been almost universally followed in this country, especially in later years, was laid down in Lyon v. Fishmongers' Co.,[15] in which Lord Selborne said: "With respect to the ownership of the bed of the river, this can not be the foundation of riparian rights, properly so called, because the word 'riparian' is relative to the banks, and not the bed, of the stream. . . . It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, *jure naturae*, as vertical."

§ 452. **The nature of riparian rights—Natural rights.**—Under the common law riparian rights are called natural rights, and arise *ex jure naturae*, or from the laws of Nature. They are the rights which the natural position of lands, through or adjoining which a natural stream flows, gives to their owner in and to such water course and to the use of the waters flowing therein. They can only attach to a natural stream which in its natural course flows through the lands to which such rights attach, except under conditions which will be discussed hereafter.[1] As was well stated by the California Court in a recent case, a riparian right "comes from the situation of the land with respect to the water. . . . the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these oppor-

14 Angell on Water Courses, Sec. 5. See, also, 1 Greenleaf's Ed. Cruise's Digest, 39; Buckingham v. Smith, 10 Ohio 288; Trustees etc. v. Dickinson, 9 Cush. 544.

15 L. R. 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

1 For riparian rights to artificial streams, see Sec. 473.

tunities, advantages, and benefits." And, speaking of the relative rights between riparian owners, the Court said: "One has as clear a right as the other to the natural advantages of his situation," etc.[2] Again, these natural advantages in the form of riparian rights attach not only to streams and water courses, but also to natural lakes and ponds. As was said by Mr. Justice Bradley in rendering the opinion of Hardin v. Jordan:[3] "As many features of the common law with regard to the rights of riparian owners were borrowed from the civil law,[4] it would not be strange if the rule relating to lakes and ponds came from the same source. It was recommended by the same reasons that applied to fresh-water rivers and streams. When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it."[5]

But whether it is upon a natural water course or stream, a lake, or a pond upon which the land touches, whether it be under the old English rule or the more modern American rule, it must be remembered that riparian rights, under the common law, are the natural advantages to the owner of such land, which spring from the natural situation of such land upon such waters.[6] As was stated in a leading English case upon the subject: "The rights of a

2 Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S. 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

See, also, Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

"The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturae*," etc. Washburn on Easements and Servitudes, 4th Ed., p. 316.

For the riparian right to the natural flow of the water, see, also, Secs. 543-547.

3 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, rev'g 16 Fed. Rep. 823.

4 Citing Hale, De Jure Maris, Pt. I, Chap. 6, p. 28.

For the civil law, see, also, Chaps. 29, 30, Secs. 552-569.

5 See, also, for riparian rights on lakes and ponds, Secs. 474, 475, 541.

See, also, Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Turner v. Holland, 65 Mich. 453, 33 N. W. Rep. 283.

6 See Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming 2 Hurlst. & N. 168, 11 Eng. Reprint 140; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Shury v. Piggott, 3 Bulstrode 339, Phopham 169, 79 Eng.

riparian proprietor, so far as they relate to any natural stream, exist *jure naturae* because his land by Nature has the advantage of being washed by streams; and if the facts of Nature constitute the foundation of the right, I am unable to see why the law should not recognize fully the course of Nature in every part of the same stream."[7] And in another English case it was stated: "The right to running water has always been properly described as a natural right, just like the right to the air we breathe; they are the gifts of Nature, and no one has the right to appropriate them."[8] And in still another English case: "A water course begins *ex jure naturae,* and having taken a certain course, it can not be diverted."[9]

§ 453. The nature of riparian rights—They are property and a part of the land itself.—"Riparian rights," according to the strict meaning of the phrase, are such as follow or are connected with the banks of streams or rivers.[1] These rights are a species of property, which belong to the owner of the bank or banks of a stream, and do not depend upon the fact as to whether or not he is the owner of the bed;[2] neither do they depend at all upon the fact as to whether the owner actually uses any of his rights or not,[3] provided he has not lost any of them through grant or prescription.[4]

Reprint 1263, 81 Eng. Reprint 280; Dalton v. Angus, L. R. 6 App. Cas. 740; Backhouse v. Bonomi, 9 H. L. Cas. 513, 11 Eng. Reprint 825; Stockoe v. Singer, 8 El. & Bl. 31; Bealey v. Shaw, 6 East 208, 2 Smith 321, 102 Eng. Reprint 1266; Indianapolis W. Co. v. Baker, 53 Fed. Rep. 970; Lake Superior Land Co. v. Emerson, 38 Minn. 406, 38 N. W. Rep. 200, 8 Am. St. Rep. 679; Merritt v. Parker, 1 Coxe's Rep. (N. J.) 460.

7 Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

8 Chasemore v. Richards, *supra.*

9 Shury v. Piggott, 3 Bulstrode 339, Phopham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280.

1 Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 746.

2 Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

"The Martin ranch abutted upon the stream and the riparian rights attaching to said lands by reason of this contiguity were paramount to the rights of any appropriator." Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866.

3 Corning v. Troy Iron etc. Co., 40 N. Y. 191, 39 Barb. 311; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201.

4 For the acquisition of riparian rights by prescription, see Secs. 1039, 1041.

More of these rights attach to what are known as non-navigable or private waters, than attach to navigable or public waters, for the reason that the most of these rights go to the public in public waters.[5] The riparian rights of persons owning land fronting on navigable waters are defined by the Supreme Court of the United States to be ownership of the beds of the waters, in those States where the local law permits it; exclusive access to the navigable part of the water from the front of his land; and the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature of the State may see proper to impose for the protection of the rights of the public, whatever those rights may be.[6]

Unlike the rights acquired to the use of water under the Arid Region doctrine of appropriation, riparian rights require no act upon the part of the owner, with the exception of the acquisition of the land adjoining such waters.[7] These rights, in those jurisdictions where the common law is followed in this respect, are attached to the land itself and are a part and parcel of it. As an incident to such estate they pass by a deed to the land, unless specifically reserved by the grantor. They are not easements or appurtenances to the land, but are "as much a part of the soil as the stones scattered over it."[8] Or, as stated in still stronger terms by Professor Pomeroy, who contended so strenuously for the application of the law of riparian rights in this Western country, in his work upon that subject: "The use of the stream, and the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, moreover, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility."[9] With all due respect for the learning of Professor Pomeroy, his state-

[5] For definitions of public and private waters, see Secs. 292, 323.

[6] Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. Ed. 984.

See, also, Delaplaine v. Chicago & N. W. R. Co., 42 Wis. 214, 24 Am. Rep. 386; North Hempstead v. Gregory, 66 N. Y. Supp. 28.

See Public Rights in and to Waters, Secs. 324-389.

[7] For the Arid Region doctrine of appropriation, see Chap. 31, Secs. 585-594.

[8] Angell on Water Courses, Sec. 5.

[9] Pomeroy on Riparian Rights, Sec. 152.

ments must be taken with the allowance that he argued the question from the strict construction of the common law. As we shall show in this work, legislation has changed these rights and is constantly changing them, as is the case of the recent statutes of Washington and Oregon, limiting these rights;[10] and, in many of the Western States, the common law of riparian rights has been entirely abrogated.[11]

See, also, Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 753, wherein it is said: "The right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it. Use does not create the right, and disuse can not destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned. The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturae*, and is an incident of the property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring land owner. It is an inseparable incident to the ownership of the land, made by an inflexible rule of law and absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." Washburn on Easements and Servitudes, 4th Ed., pp. 316, 317.

See, also, Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Penobscot Co. v. Inhabitants of Bradley, 99 Me. 263, 59 Atl. Rep. 83; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Johnson v. Jordan, 2 Met. 234, 37 Am. Dec. 85; Ormerod v. Todmorden Joint Stock Mill Co., L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week. Rep. 759, 47 J. P. 532; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; *Id.*, 2 Sawyer 450, Fed. Cas. No. 14371; Cary v. Daniels, 49 Mass. 8 Met. 466, 41 Am Dec. 532; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A. N. S. 391; Anderson v. Bassman, 140 Fed. Rep. 14; Southern California etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Rianda v. Watsonville etc. Co., 152 Cal. 523, 93 Pac. Rep. 79; Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Shamleffer v. Council etc. Co., 18 Kan. 24, 26 Am. Dec. 765; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Northern California etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Dalton v. Bowker, 8 Nev. 190; Elliott v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

10 For which see Part XIV.

11 See Secs. 588-594.

Riparian rights are generally regarded as property and of value, of which the riparian owner can not be deprived at all for the private use of another, nor for public use, except by due process of law,[12] and without receiving just compensation.[13] The common law of riparian rights may be abolished either by a constitutional provision or by a legislative enactment.[14] But such a provision can not have the effect of abolishing those rights which had already vested at the time of its adoption.[15]

§ 454. Nature of riparian rights—As hereditaments.—There has been considerable discussion as to whether a riparian right

12 See Eminent Domain, Secs. 1059-1098.

13 As was said by Mr. Justice Miller in delivering the opinion of the Court in Yates v. City of Milwaukee, 77 U. S. 10 Wall. 497, 19 L. Ed. 984, "This riparian right is property and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it can not be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

See, also, Morrill v. St. Anthony Falls Water Power Co., 26 Minn. 222, 2 N. W. Rep. 842, 37 Am. Rep. 399; Hollingsworth v. Tensas, 17 Fed. Rep. 109, 4 Woods 280; Miller v. Mendenhall, 43 Minn. 95, 44 N. W. Rep. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219; Hanford v. St. Paul & D. R. Co., 43 Minn. 104, 42 N. W. Rep. 596, 44 N. W. Rep. 1144, 7 L. R. A. 722; Keyport & M. P. S. B. Co. v. Farmers' Transp. Co., 18 N. J. Eq. 13, affirmed in 18 N. J. Eq. 511; Brisbine v. St. Paul & S. C. R. Co., 23 Minn. 114; Carli v. Stillwater St. R. & Trans. Co., 28 Minn. 373, 10 N. W. Rep. 205, 41 Am. St. Rep. 290; Union Depot St. R. & Trans. Co. v. Brunswick, 31 Minn. 297, 17 N. W. Rep. 626, 47 Am. Rep. 789; Clement v. Burns, 43 N. H. 609; Green Bay & M. Canal Co. (Patten Paper Co. Ltd.) v. Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. Rep. 1121, 63 N. W. Rep. 1019, 28 L. R. A. 443, 48 Am. St. Rep. 937; *Id.*, 93 Wis. 283, 66 N. W. Rep. 601, 67 N. W. Rep. 432; Fuller v. Shedd, 161 Ill. 462, 44 N. E. Rep. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; Parker v. West Coast Packing Co., 17 Ore. 510, 21 Pac. Rep. 822, 5 L. R A. 61; Sullivan Timber Co. v. Mobile, 110 Fed. Rep. 187; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718, 18 L. R. A. 679; Lake Superior Land Co. v. Emerson, 38 Minn. 406, 38 N. W. Rep. 200, 8 Am. St. Rep. 679; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

14 See Secs. 588-594.

For the dedication of waters by a State to the State or public, see Secs. 372-389.

15 Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798, 64 N. W. Rep. 239; Crawford Co. v. Hall, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Biglow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570; Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912.

was a corporeal or incorporeal hereditament. Mr. Angell says: "The right of property in a water course is derived, as a corporeal hereditament, from, or is embraced by, the ownership of the soil over which it naturally passes."[1] In the first place, this is not the generally accepted doctrine upon the subject of the right of property in water courses, or riparian rights as they are commonly termed. These rights, as we have discussed in previous sections, do not spring from the ownership of the soil under the water, but the ownership of the banks or sides of the water course or stream.[2] However, it may follow that by the ownership of the bank or side of a stream one of the riparian rights which attach to the land is the title to the soil over which the water flows.[3] This soil is land, and consists of a substantial, tangible, and permanent object. And, therefore, as to this particular riparian right, it must be held to be a corporeal hereditament. But, upon the other hand, those riparian rights, which are simply usufructuary in their nature and are without any substantial, tangible body, but are intangible in substance, are incorporeal hereditaments appertaining to the freehold. Such, for example, would be the right to the use of the water of the stream or the right of fishery.[4] This was the holding of the New York Court, where the owner of certain lands had the right to the use of the waters of a pond adjoining. The riparian right to the use of the water was held to be incorporeal and an appurtenance to the land, and hence should be taxed as a part of it in the town where the land lay.[5]

§ 455. The nature of riparian rights—The riparian owner's property in the water itself is merely usufructuary.—One of the most important rights which a landowner has by virtue of his riparian ownership is the right to the use of the water as it flows

1 Angell on Water Courses, 7th Ed., Sec. 5.

2 Upon what riparian rights are based, see Secs. 451, 452.

3 For the ownership of the beds of navigable streams, see Secs. 328-332.

For the ownership of the beds of private streams, see Secs. 330-332.

4 Washburn on Easements, 307; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Slack v. Walcott, 3 Mason 508, Fed. Cas. No. 12,932; Shury v. Piggott, 3 Bulstrode 339, Phopham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280; *In re* Hall, 116 App. Div. 729, 102 N. Y. Supp. 5; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Dec. 659.

5 *In re* Hall, 116 App. Div. 729, 102 N. Y. Supp. 5.

by his land. Although this is a property right, accorded to him by virtue of the natural position of his land upon the stream, as in the case of public waters,[1] this property right is in its nature usufructuary. A riparian owner has no absolute title to the water itself of a stream as it flows by his land. He may, however, have the right to apply it to certain uses. As Blackstone tersely says: "For water is a movable, wandering thing, and must of necessity continue common by the law of Nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immovable, and, therefore, in this I may have a certain substantial property, of which the law will take notice, and not of the other."[2]

All the riparian owners, through or by the side of whose land a stream naturally flows, may enjoy the privilege of using it. Hence it follows that rights, which are enjoyed by an indefinite number of persons, cannot be absolute as to any particular right, but must be relative or correlative as to all the owners on the stream.[3] The rights of all riparian proprietors upon a stream are equal; there-

1 See Secs. 287-291.

2 2 Blackstone Com. 18.

For the riparian owner's right to use the water, see Secs. 483-497.

For irrigation as a riparian right, see Chap. 26, Secs. 498-525.

That the right of a riparian owner to the water is merely usufructuary, see Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390, wherein it is said: "The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right, a right amongst others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the channel, that it may flow on in the accustomed mode to lands below. If his needs do not prompt him to make any use of them, he still has the right to have them flow on to and along and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of upper owners and riparian proprietors."

In Lux. v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, it is said: "As to the nature of the riparian owner in the water, by all modern as well as ancient authorities, the right in the water is usufructuary, and consists not so much in the fluid itself as in its uses."

See, also, Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312.

See, also, cases cited below.

3 Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 681, 10 Ch. 679, 44 L. J. Ch., N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

fore, one proprietor, though he has the undoubted right to use the waters of a stream for the purpose of generating power as it passes his land, yet he must so use it as to do no injury to any other proprietor.[4] In fact, the water must be so used by any one that no injury will result to the other owners or to any one of the other owners.[5] This is the necessary result of the perfect equality of right among all of the proprietors. Thus each proprietor upon a stream may insist that its waters shall flow to his land in the usual quantity, in its natural channel, and that it shall flow off his land to his neighbor below, in its accustomed place and at its usual level.[6] The riparian owners also have some duty to the public. While the rights of the riparian owners can not be destroyed by the public without just compensation, they are always subordinate to the public rights, and the State has the power to regulate their exercise in the interest of the public. A riparian owner can not change the natural conditions of the stream where it interferes with the public rights, any more than he can where the interference is to the rights of the other riparian owners.[7]

As against the rights of other owners or those of the public, the right of one riparian owner to the use of the waters of a stream flowing by or through his land has been compared to the right which he has in the fish swimming therein. He has no title to them until they have been captured and reduced to his possession. So, too, he has no title to the water while it remains flowing in the stream. And, as to both the right to the use of the water and the right to take the fish swimming therein, it is within the police powers of the State to regulate.[8] As was well stated by the New Hampshire Court, in a leading case upon the subject: "This right in the owner of the land must be regarded as qualified to a certain extent by the universal principle that all property is

4 For appropriation of water for power purposes, see Secs. 847-855.

5 2 Hen. IV, 11 B, 22 Hen. VI, 14 Rol. Abr. 107; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312.

6 For right to natural flow of water, see Secs. 543-547, 549.

7 Sage v. New York City, 154 N. Y. 61, 47 N. E. Rep. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592, affirming 10 App. Div. 294, 41 N. Y. Supp. 938; Miller v. Mendenhall, 43 Minn. 95, 44 N. W. Rep. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219.

See, for rights of public in waters, Chap. 15, Secs. 324-340.

8 For the power to regulate the right of fishery, see Secs. 369, 370.

For the power of a State to regulate the use of water, see Secs. 593, 1338-1341.

held subject to those general regulations which are necessary to the common good and general welfare, and to that extent it is subject to legislative control. It is a well established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that the use of it shall not be injurious to the equal enjoyment of others having the equal right to the enjoyment of their property, nor injurious to the rights of the public."[9] Also the California Court, in deciding the validity of a statute prohibiting the destruction of fish, held to the same effect and said: "Even, therefore, if, as contended by the defendant, the lands through which the stream flows are to be presumed, in the absence of contrary averment, to be owned in private ownership, it can make no difference as to the right here asserted. While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he can not lawfully kill or obstruct the free passage of those not taken."[10] So, also, it may be said regarding the rights in and to the waters of a stream of one riparian proprietor, he has no ownership in the waters as they flow by his land. He has but the right to their use. And he must so use them that his use will not injure the equal rights of other riparian proprietors upon the same stream, or the rights of the public.[11]

In an early California case, holding that the Government was a riparian owner in the streams flowing over the public lands, it was said: "It is contended that the principle embodied in the instruction is in direct conflict with this doctrine, and that it can only be maintained upon the theory of a private ownership in the water itself. This position is clearly untenable. If the Government, which in this instance is the riparian proprietor, had granted to the defendants the right to divert from the creek a given quantity of water, without restriction as to the place of diversion, it

[9] State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199.

[10] People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183.

For the right of fishing and hunting, see Chap. 17, Secs. 358-371.

[11] For the rights of the public in water and water courses, see Part IV, Chaps. 15-18.

is clear that the right could be exercised at any point on the stream, though the effect of the grant would not have been to convey any property in the *corpus* of the water, for no such property is vested in the Government." [12]

§ 456. **The nature of riparian rights—Deprivation of right.**—From the principles discussed in the last sections of this chapter,[1] it may be seen that the right of a riparian owner in and to the water course and the use of the water flowing therein spring from the natural situation of such land upon such stream;[2] that it is a species of property and a part and parcel of the land itself;[3] that as far as the use of the water is concerned it is incorporeal in its nature;[4] and that he does not own the water flowing by his land, but simply has the right to its reasonable use.[5] These property rights are a part and parcel of the freehold of which no man, in whom the title to the same has vested, can be disseized but by a lawful judgment of his peers, by due process of law, and upon just compensation.[6] Still no action will lie to recover the possession of a water course, by that name, or for the recovery of the water itself, as for so many cubical yards or for so many acres of water; but, as Blackstone states, the action must be brought for so many acres of land covered by water.[7] Neither can an appropriator sue for the value of water at so much per inch or gallon wrongfully diverted from the stream above him by another; he must sue for the damage to his enterprise from loss of the use and flow.[8]

12 Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

1 See Secs. 451-455.

2 See Secs. 451, 452.

3 See Sec. 453.

4 See Sec. 454.

5 See Sec. 455.

See, also, Secs. 288, 289.

6 For the taking of riparian rights by the power of eminent domain, see Secs. 1088-1091.

For the sale and conveyance of riparian rights, see Secs. 526-535.

See, also, Gardner v. Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526, where it was held that, although the legislature has power to take private property of this kind for useful and necessary purposes, it is bound to provide for fair compensation to the individual whose property is taken, and until a just indemnity is afforded, the power can not be legally exercised.

See, also, Beidelman v. Foulk, 5 Watts. 308 (Pa.).

7 2 Blackstone Com. 18; Runnington on Eject. 131.

8 See Remedies, Chaps. 78-83.

CHAPTER 22.

UPON WHAT LANDS RIPARIAN RIGHTS ATTACH.

§ 457. Scope of chapter.
§ 458. What are riparian lands—Extent—Side toward the stream.
§ 459. Riparian rights on meandered waters.
§ 460. What are riparian lands—How far from the stream such land may extend.
§ 461. Extent of riparian lands—The land must be under one ownership.
§ 462. Extent of riparian lands—All lands must lie within the same watershed.
§ 463. Extent of riparian lands—Lands claimed as riparian must be reasonable in extent.
§ 464. Extent of riparian lands—Rules based upon the sources of titles.
§ 465. Extent of riparian lands—Rule that all lands in common ownership at time of claim are riparian.
§ 466. The character of lands to which rights attach.

§ 457. Scope of chapter.—As we have discussed in previous sections of this work, lands, in order to be riparian, must border or touch upon the waters of a stream or other body of water; or, in other words, the riparian owner must own the banks of the stream in order for his lands to be riparian.[1] And, in the preceding chapter, having discussed the nature of the common law of riparian rights,[2] in the present chapter we will further discuss the subject as to what are riparian lands and their extent, or to what lands riparian rights attach.[3]

§ 458. What are riparian lands—Extent—Side toward the stream.—As we have stated before, riparian lands are those only which border or touch upon the waters of a stream, or other natural bodies of water.[1] They must include the *ripa* or bank of the water course or stream, or other body, and come down to the very edge of the water itself.[2] According to the laws of the State where the question arises, riparian lands may or may not include the soil under the water. If it does include this soil, it is only as one of the riparian rights which attach to the land by virtue of

1 See Secs. 451, 452.
2 See Chap. 21, Secs. 450-456.
3 See Secs. 458-466.

1 See Secs. 451, 452.
2 For the essential elements of a water course, see Secs. 301-307.

the ownership of the bank.[3] It must be remembered that riparian rights in no way depend upon the ownership of the soil over which the water flows, *but upon the bank or banks down to the very edge of the water itself.* Upon this subject a leading English case held that rights attached to riparian ownership depend solely upon the lateral contact of the land with the water, and not upon the ownership of the soil under the water. And, as to the lateral contact of the land with the water the Court assumed that, in England at least, it was the settled law that it must exist, by saying: "It is, *of course,* necessary to the existence of a riparian right that *the land should be in contact with the flow of the stream.*"[4] Again, as was held by the Supreme Court of Florida in an early case: "In order for one to have riparian rights there must be an actual water boundary of the land in connection with which such rights are claimed."[5] Laterally, or up and down the stream, the riparian lands of any owner extend as far as his lands extend.

[3] For the ownership of the beds of public waters, see Secs. 325-333.

For the ownership of the beds of private waters, see Secs. 535, 541, 542.

[4] Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 682, opinion of Lord Selborne.

See, also, for riparian right of access to the stream, Secs. 335, 336.

[5] Sullivan v. Moreno, 19 Fla. 200.

See, also, Axline v. Shaw, 35 Fla. 305, 17 So. Rep. 411, 28 L. R. A. 391, wherein it is said: "There is a manifest difference between land bounded by the lake itself, and bounded by the shore of the lake. Bounded by navigable water, the lake, or stream, the law extends the boundary to the edge of the channel. If bounded by the shore or bank, the land does not reach the water, but is limited to the upland." Clement v. Burns, 43 N. H. 609; Nickerson v. Crawford, 16 Me. 245; Chapman v. Edmands, 3 Allen 512 (Mass.); Niles v. Patch, 13 Gray 254; Buchanan v. Ingersoll etc. Co., 30 Ont. Rep. 456; Stockport Waterworks Co. v. Potter, 7 Hurlst. & N. 160, 31 L. J. Exch. N. S. 9, 7 Jur. N. S. 880; *Id.*, 3 Hurlst. & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748; Ventura L. & P. Co. v. Meiners, 136 Cal. 284, 68 Pac. Rep. 818, 89 Am. St. Rep. 128; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, where it was held that swamp land through which there was a current of water was not riparian land, and in order to be such there must be a bank touching upon the water, and that the beds of streams were not riparian lands.

Where a boundary is limited "to the bank of the stream," it necessarily excludes the stream itself. Hatch v. Dwight, 17 Mass. 289, 10 Am. Dec. 145; Daniels v. Cheshire R. Co., 20 N. H. 85.

"But it is clear that, if the whole tract owned by the defendants is riparian land, this is so because the stream crosses the tract at a point in

The facts that land which forms a part of a wide bottom extending between higher lands or bluffs on each side, that the course of the river channel is subject to changes by unusual floods, and that the land is all underlaid by an underground flow, in contact with and forming a part of the surface stream, are held not to make the land nonriparian.[6] Again, the altitude of the land above the water, which makes it impossible to use the water thereon, except by means of pumps, does not make the land nonriparian.[7] It therefore follows that, as contact with the water is absolutely necessary to the existence of riparian land, if any supervening right is interposed, so as to cut off this contact, lands which were formerly riparian cease to be such, and the riparian rights attach themselves only to the supervening right.[8] Such, for example, would be the sale of a strip of land along the water's edge. Likewise, it is the rule that any land which formerly belonged to a riparian tract, and which is cut off by sale from the portion abutting upon the water, loses its riparian rights.[9] There is, however,

the extreme southeast corner thereof. The stream does not touch the defendants' land at any other point. The tract is therefore riparian to the stream at that point only. The mere fact that a tract of land touches a stream at one point does not make such land riparian at other points on the stream, or to the whole of the stream. The riparian right of such land, or the owners thereof, is confined to the points where the land abuts upon the stream." Miller v. Baker, — Wash. —, 122 Pac. Rep. 604.

[6] Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S. 1062, where it is said: "We are of the opinion that land thus situated is not to be distinguished from other land abutting on the stream, so far as the right of the owner to the reasonable use of the water is concerned. We know of no principle of riparian right that would except such land from its benefits, nor from any decision to that effect.

See, also, Ventura etc. Co. v. Meiners, 136 Cal. 284, 68 Pac. Rep. 818, 89 Am. St. Rep. 128, holding that land may be riparian to a stream, although it does not abut thereon except when the stream is swollen by floods.

[7] Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195, the Court saying: "But it must necessarily be true, from the very nature of the right, that in no case can one proprietor be deprived of this just and equal proportion merely because his land, by reason of its altitude or level above the stream can not be irrigated by the same method employed on some other land."

See, also, for what lands may be irrigated as a riparian right, Secs. 514-516.

[8] See, also, for the side toward the land, Secs. 460-466.

[9] For extent of land which may be considered riparian back from the stream, see Secs. 463-465.

one exception to the above rule, and that is in the States where levees are constructed by the public along the rivers to retain the waters in their channels. These being improvements upon the water courses arising from the necessities of the case, it is held that the lands which touch upon the levees are riparian lands to the river, and that, too, whether the title to the levee is in the State or public, or whether the public simply has an easement over it.[10]

§ 459. **Riparian rights on meandered waters.**—As we have said in previous sections, when the Government sells a tract of land within a State, bordering upon a meandered navigable stream, or other body of water, it has then parted with all the title to the lands down to and including the bed of the water. The bed of the stream or water vested in the State upon its admission to the Union; the upland, down to the high-water line, within the boundaries of the grant, passed to the grantee, as far as the Government was concerned, and even to the thread of the stream if the rule of the State so provided.[1] The title to the beds of public streams and other bodies of water has been sufficiently discussed, together with the rules adopted in the different States.[2] There is, however, one subject which we will touch on here, and that is, as to who is the owner of the land between the meandered line of a stream or body of water and the high-water line of the water itself. It has often happened, through various causes, that there is a strip of land between the meander line and the high-water mark, and this strip is neither the bed of the stream, nor included within the land described in the patent from the Government. This proposition has led to a great deal of discussion in the Courts as to whom this strip belonged—the United States, the State, or the grantee from the Government. The Government can not claim it, as it had granted all of its title, even including the bed of

For the right to irrigate riparian land, see, also, Secs. 514-516.

10 Henderson v. Mayor of New Orleans, 3 La. Ann. 563; Bass v. State, 34 La. Ann. 494; Hart v. Board of Levee Commissioners, 54 Fed. Rep. 559.

1 For title to beds of streams upon admission, see Secs. 329-332.

For meandered bodies of water, rights of public in, see Sec. 332.

For ownership of beds of streams and other bodies of water, see Secs. 325-332, 537, 541, 542.

2 See sections cited, *supra*.

the stream, provided, of course, the land lies within a State.[3] If, however, the land is in a Territory, the United States still retains the title to the beds of the streams. The title to this strip, then, lies between the State and the grantee of the Government. And upon this question the rule is well settled that the meander line is not to be treated as the boundary line of the land granted, but is to be treated as simply a line run to show the sinuosities of the stream or other body of water,[4] and that the body of the water is the true line of the land granted by the Government.[5]

This rule is based upon the oftentimes fiction that the meander line as shown upon the plats of the Government survey conforms strictly to the high-water line of the stream as it actually exists. And the Courts take the generous position that the Government, having represented to the settler by its surveys and plats that the high-water line and the meander line were identical, and that in purchasing the land the settler was led to believe that he was

[3] See Secs. 331, 332.

[4] St. Paul & P. R. Co. v. Schurmeir, 74 U. S. 7 Wall. 272, 19 L. Ed. 74; 10 Minn. 82, 88 Am. Dec. 59.

[5] See Sec. 332; Jefferis v. East Omaha Land Co., 134 U. S. 178, 33 L. Ed. 872, 10 Sup. Ct. Rep. 518, where the Court held that meander lines are run in surveying public lands bordering upon navigable streams, not as boundaries of the tract, but to ascertain the quality of the land subject to sale; and the water course, and not the meander line, as actually run on the land, is the true boundary of the land.

See, also, Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 442, 11 Sup. Ct. Rep. 819; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, rev'g 16 Fed. Rep. 823; Stoner v. Rice, 121 Ind. 51, 22 N. E. Rep. 968, 6 L. R. A. 387; Poynter v. Chipman, 8 Utah 442, 32 Pac. Rep. 690; Knudsen v. Omanson, 10 Utah 124, 37 Pac. Rep. 250; Maynard v. Puget Sound Nat. Bank, 24 Wash. 455, 64 Pac. Rep. 754; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541, where the Court said: "The owners of banks bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land." If the rule were otherwise, "it would simply open the doors for prowling speculators to step in and acquire title from the State to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water."

See, also, Tolleston Club v. State, 141 Ind. 197, 38 N. E. Rep. 214, 40 N. E. Rep. 690; Sizor v. Loganport, 151 Ind. 626, 50 N. E. Rep. 377, 44 L. R. A. 814; Fuller v. Dauphin, 124 Ill. 542, 16 N. E. Rep. 917, 7 Am. St. Rep. 388; Kraut v. Crawford, 18 Iowa 549, 87 Am. Dec. 414; Provins v. Levi, 6 Okla. 941, 50 Pac. Rep. 81; Johnson v. Tomlinson, 41 Ore. 198, 68 Pac. Rep. 406.

purchasing water frontage, with all the rights thereunto appertaining, did actually purchase to the high-water line, although there might be a considerable strip of land between the meander line and the high-water line, not included in the acreage sold, or paid for by the settler.[6] So a settler purchasing land upon a navigable stream, or other body of water, from the Government, receives a title at least to the high-water line, and, in some States, further than this line and to the center of the stream, if the law of the State permits it,[7] even if in so doing this includes more land than is included within the survey of the tract, and more than the settler pays the Government for, provided that the land included in the strip between the meander line and the natural boundary of the stream is much smaller in proportion than the land granted, and to such lands all riparian rights attach, which are allowed by the laws of the State wherein the land is situated.[8] Where, however, the land in the strip is much larger than the land granted, and it was the evident intent of the Government to limit the land with the meander line, or in case where there was gross fraud or mistake, then the land is limited with the meander line.[9] So, the settled rule is, that if the United States has disposed of lands bordering upon a meandered nonnavigable water course or lake by a patent containing no reserva-

6 Schlosser v. Cruickshank, 96 Iowa 414, 65 N. W. Rep. 344; Kirwin v. Murphy, 103 Fed. Rep. 104, 83 Fed. Rep. 275 28 C. C. A. 348, 49 U. S. App. 658, App. Dis. 170 U. S. 205, 18 Sup. Ct. 592, 42 L. Ed. 1009; Heald v. Yumisko, 7 N. D. 422, 75 N. W. Rep. 806.

7 Illinois & M. Canal v. Haven, 10 Ill. 548, Middleton v. Prichard, 4 Ill. 510, 38 Am. Dec. 112; Jones v. Pettibone, 2 Wis. 308; McBride v. Whittaker, 65 Neb. 137, 90 N. W. Rep. 966, affirmed 197 U. S. 510, 49 L. Ed. 857, 25 Sup. Ct. Rep. 530; Johnson v. Johnson, 14 Idaho 561; 95 Pac. Rep. 499, 24 L. R. A., N. S. 1240.

8 For the States abolishing riparian rights, see Secs. 507, 621.

9 Fuller v. Shedd, 161 Ill. 462, 44 N. E. Rep. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; Grant v. Hemphill, 92 Iowa 218, 59 N. W. Rep. 263, 60 N. W. Rep. 618; Glenn v. Jeffrey, 75 Iowa 20, 39 N. W. Rep. 160; Barnhart v. Ehrhart, 33 Ore. 274, 54 Pac. Rep. 195; Little v. Pherson, 35 Ore. 51, 56 Pac. Rep. 807; Lammers v. Nissen, 4 Neb. 245, affirmed 154 U. S. 650, Appendix, 14 Sup. Ct. Rep. 1189, 25 L. Ed. 562; Bissell v. Fletcher, 19 Neb. 725, 28 N. W. Rep. 303; Boynton v. Miller, 22 Iowa 579; Johnson v. Knott, 13 Ore. 308, 10 Pac. Rep. 418; Niles v. Cedar Point Club, 85 Fed. Rep. 45, 29 C. C. A. 5, 54 U. S. App. 668; Smith v. Miller, 105 Iowa 688, 70 N. W. Rep. 123, 75 N. W. Rep. 499.

tions, and there is nothing else indicating an intention to withhold title to the lands within the meander lines, the Government has nothing left to convey, and whether the title to the bed of the waters is in the State or passes to the grantee is determined by the local law of the State wherein the land lies.[10]

§ 460. **What are riparian lands—How far from the stream such land may extend.**—Upon the question as to how far back from a certain stream, or other body of water, lands may extend and still retain their riparian character, there are certain propositions that are well settled and others concerning which there is a conflict of authority. In general it may be said that the rules are fixed by the law of the particular State where the rights are claimed, it being within the jurisdiction of the Courts of that State to settle and determine any such disputed question, and it also being within the powers of the legislature of such State to limit the extent of riparian rights within the State or to abolish them entirely.[1] Those that are settled and upon which it may be said that the authorities agree are: First, the land at the time the riparian rights are claimed must be held in common ownership;[2] second, that all riparian lands to a certain stream must lie within the watershed of that stream;[3] third, if the use for which the water is claimed consumes the water, the extent of land must be reasonable with reference to the lands of other proprietors whose lands are also riparian to the same stream.[4]

The proposition upon which there is the most conflict of authority is whether or not at the time of the claim for the use of the water is made, the land in question was acquired at one time, or by one entry, or whether the land is an accumulation of various tracts, one of which only touches upon the stream, and which tracts were acquired at different times and through different sources of title by the then owner. These propositions will be discussed in the following sections, in the order named.[5]

10 Harrison v. Fite, 148 Fed. Rep. 781, 78 C. C. A. 447; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171, 20 Sup. Ct. Rep. 124; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541.

1 For the abolition of riparian rights, see Secs. 585-594.

2 See Sec. 461.

3 See Sec. 462.

4 See Sec. 463.

5 See Secs. 461-463.

§ 461. Extent of riparian lands—The land must be under one ownership.—One of the propositions which is well settled by all of the authorities as to the extent of riparian lands back from the water front is that, at the time of the claim to riparian rights, the lands, in order to be riparian, must be under one or a common ownership. They must all be owned by the same individual, corporation, or company; and that, too, regardless of the source or different sources of the title to such lands.[1] Therefore, if the riparian lands are segregated at right angles with the stream, or from the stream back to its outermost boundary at any angle, so that each portion still retains a frontage or access upon the stream, each portion takes its proportion of all of the riparian rights which were formerly attached to the whole tract, and which are allowed under the laws of the State where the land is located, unless there should be some specific reservation made in the deed of conveyance.[2] In this case none of the lands lose any of their riparian rights.

But, upon the other hand, as riparian rights grow out of the fact of the ownership of the bank of the stream, or that of some other natural body of water, and that the land has a direct access to the water itself, any lands which are back from the stream, the title to which is in one other than the riparian owner and do not have this access, although they may directly adjoin, and be in the same watershed with the lands which are actually riparian, are not themselves riparian.[3] It therefore follows that if riparian lands are segregated parallel with the stream, or if any portion is sold which does not have a frontage or direct access to the water,

1 For lands acquired under different sources of title, see Sec. 464.

2 For the conveyance of riparian rights, see Secs. 526-536.

3 That riparian lands depend upon the natural situation upon the stream, see Secs. 451, 452.

That lands in order to be riparian to a certain stream must be within the same watershed, see Sec. 462.

Riparian lands are dependent upon the ownership of land which is contiguous to and borders upon the water, and they do not attach to any lands, however near, which do not extend to the water. Ketchikan Co. v. Citizens' Co., 2 Alaska 120; Stockport Waterworks Co. v. Potter, 3 Hurlst & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748, affirmed in 7 Hurlst. & N. 160, 31 L. J. Exch. N. S. 9, 7 Jur. N. S. 880; Omerod v. Todmorden Stock Mill Co., L. R. 11 Q. B. Div. 155, 52 L. J. Q. B. N. S. 445, 31 Week. Rep. 759, 47 J. P. 532; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

that portion so segregated loses all of its riparian rights, and the portion retaining the frontage retains all of such rights, at least during the period of such segregation. As stated by the Supreme Court of California upon the subject: "If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary."[4] And in a leading English case upon the subject it was held that the rights of a riparian proprietor can not be transferred to one who is not a riparian proprietor without transferring some of his land abutting on the river, as the riparian rights are entirely derived from his possession of the land abutting on a river.[5] As to whether or not such lands so cut off from access to the stream may recover their riparian rights by a repurchase by the owner of the lands actually riparian is a disputed question, and the rule is different in the different States, and will be discussed later.[6]

§ 462. **Extent of riparian lands—All lands must lie within the same watershed.**—As has been stated before, riparian rights attach to lands from the natural situation of such lands upon the water.[1] They must also be held by one or a common ownership.[2] However, if lands held in common ownership and bordering upon a certain stream are divided by Nature, so that a portion of them

[4] Anaheim Union W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S. 1062. "The severance, under such circumstances, would cut off such tract from the riparian right." Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

[5] Stockport Waterworks Co. v. Potter, *supra*. The decision in this case was also followed and approved in Ormerod v. Todmorden Joint Stock Mill Co., *supra;* Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

Where a tract of land not contiguous to the stream is severed from the main tract bordering on the stream, the fact that it was a part of a ranch to which riparian rights extended while the ownership was continuous from it to the banks of a stream would not preserve such right to the severed tract. "The severance under such circumstances would cut off such tract from the riparian right." Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

[6] See Secs. 464, 465.

[1] See Secs. 451, 452.

[2] See Sec. 461.

are cut off and lie in another watershed, such lands are not riparian to such stream. They belong to the lands of the other watershed, and, in turn, may or may not be riparian to the stream which drains such watershed, depending, of course, as to whether or not they touch upon such stream. In such a case Nature has interposed a dividing line, and has cut off such lands from the lands actually riparian to the first stream by the ridge dividing the two watersheds. This is just as effectual as though the common owner had cut off such lands by conveying them to another person.[3] As is said by Mr. Farnham:[4] "But the fact that the land is beyond the watershed of the stream must, of necessity, prevent its being riparian. All conceptions of riparian land lead to the conclusion that it is land which is tributary to, and lying along, a water course, and, as soon as the 'divide' is passed and the watershed of another stream is reached, the land can not be regarded with reference to the former stream."[5]

As said by the California Court in an action involving this subject: "If it ever was a rule anywhere (which we doubt) that the riparian owner, under riparian right alone, could take the water of the riparian stream to any part of his land contiguous to his riparian land, to the extent of taking the water entirely away from the watershed of such stream, provided he there consumed it all, it is a rule inapplicable to our conditions, and should not be adopted here. The contention of defendant, carried to its logical conclusion, would make all the lands embraced in a large tract riparian to any one or more of the creeks flowing through it, at the pleasure of the owner, regardless of the lateral extent of

3 See Secs. 461, 464.

4 3 Farnham on Waters and Water Rights, p. 1903.

5 See, also, for irrigation as a riparian right, Secs. 498-525.

See Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S. 197, 118 Am. St. Rep. 754, 10 Am. & Eng. An. Cas. 116, affirmed 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191; Miller v. Bay Cities etc. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S. 772; Pomona Water Co. v. San Antonio Water Co., 152 Cal. 618, 93 Pac. Rep. 881; Wiggins v. Muscupiabe Water Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

the land, and regardless of the natural barriers which divide the entire body into separate and distinct drainage systems, each drawing its natural supply of water from distinct and separate sources. Such an interpretation of the law of riparian rights can find no support from any necessity existing in this State, and would, if adopted, lead to grave abuses, and would result in serious injustice to other riparian owners." Then, after giving the definition of the word "riparian," as relating to the bank of a stream, the Court concludes: "Now, can it be said that land whose watershed does not drain into a stream is riparian to such stream? Does it relate to the stream, or in any sense form part of its bank? Can land be riparian to two creeks whose watershed is entirely different and have no drainage connection whatever? 'The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae*, because his land has by nature the advantage of being washed by the stream.'"[6] And in a later case the same Court, in reaffirming the rule, said: "Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be a part of an entire tract, which does extend to the river. . . . The principal reasons for the rule confining riparian rights to that part of the lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is in consequence entitled, so to speak, to the use of its waters. Where two streams unite we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a separate stream with regard to lands abutting thereon above the junction, and that the land lying along the watershed of one stream above that point is not to be considered as riparian to the other stream."[7]

A decision of the Oregon Court has been construed as laying

[6] Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; the last sentence citing the opinion of Lord Selborne in Lyon v. Fishmongers' Co., 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

[7] Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S. 1062.

See, also, Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

down a different rule, so as to include lands in another watershed than that of the stream to which the riparian rights attached. But upon an examination of that case[8] it will be seen that the Court admitted the rule of the California Court in the following language: "But, as we understand these cases, the Court in each instance was determining the rights of the parties then before it, and not attempting to lay down an inflexible rule as a guide in all cases. Nothing more was held or decided than that under the claim alone of riparian rights the owner of land can not, to the injury of another riparian proprietor, take water beyond the watershed, or onto lands held by a title different from the title of those through which the stream flows; and *all this we concede.*" And the Court decided the case upon the question as to what is a reasonable use of the water by riparian proprietors, where others are not injured thereby. The same may be said of a Texas case,[9] where the Court admitted the rule, but held that conditions might exist that would authorize the Court to extend the rule so as to permit water to be carried beyond the watershed; for example, if the drainage area be small and the supply of water abundant, so that other riparian owners would not be deprived of an ample supply, it might not be an unreasonable use to carry the water beyond the watershed. The same may be said of a New York case,[10] where the question was, not the extent of land in connection with which the water might be used, having reference to the watershed, but rather as to the relative proportions to which the respective owners were entitled. Therefore, it can not be said that upon the question of the "divide" being the outermost boundary of the riparian lands on a certain stream there is any great conflict of authority, as far as the last cases cited are concerned. These cases simply decided the question as to what, under the facts in each particular case, was a reasonable use of the water by one riparian proprietor as against the rights of the other proprietors upon the same stream; and, included within such use, that there might be circumstances under which the water might

8 Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

9 Watkins Land Co. v. Clements, 98 Texas Civ. App. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653.

10 Standen v. New Rochelle Water Co., 91 Hun, 272, 36 N. W. Supp. 92.

be diverted from the stream and used without the watershed of the stream, and still keep within the term of "reasonable use." [11] Therefore, it may be said that at least according to the great weight of authority, if it is not the unanimous authority, riparian land is limited in its extent by the extent of the watershed of the stream; in other words, lands beyond the watershed can not be regarded as riparian, though part of a single tract, held in common ownership, which borders upon the stream.

§ 463. **Extent of riparian lands—Lands claimed as riparian must be reasonable in extent.**—There is another proposition that is well settled by the authorities, and that is that the lands for which riparian rights are claimed, in any event must be reasonable in extent, after taking into consideration the extent of the riparian lands claimed by other proprietors, and the supply of the water of the stream from which the rights are claimed. And especially is this the case where the water is consumed by the use to which it is put.[1] This is true regardless of all questions as to the watershed being the boundary of such lands,[2] or as to the sources of title of the lands claimed to be riparian.[3] In fact, this is but a statement in another form of the general rule of the common law governing the use of the waters of streams by all riparian proprietors and by virtue of their riparian rights. The right of any one proprietor to the use of the water is relative or correlative to the rights of all of the other riparian proprietors upon the same stream. By virtue of the ownership of land in proximity to the stream, he is entitled to a reasonable use of the water, which, in the first edition of this work, we defined to be "any use that does not work actual, material, and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprie-

11 For reasonable use of the water by riparian proprietors, see Secs. 489-496.

For irrigation as a riparian right, see Secs. 498-525.

1 For irrigation as a riparian right, see Secs. 498-525.

2 That lands riparian to a certain stream must lie within its watershed, see Sec. 462.

3 For sources of title as fixing the boundaries of riparian lands, see Sec. 464.

tor."[4] This rule, as stated by us, was adopted by the Supreme Court of Oregon, in a well reasoned case.[5] And, as to whether a use by one riparian proprietor is reasonable, as stated by the Court, "does not depend so much upon the area of the land of the offending proprietor, or the place of use, as upon the effect it has upon the correlative rights of the other proprietors."

In line with this decision, the Supreme Court of the United States, in affirming the judgment of the decision of the Court of Errors and Appeals of the State of New Jersey, in the case decided in 1907,[6] in deciding the rights as between riparian proprietors, said: "On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than well-known ordinary uses, and that for any purpose, anywhere, he is narrowly limited in amount."[7]

Without here going into the question of the rights which may be acquired to the exclusive use of the water under the Arid Region doctrine of appropriation, regardless of the locality or the

4 Kinney on Irrigation, 1st Ed., Sec. 276.

See, also, for the use of the water by riparian proprietors, Secs. 489-496.

For irrigation as a riparian right, see Secs. 498-525.

5 Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, quoting the above passage.

6 Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529, affirming *Id.*, 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A., N. S. 197, 118 Am. St. Rep. 754.

7 See, also, Watkins Land Co. v. Clements, 98 Tex. Civ. App. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Hayes v. Waldron, 44 N. H. 584, 84 Am. Dec. 105; Bullard v. Saratoga Victory Mfg. Co., 77 N. Y. 525; Miller v. Miller, 9 Pa. 77, 49 Am. Dec. 545; Standen v. New Rochelle Water Co., 91 Hun, 272, 36 N. Y. Supp. 92; Patten Paper Co. v. Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. Rep. 1121, 63 N. W. Rep. 1019, 28 L. R. A. 443, 48 Am. St. Rep. 945; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Earl Norbury v. Kitchin, 7 L. T. N. S. 685, 9 Jur. N. S. 132; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195, wherein it is stated: "The right to take the water at all is a right to change the ordinary course of Nature; and the methods employed, so long as their use does not infringe upon the like and equal rights of others, are immaterial."

place of use in reference to the natural stream,[8] the rule of "reasonable use,"[9] which absolutely governs those rights to water founded wholly upon the common law doctrine of riparian rights, does not permit one riparian proprietor to irrigate or otherwise use the water from the natural stream, where the equal or correlative rights of other riparian proprietors upon the same stream are injured or infringed upon thereby. The place where the water may be used is restricted only by the duty to refrain from injuring others, and the limit of the right is at the point where it infringes upon the rights of others.

§ 464. **Extent of riparian lands—Rules based upon the sources of titles.**—It is within the powers of the court or the legislature of a State to limit and restrict the riparian rights within its boundaries, or to abrogate them entirely.[1] It is therefore within the powers of the Court or the legislature of a State to fix the boundaries of riparian lands and to determine just what their extent shall be. This, in some of the Western States, where riparian rights have been retained as a part of its laws governing waters, the Courts have done. In some cases, as we have seen, they have fixed the rim or divide of the watershed as the outermost boundary of such lands held in common ownership.[2] In others they have disregarded the boundary provided by Nature, and have fixed the extent of the land upon which water might be used by virtue of riparian ownership, as a reasonable area as compared with the lands and needs of others who have the same riparian rights.[3] In still other jurisdictions, the Courts have set the limit of the riparian land held in common ownership to the different subdivisions upon the stream and depending largely upon the sources of title to those lands. And upon this point it may be said that there are now three distinct rules adopted in different jurisdictions, by which the extent of riparian lands is limited and restricted in force in at least as many different States. These are as follows: First,

[8] For the Arid Region doctrine of appropriation, see Secs. 585-594.

[9] For reasonable use by riparian proprietors, see Secs. 489-496.

[1] For the abrogation of riparian rights, see Secs. 588-594.

[2] That riparian lands are those only within the watershed of a certain stream, see Sec. 462.

[3] That the area must be reasonable, see Sec. 463.

the smallest separate piece or parcel of land bordering upon the stream in the history of the title of all of the land of the riparian owner at the time that the claim is made or at the time of use; second, the riparian land stops at the outermost edge of the land away from the stream as described by a single original entry of the land in the acquisition of title from the Government; and, third, that the riparian lands held in common ownership include the entire tract, no matter how acquired or from what sources of title, at the time the claim is made.

California is the leading State to adhere to the first proposition above stated. It is there in effect held that, where a person owns a tract of land bordering upon a stream the title to which was derived from a single source, it is all riparian, and that, too, regardless of the size of the tract;[4] provided, that the entire tract continues in common ownership,[5] and that its boundaries do not extend beyond the natural limits of the watershed.[6] This tract remains riparian land as long as the title to the entire tract continues in common ownership; but the riparian tract can not be

[4] Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217, where the tract owned was 1,280 acres, and it was contended that 160 acres of the same were not riparian, the occupancy to the same having been held by a trespasser without segregation of title. But the Court held that the 160 acres were riparian, and said: "Situate as this tract was, a half-mile or more away from the stream, if it had been held by a title separate from and independent of the 1,280-acre tract, it would not have been riparian, and no portion of the waters of the stream would have been appurtenant to it; but the 120 acres was a part of, and never segregated from, the 1,280 acres, all of which was riparian to the stream. . . . Nor can the area of the lands to which riparian rights are appurtenant be diminished by the acts of a trespasser segregating for the time being the actual occupancy, without segregation of title."

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, where it is said: "If, however, lands have been granted by patent, and the patent was issued on the cancellation of more than one certificate, the patent can operate by relation (for the purposes of this suit) to the date of those certificates only, the lands described in which border on the stream." The case thus held in effect that all sections or fractional sections, mentioned in any one certificate of purchase, would constitute but a single tract of land, as far as riparian rights were concerned, and that the lands covered by the other certificates were not riparian.

See, also Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908.

[5] That the ownership must be in common, see Sec. 461.

[6] See Sec. 462.

added to by the purchase of other tracts contiguous to the first tract, where these last are not themselves riparian. And it is further held that mere contiguity of quarter sections with another quarter section, through which a stream runs, does not make the former riparian, although all are owned by the same person, where they are granted by separate patents, though issued to the same individual, based upon separate entries.[7] Again, if the owner sells off a portion of the original tract, not adjoining the stream, by that act all riparian rights are cut off forever from such segregated tract;[8] and that is true, even if the tract so sold should be again repurchased by the owner of the tract actually riparian. As was said in a case decided in 1907: "Land thus conveyed and severed from the stream can never again regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership."[9] Therefore, it may be considered the present rule in California that, however great or however small the tract of land may be which borders upon a stream, and which is in common ownership, it is all riparian; provided, that it was acquired through a single source of title, and is all within the watershed of the stream in which riparian rights are claimed.[10]

Upon our second proposition, stated above, that riparian land stops at the outermost edge of the land from the stream as de-

[7] Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908.

[8] That a sale of land back from the stream cuts off riparian rights, see Sec. 461.

[9] Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S. 1062, citing Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Watkins Land Co. v. Clements, 98 Tex. Civ. App. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653; 2 Farnham on Waters, 1572, Sec. 463a.

[10] In this connection it may be said that there is nothing in the decision of Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748, which tends in any way to modify or overrule the former decisions of the Court cited above limiting the extent of riparian lands in that State. In that case the Court simply decided the rights of landowners to the use of waters underlying their lands, and said: "Such waters, together with the surface stream supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may make a reasonable use upon the land so situated, taking it either from the surface flow, or di-

scribed by a single original entry of land as acquired from the Government, the Nebraska Court seems to lead. In a leading case upon the subject [11] it was held that, in any event, the extent of riparian land can not exceed the area acquired by a single entry or purchase from the Government; and queried whether, in view of the policy of the Government in the distribution of its public land, such riparian land should exceed the smallest legal subdivision of a section (that is, 40 acres), or in lieu thereof, if an irregular tract, a designated numbered lot which borders upon the natural stream. It was further held that this right could not be augmented or extended by the acquisition of the title to lands contiguous to the riparian land. The State of Texas has adopted the same rule as that of Nebraska, that the boundaries of the Government subdivisions, so far as they lie within the watershed, will govern in determining what land is riparian so as to entitle it to the use of the water from the stream for irrigation purposes, in the absence of special circumstances. "Riparian rights arise out of the ownership of land through or by which a stream of water flows, which rights can not extend beyond the original survey as granted by the Government. . . . Another limitation upon the right of the riparian proprietor is that he can not ordinarily divert water to land lying beyond the watershed of the stream." [12]

The third proposition stated above we will discuss in the following section.[13]

rectly from the percolations beneath their lands." It will be noticed that the Court in no way attempts to limit or define what are riparian lands, but simply relies upon the well-settled rule of access, or lands bordering upon or overlying such waters.

11 Crawford County v. Hathaway (Hall.), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

12 Watkins Land Co. v. Clements, 98 Tex. Civ. App. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653, citing Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908; 2 Farnham on Waters, Sec. 463a, p. 1572, where it is said: "The most satisfactory rule is that the parcels of land should be regarded as riparian, so far as their location with reference to the stream has indicated where their boundary should be fixed, so that all that parcel which is regarded as one tract should be regarded as riparian, leaving the question of the extent of use which may be made of the water to the rules regulating the relative rights of owners of the stream. Under this rule the boundary of riparian land is restricted to land the title to which is acquired by one transaction."

13 See Sec. 465.

§ 465. **Extent of riparian lands—Rule that all lands in common ownership at time of claim are riparian.**—The third rule, as stated in the previous section, limiting riparian lands to those based upon the source of title to such lands,[1] is that all lands held in common ownership at the time of the claim or the use is made of the water of the stream adjoining them should be regarded as riparian to such stream, and that, too, regardless as to how or when such lands were acquired, or from whatever sources of title. In other words, a tract of riparian land may be segregated so that any portion not touching upon the stream may be cut off, during the period of such segregation, from all riparian rights.[2] Again, upon the other hand, a tract of riparian land may be augmented by the purchase of contiguous tracts which have by themselves no actual contact with the stream, but which become riparian upon being added to the tract which actually touches upon the stream. This is the true rule of the common law. As stated by Mr. Weil, quoting from an English authority:[3] "The following is a statement of the general common law: 'If riparian property becomes divided between two owners, so that one portion no longer adjoins the stream, that portion no longer retains any riparian rights.'[4] Conversely, land which adjoins riparian land may become itself riparian by becoming united therewith in ownership."[5]

The rules as stated under our first and second divisions, as set forth in the previous section,[6] are rules adopted by the various States and modify the common law. But, as long as we are dealing with a common law subject, it becomes necessary to know just what the common law rule is. The common law knows nothing of governmental subdivisions, and hence could not have made such a subdivision the extent of riparian lands. It also does not regard the riparian land limited to the smallest subdivision in the chain of title of an entire tract. Otherwise, during the hundreds of years of conveyancing, it can be readily seen that riparian lands in England would have become smaller and smaller in area,

1 For the different rules, see Sec. 464.

2 For the effect of the segregation of riparian land, see Sec. 461.

3 Weil on Water Rights in the Western States, 3d Ed., p. 841.

4 Citing Stockport Waterworks v. Potter, 3 Hurlst. & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748, affirmed in 7 Hurlst. & N. 160, 31 L. J. Exch. 9, 7 Jur. N. S. 880.

5 Quoting from Salmond on Torts, p. 252.

6 See Sec. 464.

without the right of augmentation, until in many instances they would be nothing but a thread upon the stream, which would have attached to it all of the riparian rights, and probably far in excess of its needs, and to the entire exclusion of riparian rights of all the other lands within the same watershed, although they might be held in common ownership with the small tract actually riparian. Under the common law of England riparian lands are not restricted to any such narrow limitations; and, consequently, riparian rights are not so restricted, but depend more upon the settled rule of "reasonable use"[7] by one proprietor regardless of the extent of his riparian lands, after taking into consideration the rights of all the other owners upon the same stream. In other words, the extent of "riparian land" is not the sole limit of riparian rights; but the gist of the question is the reasonable use of those rights upon all of the lands which touch upon the stream, and are held at the time in common ownership, and are within the natural boundaries of the watershed.

Although, as we have said before, a State has the power to adopt any rule it sees fit in limiting or defining riparian lands or in maintaining or abolishing riparian rights,[8] we consider that the more consistent rule as to the extent of riparian lands back from the stream to be, to include all lands which are owned in common, regardless of the source or sources of title, and which are within the watershed of the stream, upon which a portion of such lands border, leaving the question of extent of the use which may be made of the waters of the stream to the settled rule of "reasonable use," and taking into consideration the relative or correlative rights of all the other riparian owners whose lands also touch upon the same stream.

The above is the rule adopted by the Supreme Courts of Oregon and Kansas. The case of Jones v. Conn[9] holds that the right of a riparian proprietor to use the water for irrigation purposes is not limited to the tract of land actually bordering on the stream, as first segregated, but extends to lands lying back of such tract contiguous to it, and afterward purchased by him from other persons. In support of this proposition the Court said: "It would

[7] For the rule of reasonable use, see Secs. 489, 496, 511-513.

[8] See Secs. 588-594.

[9] 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

seem, therefore, that any person owning land which abuts upon, or through which a natural stream of water flows, is a riparian proprietor, entitled to the rights of such without regard to the extent of his land, or from whom or when he acquired his title. The fact that he may have procured the particular tract washed by the stream at one time, and subsequently purchased land adjoining it, will not make him any less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of land owned by him borders upon a stream. This being established, the law gives to him certain rights in the water, *the extent of which is limited and controlled less by the area of his land than by the volume of the water and the effect of its use upon the rights of the other riparian proprietors.* By virtue of the ownership of land in proximity to the stream he is entitled to a reasonable use of the water, which is defined as 'any use that does not work actual, material, and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor.'[10] In the determination of what will be considered such a use in a particular case, the character and extent of the land, its location, and the time of acquiring the title, may all become, and are, no doubt, important factors to be considered; but they are not controlling, and each case must depend entirely upon its own facts and circumstances." The Kansas Court, upon the authority of Jones v. Conn,[11] adopted the same rule, and held that, in determining the quantity of land which might be considered riparian, the principle of equality of right of the riparian owner with the others should control, irrespective of the accidental matter of subdivisions of the land.[12]

§ 466. The character of lands to which rights attach.—The question of the character of the lands to which riparian rights attach does not seem to have been discussed to any extent by the

10 Citing Kinney on Irrigation, 1st Ed., Sec. 276.

11 *Supra.*

12 Clark v. Alleman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971. That the use of water for irrigation as a riparian right must be confined to riparian land, see, also, Secs. 514-516.

English authorities. The rule, therefore, is the same under the strict construction of that rule, the only requisite being that the lands touch or border upon the stream. But under the modified rule of the common law of riparian rights, as adopted in some of the Western States of this country where the principal use of the water is for irrigation, the character of such lands to which such rights attach or are claimed must be considered. It stands to reason that an owner whose lands are so hilly and rocky that they are absolutely unfit for cultivation, although they may adjoin a stream and be strictly riparian, can not claim the right by virtue of such ownership to the use of the water for irrigation; and, therefore, it can be said that riparian rights do not attach to such lands. He has no use for the water upon his own lands, and he has no right by virtue of riparian ownership alone to conduct the water to lands not riparian. This is the positive holding in a California case, where it was found that the riparian lands were valueless for agricultural purposes. And the Court said: "A riparian proprietor's claim to make such use of the waters of a stream is, of course, without legal foundation."[1] This, of course, is a modification of the common law riparian right to the undiminished flow of the stream, regardless of the use of the water, a subject which will be discussed in subsequent sections of this work.[2] It makes the legality of such a claim depend more upon the actual use of the water, or at least the possibility of its use upon the riparian land, than upon the fact that the land touches upon the water, and, therefore, is strictly riparian.[3]

[1] Montecito Valley Water Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935, see *Id.* on a former appeal, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, where it was held that the character of the land was a proper subject for consideration.

See, also, Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767.

[2] For the riparian right to the flow of the stream, see Secs. 543-549.

[3] See, also, for irrigation as a riparian right, Chap. 26, Secs. 498-525.

CHAPTER 23.

TO WHAT WATERS RIPARIAN RIGHTS ATTACH.

§ 467. Scope of chapter.
§ 468. Rights attach to all natural water courses.
§ 469. Natural water courses—Rights attach to navigable rivers.
§ 470. Natural water courses—Rights attach to flood waters of streams.
§ 471. Natural water courses—Rights attach to certain subterranean waters.
§ 472. Natural water courses—Interstate rivers and streams.
§ 473. Riparian rights do not attach to artificial water courses unless by lapse of time they are deemed natural.
§ 474. Lakes and ponds—General rule.
§ 475. Riparian rights also attach to natural lakes and ponds—Western rule.

§ 467. Scope of chapter.—Having discussed in the preceding chapters of this part the nature of riparian rights,[1] and to what lands riparian rights attach, in the present chapter we will discuss the subject to what waters such rights attach.[2]

§ 468. Rights attach to all natural water courses.—In general it may be said that under the common law riparian rights attach to all natural water courses,[1] and that, too, whether the same be called a river,[2] stream,[3] creek, brook, or rivulet,[4] and to their branches and tributaries.[5] They also attach in certain instances to ravines when these have all the essential characteristics of a water course and, therefore, are water courses.[6] They also attach to sloughs, when these are considered a part of a water course, or a

1 See Chap. 21, Secs. 450-456.

2 See Secs. 468-475.

1 For definitions and description of natural water courses, see Secs. 301-307.

2 Sec. 308.

3 Sec. 309.

4 Sec. 310.

5 Sec. 311. And that, too, even if such tributaries are small and flow directly from springs. See Hollett v. Davis, 54 Wash. 326, 103 Pac. Rep. 423, where it is held that where the flow from a spring is sufficient to form a water course the flow is governed by the common law rule of riparian rights.

See, also, Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589.

For the appropriation of water from tributaries, see Sec. 649.

6 For ravines as natural water courses, see Sec. 312.

branch thereof.[7] Riparian rights also attach to all classes of the flow of water courses or streams—the natural surface flow, the subterranean or underground flow,[8] and to the ordinary flood or storm waters.[9] They do not, however, attach to marshes or swamps with no natural outlet.[10] They attach to known and defined underground streams, under exactly the same principles as to surface streams.[11] It makes no difference as to the size of the streams. They may be of an actual navigable capacity,[12] or they may be the smallest rivulets, provided, always, that they have all of the essential characteristics of water courses.[13] One may have riparian rights in a stream even though its source be a spring upon the land of another, yet it must be a stream that was wont to flow from time immemorial.[14] There is one requisite, and that is the water course or stream must be a natural one, or a stream, which by lapse of time, is deemed natural. Riparian rights do not attach to artificial water courses or streams.[15]

We will now take up in detail some of the waters to which riparian rights attach, and refer by our cross-references to where the subject is discussed as to other waters in other portions of this work.

§ 469. Natural water courses—Rights attach to navigable rivers.—Riparian rights attach to all navigable water courses and

7 For sloughs as natural water courses, see Sec. 315.

See, also, Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S. 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823, where the Court held that, as regards the taking of water for purposes of irrigation, the rights of persons owning lands adjoining a slough connected with a river are equal and coextensive with those of persons owning land bordering upon the river itself.

See, also, Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

8 See Secs. 1154-1160, 1193-1195, where the entire subject will be discussed relative to the rights in subterranean or underground waters.

9 For riparian rights in flood waters, see Sec. 470.

10 Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139.

11 For riparian rights in underground streams, see Sec. 471.

12 For riparian rights on navigable streams, see Sec. 469.

For the right of navigation, see Chap. 16, Secs. 341-357.

13 See Secs. 302-307.

14 Mason v. Yearwood, 58 Wash. 276, 108 Pac. Rep. 608; Hollett v. Davis, 54 Wash. 326, 103 Pac. Rep. 423; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S. 1065.

15 See Sec. 473.

rivers as well as to those which are non-navigable.[1] In previous sections of this work, we have discussed some of these riparian rights. In certain States the riparian owner owns the beds of the large navigable rivers above the tide waters. In others the beds are owned by the State. As we have stated before the rule in this country as to whether the riparian owners or the State own the beds of the large navigable or public rivers is left entirely to the respective States wherein the riparian lands are situated.[2] In any event, whether he owns the bed of the river or not, the riparian owner has the sole right of access to and from his lands adjoining such streams.[3] Even upon portions of these rivers which are subject to the ebb and flow of the tide, although the general rule is that the riparian owners do not own the beds of such streams, there are certain riparian rights which attach, such, for example, as the right of access.[4]

When we come to the right of the riparian proprietor to the flow of the stream or his right to make a reasonable use of the waters of the stream, in general, we may say that the same rights attach to a navigable stream as attach to a nonnavigable stream,[5] subject, of course, to the public right of navigation in the stream. Therefore, it is held that riparian owners, in the case where the river has been improved in aid of navigation, have the right to insist that the water which is not required for navigation be returned to its accustomed channel in such a manner and place that it will flow past their lands as it was accustomed to flow.[6] In the

1 See previous Sec. 468.

2 For the ownership of the beds of fresh water navigable rivers, see Secs. 328-332.

For the right of navigation, see, also, Chap. 16, Secs. 341-357.

3 For the right of access to public waters, see Secs. 335-337.

4 For the ownership of the beds of tidal waters, see Secs. 325, 326.

See, also, Secs. 335-337.

See, also, North Shore Railway v. Pion, L. R. 14 App. Cas. 612, affirming Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 683, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

5 For the right of a riparian proprietor to make a reasonable use of the water, see Secs. 484-496.

6 Green Bay & M. Canal Co. v. Kaukauna Water Power Co., 90 Wis. 370, *sub nom.* Patten Paper Co. v. Kaukauna Water Power Co., 61 N. W. Rep. 1121, 63 N. W. Rep. 1019, 28 L. R. A. 443, 49 Am. St. Rep. 937; *Id.*, 93 Wis. 383, 66 N. W. Rep. 601, 67 N. W. Rep. 432; Kaukauna Water Power Co. v. Green Bay & M. C. Co., 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

But see St. Anthony Falls Water Power Co. v. Water Commissioners,

Western States, adhering to the doctrine of riparian rights,[7] it is generally conceded that a riparian owner has the same rights by virtue of his ownership in the use of the waters of the stream whether they are navigable or nonnavigable; provided, always, that the easement of navigation by the public is in no way interfered with. This is the rule in California.[8]

In conferring the authority to improve the navigation of rivers, it was held by the Washington Court that the legislature did not delegate the right to take or damage the rights of riparian owners without compensation, the Court saying: "The respondent, being a riparian owner upon the Kalama River, has, as such, valuable property rights which can not be taken or damaged for public use without compensation. One of these is its right to a continuance of the natural and ordinary flow of the water over, across, and past its lands. This riparian right, guaranteed by the common law, has been repeatedly recognized and protected by this Court."[9] This

168 U. S. 349, 42 L. Ed. 497, 18 Sup. Ct. Rep. 157, where it was held that the appropriation of the waters of a lake for a city water supply, thereby preventing their flowing past a water power plant in a river, without any compensation for the resulting injury to riparian owners, is a matter of local law on which the Federal Courts must follow the State decisions.

See, also, Scranton v. Wheeler, 179 U. S. 141, 45 L. Ed. 126, 21 Sup. Ct. Rep. 48; Morrill v. St. Anthony Falls Water Power Co., 26 Minn. 222, 2 N. W. Rep. 842, 37 Am. Rep. 399, where it was held that a riparian owner upon a navigable stream may use the water flowing past his land for any purpose, so long as he does not impede the navigation of the stream.

See, also, Williams v. Fulmer, 151 Pa. 405, 25 Atl. Rep. 103, 31 Am. St. Rep. 767.

7 For these States, see Sec. 507.

8 In the case of Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183, it is said: "We see no occasion to discuss the question as to whether the river is navigable or not. In either event, the result would be the same. The riparian owner on a nontidal navigable stream has all the rights of a riparian owner not inconsistent with the public easement. . . . The right of the State to interfere with the flow there would certainly be limited to the interest of navigation," citing Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Wood, Nuis., Sec. 485; Smith v. City of Rochester, 92 N. Y. 463; Woodruff v. North Bloomfield etc. Co., 8 Saw. 628, 16 Fed. Rep. 25, 9 Saw. 41, 18 Fed. Rep. 753.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

9 Kalama Electric Light & Power Company v. Kalama Driving Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R. A., N. S. 641, 125 Am. St. Rep. 948; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. Rep. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905; Spokane Valley Land & Water Co. v. Arthur

is also held to be the rule in the State of Texas, and that the riparian owner's right can not be taken or damaged without compensation even in the improvement of navigation in a river.[10]

The State of Nebraska, however, adopts a different rule, and holds that navigable rivers are not subject to riparian rights, especially as to the use of the waters. "As to navigable streams, the doctrine seems to be that the water and the soil thereunder belong to the State, and are under its sovereignty and domain, in trust for the people, and can not, therefore, be subject of a claim of property therein, or the right to the use thereof by an adjoining landowner. . . . The waters in such streams would be held to be *publici juris*, and not be subject to riparian claims by the adjoining landowner."[11] The court is inconsistent in its holding upon this point. It holds that riparian rights do attach to the smaller nonnavigable streams of the State. As said by Lord Chelmsford, in the case of Lyon v. Fishmongers' Company,[12] there is "no sound principle upon which the distinction between the two descriptions of natural streams can be supported." Riparian rights certainly naturally attach to both navigable as well as nonnavigable streams. The Court was also unfortunate in its citation of authorities.[13]

The cases cited do not decide that riparian rights do not attach to navigable streams. But what they do decide, as far as the subject under discussion is concerned, is that *each State has the power to decide for itself whether or not such rights shall attach to such streams*, and whether or not the riparian owner or the

Jones Co., 53 Wash. 37, 101 Pac. Rep. 515; Crook v. Hewett, 4 Wash. 749, 31 Pac. Rep. 28; Rigney v. Tacoma Light & W. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Mathews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. Rep. 1046.

10 Bigham Bros. v. Port Arthur etc. Co., 100 Tex. 192, 97 S. W. Rep. 686, 13 L. R. A., N. S., 656, reversing 91 S. W. Rep. 848.

11 Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647, citing Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. Ed. 997; Pollard v. Hagan, 44 U. S. 3 How. 212, 11 L. Ed. 565; Richardson v. United States, 100 Fed. Rep. 714.

12 L. R. 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

13 See last note, *supra*.

State shall be the owner of the soil under the water. Under these authorities, however, we can not doubt the power of the Nebraska Court to decide the case as it did, in holding that riparian rights attach to nonnavigable streams but do not to navigable streams.[14]

§ 470. **Natural water courses—Rights attach to the flood waters of streams.**—Riparian rights attach to all parts of the flow of water courses. This, of course, includes the flood or storm waters of streams, especially where such waters are confined to their natural channels.[1] But as to the extent to which riparian rights attach to flood waters of a stream the authorities do not quite agree. The more modern rule is that, as against the rights of an appropriator for nonriparian use of the water, the riparian rights of the owner of the banks of the stream only extend to the natural flow of the stream, unless actual damage is shown by the diversion of the water. The Nebraska Court held that the riparian owner, at most, "was entitled to only the ordinary and natural flow of the stream, or so much as was found necessary to propel his mill machinery, and could not lawfully claim, as against an appropriator, the flow of the flood waters of the stream."[2] Other authorities hold that riparian rights attach to all flood waters of the stream which can be counted upon as certain to occur annually, but do not attach to the waters caused by extraordinary and unexpected floods. As was said in a California case: "But the rights of the riparian proprietor do not depend upon the quantity of water flowing in the stream. Nor can that flow be said to be extraordinary which can be counted upon as certain to occur annually and to continue for months."[3] This subject will be further discussed in other portions of this work.[4]

14 See, also, upon this subject, Secs. 325-332, 374.

For the abrogation of riparian rights, see Secs. 588-594.

1 For flood or storm waters of streams, see Sec. 319.

2 Crawford v. Hathaway (Hall.), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S. 391; Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. Rep. 466.

3 Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

4 For the rights of appropriators as against those of riparian owners, see Secs. 810-823.

For the right of injunction against the appropriation of flood waters, see Sec. 563.

§ 471. Natural water courses—Rights attach to certain subterranean waters.—Riparian rights also attach to certain classes of subterranean or underground waters.[1] To underground water courses, the waters of which flow in known and defined channels, riparian rights attach the same as to surface streams. Riparian rights also attach to the underground flow of surface streams.[2]

While there are no riparian rights which attach to the ordinary percolating waters, to those underground waters which underlie lands in artesian basins[3] or catchment basins[4] under the more modern rule governing these waters as laid down in California in the case of Katz v. Walkinshaw,[5] it is held that the rights of the owners of land over these basins in and to the waters are analogous to the rights of riparian proprietors to the waters of streams adjoining which their lands lie. As said in a California case: "The land being so situated that it has the natural advantages afforded by the underlying water, the conditions are analogous to those affecting land riparian to a stream, which, because of its situation with reference to the stream, is given rights to the waters thereof," etc.[6]

The entire subject of subterranean or underground waters will be discussed in a separate portion of this work.[7]

§ 472. Natural water courses—Interstate rivers and streams.—Riparian rights also attach to interstate rivers and streams and also to other interstate bodies of water. Upon the same stream, there may be two distinct systems governing the use of waters. In one State through which such a stream runs may be the doctrine of riparian rights, while in another these rights may be entirely abolished. This was illustrated in the case of Kansas v. Colorado,[1] where it was held that each State had the right to adopt such rule

1 For the classification of subterranean waters, see Secs. 287, 323.

2 See Sec. 1158.

3 For artesian basins, see Secs. 1167-1184.

4 See Secs. 1197-1204.

5 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

6 Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 Pac. Rep. 260. See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S. 772.

7 See Chaps. 59-62, Secs. 1148-1211.

1 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655. For the same case on demurrer, see 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

as it saw fit governing and controlling the waters within its boundaries, and that "Congress can not enforce either rule upon any State,"[2] but that the power of a State in this respect was subject to the jurisdiction of the General Government to take all needed measures to preserve the navigable capacity of the navigable water courses of the United States, even against any State action; and that in the absence of any specific authority from Congress a State can not by its legislation destroy the rights of the United States, as the owner of lands bordering upon a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of Government property.[3]

The subject of interstate waters, however, will be more thoroughly discussed in another chapter.[4]

§ 473. Riparian rights do not attach to artificial water courses unless by lapse of time they are deemed natural.—As to whether or not any riparian rights can attach to artificial water courses depends entirely upon their origin and character. If they are clearly artificial channels, such as canals, ditches, conduits, or aqueducts, used to convey the water from the stream or other body of water, riparian rights can not attach.[1] In order to acquire the

2 See, also, Secs. 326, 328, 334.

3 See, also, United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 184 U. S. 416, 46 L. Ed. 619.

See, also, for navigation as against irrigation, Secs. 354-356.

For the effect of the dedication of waters by a State, see Sec. 388.

4 See Chap. 64.

1 Green v. Carotta, 72 Cal. 267, 13 Pac. Rep. 685; Wood v. Waud, 3 Exch. 748, 182 L. J. Exch. N. S. 305, 13 Jur. 472; Greatex v. Hayward, 8 Exch. 291, 22 L. J. Ex. 137; Magor v. Chadwick, 11 Ad. & El. 571; Fox River F. & P. Co. v. Kelley, 70 Wis. 298, 35 N. W. Rep. 744, where the Court held that merely acquiring land across which runs an artificial channel, in the absence of grant or title by adverse user, gives no riparian right to use water from the channel.

See, also, Nield v. London R. Co., L. R. 10 Exch. 4, 23 Week. Rep. 60, 44 L. J. Exch. N. S. 15; Arkwright v. Gell, 5 Mees. & W. 203, 2 Horn. & H. 17, 8 L. J. Exch. N. S. 201; Creighton v. Kaweah, 67 Cal. 221, 7 Pac. Rep. 658; Bailey v. Clark, 86 L. T. N. S. 309; Sampson v. Hoddinott, 1 C. B. N. S. 590, 26 L. J. C. P. N. S. 148, 3 Jur. N. S. 243, 5 Week. Rep. 230, 87 E. C. L. 590; Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. Rep. 239, 22 L. R. A. 45, 38 Am. St. Rep. 330; Ligare v. Chicago, M. & N. R. Co., 166 Ill. 249, 46 N. E. Rep. 803.

That no riparian right can attach to artificial ponds, see Burrows v. Lang, 2 Ch. 502, 70 L. J. Ch. N. S.

right to the use of water flowing in artificial channels, they must be based upon other considerations than that of the ownership of the land through which or adjoining which the streams run. It must depend upon some grant or agreement, either proved or presumed, from or with the owner of the ditch, or upon some other legal origin, such, for instance, as prescription.[2] Upon the other hand, however, the authorities hold that a water course, although constructed artificially, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to be deemed by prescription natural water courses.[3] Such is the case where the whole stream is diverted into the new channel, and thereby the artificial channel is substituted for the natural. Where this is done under such circumstances as to indicate that it is to be permanent, riparian rights may attach to the artificial channel.[4] And it is further held that where the artificial water course was not created by joint action of the owners, it may become such a one to which riparian right may attach, if the various owners along its course have always treated it as such.[5]

607, 84 L. T. N. S. 623, 49 Week. Rep. 564.

See, also, Irrigation as a Riparian Right, Secs. 499-525.

2 For prescriptive right to the use of water of artificial channels, see Sec. 662.

3 Sutcliffe v. Booth, 32 L. J. Q. B. N. S. 136, 9 Jur. N. S. 1037; Ivimey v. Stacker, L. R. I. Ch. 396, 409; Nuttall v. Bracewell, L. R. 2 Exch. 1; Murchie v. Gates, 78 Maine 300; Seibert v. Levan, 8 Pa. St. 383; Reading v. Althouse, 93 Pa. St. 400; Roberts v. Richards, 44 L. T. N. S. 271, 50 L. J. Ch. N. S. 297; Adams v. Manning, 48 Conn. 477, 51 Conn. 5; Peter v. Caswell, 38 Ohio St. 518; Miner v. Gilmour, 12 Moo. P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Freeman v. Weeks, 45 Mich. 335. Where a party having made a ditch six feet wide through his land conveyed a part of such land bounding on the ditch the grant was held to extend to the center of the ditch. Warner v. Southworth, 6 Conn. 471.

4 See cases, *supra;* Sutcliffe v. Booth, 32 L. J. Q. B. N. S. 136, 9 Jur. N. S. 1037; Townsend v. McDonald, 14 Barb. 460, 12 N. Y. 381, 64 Am. Dec. 508; Blackburn v. Somers, Ir. L. R. 5 Eq. 1; Adams v. Manning, 48 Conn. 477, 51 Conn. 5; Baily v. Clark, 86 L. T. N. S. 309; Fleming's Appeal, 65 Pa. 444.

5 This was the case in Baily v. Clark, 86 L. T. N. S. 309, where it had existed for several centuries, and had always been treated as a natural water course.

See, also, Roberts v. Richards, 50 L. J. Ch. N. S. 297, 44 L. T. N. S. 271.

See, also, irrigation as a riparian right from artificial water courses, Sec. 473.

In a recent case in Texas,[6] it was held that the canal of an irrigation company, which had condemned all of the waters of a stream, should be treated the same as the stream as affecting the question whether land of a purchaser from the company on the line of the canal is riparian land. It is also held that an artificial mill pond, maintained as such for more than forty years and sold for the establishment of an ice business for the continued maintenance of the pond, is changed from its artificial condition to a natural one, and that the grantor can not remove the dam, or sell it to another for removal, after his sale of the pond to the ice company.[7] The proprietor of a stream who diverts it into an artificial channel and continues such change for a time exceeding the statute of limitations is estopped, as against a person making beneficial use of the water below, to return it to its natural channel to the latter's injury.[8]

§ 474. **Lakes and ponds—General rule.**—The riparian rights of proprietors whose lands border upon lakes and natural ponds, as well as the ownership of the soil under the same, do not appear to have been settled by the early English authorities.[1] In the case of Paine v. Woods, Wells, J., said: "The English books offer little light on this subject. . . . But the question whether the title in the land under the fresh water pond or lake is in the proprietor of the lands adjoining or in the Crown does not seem to have been ever judicially determined in England."[2] But in this country, in general, we may say that the same rules relative to riparian rights attach to the ownership of the soil bordering upon an inland lake or pond as those which govern the ownership of the banks of streams or rivers regardless of the fact as to whether they are navigable in fact or not, or whether the owners of the bank are also owners of the soil under the water or not. This is especially so concerning the particular uses and appropriation of water by riparian owners. The weight of authority seems to hold that riparian rights proper rest upon the title to the bank of the lake, and not upon the title to the soil under the water, and they are the same whether the

6 McKenzie v. Beason, —— Tex. Civ. App. ——, 140 S. W. Rep. 246.

7 Marshall Ice Co. v. La Plant, 136 Iowa 621, 111 N. W. Rep. 1016, 12 L. R. A., N. S. 1073.

8 Hollett v. Davis, 54 Wash. 326, 103 Pac. Rep. 423.

1 Marshall v. Ulleswater Nav. Co., 3 B. & S. 732; *Id.*, L. R. 7 Q. B. 166.

2 Paine v. Woods, 108 Mass. 160.

riparian owner owns the soil under the water or not.[3] So the owner of lands upon a navigable lake has, as such, the exclusive right of access to and from the lake in front of his land and the right to construct there buildings, piers, and wharves not interfering with the public easement of navigation.[4] Also, if a lake, whether navigable or not, recede gradually and insensibly, the derelict land belongs to the adjacent riparian proprietor. The right of access is not lost by the gradual and imperceptible recession of the water, but the land gained by the reliction belongs to the owner of the contiguous land to which the addition is made.[5]

So, in general, we can say that every owner of land abutting upon a natural inland lake or pond has, like the owner of land bordering upon a river or stream, a usufruct in the waters of the lake or pond, and has a common right with his neighbors to the natural flow of the water in its accustomed place, without unnatural detention or substantial diminution in quantity or deterioration in quality; and none can make any use of it that shall in any way be prejudicial to the other owners, unless he has acquired a right to so use it by license, grant, or prescription.[6] Where the water of a lake recedes gradually and imperceptibly from the shore, the new land belongs to the riparian owner; but, upon the other hand, if the recession is sudden, the title to the land remains in the former owner.[7] The owner of land on a natural lake or pond has a right to have the natural level of the water maintained, so that he may enjoy his riparian rights. Therefore the owners lower down will

[3] Diedrich v. N. W. Union Ry. Co., 42 Wis. 248, where the Court held that, distinguished from appropriation and occupation of the soil under the water, a riparian owner upon navigable water, whether or not he owns the soil to the thread of the river or stream, has a right (unless prohibited by local law) to construct in shoal water, in front of his land, proper wharves in aid of navigation. Delaplaine v. Railway Co., 42 Wis. 214, 24 Am. Rep. 386; Chapman v. Oshkosh & M. R. Co., 33 Wis. 629; Lyon v. Fishmonger Co., L. R. 1, Appeal Cas. 662.

[4] Delaplaine v. Chicago N. W. & R. Co., 42 Wis. 214, 24 Am. Rep. 386.

[5] Murry v. Sermon, 8 N. C. (1 Hawkes) 56; Gould on Waters, 2d Ed., p. 331, Note 1; 12 Am. & Eng. Enc. of Law 651; Warren v. Chambers, 25 Ark. 120, C. S. 91 Am. Dec. 538, 4 Am. Rep. 23; Banks v. Ogden, 69 U. S. 2 Wall. 57, 17 L. Ed. 818.

[6] Smith v. City of Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

[7] Murry v. Sermon, 8 N. C. (1 Hawkes) 56; Sapp v. Frasier, 51 L. Ann. 1718, 26 So. Rep. 378, 72 Am. St. Rep. 493; Carr v. Moore, 119 Iowa 152, 93 N. W. Rep. 52; 97 Am. St. Rep. 292.

not be permitted to draw off the water below its natural low water line.[8] The same rule applies to the raising of the level of lakes and ponds to the injury of abutting owners.[9] In the Western States it is held that riparian rights attach to lakes, ponds, or sloughs, as well as to streams and water courses.[10]

§ 475. Riparian rights also attach to natural lakes and ponds—Western rule.—In the Western States, holding to the common law, natural water courses or flowing streams are not the only waters to which riparian rights attach. They also attach to bodies of still or standing waters.[1] As said in a recent California case: "No authority is cited in favor of the proposition that riparian rights exist only in flowing streams. After a somewhat exhaustive search, we have not succeeded in finding any decision to that effect. That such rights exist in any body of water, whether flowing or not, is shown by the following quotations from the decisions of other States."[2] It may be considered as settled that, where riparian

8 Fernald v. Knox Woolen Co., 82 Me. 48, 19 Atl. Rep. 93, 7 L. R. A. 459; Cedar Lake Hotel Co. v. Cedar Cr. Hydraulic Co., 79 Wis. 297, 48 N. W. Rep. 371; Draper v. Brown, 115 Wis. 361, 91 N. W. Rep. 1001.

9 Hebron Gravel R. Co. v. Harvey, 90 Ind. 192, 46 Am. Rep. 199; *In re* Minnetonka Lake Imp. Co., 56 Minn. 513, 58 N. W. Rep. 295, 45 Am. St. Rep. 494; Baker v. Weaver, 104 Ga. 228, 30 S. E. Rep. 726; Coe v. Winnepisiogee L. etc. Mfg. Co., 37 N. H. 254.

10 Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S. 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

See, also, Foss v. Johnstone, 158 Cal. 119, 110 Pac. Rep. 294.

1 For lakes and ponds, see Secs. 294-299.

2 Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S. 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823, citing and quoting Farnham on Waters, Secs. 62, 63, pp. 278, 280, 282; Turner v. Holland, 65 Mich. 453, 33 N. W. Rep. 283; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, rev'g 16 Fed. Rep. 823; Finley v. Hershey, 41 Iowa 393; Robinson v. Davis, 47 App. Div. 405, 62 N. Y. Supp. 444; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. Rep. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828; Priewe v. Wisconsin, 93 Wis. 534, 67 N. W. Rep. 918, 33 L. R. A. 645; Cedar Lake Hotel Co. v. Cedar Lake Hyd. Co., 79 Wis. 297, 48 N. W. Rep. 371; Valparaiso etc. Co. v. Dickover, 17 Ind. App. 233, 46 N. E. Rep. 591; Fernald v. Knox Woolen Co., 82 Me. 48, 19 Atl. Rep. 93, 7 L. R. A. 459; Draper v. Brown, 115 Wis. 361, 91 N. W. Rep. 1001; Delaplaine v. Chicago etc. Co., 42 Wis. 214, 24 Am. Rep. 386; Bassett v. Salisbury Co., 43 N. H. 569, 82 Am. Dec. 179.

rights are allowed at all, they attach to natural lakes and ponds in the same manner, and in favor of the same lands and persons as the riparian rights on the natural rivers and streams.[3] Therefore further discussion upon this particular point is unnecessary here. The extent of the rights in lakes and ponds will be discussed in other portions of this work.[4]

[3] See, also, for lakes and ponds, Secs. 294-299, 327.

The waters of a lake can not be either raised or lowered without making compensation to the riparian owners. Wendel v. Spokane County, 27 Wash. 121, 67 Pac. Rep. 576; Priewe v. Wisconsin etc. Co., 93 Wis. 534, 67 N. W. Rep. 918, 33 L. R. A. 645; Witty v. Nicollet County, 76 Minn. 286, 79 N. W. Rep. 112; Dressen v. Nicollet County, 76 Minn. 290, 79 N. W. Rep. 113; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. 371.

See, also, Auburn v. Union Water-Power Co., 90 Me. 576, 38 Atl. Rep. 561, 38 L. R. A. 188; Fernald v. Knox Woolen Co., 82 Me. 48, 19 Atl. Rep. 93, 7 L. R. A. 459; Madison v. Spokane Valley etc. Co., 40 Wash. 414, 82 Pac. Rep. 718, 6 L. R. A., N. S. 257; Draper v. Brown, 115 Wis. 361, 91 N. W. Rep. 1001; Kalez v. Spokane etc. Co., 42 Wash. 43, 84 Pac. Rep. 395; People v. Hulbert, 131 Mich. 156, 91 N. W. Rep. 211, 64 L. R. A. 265, 100 Am. St. Rep. 588, 18 Am. Eng. Ency. of Law 135, 139.

[4] For the appropriation of the waters of lakes, see Sec. 650.

For the ownership of the soil under lakes and ponds, see Secs. 541, 542.

CHAPTER 24.

WHO ARE RIPARIAN PROPRIETORS.

§ 476. Scope of chapter.
§ 477. The owners of the fee.
§ 478. In certain cases the owners of less than fee—In inchoate rights.
§ 479. Those entitled to the exclusive right of possession of riparian lands may use such rights.
§ 480. The United States as a riparian owner.
§ 481. A State as riparian owner.
§ 482. A municipal corporation as riparian owner.

§ 476. Scope of chapter.—Having discussed in the preceding chapters of this part the nature of riparian rights,[1] upon what lands such riparian rights attach,[2] and to what waters riparian rights attach,[3] in the present chapter we will discuss as to who are entitled to riparian lands, or, in other words, who are riparian proprietors.[4]

§ 477. The owners of the fee.—As riparian rights are a part and parcel of the lands to which they are attached,[1] it must necessarily follow that only the owners of the fee to such lands are the absolute owners of such rights. The question as to who has the right to use riparian rights is another matter and will be discussed in a subsequent section.[2] As we have also discussed in a previous section,[3] the ownership of the riparian rights in a natural stream depends upon the ownership of the bank or banks of the stream, and not upon the ownership of the soil over which the water flows. The ownership of the soil under the water is but one of the riparian rights which attaches by virtue of the ownership of the bank.[4] It therefore follows that one who merely owns the soil under the

1 See Chap. 21, Secs. 451-456.
2 See Chap. 22, Secs. 457-466.
3 Secs. 468-475.
4 See Secs. 477-482.

1 For the nature of riparian rights, see Secs. 451-456.
For the lands to which riparian rights attach, see Secs. 458-466.
Secs. 328, 329.

2 See Sec. 479.
3 See Sec. 451.
4 For the ownership of the soil under public or navigable waters, see Secs. 328, 329.
For that of private or non-navigable waters, see Secs. 537, 541, 542.

water is not a riparian owner or the owner of riparian rights in the stream.[5] Hence it follows that whoever is the owner of the land, which includes the bank or banks of the stream in fee simple, is also the absolute owner of the riparian rights in and to the stream or water course or the waters flowing therein.

§ 478. In certain cases the owners of less than fee—In inchoate rights.—In certain cases the owner of an inchoate right to the bank of a stream may also be the conditional owner of the riparian rights in the stream. Such would be the case where a tract of land had been entered under some one of the land laws of the United States,[1] such as a valid homestead or other valid entry of lands which include the bank or banks of a stream in the Western States where riparian rights are allowed. Upon the fulfillment of all of the conditions by the settler, he is given a patent by the Government and he then becomes vested with all of the riparian rights in the water course and other waters flowing therein. His riparian rights will then relate back to the very inception of his title to the land, or the first step taken to acquire title to the same.[2] But if the settler fails to comply with the conditions prescribed by the Act of Congress, under which he seeks to acquire title to the land, the inchoate title to both the land and also to the riparian rights attached then lapses and reverts to the Government.[3]

Where a riparian proprietor settled upon his land while it was Indian country, but continued to reside thereon when the country was opened to settlement, and thereafter acquired title to his lands,

[5] United States v. Morris, 24 Wash. Law Report 168; Weber v. State Harbor, 85 U. S. 18 Wall. 57, 21 L. Ed. 798; Turner v. People's Ferry Co., 22 Blatchf. 272, 21 Fed. Rep. 90; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Page v. Mayor, 10 App. Div. 294, 41 N. Y. Supp. 938.

See, however, the case of McCarter v. Hudson Water Co., 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S. 197, 118 Am. St. Rep. 754, 10 Am. & Eng. Ann. Cases 116; affirmed, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529.

[1] For the disposal of lands by the United States to individuals, see Secs. 332-441.

[2] For the Doctrine of Relation, see Secs. 742-756.

For the rights of appropriators as against settlers, see Secs. 810-823.

Rights to land attach when, see Sec. 445.

[3] For the Government as a riparian owner, see Sec. 480.

The right of a pre-emptor of such lands bordering on a stream, to use the water of said stream as riparian owner, is rendered worthless by the claimant's abandonment before pro-

such title would relate back to the date of the opening and his riparian rights date from that event.[4] The owner of a mining claim, located in accordance with the laws of Congress providing for such locations, has also inchoate right to the waters of the stream adjoining which his lands lie, which right becomes absolute upon his obtaining his patent to the mining claim from the Government, but upon the abandonment of such claim his rights to both the land and riparian rights are forfeited.[5] A mere trespasser upon the lands, either upon those of the United States, of a State, or individuals, acquires no right or ownership to the riparian rights in and to a stream which may adjoin such lands.[6] But a distinction must be made in the case of settlers upon the unsurveyed public lands of the United States, who have settled upon such lands with the *bona fide* intention that, upon the land being surveyed, they will make entry in the land office for the same. This class of settlers are protected by the statute upon their making the proper entry for the land, within the time limited by the statute after such lands shall have been surveyed.[7] However, even this class of

curing the receiver's receipt for the same. Conklin v. Pacific Improvement Co., 87 Cal. 296, 25 Pac. Rep. 399.

4 Redwater Land & Cattle Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702.

5 Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604, in which it is said: "One who locates upon public lands with a view of appropriating them to his own use, becomes the absolute owner thereof as against every one but the Government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers."

6 Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

In the State of Washington it is held that persons holding a possessory right to land abutting on a natural stream shall be entitled to use any water not otherwise appropriated for irrigation, etc., and is declaratory of the then existing law, that title acquired through patent from the United States relates back to the date of the settlement or filing, but does not authorize a mere trespasser or squatter of public land who subsequently sells or abandons his claim to acquire riparian right to a stream flowing through the land; for the reason that riparian rights are a mere incident to ownership in the soil and do not vest until the patent is issued. Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091.

7 See Secs. 445, 815-817.

In a recent case in California it was held that one in possession of unsurveyed public lands with intent to procure title thereto, is the owner of the lands within the articles of incorporation of a corporation organized

settlers have no rights in and to the lands upon which they have settled, or to the water adjoining the same, which they can assert against the Government where it reserves the land from entry for some special purpose.[8]

The same rule also applies to State lands. The disposition of State lands is entirely in the control of the legislature, which may withdraw or reserve from State sale any part of the same. As was said in a recent case in California,[9] after reviewing the decisions upon the subject: "The effect of these decisions is to put the applicant for the purchase of State lands in a position similar to that of one who enters Federal lands under the pre-emption laws of the United States. Under those laws it was uniformly held that no right, as against the United States, vested in a claimant until he had made or tendered the required payment. Up to that time the land might be withdrawn from sale."

§ 479. **Those entitled to the exclusive right of possession of riparian lands may use such rights.**—As to the use of riparian rights, such as the right to the use of water in general, it may be said that any person entitled to the exclusive right to possess and

to secure a supply of water for irrigation purposes and to distribute the same among its stockholders for use on land owned by them. The Court said: "We are of the opinion that, upon the facts alleged, the plaintiff must be held to be the owner of the land for which he desires water, within the meaning and intent of the articles of incorporation. The absolute ownership thereof is, of course, in the United States; but the plaintiff is in the undisputed possession thereof, having settled upon the same with intent to procure a Government title when it can be obtained, and he is deemed the owner and entitled to maintain his possession and use of the land as against all except the Government, or some one hereafter deriving title from the Government." Miller v. Imperial Water Co. No. 8, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S. 27.

See, also, Silver Creek & Panoche Land & Water Co. v. Hayes, 113 Cal. 142, 45 Pac. 191; Page v. Fowler, 37 Cal. 110; Doran v. Central Pacific R. R. Co., 24 Cal. 245.

[8] United States v. Hansen, 167 Fed. Rep. 881; Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. Rep. 65; People v. Sherer, 30 Cal. 645; Hutton v. Frisbie, 37 Cal. 475; Frisbie v. Whitney, 76 U. S. 9 Wall. 187, 19 L. Ed. 668, Yosemite Valley Case, 82 U. S. 15 Wall. 77, 21 L. Ed. 82; Low v. Hutchings, 41 Cal. 634; affirmed, 5 Wall. 77 (U. S.), 21 L. Ed. 82; Whitney v. Taylor, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. Rep. 796; Pennoyer v. McConnaughy, 140 U. S. 35 L. Ed. 363, 11 Sup. Ct. Rep. 699.

[9] Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. Rep. 65.

enjoy the banks, is entitled to use the riparian rights, although he does not own the fee.[1] Such would be the case of a lessee of the land to which the riparian rights were attached, where he is simply holding under his lease and does not own the title to the land. The title to the land in such a case and also the riparian rights attached thereto remain in the owner of the fee.[2] In a California case it was said: "The estate of the plaintiffs is sufficient to enable them to maintain this action. They were lessees for a term of ten years with the privilege of purchasing during that time."[3]

§ 480. **The United States as a riparian owner.**—By the Louisiana Purchase and the Treaty of Guadalupe Hidalgo,[1] the United States acquired vast tracts of unoccupied lands, through which many of the rivers and smaller streams flow, and within which there were many natural lakes and ponds. There is no question, except as to those lands and waters which had been granted by the predecessors of this Government to individuals, but that prior to the settlement of these lands, the United States was the owner of both the lands and the waters of this portion of the country. The United States having adopted the common law as governing the waters of the country prior to these treaties, and at this period being the owner of both the sides and the beds of these waters, the Government became what is known as the sole riparian owner of these lands, and the waters flowing through the same. This riparian ownership of the Government was recognized by the early California decisions during the formative period of the doctrine of appropriation hereinafter discussed.[2] In one case it was said:[3] "If the Government, which in this instance is the riparian proprietor, had granted to the defendants the right to divert from the creek a given quantity of water, without restriction as to the place of diversion, it is clear that the right could be exercised at any point on the stream, though the effect of the grant would not have been to

1 Hanford v. St. Paul etc. R. Co., 43 Minn. 104, 42 N. W. Rep. 596, 44 N. W. Rep. 1144, 7 L. R. A. 722.

2 See Secs. 624-631.

3 Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

See, also, Kalez v. Spokane Valley Land and Water Co., 42 Wash. 43, 84 Pac. Rep. 395.

1 See Secs. 394, 397, 399.

2 For the history of the Arid Region doctrine of appropriation, see Chap. 32, Secs. 595-626.

3 Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

convey any property in the *corpus* of the water, for no such property is vested in the Government."[4]

But these lands were finally opened up for settlement,[5] and the General Government relinquished its right to much of the waters flowing over the public domain, to be used by appropriators of the same for beneficial purposes.[6] It also relinquished the government and control of the waters within the boundaries of a State upon its admission to the Union.[7] But there are certain rights which the Government as the owner never relinquished to the individual settlers or to the States. These are: First, the right to continue unimpaired the navigable capacity of all of the navigable waters of the United States, regardless of any individual appropriation or diversion of the waters, or the rule of law adopted by any State.[8] Second, the right of the United States, as the owner of lands bordering on a stream or other body of water, to continue the flow of the waters; so far, at least, as may be necessary for the beneficial uses of the Government property.[9] In fact it is somewhat indefinite as to just what the Government now claims or may claim in the future under the second subject, but the language of the Supreme Court of the United States in the Rio Grande Dam and Kansas v. Colorado cases intimates, at least, that the Government has a right to the flow of the waters so far as may be necessary for the *beneficial uses* of the Government property, not by virtue of its riparian rights, but by virtue of appropriations or reservations for "bene-

[4] See, also, Spencer v. Winselman, 42 Cal. 479, 2 Morr. Min. Rep. 334; Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62; Hughes v. Devlin, 23 Cal. 501, 12 Morr. Min. Rep. 241; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, affirming *Id.*, 6 Dak. 71, 50 N. W. Rep. 486; Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

That the Government is the owner of the lands and waters upon the public domain with the absolute power of disposal, see Secs. 409-411.

[5] As to how the lands were settled, see Secs. 433-446.

[6] For relinquishment by the Government of waters, see Secs. 611-626.

[7] See Secs. 624, 625.

[8] For right of navigation, see Chap. 16, Secs. 342-357.

For the dedication of the waters to a State, see Secs. 373-389.

[9] As to what uses the water may be put, see Secs. 690-705.

See, also, Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 184 U. S. 416, 46 L. Ed. 619.

ficial uses." And in two cases the Courts have held that the Government had a preference right to the use of the water flowing through Government lands for these purposes, and that, too, when individuals were claiming the water for the same purposes.[10]

As far as the riparian rights of the Government are concerned, as we view the subject, the Government has no further or exclusive rights than an individual upon the same stream would have, and therefore the same rules govern between the Government and an individual as between individuals. Otherwise the common law upon this subject would not be followed. So, if a stream flows over the public land upon which there are also settlers, the water of the stream may be taken and used by the Government for any purpose, provided the rights of the riparian owners are not injured. This has also been the holding of the Courts.[11] The power of the Government to make reservations of its lands and waters has been discussed in previous sections.[12]

§ 481. **A State as riparian owner.**—A State may also be a riparian owner on streams which flow through or by lands owned by the State. But its rights in this respect are no greater than those of the individual owners upon the same stream. Otherwise the common law would be extended. To be sure the State has the sole jurisdiction of the waters flowing within its boundaries. It may dedicate all of its waters to the State, or to the public, and may make such laws governing the same as it sees fit so long as those laws do not conflict with the rights of the United States, as discussed

10 Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207, affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546, sustaining *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

See, also, effect of dedication by a State of its waters to the State as against the Government, Sec. 388.

11 See Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Union Mill & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

12 For the authority of the Government to make reservations, see Secs. 413, 414, 448.

For effect of the dedication of waters by a State as against the rights of the United States, see Sec. 388.

in previous sections.[1] But where the State owns lands bordering upon waters, and where it claims certain rights in the waters by virtue of the common-law theory of riparian ownership, it can claim no further rights than are accorded to the individual under the same law. So the taking of lands, through which certain streams run, by a State for park purposes, gives to the State under the common law no further rights than the individuals whose lands touch upon the same streams have.[2] Neither do riparian rights extend so as to authorize a State to supply with water from a stream a sufficient amount for its penitentiary and insane asylum, where from 1300 to 1500 people are kept in confinement, and where one of such institutions is situated a considerable distance from the stream.[3] But where the State has sold lands upon which riparian rights had previously attached, it is held that the grantees were also entitled to the same rights.[4]

§ 482. **A municipal corporation as riparian owner.**—A municipal corporation under the common law may also be a riparian owner upon a stream or other body of water, but only as to the lands actually owned by it. Riparian rights are strictly limited to the lands or lots which front on the water. If these are owned by the city, the city has the riparian rights incident to the lots; however, if the lots are owned by individuals, they alone are entitled to the riparian rights. Hence it follows that a municipal corporation can not, as a riparian proprietor, claim the right to supply the needs of all its inhabitants from a stream, upon the ground that the stream flows by the city. As a riparian owner the city can not claim a greater or more extensive right to the waters of a stream which washes by it, than the other riparian owners upon the same stream.[1] The right of a municipality to take the water from a

1 See Sec. 480.

2 Proprietors of Mills v. Commonwealth, 164 Mass. 227, 41 N. E. Rep. 280.

3 Salem Flouring Mills Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832.

See, also, Dudden v. Clutton Union Guardians of the Poor, 38 Eng. L. & Eq. 526, 1 Hurlst. (H. & N.) & N. 627, 26 L. J. Exch. N. S. 146; McCarter v. Hudson etc. Co., 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S. 197, 118 Am. St. Rep. 754, 10 Am. & Eng. Cases 116, affirmed in 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529.

4 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

1 Haupt, Appeal of, 125 Pa. 211, 17 Atl. Rep. 436, 58 L. R. A. 637; Emporia v. Soden, 25 Kan. 588, 37 Am.

stream flowing through or by the same is based upon entirely different considerations than those which govern its rights as a riparian owner.[2] As we shall see in a future portion of this work, this right may be acquired by purchase, by long continued custom, by the right of eminent domain, and in the Western States by appropriation and diversion for municipal purposes. However, if a city is the owner of riparian rights, it has the right to exercise the use of them, having due regard to the correlative rights of the other riparian owners upon the stream. And equity will enjoin a municipal corporation from taking a water supply from a stream to the injury of the lower riparian proprietors.[3]

In an Ohio case, however, it is held that an incorporated municipality situated upon a natural flowing stream is, in its corporate capacity, a riparian proprietor and has the right to use out of such stream all the water it needs for its own proper purposes, and that

Rep. 265; *Ex parte* Jennings, 6 Cow. 518, 16 Am. Dec. 447, rev'd, 5 Wend. 423; Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; *Id.*, 27 Ala. 104; *Id.*, 29 Ala. 127, 65 Am. Dec. 394; Harding v. Stamford W. Co., 41 Conn. 87; Rigney v. Tacoma Light & W. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Lord v. Meadville W. Co., 135 Pa. 122, 19 Atl. Rep. 1007, 8 L. R. A. 202, 20 Am. St. Rep. 864; Company of Proprietors etc. v. Romney, 9 C. B. N. S. 575, 99 Eng. C. L. 57; Bare v. Hoffman, 79 Pa. 71, 21 Am. Rep. 42; Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Swindon Waterworks Co. v. Wilts etc. Canal Co., L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284; Gallagher v. Kingston W. Co., 25 App. Div. 82, 49 N. Y. Supp. 250; affirmed, 164 N. Y. 602, 58 N. E. 1087; Pine v. New York, 103 Fed. Rep. 337; Leonard v. Rutland, 66 Vt. 105, 28 Atl. Rep. 835; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, 41 Atl. Rep. 385; Barre W. Co. v. Carnes, 65 Vt. 626, 27 Atl. Rep. 609, 21 L. R. A. 769, 36 Am. St. Rep. 891; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Schenectady v. Furman, 61 Hun, 171, 15 N. Y. Supp. 724; Stauffer v. East Stroudsburg Borough, 215 Pa. 144, 64 Atl. Rep. 411; Los Angeles v. Los Angeles Water Co., 124 Cal. 328, 57 Pac. Rep. 211, 571.

2 Right for municipal corporations to take the water from the streams, see Chap. 71.

3 Higgins v. Flemington W. Co., 36 N. J. Eq. 538; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Lonsdale v. Woonsocket, 21 R. I. 498, 44 Atl. Rep. 929; Pine v. New York, 103 Fed. Rep. 337; but see *Id.*, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592, where the Court held that where there had been laches upon the part of the riparian owners the damages might be ascertained and a decree issued for the payment of the same, with injunction in the alternative.

a lower proprietor who uses the water for power has no legal cause for complaint. This case was decided upon the theory that the city was a riparian owner regardless of the actual ownership of land bordering upon the stream, and is against the weight of authority.[4]

[4] Canton v. Shock, 66 Ohio 19, 63 N. E. Rep. 600, 58 L. R. A. 637, 90 Am. St. Rep. 557.

Compare cases cited in the first note of this section, *supra*.

CHAPTER 25.

RIGHT TO THE USE OF WATERS.

§ 483. Scope of chapter.
§ 484. The relative rights of owners on the same stream.
§ 485. The relative rights of owners on the same stream—Mr. Justice Story's opinion.
§ 486. Classification of uses under the common law.
§ 487. "Natural uses" and "artificial uses" distinguished.
§ 488. The use for natural wants may be extraordinary.
§ 489. The use of water for "artificial wants" must be reasonable.
§ 490. Reasonable use defined.
§ 491. The use of water by diversion an extraordinary one.
§ 492. What is a reasonable use for power purposes.
§ 493. What is a reasonable use in cutting ice.
§ 494. The manner of taking the water must be reasonable.
§ 495. The manner of the use must be reasonable.
§ 496. All surplus water must be returned to the stream after use.
§ 497. No priority of right at common law.

§ 483. Scope of chapter.—Having discussed in the preceding chapters of this part the nature of riparian rights,[1] upon what lands riparian rights attach,[2] to what waters riparian rights attach,[3] and who are riparian proprietors,[4] under the doctrine of the common law of riparian rights, in the present chapter we will discuss the right of riparian proprietors to the use of waters flowing by or through their lands under the rule of the common law. The discussion in this chapter will not include the right of riparian proprietors to use the waters of streams for the purpose of irrigating their riparian lands, except as that subject may be incidentally referred to. The right to use waters for irrigation will be discussed in a separate chapter herein, entitled "Irrigation as a Riparian Right."[5]

§ 484. The relative rights of owners on the same stream.—As we have seen in previous sections,[1] a riparian proprietor has no

1 See Chap. 21, Secs. 450-456.
2 See Chap. 22, Secs. 457-466.
3 See Chap. 23, Secs. 467-475.
4 See Chap. 24, Secs. 476-482.
5 See Chap. 26, Secs. 498-525.
1 See Sec. 455. See, also, Secs. 288, 289.

ownership in the water itself, running in a natural stream, except as to his usufructuary property thereto. The right of a riparian owner to use the water of a water course flowing by his land, may be divided into two classes. First, the ordinary use of the water; and second, the extraordinary use. These uses are based upon what are called the natural and artificial wants of man. Water used to supply man's natural wants is an "ordinary use," and to supply man's artificial wants is an "extraordinary use." The real difference pointed out by the authorities between these two classes of uses, is that under the first water may be used for ordinary purposes without regard to the effects of such use in case of a deficiency to those below on the stream, while in reference to the extraordinary uses, the effect upon those below must always be considered in determining its reasonableness. As, for example, for domestic uses the entire stream may be consumed, but for all other uses it depends upon the reasonable use based upon the correlative rights of the other owners on the stream. In the English case of Miner v. Gilmour,[2] Lord Kingsdown said: "By the general law, applicable to riparian proprietors, each has a right to what may be called the ordinary right of a use of water flowing past his land—for instance, to the reasonable use of the water for domestic purposes, and for his cattle, and this without regard to the effect that such use may have in case of deficiency upon the proprietors lower down the stream. But further, he may have use of it for any purpose or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the lawful use of it by other proprietors, either above or below him." Subject to this condition a riparian proprietor may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of water by other proprietors, and inflicts on them a sensible injury.[3] So, in this country, the rule is, that riparian proprietors have an equal

[2] 12 Moore P. C. C. 131, 4 Week. Rep. 328, 3 L. R. N. S. 98.

[3] See, also, Gould on Waters, Secs. 205-210; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106; Weiss v. Oregon Iron & Steel Co., 13 Ore. 496, 11 Pac. Rep. 255; Shury v. Piggott, 3 Bulst. 339, Popham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280; Dudden v. Clutton Union, 1 Hurlst & N. 627, 26 L. J. Exch. N. S. 146, 38 Eng. L. & Eq. 526; Mostyn v. Atherton, 2 Ch. 360, 81 L. T. N. S. 356.

or correlative right to the use of the water, and the right of each qualifies that of all the others; the question between them is whether the use made of the water by one is reasonable and consistent with a correspondent use by the rest.[4]

The common law does not deprive the riparian owners of the right to use the waters of the streams which run through or by their land, but it allows all to use the water in any manner not incompatible with the equal or correlative rights of all of the other owners upon the same stream. As was said by Mr. Justice Nelson in Howard v. Ingersoll:[5] "Streams of water are intended for the use and comfort of man, and it would be unreasonable and contrary to the universal sense of mankind to debar a riparian proprietor from the application of water to domestic, agricultural, and manufacturing purposes, provided the use works no substantial injury to others."[6] This right to the use of the water necessarily implies a right to exercise a certain degree of control over the water, and to some extent to diminish its volume. Therefore, when it is said that a riparian proprietor has the right to have the stream continue

4 Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Hendricks v. Johnson (Ala.), 6 Port. 472; Moffett v. Brewer, 1 G. Greene (Iowa) 348; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813; Holden v. Winnipiseogee Lake Cot. & W. Mfg. Co., 53 N. H. 552; Hough v. Doylestoen, 4 Brewst. 333; Ulbricht v. Eufalia W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Shook v. Colohan, 12 Ore. 239, 6 Pac. Rep. 503; Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361; Mason v. Cotton, 2 McCrary 82, 4 Fed. Rep. 792.

A riparian proprietor can not, by mere priority of use, acquire an exclusive right to the water of a stream. Bliss v. Kennedy, 43 Ill. 67.

See, also, Gillis v. Chase, 67 N. H. 161, 31 Atl. Rep. 18, 68 Am. St. Rep. 645; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Standen v. New Rochelle W. Co., 91 Hun, 272, 36 N. Y. Supp. 92; Williamson v. Lock's Creek Canal Co., 78 N. C. 156; Wheatley v. Chrisman, 24 Pa. (12 Harris) 298, 64 Am. Dec. 657, 11 Morr. Min. Rep. 24; Chatfield v. Wilson, 31 Vt. 358; *Id.*, 28 Vt. 49; *Id.*, 27 Vt. 670; West v. Fox River Paper Co., 82 Wis. 647, 52 N. W. Rep. 803; Pugh v. Wheeler, 19 N. C., 2 Dev. & B. 50; Pratt v. Lamson, 2 Allen (Mass.) 287; Roberts v. Claremount County, 74 N. H. 217, 66 Atl. Rep. 485, 24 Am. St. Rep. 962.

5 54 U. S. 13 How. 381, 14 L. Ed. 189, 17 Ala. N. S. 780, reversed.

6 See, also, for the right to use the water for natural and artificial purposes, Secs. 486-496.

through his land as it was wont to flow by Nature, it is not intended to be said that he has the right to all the water that naturally flows in the stream, for that would render the stream, which belongs to all the proprietors, of no use to any.[7]

The general principles of law which govern the rights of the upper and lower riparian owners are well settled and the upper riparian owner has no more right, nor can he use the water to any greater extent, than the lower riparian owner upon the same stream.[8] In the Western part of this country, which still adheres to the common law of riparian rights, the same rule has been adopted as to the relative rights of the riparian owners to the use of the waters of the same stream adjoining the lands, and which rights extended to all portions of the flow of the stream, subterranean as well as surface. As was held in the recent California case of Hudson v. Dailey,[9] to the effect that the application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow, the Court saying: "There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow or directly from the percolations beneath their lands. The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative."[10]

[7] Vansickle v. Haines, 7 Nev. 249; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636.

[8] Mostyn v. Atherton, 2 Ch. 630, 81 L. T. N. S. 356; Dudden v. Clutton Union, 26 L. J. Exch. N. S. 146, 1 Hurlst. & N. 627, 38 Eng. L. & Eq. 526; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314.

[9] 156 Cal. 617, 105 Pac. Rep. 748.

[10] See, also, Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Union Mill & Mining Co. v. Dangberg, 81 Fed. 73; *Id.*, 2 Sawy. 459, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Charnock v. Higuerra,

§ 485. The relative rights of owners on the same stream—Mr. Justice Story's opinion.—The rules of the common law as to the use of riparian waters, as we have said, are well settled, and the only difficulty which arises is in the application of the rules to the facts which may surround each particular case. The principles governing this use can never be better stated than it was by Mr. Justice Story in the early case of Tyler v. Wilkinson,[1] abstracts of which opinion are so often quoted upon different phases of the subject under consideration. We can do not better here than to quote a portion of that opinion: "*Prima facie* every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque filum aquae.* In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be, allowed of that which is common to all, a reasonable use. The true test of the principle

111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 115 Cal. 496, 47 Pac. Rep. 454; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. Rep. 623; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596.

1 4 Mason 397, Fed. Cas. No. 14,312.

and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation, or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness which would destroy private rights. The maxim is applied, *sic utere tuo, ut non alienum laedas.* . . .

"These are the general principles which appear to me applicable to the present case. They will be found recognized in many cases, but are in none more fully and accurately weighed and discussed than in" the following cases.[2]

"With these principles in view, the general rights of the plaintiffs can not admit of much controversy. They are riparian proprietors and, as such, are entitled to the natural flow of the river without diminution to their injury."

§ 486. Classification of uses under the common law.—Under the common law there are three classes of uses which the riparian proprietors may or may not make of the waters of a stream flowing by their lands. These are: First, natural or primary uses for which any riparian proprietor may take the waters of the whole stream;[1] second, artificial uses or uses which are not classified as those for natural wants;[2] and, third, uses of the water which may

2 Citing, Bealey v. Shaw, 6 East 208, 2 Smith 321, 102 Eng. Reprint 1266; Williams v. Moreland, 2 Barn. & Cresw. 910, 107 Eng. Reprint 620; Wright v. Howard, 1 Simon & Stuart 190, in England, 1 L. J. C. H. 94, 24 Rev. Rep. 169; Ingraham v. Hutchinson, 2 Conn. R. 584; Merritt v. Parker, 1 Coxe (N. J.) 460; Palmer v. Mulligan, 3 Caine's R. 308, 2 Am. Dec. 270; Platt v. Johnson, 15 Johns. R. (N Y.) 213, 8 Am. Dec. 233; Merritt v. Brinkerhoof, 17 Johns. R. 306, in America.

1 For natural uses, see Secs. 487, 488.

2 For artificial uses, see Sec. 489.

See, also, irrigation as a riparian right, Chap. 26, Secs. 498-525.

not be made at all; such, for example, would be the use of water by a riparian owner upon nonriparian lands.[3]

The first two classes will be discussed in the following sections of this chapter,[4] but the third class applies more to the subject of irrigation and will be discussed under the chapter on Irrigation as a Riparian Right.[5]

§ 487. "Natural uses" and "artificial uses" distinguished.—The classification made in the preceding section,[1] although followed by some of the earlier common law cases, even under the development of the common law of riparian rights, is somewhat fanciful. "Natural uses" or the uses for "natural wants" as variously defined by the authorities mean those uses of water which are based upon the immediate necessities of the case, such as those uses which must be immediate in order to sustain life.[2] "Everything, as it serveth more immediately or more nearly for food and use of man (as shall be said hereafter) hath the precedent dignity before any others."[3] And as to these uses it is generally held that one owner may consume the entire flow of the stream regardless of the rights of the other proprietors upon the same stream.[4] Therefore the words "natural" and "necessary" seem,

3 That the use must be upon riparian lands, see Secs. 457-466, 514-517.

See, also, McCartney v. Londonderry Railway, App. Cas. 1904, p. 301; Lawrie v. Silsby, 82 Vt. 505, 74 Atl. Rep. 94; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106; Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Lone Tree Ditch Co. v. Cyclone Ditch Co., 26 S. D. 307, 128 N. W. Rep. 596; *Id.*, 15 S. D. 519, 91 N. W. Rep. 352; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

4 See Secs. 487-497.

5 See Secs. 498-525.

1 See Sec. 486.

2 See Rylands v. Fletcher, L. R. 3 H. L. 330.

3 Lord Coke, speaking in regard to waters, Coke on Littleton, Book 1, Chap. 1, Sec. 1, 4a; Shury v. Piggot, 3 Bulst. 339, Popham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280, where it is said: "It is also a thing of necessity for the watering of cattle."

4 That the use of water for natural wants may be extraordinary, see Sec. 488.

But in one English case it was held that the question whether the amount of water taken from a stream for use in a house is wrongful, depends upon its quantity in relation to that which remained in the stream, and is for the jury. Norbury v. Kitchin, 9 Jur. N. S. 132, 7 L. T. N. S. 685.

See, also, Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Hazeltine v. Case, 46 Wis. 391, 1 N. W. Rep. 66, 32 Am. Rep. 715; Kimball v.

when used by the early English authorities in this connection, to be practically synonymous; while upon the other hand "artificial uses" or uses for "artificial wants" are those uses which do not depend so much upon the immediate necessities of this case as upon the question of business, profit, pleasure, or comfort. Therefore, under these authorities, the right of the use of water for irrigation is considered an artificial and not a natural use.[5] As was well defined by the South Dakota Court in a recent case: "These rights of riparian owners have at all times been divided into two classes, dependent upon the use to which the water is to be put, which uses have been variously denominated 'ordinary' or 'extraordinary' and 'natural' or 'artificial.' The so-called ordinary or natural use includes the use of the water for domestic purposes and for watering stock. The extraordinary or artificial use includes manufacturing, mining and irrigation. A wide difference in the nature of these two classes of use for water will be readily recognized. The one use is directly necessary to the preservation of animal life; the other, at best, but indirectly needful. From this difference in the inherent nature or purpose of the two uses has grown a wide difference in the rules applicable to the two."[6]

As stated before, the old common law classification is fanciful, and it is now practically obsolete, the question being left to that of the reasonable use of the water by the riparian proprietors, in all cases, rather than to an attempted arbitrary classification. Under these old authorities, the use of the water for irrigation not being considered a natural use of the water, it was held that such use could only be reasonable as compared with the rights of all riparian proprietors upon the same stream. But in a hot, dry, and arid country, where the use of water for irrigation is an absolute necessity in order to raise any crops, it can be readily seen that the use merges from what is strictly known under the common law classification as an "artificial use" into a "natural use," or one upon which the immediate necessities of life depend. Therefore, the

Northeast Harbor Co., 107 Me. 467, 78 Atl. Rep. 865, 32 L. R. A., N. S. 805; Frederick v. Bognor W. Co., 78 L. J. Ch. 40, 72 J. P. 501, 25 T. L. R. 31; Bristol W. Co. v. Uren, 15 Q. B. D. 637, 52 L. T. 655.

[5] See Irrigation as a Riparian Right, Secs. 498-525.

[6] Lone Tree Ditch Co. v. Cyclone Ditch Co., 26 S. D. 307, 128 N. W. Rep. 596.

See for former opinion in the same case, 15 S. D. 519, 91 N. W. Rep. 352.

authorities are generally drifting toward the common proposition that any use of the water of the stream by a riparian proprietor must depend upon reason or a reasonable use, after taking into consideration all of the facts and circumstances surrounding each particular case, and that, too, whether the uses are for strictly domestic purposes or whether the uses are for the irrigation of land, the development of power, or the many other uses which are made of the waters of the streams. As was said in the case of Brown v. Collins,[7] in disapproving of the opinion of Lord Cairns in the case of Rylands v. Fletcher:[8] "The distinction made . . . between a natural and a nonnatural use of land, if he meant anything more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in the wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law; it would impose a penalty upon efforts, made in a reasonable, skillful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principles can throw so serious an obstacle in the way of progress and improvement. Natural rights, are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. 'Most of the rights of property, as well as of person, in the social state, are not absolute but relative.' "[9] And in Lux v. Haggin,[10] it was said, relative to the common law classification: "The distinction between natural and artificial wants would be, under supposable conditions, somewhat fanciful."

In Harris v. Harrison,[11] it is said that: "According to the common-law doctrine of riparian ownership as generally declared in England and in most American States, upon the facts in the case at bar the plaintiffs would be entitled to have the waters of Harrison Canyon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the Western and

7 63 N. H. 442, 16 Am. Rep. 372.

8 L. R. 3 H. L. 330.

9 Quoting Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.

10 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

11 93 Cal. 676, 29 Pac. Rep. 325.

Southwestern States, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor." As held in an Illinois case,[12] "In an arid country water for irrigation may become a natural want of man as exigent as when needed for domestic purposes, since without it vegetation would cease, and the sources of life be indirectly destroyed."[13] And as said in a Nebraska case,[14] "The purpose of the law is to secure equality in the use of water by riparian owners, as nearly as may be, by requiring each to exercise his rights reasonably and with due respect to the rights of other riparian proprietors to apply the water to the same or other purposes. *This purpose is not subserved by any arbitrary classification,* and in regions where water must be carefully husbanded, and is in great demand for agricultural purposes, it is obviously better to incline toward such a rule with further equality and a wide participation in the benefits of a stream."[15] It, therefore, follows that, owing to the difficulty of classifying these uses and also in maintaining such a classification or classifications, the tendency now is to ignore the same and let the question as to the right to use the waters, as far as the common law is concerned, depend upon the reasonable use thereof, which use may be either natural or artificial, under the old common law rule classifying the same.[16]

§ 488. The use for natural wants may be extraordinary.—Under the rule of the common law, a riparian proprietor in the uses of the first class, as set forth in the preceding section,[1] for the

[12] Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106.

[13] See, also, Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

[14] Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 715, 60 L. R. A. 910, 108 Am. St. Rep. 697.

[15] Citing Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

See, also, to the same effect, Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

[16] For Irrigation as a Riparian Right, see Secs. 498-525.

[1] See Sec. 487.

purpose of supplying his natural wants, has the right to an extreme or extraordinary use of the water of a stream flowing past his land, and that, too, even if in supplying these wants all of the water of the stream is consumed, and none of which is permitted to flow down to the lower proprietors, and such a use is *damnum absque injuria* as to such lower owners.[2] These natural wants are limited in number—and are for domestic purposes, which include culinary and household purposes, cleansing and washing, and supplying the wants of the ordinary quantity of horses and stock.[3] The rule permitting the owner to supply his natural wants from a stream is ordinarily applied to navigable streams as well as those which are nonnavigable.[4] And, according to the great weight of the common law authorities, where the supply of water is very small for these natural wants, the upper riparian proprietor may, if necessary, consume all of the water of the stream to supply his natural wants, but not for any other purpose, and thus leaving no water to go down to the lower riparian owners or other users of the water.[5]

[2] Miner v. Gilmour, 12 Mo. P. C. 131, 156, 7 Week. Rep. 328, 3 L. R. A., N. S. 98; Marbury v. Kitchin, 3 F. & F. 392; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Swinton Water Co. v. Wilts Canal Co., L. R. 7 H. L. 697, 45 L. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284; Union Mill Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Union Mill Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370; *Id.*, 81 Fed. Rep. 73, 8 Morr. Min. Rep. 113; Black v. Marsh, 23 Pitts L. J. 29; Springfield v. Harris, 4 Allen 494, 81 Am. Dec. 715; Anthony v. Lapham, 5 Pick. 175; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Arnold v. Foot, 12 Wend. 330.

See, also, Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124.

That for artificial or extraordinary uses the use of the water must be reasonable, see Secs. 489-496.

[3] *Id.* Atty. Gen. v. Great Eastern R. Co., 23 L. T. N. S. 344, 18 Week. Rep. 1187; Lowe v. Lambeth Water Works Co., 52 L. T. N. S. 661; Union Mill Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

[4] Morrill v. St. Anthony Falls W. P. Co., 26 Minn. 222, 2 N. W. Rep. 842, 37 Am. Rep. 399; State v. Minneapolis M. Co., 26 Minn. 829, 2 N. W. Rep. 829.

[5] *Id.* Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 81 Fed. Rep. 73, 8 Morr. Min. Rep. 113; Roberts v. Richards, 44 L. T. N. S. 271, 5 L. J. Ch. 297, 50 L. J. Ch. N. S. 297; Evans v. Merriweather, 3 Scam. 492, 38 Am. Dec. 106; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Bear River Co. v. New York Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 3 L. T. N. S. 98; White v. White

"The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though, by reason of such diminution, a proprietor on a stream below fails to receive a supply commensurate with his wants, he is without remedy."[6] But according to some

(1906), App. Cas. 72; Helfrich v. Cantonsville W. Co., 74 Md. 269, 22 Atl. 72, 13 L. R. 117; 28 Am. Rep. 245; Spence v. McDonough, 77 Iowa 460, 42 N. W. Rep. 371; Slack v. Marsh, 11 Phila. 543; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Willis v. Perry, 92 Iowa 207, 60 N. W. Rep. 727, 26 L. R. A. 124, but in this case the Court held that the use of water for a public bath house and steam washer for washing bathing towels was an extraordinary and artificial use of the water.

But see People v. Hulbert, 131 Mich. 156, 91 N. W. Rep. 211, 64 L. R. A. 265, 100 Am. St. Rep. 588, 18 Am. & Eng. Ency. of Law 135, 139; Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Hale v. McLea, 53 Cal. 578; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; McEvoy v. Taylor, 56 Wash. 357, 105 Pac. Rep. 851; Hazeltine v. Case, 46 Wis. 391, 1 N. W. Rep. 66, 32 Am. Rep. 715.

In a recent Oregon case it was held that, for domestic use, including water not only for his household purposes but also for such animals as are essential for the proper sustenance of his family, the upper riparian owner may take so much of the water of a natural stream as may be necessary for that purpose, although none may be left for the lower riparian owners. Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

[6] Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128.

See, also, Pennsylvania R. Co. v. Miller, 112 Pa. 41, 3 Atl. Rep. 780; Clark v. Pennsylvania R. Co., 145 Pa. 438, 22 Atl. Rep. 989, 27 Am. St. Rep. 710; Anderson v. Cincinnati L. R. Co., 86 Ky. 44, 5 S. W. Rep. 49, 9 Am. St. Rep. 263; Helfrich v. Cantonsville etc. Co., 74 Md. 269, 22 Atl. Rep. 72, 13 L. R. A. 117, 28 Am. Rep. 245; Crawford County v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Union Mill & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113, 81 Fed. Rep. 73; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Baker v.

authorities the use of water for culinary purposes and for cattle must not deprive the other proprietors of an equal enjoyment of the same right.[7] Therefore, in these cases the rule is laid down upon the subject that the reasonable use of a quantity of water, for any purpose whatever, is always relative; and that it does not depend upon the convenience of, or the profitable results to, any particular proprietor, but upon the reasonable use, reference being had to the needs of all the other proprietors upon the stream. These cases, however, hold that it depends entirely upon the circumstances of each particular case.[8] As we have said before, the arbitrary classification of uses of water into natural and artificial is somewhat fanciful.[9] The better and more modern rule is to abolish such a classification, and to let each case stand upon the question of reasonable use, after taking into consideration the nature and extent of the use and all the other facts surrounding it.[10]

§ 489. The use of water for "artificial wants" must be reasonable.—The second class of uses under our classification made in a

Brown, 55 Tex. 377; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 331; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Atty. Gen. v. Great Eastern R. Co., 23 L. T. N. S. 344; Shury v. Piggot, 3 Bulst. 339, Phopham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280.

"A lower proprietor can not complain that one above uses the water of a stream for ordinary purposes, even though the water is thus exhausted." Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758.

See, also, Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Baker v. Brown. 55 Tex. 377.

7 Norbury v. Kitchin, 9 Jur. N. S. 132, 7 L. T. N. S. 685.

8 Chatfield v. Wilson, 31 Vt. 358, 28 Vt. 49; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; McElry v. Goble, 6 Ohio St. 187; Adams v. Barney, 25 Vt. 225; Pomeroy, Riparian Rights, Sec. 7; Townsend v. McDonald, 14 Barb. 460, 12 N. Y. 381, 64 Am. Dec. 508; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Bliss v. Kennedy, 43 Ill. 67; Heath v. Williams, 25 Me. 209; 43 Am. Dec. 274, note and cases cited; Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394; *Id.*, 27 Ala. 104; *Id.*, 24 Ala. 130, 60 Am. Dec. 453; Slack v. Marsh, 11 Phila. Leg. Int. 543; Elliot v. Fitchburg R. Co., 10 Cush. 193, 57 Am. Dec. 85.

It has been held in England that the use of water for brewing purposes was an ordinary use. Wilts Canal v. Swindon Water Co., L. R. 9 Ch. 457; Coulson & Forbes on Waters, 116.

9 See Sec. 487.

For use of water for irrigation, a natural or artificial want, see Secs. 499-506.

10 For reasonable use, see Secs. 489-496.

previous section are the so-called artificial uses, or those which are not immediately necessary for natural wants to sustain life.[1] These uses are for purposes of profit, comfort, trade, or improvement. The right of the riparian proprietors to use the water of a stream which runs through or adjoins their lands, to supply their extraordinary or artificial wants, or, in other words, all those wants which are not natural,[2] is common to them all. These uses include water for the running of machinery,[3] diversion in some instances for irrigation,[4] any other use where the diversion of the water from its natural channel is required,[5] and also the use for bathing, boating, and many other purposes, which are not included among those immediately necessary to support life.[6] For these uses, one riparian proprietor can never take all of the water in the stream to the exclusion of the other riparian proprietors upon the same stream.[7] However, if the supply of water is sufficient, any proprietor can use the water of the stream for any purpose whatever, provided that none of the other proprietors or the public are injured, or have any of their rights infringed upon by his so using it.[8] In other words

1 See Secs. 487, 488.

2 For use to supply natural wants, see Sec. 488.

3 For water rights for power purposes, see Sec. 492.

4 See for use of water for irrigation, a natural or artificial want, Secs. 499, 500.

5 See Sec. 491.

6 For natural wants, see Secs. 487, 488.

7 Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Learned v. Tangeman, 65 Cal. 334, 4 Pac. Rep. 191; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. Rep. 62; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Salem etc. Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832; McCartney v. Londonderry Railway, App. Cas. (1904) 301.

8 See, also, Washburn on Easements, p. 216; Angell on Water Courses, Sec. 95; 3 Kent's Com. 440; Elliot v. Fitchburg R. Co., 10 Cush. 191-195, 57 Am. Dec. 85; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Union Mill Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106; Miller v. Miller, 9 Pa. St. 74, 49 Am. Dec. 545; Arnold v. Foot, 12 Went. (N. Y.) 330; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Nuttall v. Bracewell, L. R. 2, Exch. 1; Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 3 L. R. N. S. 98, 14 Eng. Reprint 861; Gerrish v. New Market Mfg. Co., 30 N. H. 478; Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355; Norway Plains Co. v. Bradley, 52 N. H. 86; Holden v. Lake Co., 53 N. H. 552; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723; Mason v. Hill,

his right to use the water must be reasonable with reference to the equal or correlative rights of all the other proprietors upon the stream with that of his own. For it must be always borne in mind that the rights of all the proprietors upon the stream are equal, in respect to all extraordinary uses of the water thereof.[9]

5 B. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Barrett v. Parsons, 10 Cush. 367; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Cary v. Daniels, 49 Mass. 8 Met. 466, 41 Am. Dec. 532; Pitts v. Lancaster Mills, 54 Mass. 13 Met. 156; Thurber v. Martin, 2 Gray 394, 61 Am. Dec. 468; Tourtellot v. Phelps, 4 Gray 370; Chandler v. Howland, 7 Gray 348, 66 Am. Dec. 487; Wood v. Edes, 2 Allen 578; Twiss v. Baldwin, 9 Conn. 291; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Agawan Canal Co. v. Edwards, 36 Conn. 476; Merritt v. Brinkerhoff, 17 Johns. 306; Timm v. Bear, 29 Wis. 254, where it was held: "As between an upper and a lower mill on the same stream, what constitutes a reasonable use of water by the upper mill depends on the particular circumstances of each case; such as the nature, extent, and necessity of the use, the manner in which the water is applied, the previous usage, the nature and condition of the improvements upon the stream, the volume and velocity of the water, and its prospective rise and fall, the nature and situation of the lower mill and pond, the capacity of the latter, and the practicability of enlarging it."

See, also, Farrell v. Richards, 30 N. J. Eq. 511.

9 Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Merrifield v. Lombard, 13 Allen 16, 90 Am. Dec. 172; Middleton v. Flat River B. Co., 27 Mich. 533; Miner v. Gilmour, 12 Moore P. C. C. 131, 4 Week. Rep. 328, 3. L. R. N. S. 98, 14 Eng. Reprint 861; Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming 2 Hurlst. & N. 168, 11 Eng. Reprint 140; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Sandwich v. Grt. Nor. R. Co., L. R. 10 Ch. Div. 707, 27 Week. Rep. 616; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Gould v. Boston Duck Club, 13 Gray 442; Haskins v. Haskins, 9 Gray 390; Merrifield v. Worcester, 110 Mass. 219, 14 Am. Rep. 592; Moulton v. Newburyport W. Co., 137 Mass. 163; Mason v. Hoyle, 56 Conn. 255, 14 Atl. 786; Hetrick v. Deachler, 6 Pa. 32; Hazeltine v. Case, 46 Wis. 391, 1 N. W. Rep. 66, 32 Am. Rep. 715; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526.

What is a reasonable use of the water is a question of fact for the jury. Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. Rep. 62.

See, also, Prentice v. Geiger, 74 N. Y. 341; Hayes v. Waldron, 44 N. H. 584, 84 Am. Dec. 105; Barrett v. Parsons, 10 Cush. (Mass.) 367; Pollitt v. Long, 3 Thomp. & C. 232. But see Jones v. Prop. Portsmouth Aqueduct, 62 N. H. 488; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Twiss v. Baldwin, 9 Conn. 291; Gillett v. Johnson, 30 Conn. 180; Anderson v. Cincinnati

What constitutes a reasonable use is a question of fact having regard to the subject-matter and the use; the occasion and manner

So. R. Co., 86 Ky. 44, 5 S. W. Rep. 49, 9 Am. St. Rep. 263; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Kalama Co. v. Kalama Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R. A. N. S. 641, 125 Am. St. Rep. 948; Learned v. Tangeman, 65 Cal. 334, 4 Pac. Rep. 191; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Hale v. McLea, 53 Cal. 578; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Morris v. Bean, 146 Fed. Rep. 431; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Union M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Union M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; *Id.*, 81 Fed. Rep. 73; Stacey v. Delery, 57 Tex. Civ. App. 242, 122 S. W. Rep. 300; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A. N. S. 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 650, holding that an irrigation company owning riparian land has no greater right to the waters of the stream than other riparian owners; Pierson v. Speyer, 178 N. Y. 270, 70 N. E. Rep. 799, 102 Am. St. Rep. 499, holding that, under certain circumstances, the storing of water in ornamental ponds is a reasonable use of the water.

But see Los. Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; writ of error dismissed, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. Ed. 487, 63 L. R. A. 471; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Prentice v. Geiger, 74 N. Y. 341, 9 Hun 350; Penn. R. Co. v. Miller, 112 Pa. St. 34, 3 Atl. 780; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 113; 81 Fed. Rep. 73; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Patten v. Marden, 14 Wis. 473; Rudd v. Williams, 43 Ill. 385; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230; Pinney v. Luce, 44 Minn. 369, 46 N. W. Rep. 561; Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Morrill v. St. Anthony Falls W. P. Co., 26 Minn. 222, 2 N. W. Rep. 842, 37 Am. Rep. 399; Tourtellot v. Phelps, 4 Gray 370; Saunders v. Bluefield Waterworks & Imp. Co., 58 Fed. 133; Hoxsie v. Hoxsie, 38 Mich. 77; Pugh v. Wheeler, 19 N. C. (2 Dev. & B. N. C.) 50; Hendricks v. Johnson, 6 Port. (Ala.) 472; Hough v. Doylestown, 4 Brewst. (Pa.) 333; Oregon Iron Co. v. Trullenger, 2 Ore. 1; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813; Ellis v. Clemens, 21 Ont. Rep. 227; affirmed 22 Ont. Rep. 216; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723; Wheatley v. Chrisman, 24 Pa. (12 Harris) 298, 64 Am. Dec. 657, 11 Morr. Min. Rep. 24; Jacobs v. Allard, 42 Vt. 303, 1 Am. Rep. 331; Williamson v. Lock's Creek Canal Co., 78 N. C. 156; Keeney & W. Mfg. Co. v. Union Mfg. Co., 39 Conn. 576; Mason v. Cotton, 4 Fed. Rep. 792, 2 Mc-

of its application; its object, extent, and necessity; the kind of business to which the water is subservient; the importance and necessity of the use claimed by one party; and the extent of the injury caused by that use to the other.[10] There is no fixed rule of law for the determination of what will constitute a reasonable use by a riparian owner of the waters of a natural stream, but whether the use is reasonable depends upon the particular circumstances of each particular case.[11]

In the early case of Beisell v. Scholl,[12] an action for diverting a water course, decided by the Supreme Court of the United States, it was held that every man in this country has the unquestionable right to erect a mill upon his own land, and to use the water passing through his land as he pleases, subject only to this limitation, that his mill must not be so constructed and employed as to injure his neighbor's mill, and that after using the water he returns the stream to its ancient channel. In a more recent Michigan case Mr. Justice Cooley thus states the rule: "As between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether under all the circumstances of the case the use of the water by one is reasonable

Creary 82; Bates v. Weymouth Iron Co., 8 Cush. (Mass.) 548; Phoenix Cotton Mfg. Co. v. Hazen, 118 Mass. 352; White v. Whitney Mfg. Co., 60 S. C. 254, 38 S. E. Rep. 456; Mississippi C. R. Co. v. Mason, 51 Miss. 234; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

10 Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. Rep. 167, 44 Am. Rep. 194.

See, also, Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308.

11 Union Mill & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Lockwood Co. v. Lawrence, 77 Me. 277, 52 Am. Rep. 763; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Heilbron v. 76 Land & W. Co., 80 Cal. 189, 22 Pac. Rep. 62; Boyd v. Schreiver, — Tex. Civ. App. —, 116 S. W. Rep. 100; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Lockwood Co. v. Lawrence, 77 Me. 277, 52 Am. Rep. 763; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Parker v. American etc. Co., 195 Mass. 591, 81 N. E. Rep. 468, 10 L. R., A. N. S., 584; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723.

12 4 U. S. 4 Dallas 211.

and consistent with a corresponding enjoyment of the right by the other."[13]

According to all of the common law authorities, the only right of property in the water, flowing in its natural channel, is usufructuary; and that, after so using it, if the water has been diverted from its natural channel he must return it to the stream without material diminution of quantity or alteration of quality, for it is an ancient and well-established principle of the common law that the water of a stream can not lawfully be diverted unless it is returned again to its accustomed channel before it passes to the land of the proprietor below.[14] But, under the common law, this right to the extraordinary use of water is inferior and subordinate to the right of its ordinary use for the supplying of natural wants; for if the water of a stream is barely sufficient to supply the natural wants of the different proprietors none of them can use the water for such extraordinary purposes as irrigation or manufactures, or for any other purpose, except to supply himself and family with a sufficient quantity for domestic purposes, if in so using it he infringes upon the rights of any of the other riparian proprietors.[15] The two most important of the extraordinary uses under this class are the use of the water for the working of machinery and mills,[16] and the second is the use of water for irrigation under the common law. The first use is more important in the Eastern portion of our country, while

13 Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102.

See, also, Cary v. Daniels, 49 Mass. 8 Met. 466, 4 Am. Dec. 532.

14 For ownership in water, see Secs. 288, 289, 455; Angell on Water Courses, Sec. 94.

See, also, cases cited above.

See, also, Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Colborn v. Richards, 13 Mass. 420, 7 Am. Dec. 160; Cook v. Hull, 3 Pick. 269, 15 Am. Dec. 208; Anthony v. Lapham, 5 Pick. (Mass.) 175.

15 For supplying natural wants, see Secs. 487, 488; Union Mill & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 113; *Id.*, 81 Fed. Rep. 73; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Ellis v. Tone, 58 Cal. 289.

16 For use of water for power purposes, see Secs. 837-846.

See, also, Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Webb v. Portland Mfg. Co., 3 Summ. 189, Fed. Cas. No. 17,322; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Bowman's Devisees v. Wathen, 2 McLean 376, Fed. Cas. No. 1076; Beisell v. Scholl, 4 U. S. 4 Dallas 211; 1 L. Ed. 804; Kalama Elec. L. & P. Co. v. Kalama Driving Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R., A. N. S., 641, 125 Am. St. Rep. 948.

the latter use is to be found in the extreme Western Coast States and the States of the Middle West, in which there is an attempt to reconcile the appropriation and diversion of waters from the natural streams for the purpose of irrigation with the common law.[17] Both of these subjects, however, will be treated in subsequent chapters.[18]

§ 490. **Reasonable use defined.**—As stated in the preceding section,[1] the use by a riparian proprietor of the water of the stream flowing by his lands must be reasonable; and as to what is a reasonable use depends upon the circumstances surrounding each particular case. Now, the question arises, What is a reasonable use as a question of law? No arbitrary classification as to just what may or may not be a reasonable use in all cases has been or can be made by any court, but there are certain rules which have been laid down by the appellate courts, which aid the jury, or the trial courts, in trying the case without a jury, in arriving at their conclusions. It must be distinctly understood, however, as to whether or not the facts surrounding any particular case come within the general rules laid down by the courts, as what is a reasonable use of water is one of the facts for the jury to decide.

Among the general rules laid down by the courts are to be found: First, the use to be reasonable must work no unnecessary injury to other riparian proprietors upon the same stream;[2] second, the char-

17 For irrigation under the common law, see Chap. 26, Secs. 498-525.

18 For use of water for power purposes, see Secs. 847-855.

For irrigation under the common law, see Chap. 26, Secs. 498-525.

See, also, the question of reasonable use of subterranean waters, Secs. 1191-1200.

See, also, upon this subject, Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

1 See Sec. 489.

2 One riparian proprietor can not appropriate a specific portion of the water of a stream to his own use to the exclusion of those below him, and to the injury of their rights. Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199; McCartney v. Londonderry Railway, App. Cas. (1904) 301; Salem etc. Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832.

See, also, cases cited in the notes of the preceding section, 489.

But so long as there is no larger portion of water running through the land than is just and reasonable, it can not be considered to be wrongful or injurious to a proprietor lower down the stream. Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Baltimore v. Appold, 42 Md. 442; Townsend v. Bell, 70 Hun, 557, 24 N. Y. Sup. 193;

acter and extent of the particular use in its relation to the size of the stream and custom of the country;[3] and, third, the necessities of the one making use of the water. As was held in a Minnesota case,[4] what constitutes a reasonable use is a question of fact, having regard to the subject-matter and the use; the occasion and manner of its application; its object, extent, and necessity; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party; and the extent of the injury caused by it to the other.[5] The rule of equality of right is what determines the quantity to be used by each riparian proprietor.[6]

In a leading case upon the subject in Massachusetts,[7] it was said:

Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370.

See, also, *Id.*, 81 Fed. Rep. 73; Wright v. Howard, 1 Simon & Stuart 190, 1 L. J. Ch. 94, 24 Rev. Rep. 169.

3 White v. Whitney Mfg. Co., 60 S. C. 254, 38 S. E. Rep. 456; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526.

See, also, Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723, where it was held that the question of reasonableness of the use of the stream is one of fact when it is not settled by custom, as in the question of irrigation, propelling machinery, and watering cattle, and when it is in its nature doubtful.

See, also, Jacobs v. Allard, 42 Vt. 303, 1 Am. Rep. 331.

4 Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. Rep. 167, 44 Am. Rep. 194.

See, also, Tourtellot v. Phelps, 4 Gray 370.

5 See, also, Meng v. Coffey, 67 Neb. 500, 93 N. W. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Gehlen Bros. v. Knorr, 101 Iowa 700, 70 N. W. 757, 36 L. R. A. 697, 63 Am. St. Rep. 416; Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124; White v. Whitney Mfg. Co., 60 S. C. 254, 38 S. E. 456; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; *Id.*, 151 Cal. 587, 91 Pac. Rep. 395; McEvoy v. Taylor, 56 Wash. 357, 105 Pac. Rep. 851, where it is said: "The parties being riparian owners, their respective rights to the use of the water are to be determined by their rights as such riparian owners. These rights are now well established. As a riparian owner is entitled to reasonable use of the waters as an incident to his ownership, and, as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others."

See, also, City of Aberdeen v. Lytle etc. Co., 58 Wash., 368, 108 Pac. Rep. 945.

6 Pinney v. Luce, 44 Minn. 369, 46 N. W. Rep. 561.

See, also, Crook v. Hewitt, 4 Wash. 749, 31 Pac. Rep. 28.

7 Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

"The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris,* of such a character that, while it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficent gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it can not be said to be wrongful or injurious to a proprietor lower down. What is a just and reasonable use may often be a *difficult question,* depending upon various circumstances."[8] No hard and fast rule can be laid down defining what would be a reasonable use of the water in every case by a riparian proprietor. And, after a careful study of the authorities upon the proposition, we will only add that about the only definition that can be given of the term reasonable use by one riparian proprietor is that it must be reasonable, taking into consideration the facts and circumstances surrounding each particular case and the equal or correlative rights of all of the other riparian proprietors upon the same stream. As was said in a Pennsylvania case: "Each proprietor may make any reasonable use of the water upon the premises; he may diminish the quantity, but the use must be a reasonable one."[9] The difficulty of defining "reasonable use" in cases of this nature was also recognized in a recent Massachusetts case,[10] wherein it is said: "It is difficult, if not impossible, to reconcile all the decisions which have been made upon the question of the right of riparian proprietors to use the waters of streams flowing through or along their lands. This is a com-

[8] The doctrine in the above case was reaffirmed in the late case of Parker v. American Woolen Co., 195 Mass. 591, 81 N. E. Rep. 468, 10 L. R. A., N. S. 584.

See, also, Cary v. Daniels, 49 Mass. 8 Met. 466, 4 Am. Dec. 532; Thurber v. Martin, 2 Gray, 394, 61 Am. Dec. 468; Gould v. Boston Duck Co., 13 Gray 442; Pitts v. Lancaster Mills, 13 Met. 156; Springfield v. Harris, 4 Allen 494, 81 Am. Dec. 715; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723; O'Riley v. McChesney, 49 N. Y. 672; Brown v. Kistler, 190 Pa. 499, 42 Atl. Rep. 885; Wadsworth v. Tillotson, 15 Conn. 336, 39 Am. Dec. 391; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561.

[9] Brown v. Kistler, 190 Pa. 499, 42 Atl. Rep. 885.

[10] Parker v. American Woolen Co., 195 Mass. 591, 81 N. E. Rep. 468, 10 L. R. A., N. S. 584.

mon right, and each must exercise it with due regard to the rights of others, and each must submit to that degree of inconvenience and hardship in the exercise of his rights which results from the existence of like rights in others. In such cases each proprietor is entitled to use the stream in such reasonable manner, according to usages and wants of the community, as will not be inconsistent with a like use by other proprietors above and below him."

§ 491. The use of water by diversion an extraordinary one.—All uses of the water which require a diversion of the same from the natural channels thereof come under the class of artificial or extraordinary uses. Under the common law priority of appropriation is not recognized, and the first appropriator of running water has no right to divert the stream to the injury of other riparian proprietors, who may afterward seek to use the stream.[1] In fact, under a strict construction of the common law, especially in the early cases, both in England and in this country, the diversion of a water course, even where there was no actual injury to the riparian owners lower down the stream, legally imports damage, because it is an infringement of a right.[2] Mr. High says: "A riparian proprietor, owning to the center of the stream, is en-

[1] Gilman v. Tilton, 5 N. H. 231; Martin v. Biglow, 2 Aik. (Vt.) 184, 16 Am. Dec. 696; Twiss v. Baldwin, 9 Conn. 291; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102.

[2] Angell on Water Courses, Sec. 135, and cases cited; Mason v. Hill, 5 Barn. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Wilts & Berks Canal Nav. Co. v. Swindon Waterworks Co., L. R. 9 Ch. 457, S. C. L. R. 7 H. L. 697; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; but see Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming 2 H. & N. 168.

See, also, Pope v. Kinman, 54 Cal. 3; Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. (Mass.) 241; Skook v. Colohan, 12 Ore. 239, 6 Pac. Rep. 503; Butman v. Hussey, 12 Me. 407; Hilliker v. Coleman, 73 Mich. 170; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Rummell v. Lamb, 100 Mich. 424, 56 N. W. Rep. 167; Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Crooker v. Bragg, 10 Wend. (N. Y.) 260; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Shury v. Piggott, 3 Bulst. 339, Popham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280.

The diversion of a water course from its ancient channel is a nuisance. Shields v. Arndt, 4 N. J. Eq. 234.

See, also, Weiss v. Oregon Iron Co., 13 Ore. 496, 11 Pac. Rep. 255.

titled to the aid of equity to prevent a diversion of the water from the natural channel. Nor does the neglect of complainants to use or appropriate the water-power, or the fact that they have as yet sustained but small pecuniary damage, or that the defendant would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a Court of Equity in refusing relief."[3] In the later cases, however, it is held that the use by diversion is but one of the methods of using the water for extraordinary uses, and that the same rule applies as to those extraordinary uses where the water is not diverted.[4] In other words, a riparian owner has the right to the use of the stream by diverting a portion of the same, but this right must be reasonably exercised, and the water must be returned to the channel unpolluted and without any essential diminution or waste, and before the water reaches the lands of the lower proprietors.[5] Such uses of a stream by riparian proprietors is to some extent a question of degree, and in all such cases the size and capacity of the stream are to be considered, and the amount of the water diverted and for what purpose. The amount taken out from a large running river which would cause no sensible or practical diminution of its benefits to the lower proprietors would, if taken from a small stream, materially diminish its quantity and

[3] High, Inj., Sec. 795, and authorities cited.

See also, Remedies, Injunctions.

[4] See Extraordinary Use Must be Reasonable, Sec. 489.

[5] Haymes v. Gault, 1 McCord S. C. 543; Farnum v. Falmouth, 25 Eng. C. L. Rep. 526, 6 Car. & P. 529, 2 Ad. & El. 452, 4 L. J. K. B., N. S. 269; Bealey v. Shaw, 6 East 208, 2 Smith 321, 102 Eng. Reprint 1266; Kimberly & C. Co. v. Hewitt, 79 Wis. 334; Parker v. Griswold, 17 Conn. 288, 9 L. R. A. 810, 42 Am. Dec. 739; Sackrider v. Beers, 10 Johns. 241; Weiss v. Oregon Iron Co., 13 Ore. 496, 11 Pac. Rep. 255; Tucker v. Salem Flouring Mills Co., 15 Ore. 581, 16 Pac. Rep. 426.

The upper proprietor may divert the water for use on his own land, provided he restores it to the stream before it reaches the land of the lower proprietor. Webster v. Fleming, 2 Humph. 518.

See, also, Norton v. Valentine, 14 Vt. 246, 39 Am. Dec. 220; Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394; Canfield v. Andrew, 54 Vt. 1, 41 Am. Rep. 828; Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Perkins v. Dow, 1 Root (Conn.) 535.

The erection of a dam which causes the water to spread out over a large tract of land and be lost by evaporation and percolation, is a wrongful diversion of the water. White v. East Lake Land Co., 96 Ga. 415, 23 S. E. Rep. 393, 51 Am. St. Rep. 141.

work a manifest injury to those below. All the common law authorities concur that, when the amount abstracted perceptibly or materially diminishes the quantity of the stream, so that injury results to those below, such a use of it by a riparian owner is unreasonable, and an infringement on the rights of other riparian owners, for which the law furnishes redress. Neither does necessity make any difference. As was said by Black, J., in Wheatley v. Chrisman: "The necessities of one man's business can not be the standard of another's rights in a thing which belongs to both."[6]

Again, the diversion of a water course, or a part of it, by an upper riparian proprietor for generating power, or for other manufacturing purposes, without restoring to the natural channel the water after it has passed through the machinery is never allowed. In fact, any use of the water of a stream can not be considered a reasonable one which involves substantial diminution and waste.[7] As was held in a very recent California case, a riparian owner has the right to make any use of the water, beneficial to himself on the riparian land, including the generating of electric power, which his situation enables him to make; but, if his use involves the consumption of the water, he can not use more than his reasonable share as compared to the other riparian owners, and he must not pollute the water to the injury of the others entitled to it, and the water he does not consume must be returned to the stream before it passes his land.[8] As to what constitutes a reasonable use of water by diversion under the common law rule, is primarily a question of fact, to be settled by the jury in view of all the circumstances of each particular case.[9]

The subject of irrigation and the diversion of the waters of

[6] 24 Pa. St. 302, 64 Am. Dec. 657. See, also, Pennsylvania R. Co. v. Miller, 112 Pa. 34, 3 Atl. Rep. 780.

[7] Van Hoesen v. Coventry, 10 Barb. 518.

[8] Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

See, also, Gould v. Eaton, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Arroyo D. & W. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874.

[9] See, also, Secs. 511-513; White v. Whitney Mfg. Co., 60 S. C. 254, 38 S. E. Rep. 456; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526; Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. Rep. 194, 44 Am. Rep. 194; Tourtellot v. Phelps, 4 Gray 370; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723; Jacobs v. Allard, 42 Vt. 303; 1 Am. Rep. 331.

streams where all of the water is practically consumed in those States which adhere to the common law doctrines of riparian rights and at the same time permit the appropriation and diversion of water for these uses we will discuss in a subsequent chapter of this work.[10]

§ 492. **What is a reasonable use for power purposes.**—A riparian owner also has the right to the use of the waters of a stream flowing by his land for the development of power, either by direct power developed from the flow of the water itself, or by the generation of electric energy for transmission of electricity to other places than at the point where the same is developed upon the stream. The use of any riparian proprietors of the water for this purpose must be reasonable as compared to the like or other uses by other riparian proprietors upon the same stream. If the water is diverted from the stream for the purpose of getting a fall and thus developing power, after its use it must be returned to the stream for the use of the other riparian proprietors below. Any other disposition of the water after use would be termed an unreasonable use of the water. But it is not our intent at this point to discuss this subject at length, for the reason that the subject of use of water for power purposes, both under the common law of riparian rights and under the Arid Region doctrine of appropriation, will be fully discussed together in a subsequent chapter of this work.[1]

§ 493. **What is a reasonable use in cutting ice.**—The rights of riparian owners to the use of the water of a stream are not affected by the fact that it is proposed to remove the water in its congealed or frozen state. It therefore follows that the cutting of ice from a stream of water is the use of the water. As was said in an Iowa case:[1] "The use of ice is water in another form—is congealed water." It is therefore held that the taking of ice in a running stream in most respects is subject to the same rules which govern the rights of the riparian proprietor to the water. In other words,

10 For Irrigation Under the Common Law, see Secs. 498-525.

1 For Power and Mill Rights, see Chap. 47, Secs. 847-855.

1 Brown v. Cunningham, 82 Iowa 512, 48 N. W. 1042, 12 L. R. A. 583.

that the riparian proprietor's right to the use in the stream is the same as in the water before it is congealed, is a proposition well settled.[2] And it is further held that the erection of a dam on a nonnavigable stream by a riparian owner to form a pond in which to harvest ice is not an unreasonable use of the water which will entitle the lower mill owner to an injunction, it appearing that about 25 per cent of the power used by the mill was furnished by the water, and that it took only two days and a night to fill the upper pond.[3] The general rule upon this proposition is that the riparian owner of a nonnavigable water course has the right to cut and remove the ice from the stream adjoining his land in any quantity and to any extent for his own use, or for storage, or for sale, if he does not thereby appreciably diminish the quantity of the water flowing in the stream down to the lower riparian proprietors to their actual and substantial damage.[4]

§ 494. The manner of taking the water must be reasonable.—The manner of the taking of water from the natural stream by riparian owners, whose lands border thereon, is immaterial so long as such taking is within the rule of reasonable use, as discussed in the previous sections of this chapter,[1] and providing, of course,

2 Gehlen Bros. v. Knorr, 101 Iowa 700, 70 N. W. Rep. 757, 36 L. R. A. 697, 63 Am. St. Rep. 416; Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Biglow v. Shaw, 65 Mich. 341, 32 N. W. Rep. 800, 8 Am. St. Rep. 902; Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462; Edgerton v. Huff, 26 Ind. 35; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Stevens v. Kelley, 78 Me. 445, 6 Atl. Rep. 868, 57 Am. Rep. 813; Cummings v. Barrett, 10 Cush. (Mass.) 186; Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580; State v. Pottmyre, 33 Ill. 402, 5 Am. Rep. 224; Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581.

3 Gehlen Bros. v. Knorr, see *supra*.

4 Gehlen Bros. v. Knorr, see *supra*; Paine v. Woods, 108 Mass. 160; Searle v. Gardner, 12 Central Rep. 420, 13 Atl. Rep. 835; Howell v. Andrews, 62 Conn. 398, 26 Atl. 394; Gould on Waters, Sec. 191.

See, also, 2 Farnham on Waters and Water Rights, Sec. 473a, Ice.

See, also, Marshall Ice Co. v. La Plant, 136 Iowa 621, 111 N. W. Rep. 1016, 12 L. R. A., N. S., 1073, where it is held, that one who, after maintaining a mill dam for more than forty years, sells land under the pond for the establishment of an ice business for which the continued maintenance of the pond is necessary, will not be permitted subsequently to remove the dam, for the reason that the sale made the artificial condition the natural one.

1 See Secs. 488-493.

that there is no waste of the water. The taking may be by dam, constructed in the stream and through a ditch.[2] The riparian owner may also store the flood waters of the stream which come down to him during the wet season, and when a reasonable amount is so stored, taking into consideration the like rights of the other riparian proprietors, he may have the sole use of the waters so stored.[3] It may be by means of pumps, which raise the water to a sufficient height to enable it to run to the place of use.[4] The water may be also taken by means of tunnels driven so that the waters of the stream may seep therein, and from which they will flow to the places of use.[5] Two or more riparian proprietors may be tenants in common in the ditch or canal constructed for the purpose of taking the water, and they may join in common diversion if they take no more water than their combined share of the flow of the stream, and thereby the rights of others are not injured or interfered with. A riparian proprietor may change the point of diversion so long as he does not do unreasonable injury to the rights of the lower owners upon the stream.[6]

Where the riparian owner owns the land on both sides of the stream he has the right to make any change upon his own lands of the course of the stream. This is also true where the riparian owner upon the opposite side of the stream does not object or assists in this change. However, in such cases the flow of the water must be returned to the natural channel before it reaches the lands of the riparian owners below.[7] "It is a settled principle

[2] Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. Rep. 874.

[3] Perry v. Citizens Water Works Co., 59 Hun, 199, 13 N. Y. Sup. 471; Stacey v. Delery, 57 Tex. Civ. App. 242, 122 S. W. Rep. 300.

But it is held that an upper riparian owner can not impound all the waters flowing in a stream for 14 hours out of every 24, without the consent of the lower riparian owner. Tacoma East. R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. Rep. 1091.

[4] Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Chatfield v. Wilson, 31 Vt. 358; *Id.*, 28 Vt. 49; *Id.*, 27 Vt. 670; Norbury v. Kitchin, 7 L. T. N. S. 685.

[5] McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849.

[6] See, also, Right of Appropriators to Change the Point of Diversion, Secs. 857-860; Whittier v. Cocheco Co., 9 N. H. 45, 32 Am. Dec. 382; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472; 4 Morr. Min. Rep. 571.

[7] Mentone Irrigation Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S. 382, 17 Am. & Eng. Ann. Cas. 1222; Cook v. Seaboard Air Line R. Co., 107 Va. 32, 57 S. E. Rep. 564, 10 L. R. A., N. S., 966, 122 Am. St.

of the common law that a proprietor may change the whole course of a stream within the limits of his own land, provided he restores the water undiminished to its original channel before leaving his premises, and other persons are not injured by such diversion."[8] The diversion from the natural stream may be also made upon the lands of others and the waters carried over such lands to the riparian lands of the owner making such diversion, provided, of course, that rights of way may be acquired over the lands of the intervening owners.[9]

§ 495. **The manner of the use must be reasonable.**—It was also held that under the common law the manner of the use of the water by riparian owners must be reasonable and always made after taking into consideration the rights of the other owners upon the same stream. The use must be such that there will be no waste. It is a settled rule of the common law that all waste is prohibited; and if brought to the attention of the Court in a proper action will be enjoined.[1] The method of the application of the water is entirely immaterial so long as the riparian owner applying the same keeps within the rule of reasonable use as fixed by the principles of the common law and the rights of others are not materially and substantially injured by such use.[2] So in a case where the riparian owner in the use of water permits the

Rep. 825, where it was held that although a water course flowing through a tract of land has been changed to an artificial channel, at the time a railroad constructs its roadbed through such tract the company is bound to provide for the flow of the waters through a channel and through ways for freshets the same as though the channel were a natural one, if it had existed for a number of years and is to all appearances permanent.

See, also, Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394: Canfield v. Andrews, 54 Vt. 1, 41 Am. Rep. 828.

[8] Cook v. Seaboard Air Line R. Co., *supra.*

[9] Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823; Redwater etc. Co. v. Jones, —— S. D. ——, 130 N. W. Rep. 85; Logan v. Guitchard, 159 Cal. 562, 114 Pac. Rep. 989, where it was held that a prescriptive right might be had to a ditch upon the riparian lands of another, or that such right of way might be continued.

See, also, California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741.

[1] For the protection of riparian rights by injunction, see Part XIII.

[2] Campbell v. Grines, 62 Kan. 503, 64 Pac. Rep. 62; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849.

same to spread out so that a large proportion will be lost by unnecessary evaporation, such use is unreasonable, and wasteful.[3] And again, where it is ditched through porous soil in such a way that much or all is lost before the water actually reaches the place of intended use.[4] The use of the water by one owner must also be such that it does not flood the lands of other riparian owners.[5] Again, the use must not unreasonably accelerate, or retard, the flow of the stream from which the water is taken.[6] It must be borne in mind that in all cases of use of waters by any riparian proprietor the method of use is immaterial so long as it does not materially and substantially injure the rights of other riparian proprietors on the same stream. As was held in a recent California case, a riparian proprietor has the right to make any use of the water beneficial to himself on the riparian land which his situation enables him to make; but if his use involves a consumption of water he can not use more than his reasonable share, as compared with the other riparian owners, and he must not pollute the water to the injury of others entitled to it.[7]

§ 496. All surplus water must be returned to the stream after use.—There is one well-settled rule of riparian rights to the use of the waters and that is, after diversion and use of the water, all surplus water must be returned to the natural stream from which it was taken before it reaches the lands of the riparian owners below the lands of the one so using the water. And, as regarding this return of the water, it makes no difference as to the purpose for which it was originally diverted. It might have been diverted for irrigation, for mill purposes, for the development of power, or

3 Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Lawrie v. Silsby, 82 Vt. 505, 74 Atl. Rep. 94.

4 Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910.

5 Durga v. Lincoln etc. Co., 47 Wash. 477, 92 Pac. Rep. 343.

6 Radford v. Wood, 83 Neb. 773, 120 N. W. Rep. 458; Trullinger v. Howe, 53 Ore. 219, 97 Pac. Rep. 549, 99 Pac. Rep. 880, 22 L. R. A., N. S. 545.

See, also, for accelerating or retarding the flow, Secs. 545, 546.

7 Mentone Irrigation Ditch Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Gould v. Eaton, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

for any other purpose to which the use of the waters of natural streams is applied; but after this use, or after any water is diverted which is not used, it must all be returned to the natural stream from which it was taken so that those below who are entitled to the same right of use may not be injured. If the water is not so returned it is considered a wasteful, unnecessary, and unreasonable use of the water.[1] The manner of making the return of the water to the natural stream is immaterial, but it must be returned.[2] As was said in a recent California case upon the subject of the return of the water to the stream by a riparian owner: "The water he does not consume must be returned to the stream before it passes his land."[3] This subject, however, will be more thoroughly investigated when we come to a discussion of Irrigation as a Riparian Right.[4]

§ 497. **No priority of right at common law.**—As we have seen, at common law the right of every proprietor on a stream to the use of the running water thereof exists only as an incident to the private ownership of the bank bordering on the stream, and arises *ex jure naturae*,[1] and is equal in all the proprietors whose lands adjoin the same stream. And, as we have seen, this right to the reasonable use of the water of a stream, as it passes through or by a proprietor's lands, depends upon all of the circumstances of each particular case; and, also, after a riparian owner has made a so-called "reasonable use" of it, he must return it without substantial

1 Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Weiss v. Oregon etc. Co., 13 Ore. 496, 11 Pac. 255; City of Canton v. Shock, 66 Ohio St. 19, 63 N. E. Rep. 600, 58 L. R. A. 637, 90 Am. St. Rep. 557.

2 Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Mason v. Cotton, 4 Fed. Rep. 792, 2 McCrary 82.

3 Mentone etc. Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

See, also, Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

4 See Secs. 498-525.

1 See Secs. 451, 452.

See, also, Angell on Water Courses, Secs. 5, 10; Gould on Waters, Secs. 204-209, and cases cited; Pomeroy on Riparian Rights, Sec. 4.

diminution in quantity, or alteration in quality, to its natural bed or channel before it leaves his own land, so that it will reach the proprietor below him in its full, original, and natural condition. If he is the owner of the land adjoining the stream his rights exist in and to the waters thereof, whether he chooses to exercise them or not, and he may begin to exercise them when he will.[2]

So, under the common law, a prior settlement on the land, or a prior use of the water by any one riparian owner, is not recognized as giving any superior right, either higher up or lower down on the stream, or as against any of the other proprietors abutting on either side of him on the shores of a lake. Therefore an exclusive right to the use of the water by one owner as against the others can not be successfully claimed by virtue of mere prior use or occupancy, as against the equal or correlative rights of all the other proprietors whose lands touch upon the same stream, unless he has acquired a grant from all the other proprietors affected by such use, or sufficient time has elapsed for him to obtain title to such use by prescription, which, of course, presupposes a grant.[3] In other words, priority of use is not recognized, and the doctrine of prior appropriation is not the doctrine of the common law.[4] In

2 See Secs. 543-545.

3 See, also, Gould on Waters, 226, 227; Angell on Water Courses, Secs. 130-135; Pomeroy on Riparian Rights, Sec. 4; Gilman v. Tilton, 5 N. H. 231; Cowles v. Kidder, 24 N. H. 364; Parker v. Hotchkiss, 25 Conn. 321, where the Court held that, as between riparian proprietors priority of appropriation of the waters of a running stream which is common to all for the driving of machinery, gives one no superior right, unless it has been continued for such a period of time and under such circumstances as would be required to establish right by prescription. Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265, and note and cases; Wood v. Edes, 2 Allen 578; Bliss v. Kennedy, 43 Ill. 67; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106; Keeney Mfg. Co. v. Union Mfg. Co., 39 Conn. 576; Hartzall v. Sill, 12 Pa. St. 248; Pugh v. Wheeler, 19 N. C. (2 Dev. & B.) 50; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Gould v. Barton Duck Co., 13 Gray, 450; Merritt v. Brinkerhoff, 17 Johns. 306; Mason v. Hill, 5 B. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Wright v. Howard, 1 Sim. & Stuart 190; Sampson v. Hoddinott, 1 C. B. N. S. 590, 87 E. Cl. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 5 Week. Rep. 230; Chasemore v. Richards, 2 H. & N. 181, 11 Eng. Reprint 140; Bealy v. Shaw, 6 East. 208, 102 Eng. Reprint 1266.

4 For the Arid Region Doctrine of Prior Appropriation, Chap. 31, Secs. 585-594.

See, also, 2 Bla. Com. 14; Cox v. Mathews, 1 Vent. 237; Liggins v. Inge, 7 Bing. 682, 20 Eng. C. L. 287; Sackrider v. Beers, 10 Johns. 241;

the language of Mr. Justice Story, in the case of Tyler v. Wilkinson:[5] "There may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired."[6] Also, in a

Goddard's Law of Easements, 250; Mason v. Hill, 5 B. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Rutland v. Bowler, Palmer, 290, 81 Eng. Reprint 1087; Howard v. Wright, 1 Shaw 64; Van Bergen v. Van Bergen, 3 Johns. Ch. 282, S. C., 8 Am. Dec. 511.

Goddard in his Law of Easements, p. 251, declares: "That all riparian owners of natural streams have a riparian right to the use of water as it flows past their land, as long as they do not interfere with the natural rights of other riparian owners, and to sue for disturbance is now an established doctrine of law." . . . He adds: "The doctrine (of appropriation) was not established until comparatively modern times," etc. He states, after referring to some of the early decisions, that the theory of appropriation was much modified by various decisions, "as the nature of riparian rights was brought more fully under consideration." He concludes: "Appropriation of the water of flowing streams has thus gradually fallen from being considered the means of acquiring important rights to being deemed of *no importance whatever.*"

See 32 Edward III; Angell on Water Courses, 93; Year Book, 14 Henry VIII, 31.

In Chasemore v. Richards, 7 H. L. Cases 384, Lord Wensleydale declares: "We may consider, therefore, that this proposition is indisputable, that the right of the proprietor to the enjoyment of a water course is a natural right, and is not acquired by occupation"; Shury v. Piggot, 3 Blust. 339, Popham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280; Countess of Rutland v. Bowler, Palmer, 290, 81 Eng. Reprint 1087; Washburn on Easements and Servitudes, 319, and cases cited.

See, also, Bealey v. Shaw, 6 East. 208, 2 Smith 321, 102 Eng. Reprint 1266; Holker v. Porritt, L. R. 10 Exch. 59, 44 L. J. Exch. 52, 33 L. T. N. S. 125, 23 Week. Rep. 400, affirming *Id.*, L. R. 8 Exch. 107, 42 L. J. Exch. N. S. 85, 21 Week. Rep. 414; Frankum v. Falmouth, 20 Eng. C. L. Rep. 526, 6 Car. & P. 529, 2 Ad. & El. 452, 4 L. J. K. B. N. S. 690; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Embrey v. Owen, 6 Exch. 252, 20 L. J. Exch. 212, 15 Jur. 633; Ewing v. Colquhoun, 2 App. Cas. 839; McGlone v. Smith, 22 L. R. Ir. 586; Webb v. Portland Cement Co., 3 Sum. 189, Fed. Cas. No. 17,322; Wilts etc. Co. v. Swinton Water W. Co., 9 Ch. 457; *Id.*, S. C. L. R. 7 H. L. 697; McCartney v. Londonderry, R. App. Cas. 1904, 301; White v. White, App. Cas. 1906, 81; Lyon v. Fishmongers' Co., 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1.

[5] 4 Mason 397, Fed. Cas. No. 14,312.

[6] See, also, the opinion of the same learned judge in Whipple v. Cumberland Mfg. Co., 2 Story (Cir. Ct.)

North Carolina case Mr. Chief Justice Ruffin said: "There is no prior or posterior right in the use, for the land of each enjoyed it alike from the origin of the stream, and the priority of a particular new application or artificial use of the water does not, therefore, create the right to that use."[7] Again, in the case of Dumont v. Kellogg,[8] that great expounder of the law, Mr. Justice Cooley, said: "We may dismiss from our mind the fact that the plaintiff has first

661. There is, however, a class of English cases which seem to hold to the contrary of the above rule, evidently upon the theory of the civil law as laid down by the earliest authorities upon the subject. These cases are notably, Bealey v. Shaw, 6 East 208, 2 Smith 321, 102 Eng. Reprint 1266; Saunders v. Newman, 1 B. & Ad. 258, 106 Eng. Reprint 95; Williams v. Morland, 2 Barn & C. 910, 107 Eng. Rep. 620, 915; Cox v. Mathews, 1 Vent. 137.

But, so far as we can see, this principle was never approved in America to any great extent. However, see Hatch v. Dwight, 17 Mass. 289, 10 Am. Dec. 145; and opinion of Duncan, J., in case of Strickland v. Todd, 10 S. & Rawle's 69, who in construing the following passage of Blackstone: "If a stream of water is unoccupied, a person may erect a mill thereon and detain the water yet not so as to injure his neighbor's prior mill, *for he has by first occupancy acquired a property in the current*" (2 Blackstone Com. 403), said: "My own opinion is, that this doctrine ought not to be applied here."

Had this rule been adopted, it would have thrown to the ground the fundamental principles of the common law relating to running water, and all the leading cases respecting the usufructuary rights of riparian proprietors. As Chief Justice Thompson of the Supreme Court of New York said in the case of Platt v. Johnson (15 Johns. N. Y. 213, 8 Am. Dec. 233), "to give such an extension to the doctrine of occupancy would be dangerous and pernicious in its consequences. The elements," he adds, "being for general and public use, where the benefit is appropriated to individuals by occupancy this occupancy must be regulated and guarded with a view to the individual rights of all who have an interest in its enjoyment, and the maxim, *sic utere tuo ut alienum non laedas*, must be taken and construed with an eye to the natural rights of all."

[7] Pugh v. Wheeler, 2 Dev. & B. (N. C.) 55.

See, also, Heath v. Williams, 25 Me. 209, 43 Am. Rep. 265, and note; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Platt v. Johnson, 15 Johns. 213, 8 Am. Dec. 233; Gilman v. Tilton, 5 N. H. 231; Hartzall v. Sill, 12 Pa. St. 248; Gould v. Boston Duck Co., 13 Gray 442; Wood v. Eddes, 2 Allen 578; Parker v. Hotchkiss, 25 Conn. 321; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723; Bliss v. Kennedy, 43 Ill. 67; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; McCarter v. Hudson etc. Co., 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S., 197, 118 Am. St. Rep. 754, 10 Am. & Eng. Cas. 118, affirmed 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529.

[8] 29 Mich. 420, 18 Am. Rep. 102.

put the waters of the stream to practical use, since that fact gave him no superiority in right over the defendant. The settled doctrine is now that priority of appropriation gives to one proprietor no superior right to that of the others, unless it has been continued for a period of time, and under such circumstances, as would be requisite to establish rights by prescription."[9]

Coming down to the Western States of this country, which adhere to the common law of riparian rights as one of the systems governing waters and water rights, we find that in construing such rights the Courts adopt the present rule in England to the effect that there is no priority of right as between riparian owners upon the same stream, but that their rights are equal or correlative without regard to the time of the settlement of the land adjoining the stream or of the time of the first use of the water. In the case of Lux v. Haggin[10] it is said: "In examining the numerous cases which establish that the doctrine of appropriation is not the doctrine of the common law, we meet an embarrassment of abundance." And in a leading case in Oregon[11] it is said: "There is no such thing as a prior riparian ownership, so far as distribution of water for irrigation purposes between riparian owners is concerned."[12] In the case of Williams v. Altnow[13] it was said: "But in this respect the rights of all the riparian proprietors are equal, regardless of location on stream, or date of acquiring title. There can be no priority of rights as between riparian proprietors. The right of the first settler is not superior to that of the last."

[9] See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

As to Western American Doctrine, see Secs. 585-626.

[10] 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[11] Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

[12] See, also Lone Tree Ditch Co. v. Cyclone Ditch Co., 26 S. D. 367, 128 N. W. Rep. 596; *Id.*, 15 S. D. 519, 91 N. W. Rep. 352; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

For priority of right as between riparian owners and appropriators, see Secs. 810-823.

[13] 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

CHAPTER 26.

IRRIGATION AS A RIPARIAN RIGHT.

§ 498. Scope of chapter.
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§ 500. Use of water for irrigation a natural or artificial want—The common law classification.
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§ 520. Manner of taking the water.
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§ 522. Surplus water must be returned to the natural stream.
§ 523. Mere possession without title gives no riparian right.
§ 524. Right to water in artificial water courses.
§ 525. Conclusions.

§ 498. Scope of chapter.—In the previous chapters of this part we have discussed the common law theories of riparian rights.[1] In

[1] See Chaps. 21-25, Secs. 450-497.

the following part we will discuss the rights in waters and water courses under the civil law of the Romans, and how that law, as modified by various nations, was introduced into different portions of this country and still forms the basis of many of our laws upon the subject of waters.[2]

In this chapter we will endeavor to show how in certain States the old common law rule of England has been modified and changed to the extent of instead of enforcing the strict rule of the common law as it is known in England and some of our Eastern States, to the effect that the waters must be permitted to run in their natural channels, and undiminished in quantity and undeteriorated in quality, they may, under certain conditions and limitations, even under the common law, as modified, be diverted from the natural channels and applied to the irrigation of the soil.[3] In another portion of this work we will show how in other States, owing to the peculiar physical conditions of the country, the common law upon the subject of water has been entirely abrogated, either by statute or by Court decision, and what is known as the "Arid Region Doctrine" of appropriation has been substituted in its stead.[4]

§ 499. Use of water for irrigation a natural or artificial want—Upon principle.—There has been a great deal of academic discussion among the Courts and others as to whether the use of water for irrigation was to supply a natural or an artificial want; and the authorities upon the subject seem to differ considerably. The distinction between "natural" and "artificial" wants is the basis for the common law distinction between the use of water for "ordinary" and "extraordinary" purposes, discussed in previous sections.[1] As these terms are applied under the common law rules, "natural wants" may be supplied by the "extraordinary" use of the waters of a stream;[2] while upon the other hand, the "artificial wants" must be supplied by the reasonable use of the water, these latter being secondary in right of use to the first. In other words, the first class belong to those uses which are absolute necessities, and the latter class of uses belong to those which simply

2 See Chaps. 29, 30, Secs. 552-584.
3 See Secs. 507-516.
4 See Chap. 31, Secs. 585-594.

1 See Secs. 486-491.
2 See Secs. 486-490.

add to the profit, comfort, convenience, or the prosperity of the proprietor.[3] The difficulty into which the Courts in rendering the decisions upon this subject have fallen seems to have been from endeavoring to apply the common law principles of uses for natural and artificial wants to mixed classes of these wants of the water, and also to apply the same to the peculiar conditions of the respective localities and jurisdictions where the decision was rendered, as the only criterion.[4]

It must be borne in mind that the physical conditions of different portions of our country differ greatly. We have localities where the rainfall is so great that there is no question upon the subject of sufficient moisture to raise crops, but the principal question, relative to water in these localities, which comes before the Courts, is that of drainage. Upon the other hand, we have localities with exceedingly rich soil, which are so hot and dry and so absolutely devoid of moisture that were they without irrigation ten acres would produce enough to give a horned toad but a scanty livelihood. But with irrigation they will produce such crops of all kinds as are a surprise to the world, and especially to the Eastern farmers. It must also be borne in mind that due largely to this difference in conditions two separate and distinct systems of water rights have grown up in different portions of the country, and even in different portions of this Western country: One, the Arid Re-

3 See Union Mill & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Gould on Waters, Secs. 205-209; Miner v. Gilmour, 12 Moore P. C. C. 121, 7 Week. Rep. 328, 14 Eng. Reprint 861.

See, also, Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728, where the Court classifies water for the proper irrigation of such garden produce as may be necessary for the proper sustenance of a settler and his family among the absolute necessities, and hence a natural want.

4 "This subject has been confused needlessly by the unfortunate use of the words 'natural' and 'ordinary' in this connection to distinguish those uses which the common law does not attempt to limit, and 'artificial' and 'extraordinary' to designate those which are required to be within reasonable bounds." Meng v. Coffey, 67 Neb. 500, 93' N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

See, also, on same subject, Brown v. Collins, 63 N. H. 442, 16 Am. Rep. 372; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107.

See, also, for ordinary and extraordinary uses, Secs. 486-491.

gion Doctrine of appropriation, based upon the priority of the appropriation of water for beneficial uses; and the other, the common law doctrine, whose basis is equality of use between all those who own lands bordering upon the streams, and that, too, regardless of the question as to whether the use of water for irrigation comes within the class of natural or artificial wants, discussed in the preceding sections.[5] We will say that man, in order to supply even his natural wants, must eat, as well as drink. And, in our opinion, it is left to the Court of the State where water is not needed to any extent for irrigation to make the correct distinction. The Supreme Court of Illinois, in the case of Evans v. Merriweather,[6] after holding that in that State the use of water for irrigation was to supply an artificial want, and not absolutely necessary to man's existence, said: *"In countries differently situated from ours with a hot and arid climate water doubtless is indispensable for the cultivation of the soil, and in these water for irrigation would be a natural want."* And upon the question of the difference in conditions in portions of the West, and even in different portions of the same State, the California Court, in the case of Lux v. Haggin,[7] said: "It may be that, under the physical conditions existing in some portions of the State, irrigation is not, theoretically, a 'natural want' in the sense that living creatures can not exist without it; *but its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, than the use of water by drinking it."* Again, as was said in a much later California case:[8] "In an arid country water for irrigation may become a natural want of man, as exigent as when needed for domestic purposes, since without it vegetation would cease, and the sources of life be indirectly destroyed."[9]

Hence, as a conclusion from the above argument, it must follow that it depends entirely upon the climatic and physical conditions of the locality where the question is raised, whether or not the use of water for irrigation is a natural or artificial want. In England and in the Eastern States, and in some localities of the West,

[5] See Secs. 486, 487.

[6] 3 Scam. (Ill.) 492, 38 Am. Dec. 106.

[7] 69 Pac. Rep. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[8] Wiggins v. Muscupiabe Land & W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

[9] See, also, late case of Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

the use of water for irrigation may be regarded as an artificial or extraordinary use.[10] And, upon the other hand, in the arid portions of the country, where irrigation is absolutely necessary in order to raise any crops, upon principle, the use of water must be regarded as a natural want.[11]

§ 500. Use of water for irrigation a natural or artificial want—The common law classification.—What we have said in the preceding section are our views as to the use of water for irrigation being a natural or an artificial want, as based upon principle and common sense.[1] There is no more reason in holding that a person can consume the flow of the entire stream in order to furnish water for drink for a family and for cattle than there is that he can consume it for the purpose of irrigating a small patch of garden, where the absolute necessity requires it in order to supply food for the same household. They both tend to fill the immediate necessities of life.

But when we come to the common law classification, even in the Western States, of the right to the use of water for irrigation, we find it almost always classified as an artificial want calling for an extraordinary use of the water. Therefore, among riparian owners, under the strict construction of the common law doctrine, the use of water for irrigation is an extraordinary use, and is beyond question a use to supply an artificial want. All the rights of the riparian proprietors upon the same stream are equal; and, after having had their natural wants supplied, and there is still water

10 Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Rep. 821; Evans v. Merriweather, *supra;* Garwood v. New York Cent. R. Co., 83 N. Y. 400, 38 Am. Rep. 452; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678, where the Court said: "A diversion of water for irrigation is not an ordinary use, and can only be exercised reasonably and with proper regard to the rights of other proprietors to apply the water to the same purposes"; Baker v. Brown, 55 Tex. 377.

11 Lux v. Haggin, *supra;* Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Mud Creek Irr. A. & M. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758.

As to portions of Texas not arid, see Baker v. Brown, 55 Tex. 377.

See, also, Bear River & A. W. Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.

1 See Sec. 499.

in the stream, they have all an equal right to use the surplus for any artificial purpose or want, including that for the irrigation of lands.[2] And in those States which hold to the common law rule, it is held that where the water is insufficient to supply all the natural wants, the use for irrigation by one proprietor must be held in subordination to the use for domestic purposes and for drink for man and beast.[3]

The common law distinction discussed above is well set forth in a recent Oregon case[4] in the following language: "For domestic use, including water not only for his household, but also for such animals as are essential for the proper sustenance of his family, the upper riparian owner may take so much of the water of a natural stream as may be necessary for that purpose, although none may be left for the lower riparian owners. So far the use is grounded on actual necessity. But irrigation is not so essentially a vital requirement, and riparian use for that purpose is limited

2 For the Arid Region Doctrine of Appropriation, see Chap. 31, Secs. 585-594.

3 Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910, where it is said: "Appellant had the right to make free use of this water, whether it came from a spring on his land or otherwise, for the ordinary domestic purposes; but we do not think that irrigation, at least when conducted in the manner that this was, can constitute a use which will justify an upper riparian owner in taking all of the water, to the destruction of the ordinary domestic uses thereof by a riparian owner below, in the absence of prior legal appropriation." Citing Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Union Mill Co. v. Ferris, 2 Sawy. (U. S.) 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Howe v. Norman, 13 R. I. 488; Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Ellis v. Tone, 58 Cal. 289; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Lord v. Meadville Water Co., 135 Pa. 122, 19 Atl. 1007, 8 L. R. A. 202, 20 Am. St. Rep. 864; Pomeroy on Water Rights, Sec. 134; Gould on Waters, Secs. 205, 536.

See, also, Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Gillett v. Johnson, 30 Conn. 180; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596.

4 Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

at all times by the condition that it must be so exercised as not to materially injure the rights of other riparian owners in the proportional use of the water of the same stream for the irrigation of their riparian lands. On the other hand, an appropriator, subject to rights in existence at the time his appropriation is made, may take all the water he can use reasonably and without waste for a beneficial project, although it may be the lion's share and none may be left for those who come afterward. In other words, a riparian owner using water in that capacity is, in a sense, always a tenant in common with other riparian owners on the same stream whose rights, at least for irrigation, he is bound not to injure materially by his riparian use of the water. The appropriator, however, is always a tenant in severalty, owing no duty or respect to those endeavoring to use the water by title subsequent to his own." In many of the States, by statutory enactment, an order of preference rights to the use of water is fixed, usually giving the first right to the purpose of domestic uses.[5]

§ 501. **Early English doctrine.**—In England the use of water for the purpose of irrigation is practically unknown, especially as compared with its use for that purpose in the United States, or even in some of the British Provinces, notably India,[1] Australia,[2] Egypt,[3] South Africa,[4] or even in her possessions in America—Canada and the Northwest Territories.[5] That country having small rivers, and a damp, humid climate with plenty of rainfall, has never found it necessary to use the water in her natural streams for the purposes of irrigation as have certain portions of the United States. But, as England is the source from which we obtain the principles of law known in the history of jurisprudence as the common law, we naturally turn to that country to learn what were her ideas upon the subject of irrigation and her rules governing the same. Owing to the comparatively unknown practice of irri-

[5] For the subject of preference rights to the use of water, see Secs. 791-794.

[1] For irrigation in India, see Chap. 5, Secs. 103-118.

[2] For irrigation in Australia, see Chap. 6, Secs. 119-130.

[3] For irrigation in Egypt, see Chap. 4, Secs. 88-102.

[4] For irrigation in South Africa, see Chap. 7, Secs. 131-143.

[5] For irrigation in Canada, see Chap. 10, Secs. 177-237.

For irrigation in the Northwest Territories, see Chap. 10, Secs. 181-201.

gation in England, we find that the cases decided in that country are few as compared with the number of decisions in this country, in which the controversy has been in respect to the diversion of water from a water course for the purpose of irrigating land, and also that the English law upon this subject is today unsettled. Nevertheless, the authorities seem to agree upon two propositions, and these are, that the water of a natural stream can not be so diverted to the material diminution of the quantity of water which naturally flows in the water course by one riparian proprietor to the prejudice and injury of the rights of any of the others; and, that the water must not be diverted at all, unless it be again returned into the water course with no other diminution than that caused by absorption and evaporation.[6]

In a case cited by Mr. Angell in his work on "Water Courses"[7] an action was brought for the disturbance of a water course and the plaintiff was nonsuited, on the ground that the water after being used for irrigation was returned to the channel. But afterward the Court of King's Bench set aside the nonsuit, because it was shown that a portion of the water was lost by the process of evaporation and absorption. This case would seem to hold that the common law did not recognize at all the right to use the water of natural streams for the purpose of irrigation, for without the loss of some portion of the water by absorption and evaporation its use for that purpose would be a physical impossibility.[8] So also in all the decisions of England, although the term "natural and artificial wants" does not seem to be used, the Courts hold that the use of water for the purpose of irrigation, if permitted to be exercised at all, can only be exercised by one riparian pro-

[6] Greenslade v. Halliday, 6 Bing. 379, 4 Moore & P. 71, 8 L. J. C. P. 124; Strutt v. Bovington, 5 Esp. 56; Hall v. Swift, 6 Scott 167, 4 Bing. N. C. 381, 1 Arnold 157, 7 L. J. C. P., N. S. 209.

[7] See Sec. 120.

[8] See Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming *Id.*, 2 Hurlst. & N. 168; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Sampson v. Hoddinot, 1 Com. B. N. S. 590, 87 E. C. L. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 5 Week. Rep. 230; Mason v. Hill, 5 B. & Ad. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472.

prietor so that the rights of any of the other proprietors will not be prejudiced or infringed upon.[9]

§ 502. **Later English doctrine.**—The present English law upon the subject is much more liberal in the use of water for irrigation than the earlier cases cited in our last section. However, as late as 1859, the English Courts were reluctant to change their position upon the subject, although in America the old common law rule in this respect had been considerably modified. In the case of Chasemore v. Richards [1] Lord Wensleydale (Baron Parke), after discussing the case of Wood v. Waud,[2] in which it was said that a very liberal use of a stream for the purpose of irrigation was permitted in America, said: "It is not clear that a user, to that extent, would be permitted; nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water if it was again returned into the river with no other diminution than that which was caused by absorption and evaporation attendant on the irrigation of lands of the adjoining proprietor. This must depend upon the circumstances of each case." And he held that it was a matter of correlative rights among the various owners upon the stream. That, upon the one hand, it could not be permitted that the owner of a tract of many thousands of acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of the water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a water-

[9] Greenslade v. Halliday, 6 Bing. 379, 14 Moore & P. 71, 8 L. J. C. P. 124; Strutt v. Bovington, 5 Esp. 56; Hall v. Swift, 6 Scott 167, 4 Bing. N. C. 381, 1 Arnold 157, 7 L. J. C. P. N. S. 209; Chasemore v. Richards, 7 H. L. Cases 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming 2 Hurlst. & N. 168; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Sampson v. Hoddinot, 1 Com. B. N. S. 590, 87 E. C. L. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 5 Week. Rep. 230; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Gale and Wash. on Easements, 284; Domat. Pub. Law, 1, 2, 8, 11.

[1] 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, affirming 2 Hurlst. & N. 168.

[2] 3 Exch. 748, 13 Jur. 472, 18 L. J. Exch. N. S. 305.

ing pot into the stream in order to water his garden, or allow his family or his cattle to drink of it. He further held that it was entirely a question of degree, and that it was very difficult, and indeed impossible, to define in a general rule the precise limits which separate the reasonable and the permitted use of the stream for this purpose from its wrongful application; but that there was no difficulty in deciding whether a particular case falls within the permitted limits or not. In other words, the question depended entirely upon the facts of each particular case. That the right to have the stream flow in its natural state, without diminution or alteration, was an incident to the property through which it passes; that the water was *publici juris* in the sense only that all may reasonably use it who have the right of access to it. But he also held that the right to the benefit and advantage of the water flowing past the land of a riparian owner was not an absolute and exclusive right to the flow of *all the water* in its natural channel and in its natural state; but it was a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the bank of each side of the stream to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an *unreasonable and unauthorized use* of this common benefit that an action will lie; but for such a use it will. This case may be considered the opening wedge for the modern English doctrine upon the subject of the use of the waters of a stream for the purpose of irrigation, under the common law. But in America, owing to the different conditions, a much broader rule was being adopted upon the subject, even in our Eastern States, as we shall see in the next sections. And the rule which was established in the Eastern portion of the United States, was afterward adopted in England, to the effect that the right of irrigation is a common law right of a riparian owner, still, however, to a limited extent, provided that no injury is done to the other riparian owners.[3] Under this rule no exclusive right to the water can be obtained, but the right must be common to all of the riparian owners.

[3] Swinton Waterworks Co. v. Wilts etc. Co., L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633, where the Court held that no action will lie for taking an inappreciable amount of water from a stream for the purpose of irrigation.

§ 503. Early Eastern American doctrine.—During the early history of this country, when the population was comparatively sparse, even in the Eastern States, the right of a riparian proprietor to divert the water from a natural stream and use it for the purpose of irrigation was recognized to a considerable latitude. It was even held at this period that the diversion of water for this purpose, by a riparian proprietor, was to supply a natural want.[1] One of the earliest cases in this country upon this subject is that of Perkins v. Dow,[2] and in that action it was decided by the Supreme Court of Connecticut that a riparian proprietor may take the water from a stream running through his land to fertilize his meadows; provided that he does not deprive the adjoining proprietors below of a sufficiency of water for kitchen purposes, or for watering their cattle; and provided the water which is diverted for irrigation shall (*unless absorbed on the land*) be returned to its natural channel before the stream leaves his land. And if a person by absorption on his own land can dispose of the whole of the water, excepting only a bare sufficiency for the purposes before mentioned, he has the prior right because he is first on the stream and has the first opportunity. Also, in the case of Weston v. Alden,[3] the Supreme Court of Massachusetts held that, "A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle or irrigating his close; and he may do this either by dipping water from the bank and pouring it upon the land or by making small sluices for the same purpose; and if the owner of a close below is damaged thereby it is *damnum absque injuria.*" This case essentially holds that the upper riparian proprietor on a stream has a right to use all the water of a stream without any regard to the wants of those below, and not even leaving enough in the stream for their "domestic purposes." That such was not the English rule has been shown above, and that such was not the later rule of the Eastern States which have adopted the common law upon this subject will be seen in the following section.

1 Gould on Waters, 2d Ed., Sec. 205. See, also, Perkins v. Dow, 1 Root (Conn.) 537; Weston v. Alden, 8 Mass. 136, 8 Morr. Min. Rep. 82; Hayward v. Mason, 1 Root (Conn.) 537; Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504.

For irrigation as a natural or artificial want, see Secs. 499, 500.

2 *Supra.*

3 *Supra.*

§ 504. Later Eastern American doctrine.—As the Eastern States became more thickly settled and the demand for water became greater the same States which had formerly allowed a very liberal use of water for the purpose of irrigation gradually restricted that use, until they had practically adopted all the common law rules upon the subject. And, according to the later decisions of the common law authorities of this country, this use of the water comes properly under the head of extraordinary uses, to supply an artificial want; and the use of the stream for this purpose by one riparian proprietor upon the same must be reasonable and must not materially injure or affect the rights of any of the other riparian proprietors upon the same stream.[1] In regard to the early Connecticut decisions, cited in our last section,[2]

1 Colburn v. Richards, 13 Mass. 420, 7 Am. Dec. 160; Cook v. Hull, 3 Pick. 269; Anthony v. Lapham, 5 Pick. 175; Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504.

In Baker v. Brown, 55 Tex. 377, the Court held: "That the right to use the water for the purposes of irrigation, when its use is not indispensable, but is resorted to for the purpose of increasing the products of the soil, must be subordinate to the rights of a co-proprietor to supply his natural wants, and those of his family, tenants, and stock by using the water for necessary domestic purposes. Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636, where it was held that a diversion of a large portion of the waters of a stream, by a proprietor of land through which the water course ran, rendered him liable to an action on the case by a proprietor of land below, from whom the water is thus diverted; although the latter thereby sustains no present actual damage.

See, also, Newhall v. Iverson, 8 Cush. 595, 54 Am. Dec. 790; Elliot v. Fitchburg Ry. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Paine v. Woods, 108 Mass. 160; Garwood v. N. Y. Cent. Ry. Co., 83 N. Y. 400, 405, 38 Am. Rep. 452; Farrell v. Richards, 30 N. J. Eq. 511; Union Mill Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Ingraham v. Hutchinson, 2 Conn. 584; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Gillett v. Johnson, 30 Conn. 180; Randall v. Silverthorn, 4 Pa. St. 173; Miller v. Miller, 9 Pa. St. 74, 49 Am. Dec. 545; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540, note, and cases cited; Fleming v. Davis, 37 Tex. 173; Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394; *Id.*, 24 Ala. 130, 60 Am. Dec. 453, 27 Ala. 104; Blessing v. Blair, 45 Ind. 546; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Learned v. Tangeman, 65 Cal. 334, 4 Pac. Rep. 191; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Peregoy v. Sellick, 79 Cal. 568, 21 Pac. Rep. 966; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. Rep. 846; Heath v. Williams, 25 Maine 209, 43 Am. Dec. 265, note, and cases cited; Gould on Waters, Sec. 217.

2 Perkins v. Dow, 1 Root (Conn.) 535; Howard v. Mason, 1 Root (Conn.) 537, 2 Swift's Dig. 87.

in the opinion of Mr. Chief Justice Swift, rendered in the later case of Ingraham v. Hutchinson,[3] they reverse the common law, and are repugnant to a statute of that State in affirmance of that law. The Judge, in giving the opinion of the Court, and referring directly to the cases cited above, says: "It was decided that a man may divert a stream of water to manure and enrich his meadows, to the prejudice of a mill that had been erected on the stream below more than twenty years. This *is reversing the common law*, and not only gives to the upper proprietors on rivers the advantages to which the lower are entitled, but denies that even seventy years' exclusive enjoyment of water, in a particular manner, will confer an absolute right." This rule, restricting the use of water for irrigation, is especially true when the rights of other riparian proprietors for the purpose of supplying their natural wants and domestic necessities, or to irrigate their own lands, are invaded, unless the first irrigator has gained the right in some mode known to law, as by grant or prescription. In other words, at common law the right to use water for irrigation is subordinate to the natural wants and equal with all other artificial wants, and is so restricted and hemmed in by the rules of that law that its practice, as the same is known in the arid regions of the United States, is rendered almost an impossibility.

In a still later Connecticut case, that of Gillett v. Johnson,[4] the Court thus speaks of the right of the defendant to use the water of a stream to irrigate lands, as limited and restricted: "She was bound to apply the water in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle. The claim of the defendant was, that she had a right to divert the whole for the purpose of irrigation, regardless of the rights of plaintiff. Such diversion was unreasonable and therefore illegal." Also in another case, decided by the Supreme Court of New York, the parties in which were owners of adjoining farms. On the farm of the defendant, within five or six rods of the land of the plaintiff, there was a spring, from which the water in its natural channel ran over the land of the plaintiff. The defendant diverted the water from the spring and caused it to flow upon his meadow for the purpose of irrigation, to the extent of three or four acres, for which diversion in the Court below the plaintiff recov-

[3] 2 Conn. 584.

[4] Gillett v. Johnson, 30 Conn. 180.

ered judgment. In rendering the opinion of the Supreme Court, on appeal, the Chief Justice said: "The defendant has a right to use so much as is necessary for his family and cattle, but he has no right to use it for irrigating his meadow if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel." [5]

§ 505. Later Eastern American doctrine—Chancellor Kent's opinion.—One of the most frequently quoted and respected American writers upon this subject is Chancellor Kent. Writing, as he did, at a comparatively early period in the history of American jurisprudence, and before statutory enactments and case law had invaded the precincts of the common law of England to any great extent in this country, and standing at the very head of his profession both as a law writer and expounder of the law, he certainly can be quoted as among the very highest authorities of his day upon this subject of the use of waters of natural streams and lakes by riparian proprietors. "Every proprietor," he says, "of lands on the banks of a river has naturally an *equal* right to the use of the water which flows in the stream adjacent to his lands, as it is wont to run (*currere solebat*), *without diminution or alteration.* No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debit currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an *incident to the land, he can not* unreasonably detain it *or give it another direction,* and he *must return it* to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, *he can not divert or diminish* the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years which is evidence of it. This is the clear and settled doctrine upon the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no *material* injury or annoyance to his neighbor below him, who has an *equal right* to the sub-

5 Arnold v. Foot, 12 Wend. (N. Y.) 330.

sequent use of the *same water;* nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbor above him."

Then follows the passage that is often quoted to prove that water, under the common law, can not be employed for irrigation. It is as follows: "Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, *agricultural,* and manufacturing purposes, provided the use of it be made under *the limitations which have been mentioned;* and there will no doubt inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But, *de minimis non curat lex,* and a right of action by the proprietor below would not necessarily follow from such consequences, but would depend upon the nature and extent of the complaint or injury and the manner of using the water. All that the law requires of the party by or over whose land a stream passes is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or *materially* diminish or affect the application of the water by the proprietors above or below on the stream." [1]

"The unquestioned rule of the common law was, that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent." [2]

§ 506. **Later Eastern American doctrine—Conclusions.**—As we have seen, according to a few of the earlier common law authorities of the United States the practice of irrigation seems to have been permitted under great latitude.[1] But this liberal doctrine was repudiated by the later common law authorities, and the right of a riparian proprietor to divert the waters of a stream running through his land was classified among those to supply his artificial wants, or those which were not absolutely necessary to his exist-

1 Kent Com. 439, 440.

2 Mr. Justice Brewer in United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, quoting from above section from Kent.

1 See Early American Doctrine, Sec. 503.

ence,[2] and could only be exercised in common with all the other proprietors whose lands touched upon the stream. As was said in the case of Blanchard v. Baker:[3] "Although by the case of Weston v. Alden,[4] the right of irrigation seems to be general and unlimited, yet subsequent cases have restrained it consistently with the enjoyment of the common bounty of Nature, by other proprietors, through whose land a stream has been accustomed to flow.[5] And the qualification of the right, by these later decisions, is in accordance with the common law." And the rule, especially in the Eastern States of this country, that an owner of riparian land has the right to have the stream flow through his land in its natural state, without diminution of quantity or change of quality, is qualified by the limitation that each of such owners is entitled to the correlative right to a reasonable use of the water for agricultural purposes.[6] But where the stream is small and does not furnish water more than sufficient to supply the natural wants of the different proprietors living on it, none of the proprietors can use the water for irrigation.[7]

It will be noticed that the law upon this subject in the Eastern States of this country is similar to the later English doctrine discussed in a previous section.[8] This is to the effect that the water of a stream may be used for irrigation to a very limited extent. If the stream is large and there is plenty of water for all, until

2 See Sec. 500.

3 8 Greenl. (Me.) 253, 23 Am. Dec. 504.

4 8 Mass. 136, 8 Morr. Min. Rep. 82.

5 Citing Colburn v. Richards, 13 Mass. 420, 7 Am. Dec. 160; Cook v. Hull, 3 Pick. 269, 15 Am. Dec. 208; Anthony v. Lapham, 5 Pick. (Mass.) 175.

6 Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

7 Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 38 Am. Dec. 106; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Mastenbrook v. Alger, 110 Mich. 414, 68 N. W. Rep. 212; Farrell v. Richards, 30 N. J. Eq. 511; Baker v. Brown, 55 Tex. 377; Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394; *Id.*, 24 Ala. 130, 60 Am. Dec. 453, 27 Ala. 104; Slack v. Marsh, 11 Phil. 543; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Fleming v. Davis, 37 Tex. 173; Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Gillett v. Johnson, 30 Conn. 180; Colburn v. Richards, 13 Mass. 420, 7 Am. Dec. 160; Arnold v. Foot, 12 Wend. (N. Y.) 330; Messingers Appeal, 109 Pa. 285, 4 Atl. Rep. 162; Anthony v. Lapham, 5 Pick. (Mass.) 175; Miller v. Miller, 9 Pa. 74, 49 Am. Dec. 545.

8 See for later English doctrine, Sec. 502.

some riparian proprietor objects upon a legal ground that some one of his rights upon the stream has been infringed upon, the water may be used by another proprietor for irrigating his land. If, upon the other hand, the stream is small and there is not water enough to supply all of the riparian proprietors their correlative rights in the stream, including that of using the water for irrigation, then no one proprietor has the right to use it for that purpose, if this use infringes upon the rights of the other owners. As was held in the English case of Embrey v. Owen,[9] no action will lie for taking an *inappreciable amount of water for irrigation;* but the Court holds that an action would lie for taking an appreciable amount for that purpose.[10] In addition to the above, many of the common law authorities hold that in case of any diversion of the water from a natural water course by one riparian proprietor, even without actual injury to any of the other riparian owners upon the stream, the common law authorities hold that a cause of action would lie against the diverter, on the ground that a right had been infringed upon. This is a doctrine powerfully sustained by the American common law authorities. Also, that for any purpose whatsoever, for any essential diminution of water which Nature directed should flow in a certain channel, the law will interfere;[11] for, as was said in the case of Tillotson v.

9 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633

10 See, also, Swinton Waterworks Co. v. Proprietors etc. Nav. Co., L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 282, where the Court held, under certain circumstances, and *provided no injury is done,* the water may be diverted for a time and used for irrigation by an upper riparian proprietor. Sampson v. Hoddinott, 1 C. B. N. S. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 87 E. C. L. 590.

11 Woodman v. Tufts, 9 N. H. 91; Boliver Mfg. Co. v. Neponset Mfg. Co., 16 Pick. 241; Crocker v. Bragg, 10 Wend. 260, where it was held that a stream of water can not be diverted from its natural course, without the consent of the owner over or by whose land it passes, although such owner may not require the whole or any part of the water for his own use.

See, also, Baldwin v. Caulkins, 10 Wend. (N. Y.) 167; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Whipple v. Cumberland Mfg. Co., 2 Story C. C. 661; Branch v. Doane, 17 Conn. 402, 18 Conn. 233; Parker v. Griswold, 17 Conn. 288; 9 L. R. A. 810, 42 Am. Dec. 739, note, and cases cited; Lund v. New Bedford, 121 Mass. 286, 290; Chapman v. Thames Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401; Bliss v. Rice, 17 Pick. 23; Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Webb v. Portland Mfg. Co., 3 Sumn. 189 Fed. Cas. 17,322; Newhall v. Iverson, 8 Cush. 595;

Smith,[12] "It is a long established principle of the common law that wherever any act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of a right without proof of any specific injury."[13]

It will be here noticed how inapplicable the strict common law rule of riparian rights is to an arid region. As a general thing lands are not irrigated by "inappreciable" amounts of water. It takes large quantities of water to irrigate any extent of arid land. And if the common law rule, as it is laid down by the later English and Eastern American authorities, were strictly enforced in a great portion of this Western country, there would be plenty of water for all of the riparian owners to drink, but there would be very little food to eat if they had to depend upon what they could raise without irrigation.

We will now take up the question of the riparian right to irrigate land under the Western American doctrine, or in those jurisdictions which still adhere to certain portions of the common law relative to waters, but where, in certain localities at least, in order to raise crops irrigation is necessary.

§ 507. Western American doctrine versus the doctrine of appropriation—Classification of States.—We have seen in former portions of this work,[1] that under the strict common law rule of riparian rights, as recognized and enforced by the English authorities and also by the Eastern States, a riparian owner is only permitted to use so much of the waters of a stream upon which

Stowell v. Lincoln, 11 Gray 434; Butman v. Hussey, 12 Me. 407; Monroe v. Stickney, 48 Me. 462; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Gerrish v. New Market Mfg. Co., 30 N. H. 478; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53; Chatfield v. Wilson, 27 Vt. 670; Tuthill v. Scott, 43 Vt. 525, 5 Am. Rep. 301; Blumleigh v. Dawson, 1 Gilman 544; Hulme v. Shreve, 4 N. J. Eq. 3 (Green Ch.) 116; Ripka v. Sergent, 7 Watts & S. 11; Miller v. Miller, 9 Pa. St. 74, 49 Am. Dec. 545; Delaware Canal Co. v. Torrey, 33 Pa. St. 143; Graver v. Sholl, 42 Pa. St. 58; Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; Tootle v. Clifton, 22 Ohio St. 274, 10 Am. Rep. 732; Mitchell v. Barry, 26 Up. Can. Q. B. 416; Hendrick v. Cook, 4 Georgia 241; Tillotson v. Smith, 32 N. H. 90, 96, 64 Am. Dec. 355.

[12] 32 N. H. 90, 64 Am. Dec. 355.

[13] But see Bullard v. Saratoga Mfg. Co., 77 N. Y. 525.

[1] See Secs. 484, 485, 489-491.

his land touches and in such a manner as will not materially diminish its quantity or alter its quality.[2] In previous sections of this chapter we have shown that this rule is especially true as to the diversion of the water for the purpose of irrigation.[3] The rights of one proprietor in this respect are equal, or correlative, to use the more modern term, with the rights of all the other proprietors upon the stream. It will also be noticed that under the common law, English and Eastern American authorities, the Courts seem very reluctant to permit the use of the water at all for the purpose of irrigation. And, if the right is permitted, it always seems to the reader of the opinion as though the Court had strained a point to grant it. Coming to the arid and semi-arid regions of the United States, we find that all of the States formed out of these sections of the country adopted the common law of England as the foundation of their systems of jurisprudence, together with all of the common law theories of riparian rights. The fundamental principle of appropriation of water for beneficial purposes as originally established by the miners' customs has been adopted in all of the 18 States and Territories which are formed out of the arid and semi-arid regions. These States and Territories are Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.[4]

To be sure, later, in some of these jurisdictions, it was decided by the legislatures, or by the Courts, that certain features of the common law were inapplicable to the arid conditions of certain sections of this country, and in those States the common law upon the subject of waters was directly abrogated and the Arid Region Doctrine of appropriation substituted in its stead.[5] These latter States, seven in all, situated in the very heart of the arid region, followed the lead of Colorado in their abrogation of the common

2 See Secs. 501-504.

For pollution of water, see Secs. 1129-1147.

3 See Secs. 500-506.

4 For the Arid Region Doctrine, see Chap. 31, Secs. 585-594.

For a discussion of the subject of riparian rights under each State, see Part XIV, relating to the laws of the respective States, under the sections upon riparian rights.

5 For common law inapplicable to arid regions, see Secs. 588-594.

law as to this subject, and are Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming.[6]

Other States situated either in the semi-arid region of the Middle West or on the extreme Western coast have adhered to the common law of riparian rights, and at the same time have adopted and enforced the Arid Region Doctrine of appropriation of water for beneficial uses. Thus in these States we have dual systems of law governing waters which are antagonistic in principle, and, consequently, are continually clashing. These States, counting the Territory of Alaska, are eleven in number, and are Alaska, California, Kansas, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. These latter States followed largely the rule first laid down by California in its attempt to reconcile a rule governing waters, the very foundation principle of which is, that the water must continue to flow in its natural channel as it was wont to flow by Nature, with a rule which requires that in order to secure a right the water must be diverted from its channel and applied to some beneficial use or purpose. Those States which have totally rejected the common law theories as to the acquisition of water rights and the use of the water and rely wholly upon the doctrine of appropriation, are seven in number and are Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming.[7] Hence it follows that there are two distinct systems or rules of law that govern the use of the waters flowing in the natural streams and lakes of the arid and semi-arid West—right to the use of the water by an appropriation of the same, and right to its use by virtue of an ownership of the soil adjoining which the stream runs. Of these two systems one has its foundation in the equal rights of *all* the riparian owners upon the same stream to the flow of the current in its natural or accustomed channel without material diminution in quantity or alteration in quality, regardless of any priority; and the other, which is almost the converse of the first, has for its basis a right, by virtue of priority, and without any ownership

[6] For abrogation of common law by these States, see laws of respective States named.

See, also, Arid Region Doctrine, Secs. 585-594.

[7] For Constitutional provisions declaring the use of waters to be a public use, see Secs. 378-385.

See, also, Arid Region Doctrine of Appropriation, Secs. 585-594.

of the soil being necessary, to appropriate and divert the water from its natural channel, without obligation upon the part of the appropriators to turn any of it back into the natural stream, and, if necessary for this purpose and within the extent of his appropriation, to use the whole of the water of the stream.

These two systems are antagonistic in their very foundation principles, and therefore antagonistic when it comes to the application of those principles. Had the Government of the United States taken as much pains in disposing of the waters of the public domain in as uniform and systematic a manner as it did of the public lands in the arid region, over which those waters ran, and the greater portion of which lands are absolutely worthless without the application of the water, the laws regarding water rights would not be in their present unsettled and inharmonious condition. But it is not the purpose of this work to debate what the law ought to be or what it might be, but what it is. And we will now proceed to discuss the general nature and extent of rights of riparian proprietors in and to the waters of the streams in those States in the arid West where the common law riparian rights are recognized and protected.

§ 508. **Western American doctrine—California rule.**—As we have seen in a previous section,[1] in some of the States and Territories of the Western portion of this country, riparian rights as defined by the common law have been entirely abolished; we will add that in others they have been modified to a great extent, and in still others they exist with but few modifications as they are interpreted by the Courts of England and the Eastern States.[2] We have also shown in previous sections,[3] that although irrigation of the soil under certain circumstances was perhaps allowed under the strict application of the common law theories, it was so restricted by certain rules and restraints placed upon its practicable workings that those theories unmodified were found to be wholly inapplicable to irrigation as it is known and applied in the "Great Arid West." In that part of the country, in order to make the soil productive, there must be an application of the

1 See Sec. 507.

2 For the exact difference, see the rules in the separate States and Territories, Part XIV.

3 See Secs. 500-506.

waters of the streams upon it. In order to apply it to the soil there must be an actual diversion from the natural stream; and, owing to the porous soil, the hot sun, and dry atmosphere, a certain loss or diminution in quantity must necessarily follow as a result of its application and use for irrigation. Hence, in all of the States and Territories in the arid West, even in those where the common law theories are most strongly applied to riparian rights, there has been a modification of these theories to this extent, that a riparian proprietor may take water from the stream and may make a reasonable use of it for purposes of irrigation. It is considered in the Pacific States that irrigation must be held in that climate "to be a proper mode of using water by a riparian proprietor," and the lawful extent of the use depends upon the circumstances of each particular case.[4] In other words, the right of a riparian proprietor to irrigate his lands, to the extent that it is permitted under the Western American doctrine of riparian rights, is a great modification and extension of that doctrine as defined by the later English and Eastern American authorities. And, strange as it may seem, it fell to the lot of California, the very State where the doctrine of appropriation of the water for beneficial uses originated, to lead off in this modification of the common law rule of riparian rights. The most famous case upon the subject, although not the first, was that of Lux v. Haggin,[5] in which Mr. Justice McKinstry, in rendering the opinion of the Court, quoted from Chancellor Kent the portion which has been so often referred to by the common law authorities as a high authority that water can not be employed for irrigation, and sometimes that it may, which is as follows: "Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the general sense of mankind to debar any riparian proprietor from the application of water for domestic, agricultural, or manufacturing purposes, provided the use of the water be made under the limitation that he do no material injury to his neighbor below him, who has an equal right to the subsequent use of the same water."[6]

[4] Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

[5] 69 Cal. 255, 10 Pac. Rep. 674.

[6] 3 Kent Com. 439. It will be noticed that the above is not an exact quotation, but is a portion of two sentences. For the exact quotation, see Sec. 505.

The Justice, in construing this, said: "It seems to us that the foregoing, although a very distinct statement of the general proposition, *ought not to be taken literally*, unless the words 'material injury' be impressed with the signification the equivalent of a *substantial deprivation* of capacity in a lower proprietor to employ the water for useful purposes. The adjective is prefixed to injury, and the words seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he can not complain of a reasonable exercise of the use by another who possesses the general right in common with himself. The passage as a whole may fairly be said to convey the idea that water may be used for agricultural or manufacturing purposes when such use does not materially deprive the lower proprietor of water either for drinking or agriculture."

The case of Lux v. Haggin is cited as the leading case upon the subject, not only in California, but by the Courts of other States, which follow the California rule in adhering to riparian rights; and the case holds to the effect that it is the law of the State of California that riparian proprietors are entitled to a reasonable use of the waters of a stream flowing by or through their lands for the purpose of irrigation; and that what is a reasonable use is a question of fact, and depends upon the circumstances of each particular case. The Federal Court also recognizes this use of the water in California. In the case of California Pas. & Ac. Co. v. Enterprise Canal & L. Co.,[7] Wellborn, J., said: "The riparian doctrine, with irrigation as one of its uses, is the settled law of California."[8]

§ 509. Western American doctrine—Enlargement of the common law.—In order for a riparian proprietor to have the right to divert the water from a stream which runs through or by his land by virtue of his riparian ownership, and to the extent that it is permitted under the California rule, there is but one conclusion which can be reached, and that is that the common law in this

7 124 Fed. Rep. 741.

8 Citing Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Hargrove v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

respect has been greatly enlarged and extended to fit the conditions of the country.[1] In fact, that this is so has been generally recognized by the California and other Courts adhering to the rule. For instance, if a tract of patented land is in a State where the English common law doctrine of riparian ownership is enforced to the full, strict construction of the same, the owner of the land, if it is situated on a natural water course, would have the right to have the water of the stream flow down to his land without any material diminution in quantity, and could have the upper riparian proprietor enjoined from diverting the water in any way or for any purpose which would materially diminish its flow.[2] But, as was held in a recent California case,[3] such right would not accrue to the riparian owner of land in an arid region of a Western State, where irrigation is necessary to successful agriculture, and where the original rule as to riparian ownership *"has been modified"* so as to allow a riparian proprietor to divert a reasonable amount of the water of a stream and use it to irrigate his riparian land, although a material part of the water would be absorbed and prevented from flowing down to the lower proprietor. It was also held in an earlier California case that the doctrine of riparian ownership has "by judicial decision been modified, or rather, enlarged," so as to include the reasonable use of natural water for irrigating riparian land, although such use may appreciably diminish the flow to the lower riparian proprietor.[4]

1 For the common-law rule, as enforced in England and the eastern portion of the United States, see Secs. 500-506.

2 See Remedies, Injunctions by Riparian Proprietors, Part XIII.

For rule of riparian rights as construed in England and the Eastern States, see Secs. 500-506.

3 Los Angeles v. Los Angeles Farming & M. Co., 152 Cal. 645, 93 Pac. Rep. 869.

4 Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325.

See, also, Wiggins v. Muscupiabe Land & W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. Rep. 869, 1135; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S. 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823; Burr v. Maclay Rancho Co., 154 Cal. 428, 98 Pac. Rep. 260; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Mentone etc. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S. 382, 17 Am. & Eng. Ann. Cas. 1222.

The reason for this modification or extension of the common law in this respect is, as held in a recent California case, if the rule of the common law is unfitted to conditions existing in a State, so that its application will work hardship and wrong rather than betterment and good, the Supreme Courts will refuse to follow it, but will adopt some more equitable rule.[5] And in the famous case of Katz v. Walkinshaw,[6] Mr. Justice Shaw, in rendering the opinion of the Supreme Court upon the motion for rehearing, held that the true doctrine upon the subject is that the common law by its own principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under different circumstances. And, in stating the reason for the modification of the rule, held that whenever it is found that, owing to the physical features and character of the State where the common law is to be applied, and the peculiarities of its climate, soil, and productions, the application of a given common law rule tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice, on which that law is founded and which its administration is intended to promote, require that a different rule should be adopted.[7] Again, in a very recent case in Oregon[8] Mr. Justice King, in commenting upon the decision in the Kansas-Colorado case,[9] held that there was a strong and commendable tendency upon the part of the Supreme Court of the United States to recognize that the rigid rules of the common law, as interpreted and sought to be applied by those insisting upon the "undiminished flow" theory, are inapplicable to the many new and intricate questions necessarily arising under our form of government throughout the arid and semi-arid sections.[10] And so the common law of riparian rights has been modified and extended

5 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182.

For the abrogation of riparian rights, see Secs. 588-594.

For the States abrogating riparian rights, see Secs. 507, 621.

6 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

7 As to the common law inapplicable to the arid West, see Secs. 588-594.

8 Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 1099, 102 Pac. Rep. 728.

9 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

10 But see Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

so that the use can be made of the water of the natural streams, by virtue of riparian ownership, for the purpose of irrigating land, in those jurisdictions following the California rule in this respect, and that, too, where a considerable amount of the water of the stream is consumed. The modified rule does not limit the water which can be used for this purpose to an "inappreciable" amount, as was held to be the rule under a strict construction of the common law right.[11]

Some attempt has been made, by the Courts and others, to reconcile the irrigation of land as a riparian right, to the extent that it is exercised in California, upon the theory, as a Kansas Court puts it, that "The authorities are unanimous to the effect that the use of water for irrigation is one of the common law rights of a riparian proprietor"; and hence, already having that right, there has been no modification of the rule in the Western States, where the common law is adhered to.[12] The Kansas Court is incorrect in the statement that the authorities are unanimous upon the subject, as there are many powerful English and American authorities to the effect, that under a strict construction of the common law, water can not be diverted at all from a natural stream by a riparian proprietor for the irrigation of his lands, upon the theory that it would be an infringement on the rights of the other riparian owners.[13] To be sure, other cases hold that the right may be allowed, but the question of "reasonable use" of the water is held to an insignificant amount, as compared with the amount that is allowed under the Western American doctrine under discussion. It must be to the extent only of "an inappreciable amount," or "provided no injury" is done to any of the other

11 Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633.

See, also, Swinton Waterworks Co. v. Proprietors etc. Nav. Co., L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 35 L. T. N. S. 513, 24 Week. Rep. 282; Sampson v. Hoddinott, 1 C. B. N. S. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 87 E. C. L. 590, 5 Week. Rep. 230.

See for later Eastern American doctrine, Sec. 505.

12 Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

See, also, upon this subject, Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

13 See Secs. 501-506, and cases cited.

proprietors.[14] A careful study of the common law rules upon the subject will prove to the most obtuse mind that there has been a gradual modification and extension of the common law rules of riparian rights, from the earliest English and Eastern American cases down to the doctrine of the Western American States. It is not our purport here to enter into an academic discussion as to *how* the Western theory was adopted, whether it was through the flexibility of the common law to adapt itself to different conditions in different States, or, whether it was by a direct modification by the Courts in holding that the strict construction of the common law rule was inapplicable to the Western portion of the country, and hence to that extent it must be amended. However, we will say that in the ten Western States in this country, named in a preceding section,[15] a riparian proprietor has the right by virtue of his ownership of lands through which or by the side of which a natural stream flows to divert the water from the stream and use the same for the irrigation of his riparian lands, to a reasonable extent.[16] As was said by the Supreme Court of

14 See, also, Secs. 501, 502, and cases cited.

15 See Sec. 507.

16 See Western cases cited above.

See, also, Union Mill & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 73; Ellis v. Tone, 58 Cal. 289; Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 30 Pac. 623; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Swift v. Goodrich, 70 Cal. 103, 11 Pac. 561; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879, *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Learned v. Tangeman, 65 Cal. 334, 4 Pac. Rep. 191; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Peregoy v. McKissick, 79 Cal. 572, 21 Pac. Rep. 967; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. Rep. 846; Coffman v. Robbins, 8 Ore. 278; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Shotwell v. Dodge, 9 Wash. 576, 8 Wash. 337, 36 Pac. Rep. 254; Brosnan v. Harris, 39 Ore. 148, 65 Pac. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Lone Tree etc. Co. v. Cyclone etc. Co., 15 S. D. 519, 91 N.

California in one of the most recent decisions upon the proposition, in a case where it was contended by the plaintiffs that a riparian owner had the common law right to the full flow of the stream through his land: "The rule is evidently not suited to the conditions of a dry climate such as we have in this State. It is accordingly well settled here, that each riparian owner has a right to a reasonable use of the water on his riparian land for the irrigation thereof, and that the so-called common law right of each to have the stream flow by his land without diminution is subject to the common right of all to a reasonable share of the water.[17]

We will now take up the subject as to what extent water may be diverted for irrigation by riparian proprietors as one of their riparian rights under the Western American doctrine and as between each other, leaving the question of the right of appropriations subsequent to vested riparian rights on the same stream to another portion of this work.[18]

§ 510. Western American doctrine—Extent to which water may be diverted.—As we have seen in the previous sections, irrigation, especially in the arid and semi-arid States of this country, is held to be a proper mode of using the water of the natural streams by a riparian proprietor.[1] The question now is, To what extent

W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596.

See, also, the cases cited upon the question of reasonable use by riparian proprietors for irrigation.

17 Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S. 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823, citing Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Harris v. Harrison, 93 Cal. 681, 29 Pac. Rep. 325; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308; Gould v. Stafford, 77 Cal. 67, 18 Pac. Rep. 897; Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. Rep. 62; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Rose v. Mesmer, 142 Cal. 329, 75 Pac. Rep. 905.

See, also, for the right of appropriation as against prior riparian rights, Secs. 815-823.

18 For mixed rights on the same stream, and appropriations subsequent to vested riparian rights, see Sec. 823.

1 Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

See authorities cited in the previous sections.

in the common law States may water be diverted for this purpose? An examination of the authorities upon the subject will disclose the fact that they differ materially in the different States. And in some of the States there are different rules applicable to different localities, varying according to the physical conditions. The State of Texas is divided into two divisions, arid and not arid, or humid.[2] In the arid portion water for irrigation is held to supply a natural want,[3] and the Court holds that in the arid districts the waters of all natural streams may be diverted and used by an upper riparian proprietor for the irrigation of his riparian lands, to the exclusion of the use thereof by a lower riparian owner for such purposes.[4] In other portions of the State, however, the Court holds that the use of the water of a stream for irrigation will not justify the upper owner in exhausting the water to the injury of proprietors lower down on the stream.[5] Although the State of Texas has the authority to adopt what rule governing and regulating the use of waters within its boundaries as it sees fit,[6] as long as there is no interference with navigation,[7] the above rule adopted for the arid portion of the State is not in accord with the rule adopted by the other Western common law States upon the subject. The general rule of the Western American doctrine is to the effect that a riparian proprietor is not entitled to divert and use all of the water of a stream without regard

2 For irrigation in Texas, see Part XIV.

3 For natural and artificial wants, see Secs. 486, 487, 500, 501.

4 Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 785; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

See, also, Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540, where the Court held that the maxim, "The water runs, and let it run," or "Every one has a right to have the advantage of a flow of water in his land without diminution or alteration," as applied by England and the Eastern States, where water is useful only in its flow, had no application to a State where water was useful for irrigation, and instead thereof the Court substituted the rule, "Water irrigates, and let it irrigate."

See, also, Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078, where the Court also held that the old common law rule did not apply.

The rights of an upper riparian proprietor to the use of the water of the stream for irrigation purposes are superior to those of a lower proprietor. Cornick v. Arthur, 31 Tex. Civ. App. 579, 73 S. W. Rep. 410.

5 Fleming v. Davis, 37 Tex. 173.

6 For right of State over its waters, see Sec. 593.

7 For right of navigation, see Secs. 341-357.

to the wants and necessities of other riparian proprietors, although the amount so diverted and used was no more than is necessary for the irrigation of his riparian lands, unless the proprietor has acquired a title to the use of the excess of the water over and above the amount to which he is entitled by virtue of his ownership of the land, by means of a grant, prescription, or by means of a prior appropriation for beneficial uses, under the Arid Region Doctrine.[8] And in the latter case, of course, the rules applicable to that doctrine in the State where the appropriation is made will apply. In fact, there is but one state or condition where a riparian proprietor as such is permitted, under the Western American doctrine of riparian rights, to use all of the waters of a natural stream, and that is when they are necessary for domestic and household uses, and for the watering of a limited number of horses and cattle. In this case and for such necessities, where the stream is small, he may consume all of the water flowing naturally in the same.[9] But outside of this right, and especially under the common law right to divert the water for irrigation, as was said in the case of Lux v. Haggin, the leading case upon the subject, "An entire diversion of a water course by an upper riparian proprietor for irrigation is never allowed."[10] It is also held that no use of the

[8] For Arid Region Doctrine of Appropriation, see Chap. 31, Secs. 585-594.

[9] Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370; *Id.*, 81 Fed. Rep. 73, where the Court held that in the exercise of his common-law right each riparian proprietor may consume so much of the water as is necessary for household and domestic purposes and for watering his stock.

See, also, Ferrea v. Knipe, 28 Cal. 240, 87 Am. Dec. 128; Hale v. McLea, 53 Cal. 578; Washburn on Easements and Servitudes, 2d Ed., p. 240; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Ellis v. Tone, 58 Cal. 289.

In the case of Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, the Court practically classifies the use of water for the irrigation of such garden produce as may be essential to the proper sustenance of a settler and his family among his natural wants.

[10] Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

See, also, the cases cited above; Learned v. Tangeman, 65 Cal. 334, 4 Pac. Rep. 191; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Pope v. Kinman, 54 Cal. 3; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402.

water, however great, by a riparian owner can give him rights by adverse user against another riparian owner.[11] In other words, the use of water for irrigation, under the Western American doctrine of riparian rights, as is also the case under the English and Eastern doctrine, is proper so long as it is kept within the limit, that it must not unreasonably prevent the possibility of a correlative use by all the other proprietors upon the same stream. That is to say, the use must be reasonable with reference to the rights of all the other proprietors.

We will now discuss the proposition as to what is a reasonable use by riparian proprietors of the waters of a natural stream for the purpose of irrigation, as it is declared under the Western American doctrine.[12]

§ 511. Western American doctrine—Extension of the rule of "reasonable use."—As we have seen in the previous sections, in the Western common law States, in those portions where irrigation is necessary to the successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather, enlarged, so as to include the reasonable use of the water from natural streams for irrigating riparian land, even though such use may appreciably diminish the flow down to the lower riparian proprietors.[1] It is a well-known fact that in the Western portion of this country the majority of the streams are comparatively small; hence, if any considerable amount of water is diverted, it will diminish the flow down to the lower proprietors. And, as it usually takes a considerable amount of water to irri-

This rule may prevent the use of any water from some of the streams for irrigation purposes, if they are so small that all of the water is required for domestic purposes; or one owner can not take out water for irrigation and still leave a proportionate share for the other owners. Baker v. Brown, 55 Tex. 377.

11 Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Dunn v. Thomas, 69 Neb. 683, 96 N. W. Rep. 142; Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078.

See, also as to prescription as between riparian proprietors, Sec. 1040.

12 See Secs. 511-517.

1 See Secs. 500-506.

See, also, Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Wiggins v. Muscupiabe Land & W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

gate a tract of land in a proper manner, and the most of the water used is consumed in the operation so that it does not reach the lower proprietors at all by way of the natural channel of the stream, in order for a riparian owner on a small stream to be permitted to irrigate his land as one of his riparian rights, the common law rule as to "reasonable use" for this purpose had to be enlarged and extended so as to meet the physical conditions of that portion of the country, in those Western States where the common law is adhered to. So the Courts had one of three propositions to decide upon: A strict construction of the common law rule in this respect; a modification of the rule, so as to permit a practical use of the water for irrigation; or the entire abrogation of the common law of riparian rights, and the adoption of the Arid Region Doctrine only in these States, which doctrine is based upon prior appropriation and diversion for beneficial uses. As was said in the case of Meng v. Coffey:[2] "If the existence of a rule better applicable to parts of the State were of itself sufficient ground for judicial overturning of the law, the question would arise, What principle are we to adopt?" And the Courts and legislatures in these ten States, having theretofore adopted the common law upon the subject of riparian rights, rather than the "overturning of the law" in this respect[3] decided, as was their right, to extend the common law rule of "reasonable use," as it is recognized and enforced by the laws of England and the Eastern States, so that enough water might be diverted from the streams, as a riparian right, to be of some benefit to the owner in the irrigation of his lands, even if the owners below on the stream were technically injured, according to the strict construction of the common law rule, in their riparian rights, by the flow of the stream being considerably lessened when it reached their lands.[4] As was said in the case of Meng v. Coffey, "Nor do we believe that the common law rule of equality among riparian owners, *administered liberally with respect to the circumstances of particular localities,* is necessarily prohibitive of irrigation anywhere. . . . It would be impolitic to give an arbitrary or hard and fast

[2] 67 Neb. 500, 93 N. W. Rep. 715, 60 L. R. A. 910, 108 Am. St. Rep. 697.

[3] For the ten common-law States adhering to the common law, see Sec. 507.

[4] See cases cited, *supra.*

For strict construction of common law rule, see Sec. 504.

meaning to the word 'reasonable' in this connection. The use of the water for irrigation always involves some loss, and we do not think it would be wise to declare every perceptible diminution of the waters of a stream to be unreasonable. The necessity of a liberal view of what constitutes a reasonable use of water for irrigation has been judicially recognized."[5]

It was also held in a leading case in Oregon[6] that the strict rule of the common law, so often stated and reiterated in the books, that a riparian proprietor is entitled to have the entire flow of the stream come down to his premises, is subject to the *important limitation* that an upper riparian proprietor may make such use of the water as does not work any actual, material, and substantial damage to the common right which each proprietor has; and whether a use of the water for irrigation is of the character referred to, and therefore reasonable, depends upon the correlative rights of the other proprietors. And the Court further held that under this Western doctrine of the common law, that an owner was not a wrongdoer when he used the waters of a stream for the purpose of irrigation; nor does the fact that his land lies above the level thereof, so that it can not be irrigated by means of ditches wholly on his own lands, affect his right to the use of the water.[7] This extension of the rule of "reasonable use" is also so applied in the case of the smaller streams, in cases where the water for the entire stream is needed for irrigation by any one proprietor; and in these cases it is held that the Court of Equity has the power to apportion or divide the use of the water for irrigation according to time, when each appropriator may use the entire flow of the stream for a certain number of hours or days, as the case may be, and then it passes to the other proprietors for their use in the same manner.[8]

From the holding of the Courts in these ten Western common-law States and the liberal construction given to the rule of "reasonable use" the conclusion is irresistible that in this portion of the country, as to the use of the water for irrigation, the rule has been very much enlarged and extended, so that instead of permitting an "inappreciable" amount to be used, as is the rule under

5 Citing the above cases.

6 Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

7 See, also, Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195.

8 For the division of the use among riparian proprietors, see Part XIII.

See, also, Remedies, Part XIII.

the strict construction of the common law,[9] an appreciable amount, or an amount which is of some practical use to the owner, is permitted. In the State of South Dakota it was recently held that where a water right is subsequent and inferior to another's riparian rights, the latter may use all the water required for domestic purposes and for proper irrigation of the land riparian to the stream before he permits any to flow down.[10]

§ 512. **Western American doctrine—Reasonable use of water for irrigation by riparian proprietors.**—In general, the term "reasonable use" of water for irrigation, as permitted in the Western States, which follow the common-law rule governing the use of water for irrigation, as a riparian right, is always relative.[1] This use does not depend upon the convenience of, or the profitable results to, any particular proprietor upon a stream; however, these questions may be considered with the other facts in any particular case. The question does depend upon the size, character, and situation of the stream, the fall of the water, its volume and velocity, the prospective rise and fall, the season of the year, the nature of the region, the character of the soil, the amount of water required to irrigate the land per acre, the number of the riparian proprietors, and the extent of the riparian land on the stream susceptible of irrigation, owned by each proprietor, the use to which the water may be put by all of the proprietors, the kind of crops to be irrigated, and their need of water, the means adopted for returning the water to the natural channel, and a variety of other circumstances and conditions surrounding each particular case.[2] So,

[9] Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633.

See, also, Later Eastern American Doctrine, Sec. 506.

[10] Driskill v. Rebbe, 22 S. D. 242, 117 N. W. Rep. 135.

[1] For the ten States which adhere to the common law, see Secs. 507, 621.

It must be noted that in all of these States the laws also allow the appropriation of water under the Arid Region Doctrine. See Secs. 507, 621.

[2] Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325, in which the Court said: "In such a case, the length of the stream, the volume of the water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neigh-

where a riparian proprietor claimed the right to the use of water upon lands which were valueless for irrigation purposes, as against the actual use of the water for beneficial purposes, the Court said: "A riparian proprietor's claim to make such a use of the waters of a stream is of course without legal foundation."[3]

A recent Washington case held that Section 6327 of the Remington and Ballinger Code which provides that any person owning lands, who is not the riparian proprietor or who being such has not sufficient frontage to attain a sufficient flow of water to irrigate his lands, shall be entitled to a right of way over lands lying between his lands and the stream or above or below it; but it was further held that the section "does not give a right to take water already appropriated, or to take away the rights of a superior riparian owner."[4]

Under the rules of the common law the term "reasonable use" must be liberally construed, with reference to the rights of all of the riparian proprietors on a stream, and it is declared by all of the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable to all cases.[5] But there are some features of the subject upon which all the authorities agree as questions of law. One of these is that in no case can a riparian proprietor for the purpose of irrigation, as against the other proprietors either above or below him on the stream, use or successfully claim all of the water of a stream, in the absence of a prior legal appropriation. That can be done, if at all, only where the whole of the stream is absolutely necessary for strictly domestic

bor." Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90, where the Court said: "The question of reasonable use is not to be determined solely by the wants of the party using the water—whether the amount is sufficient for his own lawful purposes—but reference must also be had to the rights and needs of other proprietors upon the stream. 'The necessities of one man's business can not be made the standard of another man's rights in a thing which belongs equally to both.'"

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442; 77 Am. St. Rep. 158.

3 Montecito etc. Co. v. Santa Barbara, 151 Cal. 371, 90 Pac. Rep. 935.

See, also, *Id.*, 144 Cal. 578, 77 Pac. Rep. 1113.

4 Miller v. Baker, —— Wash. ——, 122 Pac. Rep. 604.

5 See cases cited *supra*.

See, also, Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767.

purposes and to furnish drink for man and beast.[6] Again, an upper owner has no superior right to the use of the water by virtue of his position on the stream, but can divert only such an amount of the water as will represent his proportion of it, when all the circumstances in the case, including the number of other owners and their rights in the water, are taken into consideration.[7] So, again, the authorities agree that the water must not be used by a riparian proprietor for the irrigation of nonriparian land. We will more fully discuss this question in subsequent sections.[8] An-

[6] In an action by a lower riparian owner to restrain the diversion by an upper owner of the waters of a stream, a decree ordering that the whole of the water be allowed to flow unrestricted to plaintiff's lands in the natural flow, except a given number of inches, is erroneous, since defendant would thereby be deprived of the reasonable use of any part of the water for irrigation or other necessary purposes as riparian proprietor. Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; and also *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Learned v. Tangeman, 65 Cal. 334, 4 Pac. Rep. 191; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Ellis v. Tone, 58 Cal. 289; Lone Tree etc. Co. v. Cyclone etc. Co., 15 S. D. 519, 91 N. W. Rep. 352; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Weiss v. Oregon Iron & S. Co., 13 Ore. 496, 11 Pac. Rep. 255; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370; *Id.*, 81 Fed. Rep. 73; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Corfman v. Robbins, 8 Ore. 279; Hough v. Porter, 51 Ore. 318, 95 Pac. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Arroyo D. & W. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 122.

The use of water for irrigation as a riparian right is limited by the condition that it must be so used as not to materially injure other riparian owners in their proportional use of the water from the same stream for the irrigation of their riparian lands. Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

[7] Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Learned v. Tangeman, 65 Cal. 334, 4 Pac. Rep. 191.

[8] See Secs. 457-465.

See, also, Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

other rule is that the water must not be used by an upper proprietor in a wasteful manner, so as thereby to prevent a reasonable use of the water by the lower owners.[9] And, again, the surplus water must be returned to the natural stream so that it can be used by the owners below.[10]

It follows as a conclusion from the above that a riparian proprietor in the Western States named may use the water of the natural streams for the irrigation of his riparian land, subject to the above limitations imposed by law. In all cases the use must be reasonable under all the circumstances of the case. What is a "reasonable use" under the liberal construction of the term by the courts of the Western States is a question of fact for the determination of the jury, within the limitations above set forth, under proper instructions of the Court. In the use by one proprietor no actual or substantial rights of the others must be infringed upon, or an action will lie, against the owner wrongfully using the water, at law for damages, or in equity for an injunction. It is also plain why, in the arid West (whose agricultural resources depend almost entirely upon the extent of irrigation) a strict construction of the common law was found to be a very inadequate and impracticable guide governing the right to the use of the waters of the natural streams; and why in the States formed from the country lying west of the one hundredth meridian the common law should have been modified in all, especially as to the use of the water for irrigation, and entirely abolished in some.[11]

§ 513. **Correlative rights of the several proprietors.**—Where the rights of riparian proprietors are referred to by the authorities as being "equal," that is not always what is meant in the strict sense of the word. Especially is this true under the Western American doctrine where the use of water for irrigation is allowed the owners on the banks of streams as one of their riparian rights. The terms "correlative rights," or "relative rights" are more ap-

Boehmer v. Big Rock etc. Co., 117 Cal. 19, 48 Pac. Rep. 908.

9 For wasting water, see Secs. 911-916.

See, also, Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254.

10 See Secs. 496, 522.

11 For the rules adopted in the respective States, see Secs. 507, 621.

propriate in this connection. No one would contend for a moment that it would be equitable to allow an owner who had but a few rods fronting on the stream, or a very few acres of land susceptible of irrigation, to have the same right to the use of the waters of the stream as an owner who had a mile or more fronting on the stream with, say, 1,000 acres susceptible of irrigation, especially where there was water in the stream enough for both, if divided according to their relative needs. So, again, a person who had 1000 acres fronting on the stream, and only ten acres susceptible of irrigation, should not be allowed the same right as one who had but 100 acres, all of which might be irrigated. Hence it is the rule in these Western States that a riparian owner's right to irrigate exists as an incident to the soil of the full amount of irrigable riparian land which he owns, as compared to the same character of land owned by all of the other riparian proprietors on the same stream. In other words, his right is measured by his necessities, with due regard to the correlative rights and necessities of the other owners on the same stream. Of course in cases where there are a large number of riparian proprietors whose rights are involved, there is great difficulty in determining what is a reasonable use by all. Many circumstances must be taken into consideration, and the result must depend upon the peculiar circumstances appearing in each particular case.[1] As an extreme illustration of this principle, in one California case it was held that where none of the land of a riparian owner was irrigable, "a riparian proprietor's claim to make such a use of the waters of a stream is of course without legal foundation."[2]

Upon this subject it was said by Judge Hawley, Federal Judge for Nevada: "Under the rules of the common law riparian proprietors would have all the right to a reasonable use of the waters of a stream running through their respective lands for the purpose

1 Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

See, also, as to determination of reasonable use, Secs. 490, 511.

2 Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935; see, also, *Id.*, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, Southern California v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; *Id.*, 151 Cal. 587, 91 Pac. Rep. 395; Anaheim etc. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1662.

of irrigation. It is declared in all of the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable in all cases. The question may be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions surrounding each particular case; the true test being whether the use is of such a character as to materially affect the equally beneficial use of the waters of the stream by the other proprietors."[3]

A riparian owner has a right to make a reasonable use of the waters of a stream flowing over or along his lands for the purpose of irrigation. This right should be measured primarily by the amount of water in the stream available for such purpose, the number of persons who use it, the size, situation, and character of the stream, and nature of the region.[4] However, the right of each proprietor having been once ascertained, an agreement may be made between all the owners that each take a portion of the water to irrigate their lands for all or a portion of the time; or, if the stream is small, that the apportionment may be by periods of time instead of by quantity or volume of the water.[5] Again, if an

3 Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 81 Fed. Rep. 73, quoting from the earlier opinion by the same Judge, while Chief Justice of Nevada, of Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

See, also, Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed Cas. No. 14,370, 8 Morr. Min. Rep. 113; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 610, 108 Am. St. Rep. 697; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Coffman v. Robbins, 8 Ore. 278, 8 Morr. Min. Rep. 131; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

4 McCook Irrigation & Water Power Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996; *Id.*, 70 Neb. 115, 102 N. W. Rep. 249.

See, also, Lone Tree Ditch Co. v. Cyclone Ditch Co., 26 S. D. 307, 128 N. W. Rep. 596, modifying *Id.*, 15 S. D. 519, 91 N. W. Rep. 352; Redwater Land & Cattle Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702.

5 For agreements as to apportioning water between riparian owners, see Sec. 535.

For the appropriation of water by periods of time, see Sec. 586.

agreement can not be reached between the various riparian claimants to the water, a court of equity has the authority to make the apportionment, in a proper action, and award to each owner either a definite share of the flow for continual use,[6] or all of the stream for a portion of the time.[7] These subjects will be more thoroughly discussed in other portions of this work to which references have been made.[8]

§ 514. What lands may be irrigated by a riparian proprietor—Must be riparian and lie within the watershed of the stream.—As we have seen in a previous portion of this work, lands, in order to be riparian, must border or touch upon the water of a stream or other body of water. In other words, the riparian owner must own the bank in order for his lands to be riparian.[1] This principle is also adhered to in the Western States which follow the common law and allow a liberal use of the waters of the natural streams for irrigation.[2] The question now arises, as to how far back from the stream the lands may lie, so that they may be irrigated as a riparian right, under the Western American construction of the common law. Upon this subject the States in question have adopted practically the same rule. For the present we will disregard the question of title,[3] and discuss the question from the standpoint of the water-

[6] For actions to apportion the water between riparian owners, see Remedies, Chap. 78.

See, also, Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021, where the Court held that where riparian land was partitioned, and water apportioned to the several tracts, it did not change the character of the rights of the respective parties; but the right assigned to each was a riparian right, and that one party will not be permitted to decrease the underground waters essential to the existence and preservation of the surface water, to the injury of the other riparian proprietors.

For riparian right in subterranean waters, see Secs. 1148, 1211.

[7] Wiggins v. Muscupiabe Land & W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Hough v. Porter, 51 Cal. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

[8] See references *supra*.

[1] See Secs. 451, 452, 458.

As to what are riparian lands, see, also, Secs. 457-466, and cases cited.

[2] For the ten Western States which adhere to the common law, see Sec. 507.

[3] As to title as affecting the riparian right to irrigate lands, see Sec. 518.

shed. The great weight of authority in these States holds that land in order to be riparian, and hence entitled to be irrigated as a riparian right, should lie within the drainage basin or watershed of the stream to which the riparian rights are claimed. This is so for the reason that, as soon as the land passes over the ridge or "divide" separating its drainage basin from another, it becomes tributary to another stream; and, therefore, if it touches this stream, it is riparian to it; if it touches no stream, it is not riparian land. So, if a divide cuts in two a tract of land held under one ownership, that portion only which lies within the drainage basin of the stream may rightfully be irrigated.[4]

If we are to adhere to the principles of the common law, this rule is undoubtedly the correct one. We have seen in previous sections,[5] that the use of the water for irrigation must be a reasonable one. We will also see in a subsequent section [6] that after its use all water not actually consumed must be returned to the natural stream, for a like use by the other riparian proprietors below. Now to run the water by means of tunnels, or otherwise, under the divide to another watershed, so that both the percolation and the surplus could not be returned to the stream from which it was taken, but

[4] In the case of the Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S. 1062, the Court held that land which is not within the watershed of a river was not riparian thereto, and is not entitled, as riparian land, to be irrigated from the water of the river, although it may be a part of an entire tract which does extend to the river. The principal reasons for the rule are, that where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed; and that, as the rainfall on such land feeds the stream, the land is in consequence entitled to the use of its waters. Where two streams unite, the Court held that each is to be considered a separate stream, and that land lying within the watershed of one stream is not to be considered as riparian to the other stream.

See, also, Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Montecito Val. W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Southern Cal. Irr. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Wiggins v. Muscupiabe W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Watkins Land Co. v. Clements, 98 Tex. Civ. App. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; Pomona Land & W. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

[5] See Secs. 510, 511.

[6] See Sec. 522.

would flow to another stream, would be a most unreasonable use of the water, when taking into consideration the rights of the other proprietors on the first stream, and would also give to the proprietors on the second stream water to which they were not entitled. However, the Oregon Court, in the case of Jones v. Conn,[7] intimated that the irrigation of riparian land can not be prevented by the fact that it is divided from the stream, which will prevent the return of the water to the stream, when the amount of water taken and used by the defendant was not sufficient to materially injure the plaintiffs, or to interfere in any substantial way with their rights as riparian proprietors. It was also held in a Texas case,[8] while recognizing the rule as stated above, that circumstances might exist that would authorize the Court to extend the rule; for example, if the drainage area be small and the supply of water abundant, so that other riparian proprietors would not be deprived of an ample supply, it might not be an unreasonable use to carry the water beyond the watershed.[9] These cases thus made the question of reasonable use of the water, and the needs of the other riparian proprietors the basis for their suggestions. However, in deciding the cases both held against the extension of the rule. In the Oregon case it was conceded that under the claim alone of riparian rights the owner of land can not, to the injury of another riparian proprietor, take water beyond the watershed; and where the defendant claimed the absolute right to sufficient water to irrigate his land, regardless of the effect it might have upon the other proprietors, the Court held that the plaintiffs were entitled to such a decree as would prevent its use from ripening into an adverse title, and therefore the Supreme Court affirmed the decree of the trial Court perpetually enjoining and restraining him (the defendant) from diverting any of the waters of the river to irrigate such land, "to the actual and perceptible injury of the plaintiffs as riparian proprietors upon their riparian lands." In the Texas case the Court also held against the extension of the rule, and limited the lands which might be irrigated from a stream to those which lie within the watershed.

In regard to lands upon tributaries of streams, or those lying

[7] 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

[8] Watkins Land Co. v. Clements, 98 Tex. Civ. App. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673.

[9] Citing Jones v. Conn, *supra*.

within the major watershed of a stream system, and the minor watershed of any individual tributary, the rule is that they must be considered separately, and water taken from a tributary must be used within the watershed of that tributary.[10]

§ 515. What lands may be irrigated—The question of title to different adjoining tracts.—As we have seen, land, in order to entitle it to be irrigated from a natural stream as a riparian right, must border or touch on the stream.[1] All land is riparian, as far as title is concerned, which abuts upon the stream, which at the time of the use is in one contiguous tract and held in one ownership, and from which the stream may be reached without passing over other lands the title to which is in another.[2] With the furthermost boundary of a single tract of the land from the stream held in a single ownership, the riparian character of the land ceases, for the reason that there is no direct access to the stream from other lands beyond this boundary. We now come to the question as to whether a person who owns several tracts of land, only some of which touch upon the stream and are strictly riparian, can extend his riparian right to irrigate them all, where after the purchase they formed one contiguous tract. Upon this subject the rule in the different States is not the same. One rule is that, where lands are acquired by an entryman or purchaser by different entries or purchases, the boundary of the riparian land is restricted to the land bordering on the stream which was acquired by one transaction, and beyond which the riparian right of irrigation can not extend. This is the rule laid down by the California Courts, which hold that the riparian right of irrigation should be limited to the smallest tract touching the stream in the history of the title while in the hands of the owner at the time of his claim of the right.[3] Upon this point

10 Anaheim Union W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S. 1062.

As to the irrigation of lands beyond a "divide" under the Western doctrine of appropriation, see Sec. 866.

1 See Secs. 451, 452, 456.

2 See Right of Access, Secs. 336, 337, 344, 540.

For what are riparian lands, see Secs. 454, 458, and cases cited.

3 Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908; Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

There is nothing in the case of Alta Land & Water Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, contrary to the rule stated in the text. It is true that the land in question was 1280 acres. The case does not

the Nebraska Court also holds with California that the riparian land stops at the outermost edge of a single original Government entry, and that the riparian right to irrigate this land can not be extended by purchase or subsequent entries to lands contiguous to the riparian land but not themselves touching on the stream.[4] Upon the other hand, the Courts of Oregon and Kansas hold that, in determining the quantity of land lying along a stream which a single proprietor may irrigate, the question of equality of right should control, irrespective of the matter of governmental subdivisions of the land, or the acquisition of lands through different sources of title. And that where the stream is sufficient, all land held under one ownership, regardless of the area or the different subdivisions, may be irrigated as a riparian right, where it does not work any material and substantial damage to the common rights of the other proprietors.[5]

Claiming the right to the use of the water as riparian owners, the rule as laid down in the latest cases seems to be correct in principle, as the use of water under that law must be reasonable in all respects, as between riparian owners. It is not a too liberal construction of the common law as to what are riparian lands. The common law recognizes no Government surveys, but holds that all lands touching upon a stream held in a common ownership and within the same watershed are riparian. And, if riparian, they may be irrigated, if such a use is permitted as a riparian right in the jurisdiction where the case arises. This liberality also is the correct rule when there is an ample supply of water in the stream

show how title was acquired, and only decides that land can not be segregated from a riparian tract by the temporary possession of a "squatter" holding without right.

There is also nothing in the case of Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, contrary to the rule. This case as far as it touched upon the subject simply decided the question of relation, as between an appropriator of water, and the right to its use by a riparian proprietor.

[4] Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. The Court in this case also intimates that a rule confining the riparian rights to the smallest legal subdivision recognized by the Government in disposing of its lands, namely, 40 acres, would be even more equitable. However, it does not decide this to be the rule in that State.

[5] Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

and none of the other proprietors are injured by the use. But in times of scarcity, or when the country becomes more settled and the demand for the water is greater, this liberality must be restricted and the right limited to the common law rule of "reasonable use."[6] The States which follow the common law in permitting the irrigation of land as a riparian right should follow that law in respect to the area of the land with the common law limitations and restrictions, otherwise the doctrine of appropriation which is also permitted in all of the States should be followed. To be sure, no man should be permitted to irrigate a vast tract of land acquired no matter from whom, nor under what titles, nor how far from the stream, by virtue of the ownership of a small tract of land which is actually riparian. This is especially true if this use infringes upon the rights of the other riparian proprietors or appropriators, who have acquired rights through the Arid Region Doctrine of appropriation.[7] This use, as we have said, of water in another watershed would be a most unreasonable one. In the case of Jones v. Conn[8] the Oregon Supreme Court quoted from the first edition of this work,[9] to the effect that a riparian proprietor is entitled to any use of the waters which "does not work actual, material, and substantial damage to the common right which each proprietor has, as limited and qualified by precisely the equal right of every other proprietor." This was intended to convey the meaning that a riparian proprietor might convey waters to any lands which he might own bordering upon the stream regardless of their extent or source of title, provided that the rights of the other owners were not materially and substantially injured. In other words, that the whole question should depend upon the common law rule of "reasonable use," after taking into consideration the rights of all the other riparian proprietors upon the same stream.[10] This is in fact the only rule which is recognized by the common law in any event, and under this rule the rights of all the proprietors upon the same stream must always be considered. A man with 10 acres which are riparian to a small stream might not be permitted to irrigate any of it, for the reason that the flow of

[6] See Secs. 489-491.

[7] For rights of appropriators, as against riparian owners, see Secs. 775-803.

[8] 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

[9] See Kinney on Irrigation, First Ed., Sec. 276.

[10] See Secs. 490, 511.

the stream might be sufficient only for the actual domestic and culinary uses of all of the riparian owners upon the same. Upon the other hand, a man with 1000 acres upon a large river might be entitled to irrigate all, provided always that the rights of the other owners are not materially and substantially injured thereby. Therefore, it seems to us that the only correct rule is the question of reasonable use by one owner, rather than any rule attempting to limit that use to a narrow strip of his land which actually borders upon the stream and was acquired from a single source of title.

§ 516. **Nonriparian owner has no right.**—As we have seen, riparian rights of all kinds depend upon the ownership of the banks of the streams or other bodies of water. The lands for which they are claimed must touch upon the water.[1] Hence it follows that one who is not a riparian owner can not use the water of a stream for irrigation as a riparian right. His claim would lack the essential element—ownership of the bank of the stream.[2] No person can take water from a stream, under the common law right, for the purpose of irrigating his tract of land which is separated from the stream by intervening lands belonging to other and riparian proprietors. Neither can a squatter gain title to the use of the waters of a stream belonging to another by diverting and using them for the purpose of irrigating land for which he has no title.[3] If an owner of land, the whole tract of which is riparian while the title remains in him, sells a portion which does not touch upon the stream, he thereby cuts off from the part so conveyed all participation from the use of the stream and from all riparian rights therein, unless the conveyance declares to the contrary.[4] It is held in California that land thus severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who originally owned it and who owns the part abutting on the stream.[5] He becomes as to this tract a nonriparian owner.[6] Any

1 See Secs. 451, 452, 458.

2 As to appropriation of the water by nonriparian owners, see Secs. 766, 767; Hayden v. Long, 8 Ore. 244; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S. 391.

3 Alta Land & Water Co. v. Hancock, *supra*.

4 For the conveyance of the riparian right to irrigate land, see Sec. 535.

5 Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S. 1062.

6 But see acquisition of title to different tracts, Secs. 464, 465.

right to the use of the water of the natural stream by nonriparian owners or by a riparian owner for nonriparian land must be acquired by the right of appropriation for beneficial uses, according to the Arid Region Doctrine. This subject will be discussed in a subsequent chapter.[7]

§ 517. Riparian proprietor has no right to irrigate nonriparian land.—A riparian proprietor has no right to irrigate nonriparian land, by virtue of his title to other lands which touch upon the water of a stream and therefore are themselves riparian. Whatever may be his right to a reasonable use of the water of the stream to irrigate his riparian land, he has no right to conduct any of the water to irrigate other lands not riparian.[1] In this respect the common law as it is enforced in England and in the Eastern States is in accord with the Western American doctrine.[2] The rule as stated above is correct, and that, too, whether there is any injury to any other riparian proprietor on the stream or not. There is nothing

7 See Chap. 31, Secs. 585-594.

1 Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. Rep. 62; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Montecito Val. W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Broadmoor Dairy & L. S. Co. v. Brookside W. & Imp. Co., 24 Colo. 541, 52 Pac. Rep. 792; Cohen v. La Canada Land & W. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Boehmer v. Big Rock Creek Irr. Co., 117 Cal. 19, 48 Pac. Rep. 908; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, where the Court held that, under the law of riparian proprietorship, an upper riparian proprietor is entitled to make a reasonable use of a portion of the water of a river to irrigate his riparian land, but he does not have any right to take the water away from the river to irrigate other lands, that are not riparian. Citing Kinney on Irr., First Ed., Sec. 284.

2 Swinton Waterworks Co. v. Wilts etc. Co., L. R. 7 H. L. 697, 45 L. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284; McCarter v. Hudson etc. Co., 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S., 197, 118 Am. St. Rep. 754, 10 Am. & Eng. Cas. 116, aff'd, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529. The question of irrigation was not involved in this case.

more completely antagonistic to the common-law theory of riparian rights, nothing which would more completely destroy the last vestige of the common law in the Western States adhering to that doctrine, than would the granting of the right of the diversion of the waters of a stream and conducting the same by means of ditches and canals for the irrigation of lands not adjoining the stream, by any persons who are not, with respect to such lands, riparian proprietors. As we have seen in previous sections, it is by a strained construction of the common law upon the subject that irrigation is permitted to the extent that it is practiced in the Western States, as a riparian right. As was held in a recent California case, the very theory upon which the right of a riparian owner to be protected in the use of the waters of a stream to which his lands are riparian is that, Nature having given these lands the benefit of the flow and the natural advantage of its use on the lands, one riparian owner may not divert these waters to lands not riparian to the injury of another riparian owner who can use them.[3]

The old common law rule has been modified and extended by liberal construction by the Courts of the Western common law States, in order to permit the right as it is there recognized and allowed. We have also seen that the common law right is based upon equality and equity and the right to a reasonable use of the water of a certain stream by all of the riparian owners thereon. Hence by permitting any one of these owners by virtue of his riparian ownership of a strip of land bordering upon the stream to irrigate great tracts of nonriparian land, would indeed abrogate the very principle of equality upon which the common law rule is based, and establish a rule based upon inequality and injustice. We would then have neither the common law rule nor the rule of the Arid Region Doctrine, which is based upon prior appropriation and diversion for beneficial purposes, but not upon the ownership of riparian land.[4] If the irrigation of nonriparian lands was permitted by a riparian owner, even if there was no material injury to

[3] Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S. 772.

See, also, Redwater etc. Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702; Swinton Waterworks Co. v. Wilts etc. Co., L. R. 7 H. L. 697, 45 L. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284; Boehmer v. Big Rock etc. Co., 117 Cal. 19, 48 Pac. Rep. 908.

See as to reasonable use for irrigation, Secs. 490, 491, 511-513.

[4] See for Arid Region doctrine, Chaps. 585-594.

those below him on the stream, by prescription and adverse user, it might ripen into a right, which would result in great loss to the other owners on the stream.[5]

§ 518. **Priority of use gives owner no exclusive right.**—We have seen in a preceding section that under the common law a riparian proprietor can acquire no exclusive right to the use of water for any purpose based upon priority.[1] This is also the rule in the Western States which adhere to the common law in relation to the use of waters by riparian proprietors. In accordance with the principles of the common law a riparian proprietor can not, by mere prior settlement of his land and the use of water, acquire the exclusive right as against other proprietors to divert the entire stream or an unreasonable proportion thereof for irrigation. As was said by Mr. Justice McKinstry, in the case of Lux v. Haggin,[2] "In examining the numerous cases which establish that the doctrine of 'appropriation' is not the doctrine of the common law we meet an embarrassment of abundance." Thus in the Western States, as well as in the Eastern and in England, under the common law, this principle is indisputable, that the right of a riparian proprietor to the use of the waters of a water course for the purpose of irrigation, as well as for other purposes, is a natural right, *ex jure naturae*, and is not acquired by use or occupation; hence it follows that an exclusive right can not be acquired by prior use or occupation.[3]

5 As to riparian lands under the strict construction of the common law, see Secs. 457-466.

1 See Sec. 497.

2 69 Cal. 265, 390, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

3 See late case of Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, where the Court held that there is no such thing as prior riparian ownership so far as the distribution of the water for irrigation purposes is concerned; and that the right of the riparian owner, being a variable one, depends on the use by the other proprietors.

See, also, later decision of same case, 51 Ore. 318, 98 Pac. Rep. 1083; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Pope v. Kinman, 54 Cal. 3; Creighton v. Evans, 53 Cal. 55; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Hale v. McLea, 53 Cal. 578; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Pomeroy on Riparian Rights, Sec. 133.

See, also, Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200; *Id.*, 97 Pac. Rep. 539, where the Court held that there is no priority between the rights of riparian proprietors to the use of the water of a non-navigable stream, but that their rights were equal, regardless of their location on the stream, or the date of acquiring title.

We will see in a subsequent portion of this work, however, that a prior use by a riparian proprietor of the waters of a stream, continued for a period of time and under such circumstances as are requisite to establish rights by prescription, will give him an exclusive right to the use of a certain amount of water.[4]

§ 519. Riparian owner and prior appropriator at the same time.—As was said in a previous section, in all the Western States which adhere to the doctrine of riparian rights the appropriation of water for beneficial purposes is also allowed.[1] Thus, as will be readily seen, there are dual systems of laws governing the use of waters in these States, the doctrines of prior appropriation and riparian rights, which are continually clashing or "jostling" with each other as it were, yet still existing side by side.[2] This subject will be more thoroughly discussed in a subsequent portion of this work.[3]

The question which concerns us now is, Can a person be both a riparian proprietor and an appropriator under these dual systems of laws at the same time? Our answer to this question is in the affirmative. Both rights may be acquired by original and derivative acquisition; they may exist together and be held in common as property, and each is entitled to the protection of the law.[4]

As we view the law, there are two circumstances where a riparian proprietor upon a stream may also become an appropriator. These are, first, when he is among the first of the settlers upon the stream, and he makes his appropriation when the water was not needed by others and would otherwise run to waste; and, second, in times when there is a surplus or overflow of the waters of the stream. If a person enters a piece of land through or adjoining

4 For prescription and adverse user, see Secs. 1033-1085.

1 For classification of States, see Sec. 507.

2 Mill's Irr. Manual, p. 28.

For controversies between appropriators and riparian proprietors, see Secs. 810-823.

3 See Sec. 594.

4 Lux v. Haggin, first hearing (Cal.), 4 Pac. Rep. 919, 928; Duckworth v. Watsonville Water & L. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528, in which the Court said, "It would certainly be strange if the first comer to a stream who acquires title to some land upon it has less right to the water of the stream than one who owns no land there at all."

See, also, Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704.

which a stream runs, and appropriates the water to some useful purpose including that of irrigation, before other persons have entered other lands upon the stream, who might be injured by his appropriation, he stands in the position of a prior appropriator as to subsequent settlers to the extent of his appropriation; and, within this extent, he may divert all of the water of the stream, if it is actually necessary for the purpose for which it is appropriated, without any obligation upon his part to return any of it to the natural channel.[5] And, in a case of this kind, bearing in mind that by his appropriation he is limited by its extent, if the water appropriated is not sufficient for his needs, he may claim as against the other riparian proprietors above upon the stream the right to have the water flow down to his riparian land, less what they may need for their domestic uses.[6] The two rights may exist in the same person as long as there is no waste of the water taken under either system or both systems. Upon the other hand, after the needs of a prior appropriator of the waters of a stream are satisfied, he, as a riparian proprietor, is not entitled to have the excess flow down to him in the channel of the stream.[7] And in Oregon the rule is, that a settler on a non-navigable stream has an election either to rely upon his rights as a riparian proprietor or to make an appropriation of

[5] For extent of the right of appropriation, see Secs. 776-786; Duckworth v. Watsonville W. Co., 150 Cal. 520, 89 Pac. Rep. 338.

See, also, Ortman v. Dixon, 13 Cal. 34; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; McDonald v. Bear R. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Ison v. Nelson M. Co. 47 Fed. Rep. 199; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Nevada etc. Co. v. Kidd, 37 Cal. 282; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Smith v. O'Hara, 43 Cal. 375, 1 Morr. Min. Rep. 671; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089; Thorp v. Freed, 1 Mont. 651; Smith v. Hawkins, 127 Cal. 119, 59 Pac. Rep. 295; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Seaweard v. Duncan, 47 Ore. 640, 84 Pac. Rep. 1043; Kaler v. Campbell, 13 Ore. 596, 11 Pac. Rep. 301; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308.

[6] Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308.

[7] Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678.

See, also, the case of North Powder Mill Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223, where the Court held that the first settler on the stream might elect his right, but he can not do both, as the two rights are incompatible. Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

See, also, Seaweard v. Duncan, 47 Ore. 640, 84 Pac. Rep. 1043; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

the water if it is free and subject to appropriation; but he can not do both. However, in a great majority of the Western common law States this is not the rule, but both rights may be held by the same person.[8]

Upon the second proposition stated above, at times when there is a surplus or overflow of water, and no injury is done to any of the lower riparian proprietors, one proprietor may make a legal appropriation of the surplus water of the stream, and acquire a title to the use of the same, which will be valid as against all the riparian owners upon the stream and also as against all subsequent appropriators.[9] "It is the advantage which the law gives and which necessarily follows prior occupancy and appropriation."[10] The Oregon rule is upon the theory that the riparian owners are tenants in common, and that the appropriators are owners in severalty. As was said in a recent case upon this subject: "It is the established doctrine in this State that a settler upon public lands which border upon a non-navigable stream may claim the use of the water, either as a riparian owner or as an appropriator, but he can not do both. A reason for this is that one can not at the same time hold title to the same thing both as tenant in common and in sev-

[8] For the rule in Oregon, see cases cited *supra*.

But see the late case of Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728, where the Court held that every riparian owner, regardless of the date of settlement, is entitled to a quantity of water reasonably essential to his domestic use and for the watering of his stock, including a sufficient supply for the proper irrigation of such garden produce as may be essential to the proper sustenance of his family; but that for the further irrigation of his lands he must make an appropriation, by taking some step towards the diversion of the water, or by some other good and sufficient notice.

[9] Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Gallagher v. Basey, 1 Mont. 457; affirmed, 87 U. S. 20 Wall. 670, 22 L. Ed. 452; Brown v. Smith, 10 Cal. 508; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Nevada Co. v. Kidd, 37 Cal. 282; Smith v. O'Hara, 43 Cal. 375, 1 Morr. Min. Rep. 671; Kaylor v. Campbell, 13 Ore. 596, 11 Pac. Rep. 301; Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528.

[10] Healy v. Woodruff, *supra*.

In Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563, the Court held that a lower riparian owner, who had given notice of the appropriation of a certain amount of water flowing through his land, is entitled to the quantity reasonably necessary for the uses named in his notice, if such quantity would naturally flow in the stream at the point of diversion, as against all above him on the same stream, subject to rights antecedently acquired.

eralty."[11] This reasoning may be correct as to the different claims for the same water, but as to the different rights to the water there is no reason why a person may not be both an appropriator and a riparian proprietor at the same time.

§ 520. **Manner of taking the water.**—Where a person has the riparian right to irrigate land the manner of taking the water from the stream is immaterial, so long as it does not interfere with the rights of the other proprietors. The water may be taken out by means of ditches and canals conducting the water from the stream to the place where it is used. We do not see any reason why the ditches may not be taken out above the lands of the owner, if arrangements can be made with the owners of the lands above to that effect. Of course this would prevent the water diverted from washing the riparian lands between the intake of the ditch and the lands of the user. So, if the intervening owners refuse to permit this, either on account of actual injury, or to prevent such a diversion from maturing into a right, an injunction will lie.[1] The water may be taken by means of an intercepting tunnel; however, the right to the water can not be extended by this means to the application to a use to which the stream itself can not be properly applied.[2] Pumps run by any kind of power may be used to raise the water to the height where it is needed.[3] Several riparian proprie-

[11] Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731, citing Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; North Powder Milling Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

[1] California Pastoral & Ag. Co. v. Enterprise Canal Co., 127 Fed. Rep. 741; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

For injunction by riparian owners, see Remedies.

See, also, Heilbron v. Kings River & F. C. Co., 76 Cal. 11, 17 Pac. Rep. 933; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823; Redwater etc. Co. v. Jones, 26 S. D. 466, 130 N. W. Rep. 85.

[2] McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849.

See, also, Subterranean Waters. Chaps. 59-62, Secs. 1148-1211.

[3] Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Chatfield v. Wilson, 31 Vt. 358; *Id.*, 28 Vt. 49; *Id.*, 27 Vt. 67.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Elliott v. Fitchburg R. Co., 10

tors may join in the diversion of the water by means of pumps or otherwise for their common use, provided that they take no more than the amount they are all entitled to.[4]

A very common method of diverting the water in certain localities is by means of water wheels run by the current of the stream. The amount actually diverted by this means is usually very small, and it can be elevated but a few feet. But there is another question which enters into the consideration of this feature of the case, and that is the amount of water required to flow in the stream to run the wheel is very great as compared with the water lifted. Now the question is, can a riparian owner not only lay claim to the water of a stream running through his premises to the extent of the water actually used in irrigation, but also may he compel the owners above, who have the same rights of irrigation that he has, to let water flow down to his land, for which water he has no use except to run his wheel to raise a small quantity thereof? We are of the opinion that he can not do this, and would consider this an antiquated and wasteful method of using the water. This question has never been decided as regarding the rights of riparian proprietors. But the Circuit Court of Appeals, in the case of Schodde v. Twin Falls Land & Water Co.,[5] held that, as between appropriators, this right could not be claimed.[6] All of the authorities hold that a riparian owner must use the water reasonably with reference to the correlative rights of the other owners on the same stream. We would classify this as a most unreasonable and wasteful use of the water, especially in a section where the water is scarce.

§ 521. Change in manner of taking the water—Change of use.—There is no doubt but that a riparian owner has the right to change the place of diversion of the water, when others are not injured by the change.[1] In like manner a change in the locality of the ditch

Cush. 191, 57 Am. Dec. 85; Earl Norbury v. Kitchin, 7 L. T. Rep. N. S. 685; Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

4 Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

5 161 Fed. Rep. 43, 88 C. C. A. 207. This case was affirmed by the Supreme Court of the United States April 1, 1912. See 224 U. S. 107, 56 L. Ed.

6 For methods of diversion by appropriators, see Secs. 722-724.

See, also, for wasting water, Secs. 911-916.

1 San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075.

See, also, change of place of diversion by appropriators, Secs. 857-859.

may also be made. "All that the law requires is, that the mode or manner of using the water should not have been materially varied, to the prejudice of others."[2] So, also, may the change of the place of use be made from one portion of his land to others, so long as he keeps the water on lands which are strictly riparian.[3] Also a change of the use itself may be made, so long as it does not interfere with the rights of others. However, as is the case of appropriators, the use can not be changed from one which does not consume the water to one where the water is practically consumed. Hence an owner, having the right to divert water and run it in a ditch or flume along the higher levels and thence down into the stream for the purpose of developing power, has no right to change the use to that of irrigation, where the water would be consumed, if other rights have intervened which would be injured by the change.[4]

§ 522. Surplus water must be returned to the natural stream.—After a reasonable use of the water for the irrigation of his land, it is the duty of every upper riparian owner to return to the natural channel of the stream, by safe, adequate, and water-tight appliances, above the lands of the next lower riparian owner, all the surplus water which may have been taken out by him and not absorbed and used upon his lands entitled to such water.[1] This is the

2 Belknap v. Trimble, 3 Paige (N. Y.) 577; Whittier v. Cocheco Mfg. Co., 9 N. H. 454, 32 Am. Dec. 382; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Angell on Water Courses, Sec. 224.

3 See authorities cited *supra*.

For changes which may be made by appropriators, see Secs. 856-873.

4 See, also, for the change of use by appropriators, Secs. 869-872.

1 Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Weiss v. Oregon Iron & S. Co., 13 Ore. 496, 11 Pac. Rep. 255; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370; *Id.*, 81 Fed. Rep. 73; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; and also *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Fleming v. Davis, 37 Tex. 173; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A.

common law rule of England and the Eastern States, as well as that of the Western States, and that, too, whether the water is used for irrigation or for some other purpose.[2] An injunction for all waste of the water will lie against the owner, where, after the use, he permits it to run where it will, without providing the means for its return to the natural stream.[3] And, although a riparian proprietor is, as we have seen, entitled to a reasonable use of the water for irrigation,[4] he can not dam it up and so spread out the water and cause its loss by evaporation, so that it will cause injury to the lower proprietors.[5] The manner of the return of the surplus to the stream is immaterial, so long as it is practically all returned before the land of the lower proprietor is reached.[6] And, so long as his rights to the water are not impaired, he can not require the upper proprietor to return it in any particular manner.[7]

§ 523. **Mere possession without title gives no riparian right.**—Riparian rights are mere incidents to the ownership of the soil through which or adjoining which the stream runs; and, while they may relate back by fiction of law to the date of the *bona fide* settlement or filing upon the land, by virtue of the patent subsequently

390; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Missouri P. R. Co. v. Keys, 50 Kan. 205, 40 Pac. Rep. 275, 49 Am. St. Rep. 249; Watkins Land Co. v. Clements, 98 Tex. Civ. App. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 23 Am. St. Rep. 910; City of Canton v. Shock, 66 Ohio St. 19, 63 N. E. Rep. 600, 58 L. R. A. 637, 90 Am. St. Rep. 557.

2 Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Anthony v. Lapham, 5 Pick. (Mass.) 175; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

See, also, Sec. 497.

3 Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62, citing Kinney on Irr., First Ed., Secs. 165, 166; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325.

4 See Sec. 511.

5 Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254.

See, also, the subject of wasting water, Secs. 911-916.

6 Mason v. Cotton, 2 McCreary 82, 4 Fed. Rep. 792; Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

7 Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

issued, yet they do not vest until the patent issues.[1] Hence it follows that one who squats upon and occupies and cultivates a tract of land bordering upon a stream, without acquiring any title to the land, acquires no riparian rights to irrigate the land in his possession, or any other riparian rights in and to the waters of the stream.[2]

But in this connection a distinction must be made between a squatter and an actual and *bona fide* settler upon the public lands under the laws of the United States. Even though the latter's rights be in an incomplete and inchoate condition, if he has fully complied with all the laws and requirements relative to his settlement he is entitled to all the riparian and other rights connected with the land as though he had already received his patent.[3] And, where a party has a contract for the purchase of land adjoining a stream upon conditions not yet fulfilled by him, and he has not yet acquired the fee, the doctrine of riparian rights can not be invoked in his favor, although they may be invoked in behalf of the real owner.[4] And again, one who squats upon, occupies, and cultivates a portion of riparian land belonging to another, claiming adversely under the belief that it is Government land, can not gain any title to the use of the waters of the stream by diverting and using them for the purpose of irrigating such land.[5]

§ 524. Right to water in artificial water courses.—As we have seen in a previous section, there are circumstances under which riparian rights may attach to artificial water courses.[1] One of

1 For doctrine of relation as to riparian rights, see Secs. 752-755.

2 Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 687; Brown v. Ashley, 16 Nev. 311; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429.

3 Sturr v. Beck, 6 Dak. 71, 50 N. W. Rep. 486, affirmed in 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836.

See, also, acquisition of title to Government lands and riparian rights attaching thereto, Sec. 445.

See, also, appropriation of water by squatters, Sec. 687.

4 Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678.

5 Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

1 As to riparian rights on artificial water courses, see Sec. 743.

these is where the artificial channel is entirely substituted for the natural channel. When this is the case there is no reason on principle, in those Western States which still adhere to the common law, why an owner of land through which or adjoining which the artificial stream runs may not, by virtue of his ownership, have the right to make a reasonable use of the water for irrigation. Such a stream, however, must be created under such circumstances as to indicate that it is to be permanent the same as though it was created by Nature.[2] There are very few cases that have arisen in the Western States, where irrigation is mostly practiced, which involve this precise point. And the general rule is that in all artificial channels, such as canals, ditches, conduits, or aqueducts used to convey the water from a natural stream, riparian rights can not attach.[3] However, the Oregon Court, in a very recent case,[4] has taken a rather advanced position in this respect, and holds that, after channels are artificially opened, and as such are acquiesced in, as branches of the main stream for the period prescribed by the statute of limitations, they have become fixed, and the owners of lands adjacent thereto are entitled to the same consideration and to the same rights as are those on the main and unquestioned natural channel.[5]

§ 525. **Conclusions.**—From the discussion in this chapter it will be readily seen that irrigation as a riparian right is recognized as one of the principal rights of riparian owners to the use of the waters of natural streams in the ten Western States which adhere

2 Sutcliffe v. Booth, 32 L. J. Q. B. N. S. 136, 9 Jur. N. S. 1037; Blackburne v. Somers, Ir. L. R. 5 Eq. 1.

See, also, as to appropriation from artificial water courses, Sec. 662.

3 See Sec. 473.

See, also, Creighton v. Kaweah Co., 67 Cal. 221, 7 Pac. Rep. 658; Green v. Carotto, 72 Cal. 267, 13 Pac. Rep. 685; Outhouse-Cottel v. Berry, 42 Ore. 593, 72 Pac. Rep. 584, but where the Court held that where owners of different parcels of land conduct waters across the same in an artificial channel for irrigation, and do not define their respective interests in the water, their reciprocal rights thereto are measured and determined as if they were riparian owners upon a natural stream. Citing Gould on Waters, 3d Ed., Sec. 225; Townsend v. McDonald, 12 N. Y. 381, 14 Barb. 460, 64 Am. Dec. 508.

4 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

5 Citing Outhouse-Cottel v. Berry, 42 Ore. 593, 72 Pac. Rep. 584; Harrington v. Demarris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756.

to the common law theories of riparian ownership.[1] That in order to attain to the use of water for this purpose, as it is permitted in these States, the strict rule of the common law, upon this subject, has been extended and enlarged until it practically exists as a fiction only.[2] We will also see in the future chapters of this work that in these very States, side by side with this common law rule, there exists another system for the use of water, based upon a prior appropriation for some beneficial use. On principle these two systems are directly opposed to each other, and, hence, necessarily, there is more or less clashing between them. In fact it will be noticed that in the States endeavoring to uphold both of these rules there is much more litigation than there is in the States which have abolished the rule of riparian rights, and have adopted the Arid Region Doctrine of appropriation. Especially is this true in States which have a strong system of State control, notably Wyoming. We can not but believe that had a State adopted either one rule or the other, and not attempted to uphold both, it would have been much better for the commonwealth and also for the water users. Or better still, had the Government in the early history of the opening of its public lands for sale adopted some equitable rule for the disposition of its water with the lands, so that each settler could approximate what right he had to the water when he made his entry, we would not have had this endless confusion of rights and litigation which we are having. This has been done in other new countries, notably Canada and the Northwest Territories, where, profiting by our lack of system, or rather too many systems, at an early period of the opening for settlement of the public lands, a uniform system for the use of the waters of all natural streams was adopted, with a strong Governmental control. And in this country, in an English Province, it is especially noticeable that the English rule of the common law is abolished, and also

1 For the ten States adhering to this right, see Sec. 507.

For the conveyance of lands and water rights by riparian proprietors, see Secs. 526-535.

For rights of appropriators as against riparian owners, see Secs. 810-823.

For prescription as against riparian rights, see Secs. 1039-1041.

For doctrine of relation as to riparian rights, see Secs. 742-756.

For doctrine of estoppel by riparian owners, see Secs. 1121-1128.

2 For enlargement of the common law, see Secs. 510-513.

how few cases which involve the question of water rights have gone to the Courts of last resort.[3]

But our Congress, in its wisdom, did not see fit to adopt such a rule in the early history of its public land system, hence we have inherited this endless confusion as to water rights. Claimants must prosecute their cases to the Courts of last resort at sometimes ruinous expense, only to have that Court overturn some supposed well-settled theory of the case and adopt an entirely new one. The doctrines of appropriation and riparian rights are not only clashing with each other, but often with themselves; and, in order to keep up the interest, both of these doctrines are always at war with the statutory enactments, known as Irrigation Acts, or Codes, or Water Codes, adopted in nearly every Western State, and no two of which are alike. And not only is there endless litigation upon the subject, thereby encumbering our Reports, but also text books must be written upon the subject, attempting to reconcile some of these questions, and also to define what rights an individual or corporation may have under certain conditions in and to the waters of the natural streams and other sources of natural supply. All these, and many kindred and now necessary evils, have developed on account of the lack of foresight upon the part of the National Government in not taking into consideration the fact that the waters in this Western arid country were of at least equal value and importance as the lands through which they flow.

[3] For Irrigation in Canada and the Northwest Territories, see Chap. 10, Secs. 177-237.

CHAPTER 27.

GRANTS AND CONTRACTS OF RIPARIAN RIGHTS.

§ 526. Scope of chapter.
§ 527. Public grants of rights in public waters.
§ 528. Public grants of rights in private waters.
§ 529. Private grants of riparian rights.
§ 530. Private grants—Rights of grantee limited to the terms of the deed.
§ 531. Private grants—Rights included with the land.
§ 532. Private grants—Division of land at water's edge.
§ 533. Private grants—Reservation of riparian rights.
§ 534. Private grants—Grants of riparian rights only separate and apart from the land.
§ 535. Private grants—Grants of riparian rights involving the consumption of water.

§ 526. Scope of chapter.—The relative or correlative rights of riparian owners may be changed by grant or contract.[1] In this chapter we shall not attempt to discuss all of the phases of grants or conveyances of riparian rights, but will discuss only those which we think are pertinent to the main subject of this work.

§ 527. Public grants of rights in public waters.—In the early history of the common law it was held that the Crown could grant to a subject the soil under tide waters and could also grant exclusive rights of fishery in such waters.[1] But in modern times it has been decided in England that it is incompetent for the Crown to abbreviate or destroy by its own act the public rights either of navigation or fishery, as it can not confer upon its grantee a greater power in that respect than that with which it itself is invested.[2] And, in general, we may say that in this country the Federal Gov-

[1] Perry v. Parker, 1 Woodb. & M. 280, Fed. Cas. No. 11,010; Miner v. Thomas Furnace Co., 12 Ohio C. D. 490; Smith v. Holloway, 124 Ind. 329, 24 N. E. Rep. 886; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107.

[1] See Secs. 325, 363.

See, also, Williams v. Wilcox, 8 Ad. & Ed. 314, 3 New. & P. 606, 1 W. W. & H. 477, 7 L. J. Q. B. N. S. 229; Rex v. Westham, 10 Mod. 159; Rex v. Bristol Dock Co., 6 B. & C. 181, 108 Eng. Reprint 420; Lord Fitzwalter's Case, 1 Mod. 105; Rex v. Clark, 12 Mod. 615, 88 Eng. Reprint 1558; Hale, De Jure Maris, Chap. 5; Colchester v. Brooke, 7 Q. B. 339, 15 L. J. Q. B. N. S. 59, 9 Jur. 1090.

[2] 1 Bla. Com. 286; Doe v. York, 14 Q. B. 81; 37 and 38 Vict., Chap. 40;

ernment and the several States have followed the earlier common law decisions of England in this respect to the effect that the State may grant to individuals or corporations the soil of public navigable waters or the exclusive right of fishery in them,[3] subject, of course, to the public right of navigation.[4]

§ 528. **Public grants of rights in private waters.**—As respects private water courses, as we have seen in the previous sections, riparian owners, who own the soil bordering upon the same, have all the rights that attach to such ownership and which are under the common law called riparian rights. So in that part of the country designated as the public lands, the United States as the proprietor of such lands had or has the same rights and property in the streams flowing through them that would be possessed by any other riparian proprietor.[1] And, in the absence of legislation by Congress limiting the effect of the grants, patents for public lands from the General Government pass together with the fee of the soil and as incident thereto all of the common law rights of the natural streams, which flow through them, provided, of course, that the laws of the State including such public lands have not abolished or abrogated the common law of riparian rights.[2] But, in a case of legislation by Congress, all Acts limiting the effect of the grant are in the nature of a reservation by the Government, and the patents issued thereafter must be subject to them. Such is the case of the Act of Congress of July 26, 1866, hereafter further discussed.[3] The effect of this statute is to preserve the priority

Vyner v. Mersey Docks, 14 C. B. N. S. 758; Gould on Waters, Sec. 21 and notes; also Sec. 167.

3 Commonwealth v. Alger, 7 Cush. 53; Arnold v. Mundy, 1 Holst. 1, 10 Am. Dec. 356; Bell v. Gough, 23 N. J. L. 624; Atty. Gen. v. Delaware Ry Co., 27 N. J. Eq. 1, 631; Galveston v. Menard, 23 Tex. 349; People v. Thompson, 30 Hun, 457; Middleton v. Prichard, 4 Ill. 510, 38 Am. Dec. 112.

4 For the right of navigation, see Chap. 16, Secs. 341-357.

1 For the United States as a riparian proprietor, see Sec. 480.

2 For the abrogation of riparian rights, see Secs. 588-594.

See, also, Union Mill Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Woodruff v. North Bloomfield G. M. Co., 8 Sawy. 628, 9 *Id.* 441, 18 Fed. Rep. 753; Mathews v. Ferrea, 45 Cal. 51.

3 See Secs. 611-618.

See U. S. Rev. Stat., Sec. 2339, which reads as follows: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are

against those who have received patents to their lands, subsequent to the enactment.[4]

In this country a grant by a State conveying a tract of territory, in the absence of legislation reserving any portion to the contrary, carries with it to the grantee a right of property in all the water courses within the boundary of the grant and hence all the riparian rights that attach to those water courses as an incident to the soil.[5] In fact it may be said that the same rule of law applies in the case of public grants as applies in private grants to the effect that unless a reservation is made the grant passes title to all riparian rights incident to the ownership of the land by which the stream flows.[6]

§ 529. **Private grants of riparian rights.**—In this country when an individual has once acquired an ownership in a watercourse, as an incident to his land adjoining the same, by a grant from the State, an individual, or from any other source, he may in turn convey his ownership to another in whole or in part. He may convey

recognized and acknowledged by the local customs, laws, and decisions of the Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose aforesaid is hereby acknowledged and confirmed."

See, also, Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Flagstaff Silver Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Thorp v. Freed, 1 Mont. 651.

[4] See on this point Union Mill Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Hobart v. Ford, 6 Nev. 77; Shoemaker v. Hatch, 13 Nev. 261; Rivers v. Burbank, 13 Nev. 398; Jones v. Adams, 19 Nev. 78; Broder v. Natoma W. & M. Co., 50 Cal. 621; affirmed in 101 U. S. 274, 25 L. Ed. 790; Lansdale v. Daniels, 100 U. S. 113, 25 L. Ed. 587; Titcomb v. Kirk, 51 Cal. 288; Cave v. Crafts, 53 Cal. 135.

[5] See Lunt v. Holland, 14 Mass. 149; Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Canal Com's v. People, 5 Wend. 423; People v. Canal Appraisers, 13 Wend. 355; Coovert v. O'Conors, 8 Watt. 470 (Pa.), where the Court held that a grant from the commonwealth of vacant land bounded by a stream which has not been declared navigable by law, and following its courses and distances, passes the right to the soil to the middle of the stream, and although the stream may subsequently to the grant be declared a public highway that does not devest the property previously acquired by a grant from the commonwealth.

[6] For private grants of riparian rights, see Secs. 530-536.

all or a part of his riparian rights, and his grantee will take all the title and rights that the grantor himself had and which had been conveyed to him, but of course no more. Such owner may convey the riparian rights in the stream to one person and the adjoining land to another; or he may reserve certain of his rights in the stream; or he may convey the land, without making any reservation in the deed, to his grantee, who, in that case, would be the riparian proprietor in the grantor's stead, and would own to the middle of the stream and be entitled to all the riparian rights that are attached to the land.[1] But it is held that a grant of a stream by that name will not pass the land over which the water runs. It must be described as so much land covered by water.[2] Also an owner, by a reservation in the instrument of conveyance directly expressed or clearly implied to such effect, may grant the land adjoining the watercourse and may reserve to himself all the property in the watercourse itself and all the rights attached thereto by virtue of his former ownership in the land adjoining.[3]

In all cases of grants, however, by riparian owners it must be understood that they can be made only subject to the right of non-contracting owners. This is especially true where the right granted involves a use or a consumption of the water. The rights of the riparian owners who did not join in the conveyance, and who are entitled to an equal or correlative use of the water in common with the grantor, are not affected by the conveyance. This will be further discussed in subsequent sections of this chapter.[4]

§ 530. Private grants—Rights of grantee limited to the terms of the deed.—As between the grantor and the grantee the rights granted are always limited by the terms of the instrument of conveyance.[1] The grantee may be limited by the terms of the deed in the application of the water to a certain particular use. The words

1 *Ex dem.* Hartshorn v. Wright, 1 Peters (Cir. Ct.) 64, Fed. Cas. No. 6169; Strong v. Benedict, 5 Conn. 210; Ashley v. Pease, 18 Pick. 268 (Mass.); Biglow v. Battle, 15 Mass. 313.

2 Jackson v. Halstead, 5 Cow. (N. Y.) 216.

3 Claremont v. Carlton, 2 N. H. 371, 9 Am. Dec. 88; Hay's Executor v. Bowman, 1 Rand. (Va.) 417; Waterman v. Johnson, 13 Pick. 261; Brown v. Kennedy, 5 H. & Johns. (Md.) 195, 9 Am. Dec. 503; Gavit v. Chambers, 3 Ohio 495. In regard to reservation in grants, see Angell on Water Courses, Secs. 173-190.

4 See Secs. 534, 535.

1 For the rule for the construction, see Secs. 919, 1007.

in the indenture, the situation of the parties, the uncertainty as to the quantity of the water granted, and the usage by the grantee, may all be introduced in evidence as tending to show that it was intended to limit the quantity to the particular use for which it was granted and originally intended to be applied.[2] In general we may say that the right to the use of the water course, *ex jure naturae*, or as an incident to the land, under the common law, is subject to be abridged, enlarged, or modified by grant. But the extent of such abridgement, enlargement, or modification is to be measured by the express stipulation contained in the grant or instrument of conveyance itself.[3] These special rights that may be acquired in watercourses sometimes approach those rights which are classified by law writers as easements, and can only be created by deed,[4] and when so created the grantor can not derogate from the terms of the deed, and the nature and extent of the rights of the parties can only be determined by the terms of the instrument of conveyance itself.[5]

2 Strong v. Benedict, 5 Conn. 210; Livingston v. Ten Broeck, 16 John. 14; Biglow v. Battle, 15 Mass. 313; Luttrel's Case, 4 Coke 86; Robert May's Case, 9 Coke 113; Howell v. King, 1 Mod. 190, 86 Eng. Rep. F. R. 821; Lawton v. Ward, 1 Lord Raymond 75, 91 Eng. Rep. F. R. 946; Sprague v. Snow, 4 Pick. 54.

3 On the general subject, see Angell on Water Courses, Chap. 5; Gould on Waters, Chap. 10.

See, also, Farnham on Waters and Water Courses, Chap. 24.

4 Coke Litt. 9 A.; Hewlins v. Shippam, 5 B. & C. 221, 108 Eng. Rep. 82; Croker v. Cowper, 1 C. M. & R. 418; Cook v. Sterns, 11 Mass. 533; Williams v. Wadsworth, 51 Conn. 277; Nellis v. Munson, 108 N. Y. 453; 24 Hun 575; Wright v. Newton, 130 Mass. 552; Dority v. Dunning, 78 Me. 381, 6 Atl. Rep. 6; Wilder v. Wheeler, 60 N. H. 351; Jones v. Pettibone, 2 Wis. 308; Peasley v. Tower, 62 N. H. 432; Warren v. Carey, 45 Mass. 78, 12 N. E. Rep. 999.

See, also, Andrews v. Donnelly, — Ore. ——, 116 Pac. Rep. 569; Peterson v. Cody, 14 Cal. App. 502, 112 Pac. Rep. 558.

5 Northam v. Hurley, 1 E. & B. 665, 22 L. J. Q. B. N. S. 183, 17 Jur. 672, 72 Eng. Com. L. 663; Whitehead v. Parks, 2 H. & N. 870, 27 L. J. Exch. N. S. 169; Sharp v. Waterhouse, 7 E. & B. 816, 3 Jur. N. S. 1022, 27 L. J. Q. B. N. S. 70; Tipping v. Eckersley, 2 K. & J. 273; Risien v. Brown, 73 Tex. 135, 10 S. W. Rep. 661, where it was held that an owner of a tract of land upon and through which a stream of water rises and flows, in selling parts of the tract fronting upon the stream, may reserve exclusive water privileges, and when in selling the residue of the tract he sells the land and especially conveys the water privileges theretofore reserved such grantee holds such privileges as against another vendee holding a part of the tract upon the stream, but in whose deed the water privileges were reserved.

§ 531. Private grants—Rights included with the land.—Riparian rights are a part of an estate and usually constitute a large proportion of its value, especially if the stream upon which the land borders is of any considerable size. As we have seen, these rights are of value and are counted as property.[1] As such, they are a part of the estate which will pass to the grantee under any general conveyance of the estate, unless they are expressly reserved, or circumstances showing the intention to reserve them are so strong as to overcome the presumption that they were conveyed. But, in general, if the grant is made of land bounded by a stream or other body of water, a conveyance of the land will also convey all riparian rights incident to the ownership of the land.[2] So when an owner conveys land bounded by a stream or other body of water, without making any reservations in the deed, the law infers an intent to convey all rights under the water and in front of it; this rule is too valuable to be varied, except by clear and distinct proof of a contrary intent upon the part of the grantor.[3] The rule above stated by which riparian rights pass with a grant of the

Wood v. Saunders, L. R. 10 Ch. 582; Finlinson v. Porter, L. R. 10 Q. B. 188, 44 L. J. Q. B. N. S. 56, 32 L. T. N. S. 391, 23 Week. Rep. 315; United Land Co. v. Great Eastern Ry. Co., L. R. 10 Chan. 586; Collins v. Slade, 23 W. & R. 199.

1 For riparian rights as property, see Secs. 453-455.

2 Richardson v. Prentiss, 48 Mich. 88, 11 N. W. Rep. 819; Pere Marquette Boom Co. v. Adams, 44 Mich. 403, 6 N. W. Rep. 857; State etc. v. Brown, 27 N. J. L. 14; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Head v. Chesbrough, 4 Ohio N. P. 73, 6 Ohio S. & C. P. Dec. 494; Watson v. Peters, 26 Mich. 508; Brown v. Goddard, 13 R. I. 76; Turner v. Holland, 65 Mich. 453, 33 N. W. Rep. 283; Mitchell v. D'Olier, 68 N. J. L. 375, 53 Atl. Rep. 467, 59 L. R. A. 945; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55.

For right to assign or convey an easement, see Fisher v. Fair, 34 S. C. 203, 12 S. E. Rep. 470, 14 L. R. A. 333, and note; Cadwalder v. Bailey, 17 R. I. 495, 23 Atl. Rep. 20, 14 L. R. A. 300, and note.

As to exception or reservation of appurtenance, see Hagerty v. Lee, 54 N. J. L. 580, 25 Atl. Rep. 319, 20 L. R. A. 631; Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. Rep. 1066; Cox v. Howell, 108 Tenn. 130, 65 S. W. Rep. 868, 58 L. R. A. 487, and note for how far grant of mill includes water rights.

See, also, Archibald v. New York C. & H. R. Co., 157 N. Y. 574, 52 N. E. Rep. 567; St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941, 11 Sup. Ct. Rep. 337.

3 For the conveyance of riparian rights only, see Secs. 534, 535.

For the conveyance of water rights, see Secs. 494-1031; Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. Rep. 1066.

land, also includes accretions already formed or which may possibly be formed in the future. Accretions that are already formed are considered a part of the estate and will pass by a general grant of the land without any express mention being made of them in the deed.[4]

§ 532. **Private grants—Division of land at water's edge.**—The banks of streams and the land under the water forming, as they do, different parts of one entire estate, there is nothing to prevent the separation of the estate at the water line, so as to permit the soil under the water to be owned by one person and the upland by another. Therefore, by a deed or deeds of conveyance, an estate may be divided at the water's edge and the land adjoining the water, and the land below the water pass to different persons.[1] When such a grant is made, separating the land at the margin of the stream, it results in conferring the ownership of the water, so far as it can rest in an individual, upon the one who owns the bed of the stream, and such ownership carries certain of the riparian rights. But there are certain other riparian rights, such as the use of the water upon the adjoining land, which depend upon the adjacency of such land to the water and of which the riparian owner can not be deprived by the separation of the bottom of the stream from the upland. One of these rights is to make use of the water for domestic purposes, and another is the right of irrigating the adjoining lands.

§ 533. **Private grants—Reservation of riparian rights.**—A riparian owner may grant his land without any reservation, or in the

4 Bellefontaine Improvement Co. v. Nedringhaus, 181 Ill. 426, 55 N. E. Rep. 184, 72 Am. St. Rep. 269; Gorton v. Rice, 153 Mo. 676, 55 N. W. Rep. 241; Hunter v. Witt, 21 Ky. L. Rep. 35, 50 S. W. Rep. 985; Morgan v. Scott, 26 Pa. 51; East Omaha Land Co. v. Jeffries, 40 Fed. 386.

1 Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Smith v. Ford, 48 Wis. 115, 2 N. W. Rep. 134, 4 N. W. Rep. 462; Norcross v. Griffiths, 65 Wis. 599, 27 N. W. Rep. 606, 56 Am. Rep. 641; Barker v. Bates, 13 Pick. 255, 23 Am. Dec. 678; Mayhew v. Norton, 17 Pick. 357, 28 Am. Dec. 300; People *ex rel.* Highway Commissioners v. Madison Water Co., 125 Ill. 9, 17 N. E. Rep. 147; Valentine v. Piper, 22 Pick. 85, 33 Am. Dec. 715; State v. Black River Phosphate Co., 32 Fla. 82, 13 So. Rep. 640, 21 L. R. A. 189; Watson v. Peters, 26 Mich. 508; Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. Rep. 1066.

grant he may reserve to himself any of his riparian rights. These are different parts of the same estate and may be granted as a whole or separately.[1] A riparian owner may grant the right to the use of the water, as permitted him under the common law rules, to another, or in making his deed to the entire estate he may reserve these uses to himself, and as between himself and his grantee such a deed is binding.[2] Such, for example, is the case of a riparian owner who reserved to himself the use of the water for a limited purpose, such as for a hydraulic ram, and the California Court held that the reservation was not lost by non-use for that purpose.[3]

§ 534. Private grants—Grants of riparian rights only separate and apart from the land.—Certain riparian rights may be granted separate and apart from the land to which they are naturally attached. The right of fishing and hunting comes within this class.[1] The right to cut ice and other rights to the use of the water may be either granted separately or reserved in the deeds of conveyance. The grant of the upland may be so divided that the portion granted in fact will not touch the water, in which case the grantor reserves to himself not only his riparian privileges in the use of the water, but also all accretions. Also under this rule the right of boating and gathering ice as well as the title of the soil of the grantor under the water may be granted by deed.[2]

1 For the conveyance of water rights, see Chap. 53, Secs. 994-1032.

2 *Ex parte* Miller, 2 Hill 418; Bardwell v. Ames, 39 Mass. 22 Pick. 333; Boston Water Power Co. v. Gray, 6 Mete. 131 (Mass.); Kennedy v. Scovil, 12 Conn. 317.

3 Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282, wherein the Court said: "It is also contended that all rights under the reservation were lost by abandonment and adverse user. The fact that defendant abandoned the use of the ram and secured the benefit of the water by other means is not deemed material by the Court. The defendant's right to the use of the water did not cease when he ceased to use the ram. Unless a contrary intention is plainly manifest, a reservation of water power for certain machinery is not to be held as fixing the manner of the use, but as fixing the measure of the quantity of water reserved."

See, also, Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107; Hall v. Stirling Iron R. Co., 148 N. Y. 432, 42 N. E. Rep. 1056; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

1 See Sec. 365.

2 Mitchell v. D'Olier, 68 N. J. L. 375, 53 Atl. 467, 59 L. R. A. 945; Dexter v. Jefferson Paper Co., 22

It is also held in the Western States, which hold to the common law of riparian rights, that, as between the parties to the grant or their successors in interest, riparian rights may be conveyed separate and apart from the land, if it is so expressly intended by the deeds of conveyance.[3] But, as we shall contend, the rights granted affect only the rights of the parties to the grant and do not affect the rights of others.[4]

§ 535. **Private grants—Grants of riparian rights involving the consumption of water.**—In general it may be said that the use and occupancy of the water may be granted separate and apart and thus severed from the upland. There is no question upon this point where the right of use is granted for the purpose of operating power or other plants along the stream and where the water is not consumed. In such a case the grantee must exercise the rules of reasonable use, discussed in previous sections of this part,[1] taking into consideration the rights of the riparian owners below; and, as we have seen, one element of this reasonable use is to return the water to the stream before it reaches the riparian lands of those below, practically undiminished in quantity, and undeteriorated in quality, in order that they may be permitted to make a like or other use of the water to which they are entitled.[2] In such cases, all the parties to the grant are bound in accordance with its terms; and the other riparian owners upon the same stream, who are not injured, can not object simply upon the ground of the change of ownership of the use above. As far as all practical purposes, therefore, are concerned all parties upon the stream are bound by such a conveyance.

Again, there seems to be no question but that one riparian proprietor may grant to another riparian proprietor upon the same stream the right to the use of the water or a certain amount of the water included in the grantor's riparian rights, and even if the

Misc. 389, 50 N. Y. Sup. 557; Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. Rep. 1066.

3 Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927.

See, also, Goodrich v. Burbank, 12 Allen 459, 90 Am. Dec. 161; Lonsdale etc. Co. v. Moies, Fed. Cas. No. 8,496; Hill v. Shorey, 42 Vt. 614.

4 For which, see Sec. 535.

1 See Sec. 492.

2 Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718, 18 L. R. A. 679; Hanford v. St. Paul & D. R. Co., 43 Minn. 104, 42 N. W. Rep. 596, 44 N. W. Rep. 1144, 7 L. R. A. 722; Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. Rep. 86, 58 L. R. A. 628.

grantee consumes the water or a reasonable proportion thereof, and no one is injured by the change of ownership or the change in place of use, such a grant practically binds all the riparian owners upon the stream. It binds the parties to the grant according to its terms; and it binds the other riparian owners, because they are in no position to object to the change of ownership or the change of use.[3] Again, where there is but one riparian owner, as would be the case where the entire length of the stream is upon the lands of one person, he may grant all of the riparian rights to the use of the waters of such stream, even if by that use it is all consumed by the grantee. This is for the reason that the grantor had dominion and ownership of it. It was his property and he could dispose of it as he saw fit.[4] Again, where all the riparian owners upon the stream join in such conveyance, no question can arise as to the use of the water by any grantor, unless such use should be reserved by him.[5]

But, upon the other hand, where a grantor grants his riparian right to the use of the water of a stream for the purpose of some use where the water is wholly or partially consumed, as, for example, would be the case for the irrigation of nonriparian lands, or to supply a municipality and its inhabitants with water, and the rights of the other riparian owners on the stream are materially and substantially injured by such a diversion and use made by the grantee, the grant, while binding between the immediate parties to the same, and their successors in interest, is not binding upon noncontracting riparian owners.[6] Such a conveyance by one owner

[3] Rose v. Mesner, 142 Cal. 322, 75 Pac. Rep. 905; Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. Rep. 98; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; Churchill v. Baumann, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43; Painter v. Pasadena etc. Co., 91 Cal. 74, 27 Pac. Rep. 539; Outhouse-Cottel v. Berry, 42 Ore. 593, 72 Pac. Rep. 584; City of Salem v. Salem etc. Co., 12 Ore. 374, 7 Pac. Rep. 497; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107.

[4] In a Scotch case decided in 1848 of Blantyre v. Dunn, 10 Dunlop 509, it is said: "Where a stream rises, flows, and falls into the sea within the lands of one owner, his right of property is unaffected by any other interest, and his absolute dominion over it is uncontrolled."

[5] See Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; Fergusson v. Shireff (Scotch), 6 Dunlop 1374.

[6] Hudson v. Daley, 156 Cal. 617, 105 Pac. Rep. 748; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107; Alhambra etc. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; Duckworth v. Watsonville etc.

will not be binding upon other riparian owners upon the same stream, unless for some reason they should be estopped from asserting their rights. In other words, one riparian owner can only grant the riparian rights to the use of the water which he himself owns, and he can grant no rights to the use of the waters of a stream which are owned by the other riparian proprietors. One of these rights, as we have seen, is that the water must continue to flow in the natural stream by the lands of the lower owners, except an amount as may be reasonable for the various uses of the upper riparian proprietors; and, after these uses, the surplus or unused water must be returned to the natural channel, in order that it may flow down to those below, who are also equally entitled to its use.[7]

In the Western States it is universally held that in a sale of water, where under the use put by the grantee it is entirely consumed, noncontracting riparian proprietors are not affected by such sale, unless for some reason they should be estopped from asserting their rights. In such a case it is held that if such noncontracting proprietors are materially and substantially injured by such use of the water by the grantee of another proprietor they have the right of action, either for injunction or for damages.[8]

Co., 158 Cal. 206, 110 Pac. Rep. 927; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282.

7 See Secs. 496, 522.

See, also, Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107; Swinton Water Works Co. v. Wilts & Berks Canal Nav. Co., L. R. 7 H. L. 697, 45 L. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284; Lord v. Meadville Water Co., 135 Pa. 122, 19 Atl. Rep. 1007, 8 L. R. A. 202, 20 Am. St. Rep. 864; City of Paterson v. East New Jersey Water Co., 74 N. J. Ch. 49, 70 Atl. Rep. 472; Parry v. Citizens Water Co., 59 Hun 199, 13 N. Y. Sup. 471; Stockport Water Works v. Potter, 3 Hurlst. & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748; affirmed in 7 Hurlst. C. N. 160, 31 L. J. Exch. N. S. 9, 7 Jur. N. S. 880; McCartney v. Londonderry etc. R. Co., L. R. App. Cas. 1904, 301.

8 Miller v. Bay City Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; People *ex rel.* Ricks etc. Co. v. Elk River Co. 107 Cal. 221, 40 Pac. Rep. 521, 48 Am. St. Rep. 125; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560, affirming *Id.*, 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S., 197, 118 Am. St. Rep. 754, 10 Am. Cas. 116; Stoner

As we have seen, a riparian proprietor is only entitled to a reasonable use of the water upon riparian lands. He himself can not divert and use the water upon nonriparian lands. It therefore follows that he can not sell his right to a grantee who attempts to divert and use the waters upon nonriparian lands to the injury of the other riparian proprietors upon the same stream. The same principle is followed by the California Courts in the case where one owner over an artesian or catchment basin attempts to draw off the water which underlies the lands of all the other owners, as well as his own, and sell the same for use upon distant lands to the material and substantial injury of the other owners.[9]

v. Patten, 132 Ga. 178, 63 S. E. Rep. 897; Standon v. New Rochelle Co., 91 Hun 272, 36 N. Y. Sup. 92; Paterson v. East New Jersey Water Co., 74 N. J. Eq. 49, 70 Atl. Rep. 472; Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Broadmoor Dairy & L. S. Co. v. Brookside Water & Impr. Co., 24 Colo. 541, 52 Pac. Rep. 792, where the Court held that the preference right to the use of water for domestic purposes, given by the Colorado constitution, is the same as that of a riparian owner at common law, and therefore inseparable from riparian ownership and not subject to conveyance separate and apart from the land.

See, also, Anaheim Water Co. v. Semitropic Water Co., 64 Cal. 185, 30 Pac. Rep. 623; Montecito Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; writ of error dismissed, 118 U. S. 314, 23 Sup. Ct. 395, 47 L. Ed. 487, 63 L. R. A. 471; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Boehmer v. Big Rock Co., 117 Cal. 19, 48 Pac. Rep. 908; Cohen v. La Canada etc. Water Co., 142 Cal. 437, 78 Pac. Rep. 47; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

[9] For rights in percolating waters, see Secs. 1193-1204.

CHAPTER 28.

VARIOUS RIPARIAN RIGHTS.

§ 536. Scope of chapter.
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§ 538. Accretion, reliction, and avulsion.
§ 539. Avulsion.
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§ 548. Rights of riparian owner to the products of the water.
§ 549. The modern Western rule of the "undiminished flow" of streams.
§ 550. Other miscellaneous riparian rights.
§ 551. Summary and conclusions.

§ 536. **Scope of chapter.**—In this chapter we will discuss certain miscellaneous riparian rights which the owners of riparian lands have by virtue of their lands touching or bordering upon the stream or other natural source of water supply. There will be no attempt to discuss all of these rights and we will discuss only those that are pertinent and necessary to the main subject of this work.

§ 537. **Ownership of the beds of private streams.**—As we have discussed before, riparian rights do not attach to lands through the ownership of the soil over which the water flows, but through the ownership of the bank or banks adjoining the water. The ownership of the soil under the water is but one of the riparian rights which vests in the owner of the banks.[1] In public or navigable waters, as we have seen, the riparian owner may or may not, as one of his riparian rights, own the soil under the water. This depends upon the rule adopted by the State where the claim is made.[2] But the rule as to the title of the beds of fresh water non-navigable streams is uniform in all jurisdictions and is vested in the riparian

1 See Secs. 451, 452, 458.

2 See Secs. 325-332.

owners whose lands border upon the waters of such streams. Fresh water streams which are not a common passage way are private property, and the title to the bed of the river, *ad filum aquae,* is in the proprietors of the banks bordering upon the streams, in severalty and not in common.[3] This is true whether their tenure is freehold, copyhold, or leasehold.[4] And if the banks on both sides of the stream are owned by the same person he owns the whole of the bed, according to the extent of his lands in length. If, however, his land is bounded by the stream he owns to the thread of the same; or, as it is termed in common law, *ad filum aquae;*[5] unless from prior grants from himself, his vendors, or the State before his land became private property, such a construction can be negatived.[6]

There is but one difference between a stream running through a man's land, and one that runs by the side of it; in the former case he owns the whole of the bed, and in the latter but half, or to

3 Rex v. Wharton, Holt 499, 12 Mod. 510, 88 Eng. Reprint 483; Devonshire v. Pattinson, L. R. 20 Q. B. Div. 263, 57 L. J. Q. B. N. S. 189, 58 L. T. N. S. 392, 52 J. P. 276; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Hoy v. Sterritt, 2 Watts 327; Ball v. Slack, 2 Wharton (Pa.) 508, 25 Cent. L. J. 539; Hatch v. Dwight, 17 Mass. 289, 10 Am. Dec. 145; Mead v. Haynes, 3 Rand 33; Morrison v. Keene, 3 Greenl. 474; Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Jones v. Soulard, 65 U. S. 24 How. 41, 16 L. Ed. 604, in which the Court held that a riparian proprietor upon the Mississippi was entitled to all the accretions as far out as the middle of the stream.

See, also, Canal Com's v. People, 5 Wend. 423; People v. Canal Appraisers, 13 Wend. 355; King v. King, 7 Mass. 496; Lunt v. Holland, 14 Mass. 149; Coovert v. O'Conner, 8 Watts (Pa.) 470; Holyoke Water Pr. Co. v. Lyman, 82 U. S. 15 Wall. 500, 21 L. Ed. 133; Stolp v. Hoyt, 44 Ill. 219; Berry v. Snyder, 3 Bush. 266, 96 Am. Dec. 219.

4 Gould on Waters, Sec. 46; Tilbury v. Silva, 45 Ch. D. 98, 62 L. T. N. S. 254.

5 *Ibid.* Tyler v. Wilkinson, 4 Mason's Cir. Ct. 397, Fed. Cas. No. 14,312; Hay v. Sterritt, 2 Watts 327; 2 Cooley's Blackstone 18, and note 3; Angell on Water Courses, Sec. 10; Lord Hale's Treatise, De Jure Maris. The Latin term, *ad filum aquae,* is defined by Bouvier as meaning, "to the thread of the stream; to the middle of the stream." The word thread is defined by Johnson, "a small line, anything continued in course"; Jones v. Soulard, 65 U. S. 24 How. 41, 16 L. Ed. 604; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525, in which the Court said: "If a man be owner of the land on both sides of the stream or river, in common presumption he is the owner of the whole river."

6 Hatch v. Dwight, 17 Mass. 289, 10 Am. Dec. 145.

the thread of the stream.[7] As was recently said in an Oregon case:[8] "Though the title to the soil under navigable rivers is not involved herein, the subject has been mentioned in order to distinguish between such rights of property in those streams and in non-navigable rivers above tide waters. The middle line of the latter streams has been determined in this State to be the boundary of a riparian proprietor's land. Such, also, is the general rule."[9] This is also the rule on public or navigable rivers in those States which have relinquished their rights to the beds of the same and permit their ownership by the riparian owners. This subject, however, has been discussed in another portion of this work.[10] This is true even in those States which have abrogated the common law of riparian rights as to the use of the water.

§ 538. **Accretion, reliction, and avulsion.**—We have seen in previous sections that riparian rights have their very foundation in the contact of the lands of the riparian proprietor with the water. Regardless of the ownership of beds of the streams a lateral contact

7 Starr v. Child, 20 Wend. 149, in which Mr. Justice Cowan in construing the terms used in a deed said: "But suppose we expunge the words *to the river*, and take the shores as the boundary; the grantees become the proprietors of the shore which, when applied to a fresh water river, means the bank."

Johnson's Dictionary, *Shore* and *Bank*, signify the earth arising on each side of the water. *Id.*, Bank. . . . "The bank and the water are correlative. You can not own one without touching the other. But the bank is the principal object; and when the law once fixes the proprietorship of that, the soil of the river follows as an incident, or rather as a part of the subject matter, *usque filum aquae*. . . . It is true that parts of the thing may be excluded or excepted from the grant, or it may exist in separate bonds by prescription, or they may be granted by some together with the land; but in no case *does the mere omission to mention them operate as an exclusion.*" See, also, *Ex parte* Jennings, 6 Cowan 518, 16 Am. Dec. 447, and authorities cited.

8 Micelli v. Andrus, —— Ore. ——, 120 Pac. Rep. 737.

9 Citing Shaw v. Oswego Iron Co., 10 Ore. 371, 45 Am. Rep. 146; Hanlon v. Hobson, 24 Colo. 284, 51 Pac. Rep. 433, 42 L. R. A. 502.

10 For ownership of the beds of fresh water navigable streams, see Secs. 328-332.

See, also, Johnson v. Johnson, 14 Idaho 561, 95 Pac. Rep. 499, 24 L. R. A., N. S., 1240; Lattig v. Scott, 17 Idaho 506, 107 Pac. Rep. 47; Fischer v. Davis, 19 Idaho 493, 116 Pac. Rep. 412; Drake v. Russian River Co., 10 Cal. App. 654, 103 Pac. Rep. 167; Foss v. Johnstone, 158 Cal. 119, 110 Pac. Rep. 294.

is all that is necessary.[1] If the boundary line of the owner was fixed on a particular meander line, at a certain time when the water was in actual contact with his land, and was immovable from that line, it would often happen that the owner's land would be left high and dry and separated from the stream by a strip of land of a greater or less width, and he would lose all of his riparian rights for the reason that the contact of his land with the water no longer existed.

This loss of contact of a certain line with the water results from one of three causes: First, accretion, or the gradual and imperceptible addition to the land by the deposit of silt and sediment along the edge of the water, so that the land is extended into the water. Second, reliction, or the gradual withdrawal of the water from the land, by the lowering of its surface level from any cause. Third, avulsion, by which a large quantity of land is suddenly added to the shore by some freak of the stream in severing it bodily from its former location. The contact of the owner's land must continue to exist in order for him to hold his riparian rights. The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually, by alluvial formations, or the water of which gradually receded, shall still hold the same boundary upon the stream, including accumulated soil; this is so without regard to the question whether such accumulations or relictions were formed wholly by natural causes or by such causes influenced by the artificial works of others, and also without regard to the questions whether such stream is navigable or nonnavigable, private or public.[2] Upon the other

1 See Sec. 458.

2 Angell on Water Courses, Secs. 53-57; Gould on Waters, Secs. 155-159; 2 Black. Com. 262; Rex v. Yardborough, 3 B. & C. 91, 5 Bing. 163, 2 Bligh. N. S. 147, 4 Eng. Reprint 1087; New Orleans v. United States, 35 U. S. 10 Pet. 662, 9 L. Ed. 573; Jones v. Soulard, 65 U. S. 24 How. 41, 16 L. Ed. 604; Saulett v. Shepherd, 71 U. S. 4 Wall. 502, 18 L. Ed. 442; St. Louis. Pub. Schools v. Risley, 77 U. S. 10 Wall. 91, 19 L. Ed. 850; Jones v. Johnson, 59 U. S. 18 How. 150, 15 L. Ed. 320; Handly v. Anthony, 18 U. S. 5 Wheat. 374, 5 L. Ed. 113; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Jefferis v. East Omaha L. Co., 134 U. S. 178, 33 L. Ed. 872, 10 Sup. Ct. Rep. 518; County of St. Clair v. Lovingston, 90 U. S. 23 Wall. 46, 23 L. Ed. 59, 10 Sup. Ct. Rep. 518; Fowler v. Wood, 73 Kan. 511, 85 Pac. Rep. 763, 6 L. R. A., N. S., 162, 117 Am. St. Rep. 534; McBride v. Seinwenden, 72 Kan. 508, 83 Pac. Rep. 822; Lammers v. Nissen, 4 Neb. 245; affirmed, 154 U.

hand, the right to accretions depends upon the original actual contiguity of the owner's land with the stream, and any separation, however slight, of his land from the accretion by the land of another defeats his claim. As was laid down in the case of Bates v. Ill. Cent. R. Co.,[3] "Before a proprietor can set up his claim to accretions and the like he must first show that he owns the shores; and if he fail to establish his ownership, judicial inquiries respecting his rights in or under the waters adjoining are abstractions and useless."[4]

An accretion or reliction, to vest a title in the owner of the land abutting upon the stream, must be so slow that its increase should be imperceptible, or, as some courts hold, so gradual that no one can judge how much is added from time to time.[5] However, a riparian owner can have no vested right to future accretions.[6] If

S. 650, appendix 14 Sup. Ct. 1189, 25 L. Ed. 562; Hammond v. Shepard, 186 Ill. 235, 57 N. E. Rep. 867, 78 Am. St. Rep. 274; Diedrich v. Northwestern R. Co., 42 Wis. 248, 24 Am. Rep. 399; Buse v. Russell, 86 Mo. 209; Hathaway v. Milwaukee, 132 Wis. 249, 111 N. W. Rep. 570, 112 N. W. Rep. 455, 9 L. R. A., N. S., 778, 122 Am. St. Rep. 975; Rutz v. Seeger, 35 Fed. Rep. 188; Perry v. Pratt, 31 Conn. 442; Gerris v. Clough, 48 N. H. 9; Ingraham v. Wilkinson, 4 Pick. 268; Witmore v. Atlantic White Lead Co., 37 Barb. 70; Hopkins Academy v. Dickinson, 9 Cush. 544; Halsey v. McCormick, 18 N. Y. 147.

[3] 66 U. S. 1 Black 204, 17 L. Ed. 158.

[4] See, also, *Re* State Reservation Comrs., 37 Hun 537; Saulett v. Shepherd, 71 U. S. 4 Wall. 502, 18 L. Ed. 442; Bristol v. Carroll Co., 95 Ill. 84; Peauford v. Duncan, 1 Jones N. Y. 234; Posey v. Jones, 7 Lea (Tenn.) 98.

[5] Lammers v. Nissen, 4 Neb. 245; affirmed, 154 U. S. 650, Appendix 14 Sup. Ct. 1189, 25 L. Ed. 562; Saunders v. New York etc. R. Co., 144 N. Y. 75, 38 N. E. Rep. 992, 26 L. R. A. 378, 43 Am. St. Rep. 729; Warren v. Chambers, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23.

See, also, cases cited above. Angell on Water Courses, Sec. 53; Halsey v. McCormick, 18 N. Y. 147; Emans v. Turnbull, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427; Mulry v. Norton, 100 N. Y. 424, 3 N. E. Rep. 581, 53 Am. Rep. 206; Cook v. McClure, 58 N. Y. 437, 17 Am. St. Rep. 270; Lovingston v. St. Clair, 64 Ill. 56, 16 Am. Rep. 516; *Id.*, 18 Wall. 628 U. S., 21 L. Ed. 813, 23 Wall. 46, 23 L. Ed. 59.

The legal meaning of the word "imperceptible" seems to have been settled in the case of King v. Lord Yardborough, 3 B. & Cress. 91, S. C. 10 Eng. Com. Law 19; affirmed in the H. L. 2 Bigh. N. S. 147, 1 Dow. J. C. 176. That there is no distinction in this respect between soil gained by accretions and that uncovered by relictions, see Handly v. Anthony, 18 U. S. 5 Wheat. 374, 5 L. Ed. 113; Boorman v. Sunnuchs, 42 Wis. 233; Linthicum v. Coan, 64 Md. 439, 53 Am. Rep. 210.

[6] Cohen v. United States, 162 Fed. Rep. 364.

the addition to the land is sudden and considerable it belongs to the sovereign or State,[7] where the State was the original owner; but in those States, where the riparian owner was also the owner of the bed of the stream, it remains in him.[8] And, conversely, every proprietor whose land is thus bounded by a stream is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way he can not be held accountable for his gain.[9] These principles have been sustained throughout the Western States, where the common law principles have been for the most part modified. No other rules than these can be applied on just principles, and their effect is that where a person's lands actually border upon the stream and his riparian rights have once accrued by virtue of the ownership in the lands so situated none of those rights can be lost by the gradual formation of new soil upon the margin of the water, caused by the action of the tides or current. Were this otherwise the whole system of riparian rights would be overthrown and the riparian owners whose estates derive a greater part of their value from the very fact that they border upon a water course would suffer hardship and injustice by being deprived of all the rights belonging to them by virtue of their situation through the action of the tides or current working up a line of alluvion in front of their premises.[10]

Therefore, in the Western States, even those which have rejected the common law of riparian rights as to the use of the water flowing

7 Benson v. Morrow, 61 Mo. 345; Bla. Com. 261, 262; Emans v. Turnbull, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427; Angell on Water Courses, Secs. 57, 59; Woodbury v. Short, 17 Vt. 386, 44 Am. Dec. 344.

8 Dikes v. Miller, 24 Tex. 417; Fuller v. Shedd, 161 Ill. 462, 44 N. E. Rep. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; Mulry v. Norton, 100 N. Y. 424, 3 N. E. Rep. 581, 53 Am. Rep. 206.

9 Mayor of New Orleans v. United States, 10 Peters 661, 9 L. Ed. 573; *In re* Hull & Selby R. Co., 5 M. & W. 327; Foster v. Wright, 4 C. P. D. 438, 49 L. J. C. P. N. S. 97, 44 J. P. 7; Wilson v. Shivley, 11 Ore. 215, 4 Pac. Rep. 324; County of St. Clair v. Lovingston, 23 Wall. 46; Chapman v. Hoskins, 2 Md. Ch. Dec. 485; Giraud Lessee v. Hughes, 1 Gill & J. 249 (Md.); Berry v. Snyder, 3 Bush. 266 (Ky.), 96 Am. Dec. 219; Smith v. Public Schools, 30 Mo. 290; Stevens v. Patterson R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; Betchel v. Edgewater, 45 Hun 240.

10 Deerfield v. Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; Cambre v. Kohn, 8 N. S. (La.) 572; Wilson v. Shivley, 11 Ore. 215, 4 Pac. Rep. 324.

in streams in favor of the Arid Region Doctrine of appropriation, the common law riparian right of accretion remains so long as the stream has not been diverted by any appropriator.[11] The doctrine, therefore, may be regarded as well settled in this country that when lands border on rivers and streams and the banks are changed by that gradual and imperceptible process known as "accretion," the boundaries of the riparian proprietor still remain at the river, although, as a consequence of such change in the shore line, the area of the possession may be changed, as was said by the Circuit Court of Appeals: "A boundary on a river implies a boundary changing as the shore line changes by accretion or erosion in the absence of definite intention to the contrary."[12]

§ 539. **Avulsion.**—Avulsion is where, by some sudden freak the stream breaks through its banks and forms another channel, or cuts off a large quantity of land from one owner and adds it to the bank of another. As was held in a recent Kansas case, to constitute avulsion the bank of the stream must be destroyed or removed suddenly, visibly, rapidly, violently, in a substantial quantity, and in a manner unusual to that particular river; and to constitute avulsion it was not essential to be torn away or be removed intact so as to be capable of location or identification.[1] Avulsion is different from accretion in this: Accretion is through imperceptible changes, while avulsion is sudden and may come in a single day. It follows, therefore, that riparian rights may be lost by the sudden change made in the channel of the stream

11 Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125; Hartman v. Tresise, 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Kinkead v. Turgeon, 74 Neb. 575, 104 N. W. Rep. 1061, 1 L. R. A., N. S., 762, 109 N. W. Rep. 744, 7 L. R. A., N. S., 316, 13 Am. & Eng. Ann. Cas. 43; Western Pacific R. Co. v. Southern Pacific R. Co., 151 Fed. 376, 80 C. C. A. 606; Judson v. Tidewater Lumber Co., 51 Wash. 164, 98 Pac. Rep. 377; Ami Co. v. Tidewater Lumber Co., 51 Wash. 171, 98 Pac. Rep. 380; Stockley v. Sissna, 119 Fed. 822, 56 C. C. A. 324.

12 Stockley v. Sissna, 119 Fed. 822, 56 C. C. A. 324.

See, also, Johnson v. Johnson, 14 Idaho 561, 95 Pac. Rep. 499, 24 L. R. A., N. S., 1240; Lattig v. Scott, 17 Idaho 506, 107 Pac. Rep. 47.

1 Wood v. McAlpine, 85 Kan. 657, 118 Pac. Rep. 1060.

through avulsion.[2] Where avulsion occurs the former riparian owner has no right to ditch the stream back to its former water course; and, as said by the California Court: "The foundation of a riparian proprietor's right rests upon the universally accepted maxim, adopted by the common law from the civil law, *Aqua currit et debet currere ut currere solebat ex jure naturae.* These rights thus draw their support from the laws of Nature, but they do not rise superior to those laws. When, by their operation, the flow is lost the right is lost with it. The new channel itself becomes the natural channel. Otherwise a riparian proprietor would hold all lands above him in extraordinary and perpetual servitude. If, by the forces of Nature, the stream should change its course at a point miles above him, he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very foundation head of the stream. Such a doctrine could not be tolerated."[3] However, a riparian owner has the right to take all necessary steps in strengthening the banks of the stream against sudden changes by freshets and washouts provided that he can do so without trespassing upon the land of another.[4] If the change is gradual instead of sudden the riparian owner's right of access to the stream is not lost under the rule of accretion.[5] Therefore he retains all of his riparian rights.

§ 540. The right of access to and from estate.—As discussed in previous sections, land in order to be riparian must actually touch or border upon the stream or other natural body of water.[1] It therefore follows that in order to continue its riparian character this condition must also continue. In other words, there must

2 Fowler v. Wood, 73 Kan. 511, 85 Pac. Rep. 763, 6 L. R. A., N. S., 162, 117 Am. St. Rep. 534; Missouri v. Nebraska, 196 U. S. 23, 49 L. Ed. 372, 25 Sup. Ct. Rep. 155.

3 Wholey v. Caldwell, 108 Cal. 95, 41 Pac. Rep. 31, 30 L. R. A. 820, 49 Am. St. Rep. 64.

See, also, Page v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875. But see York County v. Rolls, 27 Ont. App. 72; Morton v. Oregon R. Co., 48 Ore. 444, 87 Pac. Rep. 151, 1046, 7 L. R. A., N. S., 344, 120 Am. St. Rep. 827.

4 Cox v. Bernard, 39 Ore. 53, 64 Pac. Rep. 860; Wholey v. Caldwell, 108 Cal. 95, 41 Pac. Rep. 31, 30 L. R. A. 820, 49 Am. St. Rep. 64.

5 See Sec. 538.

1 For the nature of riparian rights, see Secs. 450-456.

For what are riparian lands, see Secs. 457-466.

always be a direct access from the land to the stream. Any intervening right between such lands and the water's edge cuts off the riparian rights from such lands and they are no longer considered as riparian.[2] And we have also seen that in order to maintain this continuity of access it is the rule that all accretions formed at the edge of the water also belong to the riparian owner.[3] Therefore, although the locality of the line of access may be changed, it is always there, even if the stream recedes to a considerable distance, and adds a considerable area to the land of the riparian proprietor. If the access to the stream is lost, through any legal means, the lands are no longer riparian; and, conversely, the riparian owner is always given the right of access to and from his estate and the water, by virtue of the fact of his lands touching upon the stream. This right of access is, therefore, one of the most important of riparian rights, and the one upon which all of the other riparian rights depend. It not only applies to non-navigable but to navigable streams and water courses, and also to all other natural bodies of water, to which riparian rights may attach.[4]

The right of access to enter from one's own estate upon a water course which runs by the same, and to pass from the water course back to the estate, exists only in the riparian owner of such estate. Having alone this exclusive right of access, the riparian proprietor only has the exclusive right to all uses of the water permitted under the common law.[5] This right is exclusive in the proprietor and extends to all portions of his domain fronting on the water, whether it is ever used by him or not, as long as it has not been lost by adverse possession by another.[6] Any interruption of it is an encroachment upon a private right, whether caused by a public or private nuisance, or authorized by legislative enactment, unless

2 See Sec. 461.

3 For Accretions, see Sec. 538.

4 To what waters riparian rights attach, see Chap. 22, Secs. 457-466.

See, also, Secs. 335, 336, 344, 365.

That the owner of land bounded by a navigable river has the right of access between his premises and the navigable channel of the river, see Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. Ed. 984; Case v. Loftus, 39 Fed. Rep. 730, 5 L. R. A. 684; Hedges v. West Shore R. Co., 80 Hun 310, 30 N. Y. Supp. 92; Paine Lumber Co. v. United States, 55 Fed. Rep. 854.

5 For the right of access for the use of water in the Western States, see Secs. 671-677.

See, also, for the right of access to and from navigable waters, Secs. 335, 336, 344.

6 For loss of riparian rights by prescription, see Secs. 1039-1041.

proper condemnation proceedings have been had for it, and upon the payment of just compensation.[7] This riparian right of access is property and is valuable, and the owner can not, directly or indirectly, be deprived of it except by a constitutional exercise of the power of the State to appropriate private property for a public use.[8] The right exists by virtue of his riparian ownership, and is entirely different from the public right of navigation and of passing and repassing along the highway of the river.[9] Upon the other hand the riparian owner has the exclusive right to make a landing, wharf, or pier from his own land out into the stream, provided that

7 Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. Ed. 984; Bowman v. Walthen, 2 McLean 376, Fed. Cas. No. 1,740; Wilkes v. Hungerford Market Co., 2 Bing. N. R. 281; Rex v. Russell, 6 B. & C. 566, 108 Eng. Reprint 560; Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1; Yarmouth v. Simmons, L. R. 10 Ch. D. 518, 47 J. L. Ch. N. S. 792, 38 L. T. N. S. 881, 26 Week. Rep. 802; Bell v. Quebec, L. R. 5 App. Cas. 84, 49 L. J. P. C. N. S. 1, 41 L. T. N. S. 451; Brown v. Gugy, 10 Jur. N. S. 525, 2 Moore P. C. N. S. 341, 10 L. T. N. S. 45, 12 Week. Rep. 492; Dutton v. Strong, 66 U. S. 1 Black 25, 17 L. Ed. 29; Schurmeir v. St. Paul etc. R. Co., 74 U. S. 7 Wall. 272, 19 L. Ed. 74; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; Farist Steel Co. v. Bridgeport, 60 Conn. 278, 22 Atl. Rep. 561, 13 L. R. A. 590; Fuller v. Shedd, 161 Ill. 462, 44 N. E. Rep. 286, 33 L. R. A. 146, 52 Am. St. Rep. 380; Payne v. English, 79 Cal. 540, 21 Pac. Rep. 952; Priewe v. Wisconsin St. Land & Imp. Co., 93 Wis. 534, 67 N. W. Rep. 918, 33 L. R. A. 645; Pion v. North Shore R. Co., 14 Can. S. C. 677, affirming 12 Quebec L. R. 205, and affirmed in 14 App. Cas. 612; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Carli v. Stillwater St. R. & Trans. Co., 28 Minn. 373, 10 N. W. Rep. 205, 41 Am. Rep. 290; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 25 Atl. Rep. 718, 18 L. R. A. 679; Shirley v. Bishop, 67 Cal. 543, 8 Pac. Rep. 82.

8 For Eminent Domain, see Secs. 1059-1098.

See, also, Van Dolsen v. New York, 21 Blatch. 454, 17 Fed. Rep. 817; Yates v. Judd, 18 Wis. 118; Lewis v. Johnson, 76 Fed. Rep. 476; Weber v. State Harbor Comrs., 85 U. S. 18 Wall. 57, 21 L. Ed. 798; Folsom v. Freeborn, 13 R. I. 200; Meyers v. St. Louis, 8 Mo. App. 266, 82 Mo. 367; Morrill v. St. Anthony Falls Co., 26 Minn. 222, 2 N. W. Rep. 842, 37 Am. Rep. 399.

9 For right of navigation, see Chap. 16, Secs. 341-357.

See, also, Attorney General v. Conservators of the Thames, 1 H. & M. 1; Lyon v. Fishmongers' Co., 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1; Bell v. Quebec, 5 App. Cas. 84, 49 L. J. P. C. N. S. 1, 41 L. T. N. S. 451; Brown v. Gugy, 10 Jur. N. S. 525, 2 Moore P. C. N. S. 341, 10 L. T. N. S. 45, 12 Week. Rep. 492; Benjamin v. Storr, L. R. 9 C. P. 400; Fitz v. Hobson, 28 R. W. 459.

he does not interfere with the general right of the public to navigation upon the stream.[10]

There have been many attempts to deprive the riparian owners of this right of access. But the courts have almost universally held that this right was a property right and of value and held by as sacred a tenure by the riparian owner as he holds the land from which it emanates, and hence he can not be deprived of it except by due process of the law of eminent domain, and then only upon just compensation.[11] Wharves or piers can not be erected in such a way as to interfere with the owner's right of access either by the public or by private individuals;[12] nor any other structures, such as embankments.[13] Nor can logs be boomed so as to cut off the access.[14] The access can not be destroyed by changing the level of the water,[15] nor by changing the channel of the stream.[16]

As we have seen in a previous section, the right of access in the majority of the States can not be taken away from the riparian proprietor, without compensation, even for the improvement of navigation.[17] As far as the Federal Courts are concerned, it is left

10 Dutton v. Strong, 66 U. S. 1 Black 23, 17 L. Ed. 29; Schurmeir v. St. Paul etc. R. Co., 74 U. S. 7 Wall. 272, 19 L. Ed. 74.

11 See cases cited above.

12 Gordon v. Winston, 181 Ill. 338, 54 N. E. Rep. 1095; Shirley v. Bishop, 67 Cal. 543, 8 Pac. Rep. 82.

13 Bedlow v. New York Floating Dry Dock Co., 112 N. Y. 263, 19 N. E. Rep. 800, 2 L. R. A. 629; Case v. Loftus, 14 Sawy. 213, 39 Fed. Rep. 720, 5 L. R. A. 684; Bell v. Hull etc. R. Co., 6 Mees. & W. 699, 2 Ry. Cas. 279, 9 L. J. Exch. 213; Buccleuch v. Metropolitan Board of Works, L. R. 3 Exch. 306; Attorney General v. Conservators of the Thames, 1 Hem. & M. 1, 8 Jur. N. S. 1203, 11 Week. Rep. 163, 71 Eng. Reprint 1; Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243, 43 L. J. C. P., N. S. 385, 31 L. T. N. S. 132; Bell v. Quebec, L. R. 5 App. Cas. 84, 49 L. J. P. C. N. S. 1, 41 L. J. N. S. 451.

14 French v. Conn. R. Lum. Co., 145 Mass. 261, 14 N. E. Rep. 113; Shepard v. Coeur d'Alene etc. Co., 16 Idaho 293, 101 Pac. Rep. 591; Smart v. Aroostook Lumber Co., 103 Me. 37, 68 Atl. Rep. 527, 14 L. R. A., N. S., 1083; Hulet v. Wishkah Boom Co., 54 Wash. 510, 103 Pac. Rep. 814, 132 Am. St. Rep. 1127.

See, also, for actions for injunctions and damages for obstructing access, Chaps. 81, 83.

15 Webster v. Harris, 111 Tenn. 668, 69 S. W. Rep. 782, 59 L. R. A. 324; State v. Sunapee Dam Co., 70 N. H. 458, 50 Atl. Rep. 108, 59 L. R. A. 55.

16 Avery v. Fox, 1 Abb. U. S. 246, Fed. Cas. No. 674.

But see Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126; affirmed, 20 How. 84 U. S., 15 L. Ed. 816.

17 See Secs. 335, 336, 345.

to the laws and decisions of the respective States to determine the rule in this respect. This subject, however, has been discussed in another portion of this work relating to public waters and navigation.

§ 541. Title to the beds under small lakes and ponds—English rule.—The early English authorities are indefinite respecting property in land covered by lakes and ponds. As to riparian rights, it was first regarded as not necessary to determine whether the soil of lakes and ponds, like that of fresh water rivers, *prima facie* belongs to the owners of the land or of the manors on either side, *ad medium filum aquae*, or whether it belongs *prima facie* to the King, by right of his prerogative. But later it was laid down [1] in the House of Lords, in the case of Bristow v. Cormican, that the Crown has no *de jure* right to the soil or fisheries of an inland non-tidal lake, which rule has been followed by other decisions. So the law of England is settled that the Crown and the public have no such rights in fresh water lakes as they possess in water courses subject to the ebb and flow of the tide; that the owners of the land bordering upon the lake or pond are the owners of the soil and the fisheries in them, and that the public have no greater privileges in them than in fresh water rivers.[2]

1 Marshall v. Ulleswater Steam Nav. Co., 3 Best. & S. 732; Com. Dig. Prerogative (D. 50); Hale, De Jure Maris, Chap. 1; Devonshire v. Pattinson, 2 Q. B. D. 263; Perry v. Thornton, 23 L. R. Ir. 402; Hunt on Boundaries and Fences, 19; Grey's Case, Owen, 20; Pollenfen v. Crispin, 1 Vent. 122; Bell's Law of Scotland, 171.

See, also, for rights of public to beds of lakes and ponds, Sec. 327.

2 Bristow v. Cormican, L. R. 3 App. Cas. 641, S. C. Ir. 10 C. L. 398, 2 L. R. Ir. 118. In this case Lord Cairns, who was then Lord Chancellor, said: "The Crown has no *de jure* right to the soil or fisheries of a lough like Lough Neagh. Lough Neagh is, as your Lordships are aware, the longest inland lake in the United Kingdom, and one of the largest in Europe. It is from fourteen to sixteen miles long and from six to eight miles broad. It contains nearly one hundred thousand acres; but though it is so large, I am not aware of any rule which would *prima facie* connect the soil or the fisheries with the Crown, or disconnect them from the private ownership, either of riparian proprietors or other persons." Lord Blackburn said: "It is clearly and uniformly laid down in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case, or book of authority, to show that the Crown is of common

§ 542. Lakes and ponds—Title to soil in United States.—In the United States, as we have seen in previous sections,[1] our great navigable lakes are regarded as public property, and are not susceptible of private ownership any more than the sea. But upon these bodies of water the riparian owner's title extends to the edge of the water at low water mark, and grants bounded by such waters extend to that line.[2] But upon the other hand, in this country a lake or pond too small to be really useful for navigation, although of considerable size as compared with other fresh water streams, may be private property, and as such is subject to the common law rules as to fresh water streams respecting the ownership of the soil under them.[3] This rule, however, varies, especially in the

right entitled to land covered by water where the water is not running water forming a river, but still water forming a lake. . . . It is, however, necessary to decide whether the Crown has of common right a *prima facie* title to the soil of a lake; I think it has not. I know of no authority for saying it has, and I see no reason why it should be."

See cases cited above as to the right of the public to navigate upon lakes. See Marshall v. Ulleswater Steam Nav. Co., 3 B. & S. 732, L. R. 7 Q. B. 166; Bloomfield v. Johnson, Ir. R. 8 C. L. 68; Bristow v. Cormican, 3 App. Cas. 641, S. C. Ir. R. 10 C. L. 398, 2 L. R. Ir. 118; Mackenzie v. Banker, 3 App. Cas. 1324.

1 See Secs. 327-330.

2 Champlain R. Co. v. Valentine, 19 Barb. 484; Trustees v. Dennett, 9 N. Y. 669; Fletcher v. Phelps, 28 Vt. 257, Jakeway v. Barrett, 38 Vt. 316; Austin v. Rutland R. Co., 45 Vt. 215, 21 Blatchf. 358, 17 Fed. Rep. 466; Canal Comrs v. People, 5 Wend. 423; Wheeler v. Spinola, 54 N. Y. 377; People v. Jones, 112 N. Y. 597; Mariner v. Schulte, 13 Wis. 682; Wood v. Kelly, 30 Me. 47; Waterman v. Johnson, 13 Pick. 261; Ladd v. Osborn, 79 Iowa 93, 44 N. W. Rep. 235; Hardin v. Jordan, 16 Fed. Rep. 823; 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, in which the Court held that by the common law, under a grant of lands bounded by a lake or pond which is not tide water and is not navigable, the grantee takes to the center of the pond or lake, ratably with other riparian proprietors, if there be such; and this rule prevailed in Illinois when the patent to the plaintiff's ancestor was granted in 1841, and is still the law of that State.

For the ownership of the beds of great lakes and ponds, See Secs. 327-330.

See, also, Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110.

3 Ledyard v. Ten Eyck, 36 Barb. 102; Gouvernor v. National Ice Co., 134 N. Y. 355, 31 N. E. Rep. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669, 57 Hun 474, 11 N. Y. Sup. 87; Atwater v. Canandagua, 56 Hun 293; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Cobb v. Davenport, 32 N. J. L. 369, 380, 33 N. J. L. 223, 97 Am. Dec. 718.

See, also, Scheifert v. Briegel, 90 Minn. 125, 96 N. W. Rep. 44, 63 L. R.

Eastern States.[4] But in the Western States it is held that the owners of land bordering upon non-navigable lakes and ponds situated within the original Government surveys own the beds of the lakes to the center, as in the case of non-navigable fresh water streams.[5] But if the lakes are large and navigable they are public property, and the riparian owners take only to the water's edge.[6] This right of title to the beds of lakes is, like the title to the beds of fresh water streams, based upon the actual contact of the riparian owner's land with the edge of the water of the lake, and with this

A. 296; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838; 16 Fed. Rep. 823; Lamprey v. State, 52 Minn. 181, 53 N. W. Rep. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; French-Glenn Live Stock Co. v. Springer, 35 Ore. 312, 58 Pac. Rep. 102; 185 U. S. 47, 46 L. Ed. 800, 22 Sup. Ct. Rep. 563; Security Land & Ex. Co. v. Burns, 87 Minn. 97, 91 N. W. Rep. 304, 94 Am. St. Rep. 684; Hanson v. Rice, 88 Minn. 273, 92 N. W. Rep. 982; Shell v. Matteson, 81 Minn. 38, 83 N. W. Rep. 491.

4 In New York it is held that an inland lake five miles long and three-quarters of a mile wide, which has no important inlet and does not form a part of a chain of connecting waters, is subject to the common law rule as to fresh water streams. Ledyard v. Ten Eyck, 36 Barb. 102.

As for the rule in Massachusetts, see Commonwealth v. Alger, 7 Cush. 53; West Roxbury v. Stoddard, 7 Allen 158; Commonwealth v. Tiffany, 119 Mass. 300; Tudor v. Cambridge W. Works, 1 Allen 164; Commonwealth v. Vincent, 108 Mass. 441; Fay v. Salem Aqueduct Co., 111 Mass. 27; Gould on Waters, Sec. 84.

In Massachusetts, ponds of more than twenty acres in area are called great ponds, and as such are owned by the State, as public property held in trust for public use. Watuppa Reservoir Co. v. Fall River *et al.*, 147 Mass. 48, 18 N. E. Rep. 465, 1 L. R. A. 466; Commonwealth v. Tiffany, 119 Mass. 300, 12 Am. & Eng. Ency. of Law 634.

Brastow v. Rockport Ice Co., 77 Me. 100, in which the Court held that, in that State, all ponds containing more than ten acres are public ponds, and the right to cut ice upon them is a public right, free to all. In this particular the owners of the shore have no greater right than other persons who can reach the pond without trespassing upon the lands of others. Clement v. Burns, 43 N. H. 609.

5 For title to the beds of fresh water streams, see Sec. 537.

See cases cited *supra*. Ridgeway v. Ludlow, 58 Ind. 248; Edwards v. Ogle, 76 Ind. 392; Stoner v. Rice, 121 Ind. 51, 22 N. E. Rep. 968, 6 L. R. A. 387; Forsyth v. Smale, 7 Biss. 201, Fed. Cas. No. 4,950.

See, also, Nye v. Andrews, 47 Ohio St. 336, 8 L. R. A. 578; Delaplaine v. Chicago R. Co., 42 Wis. 214, 24 Am. Rep. 386; Boorman v. Sunnuchs, 42 Wis. 233; Deidrich v. North Western R. Co., 42 Wis. 248, 47 Wis. 662; Olson v. Merrill, 42 Wis. 203; Wright v. Day, 33 Wis. 260.

Michigan.—Clute v. Fisher, 65 Mich. 48.

6 See Secs. 327-330.

contact he is entitled to all of the riparian rights to which an owner is entitled upon the fresh water streams.[7]

§ 543. **Right to natural flow of the water—In general.**—The right to a water course, under the theories of the common law, begins *ex jure naturae*, and, having taken a certain course naturally, it can not be diverted or so used by one proprietor, to the deprivation of the rights of the other riparian owners on the same stream or other body of water. *Aqua currit et debet currere, ut currere solebat*, is the language of the ancient common law.[1] The more modern general principle is, that every owner of land, through which a natural stream flows, has a usufruct in the water of the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, at its usual level, without unreasonable detention or substantial diminution in quantity or quality, and that none of the owners can make any use of it prejudicial to the rights of the other owners, unless he has acquired a right to do so by license, grant, or prescription. And this is so whether the water is navigable or non-navigable, so long as the use does not interfere with the navigation.[2] Or, as the rule is laid down by Mr. Justice Story, but upon

7 For riparian rights on lakes, see Secs. 474, 475.

1 Angell on Water Courses, Sec. 93; 3 Kent. Com. 439; Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Weiss v. Oregon Iron & Steel Co., 13 Ore. 496, 11 Pac. Rep. 255; Bealey v. Shaw, 6 East. 208, 2 Smith 321, 102 Eng. Reprint 1266; Pope v. Kinman, 54 Cal. 3.

2 Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265. As to the alteration of the character of waters, see Pollution of Waters, Chap. 58, Secs. 1129-1147.

See, also, Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. 14,312; Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Warren v. Westbrook Mfg. Co., 86 Me. 32, 29 Atl. Rep. 927, 26 L. R. A. 284; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Buddington v. Bradley, 10 Conn. 213, 26 Am. Dec. 386; Shury v. Piggott, 3 Bulst. 339, Popham 169, 79 Eng. Reprint 1263; Brown v. Best, 1 Wilson 174; Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Saunders v. Newman, 1 B. & Ad. 258, 106 Eng. Reprint 95; Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1; Bealey v. Shaw, 6 East. 208, 2 Smith 321, 102 Eng. Reprint 1266; Mason v. Hill, 3 B. & Ad. 304, 110 Eng. Reprint 114; Wright v. Howard, 1 Sim. & Stu. 190, 1 L. J. Ch. 94, 24 Rev. Rep. 169, in which

the theory of the ownership of the bed of the stream rather than the bank,[3] "*Prima facie*, every proprietor on each bank of a river is entitled to the land covered with the water to the middle of the thread of the stream, or, as is commonly expressed, *usque ad filum aquae*. By virtue of this ownership he has a right to the use of the water flowing over it, in its natural current, without diminution or obstruction. But strictly speaking he has no property in the water itself but a simple use of it as it passes along."[4]

it was held that every owner on the banks of a river has, *prima facie*, an equal right to use the water, and can not acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below; without a grant or twenty years' enjoyment, which is evidence of a grant.

See, also, Dickinson v. Grand Junction Canal Co., 7 Exch. 279, 21 L. J. Exch. N. S. 241, 16 Jur. 200; Rex v. Traford, 1 B. & Ad. 259, 20 Eng. C. L. Rep. 498, 8 Bing. 204, 21 Eng. C. L. 272; Saunders v. Newman, 1 B. & Ad. 258, 106 Eng. Reprint 95; Wood v. Waud, 3 Ex. Ch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Embrey v. Owen, 6 Ex. Ch. 35, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Chasemore v. Richards, 5 H. & N. 989; Mason v. Neil, 3 B. & Ad. 304, 110 Eng. Reprint 114; Crossley v. Lightowler, L. R. 3 Eq. 296, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 16 L. T. N. S. 438, 15 Week. Rep. 801; Atchinson v. Peterson, 1 Mont. 561, 1 Morr. Min. Rep. 583; 87 U. S. 20 Wall. 507, 22 L. Ed. 414, in which it was held that "on the mineral lands of the public domain, in the Pacific States and Territories, the doctrine of the common law, declaratory of the rights of riparian proprietors, respecting the use of running waters, are inapplicable, or applied only to a very limited extent, to the necessities of miners, and inadequate for their protection. Their prior appropriation gives the better right to running waters, to the extent in quantity and quality necessary for the use to which the water is applied.

See, also, Davies v. Getchell, 50 Me. 602, 79 Am. Dec. 636; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Johns v. Stevens, 3 Vt. 308; Anthony v. Lapham, 5 Pick. (Mass.) 175; Cary v. Daniels, 8 Met. 466, 41 Am. Dec. 532; Pratt v. Lamson, 2 Allen 275; Tourtelot v. Phelps, 4 Gray 370; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Buddington v. Bradley, 10 Conn. 213, 26 Am. Dec. 386; Gillett v. Johnson, 30 Conn. 180; Taylor v. Welch, 6 Ore. 199; King v. Tiffany, 9 Conn. 162; Coffman v. Robbins, 8 Ore. 278, 8 Morr. Min. Rep. 131; Hutchinson v. Coleman, 10 N. J. 5 Hol. 74; Bowman v. Wathen, 2 McLean 376, Fed. Cas. No. 1,740; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Adams v. Barney, 25 Vt. 225; Howe Scale Co. v. Terry, 47 Vt. 109; 3 Kent's Com. 439, side paging; Angell on Water Courses, Secs. 95-97.

[3] Tyler v. Wilkinson, 4 Mason 400, Fed. Cas. No. 14,312.

[4] See, also, Webb v. Portland Mfg. Co., 3 Sum. Cir. Ct. R. 189, Fed. Cas. No. 17,322; Bowman Devisees v. Wa-

By the rules of common law all proprietors of lands have precisely the same right to waters flowing through their domains, and one can never be permitted to so use the stream as to injure or annoy those who are situated on the course of it, either above or below him. And if any person on the river interposes an impediment, interrupts or diverts the course of the water to the injury of others, successive actions on the case would lie until the interruption should be removed.[5] This right to use the water of a stream at its ordinary flow is regarded and protected by the common law authorities as

then, 2 McLean 376, Fed. Cas. No. 1,740; affirmed, 42 U. S. 1 How. 189, 11 L. Ed. 97; Action v. Blundell, 12 M. & W. 324, 13 L. J. Exch. N. S. 289; Owen v. Field, 102 Mass. 90; Corning v. Troy Iron Factory, 40 N. Y. 191, 39 Barb. 311; Hoy v. Sterrett, 2 Watts. 327; Tyler v. Wilkinson, 4 Mason 377, Fed. Cas. No. 14,312; Callis on Sewers 268; 2 Black. Com. 18; 3 Kent Com. 439.

[5] In the case of Ingraham v. Hutchinson, 2 Conn. 584, Chief Justice Swift laid down the law as follows: "By common law every person owning land on the banks of rivers has a right to the use of water in its natural stream without diminution or alteration; that is, he has a right that it should flow *ubi currere solebat;* and if any person on the river above him interrupts or diverts the course of the water to his prejudice, the action will lie. This will give to every one all the advantage he can derive from the water which does not injure the proprietor of lands on the river below him." Arnold v. Foot, 12 Wend. 330, where a spring of water rises upon the land of one owner, and from it runs a stream on to the land of another, the owner of the land upon which is the spring has no right to divert the stream from its natural channel, although the waters of the stream are not more than sufficient for his domestic uses, for his cattle, and for irrigating his land.

See, also, Frankum v. Falmouth, 25 Eng. Com. Law. Rep. 526, 6 Car. & P. 529, 2 Ad. & El. 452, 4 L. J. K. B. N. S. 26, 90; King v. Tiffany, 9 Conn. 162; Buddington v. Bradley, 10 Conn. 213, 26 Am. Dec. 386, where it was held that the owner of land through which a watercourse passed has a right to the flow of the water in its natural course *without diminution or alteration.*

See, also, McCalmont v. Whitaker, 3 Rawle 84; Hendricks v. Johnson, 6 Port. (Ala.) 472; Pugh v. Wheeler, 19 N. C. 2 Dev. & Bat. 50; Merritt v. Parker, 1 Coxe's N. J. L. 460.

See, also, Lakeside Paper Co. v. State, 45 App. Div. 112, 60 N. Y. Supp. 108; Philadelphia v. Carmany, 18 W. N. C. 152; Sumner v. Gloversville, 35 Misc. 523, 71 N. Y. Supp. 1088; Crawford v. Hall, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

The natural flow of a stream can not be deflected by jetties built out into the stream. Morton v. Oregon S. L. R. Co., 48 Ore. 444, 87 Pac. Rep. 151, 7 L. R. A., N. S., 344, 120 Am. St. Rep. 827; Chicago, R. I. & P. Co. v. Groves, 20 Okla. 101, 93 Pac. Rep. 755, 22 L. R. A., N. S., 802.

property,[6] not as a mere easement or appurtenance to the land, but as inseparably annexed to the soil itself.[7] In the case of Lux v. Haggin[8] the Court explains this principle as follows: "By common law the right of the riparian proprietors to the flow of the stream is inseparably annexed to the soil and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse can not destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned."[9]

[6] See riparian rights as property, Sec. 453.

See, also, Nuttall v. Bracewell, L. R. 2 Ex. 1; Hadley v. Hadley Mfg. Co., 4 Gray 140; Gould v. Boston Duck Co., 13 Gray 442; Ashley v. Pease, 18 Pick. 268; Blanchard v. Baker, 8 Me. 253, 25 Am. Dec. 504; Keeney & W. Mfg. Co. v. Union Mfg. Co., 39 Conn. 576; McCalmont v. Whitaker, 3 Rawle 84; Brown v. Bush, 45 Pa. St. 61; Beissell v. Scholl, 4 U. S. 4 Dallas 211, 1 L. Ed. 804.

Water power, though an incident to property in the land, is itself the subject of property. Tillotson v. Smith, 32 N. H. 94, 96, 64 Am. Dec. 355; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[7] Dickinson v. Grand Junction Canal Co., 7 Exch. 299, 21 L. J. Exch. N. S. 241, 16 Jur. 200; Wright v. Howard, 1 Sim. & Stu. 190, 1 L. J. Ch. 94, 24 Rev. Rep. 169; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Johnson v. Jordan, 2 Met. 234, 37 Am. Dec. 85; Gardner v. Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 108; Union Mill Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Shamleffer v. Peerless Mill Co., 18 Kan. 24; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; 2 Black. Com. 14.

[8] 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[9] See, also, Angell on Water Courses, Sec. 93; Shury v. Piggot, 3 Bulst. 339, Popham 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280; Countess of Rutland v. Bowles, Palmer 290; Washburn on Easements 319; Johnson v. Jordan, 2 Met. 234, 37 Am. Dec. 85; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Sampson v. Hoddinott, 1 C. B. N. S. 590, 87 E. C. L. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 5 Week. Rep. 230; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Pope v. Kinman, 54 Cal. 3; Creighton v. Evans, 53 Cal. 55.

The right of a riparian owner to have the water of a stream run through his land is a vested right, and any interference with it imports at least nominal damages, even if there be no actual damages. See, also, Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec.

The right to the natural flow of the water, being but one of the riparian rights, does not depend on the ownership of the soil over which the water flows, as was held in some of the early cases, but upon the ownership of the bank by which it flows.[10] In the common law Western States it is also held that riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land, is a right of property and a part and parcel of the land itself, and such right may not be taken away except under the power of eminent domain.[11]

§ 544. Right to natural flow—Right to whole flow.—The right of one or more proprietors of several to the flow of a stream can not be divided if the division is opposed by the others. So, if a water course divides two estates, the riparian owner of neither can lawfully carry off any part of the water without the consent of the owner opposite; and not only this, but he must also obtain the consent of all the proprietors above and below who would be affected, or damaged by the diversion. In other words each proprietor is entitled not to half, or other proportion of the water, but to the whole bulk of the stream undivided and indivisible. The joint proprietors must use it as an entire stream in its natural channel. A severance would destroy the rights of all. It is impossible from the very nature of things that one proprietor can take water only from his side, as an equal portion from the other side of the stream must have mingled with all that was diverted. All parties are entitled *per my et per tout*, to their proportion of the whole stream as it naturally flows in its course, and no proprietor can divert any portion of it, although the portion diverted be less than

128; Hale v. McLea, 53 Cal. 578; Wadsworth v. Tillottson, 15 Conn. 366, 37 Am. Dec. 391.

10 See Secs. 451, 452. But see Angell on Water Courses, Sec. 5; note to Gardner v. Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526.

11 Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Dement Bros. Co. v. City of Walla Walla, 58 Wash. 60, 107 Pac. Rep. 1038; Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139.

The right of a riparian owner to the natural flow of the waters of a stream across his lands is a part of the land itself, and passes by a grant as realty. Menthow Cattle Co. v. Williams, 64 Wash. 457, 117 Pac. Rep. 239.

See, also, Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. Rep. 466.

any proprietor be actually entitled to.[1] This right to the flow of the water is a natural right.[2] "The unquestioned rule of the common law was that every riparian owner was entitled to the continued flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent,"[3] and, under a strict construction of the common law rule, a riparian owner has the right to have the entire stream continue to flow through or by his land, whether he has any use for it or not.[4] So sacred do the common law authorities hold this right of the riparian owners to the flow of the water in its natural channel without material diminution or obstruction that they even go so far as to hold that an owner above on the stream, in protecting his own land from injury, can not cut off the water of the stream by a dam, if it obstructs or diminishes the flow of the stream to those below him.[5] So, also, the right to the continuance of the natural and ordinary flow of the water across and past his lands can not be taken or damaged for a public use without just compensation.[6]

1 Vanderburg v. Van Berger, 13 Johns. (N. Y.) 212; Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Webb v. Portland Mfg. Co., 3 Summ. 198, Fed. Cas. No. 17,323; Corning v. Troy Iron Factory, 40 N. Y. 191; Parker v. Griswold, 17 Conn. 288, 9 L. R. A. 810, 42 Am. Dec. 739; Curtiss v. Jackson, 13 Mass. 507; Bear v. Hoffman, 79 Pa. St. 71; Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Plumleigh v. Dawson, 6 Ill. (Gilman) 544, 41 Am. Dec. 199; Angell on Water Courses, Sec. 101; Moulton v. Newburyport Water Co., 137 Mass. 163.

2 Stockoe v. Singers, 8 El. & Bl. 31.

3 Mr. Justice Brewer, in United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, quoting 3 Kent, Sec. 439. For this section from Kent, see Sec. 505.

4 Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Ennor v. Barwell, 2 Giff. 410, 6 Jur. N. S. 1233, 66 Eng. Reprint 171; Bannatyne v. Cranston, Mor. Dict. 12,769, *Property;* Ellis v. Clements, 21 Ont. Rep. 227; affirmed, 22 *Id.*, 216; Brown v. Best, 1 Wils. 174; Saunders v. Bluefield W. Wks. & I. Co., 58 Fed. Rep. 133; Pettibone v. Maclem, 45 Mich. 381, 8 N. W. Rep. 84; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Bliss v. Johnson, 76 Cal. 597, 16 Pac. Rep. 542, 18 Pac. Rep. 785; Ingraham v. Hutchinson, 2 Conn. 584; Kalama El. L. & P. Co. v. Kalama D. Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R. A., N. S., 641, 125 Am. St. Rep. 948.

5 Bliss v. Johnson, 76 Cal. 597, 16 Pac. Rep. 542, 18 Pac. Rep. 785; Howe v. Norman, 13 R. I. 488.

6 Kalama etc. Co. v. Kalama D. Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R. A., N. S., 641, 125 Am. St. Rep. 948.

As was stated by the learned author, in Washburn on Easements:[7] "The right of enjoying this flow without disturbance or interruption by any other proprietor is one of *jure naturae,* and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." And again, the common law upon the subject as laid down by Professor Pomeroy in equally clear and explicit language, is as follows: "The use of the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, moreover, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility."[8] And, the Supreme Court of Oregon, commenting upon the rule in the case of Benton v. Johnsox,[9] said: "While the doctrine announced by the foregoing authorities has never, so far as we are advised, been directly denied, it has been apparently ignored by the courts in some of the Pacific States and Territories, on the theory that the principles and rules of the common law respecting the rights of private riparian owners were inapplicable to the condition and necessities of the people of the particular localities where the causes of action arose."

§ 545. Right to natural flow—Obstructing flow.—The rule stated in a previous section that the riparian proprietors have the right to have the stream flow down to their lands as it is wont to flow by nature and without material diminution, applied to obstructing the flow of the stream even temporarily. An action for the diversion of a water course is grounded on the deprivation of water; and, hence, if the owner complaining is deprived of the water by any means the law will interfere. It is as illegal to detain the water unreasonably as to divert it, for although each

[7] 4th Ed., pp. 316, 317.

[8] Pomeroy on Riparian Rights, Sec. 152.

[9] 17 Wash. 277, 49 Pac. Rep. 496, 39 L. R. A. 107, 61 Am. St. Rep. 912.

owner has the equal right to use the water as it passes his land for the purpose of propelling machinery and the like, yet he must so construct his works, and so use the water, that the flow of the stream must not be unreasonably obstructed, and that all of the owners below may participate without interruption in the enjoyment of the same water and for the same purposes should they desire it.[1] It must not be understood, however, that by the above doctrine there can be no diminution of the flow, or that there can be no obstruction or impediment whatever, by a riparian proprietor in the use of the water as it flows, for that would deny any valuable use of it at all. There may be and there must be allowed that which is common to all—a reasonable use. The reasonableness of detention of the flow of the stream by a riparian proprietor above, causing injury to those proprietors below, depends upon all of the circumstances of each particular case, including the size of the stream, the time the water was detained, and the use that was made of the water by all interested.[2] The mere detention of a stream for a short time, in order to fill a pond, and then after it is filled to let down the entire flow of the stream, may be permitted.[3] However, the supply to the lower proprietor

1 See use of water for power purposes, Sec. 492; Angell on Water Courses, Sec. 115; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Arnold v. Foote, 12 Wend. (N. Y.) 330; Howell v. McCoy, 3 Rawle 256, 26 N. E. Rep. 305, 21 Am. St. Rep. 740; McKee v. Delaware & H. Canal Co., 125 N. Y. 353; affirmed, 52 Hun 52, 4 N. Y. Supp. 753; Hoy v. Sterrett, 2 Watts 327, 27 Am. Dec. 313; Twiss v. Baldwin, 9 Conn. 291; Sackrider v. Beers, 10 Johns. 241; Shears v. Wood, 7 J. B. Moore 345, 1 L. J. C. P. 3; Thompson v. Crocker, 9 Pick. 59; Soul v. Russell, 13 Met. 436; Merritt v. Brinkerhoff, 17 Johns. 306; Gerrish v. Newmarket Mfg. Co., 30 N. H. 478; Gould v. Boston Duck Co., 13 Gray 452; Hartzall v. Sill, 12 Pa. St. 248; Timm v. Bear, 29 Wis. 254; Clinton v. Myers, 46 N. Y. Rep. 511, 7 Am. Rep. 373; Mason v. Hoyle, 56 Conn. 255, 14 Atl. Rep. 786; Shears v. Wood, 7 J. B. Moore 347; Phillips v. Sherman, 64 Me. 171; Barrett v. Parsons, 10 Cush. (Mass.) 367; Thunder Bay Boom Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. Rep. 813; Wooden v. Mount Pleasant Lum. Co., 106 Mich. 412, 64 N. W. Rep. 329; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 7 L. R. A. 613, 24 N. W. Rep. 774.

2 Tyler v. Wilkinson, 4 Mason 401, Fed. Cas. No. 14,312.

3 Hartzall v. Sill, 12 Pa. St. 248; Canfield v. Andrew, 54 Vt. 1, 41 Am. Rep. 828; Mumpower v. Bristol, 90 Va. 153, 17 S. E. Rep. 853; Coldwell v. Sanderson, 69 Wis. 52, 28 N. W. Rep. 232, 33 N. W. Rep. 591; Gehlen v. Knorr, 101 Iowa 700, 70 N. W. Rep.

must not depend upon the convenience or caprice of the upper proprietor, or upon accident or mere chance, as upon the raising of a flood gate or overflow of a dam or leakage through it, but his supply must be substantially according to the natural flow, subject only to such interruption as is necessary and unavoidable by the reasonable and proper use of the water in the stream above.[4]

§ 546. Right to natural flow—Accelerating flow.—The rule as to the right of the riparian proprietors to the natural flow of the water of a stream[1] also applies to the acceleration of the current of a stream, whereby the lower proprietor is injured. The lower proprietor has the right to insist that the water flow as it is wont by Nature.[2] Hence it follows that an upper proprietor has no right to accumulate a large head of water, by any means, and then discharge the accumulated flow upon the works and lands of the proprietors below.[3] So, also, an upper proprietor has no right to discharge the natural drainage of his land, or the sur-

757, 36 L. R. A. 697, 63 Am. St. Rep. 416; Louisville & N. R. Co. v. Beauchamp, 19 Ky. L. Rep. 398; DeBaun v. Bean, 29 Hun 236; Gould v. Boston Duck Co., 13 Gray 442; Pitts v. Lancaster, 54 Mass. 13 Met. 156; Mabie v. Matterson, 17 Wis. 1; Springfield v. Harris, 4 Allen 494, 81 Am. Dec. 715; Parker v. Hotchkiss, 25 Conn. 321.

4 Ware v. Allen, 140 Mass. 513, 5 N. E. Rep. 629; Fisher v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77.

1 See Secs. 543-545.

2 See Sec. 543; Merritt v. Brinkerhoff, 7 Johns. 306.

3 In the case of Kelly v. Lett, 35 N. C. 13 Ired. 50, where this was done wilfully, and with the intent to injure the plaintiff, trespass *vi et armis* was held to be the proper remedy.

See, also, Haywood v. Edwards, Phila. Law. 350; McKee v. Delaware & H. Canal Co., 125 N. Y. 353, 26 N. E. Rep. 305, 21 Am. St. Rep. 740; affirmed, 52 Hun 52, 4 N. Y. Supp. 753, where it was held that a riparian owner who retains or stores the waters of a natural stream and discharges them in such quantities as to cause it to overflow its banks and injure the lands of a riparian proprietor below, is liable for a trespass, and for the damages occasioned thereby, and may also be restrained therefrom by injunction.

See, also, Rhodes v. Airedale Drainage Comrs., L. R. 1 C. P. Div. 402, 45 L. J. C. P. N. S. 861, 35 L. T. N. S. 46, 24 Week. Rep. 1053; Grant v. Kuglar, 81 Ga. 637, 8 S. E. Rep. 878, 3 L. R. A. 606; Frechette v. La Compagnie Manufacturiere, L. R. 9 App. Cas. 1,709, 53 L. J. C. P. N. S. 20, 50 L. T. N. S. 62; Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. Rep. 26, 30 Am. St. Rep. 546; Boyington v. Squires, 71 Wis. 276, 37 N. W. Rep. 227.

face water accumulated thereon in ponds, or the water drawn from wells therein, into a natural water course, if in so doing he thus accelerates the natural flow and increases the volume of the water in the stream to a point whereby the capacity of the stream is exceeded and the riparian proprietors below are injured in any manner.[4]

§ 547. **Right to natural flow—Backing up water.**—A riparian proprietor has the right to have the water flow by or off his land at its natural height; and hence a lower owner has no right to make obstructions in the stream on his own land which will have the effect of backing up the water and submerging the land of an upper owner.[1] And an action will lie for backing up water as soon as it interferes with a use to which the upper proprietor attempts to put his land, although he was not making such use of the land when the dam was built.[2] So, too, a dam which sets the water back so as to interfere with the drainage of the land of the upper owner is a violation of his rights.[3] Again, a lower proprietor has no right to construct his dam so as to throw the water back on the lands of the upper owner in times of ordinary

[4] Jackman v. Arlington Mills, 137 Mass. 277; Wheeler v. Worcester, 10 Allen 591; McCormick v. Horam, 81 N. Y. 86, 37 Am. Rep. 479; Williams v. Gale, 3 H. & John. 231; Miller v. Lambach, 47 Pa. St. 154, 86 Am. Dec. 521; Treat v. Bates, 27 Mich. 390; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; Davison v. Hutchinson, 44 N. J. Eq. 474, 15 Atl. Rep. 257; Wagner v. Chaney, 19 Ill. App. 546; Kay v. Kirk, 76 Md. 41, 24 Atl. Rep. 326, 35 Am. St. Rep. 408.

[1] Gibson v. Fischer, 68 Iowa 29, 25 N. W. Rep. 914; Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Omelvany v. Jaggers, 2 Hill L. 634, 27 Am. Dec. 417; McCalmont v. Whitaker, 3 Rawle 84, 23 Am. Dec. 102; Stout v. McAdams, 3 Ill. 67, 33 Am. Dec. 441; Booker v. McBride, 16 Tex. Civ. App. 348, 40 S. W. Rep. 1031; Yeargain v. Johnson, 2 N. C. 80, 1 Am. Dec. 581; Stye v. Mordant, 1 Rolle Abr. 104; Ames v. Dorset Marble Co., 64 Vt. 10, 23 Atl. Rep. 857.

But see Monongahela Nav. Co. v. Coon, 6 Pa. 383, 47 Am. Dec. 474; Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240; Smith v. Agawam Canal Co., 2 Allen 355.

[2] McLaren v. Cook, 3 U. C. Q. B. 299; King v. Tiffany, 9 Conn. 162; Whipple v. Cumberland Mfg. Co., 2 Story 661, Fed. Cas. No. 17,516.

[3] Treat v. Bates, 27 Mich. 390.

See, also, Snow v. Cowles, 22 N. H. 302; Hastings v. Livermore, 7 Gray 194; Ferris v. Wellborn, 64 Miss. 29, 8 So. Rep. 165.

freshets. But he is not responsible for damages caused by extraordinary floods.[4]

§ 548. **Rights of riparian owner to the products of the water.**—In addition to the rights enumerated in this and other chapters of this part, riparian owners have certain rights to the products of the waters of the streams which adjoin or run through their lands. As we have discussed in a previous section, they have the exclusive right to the ice which forms on the stream in front of their lands, provided the streams are private and not subject to such right by the general public;[1] but, as we have before stated, the taking of the ice is, in fact, the taking of water itself.[2] Other rights may be enumerated, as the exclusive right to take the fish from the water opposite the owner's land.[3] He has the right to take the sand and gravel from the bed of the stream, where he can do so without injury to other riparian owners, or to the public.[4] He also has the right to take the driftwood floating down the stream, where he can capture it, as it passes through or adjoining his lands.[5] There are many other rights to which such owner is entitled which are unnecessary to enumerate here. But, in general, it may be stated that he is entitled to all the rights to the water of the stream, and to its products, which do not materially and substantially interfere with the rights of the other riparian proprietors upon the same stream, or with the rights of the public.

4 Bristol Hydraulic Co. v. Boyer, 67 Ind. 236.

See, also, Humphry v. Irvin, 18 W. N. C. 449; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766; Pugh v. Wheeler, 19 N. C. 2 Dev. B. N. C. 50; Dorman v. Ames, 12 Minn. 451 (Gil. 347); Ames v. Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. Rep. 787; McCoy v. Danley, 20 Pa. 85, 57 Am. Dec. 680; China v. Southwick, 12 Me. 238.

For the act of God as a defense, see Part XIII.

For actions for flooding lands, see Part XIII.

1 For right to take ice on public streams, see Secs. 337, 493.

2 See Sec. 493.

3 For right of fishing in private streams, see Sec. 365.

4 Commissioner v. Hipple, 7 Pa. Dis. Rep. 399.

5 The owner of a bank of a river has an absolute ownership of the driftwood which lodges upon his lands, or at least a qualified, possessory title good as against a trespasser or stranger to the title, and which is the subject of grant. Yuba Consol. Goldfields v. Hilton, 16 Cal. App. 228, 116 Pac. Rep. 712.

§ 549. The modern Western rule of the "undiminished flow" of streams.—In the preceding sections we have discussed the right of a riparian proprietor to the undiminished flow of a natural stream which washes his lands, more from the standpoint of the strict construction of the common law. But, as we have seen, in the Western States of this country the common law rules of riparian rights have been modified to a great extent, and especially relative to the use of the waters of natural streams, thereby permitting, even under the common law as it is applied in these States, a more liberal use of the water, especially for the irrigation of lands.[1] As water must be diverted from the natural streams for the purpose of irrigation, and as a considerable portion of the same is consumed in the operation, it must follow that the old rule of the common law of the "undiminished flow" of the water can not be followed with the same degree of strictness as it is in England and in the Eastern States, where such a use of the water is not made to any great extent. And, upon this subject, it may be said that in no respect have the rules of the common law, as they have been handed down to us, been modified or extended more than upon the subject of the undiminished flow.

In the case of Sturr v. Beck[2] it was held by the Supreme Court of the United States, following the strict construction of the common law, to the effect that the plaintiff could make no appropriation of the water as against Beck, who was a riparian proprietor and by virtue of that right was entitled to the undiminished flow of the stream. The Court, quoting from the former case of Atchison v. Peterson,[3] said: " 'The Government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams.' " The Court then concluded its remarks upon this branch of the subject by saying: "When, however, the Government ceases to be the sole proprietor, the right

[1] For Irrigation as a Riparian Right, see Chap. 26, Secs. 498-525.

For the modification of the common law as to the use of waters, see Secs. 508-513.

[2] 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

[3] 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; 1 Mont. 561.

of the riparian owner attaches, and can not be subsequently invaded. As the riparian owner has the right to have the waters flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

But, even the Supreme Court of the United States has materially changed its views in this respect. In the case of the United States v. Rio Grande Dam & Irrigation Co.[4] the Court said: "By the Act of March 3, 1877,[5] the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further provided that 'all surplus water over and above such actual appropriation and use, together with the waters of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights.'"[6] Also in the case of Kansas v. Colorado[7] the same claim was asserted upon the part of Kansas as a riparian owner, as was decided in the case of Sturr v. Beck,[8] and Kansas insisted that large quantities of the water were being diverted from the Arkansas River by the inhabitants of Colorado, a large number of whom were claiming a prior appropriation and diverting the water to nonriparian lands, as against Kansas, a riparian proprietor. The Court refused injunctive relief and dismissed the bill, stating,

[4] 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

[5] Ch. 107, 19 Stat. L. 377, the Desert Land Act; for this see, also, Chap. 66.

[6] See, also, Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

[7] 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

For a specific statement of the facts in this case disclosing that many of the defendants were using water on riparian lands, see the first opinion, which was on demurrer, Kansas v. Colo., 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

For decision upon the facts in the case, see 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

[8] *Supra.*

in substance, that if the riparian doctrine should prevail in Kansas as against Colorado, and against the nonriparian users, whose rights were involved therein, Oklahoma and its citizens lower down on the Arkansas River might invoke the same rule in opposition to the citizens of Kansas and Colorado to their great injury, which doctrine, it is observed, would be ruinous in effect. The Court in dismissing the bill indicated that no injunction would lie until a more substantial injury could be shown, and at the same time held that the interference by a large number of the appropriators above in the State of Colorado materially depleted the flow to the riparian lands of the plaintiff State. In commenting upon this decision Mr. Justice King, in rendering the decision of the Supreme Court of Oregon, also a common law State, in the case of Hough v. Porter,[9] said: "The opinion in the Kansas-Colorado case not only brushes aside the rule claimed to have been announced in Sturr v. Beck, regarding riparian rights, but discloses what, in the opinion of the writer, is a strong and commendable tendency on the part of that great Court to recognize that the rigid rules of common law, as interpreted and sought to be applied by those insisting upon the "undiminished flow" theory, are inapplicable to the many new and intricate questions necessarily arising under our form of Government and throughout the arid and semi-arid sections."

The Supreme Court of the United States also in the case of Boquillas Land & Cattle Co. v. Curtis,[10] while not deciding the contention as to the effect of the Desert Land Act in reserving the waters for appropriation regardless of the rights of the patentees of land, but referring to the decision in the case of Hough v. Porter,[11] said: "The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds."[12] But this is not all. The Supreme Court of California, the State that has most strenuously insisted upon the common law right of the "undimin-

9 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

10 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493, affirming the decision of the Supreme Court of Arizona, 11 Ariz. 128, 89 Pac. Rep. 504.

11 *Supra.*

12 See, also, the later Oregon case of Berman v. Blackmon, —— Ore. —, 118 Pac. Rep. 848, wherein it is said: "By this Act the General Government made the water, not only of lakes and rivers but also other sources of water supply upon the public lands and not navigable, the subject of appropriation."

ished flow," and that, too, whether the riparian owner actually used the water or was actually damaged by its diversion or not,[13] by others for use, has also modified its views, and by its later cases holds to the effect that an injunction against an appropriation of the water for beneficial uses will not be granted on behalf of a riparian owner without use, or, in other words, without his showing actual, material, and substantial damage. As was said in a recent case:[14] "Even if at common law or under the civil law it was a part of the usufructuary right of the riparian owner to have the water flow by for no purpose than to afford his pleasure in its prospect, such is not the rule of decision in this State. *The lower claimant must show damage to justify a Court of Equity in restraining an upper claimant from his beneficial use of the water.* The fair apportionment and economic use of the waters of this State are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must continue to be solved by this Court as cases ~~of first~~ impression, and, as in the past so in the future, if a rule of decision at common law shall be found unfitted to the radically changed conditions existing in this State, so that its application will work wrong and hardship rather than betterment and good, this Court will refuse to approve and follow the doctrine." But this decision of California does not stand alone and is based upon earlier decisions of the same Court. In the case of Modoc Land & Live Stock Co. v. Booth[15] it was said: "A riparian owner ought not to be permitted to invoke the power of a Court of Equity to restrain the diversion of water above him by a nonriparian owner,

[13] Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Bliss v. Johnson, 76 Cal. 597, 16 Pac. Rep. 542, 18 Pac. Rep. 785; Heilbron v. Last Chance D. Co., 75 Cal. 117, 17 Pac. Rep. 65; Heilbron v. Fowler etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

The Nevada Court, referring to the above decisions, said: "The California decisions cited for the appellants may no longer be considered good law even in the State in which they were rendered." Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280.

[14] San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182.

[15] 102 Cal. 151, 36 Pac. Rep. 431.

when the amount diverted would not be used by him and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento River in Yolo County could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa County, and yet no one, probably, would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained."[16] In fact, it may be stated that in all Western States which follow the common law of riparian rights the early English rule of "undiminished flow" has been modified and extended in accordance with the principles stated above. This subject, however, will be discussed more in detail when we come to the discussion of the right of injunction and damages by riparian owners.[17]

But the Supreme Court of Washington, in a recent case,[18] adheres to the old common law rule as to the undiminished flow in the following language: "A riparian owner, such as respondents are here shown to be, has a right to the natural flow of the waters in their natural and accustomed channels without diminution or alteration, subject only to the same right and use in every other riparian owner, a right that is as much included in the ownership

16 See, also, Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; Miller v. Bay City Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Miller & Lux v. Madera Canal Co., 155 Cal. 61, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Mentone Irrigation Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

And the Court, after citing some of the early common law cases cited *supra*, in a case decided in 1909, said: "It is obvious, of course, that, if this supposed rule were strictly enforced against riparian owners, as well as appropriators, the waters in the streams of the State could not be used at all, but would flow to the sea, or until they disappeared in the sands and washes, without benefit to any one, except in the few instances where flood waters might escape naturally and flow upon lands situated similar to those of the plaintiff. The rule is evidently not suited to the conditions of a dry climate such as we have in this State." Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

17 For right of injunction of riparian proprietors, see Chap. 81.

For actions for damages by riparian proprietors, see Chap. 83.

18 Still v. Palouse Irr. & Pr. Co., 64 Wash. 606, 117 Pac. Rep. 466.

of the land as the soil itself, and can no more be interfered with by the acts of others. And, while the application of this doctrine has in some of the Western States sometimes been denied, on the theory that the rules of the common law respecting riparian owners were inapplicable to conditions and necessities of the people in the particular localities where the cause of action arose, it has since its first announcement here invariably been upheld in this State, except where it has been subjected to a priority of appropriation." [19]

§ 550. **Other miscellaneous riparian rights.**—There are a number of other rights which the proprietors of land bordering on water courses have by virtue of their ownership under the common law. Some of these it will be unnecessary to discuss, as they do not properly come within the scope of this work; others will be or have been discussed under their respective heads. These are the right and liabilities of polluting waters;[1] the common law right to divert water for irrigation,[2] and for power purposes;[3] the right of fishing and hunting;[4] the common law rules as to subterranean waters;[5] the loss of riparian rights by eminent domain;[6] the common law right to use riparian rights under license;[7] and the loss of riparian rights by prescription and adverse user.[8] We shall also discuss the applicability of the common law theories as applied to the arid West.[9]

We shall also discuss in the course of this work the rights of appropriators as against the rights of riparian proprietors.[10] Also the right of action by riparian proprietors for injunctions,[11] dam-

19 Citing Crook v. Hewlitt, 4 Wash. 749, 31 Pac. Rep. 28; Rigney v. Tacoma Light & Pr. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Madison v. Spokane Valley Land Co., 40 Wash. 414, 82 Pac. Rep. 718, 6 L. R. A., N. S., 257; McEvoy v. Taylor, 56 Wash. 357, 105 Pac. Rep. 851, 26 L. R. A., N. S. 222.

1 See polluting waters, Chap. 58, Secs. 1129-1147.

2 See Chap. 26, Secs. 498-525.

3 See Secs. 695, 847-855.

4 See Chap. 17, Sec. 365.

5 See Subterranean Waters, Secs. 1155, 1187-1190.

6 See Eminent Domain, Chap. 55, Secs. 1089-1091.

7 See Chap. 27, Secs. 526-535.

8 See Chap. 54, Secs. 1039-1041.

9 See Chap. 31, Secs. 585-594.

10 See Secs. 810-823.

11 See Chap. 81.

ages,[12] and the division or apportionment of the waters between riparian owners for the individual use of each.[13]

§ 551. **Summary and conclusions.**—In summing up this chapter, we will say that under the common law doctrines, in their most general forms, all property in water courses and inland lakes and ponds, whether the same are actually navigable or not, is held sacred to the common use alike of all the riparian owners upon their borders; that the basis and foundation of this right is that their lands must touch upon the waters; that the nature of the ownership of the water is simply usufructuary, and that each proprietor may reasonably use the water for any purpose as it passes through or by his land; that the rights of all being equal, no one can use the water to the extent that it will injure those below; that after having used the water, if it has been diverted, he must return it without any substantial diminution in quantity or any material change in quality to its natural bed or channel before it leaves his own land, so that it will reach his neighbor below in its full, original, and natural condition. We have also seen that the natural current of a stream must neither be obstructed nor accelerated by any proprietor; that the riparian proprietor is entitled to all accretions and relictions that may be added to his land by the influence of the winds or tides, and thus always giving him frontage on the water and the right of access to and from his estate to the water, or to and from the water to his estate; that he also has the exclusive right of fishery opposite his land, and that no one can bar him from that right. Also we have seen that, contrary to the Arid Region Doctrine of appropriation, under the common law, priority of use by any one proprietor can give him no higher or more extensive rights than those which belong to all the other proprietors, either higher up or lower down the stream; and, although some of them may have come long after the first proprietor settled upon the stream, all whose lands touch upon the stream must share equally in the use of its waters. And, if one proprietor acquires more extensive rights than he is entitled to by virtue of his own riparian lands against the other proprietors, he must do so by a grant or license from all who are affected thereby or by prescription, which presupposes a grant.

12 See Chap. 83. 13 See Chap. 78.

And, lastly, we shall see that these riparian rights may be lost by virtue of the right of eminent domain;[1] that the State, under this right, may acquire them; but it can not take, injure, or impair any of these rights in and to the waters of the stream, or any riparian proprietor, without due process of law, for a public purpose, and then only upon just compensation being paid to the owner of the same.

We shall also see, in the future discussions of this work, that the common law theories of riparian rights are, in the main, wholly inconsistent with the Arid Region Doctrine of appropriation of the water by diverting it from its natural channel for irrigation and other beneficial uses, and especially where that appropriation is based upon priority. Owing to the natural conditions of the greater portion of the arid West, the common law rules of riparian rights are wholly inapplicable to that portion of our country which is known as the arid region, and in many States these rules have been wholly abrogated, while in certain other States portions of the common law only have been retained.[2]

1 See Secs. 1089-1091.

2 That the common law is inapplicable to the arid region, see Secs. 585-594.

PART VII.

THE CIVIL LAW GOVERNING WATERS.

CHAPTER 29.

THE ROMAN CIVIL LAW.

§ 552. Scope of part and chapter.
§ 553. The civil law—Historical.
§ 554. Public and private waters.
§ 555. The ownership of the running water.
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§ 552. Scope of part and chapter.—The law of appropriation and diversion of waters for beneficial uses, as the same is in force in the Western States of this country, finds its basis in two systems of laws. First, the common law doctrines of riparian rights upon the subject of use of waters, which have been discussed in previous chapters of this work;[1] second, the civil law, the rules of which govern waters, which we shall discuss in this part of this

[1] For the common law rules as to the use of water, see Chap. 25, Secs. 483-497. For irrigation as a riparian right, see Chap. 26, Secs. 498-525.

work. It will be noticed that the law of appropriation in principle follows the civil law more closely than it does the common law, although the California Courts and the Courts of some of the other States attempt to justify the diversion of water for irrigation and other uses which consume the water under the common law.[2]

In the following chapter we shall also endeavor to trace the civil law in its various modifications under the French, Dutch, Spanish, and Mexican rule down to the Louisiana Purchase,[3] the Treaty of Guadalupe Hidalgo,[4] and the Gadsden Purchase, and thus show the conditions of the country respecting waters in those portions of our territory acquired by this country at the time of their acquisition. In this manner we can show the growth and progress of the American system of the appropriation of waters, for beneficial uses, by the diversion of the same from the natural streams and applying it to those uses.

§ 553. **The civil law—Historical.**—The term "civil law" or Latin equivalent, *jus civile,* has been used in a great variety of meanings, both in ancient and modern times. In the sense in which it is used here, it is that great system of laws handed down to the modern world by the genius of the Roman people. Our knowledge of the Roman law is almost entirely found in that great codification made under the authority of the Roman Emperor, Justinian, known as "*corpus juris civilis,*" and generally called "The Pandects," but sometimes "The Digest," which included all of the earlier Roman laws found in "The Code," "The Digest," and "The Novels." The work was done by commissioners appointed by Justinian and the objects of this codification, as determined from the orders given by the Emperor, were, to peruse all of the writings of all authorized jurists, and to extract from these works, giving credit to the original authors, whatever was of most permanent and substantial value, with power to change the expressions of the original authors wherever conciseness or clearness would be thereby promoted, or wherever such a change was needed in order to adapt their language to the condition of the law as it was in effect in Justinian's time. The commissioners were to avoid repetitions and contradic-

2 See Chap. 26, Secs. 508-511.
3 See Secs. 572-575.
4 See Secs. 576-583.

tions by giving only one statement of the law upon any one point, and were to insert nothing at variance with any of the provisions in the *Codex Constitutionum*. The work of the commissioners was completed in the year 533 A. D., and in the same year the Emperor published it as an imperial statute. It is from this work that the civil law comes to us, and it has exerted a great influence both upon the common law of England, as will be seen in various portions of the same, and also upon the modern American law. This seems especially true upon the subject of waters, through the Dutch in New York, the French in Louisiana and other Southern States, and the Spanish and Mexicans in Texas and that great portion of this country known as the "arid region" of the United States, acquired from Mexico under the Treaty of Guadalupe Hidalgo and by the Gadsden Purchase.

While the Pandects were being codified the Emperor, Justinian, gave another order, that an abstract be prepared of the fundamental laws to be found in the Pandects, which work might be used as an elementary text book by law students. This work was also published as a statute with full legal validity shortly before the Pandects, and called "The Institutes of Justinian." This is the only work which has been fully translated into English, and embodies some of the fundamental principles of the Roman law upon the subject of waters.[1]

We will now take up the subject of the Roman law of waters, after which we will endeavor to trace that law through the early Dutch, French, Spanish, and Mexican occupants of certain sections of this country down to the present time.

§ 554. Public and private waters.—Under the ancient Roman law, as the same is to be found in the Pandects and the Institutes of Justinian, the rivers and other bodies of water were divided into public and private, while the running water itself was counted as public. Things common to mankind by the law of Nature, are the air, *running water*, the sea, and consequently the shores of the sea, is the language used.[1] As to whether a body of water was

[1] See Cooper's Institutes of Justinian, 1852; Sander's Institutes of Justinian, 1876; Sohm, Institutes of Roman Law; Walton, Civil Law in Spain and Spanish America; Howe, Studies in Civil Law, 1905; Ware, Roman Water Law, 1905.

[1] Inst. Lib. 2, T. 1, Sec. 1.

See, also, for the classification of waters, Secs. 287-291.

public or private depended upon the fact as to whether or not it was navigable. Some rivers were regarded as public, others not. Cassius defined a public river as a perennial river, that is, one that flowed at all seasons of the year.[2] This is practically the classification under the common law.[3] In fact, many of the principles and terms of the common law are taken directly from the civil law. The name of "riparian proprietor," indicating the owner of the *ripa* or bank of a stream, is borrowed from the civil law. As is stated by Mr. Angell:[4] "The owners of water courses are denominated by the civilians riparian proprietors, and the use of the same significant and convenient term is now fully introduced into the common law." In fact, many of the principles of the common law were taken directly from the earlier civil law, and the terms used by the civil law have been adopted and carried down to us through the common law.[5]

§ 555. The ownership of the running water.—The common law borrowed from the civil law many things relative to the government and use of waters, and among these is the question of the ownership of the *corpus* of the running water. The civil law authorities upon the subject of the ownership of running waters may be summed up as follows: That the running water was a natural resource and was classed by the civil law writers, which also include the Institutes of Justinian, with the air and those things which can not be owned in their natural state and condition, or those which belong, according to the civil law rights, to the "negative community," or which belong to nobody. As was

2 D. 43, T. 12, Secs. 1, 3; Ware, Roman Water Law, Sec. 19.

NOTE.—In giving references to the Pandects or Digest, they will be given as above, that is to say: Dig. 43, Title 12, Sec. 1, Par. 3.

3 For the classification of public and private waters, see Secs. 287-291.

4 Angell on Water Courses, 7th Ed., Sec. 10.

5 Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861.

See, also, Fleming v. Davis, 37 Tex. 173; Yale on Mining Claims and Water Rights, p. 153; Williams v. Moreland, 2 Barn. & C. 910, 107 Eng. Reprint 620; Liggins v. Inge, 7 Bing. 692, 5 Moore, p. 712, 9 L. J. C. P. 202; Wright v. Howard, 1 Sim. & S. 190, 1 L. J. Ch. 94, 24 Rev. Rep. 169, 2 Smith 321; Bealey v. Shaw, 6 East 208, 102 Eng. Reprint 1266; Irvine v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

said by Vattel: "There are things which in their own nature can not be possessed. There are things of which nobody claims the property, and which remain common, as in their primitive state when a nation takes possession of a country; the Roman lawyers called these things *res communes*, things common; such were, with them, the air, the running water, the sea, the fish, and wild beasts."[1] As was said in the Digest or Pandects of Justinian,[2] there are certain things which by natural law are common, certain organizations, certain things belonging to nobody, and other things, the property of individuals acquired in various ways. The things which by natural law are common are as follows: The air, the running water, and the sea, and, it therefore follows, the shores of the sea; also the stones, gems, and the like, which we find upon the shore, by natural law immediately become ours. But almost all the rivers and harbors are public.

As we have seen in previous sections,[3] the common law in adopting the principles of the civil law, as to the title to the *corpus* of running water, eliminated the negative element to the effect that they belong to nobody, or do not belong to anybody, and held to the effect that they were the common property of everybody, and therefore the title to the body of waters could not be acquired by an individual while it continues running in its natural channel.[4] Both the civil and common law authorities classify the property in running waters by analogy with the property in wild animals or fishes swimming in the sea. As is said by Justinian, after referring to the property in flowing water, "Likewise wild animals, birds, and fishes, since before capture belong to no one, after capture belong to him who captures them."[5]

1 Vattel, Law of Nations, see Chap. 20, Chitty's Translation, p. 109, Sec. 234.

See Institutes of Justinian, Bk. 2, Tit. 1, Sec. 1; Grotius, Bk. 2, Sec. 12; Puffendorff, Bk. 4, Chap. 5, Sec. 2; Pothier, Traité du Droit de Propriété, No. 21; Pardessus Traité des Servitudes, Vol. 1, p. 174; Colquhoun, Summary of Roman Law, Sec. 923; Lux v. Haggin, 69 Cal. 225, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Geer v. Connecticut, 161 U. S. 519, 40 L. Ed. 793; 16 Sup. Ct. Rep. 600; Mason v. Hill, 5 Barn. & Adol. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 188, 110 Eng. Reprint 692; Ohio Oil Co. v. Indiana, 117 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 20 Morr. Min. Rep. 466.

2 See Bk. 1, Tit. 8.

3 See Secs. 288, 289, 455.

4 See Secs. 288, 289.

5 Institutes of Justinian, Lib. 2, Tit. 1, Sec. 12.

§ 556. The ownership of severed water.—It is held by the authorities both under the civil law and the common law, as we have seen in preceding sections,[1] that there can be no individual property in running water. But it is further held in both of these systems of laws that water, after it has been severed from the natural stream and taken into reservoirs, tanks, or other receptacles, belongs to the possessor of the same.[2] As was said in a late Oregon case,[3] "The water had been segregated by the plaintiff from the general supply, was impounded in his ditch, and was intended to be appropriated to his own use. It was under his control and had become his property."

§ 557. The right of navigation.—All navigable waters being public, the general public had the right to use them for any lawful purpose; the ports were also public; hence the right of fishing in ports or in public rivers was common to all.[1] Special stress was laid upon the preservation and facilitating of navigation. Therefore the interdict of the Praetor was to do nothing either in the stream itself or on the banks thereof whereby the landing or the

See, also, Pothier, Traite du Droit de Properitéré, Opera Tom. 8, p. 137.

See, also, the case of the Swans, 7 Coke Rep. 15b, 77 Eng. Reprint 435; 2 Black. Com. 255.

1 See Secs. 288, 289.

2 See, also, for the right to water after diversion under the Arid Region doctrine of appropriation, Secs. 773, 774.

See Bowyer's Commentaries on the Civil Law, p. 61; Pothier, Opera Tom. 8, p. 149; Gluc, Commentaries on the Digest, Lib. 1, Tit. 8.

See, also, Spring Valley Water Co. v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 173; Heyeman v. Blake, 19 Cal. 579; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Vernon Irrigation Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

See, also, Magistrate v. Elphistone (Scotch), 2 Kame's Dec. 331; Embrey v. Owen, 6 Ex. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Mason v. Hill, 5 Barn. & Adol. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Lyon v. Fishmongers' Co., L. R. App. Cas. 682, 10 Ch. 679, 44 L. J. Ch. N. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1; White v. White, App. Cas. (1906) 72; Race v. Ward, 3 El. & B. 712, 3 C. L. Rep. 744, 24 L. J. Q. B. N. S. 153, 1 Jur. N. S. 704, 3 Week. Rep. 240, 30 Eng. L. & Eq. Rep. 187; City of Syracuse v. Stacey, 169 N. Y. 231, 62 N. Y. Rep. 357; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; County of Sierra v. County of Nevada, 155 Cal. 1, 99 Pac. Rep. 371.

3 Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584. See *Id.*, on rehearing, 110 Pac. Rep. 1092.

1 Inst. Lib. 2, T. 1, Sec. 2.

See, also, for the right of navigation, Chap. 16, Secs. 341-357.

navigation was made worse.[2] The law went further than the common law in permitting the banks of rivers, although the title to the same was in the adjoining property owners, to be used by the public in navigating the streams; and all persons had the same right to bring their vessels to the land, and to fasten them to the trees growing upon the banks, and to unload them there, as they had to navigate the river itself.[3] As was said in the Pandects, rivers which flow perennially are public, and therefore their banks are also public.[4] The banks of the rivers might be improved and strengthened so long as navigation on that account was not injured, but such improvements were only tolerated when they made no impediment to navigation.[5] And any person who wanted to strengthen the banks of a public river was compelled to give security against future damages, and this security must be given before the work was done. The same rule applied to the strengthening of the banks of lakes, canals, and ponds. The use of public streams was held common to all, just the same as the public roads and the shores of the sea. In these places it was held to be a public right for any one to build up improvements or to tear them down, provided, however, that this was done without injury to any one else; for, as was held, to build on the banks of a river was allowed by the law of nations, unless the public use is impaired.[6]

It will be noticed that all of the law tends to preserve the rights of the general public, especially in the right of navigation. Even in the case of a lake, which was entirely within the boundaries of a private estate, the right of navigating it was given if it aided in reaching a neighboring estate.[7] If a stream was navigable no right could be given to divert the water in such quantity that it became less navigable, even if by such act another stream became navigable.[8] So we can see from this that the ruling of the Supreme Court of the United States in the Rio Grande dam case and the case of Kansas v. Colorado, that the navigable capacity of the

2 D. 43, T. 12, Sec. 1; Ware, Roman Water Law, Sec. 16.

3 Inst. Lib. 2, T. 1, Sec. 4.

4 D. 43, T. 3, Sec. 3.

5 D. 43, T. 15, Sec. 1; Ware, Roman Water Law, Secs. 63-68.

6 D. 39, T. 2, Sec. 24; D. 43, T. 8, Sec. 4; Ware, Roman Water Law, Secs. 74, 77.

7 D. 8, T. 3, Sec. 23, 1 Par. 1; Ware, Roman Water Law, Sec. 161.

8 D. 39, T. 3, Sec. 10, Par. 2; Ware, Roman Water Law, Sec. 275.

navigable waters of the United States must be preserved, has a precedent in the laws of ancient Rome.[9]

§ 558. **Rights of riparian owners based on access.**—The rights of riparian owners, whose lands border on streams and other natural bodies of water did not originate with the common law of England; but these rights were recognized and protected in the days of ancient Rome, and also in the days of the later Roman Emperors. The banks of a river were held to be the property of those whose lands they adjoin, and consequently the trees growing upon them were also the property of the same persons.[1] All riparian rights recognized under the civil law were based on lawful access to the water or other natural bodies of water, which touched or bordered upon the water itself. In other words, the waters, while they continued in the streams, were subject to the common use of all who could legitimately gain access to them for the purposes necessary to the support of life.[2] This principle also applies to the right to take and use the waters at civil law. This right was in those who are known under the common law as riparian proprietors, because of their legal right of access to the stream.[3]

It will be seen from a comparison that the rights of riparian owners under the civil and common law are practically the same as originally formed in the civil law and later embodied in the rules of the common law, as discussed in previous chapters of this work.[4] The rights of the riparian owners under each sys-

9 See Secs. 354, 355; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

1 Inst. Lib. 2, T. 1, Sec. 4.

2 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

3 Miner v. Gilmour, 12 Moore P. C. C. 131, 14 Eng. Reprint 861.

See, also, Louisiana Code, Art. 657, wherein it is said: "He whose estate borders on a running water, may use it as it runs, for the purpose of watering his estate or for other purposes. He, through whose estate water runs, whether it originates there or passes in from lands above, may use it while it runs over his lands; but he can not stop or give it another direction, but is bound to return it to its ordinary channel where it leaves his estate."

See, also, Code Napoleon, Article 644, to the effect that the rights of the use of water of running streams are given only to the riparian proprietors; that is, to the proprietors of the estates contiguous to the flow of the water.

4 For the common law, see Secs. 451, 452, 458, 540.

For the rights of riparian owners

tem were based upon a legal right of access to the waters of the stream. In other words, their lands must touch or border upon the stream.[5]

§ 559. Miscellaneous rights of the owners of the banks.—As we discussed in the previous section, the right of ownership of the use of the waters of natural streams, under the Roman civil law, was only in those who had lawful access to the waters, or who were the owners of the banks.[1] This is also true under the common law rule.[2] But, as we have seen, under the civil law the banks were subject to the use of the public in landing from the river, where the same was navigable.[3] Where the river changed its course, the old bed became the property of the owners on each side.[4]

But the ownership of the banks of a river or other body of water was subject to certain servitudes, such as the right of others of drawing of water, the watering of cattle, and the digging of sand.[5] Also, where such fields bordered on large streams, it was permissible for others than the owners to construct dikes and ditches on the land, if they were necessary in order to use the water. If no fixed law governed the fields, ancient custom took the place of law; for in servitudes the rule was followed that, where the servitude was found not to be imposed by law, he who has for a long time exercised the right without force, stealth, or variation was regarded as having a servitude by ancient custom or fixed law. They could not, however, compel a neighbor to build the works on his own land, but the others who claimed the servitude had the right to go upon the land and build them. And a suit might be brought to enforce this right.[6] The servitude of drawing water might be established, although a public road intervened between the riparian land and the water.[7] The law of accretions was similar to that of the common law of the present day, a species of property by possession called "*pro suo,*" for in

under the civil law, see subsequent Sections, Nos. 559, 564, 566.

See, also, for rule of access under the Mexican law, Sec. 580.

5 See Secs. 451, 452.

1 See Sec. 558.

2 See Secs. 451, 452, 458, 540.

3 See Sec. 557.

4 D. 43, T. 12, Sec. 1, Par. 7.

5 Inst. Lib. 2, T. 3, Sec. 3.

6 D. 39, T. 3, Sec. 1, Par. 23; Ware, Roman Water Law, Sec. 78.

7 D. 39, T. 3, Sec. 17, Pars. 2-4.

such a manner the possessor owned all those things which he captured in the sea, earth, or sky, or which became his by alluvion. If a river suddenly changed its course to a new channel farther away the riparian owner could not follow the river to its new channel; but if alluvion, little by little, formed on his land, he might follow the river.[8] If an island formed in a river it did not become the common property, in undivided shares, of those whose estates bordered on the river side, but in definite parts. Each had so much as lay in front of him, measured by a straight line through the island in prolongation of the boundaries of his estate.[9] The water might be used by the riparian proprietors, but must be used in such a way as not to exhaust the water of public rivers to the injury of the other riparian proprietors. Neither could the course of the water be changed, nor made deeper, nor more constricted, whereby the current became more rapid, to the detriment of those who dwelt adjacent.[10] The riparian owner had the right to build any structure upon the banks, provided the rights of the other owners or the rights of the public were not interfered with. For building on the banks of a river is allowed by the law of nations, unless the public use is impaired.[11] Levees, in order to strengthen the banks, might also be built, but could not be so constructed to the damage of those dwelling along the river. This right was to be determined from the facts in each case, and in most cases the utility of the work decided the case.[12] Before permission was granted to build levees the owner was compelled to give a bond against apprehended injury to neighbors and property owners across the river, good for a period of ten years.[13]

It will be noticed from a perusal of the above that many of the common law rights of riparian owners were taken directly from the civil law.[14]

8 D. 43, T. 20, Sec. 3, Par. 2; Ware, Roman Water Law, Sec. 93.

See, also, for accretions under the common law, Secs. 538, 539.

9 D. 41, T. 1, Sec. 29; Ware, Roman Water Law, Sec. 97.

10 D. 43, T. 13, Sec. 1, Pars. 1-5; Ware, Secs. 43-48.

11 D. 43, T. 8, Sec. 4; Ware, Sec. 77.

12 D. 43, T. 13, Sec. 1, Par. 6; Ware, Sec. 49.

13 D. 43, T. 15, Sec. 1, Pars. 3-6; Ware, Secs. 65-68.

14 For common law theories of riparian rights, see Chaps. 21-28, Secs. 540-551.

§ 560. **Surface waters.**—We also find that elaborate laws were in force during the time of the Roman Emperors, relative to the protection from surface water, or "rain water," as it is called in the Pandects. The ancient action of *aquae pluviae arcendae* (*aq. plu. ar.*) might be brought either before or after actual damage had been done, provided that something had been done by the man from which damage was feared; that is, when something was done by the hand of man which caused the water to flow differently than it would flow by Nature; for instance, if the water is made to flow in greater volume, or more rapidly, or more violently, or if restraint caused it to overflow the land of another. However, if water in its natural flow did damage, then the said action did not lie.[1] If, however, the water was forced to a higher level, or drained to a lower level, by any barriers to its natural flow the action would lie.[2] The action would lie by an upper land owner against a lower owner, lest the water in its natural flow be artificially prevented from flowing through the latter's field; and by a lower against an upper owner, lest the water is sent down in a manner different from its natural flow.[3] There was, however, one act of man excepted from the action, and that was the tilling of the fields in the natural way.[4]

In a subsequent chapter of this work we will discuss more at length the subject of what is technically known as surface water.[5] Here it will suffice to say that there are two rules in this country adopted by the laws of the respective States relative to surface water and its control. One, the civil law rule, which is to the effect that the rights of the land owners are to be determined by the natural situation of their lands, so that the owner of land at a higher level has a right of an easement over the land of his neighbor below, to have the surface water pass off naturally, and which right the lower owner can not interfere with.[6] The common law rule recognizes no such easement of the upper owner of lands, but calls surface waters a "common enemy," which the lower owner may keep from coming from the upper lands, and which either owner may get rid of as best he can. Both rules, how-

1 D. 39, T. 3, Sec. 1, Pars. 1-5; Ware, Secs. 109-114.

2 D. 39, T. 3, Sec. 1, Par. 10; Ware, Sec. 116.

3 D. 39, T. 3, Sec. 1, Par. 13.

4 D. 39, T. 4, Sec. 1, Par. 15.

5 See Secs. 318, 654.

6 See Chaps.. 81, 83.

ever, provide to the effect that there must be no artificial accumulation of the water which may be subsequently discharged upon another's lands.[7]

§ 561. **The acquisition of water rights.**—Under the Roman laws a water right, or the right to the use of water, might be acquired or lost for certain reasons. This right might be for the use of the water as it flowed in the stream, or it might be by diverting the same in canals and ditches from the natural streams and conducting it to the place of use. Even in the public rivers this might be done, provided that the navigable capacity was not impaired. The interdict that nothing be done in a public river whereby the water was made to flow otherwise than as during the summer before was interpreted to apply only to the course of the stream, and not to apply to the quantity of the water flowing therein.[1] However, if the stream was navigable, water could not be taken from it in such quantity as to make the stream less navigable.[2] Water rights could also be acquired from the public reservoirs and canals, under strict regulations, severe penalties being prescribed for any violations of the regulations, even to the extent of loss of the water right and confiscation of the offender's estates.[3] In order to draw water from public reservoirs and canals and other public waters, permission had to be granted by the Emperor, no one else having the authority.[4] This permission might be given either to the estates or to a person. When given to the estate, it was not extinguished on the death of a person; but, when given to a person, it was extinguished with his death.[5]

A water right whose origin is time out of mind has a duly constituted existence.[6] So, what were known as ancient water rights were recognized and protected. If it could be proved that a flow of water through certain places was according to "ancient custom," and according to observation it showed usefulness in irrigating certain tracts of land, it was provided that no new innovation against the old form and established custom was permitted.[7] The

7 See Chaps. 81, 83.

1 D. 43, T. 13, Sec. 1, Pars. 1-3; Ware, Secs. 43-46.

2 See Sec. 557; D. 39, T. 3, Sec. 10, Par. 2.

3 C. 11, T. 42, Secs. 2, 3; Ware, Secs. 163, 164.

4 D. 43, T. 20, Sec. 1, Pars. 38-45.

5 D. 43, T. 20, Sec. 1, Pars. 43-45; Ware, Sec. 184.

6 D. 43, T. 20, Sec. 3, Par. 4; Ware, Sec. 281.

7 C. 3, T. 34, Sec. 7; Ware, Sec. 253.

amount taken, however, in order to hold an ancient right, was that amount which had been taken by custom and had been used continuously. It will be noticed in our chapter on Irrigation in Italy that these ancient rights are still in force in many of the Provinces of Italy, and that they are an obstacle against the progress of the country.[8] In order to prove one of these ancient rights, the owner was not compelled to show the title by which the right originated, as if by devise or some other way. The owner also had a right of action against any injury to his right, and in his claim he might set forth the number of years he had been in possession of the use of the water without force, stealth, or variation.[9]

As to the other water rights than those known as ancient, they might be acquired by permission of the Government; and the right of diverting water from the same place in the stream might be given or granted to many persons, and could be granted for different days and different hours.[10] And, if the supply was sufficient, the right might be given to many persons in the same place, as well as for the same day or the same hour.[11] The right, however, could not be used for any part of the estate except for which it was acquired. And if a portion of the estate was sold the water right followed the purchaser, in proportion to the area of the part sold and the part kept, regardless of the need of the different portions for the water.[12] The right of diverting water appertained, not to the owner of the land, but to the land itself. Usage was the basis of the right, and this might be for irrigation, watering cattle, embellishment or ornamental works, and beautifying grounds.[13] The use of the water must be confined to the exact time for which it was granted, and if one had a right to use the water during a certain hour of either day or night, he did not have the right to use the water at any other hour.[14] Severe penalties were provided for the violation of any of these laws, which included forfeiture of all water rights, and even life imprison-

8 See Chap. 8, Secs. 144-159.

9 D. 8, T. 5, Sec. 10; Ware, Sec. 320.

10 D. 8, T. 3, Sec. 2, Par. 1; Ware, Sec. 254.

11 D. 8, T. 3, Sec. 2, Par. 2; Ware, Sec. 255.

12 D. 8, T. 3, Sec. 25; Ware, Sec. 258.

13 D. 8, T. 3, Sec. 20, Par. 3; D. 43, T. 20, Sec. 3; Ware, Secs. 279, 280.

14 D. 43, T. 20, Sec. 2.

ment of the offender, where water was stolen or taken "through furtive channels."[15]

§ 562. **Right to the waters of springs.**—Water originating in springs in the land of one can not be conducted off without the consent of him to whom the use of the water belonged, whether this was the owner of the land or another.[1] However, the right to the use of the water of a spring could be acquired by grant, or by adverse user. And any violence to him who, adversely to another, had been using the water of a spring as he used it during the past year, without force, stealth, or variation, was especially forbidden.[2] The right was also given to clean out springs where the right to the use of the water was claimed by adverse possession.[3]

§ 563. **The right to subterranean waters.**—If one person in digging in his own land turned away the source of his neighbor's spring, nothing could be done; nor even could an action for fraud be brought, if that which he did was for the purpose of benefiting his own field, and not with the intention of injuring his neighbor.[1] Under this rule all rights to subterranean waters belonged to the owners of the soil. This rule was followed by the common law.[2] However, the right to discover water on an estate might be granted by the owner of an estate to another, and he, having found it, had the right to convey it away.[3] Under the Partidas, or the Spanish Code, which had for its basis the civil law of Rome, it was provided that when a man has a fountain or well upon his land, and his neighbor wishes to make one upon his land, in order to procure water for his use, the latter may do it and the former can not prevent him, notwithstanding the water in the first well or fountain may be diminished thereby, unless the person wishing to make the new well has no need of it, and acts maliciously.[4]

15 C. 11, T. 42, Sec. 4; Ware, Sec. 253.

1 C. 3, T. 34, Secs. 4, 6; Ware, Secs. 148, 150.

2 D. 43, T. 22, Sec. 1; Ware, Sec. 141.

3 D. 43, T. 22, Sec. 1, Pars. 6-8; Ware, Secs. 144-146.

1 D. 39, T. 3, Sec. 1, Par. 12; D. 39, T. 3, Sec. 21; Ware, Secs. 154, 155.

2 See Secs. 1201, 1202.

3 D. 8, T. 5, Sec. 21; Ware, Sec. 158.

4 Partidas, 3 T. 31; 1 Moreau & Carlton's Translation, 409, 410.

§ 564. **Grants of rights by riparian owners.**—The rule as to the grant of conveyance of water rights by riparian owners either to other riparian owners, or to others, is practically the same in both the civil and common law. As riparian owners under both systems are entitled to an equal or correlative share of the water flowing in the stream which adjoins their respective properties, no one riparian owner may grant his share of the water to another, where the water is consumed and thereby the rights of the other owners are injured. It is also held that all grants of riparian rights are valid as between the contracting parties, but are invalid as between noncontracting parties whose rights are permanently and substantially injured or interfered with.[1] This subject, however, has been fully discussed in previous sections of this work.[2]

§ 565. **Loss of water rights.**—The Roman water laws provided that a water right might be lost in one of several ways. One who violated the ordinance governing public reservoirs and canals not only lost the water rights which had theretofore been granted him, but also he was severely punished, according to his station in life.[1] Any right might be lost by nonuser for the period prescribed for its loss.[2] So, also, for using the water in a different manner than that prescribed, the right was forfeited. And, in case of a sale, the time during which the preceding owner did not use it was reckoned up against his successor.[3]

§ 566. **Use of water for irrigation.**—The use of water for irrigation was amply provided for under the Roman laws, and, of course, in order to irrigate lands the water had to be diverted from its natural channel. Hence the rule that water which springs up

1 See Digest of Justinian, D. 8, T. 3, Sec. 24; Ware's Roman Law, Sec. 257, where it is said: "From my water right, so Labeo says, I may accommodate any of my neighbors with water; on the other hand, Proculus holds that the water may not be used for any other part of the estate than that for which the right was acquired. The opinion of Proculus is the truer one."

See, also, Hall's Mexican Law, Sec. 1399; Eschriche, Aguas, Sec. 4.

2 For grants and contracts of riparian rights, see Chap. 27, Secs. 526-536.

1 C. 11, T. 42, Sec. 3; Ware, Sec. 164.

2 D. 8, T. 6, Secs. 7, 10, 16; Ware, Secs. 263-266.

3 D. 8, T. 6, Sec. 18; Ware, Sec. 267; D. 8, T. 6, Sec. 17; Ware, Sec. 153.

in a river bed belongs to him who leads it off.[1] The water might be taken from the river by canals and ditches, or it might be raised from the rivers by wheels, and when the right was once acquired it was preserved to the owner.[2] Water originating in the land of another could not be conducted off his land to irrigate other lands if it was needed by the owner, unless the right to its use had been lost by nonuser.[3] A right might also be granted to take water for irrigation from the public reservoirs and canals.[4] The use of the water was divided into two classes—"daily" and "summer." Daily water was that which was used continuously, both summer and winter, while the summer water was used only during the irrigation period of each year.[5] The summer time was defined as beginning at the vernal equinox, March 22, and ending with the autumnal equinox, September 22.[6] The right to the water was not based upon the acreage, but the use to which the water was put measured the right.[7] So, under our modern laws of appropriation of water, the use for a beneficial purpose is the culmination of title.[8] Also, as in our own times, the right to the use of the water might be acquired for different days or for different hours of the day or night.[9] Specific laws were set forth for the repair of the ditches and canals, and for changes in their location provided no injury was done to others. Violence was forbidden against any one who was repairing or cleaning canals, conduits, or headgates to facilitate the conveying of water, because it was permitted him, although adversely to others, so to do, as long as the water was not conveyed otherwise than it was the last summer, without force, stealth, or variation.[10]

§ 567. **Rights of way.**—The right of way for canals and aqueducts over the lands of another was carefully provided for by the

1 D. 43, T. 20, Sec. 3, Par. 3; Ware, Sec. 40.

2 D. 8, T. 4, Sec. 2; Ware, Sec. 91.

3 C. 3, T. 34, Secs. 4, 6, 10; Ware, Secs. 148-151.

4 D. 43, T. 20, Sec. 1, Pars. 43-45; Ware, Sec. 184.

5 D. 43, T. 20, Sec. 1, Par. 3; Ware, Sec. 188.

6 D. 43, T. 20, Sec. 1, Par. 32; Ware, Sec. 216.

7 C. 3, T. 34, Sec. 12; Ware, Sec. 226.

8 See Secs. 725-728, 877.

9 D. 8, T. 3, Sec. 2, Pars. 1, 2; Ware, Secs. 254, 256.

10 D. 43, T. 21, Secs. 1-11; D. 43, T. 21, Secs. 2, 3; D. 43, T. 21, Sec. 3, Pars. 1-10; Ware, Secs. 229-249.

laws of the Roman Emperors. Also where one had the right of drawing water from a river by grant, the right of way to and from the river was also granted.[1] With the right of way for canals and aqueducts, certain other rights follow: First, the right to repair canals or aqueducts; second, the right of the owner and his workmen to go upon the land to make repairs; third, the right of a strip on each side of the channel to make the repairs, and the right to deposit material for the same.[2] However, this must all be done without impairing the rights of the servient estate. A right of way could also be acquired by adverse possession through the property of another. And, if one had exercised the right of conducting a flow of water through the property of another with his knowledge, a servitude of a permanent character was, in time, acquired. The time required to secure this right was ten years, if the owner was present and knew of the use, and twenty years if the owner was absent, where it was presumed that he knew of the use. If, however, the right of way was forbidden by the owner, within the periods named, then no right of way could be acquired, and the expenses incurred therefor were in vain, because the ownership of any improvements made on the land of another, as long as it remains in the same estate, belongs to the owner of the land.[3]

The right is also given under the civil law of condemnation of rights of way for ditches and canals over the lands of others. Where lands border upon streams it was permissible for others than the owners to construct dikes and ditches on the land, if it were necessary in order to conduct the water to the place of use.[4] Under the later common law this right is also granted, and it is also granted under the laws of all of the respective States of this country. The right granted under the civil law and as it has been carried down to the modern European countries under their form of government is even greater than the right which is granted under the common law, or the statutory laws of this country. Less particularity is exercised in the distinction between private and public rights for which rights of way may be condemned. Then

1 D. 8, T. 3, Sec. 3, Par. 3; Ware, Sec. 292.

2 D. 8, T. 4, Sec. 11, Par. 1.

3 C. 3, T. 34, Secs. 2-4; Ware, Secs. 250-252.

4 D. 39, T. 3, Sec. 1, Par. 23; Ware, Roman Water Law, Sec. 78.

again, under the Constitution of the United States and our State constitutions, private property may not be taken even for a public use without just compensation and upon due process of law. Under the civil law the private rights of the individual were not guarded to the extent, in this respect, as are the rights of the individual in this country.[5]

§ 568. **Remedies.**—Not only was the substantive law governing waters fully covered, but also the subjects of remedies and procedure were treated in great detail by the laws of the Roman Emperors. There was an action for damages where property of one was injured by the waters used by another, or by the water breaking out of the reservoirs and canals,[1] or when the flow of the waters is interfered with so that it did not reach the rightful owner.[2] The measure of damages was to be fixed by an appraisement of the damages by the Judges upon the facts, that is, what damages shall appear to have been inflicted.[3] An action might also be brought for anticipated damages called *damni infecti*—threatened damages. This action was to compel the giving of security or a stipulation against anticipated damages in the future.[4] An action for an injunction, *quod vi*, against the pollution of water;[5] against the injury from water;[6] and in this action damages might also be assessed.[7]

There was also a special action which could be brought concerning surface water, and this action embodied almost all the other forms of actions. The action was called "*aquae pluviae arcendae,*" and originally only related to actions concerning rain water. But later the scope of the action was extended so as to include nearly all forms of actions, but still being confined to

5 For the right of eminent domain, see Chap. 55, Secs. 1059-1098.

1 C. 3, T. 35, Sec. 2; D. 43, T. 8, Sec. 5; Ware, Secs. 317, 322.

2 D. 8, T. 5, Sec. 10, Par. 1; Ware, Sec. 321.

3 D. 39, T. 3, Sec. 6, Par. 8; Ware, Sec. 360.

4 D. 8, T. 2, Sec. 18; D. 39, T. 3, Sec. 14, Pars. 2, 3; Ware, Secs. 311, 373, 374.

5 D. 43, T. 24, Sec. 11; Ware, Sec. 157; D. 39, T. 3, Sec. 3; Ware, Sec. 342.

6 D. 39, T. 3, Sec. 5; Ware, Sec. 351; D. 39, T. 3, Sec. 11, Pars. 6-14; Ware, Secs. 368-371.

7 D. 39, T. 3, Secs. 13, 14; Ware, Sec. 370; D. 39, T. 3, Sec. 14, Pars. 1-4; Ware, Secs. 373-375.

the subject of surface waters, it being decided that it did not include hot waters or spring waters, upon the ground that they were not surface waters.[8] This action might be brought against both the landlord and tenant, or against any other person causing the injury.[9] The scope of the action included injunction for the wrongful diversion of water so that it was prevented reaching the field of the one to whom it was rightfully entitled.[10] It also might be brought by an upper owner against a lower owner to permit the water to flow down through the lower field as it was wont.[11] It also included damages by surface water, when something was done by the hand of man which caused it to flow differently than it would flow by Nature; for instance, if it was made to flow with greater volume, or more rapidly, or more violently, or if restraint had caused it to overflow the land of another.[12] In the judgment in this form of action future damages were also considered.[13] The action also included the remedy by mandamus, as, for instance, to compel an upper land owner to clean a ditch running through his land to the land of a lower owner;[14] also for the removal of an obstruction to the natural flow of the water, such as dikes, or trees planted to restrain the water;[15] also, if one made trenches from which the water was liable to do damage, the Judge had the power to compel him to fill up the trenches; in all cases, if the defendant refused to obey, the Judge had the authority to sentence him to punishment.[16] In fact, the object of this action seems to have been to adjudicate all subjects appertaining to the flow of surface water and to provide a remedy for the same.

§ 569. **Roman laws—Concluding comparisons.**—A careful comparison of the water laws of the Roman Emperors, as set forth in

[8] D. 39, T. 3, Sec. 3; Ware, Sec. 342.

See, also, as to the nature of the action, D. 39, T. 3, Sec. 23, Par. 2, and D. 39, T. 3, Sec. 1, Pars. 1-6, 10, 11, 13-22; Ware, Secs. 79, 109-127.

[9] D. 39, T. 3, Sec. 22, Par. 2; Ware, Sec. 381.

[10] D. 39, T. 3, Sec. 1, Par. 13; Ware, Sec. 118.

[11] *Id.*

[12] D. 39, T. 3, Sec. 1, Pars. 1-6, 10-22; Ware, Secs. 109-127.

[13] D. 39, T. 3, Sec. 14, Par. 2.

[14] D. 39, T. 3, Sec. 2, Pars. 1-5; Ware, Secs. 330-334.

[15] D. 39, T. 3, Sec. 1, Par. 2; D. 39, T. 3, Sec. 7; Ware, Sec. 361.

[16] D. 39, T. 3, Sec. 24, Par. 2; Ware, Sec. 385.

the Pandects and Institutes of Justinian, a brief abstract of which has been set forth in the preceding sections,[1] with the civil law as adopted and modified by other later nations,[2] upon the same subject, will show that the laws of the Romans were much more perfect than the laws of the later nations. These Roman laws were adopted for a country which in many portions was hot and arid; and where, in order for the land to produce anywhere near up to its full capacity, irrigation of the soil was necessary. Prior to the codification of the Pandects these laws had been in the process of formation for over 1,000 years. They were therefore well settled and covered every point which was liable to arise upon the subject. The modern doctrine of appropriation of water for beneficial uses more nearly follows the civil law than does the common law, although there are many features of the common law which were taken directly from the laws of the Roman Emperors. For instance, the law upon the subject of riparian rights, with the exception of the right to have the stream run as it was wont by Nature and the use of the water, was, in the main, taken directly from the civil law.[3] The law governing surface waters also came from the civil law. As to the use of the water itself, especially by diverting the same from the natural streams and applying it to some beneficial purpose, as, for instance, irrigation, the common law and the civil law are diametrically opposed to each other. This difference can be explained by the fact that the physical features of the two countries were different as respecting the needs of water, especially for irrigation. In England, where the common law originated, water was not needed for irrigation. It was more of a question how to drain the water off the land than how to conduct it on the land. Hence the change in this respect. The modern law of appropriation more nearly follows the civil law than it does the common law, although the common law was adopted in this country, where the same was applicable.[4] Again, we say this was due to the physical condition of the country. The Western portion of this country being hot and arid, water is necessary to irrigate the soil in order, in many places, that they produce any crops at all. It also will be noticed that even England, in all of her Provinces where irrigation is nec-

1 See Secs. 553-568.
2 See Secs. 571-583.
3 See Secs. 450-551.
4 See Secs. 586-594.

essary, in order for the land to produce crops has also discarded the old common law theory that the water must be permitted to flow in its natural channel as it was wont to flow by Nature, and has adopted the rule of the civil law that the water may be diverted from the streams and applied to beneficial purposes. That this is true, see the water laws of India, Egypt, Australia, South Africa, and Canada. In the meantime, in the very country where the civil law originated, there is the most perfect system of laws governing waters, and especially as to that portion used for irrigation, of any civilized country on earth. From this just and equitable system of laws the people of that country have built up an irrigation system that has been the model and example of many countries, including our own.[5]

[5] See Chap. 8, Irrigation in Italy.
See, also, Irrigation in Italy, Meade; Irrigation Laws of Italy, Meade.

CHAPTER 30.

THE CIVIL LAW IN THE UNITED STATES.

§ 570. Scope of chapter.
§ 571. Brought by the Dutch to New York.
§ 572. Brought by the Spanish to the Southern States.
§ 573. By the Spanish—The Partidas.
§ 574. Brought by the French to Louisiana—Code of Domat.
§ 575. Brought by the French to Louisiana—Code Napoleon.
§ 576. Brought by the Mexicans to the Western States.
§ 577. The Mexican water laws—In general.
§ 578. The Mexican water laws—Acquisition of private rights.
§ 579. Mexican laws—The acquisition of private rights by way of Government concessions.
§ 580. Use of water not confined to riparian lands.
§ 581. The Mexican water laws—Pueblo rights—The plan of Pictic.
§ 582. The Mexican water laws—Pueblo rights—Right to extend the use of water to territory annexed to pueblos.
§ 583. The Mexican water laws—As affecting the rights to water on Mexican land grants.
§ 584. Conclusions.

§ 570. Scope of chapter.—In the preceding chapter we discussed the Roman civil law as its principles were applied to the subject of waters in the various countries of the Old World, and from the time of the ancient days of Rome to the days of the Roman Emperors. In the present chapter we will discuss how, through various sources, the civil law has been brought to this country and its principles are now embodied in many respects in the jurisprudence of many sections of the United States. It was brought by the Dutch to New York,[1] by the Spanish to many of the Southern States,[2] by the French to Louisiana, and by the Mexicans to that portion of the country which now includes the majority of the States of the arid West.[3] It is more with the latter section of the country with which we have to deal. And we will endeavor to show how the civil law as modified by the Spanish and Mexicans has left its impress upon the laws governing the waters in many portions of the West.

1 See Sec. 571.
2 See Secs. 572, 573.
3 See Secs. 574, 575, 576-584.

§ 571. Brought by the Dutch to New York.—The civil law upon the question of waters was brought to this country by the Dutch, when they settled New York, and its influence is still felt in that State. This State was one of the original States of the Union and was the first part of the United States that had been formerly governed by the civil law. However, as we in this work have very little to do with the question of waters in the State of New York, our discussion upon this subject will be very brief. The civil law of the Dutch was superseded by the common law, when the English acquired possession of New Amsterdam, as it was then called. The question relating to waters first arose in regard to the title of the beds of navigable nontidal streams, whether the beds of these streams were in the public, according to the American interpretation of the civil law in this respect,[1] or whether the common law prevailed and the title to the beds of these streams was in the riparian owners.[2] The question was finally settled that in the valleys of the Hudson and Mohawk Rivers the titles granted to the original Dutch settlers, as construed by the rules of the civil law then prevailing in the Netherlands, did not convey to the riparian owners the banks or beds of any navigable streams; and, upon the surrender of this territory by the Dutch, the guaranty assured by the English authorities to its inhabitants of the peaceable enjoyment of their possessions simply confirmed the right already possessed, and the beds of the navigable streams, never having been conveyed, became vested in the English Government as ungranted lands, and the State of New York, as a consequence of the Revolution, succeeded to the rights of the mother country.[3] It was afterward held that a riparian proprietor having a patent from the Dutch, and having

1 See Canal Appraisers v. People, 17 Wend. 571, Lockwood's Rev. Cas. 51; Angell on Tidewaters, Appx. 223.

But it seems that even the Dutch had trouble in deciding this question. Vinnius, one of the leading Dutch authorities, asserts that by the Roman law the title to the beds of navigable rivers was in the riparian owners, subject to the easement of the public of passage and of mooring on the banks. Vinnius, Justinian, Secs. 2, 4.

See, also, Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435.

2 For common law rule as to title to beds of non-navigable streams, see Secs. 537, 541, 542.

3 Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 398; People v. Canal App., 33 N. Y. 461; People v. Page, 39 App. Div. 110, 56 N. Y. Supp. 834.

afterward secured one also from the English King, owned the bed of a navigable nontidal stream. In other portions of New York, where the title was derived wholly from the English, it is held that the beds of the streams are in the riparian owners.[4]

§ 572. **Brought by the Spanish to the Southern States.**—The civil law was also brought to this country by the Spanish, who settled in that portion of the country which now forms some of the Southern States. Upon the subject of waters, however, it was brought in a somewhat modified and much inferior form from the law of the Roman Emperors, discussed in previous sections of this work.[1] The history of this modification is that in the year 1256 A. D. King Alfonso IX gave a royal order to certain eminent lawyers to compile and codify the laws of Spain. The order was complied with, and seven years later what are known as "The Seven Partidas" were published as an original work. They are, however, nothing but a poor compilation of the Pandects, that great codification of all the laws of the Romans, made under the authority and direction of the Emperor Justinian, the principal features of which, concerning waters, have been discussed in the previous chapter.[2] The Partidas, however, became the law in Spain, and continued in force down to and after the time of the discovery of America; and, of course, were brought to this country direct from Spain by the Spanish, who settled in Florida and other Southern States. By this means the civil law found its way to another portion of this country and left its influence there, which is still felt in many respects. We will now discuss the principal features of the Partidas governing waters.[3]

§ 573. **By the Spanish—The Partidas.**—The Partidas of the Spanish upon the subject of waters are very meager, and embody

4 See title to the beds of streams, Secs. 328-332.

See, also, Canal Fund Comrs. v. Kempshall, 26 Wend. 404.

1 See Secs. 552-569.

For the general law governing waters in other Spanish-American countries, including Guatemala, Chile, Colombia, Uruguay, see Walton's Civil Law in Spain and Spanish America, 1900, Secs. 407-425, 552-563, 586-588.

2 See Secs. 553-569.

3 See translation of the Partidas, by L. Moreau Liset and Henry Carleton, 1820; Ware, Roman Water Law, 1905.

only the most fundamental principles. They declare that things belonging, in common, to all the living creatures of the world are the air, rain, water, the sea and its shores; and every creature may use them according to his wants.[1] It will be noticed that this statement goes further than the Roman law, which was confined to *running water.* Also the last expression, "and every creature may use them," is added. This is considered, in the famous English case of Mason v. Hill, as an incorrect statement of the civil law upon the subject.[2] This is undoubtedly true as to the Roman law upon the subject as embodied in the Pandects, and Institutes of Justinian,[3] but it is also true that the above statement is correct as adopted by royal authority in the Partidas of Spain, and that the same was brought to America by the Spaniards. It is further declared that rivers, ports, and public roads belong to all men in common.[4] This rule was even carried to the extent that it was also held that strangers coming from foreign countries may make use of them in the same manner as the inhabitants. The banks of the rivers belonged to the owners of the estates touching upon the water, although, as under the Roman law, they might be made use of by those navigating the streams.[5]

The right of navigation was also protected, and any obstruc-

1 P. 3, T. 28, Sec. 3; Ware, Sec. 395.

Cocas comunes are defined as those "*qui sirven a los hombres y demas vivientes como el aire, el agua, llovediza, el mar y sus riberas.*" Febrero Novissimo, T. 1, Lib. 2, Sec. 1; Lux v. Haggin, 69 Cal. 316, 10 Pac. Rep. 674.

2 See Mason v. Hill, 5 Barn. & Adol. 1, 5 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692.

See, also, Liggins v. Inge, 7 Bing. 692, 5 Moore P. C. C. 712, 9 L. J. C. P. 202.

3 See, for the rule of the civil law, Secs. 288, 555.

4 P. 3, T. 28, Sec. 5; Ware, Sec. 396.

5 See Sec. 557.

That this portion of the Spanish law has its influence as far north as Missouri, see the case of O'Fallon v. Daggett, 4 Mo. 343, 29 Am. Dec. 640, where the Court held that a grant of land by a government must be interpreted by the law of the country in force at the time when it was made, and therefore a grant made by the King of Spain of land bordering on a river must be interpreted by the Spanish law then in force; and that banks of navigable rivers, granted to private owners, may, by the Spanish law, be used by navigators for the purpose of landing, fastening, and repairing vessels, but they can not obstruct the owner's enjoyment thereof beyond the reasonable limits of necessity.

tions to the same might be removed and destroyed.[6] The law of accretions was practically the same as the rule of the Roman law.[7] In no place is it provided how the water might be acquired and used for irrigation or for other purposes by individuals, but it was evidently so used, as it was provided that estates might serve one another by receiving aqueducts or other conduits for water to pass to mills, or to water gardens, or other estates of other persons. Provisions were also made as to how these conduits must be constructed, and for their care, in order that they do no damage to the dominant estate.[8] The law of surface waters was similar to that of the Roman law.[9] The erection of any new works by which damage was done to another's estate by the flow of water might be demolished.[10] If one by digging upon his own land destroyed a well or spring upon the land of his neighbor, the latter could not prevent him or recover damages unless it was done maliciously.[11] In the Partidas upon the subject of subterranean waters it was provided, as follows: "When a man has a fountain or well in his house, and his neighbor wishes to make one in his house likewise in order to procure water for his use, the latter may do it, and the former can not prevent him, notwithstanding the water in the first well or fountain may be thereby diminished, unless the person wishing to make the new well has no need of it and acts maliciously."[12]

§ 574. **Brought by the French to Louisiana—Code of Domat.**—The civil law in this country had another source than those named in the previous sections, and that was through the French in their settlement of Louisiana; and up to the time of the Louisiana Purchase it was the governing law, somewhat modified to fit French conditions, and of that great section of this country acquired from France. The civil law has left its impress in many ways in this

6 P. 3, T. 28, Secs. 6-8; Ware, Secs. 396-398.

7 See Sec. 559.

8 P. 3, T. 31, Sec. 4; Ware, Sec. 405.

9 See Sec. 560.

See, also, Chaps. 81, 83.

10 P. 3, T. 32, Sec. 17; Ware, Sec. 413.

11 P. 3, T. 32, Sec. 19; Ware, Sec. 415.

12 1 Moreau & Carlton's Translation of the 3 Partidas, T. 31.

See, also, for the Diversion of Subterranean Waters, Influenced Through Malice, Secs. 1201, 1202.

section of our country. The history of the civil law of France is somewhat similar to that of Spain. It, too, had its codifiers, who collected the Roman laws and changed them so as to fit the conditions of France. Domat in 1694 was the first to undertake this work.[1] In this work we find that rivers, the banks of rivers, and highways are things public, the use of which is common to all persons, according to the respective laws of the countries. And these kinds of things do not appertain to any particular persons, nor do they enter into commerce, but it is the sovereign that regulates them. This law, especially as to the use of the banks of rivers, is still followed in Louisiana. In that State the public have a right of way along the banks of all navigable waters and the right to use them for any purpose connected with navigation, and the riparian owner can make no use of the banks or shore which will interfere with this public right.[2] We also find in Domat that the right to the water of springs on the land of another was provided for.[3] Also that the water of streams might be conducted from one piece of ground to another in aqueducts either above or below ground.[4] Nonnavigable streams are declared to be the property of the particular persons whose lands they cross.[5] The law upon the subject of surface waters was declared to be that he who has the upper grounds can not change the course of the water, either by turning it some other way, or rendering it more rapid, or making any other changes in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do anything which may hinder his grounds from receiving the water which they ought to receive from the estates above.[6] The law of accretion is also provided

1 See Cushing's Edition of Domat, 1850.

2 See Domat, Cushing's Ed., 1 Vol. 150; Henderson v. New Orleans, 3 La. 563; McKeen v. Kurfast, 10 La. 523; Shepherd v. Third Municipality, 6 Rob. (La.) 349, 41 Am. Dec. 269; Pickles v. McLellan Dry Dock Co., 38 La. 412; Watson v. Turnbull, 34 La. 856; Gleisse v. Winter, 9 La. 149; Hanson v. Lafayette, 18 La. 295; Bourg v. Niles, 6 La. 77; De Ben v. Gerard, 4 La. 30; Sweeney v. Shakespeare, 42 La. 614, 7 So. Rep. 729, 21 Am. St. Rep. 400; New Orleans v. Magnon, 4 Mart. (La.) 3.

3 Domat, I Vol. 443; Ware, Sec. 5.

4 Domat, I Vol. 443; Ware, Sec. 5.

5 Domat, I Vol. 590; Ware, Sec. 5.

6 Domat, I Vol. 616; Ware, Sec. 5. See next section for rule under Code Napoleon.

See, also, Jordan v. Benwood, 42 W. Va. 312, 26 S. E. Rep. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

See, also, Louisiana Code, Art. 656;

for similar to that of the Roman law.[7] It will be noticed that under the French civil law there are no provisions for the irrigating of lands. However, at the time of Domat irrigation was practiced in France.[8]

§ 575. Brought by the French to Louisiana—Code Napoleon.—France later had another codification of its laws, under the Emperor Napoleon, and the civil law that was in force at the time of the Louisiana Purchase was this code. Although little is said in this code relative to the rights in fresh water rivers and streams, and the question of irrigation, there is more than there is in the Domat code.[1] It is provided that he whose property borders on or is intersected by running water may employ it in its passage for the watering of his property, but, on condition of restoring it at the boundaries of his field to its ordinary course. If a dispute arose between proprietors who used the water the Courts had the authority to render judgment settling such disputes, and might reconcile the *interest of agriculture* with respect to other property rights. In all cases particular and local regulations on the appropriation, course, and the use of waters must be observed.[2]

It will be noticed that the appropriation and diversion of water was left to local custom. It will be also noticed that no right was given under the law as abstracted above for the use of waters on lands other than those owned on the borders of the streams. This is also the construction of eminent French writers upon the passage that the rights granted were only to those whose estates

Little Rock & Ft. S. R. Co. v. Chapman, 39 Ark. 463, 43 Am. Rep. 280.

7 Domat, I Vol. 856; Ware, Sec. 5.

8 See Irrigation in France, Chap. 9, Sec. 161.

For the French civil law, as set forth in the Code Napoleon, see Sec. 575.

1 See Sec. 574.

2 Code Napoleon, Secs. 644, 645; Ware, Sec. 6.

See, also, the Louisiana Code, which has come down from the Code Napoleon, Art. 657, of which is as follows: "He whose estate borders on running water may use it as it runs for the purpose of watering his estate, or for other purposes. He through whose estate water runs, whether it originates there, or passes from the lands above, may make use of it while it runs over his lands; but he can not stop or give it another direction, and is bound to return it in its ordinary channel where it leaves his estate."

bordered or were contiguous to the flow of the stream.[3] In this respect the civil law does not seem substantially different from the later construction of the common law, where the water may be diverted from the natural channels and used for irrigation or for other useful purposes.[4] The law also provided for surface waters in making the lower lands servient to those above. The proprietor above, however, could do nothing where the natural servitude due by the estate below might be rendered more burdensome; neither could the proprietor below build any obstruction which would prevent the natural flow of the water.[5]

§ 576. **Brought by the Mexicans to the Western States.**—There is still another source by which the civil law was brought to this country and that was by the Mexicans, who brought it to that great area of territory including the whole of the Western portion of this country ceded to the United States by the Treaty of Guadalupe Hidalgo, the territory acquired by the Gadsden Purchase, and the State of Texas. By the civil law we do not mean the civil law in its purity as we find it in the Pandects and Institutes of Justinian,[1] but that law the basis of which was the civil law of the Roman Emperors, which had been modified by the Partidas and other laws of Spain to fit Spanish conditions,[2] and which had been still further modified by the Mexicans to fit Mexican conditions.[3]

The various laws enacted and promulgated, at different periods from the time of the Spanish settlements in America, for the government of the Indies and Mexico, in the form of *cédulas*,[4]

3 "Les droits d'usage mentionnés en l'art 644 né sont accordés qu'aux riverains, c'est-á-dire, aux propriétaires de fonds contigus ay cours d'eau. Droit Civile Francais, by Aubrey & Rau, 4th Ed., Vol. 3, p. 47.

4 For irrigation under the common law, see Secs. 498-525.

See, also, Yale on Mining Claims and Water Rights, p. 153.

5 Code Napoleon, Sec. 640.

See, also, Little Rock & Ft. Smith R. Co. v. Chapman, 39 Ark. 463, 43 Am. Rep. 280; Jordan v. Benwood, 42 W. Va. 312, 26 S. E. Rep. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

Louisiana Code, Arts. 656, 657.

1 See Secs. 553-569.

2 For the Partidas, see Sec. 573.

3 For Irrigation in Mexico, see Chap. 9, Sec. 175.

4 *Cedulas* were orders emanating from a superior tribunal, promulgated in the name and by the authority of the sovereign.

decretos,[5] *resoluciones*,[6] *reglamentos*,[7] *ordenamientos*, and *pragmátisas*,[8] were collected and codified under the order of Philip IV and published in 1861. These, with the Partidas,[9] then in force, governed the Spanish-American Colonies and Provinces down to the year 1787, when a Mexican Judge, Don Eusebio Ventura Beleña, published at the City of Mexico his work entitled, "*Recopilacion Sumaria de todos los Autos Acordados de la Real Audiencia y Sala del Crimen de esta Nueva España*," etc. This work, although not official, is constantly quoted and relied upon as unquestionable authority, and contains all the laws governing the Indies and Nueva España, or Mexico, in force at that date, not contained in the Partidas. The laws of Mexico alone, prior to 1787, may be found in the work of Beleña, and from that date to the year 1821, the date of the independence of Mexico, in the "*Collecion de los Decretos y Ordenes de las Cortes de España, que se reputan vigentes en la Republica de los Estados Mexicanos*," which was published by authority in the City of Mexico in 1829. From the time of the independence of Mexico down to the present time Mexico has been governed by its constitution and the laws enacted by the Mexican Congress for the government of that country. But the basis of the Mexican laws is the civil law of the Roman Emperors. This was modified by the Laws of Spain as set forth in the Partidas of 1256, and further modified by the subsequent laws of Spain down to the independence of Mexico, and then again modified by the constitution and laws of the Republic of Mexico down to the year 1848, the date of the Treaty of Guadalupe Hidalgo and the date that this great Western country was ceded to the United States.

Thus the civil law of the Roman Emperors, through the various sources named in this section and in preceding sections, became the fundamental law upon certain subjects regarding waters. And here it is opportune to say that it is not only the written laws of Mexico, as found in the books, which were transmitted to this country, but also the local customs in acquiring water rights and the uses of

5 *Decretos* were similar orders in ecclesiastical matters.

6 *Resoluciones* were opinions formed by some superior authority on matters referred to it for decision.

7 *Reglamentos* were written instructions given by competent authority.

8 These were orders emanating from the king.

9 For the Partidas, see Sec. 573.

water. We will now discuss the influence that the Mexican laws have had upon the laws now in force governing waters in all the territory of this country which formerly was a portion of Mexico.[10]

§ 577. The Mexican water laws—In general.—Under the civil law, as it was enforced by the Roman Emperors, the waters of non-navigable streams were subject to the common use of all who could legally gain access to them for all purposes to support life; this use also included the diversion of the waters from their natural channels for the purpose of irrigation.[1] The right of access was generally regarded to include only the right of those who owned lands touching upon the water, or those who, under the common law, are deemed riparian owners. The right to the use of the water was also confined to the riparian lands.[2] As was said in the case of Lux v. Haggin, relative to the right of access or to the rights granted by access under the Mexican law, "The waters of innavigable rivers, while they continued such, were for the common use of all who could legally gain access to them for purposes necessary to the support of life."[3] By the time the civil law had been sifted down through the various transformations down to the Government of Mexico, at the time of the Treaty of Guadalupe Hidalgo, the civil law rules upon the subject of waters had been modified in a number of ways. Under the Mexican law at this period the rivers and streams belonged to the nation, the use of the waters to the inhabitants in common. That is to say, as long as the waters were flowing in their natural channels they were "*publici juris*," "*res communes*," "*bonum vacans*," or the common property of all the inhabitants. In this state or condition no individual owned the *corpus* of the water.[4]

10 For the Mexican legislation from the date of independence to the present time, see the *Recopilacion de Leyes Mexicanas*, by Dublan and Lozano.

1 See Sec. 566.

2 See Sec. 558.

3 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

4 For the ownership of the water itself, see Secs. 288, 289, 555.

As to the meaning of "*publici juris*," etc., see Mason v. Hill, 5 Barn. & Adol. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; United States v. Conrad Inv. Co., 156 Fed. Rep. 123; affirmed, 161 Fed. Rep. 829, 88 C. C. A. 647; Liggins v. Inge, 7 Bing. 692, 5 Moore P. C. C. 712, 9 L. J. C. P. 202;

However, according to the Mexican law, the Mexican Government possesses the power of retaining the waters in their natural channels; or, by way of convenience, of conferring the exclusive use of a portion or the whole of the waters of a certain stream to individuals or corporations upon such terms and conditions and with such limitations as it saw fit to establish by law, and that, too, whether they were riparian owners or not. It was, however, the policy of the Mexican Government to foster and protect navigation, and the laws prohibited any diversion or obstruction of the waters of a river by riparian proprietors or others which would impair or interfere with the navigation of streams. Also in this respect the Mexican law followed the civil law and permitted the use of the banks of rivers by those who used the streams for their navigation.[5] In a number of respects, however, rights were acquired in Mexico which were a departure from and at variance with the ancient civil law rules. Among these was the exclusive right which might be acquired in the waters of a stream to irrigate nonriparian lands. Others were the rights acquired by pueblos, known under the Mexican law as "pueblo rights."[6]

The United States took this portion of the country from Mexico with these rights in full force, and they have ever afterward exercised a powerful influence upon the laws governing waters, especially in the Southwestern portion of our country. We will now take up these various rights which were acquired under the Mexican laws in that portion of the country afterward acquired by the United States and endeavor to trace their influence upon the modern laws in force in the Western part of this country, and especially as relating to the Arid Region Doctrine of appropriation of water for useful purposes.[7]

Williams v. Moreland, 2 Barn. & C. 910, 107 Eng. Reprint 620; Manning v. Wasdale, 5 Ad. & E. 758, 1 Nev. & P. 172, 2 H. & W. 431, 6 L. J. K. B. N. S. 59; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Cary v. Daniels, 8 Met. 466 (Mass.), 41 Am. Dec. 532; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Morton v. Solambo, 26 Cal. 533, 4 Morr. Min. Rep. 463.

5 For the use of banks at civil law, see Secs. 554, 557.

For the Right of Navigation in the United States, see Chap. 16, Secs. 341-357.

6 See, for Pueblo Rights, Secs. 581, 582.

7 For the Arid Region Doctrine of Appropriation, see Chaps. 31-40.

§ 578. The Mexican water laws—Acquisition of private rights.—We find that under the Mexican law an exclusive right to the use of a part or the whole of the waters of nonnavigable streams might, under certain circumstances, be legally acquired by individuals for their own private use. The Mexican law permitted diversion from the rivers and streams not navigable, and by those who were not riparian owners, and for the irrigation of lands not riparian. As was held by the Supreme Court of the United States in a recent decision,[1] in adopting the language of the Territorial Court: "Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that in the State of Sonora the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this Territory irrigation was practiced in the Santa Cruz Valley prior to the cession, and it is well known that the right of appropriation, without regard to the riparian character of the lands, was there in force probably from the time when the Spaniards first settled in the valley."[2] Again, the Spanish law in some respects followed the civil law of riparian rights, and it was provided that, "If water passes between estates of different owners, each one of these can use it for irrigation of his estate or for any other object, but not the whole of it, but only the part which corresponds to him, because both have equal rights and the one can consequently oppose use of it all by the other, or even a part considerably more than his own."[3]

In order to acquire private rights to the use of water, the individual so seeking the same must have been the owner of the land, not necessarily, however, upon the border of the stream. As was said in an Arizona case:[4] "Arizona, prior to its organization as a Territory, constituted a part of the Territory of New Mexico, but originally, and before the annexation under the Treaty of

1 Boquillas Land & Cattle Co. v. Curtis, 113 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493. For same below, see 11 Ariz. 128, 89 Pac. Rep. 504.

2 For irrigation laws of Arizona, see Part XIV.

For irrigation laws of New Mexico, see Part XIV.

See, also, Eschriche, Tit. "Acequia"; see, also, "Aguas" and "Rio"; De Baca v. Pueblo of Santo Domingo, 10 N. M. 38, 60 Pac. Rep. 73; Mexican Code, 1870, Arts. 1065, 1069, 1073; Mexican Code, 1884, Art. 966.

3 Hall's Mexican Law, Sec. 1391.

See, also, for the Code Napoleon upon the same subject, Sec. 575.

Guadalupe Hidalgo and the subsequent purchase, under the Gadsden Treaty, of that part of the Territory lying south of the Gila River, constituted a part of the State of Sonora. The first legislation by the Territory followed closely the old Spanish and Mexican laws upon the subject of water rights, as these had been incorporated in the statutes of New Mexico. Under these Mexican and Spanish laws, enforced in the State of Sonora, the *holding of land was the basis* for any valid appropriation or use of water from a public stream. The community ditch or 'public acequia,' as termed in the Howell Code, was the usual and ordinary means for the diversion of water. Each village or group of farmers constructed its own common ditch. The management and control of this ditch was regulated by law, and not by the agreements and contracts of the users of water under it. Such ditches were recognized and treated as public property, in much the same way that a public road under our laws is regarded. Hence every *land owner* under it, whether he used water or not, was required to contribute his quota of labor in the maintenance and preservation of the ditch."[5]

§ 579. **Mexican laws—The acquisition of private rights by way of Government concessions.**—Under the laws of Mexico the Government had a strong supervisory power. It had the power of retaining the waters in their natural channels, or by way of concessions permitting the exclusive use of the waters to individuals and corporations for the purpose of irrigation or other uses, upon such terms and conditions, and with such limitations as it saw fit to establish by law.[1] The Government had the power to concede private rights to the exclusive use of the waters of nonnavigable streams, even if the consequence should be the entire deprivation of the common use by the public in general. Those who appropriated and diverted the waters of a nonnavigable stream in accordance with the laws of Mexico, of course, obstructed to that extent the common use. No one had any exclusive right in or to the water until he had complied with the conditions which

4 Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 Pac. Rep. 332.

5 See, also, Hagerman Irrigation Co. v. McMurry, —— N. M. ——, 113 Pac. Rep. 823.

1 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

authorized him to appropriate it. Upon the other hand, every one who had complied with the conditions imposed by the Government, in the appropriation and use of the water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he merely acquired a conditional right. It has been held that where one had acquired the right to the exclusive use of a portion of the waters of a stream under the Mexican law, he can not be deprived of his right by the laws of a State or Territory of the United States after the cession of his lands to the United States.[2]

It seems that it was not the policy of the Mexican Government to make grants of these exclusive rights to waters. But a private right to the exclusive use of the waters could be acquired under the Mexican law by prescription, or on compliance with the established conditions. It will be noticed that this rule is similar to the rule of appropriation in vogue in the entire portion of this country acquired from Mexico. And, although neither in the civil law nor in the Mexican law is there any mention of an acquisition of an exclusive water right based upon priority of appropriation, both the Mexican law and the original civil law, before it was modified by the laws of Spain and Mexico, are followed by the modern law of appropriation for beneficial uses or purposes to a far greater extent than is the common law of England. The question of exclusive rights by a priority of appropriation forming its basis was an innovation in the law of waters adopted by the settlers of this Western country after the territory was acquired from Mexico; and, therefore, it might be termed a modification of the Mexican law as to the use of waters, incorporated into our own laws by the Treaty of Guadalupe Hidalgo.[3]

§ 580. **Use of water not confined to riparian lands.**—Under the Mexican laws the use of water from the natural streams was not confined to lands which were strictly riparian thereto, but this use was extended to other lands, subject to the regulation and control of the public authorities. In the case decided by the Supreme Court of the United States of Gutierres v. Albuquerque

2 Lux v. Haggin, *supra*. See, also, Mexican grants, Sec. 583.

3 For priority of appropriation, see Secs. 776-782.

Land & Irrigation Co.[1] it was conceded by both sides that, by the laws of Mexico in force when the Territory of New Mexico was ceded to the United States, the use of waters of both navigable and nonnavigable streams was not limited to riparian lands, but extended as well to lands which did not lie upon the banks of rivers and streams, and that such use was subject to be regulated and controlled by the public authorities. However, the diversion from the navigable streams was only permitted when it did not interfere with navigation.[2] And, in the recent case decided by the Supreme Court of New Mexico of Hagerman Irrigation Co. v. McMurry,[3] it was said: "Indeed, riparian ownership, as known to the common law, has never, it would seem, been recognized in New Mexico. As pointed out in Gutierres v. Albuquerque L. & I. Co.,[4] by the Mexican law in force here at the time the United States acquired the territory, the use of the water of the streams was not limited to riparian lands, but extended to others, subject to regulation and control by the public authorities. And the Mexican law, as well as the law of Indian tillers of the soil who preceded the Spaniards here, as it may be gathered from the ruins of their irrigation systems, did but recognize the law of things as they are, declaring that such must of necessity be the use of the waters of streams in this arid region."

§ 581. **The Mexican water laws—Pueblo rights—The plan of Pictic.**—Another feature of the Mexican laws upon the subject of waters, based upon the civil law as modified by Spanish and Mexican authorities, and which was transmitted to this country by the Treaty of Guadalupe Hidalgo, the acquisition of Texas, and the Gadsden Purchase, was the right of pueblos or agricultural villages. There are many cities and towns in the Southwestern portion of this country, especially in California, Texas, Arizona, and New Mexico, which were founded as Mexican pueblos. They originally differed from our municipalities in many respects. They had no charters, and were always subject to the control and su-

1 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming 10 N. M. 177, 61 Pac. Rep. 357.

2 See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

3 — N. M. —, 113 Pac. Rep. 823.

4 188 U. S. 545, 23 Sup. Ct. 338, 47 L. Ed. 588.

pervision of superior officers of the Mexican Government, and this control was complete and constant. These officers could suspend, restrict, or enlarge the powers of the officers of the pueblos. These pueblos also constituted instrumentalities for the government of the neighboring country; and in many instances their jurisdiction extended over a large area of territory.[1] No grants of land were ever made to the pueblos by the Mexican Government, but as soon as a pueblo was organized it became entitled to have certain lands set apart to it for its use and the use of its inhabitants. This right was held by the cities and towns of Spain for a long period before her conquests in America, and was recognized in her laws and ordinances for the government of her colonies here.[2]

At first the plan for the establishment of these pueblos was for the King of Spain, in each case by special ordinance, to provide for the foundation of the pueblo, and to set apart for the use of the pueblo and its inhabitants a certain area of land, and to prescribe in the ordinance the rights of the pueblo and its inhabitants to the use of the waters flowing to those lands. Later, upon the establishment of the pueblo of Pictic in the State of Sonora, sixteen square leagues of land were thus set apart for the use of the pueblo and its inhabitants, and it was further provided:

"7th. The neighbors and natives shall likewise enjoy the use of the woods, water, and other benefits from the royal and vacant lands lying outside of the tract assigned to the new town, jointly with the residents and natives of the immediate and adjoining towns; which favor and right shall continue until by His Majesty the same shall be granted or alienated; in which case regulations will be made according to the provisions for concessions in favor of new possessors or proprietors."

And, further, it was also at this time provided by the King, by general ordinance, that thereafterward the provisions and rights granted and the general plan followed in the foundation of the

1 Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Hart v. Burnett, 15 Cal. 530; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

2 Law of the Indies, in White, Recop., Vol. II, 44; Brownsville v. Cavazos, 100 U. S. 138, 25 L. Ed. 574; Stevenson v. Bennett, 35 Cal. 432; Townsend v. Greeley, 72 U. S. 5 Wall. 326, 18 L. Ed. 547; Grisar v. McDowell, 73 U. S. 6 Wall. 363, 18 L. Ed. 863.

pueblo of Pictic should be followed in the foundation of any new pueblos in the jurisdiction of the commanding general of the internal Provinces of the West, of which California, Arizona, New Mexico, and Texas constituted a part. This scheme for the foundation of the pueblos we will designate as the "Plan of Pictic."[3] Relative to its right to waters under the Mexican law a pueblo, as a quasi corporation, had the power to distribute to the common lands and to its inhabitants the waters of a non-navigable stream on which the pueblo was situated. And our Courts have determined that the cities and towns in this portion of the country, where they were the successors of these pueblos, held the pueblo lands and waters in trust for the inhabitants, and that the legislatures of the respective States and Territories, as successors to the Mexican Government, can control the execution of this trust.[4] And this pueblo right to the use of water, or the right of all the inhabitants in common within the jurisdiction of the pueblo, was superior to the individual rights of appropriators, and also superior to the rights of the riparian proprietors, through whose fields the stream ran.[5]

[3] For a discussion as to the foundation of the pueblo of Nuestra Señora Reina de Los Angeles, in 1781, which pueblo embraces four square leagues of land included in and is now a part of the present City of Los Angeles, and where it was claimed before the commissioners under the Act of Congress of March 3, 1851 (9 Stat. L. 631, Chap. 41), that the Plan of Pictic should have been followed as to the area granted, but where the commissioners allowed but four square leagues, see Los Angeles Milling Co. v. Los Angeles, 217 U. S. 217, 514 L. Ed. 736, 30 Sup. Ct. Rep. 452; Dis. writ of error to the Supreme Court of California, 152 Cal. 645, 93 Pac. Rep. 869; The Pueblo Case, 4 Sawy. 563; Feliz v. Los Angeles, 58 Cal. 73; Elms v. Los Angeles, 58 Cal. 80.

[4] Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Los Angeles v. Los Angeles F. & M. Co., 152 Cal. 645, 93 Pac. Rep. 869; Dis. 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

[5] See, also, Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; Feliz v. Los Angeles, 58 Cal. 73; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395; Devine v. Los Angeles, 202 U. S. 313, 50 L. Ed. 1046, 26 Sup. Ct. Rep. 652; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; 63 L. R. A. 471 (writ of error) dismissed, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. Ed. 487.

§ 582. The Mexican water laws—Pueblo rights—Right to extend the use of water to territory annexed to pueblos.—The pueblo rights described above were not confined strictly to the village or town included within any particular pueblo, but as stated in the seventh article of the "Plan of Pictic," the neighbors and natives shall likewise enjoy the use of the waters from the royal and vacant lands lying outside of the tract assigned to the new town jointly with the residents and natives of the immediate and adjoining towns.[1] And the government and control of the waters used by those on the outside was to be the same as the control of those waters used inside of the towns. It is therefore held by the Supreme Court of California in construing these pueblo rights that such a pueblo right to the water of a stream includes the right to take all the water that is reasonably necessary to give an ample supply to the use of its inhabitants and for all *municipal* purposes for which the city may require water; that this right is measured by the necessity, and if the needs increase in the future the right will expand to include them; and this, although the population of the city is not confined to the original pueblo limits.[2] In the late case of the City of Los Angeles v. Hunter,[3] it was said: "The right to use the water upon annexed territory not within the limits of the original pueblo is distinctly declared in the City of Los Angeles v. Pomeroy."[4]

Under the California rule of the extension of pueblo rights to lands other than those within the original pueblo limits, there is a question which might arise. Can a city or municipality, which has succeeded to the original Mexican pueblo rights to the use of water, so extend the area upon which the water may be used that such city or municipality may engage in the general irrigation business for the irrigation of lands far from the town boundaries? In answer to this we will say that there is nothing in the California decisions which permits the extension of the area beyond the limits of the *town or city* where the same has been extended beyond the original pueblo limits. And, although there seems to be no direct decision upon the question, upon principle, we can not see how under the "Plan of Pictic" the limit of the land irri-

1 See Sec. 581.

2 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

3 156 Cal. 603, 105 Pac. Rep. 755.

4 See *supra*.

gated by the pueblo can be extended beyond the town limits, where the town exceeds in limit the original pueblo. The right to the use of water under the "Plan of Pictic" was that the neighbors and natives should likewise enjoy the same use of the water as the inhabitants of the town, but the lands of both were limited to those of the pueblo itself. And to hold that a city or town by virtue of its being a successor to original Mexican pueblo rights could go into the irrigation business for the irrigation of lands on the outside of the original boundaries of the pueblo where such lands were not included within the boundaries of the town, as extended, we find no authorities. It is, therefore, our opinion that this can not be done.

§ 583. **The Mexican water laws—As affecting the rights to water on Mexican land grants.**—Prior to the cessions of the territory formerly owned by Mexico to the United States a large number of grants of land were made to individuals by the Mexican Government. In the treaty with Mexico it was provided to the effect that such actual and *bona fide* grantees should be protected in their titles to these lands, and that their right of ownership should be respected by the United States Government after the territory had passed to this Government. Following the treaty with Mexico Acts of Congress were passed to ascertain and settle the private land grant claims. Legal proceedings were had under these Acts of Congress,[1] and the titles to the land included in these *bona fide* grants confirmed in the respective grantees or their successors in interest. But the treaty with Mexico, while thus securing the title and ownership of the tracts of land which had been granted by Mexico, did not attempt to provide that this ownership should be governed and controlled by the laws of Mexico, nor by any other laws than by the laws of the United States, and of the States and Territories formed out of the domain acquired from Mexico including these land grants.[2] So, also, as to the water rights

1 See Act of Congress of March 3, 1851, 9 Stat. L. 631.

In the case of Los Angeles v. Los Angeles Farm & M. Co., 152 Cal. 645, 93 Pac. Rep. 869, the Court held that under the above Act it did not contemplate the presentation of claims to anything but "land"; the claims to water were not included.

2 Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945; Woodruff v. North Bloomfield etc. Co., 9 Sawy. 441, 18

on these grants. The riparian rights of a private proprietor under a Mexican grant duly confirmed are exactly the same, and governed by the same laws, as those held and enjoyed by any other private riparian proprietor within the same State. It is the title which governs and not the source of title. Therefore in those jurisdictions which uphold the common law theories of riparian rights, as, for instance, the State of California,[3] these rights attach to all lands whose title is deraigned from Mexican grants, as well as to those lands which were granted by the United States. Upon this question there is no controversy.[4] However, the question whether or not such water rights would attach as riparian rights to the lands included with our Mexican land grants is left for the respective States within which such grants lie to decide. As was held by the Supreme Court of the United States,[5] riparian rights asserted to have been secured by the treaty of Guadalupe Hidalgo, between the United States and Mexico, are not rights of Federal origin which, when denied, lay the basis for a writ of error from the Federal Supreme Court to a State Court, and, therefore, the case was dismissed for want of jurisdiction.

There is also no question but that an appropriation of water under the Mexican laws by the diversion of the waters of a stream and used for a beneficial purpose should be upheld after the cession to the United States; provided, of course, that there was a use of all the water for a beneficial purpose continued after that date.

Fed. Rep. 753, 8 Sawy. 628, 16 Fed. Rep. 25; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

The Mexican Government on February 5, 1824, made a large number of grants of water to various grantees. On a subsequent day it made grants of water for other land, using the same language. Few grants were subsequently made. Each grant granted to the grantees "one day of water with a corresponding labor of land." The original grantees of both lands used the water for irrigating their respective lands concurrently. It was held by the Court in a recent Texas case that the grants did not give any superior right to any of the grantees, but distributed to each water rights in common. San Juan Ditch Co. v. Cassin, —— Tex. Civ. App. ——, 141 S. W. Rep. 815.

3 See Sec. 507.

4 See Los Angeles v. Baldwin, 53 Cal. 469; Pope v. Kinman, 54 Cal. 3; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

5 Los Angeles Farming and Milling Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; for the same case below, see 152 Cal. 645, 93 Pac. Rep. 869, 1135.

And, therefore, where these Mexican land grants lie within jurisdictions which entirely reject the common law rule of riparian rights, as is the case in Arizona and New Mexico, another question presents itself. Upon examination of the Mexican law of waters, there can be no question but that there were certain rights which might be acquired by virtue of the ownership of the land along the stream. These rights therefore were somewhat analogous to the common law of riparian rights. It is denied that this was the case in the State of Sonora, and is held that the only personal right which could be acquired was by appropriation, and which might be acquired by concessions from the Government.[6] But as we understand the law of waters to have been under the Mexican law, the use of water of non-navigable streams was under the control of the Mexican Government, and as we have stated in a previous section it had the power of retaining the waters in their natural channels for the sole use of riparian owners; or, by way of concessions, the right of conferring the exclusive use of a portion or the whole of the waters of such a stream to individuals or corporations, for use on non-riparian lands.[7] Now this being true, the change of

6 "Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that in the State of Sonora the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this Territory irrigation was practiced in the Santa Cruz Valley prior to the cession, and it is well known the right of appropriation without regard to the riparian character of the lands was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law, as modified by custom. To concede, therefore, to the owner of the grant in question riparian rights, would be in effect to concede to it what his predecessors in interest do not appear to have possessed prior to the cession under the Gadsden Purchase." Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504. Of this statement it was said by the Supreme Court of the United States on appeal: "This is the statement of the Territorial Court, and we know nothing to control it. It is not met by arguments as to the general character of the Mexican law, or by inference from the situation and nature of the grant." The same doctrine seems to be implied by the Howell Code, Chap. 55, Sec. 25; 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493.

See the case of Los Angeles v. Los Angeles Farming Co., 152 Cal. 645, 93 Pac. Rep. 869; dismissed, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452, where the whole claim of the defendant was based upon the riparian rights of a Spanish-Mexican land grant.

7 See Sec. 579.

sovereignty operated merely to transfer from Mexico to the Government of the United States and the States and Territories where these lands lie. And, as the local laws upon the subject of waters within their respective jurisdictions are left entirely to the States and Territories, the Territories might, therefore, confer common law rights upon the riparian owner; or, upon the other hand, it might establish the right to the use of the waters by prior appropriation and diversion for the irrigation of lands either riparian or non-riparian, or for other beneficial uses not connected with the common law rules of riparian rights. This latter the legislatures of the Territories of Arizona and New Mexico have seen fit to do; in other words, they have chosen to deny to riparian owners exclusive rights, and have conferred upon others rights to the use of the waters of these streams, without reference to the situation of the lands owned by the latter with respect to the streams from which such waters may be taken. Hence it follows that in these Territories riparian rights are not recognized as attaching to Mexican land grants made before the treaty of Guadalupe Hidalgo or the Gadsden Purchase.[8]

[8] Boquillas Land & C. Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504; affirmed, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493, where the Territorial Court upon this subject said: "If, under the Mexican law, the use of waters of innavigable streams was under legislative control, the change of sovereignty operated merely to transfer this right of control from Mexico to the Government of the United States. This being so, it must follow that the owner of the land grant, with the change of sovereignty, stood in exactly the same position as before, with relation to the right of the sovereignty to grant the exclusive use of waters of any innavigable stream, flowing through or adjoining the grant, to whomsoever it might choose. The United States, or its delegated authority, the Territory of Arizona, might, therefore, confer common law rights upon the riparian owner, or might establish the right of prior appropriation, and grant this right to others than riparian owners. As we have seen, the Legislatures of New Mexico and of Arizona, under their delegated authority from the sovereignty of the United States, to whom, under the doctrine stated in Lux v. Haggin, passed the right of control over innavigable waters by the treaty of cession from Mexico, have chosen to deny to riparian owners exclusive rights and to confer upon others rights to the use of such water without reference to the situation of the lands owned by the latter with respect to the streams from which such water may be taken."

See, also, Albuquerque and & Irr. Co. v. Gutierres, 10 N. M. 177, 61 Pac. Rep. 357; affirmed in 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

See, also, Trambley v. Luterman, 6

§ 584. **Conclusions.**—In this part we have endeavored to trace the authority for the system of appropriation of the waters of natural streams for irrigation and other beneficial purposes, as it is practiced in this Western country, back further than the origin of the common law of England, to the civil law of the Roman Emperors. We have shown how the civil law upon this subject has come down through the early Dutch, French, and Spanish settlers to different portions of this country. We have also shown how the civil law came to this country through the Spanish who settled in Mexico, by means of the acquisition by this country of the State of Texas, the treaty of Guadalupe Hidalgo, and the Gadsden Purchase. From the previous sections it is evident that the laws governing private rights in waters differed very little under Mexican rule at the time when the Southwest was ceded to the United States from those in force in California at the present time. The law of appropriation for beneficial purposes was known and recognized as authority, and the same is also true respecting the law of riparian rights. There were in Mexico prior to the cession of California the two systems separate and distinct that we find now under the law of that State. The Mexican law as it existed at the time of the cession of California recognized an inherent and vested right in riparian owners to the use of the waters of a stream; and also recognized a vested right in those who had actually appropriated the waters in the manner and under the conditions prescribed by the laws of that country. When the territory of the Southwest was transferred to the United States by the treaty of Guadalupe Hidalgo in 1848, and became subject to the laws of this Government, and finally to the laws of the respective States and Territories organized out of the same, the existing laws regarding private interests in and to the waters of streams and lakes were not found to be materially in conflict with the laws of the United States, or those finally adopted by the several States and Territories. So, in the change from the Mexican laws to those of the United States few obstacles were thrown in the way as regards water and other property rights of persons who were grantees of the Mexican Government to certain lands included within this tract, prior to the time of the treaty, and who claimed rights in the waters of flowing

N. M. 16, 27 Pac. Rep. 313; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Barnett v. Barnett, 9 N. M. 205, 50 Pac. Rep. 337.

streams by virtue of their riparian ownership; also the rights of those persons at the time of the acquisition of the territory including their lands who were actually appropriating the waters of the streams and rivers by diverting them from their natural channels, and applying them to some beneficial purpose. The law governing waters in Mexico was always subject to Government control, and by the transfer of the title of these lands to this country, through which these waters flow, there was simply a change of sovereign and not a change of right. We have also shown that it is left entirely to the States and Territories formed out of the lands acquired from Mexico to adopt whatever rule as to waters they may see fit, whether it be the common law of riparian rights, the Western theory of water rights based only upon appropriation and diversion from the natural channels and the water applied to some beneficial use or purpose, or whether it be a combination of both rules as is the case in California and some of the other States. Under the civil law and as modified by the Spanish and Mexicans, the exclusive right to the use of waters for the irrigation of lands other than riparian, was entirely under the Government control and granted by way of concessions to the individuals applying therefor. The question of priority of appropriation, by simply going to a stream and taking the water therefrom prior to any one else doing the same thing, did not enter into their laws. This feature of the Western rule of appropriation of waters was left to the miners and settlers in the Western portion of this country, after its acquisition from Mexico. This subject will be discussed in future portions of this work.[1]

1 See Secs. 585-756.

PART VIII.

THE APPROPRIATION OF WATERS FOR BENEFICIAL USES.

CHAPTER 31.

ARID REGION DOCTRINE OF APPROPRIATION.

§ 585. Review—Scope of present chapter.
§ 586. What it is—Judge Hawley's definition and description.
§ 587. What it is—Definition—In derogation of the common law.
§ 588. Physical cause of doctrine of appropriation.
§ 589. Physical cause of doctrine—Common law deemed inapplicable.
§ 590. Common law adopted where inapplicable—General rule.
§ 591. Common law deemed inapplicable—Cause of the change of rule in Nevada.
§ 592. Common law deemed inapplicable—The present situation in California.
§ 593. The question as to what law governs waters within the respective States is left entirely to the States to decide.
§ 594. The doctrine of appropriation, as against riparian rights—Practical workings of the two systems as to irrigation.

§ 585. Review—Scope of present chapter.—In the preceding chapters of our work we have seen that under the common law of riparian rights, as the same is strictly construed by both the English and American authorities, the rights of the riparian proprietors in the use of the waters of the natural streams or lakes upon which their lands touched were the only private rights in and to those waters recognized under that law.[1] This right was created by Nature, *ex jure naturae,* and was an incident to their ownership of the land bordering upon the water, and treated as a part of the same. Also that these rights of the riparian proprietor existed whether they chose to exercise them or not, to the ex-

1 For common law theories of riparian rights, see Chaps. 21-28, Secs. 450-551. For the rights of the public in waters, see Chaps. 15-18, Secs. 324-389.

clusion of all others desiring to exercise them; that these rights did not depend upon occupancy, and were not limited by the prior occupation of others not amounting to an adverse enjoyment by prescription, but that the rights of all of the proprietors upon a stream were equal, and each one entitled to a reasonable use of the stream, provided that he did not injure any of his neighbor's rights in and to the same, and that it was wholly immaterial as to who was first in time. We have also seen that one of the fundamental principles of the common law was that the streams must be permitted to flow in their natural channels as they were wont to flow by Nature, without any material diminution in quantity or alteration in quality. As Chancellor Kent said: "*Aqua currit et debit currere ut currere solebat* is the language of the law." Hence the use of the water must necessarily, under these restrictions, be very limited, as compared with the lawful uses of the present day rules. We have also seen how this strict rule of the common law as to the use of the water, in eleven of the States of this country, has been enlarged and extended so as to include the diversion of the water from its natural streams and its use for the irrigation of land, and that, too, where the greater portion of the water was consumed.[2]

We have also discussed in another chapter that portion of the civil law of the Roman Emperors upon the subject of waters, which has been handed down to us in a modified form by the Spaniards and Mexicans. Under this system of laws the water of the natural streams was considered *publici juris*, or as belonging to the public; the use of the water could be made by individuals, but it was always under strong governmental control.[3] This influence of the civil law is still felt in the Western States, in spite of the fact that in all of these States, primarily at least, the common law of England was adopted as their system of jurisprudence, which also included its law of waters. But, ever since that section of this country located west of the 100th meridian, and known as the "Arid Region," first began to be peopled by the Anglo-Saxon race, following at first mining as an occupation, and afterward with increasing numbers settling down to agricultural and mechanical industries, a great change from the old common law theories

2 See for irrigation as a riparian right, Chap. 26, Secs. 498-525.

3 For civil law governing waters, see Chaps. 29, 30, Secs. 552-584.

has been gradually taking place, until today in some of the States formed out of the "Arid Region" the common law theories upon the subject of waters are absolutely abolished, in others ignored, and in all modified, particularly with regard to the uses of the waters of inland streams and lakes. The present chapter will be devoted to showing how this change was brought about, and the application of the new doctrines to the lands and waters upon the public domain, or that part owned by the United States.

In this part we will discuss the appropriation of water for beneficial uses and purposes as the same is known under the Arid Region Doctrine of appropriation.

In the present chapter we will discuss the Arid Region Doctrine of appropriation, what it is, and how, because of the inapplicability of the common law principles of riparian rights to physical conditions of many portions of our arid West, this doctrine was adopted.

§ 586. What it is—Judge Hawley's definition and description.—No man better understands the cause of the adoption of the Arid Region doctrine of appropriation and its principles than did Judge Hawley, first Chief Justice of the Supreme Court of Nevada and afterward Federal Judge for the District of the State of Nevada. The judicial life of Judge Hawley practically coincides with the formative period of the Arid Region doctrine of appropriation. And there were tried before him probably as many important cases, involving all phases of this subject, as were tried before any other Judge of the country. In three important Federal cases—of Hewitt v. Story,[1] Union Mill & Mining Co. v. Dangberg,[2] and Rodgers v. Pitt,[3] wherein opinions were rendered by Judge Hawley, he used practically the same language in defining and describing the Arid Region doctrine of appropriation. We can do no better than to quote certain passages from these three opinions. He said:

"We consider the law to be well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of

1 64 Fed. 510, 30 L. R. A. 265, 12 C. C. A. 250, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101.

2 81 Fed. Rep. 73.

3 89 Fed. Rep. 420, 129 Fed. Rep. 932.

water that is necessary to irrigate his land by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made. He would be entitled, not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the Courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that

the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator. These general principles are of universal application throughout the States and Territories of the Pacific Coast. They have, in one form or another, been declared, upheld, and maintained by the Courts by a uniform current of decisions in California ever since the decision in Eddy v. Simpson."[4]

A better description of the Arid Region doctrine of appropriation can not be given than is embodied in the above statement.

§ 587. What it is—Definition—In derogation of the common law.—The Arid Region Doctrine of appropriation may be defined

[4] 3 Cal. 249, 58 Am. Dec. 408; also citing Kelly v. Natoma Water Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Ortman v. Dixon, 13 Cal. 33; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Nevada County & S. Canal Co. v. Kidd, 37 Cal. 282; Mitchell v. Amador Canal & Min. Co., 75 Cal. 483, 17 Pac. Rep. 246; Peregoy v. McKissick, 79 Cal. 572, 21 Pac. Rep. 967; Cal. Civ. Code, Secs. 1410 *et seq.*

The same rules prevail in Nevada: Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Ophir Silver Min. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213.

In Colorado: Wheeler v. Northern Colorado Irrigation Co., 10 Colo. 583, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Platte Water Co. v. Northern Colorado Irrigation Co., 12 Colo. 525, 21 Pac. Rep. 711; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Fort Morgan Land & C. Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

In Idaho: Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250.

See, also, Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall 670, 22 L. Ed. 452; Broder v. Natoma Water & Min. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621; Gould, Waters, Secs. 228 *et seq.*

as that doctrine or rule of law which has grown up in this Western portion of our country, governing the use of the water of the natural streams and other bodies, by its appropriation for any useful or beneficial purpose, based upon the physical necessities of the case; and, whereby for the purpose of applying the water to some beneficial use, the water must be diverted from its natural channels, and, in contradistinction to the strict construction of the common law of riparian rights, the place of use may be on either riparian or nonriparian lands, and the right based upon priority.[1] In fact, this doctrine is in derogation of the common law, and as said in an early California case, it is "without judicial or legislative precedent, either in our own country or in that from which we have borrowed our jurisprudence."[2] In the early history of the doctrine, however, attempts were made in some of the California decisions to reconcile the doctrine of appropriation with the common law. But, for the reason that the very fundamental principles of the two doctrines are opposed to each other, this attempt at reconciliation did not get very far.[3]

1 For the definition of the appropriation of water, see Sec. 707.

That the Doctrine of Appropriation is in derogation of the common law, see Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175.

It is "an innovation upon the old rules of law upon the subject." Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604.

"The doctrine of 'appropriation,' so called, is not the doctrine of the common law." Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674.

2 Bear River Water Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.

See, also, Hoffman v. Stone, 7 Cal. 49, 4 Morr. Min. Rep. 520; Pomeroy on Riparian Rights, Sec. 20; Yale on Mining Claims and Water Rights, pp. 129, 137.

3 It was said by Chief Justice Sanderson in the case of Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597: "Moreover, the entire charge impliedly if not expressly proceeds upon and sanctions the idea that as between ditch owners and miners using the water of a stream in the mineral regions of the State for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior right of the other. This is due in great measure doubtless to the *notion*, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a

About the most that can be said of the two doctrines is that they may both exist in the same State at the same time;[4] but even then they are continually clashing.

§ 588. **Physical cause of doctrine of appropriation.**—There were manifest equities which demanded that the common law, hastily adopted by the Western States and Territories from a country so dissimilar in climate and other physical conditions to those of the arid region, should not be made applicable when it imperiled the most vital interests of some of the richest agricultural districts of the world. The rain does not fall alike over all the earth, and especially in mountainous countries. In some sections of the United States included in the arid West, the annual rainfall amounts to thirty or forty inches, while in other sections it amounts to only from six to ten inches per annum. This is due to a certain extent to the topographical features of the country, the proximity to the sea, and to other causes which have their influence in special localities.[1] The mighty peaks of the Rocky Mountains tap the rain clouds and drain them of their moisture before they reach the space over the valleys, which are thus, in their natural condition, left dry and arid. This is especially true during the summer months or during the cropping season, when the water is needed the most as an aid to agriculture. Also during the winter season, beginning with early fall, great masses of snow are piled up in the mountains, where, if the mountains are covered with timber and undergrowth, the snow remains in these reservoirs of Nature until the summer's sun causes it to gradually melt and run down into the canyon streams, then out from the mountains toward the sea, through the vast extent of dry valleys, where perhaps not a drop of moisture has fallen for months.[2] Thus it happens that when the water reaches the valleys in the arid region on its way

just and fair determination of controversies touching such rights. *This notion is without any substantial foundation.*"

See, also, Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175.

4 Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

1 For influence of forests upon the rainfall, see Chap. 2, Secs. 47-57.

See, also, Secs. 5, 6.

2 For the influence of forests in storing water, see Chap. 2, Secs. 47-57.

to the ocean, instead of being precipitated nearly equally upon the earth, as is the case in what is known as the "humid region" or "rain belt," it is gathered in natural channels, which only touch a very small proportion of the land within the arid region. Under a strict construction of the rules of the common law, as we have seen in a previous portion of this work, a very few riparian owners would control all of the water in that part of the country to the exclusion of all others. Nature clearly designed, in spite of the facts set forth above as to the inequality of precipitation, that the rain should still be permitted to shed its blessings on all, and that a nonriparian land owner should not be prevented from securing his just proportion of the water, simply because of the topographical features of the country thereabouts, which are entirely beyond his control. The water which he should receive drains from its storage source in the mountains into streams which flow only by his neighbor's land, who, as an incident of his ownership of the soil adjoining the stream, controls all of its waters, although the same may be far in excess of what he and all other riparian owners may need. And, by a strict construction of the common law, this surplus water must not be diverted from its natural channel, but must be permitted to flow, without material diminution in quantity, on to the sea. And even under the Western American doctrine of riparian rights, as modified and expanded,[3] to the extent that water may be used for irrigation, it is the unanimous consensus of authority that the water can not be diverted to irrigate nonriparian lands.[4]

§ 589. Physical cause of doctrine—Common law deemed inapplicable.—The common law of riparian rights had its origin in Great Britain, under conditions of climate peculiar to its position, in the path of the great Gulf Stream, in an atmosphere laden with moisture, which is precipitated with lavish profusion upon that favored spot. The law gave to the riparian owners, as an incident to their ownership of the soil adjoining the water, the right to the natural flow of the stream without material alteration or diminution. One might use the water for any purpose, provided

[3] For common law riparian rights as expanded, see Secs. 511, 512.

[4] For riparian right of irrigation must be confined to riparian lands, see Secs. 516, 517.

that he in turn restored the same to its natural course, so that his riparian neighbor below might receive the same unaltered in quality and undiminished in quantity. He was not permitted to drain his land so as to increase the quantity of water in the stream to the injury of his neighbors below, nor dam the water back upon the lands to the injury of those above him; nor could there be, according to that law, any diversion or use of the water by one owner that would work material detriment to any other owner above or below him. Owing to the position of the country and its climatic influences the great problem there to be solved was how best to drain the water off the land and get rid of it, not how to save it in order to conduct it upon the land in aid of the husbandman.[1] This latter has been the great problem in the arid portions of the earth, from the earliest days,[2] and this is especially true in that part of this country west of the 100th meridian known as the arid and semi-arid regions. So the fundamental cause of the change in this portion of our country, from the common law rules of riparian rights, as the same are in force in England and in the Eastern States of the Union, to the Arid Region doctrine of appropriation, in all of our Western States where water is used for irrigation, can be attributed principally to the difference in the physical conditions of the arid region from that of England and the East as regards the equal, or rather, the unequal distribution of moisture. Out of this unequal distribution of rainfall grew the necessity of the early California system of the miners, relative to water rights, which system was based upon the principle of free land, to which discovery, appropriation, and use gave title.[3]

1 For common law theories of riparian rights, see Secs. 450-551.

2 For irrigation in the ancient countries, see Chap. 3, Secs. 63-87.

3 Reno Smelting & R. Works v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 415, 1 Morr. Min. Rep. 583, in which Mr. Justice Field said: "As respects the use of water for mining purposes, the doctrines of the common law, declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of the miners, and inadequate to their protection."

See, also, Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Broder v. Natoma W. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Osgood v. Eldorado W. & M. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

In the case of Clough v. Wing,[4] decided by the Supreme Court of Arizona, which State is within the very heart of the arid region, after referring to several cases upholding the Arid Region doctrine as against that of the common law, the Court said: "These cases state a doctrine very different from the common law. . . . That law gave to the servient and dominant heritage the right to the natural flow of the water. The riparian owner might use the water in its course to turn his waterwheel or for other purposes, but was required to restore the same to its natural course. While he might not hinder the flow so as to injure those below him, he might depasture his domestic animals so as to drink therefrom, and take water for domestic uses. He might not drain his land so as to increase the flood, to injure those below, or dam the water back upon the lands above him. The problem there to be solved was how best to drain the water off the land and get rid of it, not how to save it, to be conducted on the land in the aid of the husbandman. The latter has been the problem in the arid portions of the earth. From 'time whereof the memory of man runneth not to the contrary' the rights of riparian owners were settled in the common law."[5] Again, in a later Arizona case, of Boquillas Land & Cattle Co. v. Curtis,[6] Mr. Justice Nave, in concurring in the main opinion, said: "Without

[4] 2 Ariz. 371, 17 Pac. Rep. 453.

[5] Citing 1 Inst. 4; 2 Bla. Comm. 18; Angell on Water Courses 8; 3 Kent Comm. 361; Elliott v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Wright v. Howard, 1 Sim. & Stu. 190; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Weiss v. Steel Co., 13 Ore. 496, 11 Pac. Rep. 255; Hill v. Lenormand, 2 Ariz. 354, 16 Pac. Rep. 266; Ware v. Allen, 140 Mass. 573, 5 N. E. Rep. 629; Mason v. Cotton, 2 McCreary 82, 4 Fed. Rep. 792; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Pyle v. Richards, 17 Neb. 180, 22 N. W. Rep. 370; Van Orsdal v. R. Co., 56 Iowa 490, 9 N. W. Rep. 379; Union Pacific R. Co. v. Dyche, 31 Kan. 120, 1 Pac. Rep. 243; Red River Co. v. Wright, 30 Minn. 249, 15 N. W. Rep. 167, 44 Am. Rep. 194; Creighton v. Kaweah etc. Irrigation Co., 67 Cal. 221, 7 Pac. Rep. 658; Moore v. Clear Lake Co., 5 Pac. Rep. 494; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Garwood v. N. Y. C. & H. R. R. Co., 83 N. Y. 400, 38 Am. Rep. 452; Pennsylvania R. Co. v. Miller, 3 Atl. Rep. 780; Totel v. Bonnefoy, 123 Ill. 653, 14 N. E. Rep. 687, 5 Am. St. Rep. 570; Peck v. Herrington, 109 Ill. 611, 50 Am. St. Rep. 627.

[6] 11 Ariz. 128, 89 Pac. Rep. 504; affirmed in 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493.

further elaboration of my reasons, I state my belief that the utter incompatibility of the doctrine of riparian rights with the conditions of life in this Territory is an all-sufficient reason, under the principles of the common law itself, to hold that that doctrine is not here in force."

Again, in the case of Farm Investment Co. v. Carpenter,[7] it is said: "This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, *and one inconsistent therewith,* having been affirmed and asserted by custom, laws, and decisions of Courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, *publici juris.*"

From the above authorities cited in our notes, therefore, it can be readily seen, that primarily the cause of the change was the inapplicability of the common law rules to the physical characteristics of the arid West. There the greater portion of the country is extremely arid, and the soil absolutely unfit for cultivation unless irrigated. But with irrigation some of the greatest crops in the world can be raised. The general surface of the country is a table land traversed by parallel mountain ranges, cut through by deep gorges through which the waters flow. The topographical features, therefore, afford great natural advantages for conducting the water over the lands. The very condition of the country and the *necessities* of the situation impelled the first miners and settlers upon the public lands to resort to the diversion and use of water of the natural streams in violation of the strict rules of the common law.[8] This fact in itself is a striking illustration and a conclusive argument against the adoption of all of the rules of the common law

[7] 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

[8] For history of the change, see Secs. 595-626.

where certain portions of them are inapplicable. For, were the common law rules governing riparian rights the prevailing ones and strictly followed, the most of the water that is now being diverted from the natural streams to fertilize and irrigate the soil in this great arid region would be wasted in the sea.[9]

In the case of Willey v. Decker [10] it is said: "In this State, on the other hand, the common law doctrine concerning the rights of a riparian owner in the water of a natural stream has been held to be unsuited to our conditions, and this Court has declared that the rule never obtained in this jurisdiction.[11] It was said in the opinion in that case that: 'A different principle, better adapted to the material condition of this region, has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation.' And, further, in explanation of the reasons for the existence of the new doctrine, it was said: '*It is the natural outgrowth of the conditions existing in this region of the country.* The climate is dry, the soil is arid, and largely unproductive in the absence of irrigation; but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water are few;

[9] See for irrigation as a riparian right, early common law authorities, Secs. 499-506.

See, also, Coffin v. Left Hand Ditch Co., 6 Colo. 443; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Bear River v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Hill v. King, 8 Cal. 336; Merced M. Co. v. Fremont, 7 Cal. 317, 327, 68 Am. Dec. 262, 7 Morr. Min. Rep. 313; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, 5 Am. R. A. & Corp. Rep. 288; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 66, reversing *Id.*, 68 Fed. Rep. 948; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

[10] 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

[11] Citing Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914.

and while the land contiguous to water, and so favorably located as to naturally derive any sort of advantage therefrom, is comparatively small in area, the remainder, which comprises by far the greater proportion of our lands otherwise susceptible of cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed by irrigation. Irrigation and such reclamation can not be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose, and a security accorded to that right. *Thus the imperative and growing necessities of our conditions in this respect alone,* to say nothing of the other beneficial uses, also important, have compelled the recognition, rather than the adoption, of the law of prior appropriation.' "[12] But the legislatures and courts, at an early day, grasped the situation, and the result was that the Arid Region Doctrine of prior appropriation of the waters of the natural streams for beneficial uses was adopted in all of the Western States and Territories included within both the arid and semi-arid regions, where water is needed for irrigation. It is true that the common law doctrine of riparian rights has been retained in ten of these States,[13] side by side with the doctrine of appropriation, but it is in such a modified and expanded form that even under it the waters of the streams may be diverted and used for irrigation by each riparian owner upon the stream.[14]

§ 590. Common law not adopted where inapplicable—General rule.—As has been stated before, all of the States of the Western portion of this country adopted the common law of England as their system of jurisprudence.[1] By unanimous authority this adoption has been construed to mean that the common law was adopted

12 See, also, Coffin v. Left Hand Ditch Co., 6 Colo. 443; Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Union Mill & Mining Co. v. Dangberg, 81 Fed. Rep. 73; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Hagerman etc. Co. v. McMurry, —— N. M. ——, 113 Pac. Rep. 823.

13 For the ten States retaining the common law, see Sec. 621.

14 See modification of the common law of riparian rights, Secs. 508-512. For history of change, see Secs. 595-626.

1 See Sec. 587.

only so far as it is applicable to our situation, the characteristics of our country and our system of Government.[2] There is no com-

[2] "The common law, so far as it is applicable to our situation and Government, has been recognized and adopted as one entire system. . . . It has been assumed by the Courts of justice, or declared by statute . . . as the law of the land in every State. It was imported by our colonial ancestors as far *as it was applicable.*" 1 Kent Com. 473. See, also, pp. 472, 536.

"The common law of England was adopted by the founders of the American Colonies *to a limited extent only.*" Curtis Com., Sec. 16.

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; *but they brought with them and adopted only that portion which was applicable to their position.*" Mr. Justice Story in Van Ness v. Pacard, 27 U. S. 2 Pet. 137, 7 L. Ed. 374.

"As a general proposition, so much of these (the common law principles) as were suited to the condition of a people like that of the early settlers of this country was adopted by common consent as the original common law of the Colonies." Professor Washburn in his Law of Real Property, p. 36.

"There is nothing in *Magna Charta,* rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the forces of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms." Mr. Justice Mathews in Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111.

See, also, Bogardus v. Trinity Church, 4 Paige (N. Y.) 178; Morgan v. King, 30 Barb. 9; Seely v. Peters, 10 Ill. (5 Gilm.) 130; Boyer v. Sweet, 4 Ill. (3 Scam.) 120; Browning v. Browning, 3 N. M. 659, 9 Pac. Rep. 677; People v. Canal Appraisers, 33 N. Y. 461; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Starr v. Child, 20 Wend. 149, where the Court said: "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law, when that reason utterly fails—*Cessante ratione legis, cessat ipsa lex.*"

See, also. Inge v. Murphy, 10 Ala. 885; McClintock v. Bryden, 5 Cal. 97, 63 Am. Dec. 87; Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; Lindsley v. Coats, 1 Ohio 243; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Bates v. Brown, 72 U. S. 5 Wall. 710, 18 L. Ed. 535; Morris v. Vanderen, 1 U. S. 1 Dall. 64, 1 L. Ed. 38; Cox v. Matthews, 17 Ind. 367; Shewel v. Felt, 3 Yeates 21; Drake v. Rogers, 13 Ohio St. 21; Flanagan v. Philadelphia, 42 Pa. 219; Dawson v. Coffman, 28 Ind. 220; State v. Cawood, 2 Stew. (Ala.) 360.

That certain common law rules upon the subject of waters have been repudiated in other than Western States, see Edwards v. Charlotte, C. & A. R. Co., 39 S. C. 472, 22 L. R. A. 246, 39 Am. St. Rep. 746; Martin v. Biglow,

mon law of the United States as distinguished from that of the individual States.[3]

From the authorities, we are of the opinion that no legal doctrine is better settled in the United States than that such portions of the common law of England, as are not adapted to the necessities, society of our people, or the physical condition of any State or Territory of the Union, form no part of the law of that State or Territory, even if in general terms at an early day the common law was adopted as the general law of jurisprudence by that jurisdiction, and since that time there has been no specific repeal of the portion which is inapplicable. Its applicability to the physical conditions and necessities of any State or Territory of this country must be taken into consideration, bearing in mind that the common law was framed with special reference to the physical condition of a country and the needs of a people in many respects widely differing from our own. Hence it follows that the common law theories of riparian rights, especially as to the "undiminished flow" of the natural streams by the lands of riparian owners, although applicable in the country where the common law was adopted on

2 Aik. (Vt.) 184, 16 Am. Dec. 696; Fulmer v. Williams, 122 Pa. 191, 15 Atl. Rep. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88; Champlain & St. L. R. Co. v. Valentine, 19 Barb. (N. Y.) 484; Gouverneur v. National Ice Co., 134 N. Y. 355, 31 N. E. Rep. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669, reversing *Id.*, 57 Hun, 474, 11 N. Y. Supp. 87; Kingman v. Sparrow, 12 Barb. 201; reversed, 1 N. Y. 242, 4 How. Prac. 467; Buck v. Ellenbolt, 84 Iowa 394, 51 N. W. Rep. 22, 15 L. R. A. 197.

The common law is adopted in the State of Illinois by general legislative enactment, but this must be understood only in those cases where the law is applicable to the habits and conditions of society of that State, and is in harmony with the genius, spirit, and objects of the State. Boyer v. Sweet, 4 Ill. (3 Scam.) 120.

See, also, Stuart v. People, 4 Ill. (3 Scam.) 396; Penny v. Little, 4 Ill. (3 Scam.) 301; State v. Calvin, Charl. (Ga.) 151; Barlow v. Lambert, 28 Ala. 704, 65 Am. Dec. 374; Carson v. Blazer, 2 Bin. (Pa.) 475, 4 Am. Dec. 463; Wagner v. Bissell, 3 Iowa 396; Le Barron v. Le Barron, 35 Vt. 365; Sackett v. Sackett, 8 Pick. 309.

For Western cases upon the same subject, see the following sections.

3 Wheaton v. Peters, 33 U. S. 8 Pet. 591, 8 L. Ed. 1055; Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. Rep. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; People v. Folsom, 5 Cal. 374.

The common law rule of decision in a Federal Court is that of the State in which the Court is sitting. Lorman v. Clarke, Fed. Cas. No. 8,516, 2 McLean 568; Pennsylvania v. Wheeling & B. Bridge Co., 54 U. S. 13 How. 518, 14 L. Ed. 249.

account of its damp, humid climate, is entirely inapplicable to the conditions and necessities of the arid region of the United States, of which the State of Arizona and the State of Nevada, with their scanty rainfall, hot, dry climate, and parched soil, are good examples.[4] Furthermore, it is the rule of law that each State may adopt either the common law rule of riparian rights, or the doctrine of appropriation, or a dual system consisting of both rules as its law governing the waters flowing within its boundaries, as it shall see fit. The United States can not force either law upon a State.[5]

In the following sections, we will discuss more in detail the physical causes which led to the adoption of the Arid Region Doctrine of appropriation in all of the Western States and Territories, as at least one of the rules of law governing waters, and the abrogation of the common law of riparian rights in some of the States.[6]

§ 591. **Common law deemed inapplicable—Cause of the change of rule in Nevada.**—There is no better illustration to be found of the change from the law of riparian rights, after the common law governing the same had been adopted, and the direct cause of the change, than can be found in Nevada. In 1861, while Nevada was still a Territory, the common law of England was adopted by the legislature, in the following language: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution or laws of the United States, or the laws of the Territory of Nevada, shall be the rule of decision in all courts of this Territory."[1] And when Nevada became a State the above enactment was adopted in the Constitution by the following clause: "All laws of the Territory of Nevada in force at the time of the admission of this State, not repugnant to this constitution, shall remain in force until they expire by their own limitations or be altered or repealed by the legislature."[2] It will be noticed that

4 Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Reno etc. Co. v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364.

See, also, dissenting opinion in Lux v. Haggin, 4 Pac. Rep. 929; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See, also, Secs. 590-594.

5 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, Secs. 330, 593.

6 See Secs. 591-593.

1 See Nev. Stat. 1861, p. 1.

2 Const. of Nevada, Art. 17, Sec. 2.

the section is entirely silent upon the subject as to the applicability or non-applicability of the common law, or any portion thereof, to the conditions or necessities of the State of Nevada. And, when the question was first considered by the Supreme Court of the State, in the case of Vansickle v. Haines,[3] the Court in upholding the common law rule of riparian rights according to the strict construction thereof, after quoting the section of the statute above, said: "Hence, although the common law might, in the opinion of the judges, be inapplicable, still, if not in conflict with the constitutional laws of the United States or the constitution or laws of Nevada, it must nevertheless be enforced." Later the same Court in the cases of Jones v. Adams,[4] and Reno etc. Co. v. Stevenson,[5] without any further enactment upon the part of the legislature of that State, overruled the case of Vansickle v. Haines upon the only ground that the common law of riparian rights was unsuited to the physical conditions of that State, and they were thereby entirely abrogated, and the Arid Region Doctrine of appropriation of waters for beneficial uses was adopted in lieu thereof. These decisions upon the part of the Court in the later cases have been called by an Eastern writer upon the subject, in a somewhat hysterical manner, "one of the most flagrant examples of judicial legislation that was ever perpetrated."[6] But in view of the authorities cited in the previous sections,[7] the Court had this power; and, owing to the fact that Nevada is one of our most arid States, the physical conditions of which are such that the common law of riparian rights is entirely inapplicable, as it was construed in the Vansickle case, it will have to be admitted, by all who are at all familiar with the subject, that it was better for the Court to reverse its holding, than to persist in adhering to a wrong rule.

The direct cause of the change of rule from the common law to the absolute abrogation of the law as far as the use of the waters of natural streams is concerned is stated in the following cases. In the case of Jones v. Adams[8] it is said: "In all the Pacific Coast

[3] 7 Nev. 249, 15 Morr. Min. Rep. 201.

[4] 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

[5] 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364.

[6] Farnham on Waters and Water Rights, 1904, p. 2039.

[7] See Secs. 588-590.

[8] 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

States and Territories, prior to the passage of the Act of Congress of July 26, 1866, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, was held to be inapplicable, or applicable only to a very limited extent, to the wants and necessities of the people, whether engaged in mining, agricultural, or other pursuits; and it was decided that prior appropriations gave the better right to the use of the running waters to the extent, in quantity and quality, necessary for the uses to which the waters were applied. This was the universal custom of the Coast, sanctioned by the laws and decisions of the courts in the respective States and Territories, and approved and followed by the decisions of the Supreme Court of the United States."[9]

Again, this doctrine was reaffirmed in the case of the Reno Smelting, Milling & Reduction Works v. Stevenson,[10] wherein it was said: "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law, when that reason utterly fails—*Cessante ratione legis, cessat ipsa lex.* In States where the common law has not been adopted by legislative enactment, courts have proceeded upon the hypothesis of its adoption, *subject always to its applicability to the locality.*[11] From these authorities we assume that the applicability of the common law rule to the physical characteristics of the State should be considered. Its inapplicability to the Pacific States, as shown in Atchison v. Peterson,[12] applies forcibly to the State of Nevada. Here the soil is arid and unfit for cultivation, unless irrigated by the waters of running streams. The general surface of the State is table land, traversed by parallel mountain ranges. The great plains of the State afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The condition of the country and the necessities of the situation impelled settlers upon the public lands to resort

9 Citing cases.

10 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364.

11 Citing Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Morris v. Vanderen, 1 U. S. 1 Dall. 64 (1 L. Ed. 38); Report of the Judges, 3 Binn. 595; Shewel v. Fell, 3 Yeates 21; Flanagan v. Philadelphia, 42 Pa. 219; State v. Cawood, 2 Stew. (Ala.) 360; Inge v. Murphy, 10 Ala. 885.

12 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

to the diversion and use of waters. This fact of itself is a striking illustration and conclusive evidence of the inapplicability of the common law rule."

Again, in the later case of Walsh v. Wallace,[13] upon the same proposition as to the cause of the abrogation of the doctrine of riparian rights as to the use of water and the overruling of the decision in the case of Vansickle v. Haines,[14] the Court said: "Under two rules of the law may rights to the use of water flowing in a natural stream be acquired—under the rule of riparian rights, and under the rule of appropriation. It is conceded by counsel in this action, and it has been held by this Court that the doctrine of riparian rights is so unsuited to the conditions existing in the State of Nevada, and is so repugnant in its operation to the doctrine of appropriation, that it is not a part of the law, and does not prevail here."

§ 592. Common law deemed inapplicable—The present situation in California.—The Supreme Court of California since the case of Lux v. Haggin,[1] has been one of the most strenuous of the courts of the Western States in its adherence to the common law doctrine of riparian rights, especially as to the undiminished flow of the water in the natural streams and the use of such waters.[2] During the last few years, however, the views of this Court have been considerably changed upon at least two phases of the subject. First, the Court has absolutely abrogated the common law as to rights in percolating waters, in holding that instead of each land owner being entitled to all the percolating waters found upon his lands, that he had but a correlative or relative right to the percolating waters of catchment basins, and as stated by Mr. Justice Shaw in the late case upon the subject of Katz v. Walkinshaw,[3] this was upon the ground of the inapplicability of the common law rule to the conditions in the State of California. He said: "Whenever it is found that, owing to the physical features and character of this State, and the peculiarities of its climate, soil, and productions, the application of a given common law rule

13 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

14 *Supra.*

1 69 Cal. 255, 10 Pac. Rep. 674.

2 See Sec. 594.

3 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted—one which is calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures. The question whether or not the rule contended for is a part of the common law applicable to this State depends on whether it is suitable to our conditions under the rule just stated."[4]

The second phase, upon which the Supreme Court of California has materially changed its views as to the applicability of the common law to the conditions of that State, is relative to the question of the undiminished flow of streams. And, instead of holding, as the Court did in the earlier cases, that a lower riparian owner was entitled to the undiminished flow of the stream, and that, too, without actual damage or use upon his part,[5] the Court has materially modified its views in this respect and now holds that damage must be shown. The Court by a very recent decision,[6] modified its views as to the flow of surface streams, and held that a riparian owner must show some damage in order to restrain an upper owner from the beneficial use of the water, and the Court also placed its decision upon the ground that the common law rule as to the undiminished flow of streams was inapplicable to the conditions of the streams, and said: "Even if at common law or under the civil law it was a part of the usufructuary right of the riparian owner to have the water flow by for no purpose other than to afford him pleasure in its prospect, such is not the rule of decision in this State. The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water. The fair apportionment and economic use of the

4 See, also, Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325.

5 Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Bliss v. Johnson, 76 Cal. 597, 16 Pac. Rep. 542, 18 Pac. Rep. 785.

6 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

waters of this State are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must continue to be solved by this Court as cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found unfitted to the radically changed conditions existing in this State, so that its application will work wrong and hardship rather than betterment and good, this Court will refuse to approve and follow the doctrine."[7]

It appears to the writer from the above rulings, taken in connection with the Act of the Legislature of 1911 in amending section 1410, Civil Code,[8] to the effect that, "all water or the use of water within the State of California is the property of the people of the State of California," that the State of California, although somewhat late, is about to adopt a new policy as to the government and control of the waters within its boundaries.[9]

§ 593. **The question as to what law governs waters within the respective States is left entirely to the States to decide.**—The control as sovereign,[1] of the waters within the boundaries of a State is left entirely to the State itself. Each State has the power either by legislative enactment, or by court decision, to adopt such a rule governing the waters flowing or standing therein, as it sees fit. A State may adopt the common law of riparian rights only,[2] as has been done in the Eastern States. And, in this connection it may limit and define the rights of riparian owners in and to the waters

7 See, also, Modoc v. Booth, 102 Cal. 151, 30 Pac. Rep. 431; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Mentone Irrigation Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

See, also, as to the question of the undiminished flow of streams, Secs. 549, 820-822.

See, also, the right of injunction against the interference with the flow of streams, Part XIII, Injunctions.

8 See Supplement to Kerr's Cyc. Code, 1911, p. 584; Stats. & Amendments 1911, p. 421.

9 See, also, Sec. 1340; also see Part XIV, California.

1 See United States as a riparian proprietor, Sec. 480.

2 For riparian rights only, see Secs. 450-551.

of such streams and to the soil lying under the same.[3] A State may also adopt a modified form of riparian rights allowing a more extensive use of the waters of streams, especially for irrigation, than was allowed under the strict rule of the common law. This has been done in California, and some of the other Western common law States.[4]

Again, a State may entirely abrogate the common law of riparian rights, and adopt in lieu thereof the Arid Region Doctrine of Appropriation, as defined in this chapter,[5] and as enforced, as set forth in the following chapters of this part.[6]

And, still again, a State may retain the common law of riparian rights, and at the same time adopt the Arid Region Doctrine of Appropriation, and thus have the dual systems of laws governing waters, within its jurisdiction.[7]

As far as the United States Government is concerned by those various Acts of Congress, fully discussed in future portions of this work, it has waived its rights as sovereign in and to the government and control of the waters flowing or standing within the

[3] For the ownership of beds of fresh water, navigable rivers, see Secs. 328-331.

For the ownership of beds of fresh water, non-navigable rivers, see Secs. 535-542.

That the riparian rights of patentees from the United States are determined according to the law of the State in which the lands lie, see Shively v. Bowlby, 152 U. S. 1, 45, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; Lowndes v. Huntington, 153 U. S. 1, 38 L. Ed. 615, 14 Sup. Ct. Rep. 758; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. Ed. 85, 15 Sup. Ct. Rep. 991; St. Anthony Falls Water Pr. Co. v. St. Paul W. Comrs, 168 U. S. 349, 42 L. Ed. 497, 18 Sup. Ct. Rep. 157; Kean v. Calumet Canal & Imp. Co., 190 U. S. 452, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651; Hardin v. Shedd, 190 U. S. 508, 47 L. Ed. 1156, 23 Sup. Ct. Rep. 685; St. Louis v. Myers, 113 U. S. 566, 28 L. Ed. 1131, 5 Sup. Ct. Rep. 640; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Eldridge v. Trezevant, 160 U. S. 452, 40 L. Ed. 490, 16 Sup. Ct. Rep. 345; St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941, 11 Sup. Ct. Rep. 337; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; McGilvera v. Ross, 215 U. S. 70, 54 L. Ed. 95, 30 Sup. Ct. Rep. 27; Los Angeles etc. Co. v. Los Angeles, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; Schodde v. Twin Falls etc. Co., decided by the Supreme Court of the United States, April 1, 1912, advance sheets L. Ed. May 15, 1912, p. 470; affirming 161 Fed. Rep. 43, 88 C. C. A. 207.

[4] See for an enlargement of the common law, Secs. 508-513.

[5] See Secs. 586-590.

[6] See Chaps. 32-40, Secs. 595-756.

[7] As for the effect of dual systems, see the next section, No. 594.

boundaries of any State, and has conferred the jurisdiction of such waters upon such State.

For example, by the Act of 1866,[8] the rights to the use of waters where "the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."[9] Also by the Act of February 26, 1897,[10] the regulation of rates and charges for the use of waters was left entirely to the States and Territories, and that, too, where the waters were taken from reservoirs on rights of way granted by the Government under the provisions of March 3, 1891.[11] And, again, by the National Reclamation Act,[12] it was provided that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws."

It has also become the settled rule of law of the Federal courts that such courts will adhere to the rule that each State has the right to adopt such law or laws as it sees fit governing and controlling the waters and the use thereof within its boundaries, and that the Federal courts will follow in their decisions the rule or rules so adopted by such jurisdiction. This is true whether that rule of law is adopted by such State by statutory enactment or by decision of its highest court. In other words, such State may decide for itself, as to the applicability or inapplicability of the common law rule as applied to the physical conditions of such State; and, if such rule is determined to be inapplicable, the State, in lieu thereof, may adopt such other rule as it sees fit governing the entire subject of waters and their use within its boundaries. As was said

[8] 7 Fed. Stat. Ann. 1905, p. 1090; 2 U. S. Comp. Stats. 1901, p. 1437; 14 Stat. L. 253.

[9] For the Acts of 1866 and 1870, and construction thereof, see Secs. 611-619.

[10] 7 Fed. Stat. Ann., p. 1098; 2 U. S. Comp. Stat. 1901, p. 1556; 29 Stat. L. 599.

[11] See Secs. 937-950.

[12] See Chap. 65, Secs. 1235-1286; 7 Fed. Stat. Ann. 1905, p. 1098, Sec. 8; 32 Stat. L. 388.

by Judge Hawley, in the case of the Union Mill & Mining Company v. Dangberg:[13] "Riparian rights are founded upon the ancient doctrine of the common law. If the law is a progressive science, courts should keep pace with the progress and advancement of the age, and constantly bear in mind the wants and necessities of the people and the peculiar conditions and surroundings of the country in which they live."

The State may entirely abrogate the common law rule of riparian rights and adopt the Arid Region Doctrine of Appropriation, and in connection therewith also adopt a system of State control, providing for the appropriation, administration, distribution, and use of its waters under State regulations, and under the supervision of State officials.[14] In other words, this whole question is left entirely to the respective States to decide. As was said by Mr. Justice Brewer, in the opinion of the Supreme Court of the United States, in the case of Kansas v. Colorado:[15] "It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." . . . "It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress can not enforce either rule upon any State."[16] Also the Supreme Court of the United States in affirming the judgment of the Supreme Court of the Territory of Arizona, which held that owing to the peculiar

[13] 81 Fed. Rep. 73.

[14] For the laws of State control, see Chap. 68, Secs. 1337-1366.

"That the State may supervise and control the appropriation, diversion, and distribution of the public waters, and impose that duty upon administrative officers, is settled by our former decisions, and is equally well settled in other States, where the doctrine of prior appropriation of water prevails." Hamp v. State, —— Wyo. ——, 118 Pac. Rep. 653.

[15] 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

[16] See, also, Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; affirming *Id.*, 1 Mont. 561; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S. 208, 101 Am. St. Rep. 953, 4 Am. & Eng. Ann. Cas. 1171.

See, also, Sternberger v. Seaton Mtn. etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

conditions of that Territory the common law of riparian rights has never there been in force. And, in the case of Boquillas Land & Cattle Co. v. Curtis,[17] in construing the Arizona code upon the subject, said: "But we agree with the Territorial Court that, construed with the rest of the Code, it is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames."

In fact, the Federal courts, including the Supreme Court of the United States, in many cases have approved and indicated their satisfaction with the laws of the State Legislatures and the decisions of the State courts, which hold that the common law doctrine has been abolished and has said that each State, without interference from the Federal courts, may for itself, as between rival individual claimants, determine which doctrine shall be therein enforced.

§ 594. The doctrine of appropriation as against riparian rights —Practical workings of the two systems as to irrigation.—A great deal has been said relative to the practical workings of the two systems of laws; namely, the Arid Region Doctrine of Appropriation and the common law of riparian rights, especially as far as their practical workings for the irrigation of lands are concerned. From our personal observations, we are very much in favor of the doctrine of appropriation and that, too, to the entire abrogation of the common law of riparian rights as to the use of the water, and especially as the doctrine of appropriation has been developed under the more modern codes of State control.[1] At the present time the principal industry in all of the Western States in the arid and semi-arid regions is that of agriculture, and in many sections of these States that of irrigated agriculture. The population of the Western States is rapidly increasing and in two of the States has more than doubled during the last decade. This rapidly increasing population, in turn, requires more of the agricultural products to sustain it. Therefore, the time is rapidly drawing near when the available water supply will have to be used to its utmost capacity to support the population of these States, much less to raise products for exportation.

[17] 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; affirming *Id.*, 11 Ariz. 128, 89 Pac. Rep. 504.

[1] For the laws of State control, see Chap. 68, Secs. 1337-1367.

Now the question arises as to which of these two systems is the best adapted for the fullest development of irrigated agriculture in this Western country. There are arguments for and against each system. Under our chapter upon the subject of irrigation as a riparian right,[2] we have set forth all of the rights of the riparian owner to the use of the water for the irrigation of his lands. As we have there seen, these rights are confined to riparian owners and to riparian lands and that the right of any particular owner was only to the extent of a reasonable use of the water of the stream, after taking into consideration the rights of all the other riparian proprietors upon the same stream. We have also seen that the rights of the riparian proprietors were so limited and hemmed in by the rules and restrictions of the common law that they greatly interfered with the use of the water to its fullest capacity and therefore interfered with the development of the country. As was said by the Chief Justice of Montana in an early case:[3] "The water for irrigation in this country as naturally belongs to the lands through which the stream passes, in certain proportions, as in other countries it belongs to the land to supply the necessities of life." We contend that it is the main objection to the common law of riparian rights that under that law the water is limited to riparian lands only. What if there should be more water flowing in the streams than is actually needed by the small fringe of riparian lands along the same? It is certain that without the aid of the law of appropriation in such cases it would be impossible to develop a country along agricultural lines to its fullest capacity. The Montana opinion referred to above again states: "Is it not the true policy of this Territory to enact such a system of laws here as shall distribute our short supply of water to the best advantage to all our people? The common law applied to this country is ample and sufficient to secure this much desired end." And the Chief Justice, after setting forth the principles of the doctrine of appropriation, further says as against that doctrine: "And all the consequences so disastrous in any view are to be visited upon Montana that a few individuals may have what does not now, and never did, belong to them." Again, Professor Pomeroy in his work upon riparian rights, in which he argues only from the standpoint of the common

2 See Chap. 26, Secs. 498-525.

3 Thorp v. Freed, 1 Mont. 651.

law, said:[4] "After Colorado and these Territories become fully settled, especially by an agricultural population, this system of water regulation will inevitably give rise to an enormous amount of trouble, controversy, and litigation. It is impossible to conceive of legislation tending more than this to create strifes, conflicts, and breaches of the peace. The right of the prior appropriation on the public streams was a most fruitful cause of litigation in California, as shown by the great number of reported cases; but this is a feeble illustration of the litigation and controversy which must arise from the statutes of Colorado and of the various Territories when they come into full operation upon an increasing population." In another place Professor Pomeroy says:[5] "The doctrine of prior appropriation is completely at war with a system which recognizes, harmonizes, and protects the rights of all parties in the State."[6]

Upon the other hand, one of the best arguments against maintaining riparian rights in an arid country where irrigation is a necessity for the production of crops is the fact that in all of the British Colonies riparian rights have been either abrogated or restricted so that they are practically abrogated and that, too, although in the mother country of England the strict rule of common law of riparian rights prevails. This is true in Egypt,[7] in India,[8] in Australia,[9] in South Africa,[10] and in the British Colonies of Canada.[11] Upon the other hand, in certain Western States of this country, which originally adopted the common law as the system of jurisprudence of those particular States, by a servile adherence to precedent, the courts have held, by a long series of cases, that the common law principles as to riparian rights were adopted

4 Pomeroy on Riparian Rights, p. 264.

5 Pomeroy on Riparian Rights, Sec. 160.

6 See, also, Farmers' Irrigation District v. Frank, 72 Neb. 136, 100 N. W. Rep. 286, wherein the Court, deprecating the unrestricted law of appropriation, says it breeds monopolies, leads to antagonism, strife, gross exactions, and abuses; is detrimental to the public welfare, and has given rise to interminable litigation.

See, also, Irrigation as a Riparian Right, Chap. 26, Secs. 498-525.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

7 See Irrigation in Egypt, Secs. 88-102.

8 See Irrigation in India, Secs. 103-118.

9 See Irrigation in Australia, Secs. 119-130.

10 See Irrigation in South Africa, Secs. 131-143.

11 See Irrigation in Canada, Secs. 177-237.

in those jurisdictions regardless of the fact whether or not they were applicable to the physical conditions of those States. As was said by Mr. Justice Holmes, speaking for the Supreme Court of the United States, in a recent case relative to the general clause adopting the common law in the Territory of Arizona:[12] "In the first place, this is merely the adoption of a general system as against another general system (the Spanish-Mexican) that had been in force and that was repealed. . . . If there was nothing more in the code, it would be going a great way to say that such a broad phrase forbade the Courts to hold that the common law was adaptable and established the English rule of riparian rights only for the English conditions. . . . The right to use water is not confined to riparian proprietors.[13] Such a limitation would substitute accident for a rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land."[14] Without citing many cases we will say in all of the States where the common law of riparian rights has been abrogated, relative to the flow of the streams and the use of the water, there are positive assertions by the Supreme Courts as to the cause of this abrogation of the common law and as to why the Arid Region Doctrine of Appropriation was held to be the only doctrine which was applicable to the physical conditions of such particular States and Territories. In the Nevada case of Twaddle v. Winters,[15] it is said: "As time passes it becomes more and more apparent that the law of ownership of water by prior appropriation for a beneficial purpose is essential under our climatic conditions to the general welfare, and that the common law regarding the flow of streams, which may be unobjectionable to such localities as the British Isles and the coast of Oregon, Washington, and Northern California, where rains are frequent and fogs and winds laden with mist from the ocean prevail and moisten the soil, is unsuitable under our sunny skies, where the lands are so arid that irrigation is required

12 Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493.

13 Citing Gutierres v. Albuquerque Land & Irrigation Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

14 See, also, Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

15 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289.

for the support and prosperity of the people. Irrigation is the life of our important and increasing agricultural interests, which would be strangled by the enforcement of the riparian principle." And, it is further stated by the Court that the California decisions cited by the appellants upon the question of riparian rights "may no longer be considered good law even in the State in which they were rendered." [16]

In all the Western States, which still adhere to the common law of riparian rights, it may be said that they do not adhere to these rights only. In every one of these States, as an adjunct, it may be said, to the common law, is also found the doctrine of appropriation of waters for beneficial uses. And in every one of these States which has these dual systems of laws governing and controlling the waters within its boundaries, it may be said that its Supreme Court has also upheld the doctrine of appropriation. It has, therefore, been held, in effect at least, that in all of these States which have these two systems of laws, they may exist together in the same jurisdiction; and in some of the States it has been positively held that the doctrine of prior appropriation may exist and be enforced in the same State with the common law doctrine of riparian rights, and that, too, in spite of their contrary fundamental principles.[17]

Again, it may be said that in certain of the Western States the common law as to the use of waters of natural streams has been entirely abrogated and the Arid Region Doctrine of appropriation stands alone in these States. It will be noticed that the States wherein this condition is found are those which are more arid, and water is more scarce, while those States which adhere to the dual systems of laws governing water are those that are less arid, have

[16] See, also, upon the subject of the adoption of only such portions of the common law as are applicable to the conditions of any State, Secs. 587-593.

See, also, Salt Lake City v. Salt Lake City etc. Co., 25 Utah 456, 71 Pac. Rep. 1069; Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541.

[17] Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

See, also, Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 332, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

larger streams, and, as a general thing, water is much more plentiful. As was said by the Nebraska Court:[18] "In all States which, like our own, are but partially arid the common law is in force. The States holding to the contrary rule are wholly within the arid regions."

The State of California has been heretofore the most strenuous in adhering to the common law doctrine of riparian rights as is indicated by a long line of decisions of its Supreme Court, especially those after the case of Lux v. Haggin,[19] but that State has also adopted the doctrine of appropriation and has, therefore, the dual systems of laws governing the waters within its boundaries. In California, under the system of riparian rights, it seems that certain riparian owners by virtue of the situation of their lands upon the streams have prevented the fullest development and use of those waters. It is said by Mr. Wiel:[20] "A few big riparian proprietors holding extensive ranches under Mexican grants have barred extension in some places." But, it is said that the doctrine of appropriation leads to litigation, "antagonism, strife, and dissension."[21] It may also be said, with truth, if we are to judge from the reported cases of the California Courts, that the dual systems of laws, continually clashing with each other and themselves, lead to a far greater amount of litigation than does the doctrine of appropriation, where it stands alone. As a comparison we may cite the State of Wyoming where the doctrine of appropriation has been adopted alone, and, under its system of State control and administrative laws, is enforced. In that State there have been very few cases decided by the Supreme Court as compared to those which have been decided by the California Court. It, therefore, may be said, in contradistinction to what was said by Professor Pomeroy, that the system of riparian rights adopted in a country which is totally inapplicable to its existence does not harmonize or protect the rights of all the parties of the State.

In the third edition of Mr. Wiel will be found a note,[22] which

18 Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 687.

19 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

20 Wiel on Water Rights in the Western States, 3d Ed., p. 129.

21 Thorp v. Freed, 1 Mont. 651.

See, also, quotation from Professor Pomeroy, *supra;* Farmers' Irrigation Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

22 See Wiel on Water Rights in the Western States, 3d Ed., p. 129, note.

was condensed from Section 339 of the first edition of this work, and is as follows: "The State of California, constituting a large and important part of the field where the art of irrigation is practiced, is also the great model for the rest of the region regarding the practical development of its water supply, and in the use of water as applied to the purpose of irrigation. California is not only ahead in the development of her water supply and the number, size, and boldness of design of her irrigation works, but that State is also superior to all other States and Territories of the arid West in her method of applying and utilizing the water. It is safe to say that California owes the larger portion of the prominence which it occupies today to the results of irrigation."

To the above we can only add that the State of California, owing to its rich soil, salubrious climate, energetic citizens, and comparatively ample supply of water, has continued to prosper from the time that that section was written by us to the present time. But it may be said that this is so *in spite of* its systems of laws which attempt to govern and regulate the use of the water, but which have bred more litigation upon this important subject than have nearly all of the other Western States combined. For which statement we refer simply to the number of reported cases of its Supreme Court.

The Supreme Court of the United States, in one of its latest decisions,[23] recognized the inconsistency of attempting to adhere to both the common law of riparian rights and to the Arid Region Doctrine of appropriation. Mr. Chief Justice White, in rendering the opinion of the Court, said: "The misapprehension upon which the contention rests is the assumption that because a certain character of riparian rights may exist in Idaho, therefore such rights as are absolutely incompatible with the rule of prior appropriation for beneficial use may coexist with that system."

In closing this section, we will reiterate that, in our opinion, the Arid Region Doctrine of appropriation alone, as the same is in force in those States which have also adopted the law of state control,[24] regulating and controlling the appropriation and use of waters

[23] Schodde v. Twin Falls etc. Co., decided April 1, 1912, 124 U. S. 107, 56 L. Ed. —, 32 Sup. Ct. Rep. 470, affirming *Id.*, 161 Fed. Rep. 43, 88 C. C. A. 207.

[24] For the laws of State control, see Chap. 68, Secs. 1337-1367.

within their boundaries for beneficial purposes, and also administering to the division of those waters as between the respective claimants, and where the common law of riparian rights is either entirely abrogated or is limited and restricted in certain ways to certain specific uses, is the doctrine best applicable not only to the States that are entirely arid, but also to the semi-arid States as well.

CHAPTER 32.

HISTORY OF DOCTRINE OF APPROPRIATION.

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§ 595. **Scope of chapter.**—In this chapter we will describe how the doctrine of appropriation came to be adopted in the States and then Territories of the arid and semi-arid portions of this country. We will also note the particular features of the doctrine, especially as to that subject relative to rights based upon priority, a feature that prior to that time was new in the history of water laws.

§ 596. **The discovery of gold in California.**—In 1848 gold was discovered in California, and since the voyage of the Argonauts there has been no such search for a golden fleece as this which now commanded the attention of the world. By sailing vessels and steamships over the ocean, by prairie schooners and all sorts of vehicles drawn by horses, oxen, and other draft animals, by riding and on foot, the motley throng from all parts of the earth rushed to the "diggins." Of nationalities the flow from Europe alone equaled in variety that of the medieval crusades, with notable prominence to the leading types, among which could be seen the self-complacent Briton, the methodic and reflective German, and the versatile Gaul. But all parts of the world contributed to swell the list. Africa was represented by the orthodox negro, by the swarthy Moors, and the straight featured Abyssinians. Asia and Australasia provided their share in Mongolians, lithe and diminutive Malays, the dark-skinned Hindoos, and the well formed Maoris, the Kanakas and the stately turbaned Ottoman. The ubiquitous Hebrews, ever to be found in the wake of movements offering trade profits, the Hispano-Americans, and the half naked aborigines, all were there, laboring side by side with their American brothers, the sturdy Yankees, who thronged in vast numbers from the Eastern States. The population of California, which in 1848 numbered only from five to six thousand, in 1849 numbered nearly one hundred and ten thousand souls. Scattered over a territory that belonged almost entirely to the public domain of the United States, that motley throng of people started in the West the mining industry of this country, which became and still is, in many of the Pacific States, of paramount importance, and destined, from the physical features of the country, always to remain so.

§ 597. **The character of the immigrants to California.**—Coming as these immigrants did from all countries of the world, differing

in their habits, customs, and religious ideas, restrained by no law save that of superior physical force, and not even agreeing whence the laws by which they would consent to be governed should emanate, these multitudes of men settled in every direction throughout the mining districts of the Sierra Nevada and Coast Range Mountains. The immigrants who came by sea, speaking broadly and with all due regard to exceptions, were pioneers not particularly beneficial to the settlement of an entirely new country. Belonging, as a great many did, to the criminal classes of Europe and the Eastern States, they embraced much of the abnormal and a great deal of the criminal and vicious in early California life. The better classes might build cities and organize society, but there were those among them who for a time made the cities hotbeds of vice and corruption, and converted the social fabric into a body nondescript, at the sight of which the rest of the world stood wrapped in apprehension.[1] But, fortunately for the future of California and the country at large, there was a class of people in this mad rush to the Pacific Coast to whom, even when their visions of suddenly acquired wealth had been dispelled, sober second thought and strength came; and who readily adapted themselves to the several other fields of labor from which they might wrest more surely though slowly the fortune withheld by fickle chance in the gold fields. And here the overland immigrants as a mass had the advantage in numbers and in many other respects. Coming, as the most of them did, from the small towns and villages and the farms of the interior, or from the young settlements on the Western frontier, and accustomed to a rugged and simple life, they craved less excitement. And being honest, industrious, thrifty, and self-reliant, they could readily fall back upon familiar toil and find a potent ally in the cultivation of the soil and in mechanical industries. A large proportion of this class of settlers indeed had come to California to cast their lot for all time in a Western home. And, fortunately for California and also for the great West, this latter class, living nearer to the gold fields, not only arrived upon the scene among the first but also in greater numbers than all other

1 "Swarms of foreigners were pouring in from Mexico, South America, the Islands of the Pacific, the penal colonies of Great Britain, from Europe, and working in the mining districts." Yale, Mining Claims and Water Rights, 1867, p. 31.

classes put together, and at the close of the year 1849 nearly sixty thousand American citizens were upon the ground and actively engaged in building up the future State of California.

§ 598. **Mining rules and regulations.**—The American element preponderated, and the Yankee fancied himself over all with his political and commercial supremacy, the more so because he was within the confines of territory owned by his own country, which at all hazards had to be maintained and protected, to the exclusion of the laws and customs of all other nationalities. This element being full of great projects and happy devices for surmounting obstacles, even to the achieving of the seemingly impossible, and fitted no less by indomitable energy, shrewdness, and adaptability than by political and numerical rights, assumed the mastery wherever it went, and carried with it that love of order and system and of fair dealing, which is the prominent characteristic of the American people.[1] In every locality where the mines were being worked, or there was prospecting for mineral, the miners held improvised meetings and framed certain rules and regulations, based upon general custom, for their own government, for the government of all those who came into that locality, for the government of their mining claims, and also for the appropriation and use of the waters of the natural streams to work the claims. These organizations, covering as they did specific tracts of territory, are known as "mining districts," and the rules and regulations adopted are known as the "mining rules" or "mining regulations" of the respective districts.[2] These miners' rules and regulations in the different districts have a marked similarity to each other, only varying in the several districts according to the extent and character of the mines, and the amount of water flowing in the streams and its accessibility. They were very simple; and, as far as property rights were concerned, related to the acquisition, working, and retention of their mining claims, and to the appropriation and diversion of

1 Jennison v. Kirk, 98 U. S. 455, 25 L. Ed. 240; Snyder on Mines, Sec. 77.

2 "And it matters not what name is applied to them, whether it be customs, miners' rules and regulations, or the by-laws of the district, they come to us not only in the humble garb of custom, but as an authoritative enunciation of the mining common law of the vicinage." King v. Edwards, 1 Mont. 235; Gleeson v. Martin White M. Co., 13 Nev. 442; Snyder on Mines, Sec. 118.

the water to be used in working them. They prescribed in brief detail the acts necessary to constitute such an appropriation of mineral land or water of a stream as would give a claimant a right as against all others, the amount of work which would entitle him to the continued possession and enjoyment of the claim, and what would constitute an abandonment of these rights and others of like character. There was one principle embodied in them all, and on which rests the "Arid Region Doctrine" of the ownership and use of waters, and that was the recognition of discovery, followed by prior appropriation, as the inception of the possessor's title, and development by working the claim as the condition of its retention.

The lands all being upon the public domain of the United States the first appropriator was held to have, within certain well-defined limits, a better right than others to the claim he had taken up; and in all controversies and disputes, except as against the Government, he was regarded as the original and (unless he had abandoned his claim) absolute owner from whom title was to be traced. But the mines could not be worked without water. Without water the gold would forever remain buried in the earth or rock. Therefore it became oftentimes, when the mining claims were not on the banks of a stream or lake, an important and necessary business to carry the water to the mines in order that they might be worked. The waters of rivers and lakes were carried great distances by means of ditches and flumes, constructed with great labor and enormous expenditure of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining as well as for agricultural and ordinary domestic consumption. But here also the first appropriator of water to be conveyed to such localities, for mining or other beneficial purposes, was recognized as having to the extent of actual use the better right. The doctrine of the common law respecting the rights of riparian owners was not considered applicable, or only in a very limited degree, to the condition of the miners in the mountains. Numerous regulations were adopted, or from their obvious justness assumed to exist, by the mining communities for the protection of these water rights and for the security of the ditches and flumes conducting the water, not only between the different appropriators, but also between them

and the holders of mining claims and the owners of lands adjoining the rivers and streams.[3]

It was not until 1851 that there was any legislation upon the subject of acquiring title to either mining claims or water rights, at which time, although both the mining claims and the waters were upon the public domain of the United States, the State legislature of California passed an Act relating thereto.[4] In 1866, Congress passed the first Act relating to the sale of mineral lands on the public domain, the ninth section of which had reference to the waters appropriated, as related in this and the previous sections.[5] So it happened, that for a period of eighteen years, from 1848 to 1866, proprietors in the mining claims and water rights to the value of many millions rested their title to the same upon only the regulations and customs of miners, which, sanctioned by the legislature and State courts of California, constituted all the law governing the property in mines and in the waters, both located upon the public domain of the United States.[6]

The Nebraska case of Meng v. Coffey,[7] commenting upon the origin of the doctrine, said: "It arose in California at a time when government and law were not yet established, when there was no agricultural population and no riparian owners, and when streams could be put to no use except mining. From the necessities of the case, there being no law applicable, the miners held meetings in each district or locality, and adopted regulations by which they

3 As to the authority of miners' rules, see Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621; Yale on Mining Claims and Water Rights, 1867, pp. 58-88; Snyder on Mines, pp. 55-64.

4 See Sec. 600.

5 For Act of Congress of 1866, see Secs. 611-614.

For copy of the 9th section thereof, see Sec. 611.

6 Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; reversing *Id.*, 9 N. M. 303, 51 Pac. Rep. 674; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; reversing *Id.*, 10 N. M. 617, 65 Pac. Rep. 276; *Id.*, 13 N. M. 386, 85 Pac. Rep. 393.

7 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

agreed to be governed. As at that time streams could be put to no use except for mining, and as the use of large quantities of water was essential to mining operations, it became settled as one of the mining customs or regulations that the right to a definite quantity of water, and to divert it from streams or lakes, could be acquired by prior appropriation. . . . It was a crude attempt to preserve order and the general peace, and to settle customary rights among a body of men subject to no law, under which so many and so valuable rights arose that when the law stepped in it was obliged to recognize them. In this way the rule of appropriation became established in the Pacific States, in opposition to the common law, with reference to streams or bodies of water which wholly ran through or were situated upon the public lands of the United States."

§ 599. **Introduction of element of priority.**—It was at this period of the early history of California, and in the manner described in the preceding sections, that an entirely new element was introduced as an essential requisite in the acquisition of title to water rights—the element of priority. It was based upon the maxim of equity, *Qui prior est in tempore, potior est in jure.*[1]

[1] In a historical statement of the case of Titcomb v. Kirk, 51 Cal. 289, 5 Morr. Min. Rep. 10, is to be found the following: "The gold fields on the Pacific Coast, and on the Eastern slopes of the Rocky Mountains, were situated on the public lands of the United States. These fields were also in mountainous districts through which flowed numerous rivers and small streams of water. This water was necessary to separate the gold from the earth. It had to be turned, by means of ditches, from the beds of the rivers, canyons, and ravines, where it flowed, upon the sides and summits of the hills and mountains, where the deposits of gold-bearing earth were found. These ditches or canals, many of them, extended for twenty, thirty, and forty miles, and cost hundreds of thousands of dollars each, and were built by capitalists for the purpose of conveying and selling water to the owners of mining claims. Others were shorter, and were dug by claim owners for the purpose of conveying smaller quantities of water to particular claims. The water was at first used by conducting a few inches from the ditches into sluice boxes with riffles on the bottom, and then shoveling the earth into the boxes, where it was dissolved by the water, and, being carried down by the current, left the gold on the bottom. This method of work could only be used where the earth above the bedrock was shallow—say, from six inches to six feet in depth. Claims of this character were soon exhausted. To work the more extensive and deep de-

This was something entirely new as far as all systems of laws of the world governing waters were concerned, as far as I have been able to ascertain. It was not included in the civil law as handed down to us from the Roman Emperors, by means of the Spaniards and Mexicans. Under that law, as we have seen, the waters of the natural streams were considered the property of the public; and, in order to secure an exclusive private right it had to be acquired by means of a concession of the Government, or through the ownership of land.[2] Again, it was not recognized under the common law of England, either as strictly construed under the laws of that country or those of the Eastern States of this country, or even under the Western American doctrine of riparian rights as the same is adjudicated at the present time.[3] And so the element of priority, an element so essential in the acquisition of a title to water rights, under the Arid Region doctrine of appropriation, had its very inception in the rules, regulations, and customs of the

posits, where the earth and gravel are from ten to three hundred feet in depth, the 'hydraulic process,' as it is called, was adopted. To work by this process, the ditch must have considerable altitude above the mining claim. The water is turned into an iron pipe, and is ejected from a nozzle at the lower end of the pipe under a pressure of from one to three or four hundred feet against the bank of gold-bearing earth.

"Conflicts soon began to take place between the owners of mining claims, the owners of ditches, and the owners of mining claims and ditches. These were settled (before the organization of Courts) by miners' meetings, and in a short time customs were in force regulating, not only the size of mining claims, but the conflicting rights of miners and ditch owners. *The rule established was that of priority—first in time, first in right.* The legislature then provided that, in actions concerning mining claims, proof should be admitted of the customs in force at the diggings, and that such customs should be the law when not in conflict with the laws and constitution of the State. The Courts also adopted the same rule of decision. By this rule, the constructor of a ditch could not excavate it across a mining claim which had been located before the location of the ditch, without the consent of the miner. The location of a ditch consisted in placing written notices at or near its head, and marking out its general route. When this was done, the ditch acquired a right of way, provided its projectors immediately proceeded in good faith to excavate the same and appropriate the water. By the United States statutes in force, both miners and ditch owners were trespassers on the public lands, and could have been removed by the military."

2 For the rules of the civil law, see Chaps. 29, 30, Secs. 552-584.

3 For Western American doctrine of riparian rights, see Secs. 507-512.

miners at the time of the great rush for gold to what is now the State of California. It was based upon the prevailing spirit for fair play, which is always the rule wherever Americans assemble. Originally starting by the rule adopted for the inception of title to a mining claim, that the man who first made a discovery and set his stakes had a better right to the claim than those who came later, the rule was extended so as to include the water of any natural stream which had been appropriated for the purpose of working the claim, and that, too, whether the claim bordered on the stream or not. Again, the rule was extended so that the prior appropriation of the waters of the natural streams could be made for the purpose of any beneficial use; mining, irrigation, power purposes, and uses by municipalities were all included among the uses for which water could be appropriated by one having the prior right thereto. And as between all claims to the water which would otherwise be equal, these miners in their rough and ready methods enforced the right which was first in time to the extent of the appropriation, even if it took all of the water of the stream. However, if there was an amount in the stream exceeding the valid claim of the first appropriation, then the other claimants came in for their share in the exact order of their priorities to the extent of each appropriation. It must also be remembered that at this period there was no law upon the subject, which was being enforced in this section of the country, and that technically this new rule was a violation of the common law of riparian rights, which was the law of the land after the Treaty of Guadalupe Hidalgo in 1848. But the law of necessity was the only law recognized by the miners. As was said by the Supreme Court of Nebraska:[4] "The doctrine of prior appropriation arose in California at a time when government and law were not yet established, when there were no agricultural population and no riparian owners, and when the streams could be put to no use except for mining. From the necessities of the case, there being no law applicable, the miners held meetings in each district or locality, and adopted regulations by which they agreed to be governed."[5]

[4] Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

[5] See, also, cases cited in last preceding sections, also in those following.

See, also, Titcomb v. Kirk, 51 Cal. 289: "By the United States stat-

Having sufficiently discussed how the doctrine of prior appropriation originated, we will now follow its history and see how the rules, regulations, and customs of the miners were crystallized into law.[6]

§ 600. **California Act of 1851—Proof of custom.**—California was admitted to the Union in 1850, and the State government organized and Courts formed. In 1851 a general statute was adopted, providing that the common law was the rule of decision in the State. In the same year there was also enacted by the legislature an Act which sanctioned the mining rules, regulations, and customs, discussed in the previous sections,[1] which rules also provided for the acquisition of the title to water rights.[2] The California Act of 1851 was as follows: "In actions respecting mining claims proof shall be admitted of the customs, usages, or regulations established, or in force, at the bar or diggings embracing such claims, and such customs, usages, or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action." This Act, slightly amended in phraseology, is still in full force.[3] The substance of this statute

utes in force, both miners and ditch owners were trespassers on the public lands, and could have been removed by the military. The Government, however, did not interfere, nor did Congress pass any Act upon the subject until 1866." Yale on Mining Claims and Water Rights, pp. 58, 59, 70-88; Halleck's introduction to the translation of De Fooz, Secs. 5, 7; Snyder on Mines, Secs. 50-54, 76-83; Lindley on Mines, Sec. 40; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Hicks v. Bell, 3 Cal. 219; Ortman v. Dixon, 13 Cal. 33.

6 See Secs. 600-625.

1 See Secs. 598, 599.

2 See Sec. 599.

3 See Sec. 748 California Code of Civil Procedure; 3 Kerr's Cyc. Codes 1273, which reads as follows: "In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings, embracing such claim, and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action."

For construction of the above, see Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; McClintock v. Bryden, 5 Cal. 97, 63 Am. Dec. 87; St. John v. Kidd, 26 Cal. 264, 4 Morr. Min. Rep. 454; Morton v. Solambo etc. Co., 26 Cal. 533, 4 Morr. Min. Rep. 463; Table Mountain etc. Co. v. Stranahan, 31 Cal. 387.

was afterward adopted by the statutes of nearly every Western State.[4]

Thus it devolved upon the legislature of the new State of California to pass the first Act declaring these "mining customs" to be the law which should control and govern not only the acquisition and retention of mining claims, but also the acquisition and retention of water rights necessary for working the same. This enactment was based upon an entirely new principle governing the rights of water in the United States, the law of priority of appropriation, or the first in time being the first in right. But it will be noticed that the rights acquired in and to the waters of the natural streams under the rules of the miners, and sanctioned by the Act above quoted, were in direct conflict with the principles of the common law upon the subject of riparian rights, adopted by the same legislature. Hence, as there were many active lawyers upon the ground, as there always are when some great attraction draws the people to any particular locality of our country, the trouble began at once; and the "irrepressible conflict" between the common law of riparian rights and the Arid Region Doctrine of appropriation was on. That conflict has now been fought for about sixty years, and is not yet finished. However, it is undoubtedly decided that the Arid Region Doctrine of appropriation, which had its foundation in the customs of the miners, has come to stay, and in seven of the States of the West it has superseded the common law upon the subject of waters, and in all of the other Western States it is recognized as one of the systems under which rights to waters may be acquired.[5]

§ 601. **Early court decisions against doctrine.**—The rules and regulations of the miners, having been strengthened by the Act of the California legislature, discussed in the previous section, were in a few years approved to the fullest extent by the Courts of that State, although in some of its first decisions the Supreme

4 Mallett v. Uncle Sam Mining Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17; Riborado v. Quang Pang etc. Co., 2 Idaho 136, 6 Pac. Rep. 125.

5 For the seven States which have the Arid Region Doctrine of appropriation only, see Sec. 621.

For the seventeen States which permit appropriation under the doctrine, see Sec. 621.

For the ten States which have both systems, see Sec. 621.

Court was loth to adopt the new doctrine, relative to the acquisition of water rights, and in others it refused to do so. In the case of Eddy v. Simpson, decided in 1853, the District Court charged the jury on the trial below, as follows:[1] "As a general principle, the party who first uses the water of the stream is by virtue of priority of occupation entitled to hold the same. If a company or association of miners construct a ditch to convey water from a running stream for mining or other purposes, and they are the first to use the water, locate, and construct the ditch, they are legally entitled to the same as their property, to the extent of the capacity of the ditch to hold and convey the water. For, if it appears that there is more water running in the stream than the ditch of the first party can hold and convey, then any other party may rightfully take and use the surplus, and it does not matter whether the excess of water be taken from a point above or below the dam of the first party." Justice Wells, in delivering the opinion of the Supreme Court reversing the judgment below, said: "The rule laid down by the Court below, while it is a departure from all rules governing this description of property, would be impracticable in its application, and we think that it is much safer to adhere to known principles and well settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this State are embarked."

There are also other early cases where there was the same ruling as in the case of Eddy v. Simpson.[2]

In the case of Hill v. Newman[3] Mr. Justice Bryan, in delivering the opinion of the Court, said: "The right to running water is defined to be a corporeal right, or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes."[4]

1 Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408.

2 *Supra.*

3 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513.

4 Citing Sackett v. Wheaton, 17 Pick. 103; 1 Cruise Digest 39; Angell & Ames on Water Courses, p. 3.

It must be noted that the Justice was in error in his statement of the common law, that the right is embraced by the ownership of the soil *over* which the water passes, and also in the statement that it is a corporeal hereditament. The correct rule is that the right follows the ownership of the land touching upon the water laterally. For which, see Secs. 451, 458.

§ 602. Early court decisions in favor of doctrine—In general.—But in other cases the Supreme Court of California adopted the new doctrine, in some cases almost without discussion, as though the rule had been the settled law for ages; however, in other cases all phases of the question were most carefully considered and elaborate opinions given.[1]

The grounds upon which these decisions were based are stated by Mr. Justice Heydenfeldt, speaking for the Supreme Court of

See, also, Ramsey v. Chandler, 3 Cal. 90, 4 Morr. Min. Rep. 240.

That the right to running water is an incorporeal hereditament, see Sec. 454.

1 Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Stiles v. Davis, 5 Cal. 120; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Hicks v. Bell, 3 Cal. 219; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Nevada etc. Co. v. Kidd, 37 Cal. 282; Newman v. Hill, 5 Cal. 445; Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161; Hill v. King, 8 Cal. 336; Merced M. Co. v. Fremont, 7 Cal. 317, 327, 68 Am. Dec. 262, 7 Morr. Min. Rep. 313; Tenny v. The Miners' Ditch, 7 Cal. 335, 11 Morr. Min. Rep. 31; Tuolumne Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34; Parke v. Kilhman, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; White v. Todd's Valley Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; McDonald v. Bear River Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Leigh v. Independent Ditch Co., 8 Cal. 328, 12 Morr. Min. Rep. 97; Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; Mokelumne Hill Co. v. Woodbury, 10 Cal. 185; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Tarter v. Spring Creek Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Ortman v. Dixon, 13 Cal. 33; Priest v. Union Canal Co., 6 Cal. 170; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Hoffman v. Stone, 7 Cal. 46; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Morton v. Solambo Co., 26 Cal. 533, 4 Morr. Min. Rep. 463; Wixon v. Bear R. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Hill v. Smith, 27 Cal. 476, 32 Cal. 166, 4 Morr. Min. Rep. 597; Parks Canal Co. v. Hoyt, 57 Cal. 44; Farley v. Spring Valley W. Co., 58 Cal. 142; Himes v. Johnson, 61 Cal. 259; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Ophir S. M. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Bear R. W. Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Yale on Mining Claims and Water Rights, 1867, pp. 154-177.

California in the case of Irwin v. Phillips,[2] and quoted in the following section,[3] and also in the opinion rendered by Mr. Justice Field, then of the Supreme Court of the United States, in the case of Jennison v. Kirk,[4] and discussed in a following section.[5]

§ 603. **Early court decisions in favor of doctrine—Irwin v. Phillips.**—One of the first decisions of the Supreme Court of California, wherein the subject was thoroughly discussed, and in fact, the leading case of this period, was that of Irwin v. Phillips,[1] in which Mr. Justice Heydenfeldt, in speaking for the Court, said:

"It is insisted by the appellants that in this case the common law doctrine must be invoked, which prescribes that a water course must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being both at the civil and common law that the owner of lands on the banks of a water course owns to the middle of the stream, and has the right in virtue of his proprietorship to the use of the water in its pure and natural condition. In this case the lands are the property either of the State or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that at the common law the diversion of water courses could only be complained of by riparian owners who were deprived of the use, or those claiming directly under them. Can the appellants assert their present claim as tenants at will? To solve this question it must be kept in mind that their tenancy is of their own creation, their tenements of their own selection, and subsequent, in point of time, to the diversion of the stream. They had the right to mine where they pleased throughout an extensive region, and they selected the bank of a stream from which the water had been already turned for the purpose of supplying the mines at another point.

2 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

3 See Sec. 603.

4 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

5 See Sec. 613.

1 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

See, also, Meng v. Coffey, discussing the history of the doctrine, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

"Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and, with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one Government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system which are crude and undigested and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed that they have come to be looked upon as having the force and effect *res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural bed and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in the various Acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the lawmakers; as, for instance, in the Revenue Act, 'canals and water races' are declared to be property subject to taxation, and this when there was none other in the State than such as were devoted to the use of mining. Section 2 of Article 9 of the same Act, providing for the assessment of companies and associations, among others mentions 'dam or dams, canal or canals, or other works for mining purposes.' This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work mines, it has equally conferred the right to divert streams from their natural channel; and as these two rights stand upon an equal

footing, when they conflict they must be decided by the fact of priority, upon the maxim of equity, *qui prior est in tempore, potior est in jure.* The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. If it is upon a stream, the waters of which have not been taken from their bed, they can not be taken to his prejudice; but if they have been already diverted, and for as high and as legitimate purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection."

§ 604. **Possessors both of lands and waters at this time mere trespassers.**—It must be remembered that at this period of the history of the doctrine, appropriations, both of the mining claims and of the waters for use thereon, were made upon the lands belonging to the United States, and Congress had not at this time made any provisions whereby the title to either the land or the water could be acquired. It must also be remembered that, at this period, those who were occupying the mineral lands of the United States and appropriated the waters upon the public domain were in fact trespassers upon such land and without any title thereto; and, at that time, they had no means of ascertaining that they ever would acquire title either to the lands or to the waters. Yet the Courts of the State of California, without any law or authority upon which to base their action, except upon "the manifest equities of the case," went ahead and rendered their decisions upholding and sustaining, *at least,* the possessory title to both the lands and the waters. These decisions were also in the face of another decision by the same Court where the opinion was rendered by Mr. Justice Field, to the effect that all the lands of the public domain and everything connected with the soil, including the waters thereon, belonged to the United States.[1]

It is by the merest stroke of good fortune, or rather, through the

[1] "Digging for minerals on the public domain of the United States was a trespass entitling the Government to damages in the action at law, and such waste as would be restrained by an injunction from the Court of Chancery, pending the action at law. These rights belong to the Government as a proprietor of the land in common with an individual owner of

sense of fairness and justice of the American people through their Congress, that these mere possessory titles were afterward by the Act of Congress of 1866 ratified and confirmed, and thereby an absolute title vested in such possessors.[2]

§ 605. **The settled rule before any Act of Congress—Spread of California doctrine.**—As we have seen in the previous sections, by a long line of decisions, it became the settled rule in California that at least a good possessory title could be acquired to a water right by the prior appropriation of the waters of the natural streams and lakes, and their application to the working of mining claims, which had also been appropriated, or "located"; and that, too, when both these lands and waters were upon the public domain of the United States, and before Congress had made any provisions authorizing or recognizing in any manner these appropriations.[1] This doctrine soon spread to all of the States and Territories of the arid and semi-arid West, where the same necessities arose for the use of water. As was said by the Supreme Court of Nevada in a case decided in 1865:[2] "So far, then, as the anomalous rights and character of the miner located upon the public land for the purpose of mining are defined and established by the Courts of California, we feel it our duty to recognize them whenever their decisions may be applicable to our condition. Nearly the entire mining interest of this State has grown up under the fostering protection of the law as it was administered and recognized by the Courts of that State. To repudiate the theory and principles upon which they have acted would be to overturn the foundation upon which half of our rights rest."[3]

And so it soon became the settled doctrine throughout all the

the land in the absence of protective legislation." Yale on Mining Claims and Water Rights, p. 331.

By the United States Statutes in force both mines and ditch owners were trespassers on the public lands and could be removed by the military. Titcomb v. Kirk, 51 Cal. 288, 5 Morr. Min. Rep. 10.

2 For the Act of Congress of 1866, see Secs. 611-614.

1 See Secs. 600-603.

For first Act of Congress authorizing these acts, see Secs. 611-614.

2 Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17.

3 See, also, Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Thorp v. Freed, 1 Mont. 651; Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

West that a permanent right of property in the waters of the natural streams and lakes, which ran wholly through or were situated upon the public domain of the United States, might be acquired for mining or other beneficial purposes[4] by the mere appropriation thereof and use for those purposes; that the prior appropriator might thus acquire the right to divert, use, and consume all of the water of the stream, if the same should be necessary for his purposes, as against all others claiming later rights. As the public domain, both the land and water, belonged to the United States, and at that time there being no authorization of Congress for these acts, it can be readily seen that these acts upon the part of the miners and others were technically trespasses against the property and rights of the United States. However, in the continuation of our history of the doctrine, it will be seen how Congress legalized these acts.[5]

§ 606. **Attempted preference first given to mining.**—During the first years of the settlement of the arid West mining was practically the only industry. And as we have seen, the Arid Region Doctrine of appropriation originated with the miners' customs,[1] it was, therefore, strenuously urged at first that water could only be appropriated for that use in mining occupations. In fact, the agricultural possibilities were at that early period of the history of the country an entirely unknown quantity, and the use of water for irrigation, where the greater portion of it was consumed, was looked upon by some of the Courts and the legislature of California as a waste of the water, especially where this use conflicted with the rights claimed by the miners. The early legislatures of the State of California, therefore, attempted to favor the miners above all others classes in the use of water.

The Act of the legislature of 1851, quoted in a previous section,[2] permitted the admission of proof of the "customs, usages, and regulations" in force at the bar or diggings embracing the claims involving any controversy. Again, the Act of 1852, known as the "Possessory Act," permitted those in possession of mining claims

4 For other purposes than that of mining, see Secs. 606, 607.

5 See for Act of Congress of 1866, Secs. 611-614.

1 See Secs. 598-600.

2 See Sec. 600.

on the mining lands to sue in the State Courts for interference with their possessions, with a proviso excepting the possessors of land for agriculture or grazing from protection against the miners if the land contained mines or minerals.[3] And it was held that the rule rested upon its necessity for the preservation of peace and quiet in the country.[4]

Again, the Act of 1855, known as the "Indemnity Act," required the miner who entered upon the land of an agriculturist to give a bond for whatever damages might be done to the *improvements only* of the agriculturist.[5] This Act requiring the indemnity referred to was intended to guard against the injuries resulting from the unrestricted license given by the Act of 1852, known as the "Possessory Act," and discussed above.[6] The possession of a farmer on the public land was held evidence of title in him as to everybody but a miner;[7] and, where a party entered on mineral land for the purpose of mining, he could not be presumed to be a trespasser, although the land was in the actual possession of an agriculturist,[8] the theory being that the possession of the agriculturist was subject to the right previously vested in the miner, where he claimed the possession for mining operations.[9]

3 See Statutes 1852, p. 158.

4 See Hubbard v. Barry, 21 Cal. 321; Gray v. Dixon, 74 Cal. 508, 16 Pac. Rep. 305; Stoakes v. Barrett, 5 Cal. 36; Hicks v. Bell, 3 Cal. 219; McClintock v. Bryden, 5 Cal. 97, 63 Am. Dec. 87; Burdge v. Underwood, 6 Cal. 45; Fitzgerald v. Urton, 5 Cal. 308; Yale on Mining Claims and Water Rights, pp. 47-50.

5 Statute 1855, p. 145.

6 See Burdge v. Underwood, 6 Cal. 45; Weimer v. Lowery, 11 Cal. 104, 4 Morr. Min. Rep. 543; Martin v. Browner, 11 Cal. 13; Henshaw v. Clark and 103 Chinamen, 14 Cal. 460; Biddle Boggs v. Merced M. C., 14 Cal. 249; 70 U. S. 3 Wall. 304, 18 L. Ed. 245; Billings v. Hall, 7 Cal. 1; Yale on Mining Claims and Water Rights, pp. 50-52.

See, also, Gillan v. Hutchinson, 16 Cal. 153, where the Indemnity Act was held unconstitutional. But see Rupley v. Welch, 23 Cal. 452, 4 Morr. Min. Rep. 243, where the Act was again upheld. See, also, Esminger v. McIntire, 23 Cal. 593; Rogers v. Soggs, 22 Cal. 444, 14 Morr. Min. Rep. 375.

7 Yale on Mining Claims and Water Rights, p. 51.

8 Smith v. Doe, 15 Cal. 100, 5 Morr. Min. Rep. 218.

See, also, Gillan v. Hutchinson, 16 Cal. 153, where the Indemnity Act was held unconstitutional.

9 Rupley v. Welch, 23 Cal. 452, 4 Morr. Min. Rep. 243. See the case of Natoma W. Co. v. Hancock, 101 Cal. 42, 55, 35 Pac. Rep. 334, criticizing this case, and where the Court said: "But in early mining times the paramount right of the miner strenuously insisted upon by the miners and in the mining sections often exercised with

§ 607. **All beneficial uses finally given equal footing.**—From an examination of the California cases of this period it will be seen that they are at considerable variance with each other upon this phase of the subject.[1] There are cases which tended to restrict the claims of the miner and to place all pursuits, especially where the use of water was required, upon an equal footing. In fact, it may be said that the Supreme Court of the State limited and restricted as far as possible the Acts of the legislature especially favoring the miners, discussed in the previous section,[2] and tended to place all uses of water upon an equal footing.[3] So that the prior possessory right of the agriculturist was finally protected, and his water was protected even as against the miners, always provided, of course, that his appropriation was prior.[4] And the rule was adopted, even before there was any legislation by Congress upon the subject, that a valid appropriation could be made of a water right independent of the purpose for which it was appropriated, provided that the appropriation was a prior one, and that the water was used for some useful or legitimate purpose, regardless of the fact whether that purpose was for mining, agriculture, or any other beneficial use for which water is used.[5]

a high hand, as it was by the defendants."

See, also, the case of Thorp v. Freed, 1 Mont. 651, where it was urged that the right to appropriate waters applied only where it was used for mining operations. But by a divided Court the question was left undecided.

In the case of Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583, the Supreme Court of the United States upheld the right as applied to mining, but was silent as to the right for other uses.

But in the case of Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683, the same Court held that the right also applied to irrigation.

1 See cases cited under last section.

2 See Secs. 602, 603.

3 Fitzgerald v. Urton, 5 Cal. 308, 12 Morr. Min. Rep. 198; Tarter v. Spring Creek Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; McDonald v. Bear River & A. W. & M. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Wixon v. Bear River etc. Co., 24 Cal. 365, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Biddle Boggs v. Merced M. Co., 14 Cal. 279; 70 U. S. 3 Wall. 304, 18 L. Ed. 245; Smith v. Doe, 15 Cal. 100, 5 Morr. Min. Rep. 218; Ortman v. Dixon, 13 Cal. 33.

4 Rogers v. Soggs, 22 Cal. 444, 14 Morr. Min. Rep. 375; Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692, 12 Morr. Min. Rep. 232.

5 Yale on Mining Claims and Water Rights, p. 139; Rogers v. Soggs, 22 Cal. 444, 14 Morr. Min. Rep. 375; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

It is the general rule today in all the States of the arid and semi-arid West, where there is no statute giving preference uses, that all uses of water are treated impartially, as far as the right of the appropriation of the same is concerned. As was said by Mr. Justice Field, in rendering the opinion of Basey v. Gallagher:[6] "Ever since that decision it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flourmills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced."[7]

§ 608. **Decisions of court judicial legislation.**—In the study of the early history of the doctrine, the question will often arise in the mind of the student, as to whether the Courts did not exceed their province in their decisions in promulgating an entirely new doctrine upon the question of the use of waters, and the acquisition of rights therein, and that, too, contrary to the common law adopted by the State of California as its rule of jurisprudence. There is no question but that the Courts in many instances did exceed their powers upon the subject. It is within the province of the Courts to construe the laws as they exist and not make new ones, or to repeal old, existing laws. This duty comes within the legislative branch of our Government. But this usurpation of legislative functions by the Courts can be excused upon many grounds. It must be borne in mind that the judiciary of the new State of California had thrown upon it responsibilities not then or since incurred by any other State of the Union. In addition to those perplexing questions that arose in the nature of things, and especially putting into practical operation a new constitution and a new code of statutes, there was a large class of cases unknown to the jurisprudence of the other States. The mining interests

[6] 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

[7] See, also, Natoma Water Co. v. Hancock, 101 Cal. 42, 35 Pac. Rep. 112, 35 Pac. Rep. 334.

See, also, for the purposes for which water may be appropriated, Secs. 690-705.

For statutes upon the subject of preference uses, see Secs. 791-794.

For the laws of the various States, see Part XIV.

of the State had grown up under the force of new and extraordinary circumstances; an unusual and entirely new method had been adopted through the miners' customs for the acquisition of title to a water right, and all in the absence of any specific and certain legislation to guide the Courts. There being no known system existing at the beginning, parties were left without any certain guide, and for that reason placed themselves in such conflicting positions that it was impossible to render any decision that would not produce great injury, not only to the losing parties immediately connected with the suit, but to great numbers of others who, though not formal parties to the record, must be deeply affected by the decision. No class of cases could have arisen more difficult of a just decision than that class of cases involving the rights to the use of water, especially where the Courts endeavored to reconcile the use as acquired under the new Arid Region Doctrine of appropriation under the miners' customs with the common law theories of riparian rights, adopted as the rule of decision in that State. Is it any wonder that the early Courts of California were compelled to adopt some new rules, which may be termed judicial legislation, for the government of these interests? Left without any direct precedent, as well as without any specific legislation, either by Congress or by the legislature of the State, the Courts were compelled to apply to this anomalous state of things the more expanded principles of equitable justice.[1] And, as we shall see in following the history of the doctrine further, the possessory rights in the mining land, and the appropriation

1 See Bear River etc. W. Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Yale on Mining Claims and Water Rights, p. 139, where the author says: "There is no State legislation upon the subject of water rights for mining purposes. The complaint of the Supreme Court was, in the opinion of some of its members, that they were compelled to take the place of the legislature in framing rules in regard to water rights. This was undoubtedly the case; the only rule adopted by the legislature touching the subject was the adoption of the common law as the rule of decision, by the Act of April, 1850. It was therefore, as the Chief Justice said, left to the Courts, and this can be admitted without injustice to the members in the days of its early organization. Whether the duty was properly performed or not under the law, their rules are now adopted by Congress, and that ought to be satisfactory to all concerned."

of the waters of the natural streams, were afterward confirmed by Congressional legislation.[2]

§ 609. **Character of title of claimants.**—It must be admitted at this late day that the mere possessory claimants to the mineral lands and waters, prior to the Act of 1866, had no title against the Government, which was the owner of both the lands and waters flowing thereon. Even this proposition was admitted by some of the earlier California cases, which so strenuously upheld these possessory rights. In the case of Kidd v. Laird [1] the Court, after holding that the Government was the riparian proprietor upon all of the waters flowing upon the public domain, said: "Upon this subject it is only necessary to consider that none of the rights involved in this controversy are founded upon a legal title, and that the safety and security of the parties require that the rights of each, as fixed by the priority and extent of their respective appropriations, should be regarded as perfect and absolute as if they had been acquired by prescription, or were held under an express grant from the riparian owner." [2]

Upon this proposition, in the case of Biddle Boggs v. Merced Mining Company,[3] the Court, by Chief Justice Field, said: "That there was an implied license from the Government to mine for the precious metals upon the public land, by reason of its indulgence, if not by direct encouragement, extended to the mining population, as claimed by every miner, has been expressly denied by judicial authority." [4]

Upon the other hand, these claimants to possessory rights had no title, as against the Government of the United States, who was the owner of all the lands and waters as between each other. The first appropriator had a good title to his right of possession against all subsequent comers. These two propositions were summed up by Mr. Justice Field in his opinion in the case of Jennison v.

2 See, for Acts of Congress confirming these rights, Secs. 611-618.

1 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

2 See, also, Lindley on Mines, 2d Ed., Sec. 642; Hughes v. Devlin, 23 Cal. 501, 12 Morr. Min. Rep. 241; Buchner v. Malloy, 155 Cal. 253, 100 Pac. Rep. 687; Miller v. Imperial Water Co., 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

3 14 Cal. 279, 70 U. S. 3 Wall. 304, 18 L. Ed. 245.

4 See, also, Yale on Mining Claims and Water Rights, pp. 332, 333.

Kirk,[5] in which he said: "The first appropriator was everywhere held to have, within certain well-defined limitations, a better right than others to the claims taken up, and in all controversies, *except as against the Government*, he was regarded as the original owner, and from whom title was to be traced."

§ 610. **California decisions based upon presumption of grant.**—In view of the fact that previous to the year 1866, the date of the first Act of Congress upon the subject, this new doctrine of prior appropriation could be based upon no grant, statute, or express permission from the Federal Government directly authorizing the right of exclusive appropriation of water upon the public domain, and from the fact that the legislature of the State of California passed the following Act, "The common law of England so far as it is not repugnant to or inconsistent with the Constitution of the United States or the constitution or the laws of the State of California shall be the rule of the decisions of all the courts of this State," it seems strange that the early California decisions respecting water rights, which are directly opposed to the common law rules respecting the same, as universally understood and expounded by the Courts of England and of the United States, should be based upon "one favorite and much indulged doctrine" of the common law itself—the doctrine of presumption. Yet, in spite of the seeming inconsistency, such is the fact. Pomeroy, in his work on "Riparian Rights," seems to give the true explanation, that it was "in order to protect the vast interests which had grown up under the mining systems, and to give legal sanction to the rights thus acquired."[1]

The case of Conger v. Weaver[2] is the leading case upon this theory of presumption. The case was decided in 1856, and the question was discussed with great ability by the learned Judge, Mr. Justice Heydenfeldt, who, in delivering the opinion of the Court, said: "Every Judge is bound to know the history and the leading traits which enter into the history of the country where he presides. This we have held before, and it is also an admitted doctrine of the common law. We must, therefore, know that this State has

[5] 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 240.

[1] Pomeroy on Riparian Rights, Sec. 22.

[2] 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the Government; that but little, as yet, had been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously, from a period anterior to the organization of the State Government to the present time; upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes, and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees, diverted water courses; and, indeed, have done, in various enterprises of life, all that is usual and necessary in a high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the Courts who have to apply the law in reference to them, but also the Government of the United States, which claims to be the proprietor of these lands; and the Government of the State, within whose sovereign jurisdiction they exist. In the face of these notorious facts, the Government of the United States has not attempted to assert any right of ownership to any of the large body of land within the mineral region of the State. The State Government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them in some instances, and recognized them in all. Now, can it be said with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon the *doctrine of presumption of a grant of right*, arising either from the tacit assent of the sovereign, or from the expressions of her will in the course of her general legislation, and, indeed, from both. Possession gives title only by presumption; then, when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? *Only upon the doctrine of presumption*, for a license to occupy from the owner will be presumed."

Referring to the opinion in the above case in the case of Lux v. Haggin,[3] decided over 30 years after, the Court said: "The law

[3] 69 Cal. 255, 10 Pac. Rep. 674.

of California, with reference to priority of possession on the public lands, has been so long established that we are apt to forget that the whole system was built upon a presumption entertained by the Courts of a permission from the United States."[4]

"Presumptions of a fact are inferences as to the existence of some fact drawn from the existence of some other fact."[5]

So the existence of the open and notorious fact that certain waters of streams and lakes located upon the public domain of the United States had been appropriated by private parties for mining, agriculture, and various other purposes; and that enormous expenditures of money had been made in building up vast interests in conducting the water to places where it was needed; also that in the face of these open and notorious facts the Government of the United States, the proprietor of these lands and waters, had not attempted to assert any right of ownership in them, and that the State Government of California had not only looked approvingly upon this universal appropriation of said lands and waters, but had in some instances encouraged them, it was therefore held that these rights rested upon the doctrine of presumption of a grant of right, arising from the tacit assent of the Government, the owner, to the appropriation of both the lands included in the mining claims located upon the public domain, and also the appropriation of the waters of the natural streams for beneficial purposes.[6]

[4] See, also, Hicks v. Bell, 3 Cal. 219; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621.

[5] Bouvier Law Dic., sub. Presumption; 1 Phillips on Ev. 156; Rex v. Burdett, 4 B. & A. Ald. 95; 160 Eng. Reprint 873; Patteshall v. Turford, 3 B. & Ad. 890, 23 Eng. C. L. 212, 110 Eng. Reprint 327; Eldridge v. Knott, 1 Cowper 214, 98 Eng. Rep. F. R. 1050; Good Title v. Baldwin, 11 East 488, 103 Eng. Rep. F. R. 1092.

[6] As to the conflicting rights between the settlers and appropriators, see Secs. 810-823.

See Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Fitzgerald v. Urton, 5 Cal. 308.

But see the case of Boggs v. Merced Mining Co., 14 Cal. 279, 70 U. S. 3 Wall. 304, 18 L. Ed. 245, where Mr. Chief Justice Field said in rendering the opinion of the State Court: "Assuming, then, in the first place, for the purpose of this case, that the mineral belongs to the United States—has the defendant any effectual license to

Technically speaking, of course, the presumed grant or license consisted simply in the forbearance of the Government from interfering with or prohibiting these appropriations of the waters flowing upon the public domain, there never being any grant or license in fact from the Government until the Act of Congress of July 26, 1866.[7] But whatever it may be called, a presumptive grant, license, or forbearance of the Government, the rights of persons who had constructed canals and ditches to be used in mining operations, and for the purpose of irrigation, or for any other beneficial use or purpose, in the region where such artificial use of the water was an absolute necessity, were rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866; and the very cause of the passage of that Act was for the purpose of protecting those rights, as will be seen when we come to the

enter upon the premises of the plaintiff and remove it? It is sometimes said, in speaking of the public lands, that there is a general license from the United States to work the mines which these lands contain. But this language, though it has found its way into some judicial decisions, is inaccurate as applied to the action, or, rather want of action, of the Government. There is no license in the legal meaning of the term. A license to work the mines implies a permission to extract and remove the mineral. Such license from an individual owner can be created only by writing, and from the General Government only by Act of Congress. It carries an interest in land, and arises only from grant. The mineral, whether a distinct possession or otherwise, constitutes part of the realty, as much so as growing timber, and no interest in it can pass except in the ordinary modes for the disposition of land. It is under the exclusive control of Congress equally with any other interest which the Government possesses in land. But Congress has adopted no specific action on the subject, and has left the matter to be controlled by its previous general legislation respecting the public domain. And it is from its want of specific action, from its passiveness, that the inference is drawn of a general license. The most which can be said is that the Government has forborne to exercise its rights, but this forbearance confers no positive right upon the miner which would avail as a protection against the assertion of its claims to the mineral. The supposed license from the General Government, then, to work the mines in the public lands, consists in its simple forbearance. Any other license rests in mere assertion, and is untrue in fact and unwarranted in law."

[7] For copy of this Act, and construction, see Secs. 611-619.

But in Ortman v. Dixon, 13 Cal. 33, it was said: "We hold the absolute property in such cases to pass by appropriation as it would by grant."

history of its passage.[8] It was said in an Oregon case:[9] "The right of mining for the precious metals is a franchise, and the attendant circumstances raise the presumption of a general grant from the sovereign of the privilege."

§ 611. Act of Congress of July 26, 1866.—It is our purpose at this point to discuss the Acts of Congress of 1866, and that of July 9, 1870, only so far as they relate to the history of the doctrine of appropriation, leaving the more thorough discussion of the Acts, their construction and effects, to other portions of this work.[1] As we have seen, the Government had by its conduct recognized the rights of persons who had appropriated the water of the streams and lakes on the public domain, and who had constructed canals and ditches to facilitate its use in mining operations and for the purpose of agriculture in the region where such artificial use of the water was a necessity. It is further true that before any Act of Congress was passed sanctioning those claims of the miners, this doctrine of prior appropriation, which at first applied only to the operations of mining, was extended to all other beneficial purposes for which water was essential—to irrigation, in promoting agriculture and horticulture, to milling, manufacturing, and municipal purposes—which uses were also recognized and encouraged by the Government as being equal.[2]

On the 26th day of July, 1866, there was approved an Act of Congress which confirmed the position taken by the Supreme Court

8 For history of the passage of the Act of 1866, see Secs. 612, 613.

See, also, Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621; Atchison v. Peterson, 1 Mont. 561, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Forbes v. Gracey, 94 U. S. 762, 34 L. Ed. 313; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240.

See, also, Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533; Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. M. Rep. 526; Merced M. Co. v. Fremont, 7 Cal. 317, 327, 68 Am. Dec. 262, 7 Morr. Min. Rep. 313.

See Mallett v. Uncle Sam M. Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. M. Rep. 17; Sparrow v. Strong, 70 U. S. 3 Wall. 104, 18 L. Ed. 50, 2 Morr. Min. Rep. 320.

9 Gold Hill etc. Co. v. Ish, 5 Ore. 104, 11 Morr. Min. Rep. 635.

1 See Secs. 611-618.

2 See Secs. 606, 607.

of California, and ratified all possessory rights, both in lands and waters, which were recognized and acknowledged by the local customs, laws, and decisions of the Courts, and which had vested and accrued *prior* to the passage of the Act.[3] The ninth section of that Act reads as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury shall be liable to the party injured for such injury or damage."[4]

The Act of 1866 related principally to mining lands, Section 1 of which provided as follows: "Be it enacted that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be *free and open* to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

It was thus, after eighteen years of constant struggle, that Congress finally acknowledged the general wisdom of the customs and regulations of the miners, which sprang from the necessities of

[3] That the Act was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use rather than the establishment of a new right, see discussion and cases cited in Secs. 612-614.

See, also, Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 685; Forbes v. Gracey, 94 U. S. 762, 34 L. Ed. 313; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772.

[4] 7 Fed. Stat. Ann., 1905, p. 1090; 2 U. S. Comp. Stat. 1901, p. 1437; Rev. Stat. of U. S. 1878, Sec. 2339; 14 Stat. L. 523.

See, also, Chap. 51, Secs. 931-934.

the case leading up to them, and confirmed what was the inception of the Arid Region Doctrine of appropriation of the waters of the natural streams for beneficial uses or purposes. And, as in the course of time the State of California, and in fact, all of the Western portions of our country were becoming rapidly settled up, this Act prevented the destruction and confiscation of these rights, which would have been the case had the land been granted by the Government to the settlers without their recognition, and the common law rules of riparian rights strictly adhered to. But, after the passage of the Act, all subsequent patentees acquiring lands from the United States take those lands *subject* to all "vested and accrued" rights in and to the waters of the public domain appropriated by other parties prior to its enactment.

In the next section we will take up the immediate cause for the passage of the Act.[5]

§ 612. **How the Act of July 26, 1866, was passed.**—Our history of the doctrine of appropriation would not be complete if we did not give a short sketch as to how the Act of 1866 was passed. It must be remembered that at this time the Civil War had been ended but a short time and this Government emerged from the same with an enormous debt, and the country was in the throes of the "Reconstruction Period." A great many schemes had been proposed to pay off the war debt, and it was suggested by some members of Congress that the sale of the mines and the rights of the miners, which had been held up to this time by a possessory right only, should be made for this purpose. This, as can be readily seen, would have amounted to a confiscation of all of these possessory rights of the miners and others who had acquired the rights to the use of the waters of the natural streams on the public domain under the miners' customs. It was to prevent this, and not of their own initiative, that the majority of the Western members of Congress, headed by Senator William M. Stewart of Nevada,[1] endeavored, by counter measures to the bills introduced in Con-

5 See Sec. 612.

For the right of appropriators as against rights of settlers, see Secs. 810-823.

1 Senator Stewart, one of the greatest public characters in the history of the Western country, died about one month before this article was written.

gress which provided in effect for this confiscation, to checkmate this proposed action, and which resulted, to the great surprise of all, in a more equitable rule for all concerned.[2] At this point we will abstract the history of the contest as given by that eminent writer upon the subject, Mr. Gregory Yale, who wrote his work upon the subject of "Mining Claims and Water Rights" in 1867, the year following the passage of the Act of Congress, and who was in California at the time. He says:[3]

"The miners of California and the States and Territories adjacent thereto have but a very inadequate idea of the imminent peril in which the pursuit in which they are engaged was placed at the commencement of the 39th Congress. Two years ago there was a strong disposition in Congress and the East generally to make such a disposition of the mines as would pay the National debt. The idea of relieving the Nation of the payment of the enormous taxes which the war had saddled upon us by the sale of the mines in the far distant Pacific Slope, about which few people here have any knowledge whatever, was the most popular that was perhaps ever started. Compelling other people to liquidate your obligations has been in all ages and in all nations a highly comfortable and popular proceeding. . . . The first bill on the subject was introduced in the Senate by Mr. Sherman of Ohio, and in the House by Mr. Julian of Indiana. Both of these measures contained most odious features. Sherman's bill went to the Committee on Public Lands, of which Mr. Stewart was a member. After much consideration it was understood that the committee would report adversely. Julian's bill received a much more favorable consideration in the House. In fact, the House went so far as to pass a resolution indorsing legislation substantially of the character contemplated in Julian's bill. After much canvassing, Mr. Conness and Mr. Stewart came to the conclusion that it was no longer safe to act on the defensive, and that it was necessary to determine what legislation would be acceptable, and to make a bold move to obtain it. The Secretary of the Treasury was then one of the strongest advocates of the sale of the mines, and appeared to be under the impression that it would yield a large

2 A complete history of this contest will be found in the Congressional Globe, 1st Session of the 39th Congress, Part IV.

3 Page 10.

revenue. The movement thus far had been encouraged by him, and it was thought that a partial success of his views would be more satisfactory to him than entire defeat. Mr. Conness accordingly suggested to him to have a bill prepared in his department which would avoid the odious provisions of the other two propositions, and get some Senator to introduce it, assuring him that a liberal measure would receive the favorable consideration of the Pacific delegation. The result was that the Secretary had prepared the second bill, introduced by Mr. Sherman, which was a great gain on the first bill. This bill went to the Committee on Mines, of which Mr. Conness was chairman and Mr. Stewart a member. After much discussion these two Senators were appointed a committee to draft a substitute, which, after several weeks of close study, resulted in the reporting of a bill substantially the same as the one which is now law."

Then, after stating the position of some of the members of the Senate upon the proposition and that it was opposed by some of the Western Senators, the author proceeds: "After being amended slightly by Mr. Stewart the bill passed the Senate. When it was first introduced the bill had no friends in the House, but after it passed the Senate some of the Pacific delegation began to regard it favorably. It should have gone in the House to the Committee on Mines, of which Mr. Higby was chairman; but Mr. Julian, who is an old member and chairman of the Committee on Public Lands, seized on the bill at once and had it transferred to his committee. Then the struggle came to get it out of that committee. Mr. Stewart addressed himself to the members of it, and got every one of them except Julian, but he was intractable. He wanted his bill to go first, and would not let this supersede it. The House, too, was canvassed, and was found to be favorably disposed, but there was no way of getting at the bill. In the meantime, Higby had passed a bill from the Committee on Mines in regard to ditches. It contained only three provisions, and bore no resemblance to the bill in question, but it related to the same subject. When this bill came to the Senate the mining bill was tacked on as a substitute, and was passed. It was then sent back to the House and went on the Speaker's table. In that condition it required a majority to refer it. To get that majority Julian exerted all his strength, but failed. The bill was passed in the

House without amendment, and became a law. This accounts for its being entitled 'An Act granting the right of way to ditch and canal owners through the public lands, and for other purposes.' . . . The result of the whole fight is the grant of all the mines to the miners, with some wholesome regulations as to the manner of holding and working them, which are not in conflict with existing mining laws, but simply give uniformity and consistency to the whole system. The escape from entire confiscation was much narrower than the good people of California ever supposed. If either of the bills originally introduced had been passed the Pacific States and Territories would have received a blow from which they would never have recovered. The Government could only have receded after the most irreparable and widespread damage had been done."[4]

In reference to the question of confiscation, we will only add that had the original bill passed, it would not only have confiscated the mines, but also the water rights used in working the mines and for other uses, and taken from the streams flowing upon the public domain. As we have seen, in previous sections of this work, these rights to water were based wholly upon the miners' customs in appropriating the waters from the streams. With the miners' rights to the mines would also have gone the rights to the water based upon the miners' customs.

§ 613. Decision of the Supreme Court of the United States as to the cause of the passage of the Act of 1866—Jennison v. Kirk.—In commenting upon the facts as to why and how the Act of 1866 was passed, Mr. Justice Field of the Supreme Court of the United States, in rendering the opinion of that Court in the case of Jennison v. Kirk,[1] said:

"The object of the section was to give the sanction of the United

4 It will be noticed that the greater portion of the Act of July 26, 1866, related to mines and mining; only the ninth section, quoted in a previous section, related to water and water rights, and rights of way for the same. See Sec. 611.

1 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

Mr. Justice Stephen J. Field was also a historical character in the early history of California. He was a Judge of the District Court, Chief Justice of the Supreme Court of the State, and finally Associate Justice of the Supreme Court of the United States. He died in 1897.

States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the Courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the Act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open by law to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada Mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the Government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be

worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right.

"The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of the miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditure of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justice, for the security of these ditches and flumes and the protection of rights to water, not only between appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State Courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners as enforced and moulded by the Courts and sanctioned by the legislation of the State, constituted law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to the sale of the mineral land. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such land from sale. In that year the Act, the ninth section of which we have quoted, was passed. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by the citizens of the United States, and those who had declared their intention of becoming citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. . . . In no provision of the Act was any intention manifested to interfere with the pos-

sessory rights previously acquired, or which might be afterward acquired; the intention expressed was to secure them by a patent from the Government. The Senator of Nevada, Hon. William M. Stewart, the author of the Act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the Government. The legislature of California, he said, had wisely declared the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the Constitution or laws of the State or of the United States, should govern their determination; and a series of wise judicial decisions had moulded these regulations and customs into 'a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes.' 'The miner's law,' he added, 'was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, under the implied sanction of a just and generous Government. And the Act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the Government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were already attached.' These statements of the author of the Act, in advocating its adoption can not, of course, control its construction, where there is doubt as to its meaning; but they show the condition of the mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject; and thus serve to indicate the probable intention of Congress in the passage of the Act. . . . It was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where

they were not previously recognized by the customary law of miners."[2]

§ 614. Other decisions as to the cause of the passage of the Act of 1866.—There are also a number of other decisions rendered by various Supreme Courts, including those by the Supreme Court of the United States, which set forth the cause of the passage of the Act of July 26, 1866.[1] The Washington Court, in the case of Benton v. Johncox,[2] relative to the cause of the passage of the Act, said: "It was for the purpose of protecting the rights of appropriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of the Courts, that the ninth section of the Act of Congress of July 26, 1866, the substance of which is included in Section 2339 of the Revised Statutes, was enacted. It was apparent to Congress, and, indeed, to every one, that neither local customs nor State laws nor decisions of State Courts could vest the title to public land or water in private individuals without the sanction of the owner, viz., the United States. The Government being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; but, when it disposed of land without reserving the water, the latter passed to its grantee free from interference thereafter by the grantor."

Again, the Nebraska Court, referring to the Act of 1866, in the case of Meng v. Coffey,[3] said: "But it was only the same rule as that by which possession of mining claims was recognized. It was a custom intended to prevent disorder and forcible dispossession of those who had located mines."[4]

Again, the Supreme Court of the United States in the case of Ivanhoe Mining Company v. Keystone Consolidated Mining Company,[5] said: "Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in

2 Cong. Globe, 1st Sess., 39th Cong., Part IV, pp. 3225-3228.

1 For the opinion of Mr. Justice Field upon the subject, see Sec. 613.

2 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912.

3 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

4 Quoted from the decision of Mr. Justice Field, in the case of Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

5 102 U. S. 167, 26 L. Ed. 126, 13 Morr. Min. Rep. 214.

the precious metals, and such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State, in 1850, was largely composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested, by the treaty, in the Government of the United States, it became important to determine what course the Government would take with regard to this new source of untold wealth. The Spanish Government, to which this territory and much other, rich in the precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the Crown, which made Spain for a time the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that, with the Territory, we had acquired the laws, which governed the production of gold from the earth. Others believed that, whether this were so or not, it would be a wise policy for the Government to secure to itself a fair proportion of the metal produced from its own ground. But while Congress delayed and hesitated to act, a swarm of enterprising and industrious citizens filled the country, and before a State could be organized had become its dominating element, with wealth and numbers and claims which demanded consideration.

"Matters remained in this condition, with slight exception, until the year 1866, when Congress passed a law by which title to mineral land might be acquired from the Government at nominal prices, and by which the idea of a royalty on the product of the mines was forever relinquished." [6]

§ 615. **Act of July 9, 1870, making all patents subject to vested rights.**—Thus, as we have seen, in following the history of the doctrine, the prior appropriation of the water of a stream or lake upon the public domain, from the very first, after the discovery of gold in California in 1848, secured a title to the water appropriated, which was then considered good as against all the world except the United States Government. And furthermore, the Government,

6 See, also, Chambers v. Harrington, 111 U. S. 350, 28 L. Ed. 452, 4 Sup. Ct. Rep. 428.

instead of denying this right and treating it as non-existing, not only recognized it as having accrued and vested (by its forbearance from interfering and prohibiting these open and notorious acts of appropriation of water), but also, by the Statute of 1866,[1] formally acknowledged the doctrine of appropriation and made the Government title to the waters and to the lands used for rights of way for ditches and canals subject to the claims and uses of the appropriators, whose rights had vested and accrued prior to the vesting of other rights of the grantees of the Government either in the water or in the land. And so the Government having disposed of the waters on its lands, where the same had been actually appropriated, and also having given certain easement in the land for the rights of way for the ditches and canals in order to conduct the water to the place of use, it could only give to its patentees, after the passage of the Act of 1866, a title to the lands subject to any vested and accrued rights and rights of way for the construction of the ditches and canals.[2] This was a consequence which naturally followed from the well settled law of conveyancing. And although there was no reservation clause in the Government patents, prior to those issued after the Act of 1870, wherever the title of the United States to any portion of the public domain was thus burdened the same burden would on general principles accompany the title, if transferred to any subsequent or private owner; whoever succeeded to the title of the United States, through any mode of acquisition or conveyance, would acquire and hold it, subject to the same servitude which before existed in favor of the prior appropriator.[3]

But it has not been left as a matter of inference. By an Act of July 9, 1870, Congress in supplementing the Statute of 1866 provided:

"*All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights*

1 For Act of 1866, see Sec. 611.

2 Pomeroy on Riparian Rights, Secs. 16, 25; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Osgood v. El Dorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

See, also, Copp's Mining Dec. 1873, 1874.

See, also, for discussion as to rights of way granted under the Acts of 1866 and 1870, Secs. 931-934.

3 Pom. Rip. Rights, Sec. 25; Osgood v. El Dorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section." [4]

§ 616. Construction of Acts of 1866 and 1870—Effect of Acts on appropriations against patentees of the Government prior to 1866.—The United States being the owner of the public domain, and, of course, as incident thereto the waters flowing thereon, an appropriator of those waters, prior to the year 1866, did not acquire any legal title to the same as against the Federal Government or its grantee, who obtained his patent prior to 1866, the date of the first Act of Congress confirming the claims made by appropriation.[1] But it was held that in cases where the rights by appropriation had vested and accrued prior to the Act of Congress of 1866, and also prior to the rights of the grantees of the Government, that these were rights which "the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866." [2] It has never been held by the Supreme Court of the United States, or by the Supreme Court of California, that an appropriation of water on the public lands of the United States after the act of Congress of July 26, 1866, or the amendatory and declaratory Act of 1870, gave to the appropriator the right to the water appropriated as against the grantee of riparian lands upon the same stream under a grant made or issued *prior* to the Act of 1866, except in a case where the water, so subsequently appropriated, was reserved by the special terms of such grant. And it has been held by the Supreme Courts of California and Nevada that one who acquired a title to riparian lands from the United States prior to the Act of Congress of July 26, 1866, could not, in the absence of special reservation in his grant, be deprived of his common law rights to

4 7 Fed. Stat. Ann. 1905, p. 1096; 2 U. S. Comp. Stat. 1901, p. 1437; U. S. Rev. Stat. 1878, Sec. 2340; Act of July 9, 1870, 16 Stat. L. 218.

For the construction of this Act, see Secs. 616-620.

1 See Sec. 611.

2 Broder v. Natoma W. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

See, also, Sec. 613.

For appropriation as against riparian owners, see Secs. 810-823.

the natural flow of the stream as it was wont by Nature by one who had appropriated its waters after the passage of that Act.[3]

In the case of Lux v. Haggin, decided by the Supreme Court of California,[4] Mr. Justice McKinstry, in giving the opinion of the Court relative to the principle that a patent issued prior to the Act of Congress of July 26, 1866, for riparian lands upon a stream was not subject to an appropriation of the waters of the same stream made prior to the issuance of the patent, referred approvingly to the rule as laid down by the Supreme Court of Nevada in the case of Vansickle v. Haines, and said: "In Vansickle v. Haines, the plaintiff had diverted one-fourth of the water of Daggett Creek in the year 1857. He made the diversion on a point then on the public land, but which in 1864 was patented by the United States to the defendant Haines. In 1865 Vansickle obtained a patent for his own land where he used the water. In 1867 Haines constructed a wood flume on his land and turned into it all of the waters of the stream, thereby depriving the plaintiff of that part of it which he had been using. The Supreme Court of Nevada held that the plaintiff by his appropriation of water *prior* to the date of the defendant's patent acquired no right which could affect that grant, and that while the Act of Congress of July, 1866, protected those who at that time were diverting water from its natural channels on the public lands, and while all patents issued or titles acquired from the United States since that date are obtained subject to the rights of water by appropriation existing at that time, yet with respect to patents for riparian lands issued *before the Act of Congress* the patentee had already acquired the right to the flow of the water, with which Congress could not interfere."[5] In other words the decision held that any one claiming the water of a stream which was upon the public domain simply by the appropriation of the same, no matter how beneficial or necessary the use to which it

[3] Osgood v. El Dorado Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; afterwards overruled in Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

[4] 69 Cal. 255, 10 Pac. Rep. 674.

[5] Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; afterwards overruled, upon the theory that the common law of riparian rights was inapplicable in that State. Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

See, also, Reno Smelting etc. Works v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364.

was applied, acquired no vested right as against the Government or its grantees, unless he still continued to appropriate the water to his own use until after the Act of Congress of 1866 without the water being claimed by some riparian owner who had received his patent to the land *prior* to said Act. But in reference to other appropriators and grantees of the Government who received their patents after the said Act of Congress of 1866, the first appropriator's title to the water was good. And it was further held that those who had appropriated the waters on the public lands prior to the Act of 1866 were not treated by the Government as trespassers, but as thereby licensed; but that they had acquired no title which could be asserted against the United States or its grantees.[6] This construction of the effect of these Acts, as can be readily seen, rendered it very uncertain as to the title to the water where it was appropriated prior to the passage of the Acts. At this period the common law of riparian rights was in force in all States and Territories and it was not abolished in certain jurisdictions until afterwards.[7] The correct construction of these Acts as regards this phase of the subject undoubtedly is that the Acts could not be construed to be retroactive in effect, so as to affect the rights of those who had acquired their patents to the land prior to the time of the passage of the Acts, where the patents were granted without any reservations, even where the appropriation was made prior to the inception of the rights of the settlers or others so acquiring the absolute title to the land. A grant of the land without any reservations, in these cases, also granted all of the incidents thereto.[8] However, the question of the rights of appropriation as against the rights of patentees to the land, where the patents were obtained prior to the passage of the Act of 1866, has now become obsolete from the fact that all such claims have long since been adjusted; and,

6 Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; *Id.* v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; *Id.*, 81 Fed. Rep. 73.

See, also, Thorp v. Freed, 1 Mont. 651; Chicago etc. Co. v. McPhillamey, —— Wyo. ——, 118 Pac. Rep. 682.

7 For the States abolishing the common law of riparian rights, see Secs. 507, 621.

For the States adhering to the dual laws of waters, see Secs. 507, 621.

8 Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; *Id.* v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; *Id.*, 81 Fed. Rep. 73; Thorp v. Freed, 1 Mont. 651.

therefore, no extended discussion is necessary here regarding them. We will now take up the construction of the Acts in question as to the rights granted under them for appropriation of water, both prior and subsequent to the time of the passage of the Acts, and against which the subject of the rights of those receiving patents prior to the Acts is not involved.[9]

§ 617. **Construction of Acts of 1866 and 1870—No new system adopted by Acts.**—The Acts of Congress of 1866 and 1870 were not intended to, and did not adopt any new system governing the right to the use of waters, by its appropriation from the natural stream or other bodies flowing over the public domain, or for the acquisition of rights of way over the public lands for ditches and canals for the purpose of conducting the water to the place of use, than had been in actual practice by the miners and settlers in the Western part of this country for at least 18 years prior to 1866, the date of the passage of the first Act.[1] Neither was there any change of policy adopted by the General Government in enacting these laws, from what had been its policy during the years before their enactment, by its acquiescence in, and the encouragement of the doctrine of appropriation. Such an acquiescence in, and recognition and encouragement of, all vested rights that the Supreme Court of the United States held they were not under the necessity of relying on the statute for their protection, but which the Government had, by its conduct, recognized and encouraged and was bound to protect even before the passage of the Act of 1866.[2] The Acts themselves were very brief and contained but two short sections, and instead of adopting any new rule, they simply recognized, sanctioned, acknowledged, and confirmed the general system already recognized and acknowledged and established by the local customs, laws, the decisions of the Courts, and by statutory enactment, and provided for the continuation of that system in the future.[3] As stated by the Supreme Court of the United States: "The effect of this statute was to recognize, so far as the United States are concerned,

9 See Secs. 618, 619.

1 For the history of the doctrine of appropriation, see Secs. 596-615.

For rights of way over the public lands, see Secs. 927-971.

2 Broder v. Natoma W. Co., 101 U. S. 274, 25 L. Ed. 790; affirming *Id.*, 50 Cal. 621.

3 That the Acts were prospective in effect, see Secs. 618, 619.

the validity of the local customs, laws, and decisions of Courts in respect to the appropriations of water."[4]

As was said by Mr. Justice Miller in delivering the opinion of the Court in Broder v. Natoma Water & Mining Co.:[5] "We are of the opinion that it is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866, and that section of the Act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument."[6]

And, as stated by the Supreme Court of Nevada: "We are of the opinion that the ninth section of the Act of Congress confirmed to the owners of water rights on the public lands of the United States the same rights which they held under the local customs,

[4] United States v. Rio Grande Dam etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

See, also, Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Howell v. Johnson, 89 Fed. Rep. 556; Mohl v. Lamar C. Co., 128 Fed. Rep. 776; Krall v. United States, 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351; Van Dyke v. Midnight Sun etc. Co. (Alaska), 77 Fed. Rep. 90; Maffet v. Quine, 93 Fed. Rep. 347; Morris v. Bean, 123 Fed. Rep. 618.

"They intended no new, other, or different rights than such as existed at the time of their adoption." United States v. Conrad Inv. Co., 156 Fed. Rep. 123; affirmed, 161 Fed. Rep. 829, 88 C. C. A. 647; Scott v. Toomey, 8 S. D. 639, 67 N. W. Rep. 838; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089.

[5] 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621, 5 Morr. Min. Rep. 33.

[6] Citing Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Forbes v. Gracey, 94 U. S. 762, 34 L. Ed. 313; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240.

laws, and decisions of the Courts prior to its enactment; that the Act of Congress did not introduce, and was not intended to introduce, any new system, or to evince any new or different policy upon the part of the General Government; that it recognized, sanctioned, protected, and confirmed the system already established by the customs, laws, and decisions of Courts, and provided for its continuance.[7]

But the Acts did not grant any right not "recognized and acknowledged by the local customs, laws, and decisions of the courts."[8] However, the purpose of Congress was to recognize the legislation of a Territory as well as of a State.[9]

§ 618. Construction of Acts of 1866 and 1870—Effect of Acts as to the time the rights to water vested.—The claims relative to the use of water by appropriation which were affected by the

[7] Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; overruling Vansickle v. Haines, 7 Nev. 249.

See, also, Reno etc. Works v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; City of Denver v. Mullen, 7 Colo. 345, 3 Pac. Rep. 693; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Sullivan v. Northern Spy M. Co., 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Parkersville D. Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775, where the Court said: "The Act of Congress of July 26, 1866, authorizing the diversion of water flowing through the public domain, was the acknowledgment of a previous right instead of the creation of a new one."

"It was only the same rule as that by which possession of mining claims was recognized." Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

"The customs alluded to in the Act of 1866 are the customs alluded to in the history of the doctrine of appropriation already given." Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Osgood v. El Dorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Jacob v. Day, 111 Cal. 578, 44 Pac. Rep. 243; Pomeroy on Riparian Rights, Secs. 17, 28.

[8] Titcomb v. Kirk, 51 Cal. 288, 5 Morr. Min. Rep. 10; Osgood v. El Dorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

[9] Gutierres v. Albuquerque etc. Co., 188 U. S. 553, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming 10 N. M. 177, 61 Pac. Rep. 357.

Acts of 1866 and 1870 may be divided into two classes: First, those claims which by priority of possession had vested and accrued prior to the time of the passage of the Act of 1866, and against which the rights of patentees who had received their patents prior to the Act were not involved;[1] and, second, those claims which by priority of possession vested and accrued subsequent to the passage of the Act; and, of course, where the claims under each class were recognized and acknowledged by the local customs, laws, and decisions of the Courts. As to the rights under the first class, the statute provides that their possessors and owners "shall be maintained and protected in the same." The Act of 1866 therefore ratified, validated, and confirmed all the water rights then existing at the time of its passage, whenever the same were held by a priority of possession and were recognized and acknowledged by the local customs, laws, and decisions of the Courts.[2]

The greatest effect which the Acts had was in regard to the second class of claims mentioned above, or those claims to the right to the use of the water which vested and accrued subsequent to the passage of the Act of 1866. Although both the original Act of 1866 and that of 1870, amending and supplementing the first Act,[3] had in view chiefly the protection of existing appropriations rather than future ones,[4] it was but very shortly after their passage that they were construed by the Courts to apply as well to all appropriations in the future, which were also prior in time and were also recognized and acknowledged by the local customs, laws, and de-

1 For effect of Acts as against patentees of the Government prior to 1866, see Sec. 615.

2 For rights of way granted under the Acts, see Rights of Way, Secs. 931-934.

See the cases cited in the previous section.

"In other words, the United States, by the section, said that whenever rights to the use of water by priority of possession had become vested and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them." Jefferson v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Broder v. Natoma W. Co., 101 U. S. 274, 25 L. Ed. 790, 5 Morr. Min. Rep. 33, affirming 50 Cal. 621; Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452.

One of the objects of the Act of 1866 was the confirmation of all existing water rights. Hobart v. Ford, 6 Nev. 77.

See, also, Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

3 For these Acts, see Secs. 611, 615.

4 "The protection of existing rights against national spoliation was the primary object." Wiel on Water Rights, 2d Ed., 1908, p. 26.

cisions of the Courts. In other words, the Court construed the Act of Congress of 1866 to be prospective in its operation, and to apply to all appropriations made in the future. This was decided by the Federal Court as early as 1872,[5] and since that date it has been construed many times to the same effect by the Courts. And, thus it happened that under this liberal construction of these Acts, they not only recognized and protected existing claims, the rights to which had vested prior to the passage of the Act of 1866, but they also now recognize and protect all such claims which have vested under the same rules since the date of the passage of the Act down to the present time. In other words, the Act not only recognized the individual claims then existing, but it also recognized the *system* under which the right to these claims was acquired, which we have designated as the Arid Region Doctrine of appropriation, and declared that system to be a valid method under which existing rights to water, and rights of way for the purpose of conducting the water to the place of use, had been acquired, and under which others might be acquired in the future. As said by Mr. Justice Brewer, in rendering the opinion of the Supreme Court of the United States, in a case decided in 1899, "The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws, and decisions of Courts in respect to the appropriation of water."[6] Again,

[5] The Act of Congress of July 26, 1866, 14 Stat. L. 253, is prospective in its operation. Union M. & M. Co. v. Ferris, 2 Sawy. (U. S.) 176, 24 Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

See, also, Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

The Act applies to water rights accrued since as well as before its passage. Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

We may be excused in remarking, in passing, that this construction of the courts probably did more toward the material building up of this Western country than any other construction of any law by any court.

[6] U. S. v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

"It recognized, sanctioned, protected, and confirmed the system already established by the customs, laws, and decisions of courts, and provided for its continuance." Chief Justice Hawley, in Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

See, also, Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming Id., 10 N. M. 177, 61 Pac. Rep. 357; Union M. & M. Co. v. Ferris, 2 Sawy. (U. S.) 176, 24 Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119;

as said by Mr. Justice Peckham in another case: "The Government enacts that any one *may* go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued which are recognized and acknowledged by the local customs, laws, and decisions of Courts, such rights are acknowledged and confirmed."[7] And again, as said by Mr. Justice Brown in still another case: "But in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the plaintiff. The question, Who had acquired this priority of possession? was not a Federal question, but a pure question of fact, upon which the decision of the State Court was conclusive."[8] The Court thus recognized the validity of the laws of the State of Utah under which the rights were claimed and also held that the decision of its Supreme Court was conclusive under those laws as to the respective rights of the parties. It is to be noted that the rights claimed in all of these cases vested and accrued long subsequent to the Act of 1866. And, although the language in the Broder case, one of the early cases

Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649.

"It has, as we interpret this law, authorized any person wishing to construct a canal or ditch for mining or agricultural purposes to construct it over any public land." Hobart v. Ford, 6 Nev. 77, 15 Morr. Min. Rep. 236.

As was said in the case of Gold Hill etc. Co. v. Ish, 5 Ore. 104, 11 Morr. Min. Rep. 635, by the Oregon Court: "By this Act the mineral lands of the public domain, both surveyed and unsurveyed, are declared to be free and open to exploration and occupation to all citizens of the United States, and those who have declared their intentions to become citizens, subject to such regulations as may be prescribed by law. . . . Whatever difference of opinion may exist as to the tenure by which mining claims were held prior to the passage of this Act of Congress, it is clear that, by the Act, the general Government extended to all in possession of mining claims, and to all subsequently locating and denouncing mines containing precious metals, a guarantee of protection in their occupancy so long as the mines are operated and worked."

[7] Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7, affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368.

[8] Telluride etc. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245, dis. writ 16 Utah 125, 51 Pac. Rep. 146. The same language was adopted by Mr. Justice McKenna in a second appeal of the same case. See 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178, dis. writ 23 Utah 22, 63 Pac. Rep. 995.

before the Supreme Court of the United States, seems to limit the effect of the Act to claims existing at the time of the passage of the Act, by stating "the section of the Act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one,"[9] the question as to the rights of parties which had vested subsequent to the passage of the Act was not raised in the case. The rights in that case had vested in 1853, and the Court simply confined its opinion to the facts in that particular case, which comes under the first class of claims discussed in the first part of this section. However, in the case of Jennison v. Kirk, where the ditch in controversy was constructed in 1873, its validity was not questioned.[10]

In the face of the later decisions of the Supreme Court of the United States from which we quoted, as well as the universal construction of the Acts of 1866 and 1870, holding to the effect that all claims which have vested subsequent to the passage of the Acts, where the other conditions were in accordance with the law, were valid, it is not stating it too strongly to slightly change the language used by the Court in the Border case and quoted above, that the Act of 1866 was rather a voluntary recognition of a pre-existing *system* of appropriation, constituting a valid right to its continued operation, than the establishment of a new one. And it has thus become a part of the law of the land, of which every citizen is entitled to avail himself, and of which every purchaser from the United States is bound to take notice. The Arid Region Doctrine of appropriation thus established was not a temporary thing, to pass out of existence as soon as the rights of appropriation, which had vested prior to the Act of 1866, had been adjusted. But, as we have said, it was born out of the necessities of our conditions in the Arid West.[11] It was the growth of years, and permanent in its character. And the Acts of 1866 and 1870 fixed the status of water rights acquired by appropriation with respect to the public lands of the United States, both where those rights had vested and accrued prior to the passage of the Acts, and also subsequent thereto

[9] Broder v. Natoma W. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621.

[10] Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240. See, also, Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

[11] For physical conditions causing passage of Acts, see Secs. 588, 589.

even down to the present time, for these Acts are still in our statutes and in full force and effect.

§ 619. Effect of Acts upon title of appropriators—Equivalent to a grant.—The effect of the Acts of Congress of 1866 and 1870 upon the rights claimed by possessors was that of a direct grant by the United States to the claimant where the claimant was complying with the local laws, customs, and statutes of the State within which the claim was made. As was said by the Supreme Court of the United States in construing the Act of 1870 in the case of Broder v. Natoma Mining Co.:[1] "As to the canal of the defendant, so far as it ran through the land of the United States, at the date of this Act it was an *unequivocal grant* of the right of way, if it was no more."[2] It is to be noted that under the same Act, it provided that possessors of mining claims might upon complying with the terms of the Act, acquire a patent to such claims. But, upon the other hand, no provisions were made in the Act for acquiring a patent to water rights, although it is held to be the universal rule that where a claimant has complied with local customs, rules, and regulations, and statutory laws of the State wherein the claim is made, that he receives a title to such right to the use of water or to the right of way over the public land of the United States which is in effect the same as though he had received a patent therefor.

§ 620. State regulation as the result of the Acts of 1866 and 1870.—One of the results of the Acts of Congress of 1866[1] and 1870[2] in all of the States and Territories of the Western portion of the country where water was being appropriated and used under the Arid Region Doctrine, laws were enacted by the legislatures

1 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621, 5 Morr. Min. Rep. 33.

2 See, also, Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453, 19 Morr. Min. Rep. 243; Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. Rep. 726; Welch v. Garrett, 5 Ida. 639, 51 Pac. Rep. 405, 19 Morr. Min. Rep. 193; Woodruff v. North Bloomfield etc. M. Co., 18 Fed. Rep. 753, 9 Sawy. 441; Union Mill & Mining Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,372, 8 Morr. Min. Rep. 90; Farley v. Spring Valley etc. Co., 58 Cal. 142; Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 121, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

1 For copy of Act of 1866, see Sec. 611. For construction of Act, see Secs. 613-619.

2 For copy of Act, see Sec. 615.

providing how the water might be appropriated,[3] for what purposes it might be used,[4] what changes might be made in the appropriation or use,[5] and how these rights might be maintained or lost,[6] and other provisions which seemed necessary in the respective jurisdictions to the enforcement of the doctrine.[7]

In general it may be said that these early laws were simple and usually merely adopted the main principles of appropriation as evolved by the early miners of California and sustained by the Supreme Court of that State, and afterwards ratified by the Acts of Congress of 1866 and 1870. Some of these original Acts are still in existence at the present time; others have been superseded by later and more elaborate codes upon the subjects of water and water rights. And, in fact, in most of the States, it can be said that during the last decade elaborate codes governing the whole subject of the acquisition of the right and use of water for irrigation and other purposes have been enacted. All of these laws as they exist today will be discussed in later portions of this work.[8] The California law upon the subject was adopted in 1872, and contained but 13 sections, the majority of which are still in existence and in full force and effect.[9] The statutes enacted in the other States and Territories were usually enacted after the adoption of the California statutory provisions relative to the acquisition of water rights. In the then Territory of Wyoming, however, and prior to the adoption of the California statute, the legislature passed an Act based upon the early California decisions upon the subject and providing for the appropriation and use of the waters within that Territory.[10] The Constitution of Colorado, adopted in 1876, declares the water of every natural stream not theretofore appropriated, within the State of Colorado, to be the property of the public.[11] Its code of irrigation laws afterwards followed. The

3 See Secs. 706-732.

4 See Secs. 690-705.

5 See Secs. 856-873.

6 See Secs. 1099-1120.

7 See the laws of the respective States in this respect, in Part XIV.

How water is appropriated, see Secs. 706-732.

8 See Secs. 706-732, 1337-1367.

9 See Secs. 1410-1422, Cal. Civil Code, 2 Kerr's Cyc. Codes, pp. 1137-1165.

10 See Laws of Wyo., 1869, pp. 310, 311.

See, also, Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See, also, Irrigation in Wyoming, Part. XIV.

11 See Irrigation in Colorado, Part XIV.

See, also, dedication by a State of its waters to the public, Secs. 372-389.

constitutional provisions of Colorado were largely followed in the constitutions of Wyoming and Idaho.[12] And so it continued until all of the Western States and Territories had adopted some legislation authorizing the appropriation of the waters of the natural streams within their respective jurisdictions for beneficial purposes.[13]

§ 621. States adopting Arid Region Doctrine of appropriation.—In every Western State there are in force laws which adopted the Arid Region Doctrine of appropriation, at least as one of the systems of laws within their respective jurisdictions, governing and controlling waters, the acquisition of water rights, and the use of the water. We have classified these States in a previous section of this work,[1] and to recapitulate here, we will state that there are 18 States which are formed out of the arid and semi-arid regions of the United States, which have adopted the Arid Region Doctrine of appropriation of waters for beneficial uses. These are, including the District of Alaska: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

In seven of these States, which are located within the very heart of the arid region, the common law of riparian rights, as to the flow of natural streams, and the use of the waters thereof, has been absolutely abrogated by statute or Court decision. These are Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming.

In 11 of these States, counting Alaska, they have both systems, the Arid Region Doctrine of appropriation, and the common law of riparian rights. These are: Alaska, California, Kansas, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington.[2]

As we have seen in previous sections of this work, each State had the power to adopt either system or both systems governing the laws of the waters flowing within its boundaries. The Federal Gov-

12 For irrigation in Wyoming, see Part XIV.

For irrigation in Idaho, see Part XIV.

13 See irrigation in the various states, Part XIV.

1 See Sec. 507.

2 See also, for classification, Sec. 507.

See, also, for the subject of riparian rights in the discussion of the laws of the respective States, in Part XIV.

ernment has left this subject entirely to each State to decide and, as stated by Mr. Justice Brewer in the case of Kansas v. Colorado, each State "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation, shall control. Congress can not enforce either rule upon any State."[3]

§ 622. **Desert Land Acts of March 3, 1877, and March 3, 1891, also strengthened and confirmed doctrine of appropriation.**—Congress did not let the subject of the Arid Region Doctrine of appropriation rest with the Acts of 1866 and 1870, which we have discussed in the previous sections.[1] By the Act of March 3, 1877, which was afterwards amended by the Act of March 3, 1891, Congress still further confirmed and strengthened the doctrine. Throughout all portions of the Arid West there were vast tracts of vacant and so-called "desert land," which still remained unsettled.[2] The lands along the streams and upon which the water could be easily conveyed were becoming rapidly taken up, but the desert land, as a general thing, lay further back from the stream upon the benches and mesas and upon which it was harder to conduct the water. These lands, although designated in the Act as desert, were in fact far from being such. Because they were covered with the wild growth of that part of the country is no indication of their desert character, but just the opposite. They were in fact no more desert from this fact than the lands of Ohio or Indiana, which were also covered with wild growth of trees and other vegetation. The soil of these lands was as rich as that of any lands to be found in any part of the country, regardless of their peculiar growth of sage brush and grease wood. It is the land which has no wild growth at all which must be considered desert. And these very lands have since, with the application of water for irrigation, become some of the most productive in the whole country. But the idea prevailed in Congress that these lands were desert and barren and practically worthless; but that there was a bare possibility that something might be done with them which, in a way, would make

[3] Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. St. Rep. 655. See, also, Sec. 593.

[1] See Secs. 611-619.

[2] For the distinction between arid and desert land, see Sec. 5.

them produce something. And so, as an extra inducement, the "Act to provide for the sale of desert lands in certain States and Territories" was first passed in 1877. This Act was afterwards amended in 1891 in some particulars, and as so amended is now the law upon the subject.[3]

It is not our intention to discuss in all of their details the Desert Land Acts in this portion of our work, but we will leave this to another chapter.[4] The particular features of the Acts to which we wish here to call special attention are the provisions which are confirmatory to and strengthen the Arid Region Doctrine of appropriation, first sanctioned and ratified by Congress by the Acts of 1866 and 1870, and discussed in the previous sections.[5] The Act, after providing for the filing of the declaration by an applicant for a tract of desert land,[6] stating therein that he intends to reclaim the tract of land by conducting water upon the same within a period of three years thereafter, further provides: "That the right to the use of the water by the person so conducting the same on or to any tract of desert land (specified) shall depend upon *bona fide prior appropriation;* and that such right shall not exceed the amount of water *actually appropriated,* and necessarily used for the purpose of irrigation and reclamation." At this point the Act leaves the rights of the particular claimant, and provides generally for the rights of all appropriators of water for useful purposes in the following language: "And all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and *be held free for the appropriation* and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." Thus by this Act

[3] See Fed. Stat. Ann., 1905, pp. 392-396, 2 U. S. Comp. Stat., 1901, pp. 1548-1552, Act of March 3, 1877, Ch. 107, 19 Stat. L. 377; Act of March 3, 1891, Ch. 561, 26 Stat. L. 1096, 1097.

For full text of the Act, see Sec. 1290.

For the acquisition of land and the right to water thereunder, see Secs. 1290-1308.

For the disposal of desert lands to individuals, see Sec. 444, 1296-1308.

For the effect of the Desert Land Act upon the riparian rights of settlers, see Secs. 549, 1295.

[4] For the full discussion of the Desert Land Acts and their construction, see Chap. 66, Secs. 1287-1311.

[5] See Secs. 611-619.

[6] For the essentials for acquiring a tract of desert land, see Secs. 1296-1308.

all surplus water, or water to which vested rights had not theretofore attached, was absolutely dedicated by the United States, as proprietor, to the public or to individuals of the public, for the use for all beneficial purposes, the title to which might be acquired by appropriation.[7]

§ 623. **Desert Land Act—Construction of Act confirms the right of appropriation.**—The Desert Land Act [1] in no way repealed the previous Acts of Congress of 1866 and 1870 granting the right of appropriation of the waters flowing over the public domain, and discussed in our previous sections.[2] Neither did it add anything new to the previous Acts, as to the method of acquiring water rights by appropriation, or the extent of those rights, and it may be considered as simply confirmatory of the earlier statutes of Congress in this respect.[3] There was one thing, however, which the Act did, and that was to still further declare the policy of the United States, through its Congress, that all waters flowing over the public domain, where rights to the same had not previously vested, as far as the United States were concerned as the proprietor thereof, were subject to the right of appropriation for beneficial uses. The portion of the proviso inserted in the first section of the Act that "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for appropriation and use of the public," for the purposes named, was not necessary, or in fact pertinent to the filing of the declaration of an applicant for a desert land entry, to which the rest of the section relates. And this part of the proviso is a direct expression of the will of Congress that all the public waters then remaining might be so taken and used for beneficial purposes, but subject always to existing rights.[4] Hence the only possible construction of this portion of

7 For the United States as political sovereign, see Sec. 448.

For the right of the respective States to adopt such laws governing waters as they see fit, see Secs. 590, 593.

1 See previous Sec. 622.

For full copy of Act, see Sec. 1290.

2 See Secs. 611-619.

3 For the discussion as to the effect that the Act had upon riparian rights, see Sec. 549.

See, also, Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083.

4 That the water might be appropriated through the intermediary of a corporation, see Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L.

the Act of 1877 is that it was an additional confirmation and consent to the Arid Region Doctrine of appropriation. As was said by the Court in a Wyoming case: "If any consent of the General Government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in the several Acts of Congress, beginning with the Act of July 26, 1866, and including the Desert Land Act of March 3, 1877."[5] We do not think that this Act went to the extent, as seems to be held in a recent Oregon case,[6] to repeal the common law of riparian rights in those Western States which also adhere to that rule; neither could it go to that extent. The United States, as the owner and proprietor of all of the unappropriated waters flowing over its public lands, simply released its claim to these waters, where it did not interfere with navigation or with its own uses,[7] and left the sovereign jurisdiction to the laws of the States and Territories through which they flow. And each State may determine for itself as to the rule of law which shall govern the waters within its boundaries, whether it shall be the common law of riparian rights or the Arid Region Doctrine of appropriation, or both rules. Congress can not abrogate the law of riparian rights where a State law provides for the same. Neither can Congress "enforce either rule upon any State."[8]

It is, however, as we have discussed in a previous section, within the power of the Supreme Court of Oregon to reject the common

Ed. 588, 23 Sup. Ct. Rep. 338, affirming 10 New Mex. 177, 61 Pac. Rep. 357.

See, also, Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083; United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Spokane Valley etc. Co. v. Arthur D. Jones & Co., 53 Wash. 37, 101 Pac. Rep. 515; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; United States v. Conrad Inv. Co. 156 Fed. Rep. 123; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Winters v. United States, 143 Fed. Rep. 740, 74 C. C. A. 546, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493, affirming *Id.*, 11 Ariz. 128, 89 Pac. Rep. 504.

[5] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

[6] Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083.

[7] For interference with navigation, see Secs. 350-356.

United States as a riparian proprietor, see Sec. 480.

See, also, Sec. 388.

[8] Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, Sec. 375.

law theory on riparian rights upon the ground that it is inapplicable to the conditions within the State of Oregon. In the decision rendered by the Supreme Court of the United States in Boquillas Land & Cattle Co. v. Curtis,[9] Mr. Justice Holmes, in delivering the opinion of the Court, while deeming it unnecessary to decide whether lands in the arid regions patented after the Act of March 3, 1877, are not excepted, subject to the rule that priority of appropriation gives priority of right by virtue of that Act construed with the Act of 1866, said: "The Supreme Court of Arizona has rendered the decision to the effect on plausible grounds."[10]

§ 624. Later Acts of Congress confirming doctrine of appropriation.—There are a number of other Acts of Congress which still further confirm and sanction the doctrine of appropriation of the waters upon the public lands of the United States for beneficial purposes. These Acts will all be discussed in another portion of this work,[1] but we will make a hasty review of them here.

Among these Acts may be found the Act of March 3, 1891, granting rights of way through the public lands and reservations to canal or ditch companies for irrigation.[2] In construing the effect of this Act in connection with the Desert Land Act of 1877, discussed in our previous sections,[3] Mr. Justice Brewer, in speaking for the Supreme Court of the United States, said: "Obviously by these Acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention to the common law rule as to continuous flow."[4] The last part of section 18

[9] 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493, affirming *Id.*, 11 Ariz. 128, 89 Pac. Rep. 504.

[10] Citing, also, Hough v. Porter, *supra;* United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Gutierres v. Albuquerque Land & Irrigation Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 New Mex. 177, 61 Pac. Rep. 357.

[1] See Part XI, Chaps. 65, 66, 67.

[2] 6 Fed. Stat. Ann., 1905, pp. 508-510; 2 U. S. Comp. Stat., 1901, p. 1514; Act of March 3, 1891, Ch. 561, "An Act to repeal timber-culture laws, and for other purposes," 26 Stat. L. 1101, Secs. 18-21.

For full text of the sections in question, see Sec. 937.

See, also, chapter on rights of way, Secs. 927-948.

[3] See Secs. 622, 623.

[4] U. S. v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

See, also, Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 New Mex. 177, 61 Pac. Rep. 357.

of the Act of March 3, 1891, provides: "And the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective States and Territories." By this clause in the Act the right of appropriation was directly recognized, as under the laws of all of the States and Territories affected by the Act the right of appropriation was provided for at the time.

The next important Act was the Act of August 18, 1894, commonly called the Carey Act,[5] which Act also contained provisions for the reclamation of the desert lands, by the appropriation of water for the irrigation of the same. This Act will be fully discussed in a subsequent chapter. The only point which we wish to call attention to here is that this Act was in conformity with the general policy of the Government, that as far as it was concerned the waters flowing upon the public domain might be appropriated for irrigation as one of the beneficial uses; and, as a special inducement for the reclamation of lands by this means by a State accepting the provisions of the Act, the Government agreed to grant to the State from time to time as the work of reclamation proceeded as in the Act provided, "free of cost of survey or price of such desert lands, not exceeding 1,000,000 acres in each State."[6]

The last important Act of Congress, still further confirming the right of appropriation, was the National Reclamation Act, or the Act of June 17, 1902,[7] by which Congress confers the power upon the General Government to make appropriations itself, and also to acquire other rights to water already appropriated, and to sell the right to the use thereof for irrigation to settlers of tracts of land not exceeding 160 acres.[8] And the direct recognition and further confirmation of the general right of appropriation and of

[5] 6 Fed. Stat. Ann., 1905, pp. 397, 398; 2 U. S. Comp. Stat., 1901, p. 1554; 28 Stat. L. 422.

For full text of the Act and the amendments thereto, see Secs. 1315-1322.

For the scope and construction of the Act, see Chap. 67, Secs. 1322-1336.

[6] For a full discussion of the provisions of the Carey Act, see Chap. 67, Secs. 1312-1336.

[7] 7 Fed. Stat. Ann., 1905, pp. 1098-1101; Supp. U. S. Comp. Stat., 1905, pp. 349-354; 32 Stat. L. 388.

For full text of the Act and amendments thereto, see Secs. 1244-1260.

For scope and construction of the Act, see Chap. 65, Secs. 1261-1280.

[8] Sec. 5 . . . "No right to the use of water for land in private ownership shall be sold for a tract not exceeding one hundred and sixty acres to any one land owner."

the laws of the various States and Territories under which these appropriations have been made, and are now being made, is to be found in section 8 of the Act. This section provides: "That nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws."

Other Acts of Congress have also been passed from time to time which are unnecessary in this discussion, but which tend to show that the Arid Region Doctrine of appropriation is now one of the settled policies of the United States which has been embodied in the laws of Congress. This doctrine, which, as we have seen, originated with the customs and regulations of the early miners of California,[9] has now become one of the settled laws of Congress as well as in all of the States and Territories of the arid and semi-arid West. From the first Act in 1866 to the National Reclamation Act in 1902, in fact all of the Acts of Congress relating to the subject have been a series of ratifications and confirmations of this doctrine.

§ 625. **The Acts of Congress must not be construed as an absolute dedication of all the waters for appropriation.**—The various Acts of Congress discussed in the preceding sections [1] must not be construed as an absolute dedication of all of the waters flowing over the public lands of the United States for appropriation for beneficial uses. Upon the other hand, by the more recent rulings of the United States Supreme Court, it is held that, although the power of changing the common law rule as to streams within its boundaries belongs to each State, yet two limitations must be recognized: First, that in the absence of specific legislation of Congress a State can not, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, *at least*, as may be necessary for the beneficial uses of the Government property. Second, that it is limited to the superior power of the General Government to secure the uninterrupted navigability of all the navi-

[9] For the history of the doctrine, see Secs. 595-624.

[1] See Secs. 611, 615, 622-624.

gable streams within the limits of the United States. In other words, the Court holds that the jurisdiction of the United States over the natural water courses is superior and paramount to the jurisdiction of any State; and that all needed measures may be taken by the Government to preserve the water courses of the country, for *"at least"* the two purposes named above, *"even against the action of any State,"* in authorizing, under its laws, appropriations to be made.[2] The Court, especially in the Kansas-Colorado and the Rio Grande cases, clearly intimates, to say the least, that the Government might also make other claims to the water than for its use for navigation, or as a riparian owner. Whether it will do so, time alone can tell.

§ 626. **The result of the doctrine of appropriation.**—Our history of the doctrine of appropriation would not be complete were we to pass unnoticed the vast number of claims for the use of water flowing over the public domain which have had their inception and have been perfected under the local laws of the respective Western States and Territories since the Acts of Congress of 1866 and 1870. The fact is well known that in every Western State both in the arid and semi-arid regions, the inception of thousands of these claims originated long subsequent to the passage of the Acts in question. In every locality, where there are arable land and water in near proximity to each other, throughout this whole Western country water has been diverted from the natural streams and lands cultivated by the means of irrigation. In fact the acts of appropriation and the amount of water diverted and used under the Arid Region Doctrine are many times more after the Acts of Congress of 1866 and 1870 than there were before. It was principally through this means that the country has become habitable; and, as the result of its condition, has become settled, first by the early pioneers, and now by all classes

2 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

See, also, dedication by a State of its water, as against the United States, Sec. 388, and cases cited; United States as a riparian owner, see Sec. 480.

Impairment of the navigability of stream by the diversion of water for irrigation, Secs. 353-356.

of people that can be found in the Eastern States. Great cities have grown up and all kinds of business and manufacturing enterprises are being carried on. In the country districts great irrigation projects have been carried to complete success, in some cases including hundreds of thousands of acres of land. The inception of the rights to the waters for the irrigation of many of these lands originated since the Acts of Congress in question. These acts of appropriation are still going on in every Western State. There are still waters from the larger rivers which, by means of large investments of capital, may be diverted and applied to the irrigation of large tracts of now vacant lands. But the waters from the smaller sources of supply are nearly all appropriated, so that any extension in that direction, except by more economical use and the storage of the waters which run off during the non-irrigating period, is impossible. But the work of reclamation is bound to go on until the maximum limit is reached. The National Government, through the Reclamation Act, will be of great assistance toward this end, while, at the same time, it does not seem to be a rival to or hinder private enterprises. In fact, private enterprises seem to have prospered more since the Act was passed. The two work in harmony together and toward the common end, the settlement of the Western country and the development of its vast resources.

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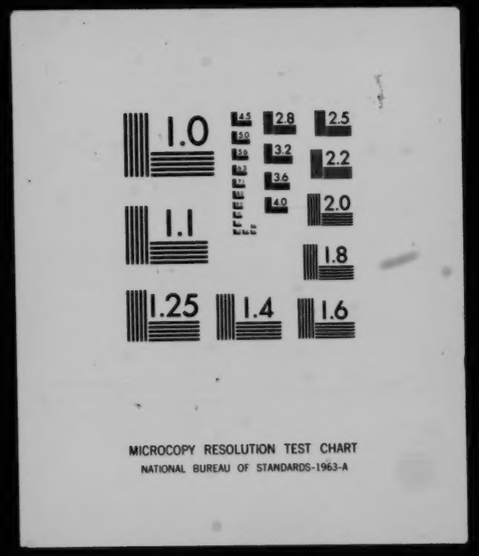

END

A TREATISE

ON THE

LAW OF IRRIGATION

AND WATER RIGHTS

AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS

AS THE SAME IS IN FORCE IN THE STATES OF THE ARID AND SEMI-ARID REGIONS OF THE UNITED STATES; AND ALSO INCLUDING AN ABSTRACT OF THE STATUTES OF THE RESPECTIVE STATES, AND THE DECISIONS OF THE COURTS RELATING TO THOSE SUBJECTS.

BY

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SECOND EDITION

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KINNEY

ON

IRRIGATION AND WATER RIGHTS.

SECOND EDITION—VOLUME TWO.

CHAPTER 33.

TWO THEORIES AS TO LEGAL RIGHT.

§ 627. Classification—Scope of chapter.
§ 628. California and Colorado theories distinguished.
§ 629. California theory—Rights by appropriation—Title based on grant from the Government.
§ 630. California theory—Rights by appropriation based on grant—Authorities discussed.
§ 631. California theory—Riparian rights—Title also based on grant from the Government.
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§ 638. Conclusions as to the two theories—Acts of Congress ratifying constitutions containing dedication provisions.
§ 639. Conclusions as to the two theories—Continuous assertion of title in the United States by the Courts.
§ 640. Conclusions as to the two theories.

§ 627. Classification—Scope of chapter.—While the Arid Region Doctrine of appropriation was in the formative period in the State of California, as we have related in the previous sections,[1] the appropriation of the waters of the natural streams for the same purposes and by the same system was being made in other States and Territories in the arid West. And, strange as it may seem, although the appropriation of the water and the uses to which it was put were the same in the different localities, two distinct theories are enunciated by the Courts as to the legal rights upon which the doctrine of appropriation was based. As the States of California and Colorado were the leaders in advancing the arguments in support of these two theories, respectively, we will designate them as the California theory and the Colorado theory.

It will be noticed that some of the authorities call these the "Cali-

1 See Secs. 595-624.

fornia Doctrine" and the "Colorado Doctrine,"[2] others the "California System" and "Colorado System."[3] We have chosen to adhere to our original classification of the Arid Region Doctrine of appropriation, and the "California Theory" and the "Colorado Theory," as the two theories respecting the source of title under the Arid Region Doctrine of appropriation. In this chapter we will discuss the two theories as to the source of title to the use of water in the Western States of this country. It must be noticed that a distinction must be made between the ownership or title of the waters and the right of a State to govern and control the waters flowing within its boundaries, and the use thereof. This latter subject, as to State control, will be discussed in another chapter, when we come to the discussion of the subject of State administration of waters or the laws of State control.[4]

§ 628. **California and Colorado theories distinguished.**—In brief the two theories maintained in the respective States as to the source of title to the use of water acquired by appropriators may be stated as follows: Under the California theory the right acquired by prior appropriation on the public domain is held to be founded in a grant from the United States Government as the original sole owner of the land and water. Under the Colorado theory the ownership and control of all the waters of the natural streams within the boundaries of a State were surrendered by the General Government to that State upon its admission to the Union; that this included even the title to the use of the water. And, therefore, the appropriator, instead of acquiring his title to the use of the waters from the United States, as the owner thereof, acquires it from the State wherein the appropriation is made. And, as great property rights have accumulated in all of the Western States, based wholly upon the Arid Region Doctrine of appropriation, it is necessary to determine which of these two theories is the correct one. In this connection it may be said that a distinction must be made between the question of ownership and the question of the mere control of and sovereignty over the water. The Government may surrender its sovereignty over the water and still retain its title thereto.

[2] See Wiel on Water Rights in the Western States, 3 Ed., Secs. 151, 167.

[3] See Mill Irrigation Manual, 1907, pp. 26-43; Long on Irrigation, Sec. 6.

[4] See Chap. 68, Secs. 1337-1367. See, also, for the dedication by a State of its waters to the State or to the public, Chap. 18, Secs. 372-389.

We will also add that the substantive law of the Arid Region Doctrine of appropriation is the same under both theories and, aside from their difference as to the legal right, there is very little difference as to their practical workings. We will now take up these two theories and discuss them at some length.[1]

§ 629. California theory—Rights by appropriation—Title based on grant from the Government.—As stated in our previous section,[1] under the California theory the right of appropriation of the waters of the natural streams flowing over the public domain is based upon a grant from the Government direct to the appropriator. This grant was originally implied or presumed in the silent acquiescence of the United States during the early years of the formative period of the Arid Region Doctrine of appropriation,[2] and later as resting on the Acts of Congress of 1866 and 1870.[3] In our view of the question this is the only correct position. After the Treaty of Guadalupe Hidalgo in 1848 the United States became the sole owner of all the lands covered by the vast tract of country ceded to this country by Mexico, with the exception of a few tracts of land previously granted to individuals by the Mexican Government before the treaty.[4]

§ 630. California theory—Rights by appropriation based on grant—Authorities discussed.—Under the California theory, therefore, a water right can be acquired only by a grant expressed or implied from the owner of the land to the appropriator. And, therefore, the United States, being the sole owner of the lands and

[1] See the following sections, Nos. 629-640.

[1] See Sec. 628.

[2] See Secs. 609, 610.

[3] For Act of 1866, see 7 Fed. Stat. Ann., 1905, p. 1090; 2 U. S. Comp. Stat., 1901, p. 1437; U. S. Rev. Stat., 1878, Sec. 2339; 14 Stat. L. 253. For copy of Act, see Sec. 611.

For Act of 1870, see 7 Fed. Stat. Ann., 1905, p. 1095; 2 U. S. Comp. Stat., 1901, p. 1437; U. S. Rev. Stat., 1878, Sec. 2340; 16 Stat. L. 218. For copy of Act, see Sec. 615.

For the construction of these two Acts, see, also, Secs. 616-619.

[4] For the Treaty of Guadalupe Hidalgo, see 7 Fed. Stat. Ann., 1905, pp. 694-703. Treaty concluded February 2, 1848; ratification advised by the Senate, with amendments, March 10, 1848; ratified by President March 16, 1848; ratifications exchanged May 30, 1848; proclaimed July 4, 1848. See, also Treaties and Conventions, 1849, p. 681.

See, also, Sec. 399.

waters of the public domain, the right acquired by appropriation and user of the water flowing over the public lands is founded in a grant from the United States, and that such grant was first presumed or implied from the silent acquiescence of the Government,[1] and now rests upon the Act of Congress of 1866 and confirmatory Acts subsequent thereto, discussed in previous sections.[2] Under

[1] See Secs. 609, 610.

[2] That the title of appropriators was first based upon a presumption of a grant from the Government, see Sec. 610.

For the Acts of 1866 and 1870, see Secs. 611, 615.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

See, also, Smith v. Denniff, 23 Mont. 65, 57 Pac. Rep. 557, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408, wherein it is said: "A water course can, therefore, be acquired only by the grant, express or implied, of the owner of the land and water. The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States Government as the owner of the land and water. Such grant has been made by Congress."

"The Act of Congress of 1866 (Rev. Stat. U. S., 2339) operated as a grant of the water so appropriated, and the right of way for ditches and canals is conveyed by the next section (2340)." Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; *Id.*, 147 Cal. 233, 81 Pac. Rep. 512.

Welch v. Garrett, 5 Idaho 639, 51 Pac. Rep. 405, 19 Morr. Min. Rep. 193.

"Practically all the lands in the semi-arid portion of the State at the time belonged to the Government. It was the riparian proprietor, and it authorized the appropriation of water for agriculture, mining, and manufacturing purposes." Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Cruse v. McCauley, 96 Fed. Rep. 369; Howell v. Johnson, 89 Fed. Rep. 556; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Story v. Wolverton, 31 Mont. 346, 78 Pac. Rep. 589; United States v. Conrad Inv. Co., 156 Fed. Rep. 126; affirmed 161 Fed. Rep. 829; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091.

See, also, Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453, 19 Morr. Min. Rep. 243, *Id.*, 120 Cal. 86, 52 Pac. Rep. 139, where the Court said: "An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be a part of the public domain, is a licensee of the general Government; but, when such part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator, who holds his rights against this land *under an express grant.*"

Osgood v. Eldorado Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Ortman v. Dixon, 13 Cal. 33; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; The Hot Springs Cases, 92 U. S. 698, 23 L. Ed. 690, 11 Ct. Cl. 238; Van Lear v. Eisele, 126 Fed. Rep.

the California theory, as to the source of title to a water right by appropriation, the title comes from the owner of the land. So, when a stream is situated on the public lands of the United States, a person may, under the customs and laws of the State and the legislation by Congress, acquire by prior appropriation the right to use the waters thereof for any beneficial use or purpose, and to construct and maintain ditches and canals over and upon the public land to convey the water to the place of use, and such right being good as against all other private persons, and by statute good as against the United States and its subsequent grantees. But, upon the other hand, when a grantee of the United States obtains title to a tract of riparian land, the waters of which have not been theretofore appropriated, his riparian rights in and to the waters of the stream follow the title to the land as one of the incidents thereof, and are not subject to any appropriations made after the inception of his title by another party without his consent.[3] This theory being that the appropriator, not acquiring his title from the State, but from the United States as owner of both the lands and waters, the legislative power of the State is limited to the enactment of such laws as come within the police powers of the States regulating water, and the procedure in the State Courts subject always to constitutional limitations.[4]

Although the right of an appropriator is founded on a grant from the Government, no actual documentary patents have ever been issued by the United States for such water rights as is in the case of mining claims. But the theory of the law is that where an appropriator complies with the local rules, regulations, and laws of the State wherein the claim is made, that his title to the water is of equal force as though an actual patent had been granted to the same. The Act of 1866 was in fact a grant of the right to the use of waters to those who had complied with the laws, rules, and regulations required thereunder. And a grant by Congress is one of the highest possible muniments of title. As was said in the case of

823; Woodruff v. North Bloomfield etc. Co., 9 Sawy. 441, 18 Fed. Cas. 753; Caviness v. La Grande Irr. Co., —— Ore ——, 119 Pac. Rep. 731.

See, also, for the power of Congress to dispose of its lands and waters, Secs. 409, 411.

[3] Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

For conflicts between riparian owners and appropriators, see Secs. 810-823.

[4] Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

Broder v. Natoma Water Co.,[5] in referring to the Act, "It was an unequivocal grant." [6]

§ 631. **California theory—Riparian rights—Title also based upon grant from the Government.**—We have discussed in previous sections how the Government became the sole owner of the lands included within the public domain of the United States.[1] With this land the United States also became the sole owner of all incidents connected with the land, including the right to all of the waters flowing over the same. These lands were at that time wholly unoccupied, with the exceptions of certain Mexican grants and a few scattered mining and agricultural claims. The claims for the water were also very few and small. So at this period the United States, being the sole owner of this vast tract of vacant land, was also the sole owner, as far as the Government could own them, of all the waters flowing over them, as one of the incidents to the soil, and a part and parcel of such lands. At this period the Government had the sole power to deal with these waters as it saw fit. It could have protected these rights and adhered to the strict rule of the common law and claimed the water as the sole riparian proprietor as long as the title to the land bordering upon the streams remained in the Government. And, after the disposition to settlers, the Government could have granted its rights in the streams to them, and then these settlers would have held the rights in the streams as riparian owners, as successors in interest of the United States. In the meantime the Government had the legal title to also treat all appropriators of these waters as trespassers, as well as those persons occupying the mineral lands upon the Government public domain. Again, the Government might have adhered to the laws of Mexico, from whence title to this land came, and treated all of the waters of natural streams as *publici juris*, and

[5] 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621.

[6] See, also, Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 121, 101 Pac. Rep. 825, 104 Pac. Rep. 281, where it is said: "In other words, that the Congress plainly acknowledges a right of way for the ditch or canal as fast as the work progresses and before water is turned in and such acknowledgment, from so supreme authority, amounts to a grant of the right of way to those who, in good faith, prosecute the work of construction, over unoccupied public lands, with reasonable diligence to completion, for the purpose of applying the completed ditch or canal to a beneficial use."

[1] See Secs. 390-406.

by a system of concessions have given to certain individuals the exclusive use of the water under certain restrictions by the Government, as is the case of concessions under the Mexican laws.[2] And, again, the Government had the power to do exactly as it did do in permitting these lands to be occupied by its own citizens and the waters to be appropriated from the natural streams for their use for all beneficial purposes, long before Congress passed any Acts for disposing of any of these lands, until vast property interests had grown up involving millions of dollars of expenditure, and all based on possessory rights alone. And then, as these possessory rights had been accumulating for 18 years, the Government had the power to do as it did do in 1866 and 1870, to acknowledge and confirm all of the possessory rights which had vested and accrued prior to the passage of the Acts. As we have discussed in previous sections, these Acts of the Government constituted as much of a grant as though a documentary patent had been given by the Government to the appropriator and user of the water. The Government also had the power and authority to relinquish its administrative control over the waters flowing upon the public domain and leave that matter entirely to the State wherein the same were situated, and, as we have seen, that State could adopt either the Arid Region Doctrine of appropriation and abrogate the common law of riparian right, or it could adopt both these systems governing and controlling the waters within its boundaries.

Under the California theory, then, the Government still retains its riparian rights in and to all of the waters flowing over its lands to which a possessory right has not vested and accrued in accordance with the Acts of 1866 and 1870. And as afterwards the Government disposed of its lands to individuals,[3] these riparian rights were transferred to the individuals acquiring the same, subject to the rights of those who had previously acquired the use of the waters flowing thereon.[4] It is thus that in all of the States which adhere to the California theory, we find the dual systems of water rights side by side—the law of appropriation for beneficial uses, and the common law of riparian rights.[5] So, in general, if the waters are actually appropriated prior to the inception of the title

[2] For the water laws of Mexico, see Secs. 577-583.

[3] As to how the Government disposes of its lands, see Secs. 408-449.

[4] For rights as between appropriators and settlers, see Secs. 810-823.

[5] For a list of the States having these dual systems, see Secs. 507, 621.

to a tract of land patented to a settler, the grant is made subject to this right, but otherwise the right to the water passes as a riparian right with the land granted.[6]

§ 632. **Colorado theory of State ownership.**—Under the Colorado theory or the theory of State ownership, as it is sometimes called, as to the legal right to the appropriation of waters flowing on the public domain, the grant principle under the California theory is not recognized. The United States is not recognized as the grantor to the appropriator; neither are the riparian rights of the Government recognized in the streams flowing over the public domain; and hence the grantees of the Government have no riparian rights in those streams. Also all riparian rights are abrogated or abolished, either by statutory enactment or Court decision. The reason upon which this theory is based is that the waters of streams flowing on the public domain were never claimed by the United States, but were left or surrendered to the respective States and Territories wherein they flowed, both as to their ownership and as to the jurisdiction and control of the same. Those States and Territories had it within their power to abolish all of the common law theories of riparian rights relative to the use or the flow of natural streams,[1] and that "imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith."[2] This necessity was due to the fact that the climate was dry, the soil arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. Therefore the State having all this power, and having the ownership of the use of the water, had the right to declare, as it did do, that the water was the property of the State or public,[3] and that

Also, see the laws of the various States, Part XIV.

But see Welch v. Garrett, 5 Idaho 639, 51 Pac. Rep. 405. Idaho is one of the States which has abolished riparian rights, and has the doctrine of appropriation only.

6 For right of appropriation as against settlers' rights, see Secs. 810-823.

Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

1 For riparian rights, see Secs. 450-551.

For irrigation as a riparian right, see Secs. 498-525.

2 Coffin v. Left Hand Ditch Co., 6 Colo. 443.

3 For the dedication of the waters within a State to the State, see Secs. 372-389.

the appropriator acquires his right to use the water for beneficial purposes from the State and not from the United States. And that his only title to the use of the water is his legal prior appropriation under the laws of the State, and his continuous application to some beneficial purpose. It will be noticed that under this theory any present rights of the General Government are entirely disregarded and ignored. It will be also noticed that whichever theory is the correct one, the California or the Colorado, they both lead ultimately to the same result and to the same doctrine—the appropriation of the water for some beneficial use or purpose, and the continuation of the title in the appropriator only so long as all of the water so appropriated is used for such a purpose, all under the Arid Region Doctrine of appropriation.

§ 633. **The Colorado theory of State ownership—Other States following Colorado rule**—Other States and Territories, especially those situated in the extreme portions of the arid region, were quick to follow the Colorado theory of State control upon the same grounds, until it is to be found in Colorado, Arizona, Idaho, New Mexico, Nevada, Utah, and Wyoming, or in those States and Territories which have been named as abolishing riparian rights.[1] The State of Nevada at first held with the California theory,[2] but afterwards overruled its decision in that respect and held with the Colorado theory of State ownership.[3]

1 See Secs. 507, 621.

For the dedication by a State of its waters to the State or public, see Secs. 372-389, 638.

2 Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Lake v. Tolles, 8 Nev. 285; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678.

3 Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Reno S. M. & R. Works v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 19 Am. St. Rep. 364; Walsh v. Walace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; Ronnow v. Delmue, 23 Nev. 29, 41 Pac. Rep. 1074. And in Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289, the Court said: "The California decisions cited for appellants may no longer be considered good law even in the State in which they were rendered. In the recent case of Kansas v. Colorado (206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655) Congressman Needham testified that irrigation had doubled and trebled the value of property in Fresno and Kings Counties, California; that they had to depart from the doctrine of riparian rights, and under that doctrine it would be difficult to make any future development; that there had been a departure from the principles laid

Also the United States Circuit Court for the District of Nevada held with the Colorado theory.[4] The rest of the States and Territories which abrogated the common law theory of riparian rights [5] from the very first followed the Colorado theory. In a recent case in Arizona Territory it was in effect held that the ownership of the Government was surrendered by the United States in Arizona and New Mexico and the Territories might confer common law rights upon the riparian owners or they might establish the right of prior appropriation and grant this right to others than riparian owners.[6] In Idaho the theory was adopted in the case of Drake v. Earhart,[7] in which the Court said: "Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity."[8] And in a recent Federal case in Idaho it was held that the United States,

down in Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674, because at that time the value of water was not realized; that the decision had been practically reversed by the same Court on subsequent occasions, and that the doctrine of prior appropriation and the application of water to a beneficial use is in effect in force now in that State."

NOTE.—The statements made by Congressman Needham are all true, with the exception of the abrogation of the common law in California as laid down in the case of Lux. v. Haggin. I can find no authority for the statement that that case has been overruled. Upon the contrary, it is adhered to in that State as the law upon the subject. What the Courts have done in California is to hold that water may be diverted from the streams and used for irrigation as a riparian right. It is true that the law of appropriation does exist in California. However, it is but one of the two systems upon the subject of waters which they have in that State—appropriation under the Arid Region Doctrine, and the common law of riparian rights. Probably the Congressman had resided in the humid portion of the United States so long that he had forgotten the laws of his own State relative to the subject.

Upon this subject, see irrigation as a riparian right, Secs. 498-525.

Modification and extension of the common law, Secs. 508-513.

As to the statements of Congressman Needham, see, also, Wiel on Water Rights, 1908, pp. 40, 83, notes.

4 Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

5 See Secs. 507-621.

6 Boquillas Land & Cattle Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504, affirming 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493

See, also, Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483; Hagerman etc. Co. v. McMurray, —— N. Mex. ——, 113 Pac. Rep. 823; Trambley v. Lutterman, 6 N. Mex. 15, 27 Pac. Rep. 312.

7 2 Idaho 750, 23 Pac. Rep. 541.

8 See, also, Krall v. U. S. (Idaho), 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351; Hutchinson v. Watson D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

in order to appropriate water and to condemn lands for rights of way, must proceed under the general State laws.[9]

The Supreme Court of Utah, when Utah was still a Territory,[10] adopted the Colorado theory as decided by the Supreme Court of that State in its early history in the case of Yunker v. Nichols.[11] Also, the Supreme Court of Utah, in a recent case,[12] said: "To initiate and acquire a right in and to the use of unappropriated public water whether in the public domain or within a reservation or elsewhere, is dependent upon the laws or customs of the State in which such water is found."

The Supreme Court of Wyoming, in comparing the two theories as to the legal right,[13] after setting forth the California theory, said: "Upon that theory the right acquired by prior appropriation on the public domain is held to be founded in grant from the United States Government as owner of the land and water, under the Acts of Congress of 1866 and 1870.[14] . . . In this State, on the other hand, . . . this Court has declared that the rule never obtained in this jurisdiction. . . . 'A different principle, better adapted to the material condition of this region, has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation. . . . It is the natural outgrowth of the conditions existing in this region of the country.'"[15] Thus, in all of the extremely arid States, it is the well settled rule of local law, that the right of an appropriator to the use of the water appropriated is based, not upon the theory of a grant from the United States, as is held under the California theory,[16] but "by operation of law" owing to the condition of the country and the necessities of the case; that the United States has no jurisdiction over these waters either as land owner

9 Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429, 172 Fed. Rep. 615.

10 Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290.

11 1 Colo. 551, 8 Morr. Min. Rep. 64. See, also, Sec. 634-636.

12 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

13 Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

14 For Act of Congress of 1866, see Secs. 611-614.

For Act of Congress of 1870, see Secs. 615-619.

15 Citing Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914.

See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

16 See Secs. 628-631.

or law maker, but that the entire subject was left by the General Government to the respective States and Territories both as to ownership and control to adopt such rules relative thereto as they thought best.[17]

§ 634. **Colorado theory of State ownership—Authorities discussed.**—The authorities sustaining the Colorado theory, as set forth in our preceding section,[1] are numerous. As early as 1872, the Territorial Supreme Court of Colorado had the question before it in the case of Yunker v. Nichols.[2] And Mr. Chief Justice Hallett,[3] in rendering one of the opinions of the Court, mentioned the fact that when the lands of that Territory were derived from the General Government, they were subject to the law of Nature, which held them barren until awakened to fertility by the nourishing streams of water, and that the purchasers of them could have no benefit from their grant from the Government without the right to irrigate them, and said: "It may be said, that all lands are held in subordination to the dominant rights of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, *not by grant*, but by operation of law." This opinion was concurred in by the remaining two judges, and it practically formed the basis for the Colorado theory as to the legal rights of the appropriator, and decided that the common law doctrine of riparian rights was inapplicable to Colorado, long before there was any contest in that jurisdiction between the rights of the appropriator and a riparian owner. This contest arose in the case of Coffin v. Left Hand Ditch Co.,[4] ten years later, in 1882. In that case the Court held, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands is inapplicable to Colorado, and that: "Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith"; that the first appropriator of water from a natural stream has a prior right thereto, to the extent of

17 For Colorado theory, see Sec. 632.

1 See Secs. 632-634.

2 1 Colo. 551, 8 Morr. Min. Rep. 64.

3 Mr. Justice Hallett was afterwards for many years Judge of the U. S. District Court for the District of Colorado, and rendered many decisions involving the rights of waters.

4 6 Colo. 443.

such appropriation; that the appropriator was entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and that the right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation.[5]

It will be noticed that the California theory that the right of appropriation was based upon a grant from the Government is repudiated in the Colorado theory. As was said in the case of Yunker v. Nichols,[6] it arose "not by grant but by operation of law." Riparian rights being entirely abolished in Colorado, as neither being in the Government nor in a grantee of the Government, it must follow as a matter of course that under the Colorado theory no rights of the Government are recognized in or to the waters within the boundaries of the State; but that the sole jurisdiction, control, and even the title to the use of the water were all left by the United States to the State. And that thereafter the State, by its constitutional provisions, appropriated, as it were, all of the unclaimed waters within its boundaries as the property of the State or public; and that the individual obtains his title to the use of the water not from the United States, but by the appropriation and use of the water under the laws of the State. The element of grant, the basis of the California theory, is not recognized under the Colorado theory.[7] Mr. Justice Hallett, then Judge of the Circuit Court for the District of Colorado, in two recent cases held to this effect.[8] This theory has been followed in the Colorado

[5] See, also, Schilling v. Rominger, 4 Colo. 100.

For adoption of the common law when inapplicable, see Secs. 588-591.

See, also, Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

[6] *Supra.*

[7] For element of grant under the California theory, see Secs. 609, 610.

[8] Mohl v. Lamar Canal Co., 128 Fed. Rep. 776; Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

See, also, Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

But see the opinion of Judge Hallett in Schwab v. Beam, 86 Fed. 41, 10 Morr. Min. Rep. 279, wherein water of a stream was claimed by virtue of the location of placer mining claims upon its banks. Judge Hallett said: "The waters were *appropriated* when the claims were located, and the owner of the claims is entitled to have them *ut currere solebat*, without diminution,

courts, in many cases, until it has become the settled rule in that State beyond question. In recent cases it was held that a patent from the Government to certain tracts of land through which water flows does not give color of title to the water.[9]

§ 635. **Dedication by a State of its waters to the State or public.**—All of the States which have abrogated the common law doctrine of riparian rights have either by constitutional provision or by statutory enactment dedicated the waters flowing within their respective boundaries to the State or to the public. Also, some of the States have made such dedication which still adhere to the common law as to certain features. These States are Montana, North Dakota, South Dakota, Texas. And even California, by the Act of the legislature of 1911,[1] provides: "All water or the use of water within the State of California is the property of the people of the State of California," etc. In Montana and North Dakota the Supreme Courts hold that a declaration of State ownership is not antagonistic to, nor does it prevent the existence of riparian rights within the same jurisdiction.[2] The subject of the dedication of the waters of a State, however, has been discussed in a previous chapter of this work and no further discussion is necessary here.[3]

subject to the reasonable use of other riparian owners high up on the course of the stream."

NOTE.—This position is clearly untenable under either the common law rules or the Arid Region Doctrine of appropriation. Under the common law there is no "appropriation" of the waters of a stream by mere ownership of riparian lands. By virtue of this ownership the owner is entitled to a reasonable use of the waters of the stream, as an incident to his land. (See Secs. 483-497.) Upon the other hand, under the Arid Region Doctrine of appropriation, the mere location of mining claims or the purchase of land upon the bank of a stream is not *ipso facto* an appropriation of the waters thereof. Some act of actual appropriation of the water is required. (For the requisites of an appropriation, see Secs. 706-732.)

9 Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588.

See, also, Cascade etc. Co. v. Empire etc. Co., 181 Fed. Rep. 1011.

1 See Statutes and Amendments, Cal. 1911, Chap. 407, amending Civil Code, Sec. 1410.

See, also, Supp. Kerr's Cyc. Code, 1911, p. 584.

2 Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408, *Id.*, 23 Mont. 65, 57 Pac. Rep. 557; Bigelow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570.

3 For dedication of waters by a State, see Chap. 18, Secs. 372-389.

§ 636. **Conclusions as to the two theories—Original ownership of the United States.**—Regardless of these two theories as to whether the appropriator deraigns his title to the use of the water from the United States or from the State, the Arid Region Doctrine of the appropriation of the waters of the natural streams for beneficial uses is here to stay. It has become a part of the law of the land, and is as well recognized as any other part of our substantive law. But, as stated before,[1] we hold that the California theory is the only correct one as to the origin and basis of that right.[2] And, as we shall endeavor to show, the authorities bear us out in that statement. In the first place, the United States, after the Louisiana Purchase, the Treaty of Guadalupe Hidalgo, and the Gadsden Purchase, became the owner not only of the lands included in these various transactions respectively, but also of the streams and other bodies of water included therein, and also of the waters flowing therein, as near as it is possible for ownership in running waters to be acquired, with the exception of those few claims of private owners, which had vested prior to the acquisition of any of the particular territories.[3]

To say the least, the United States had, at the time of any particular purchase or treaty, an absolute title to the use of these waters. At this period the United States had also the absolute sovereignty over both the land and waters. That the United States at this time had the absolute ownership and sovereignty of and over the waters will have to be conceded by all. There was no other Government than that of the United States; there was no other sovereign as not even the Territorial Governments had been formed. It was not until some time later that these tracts were cut up into Territories which afterwards became States. Taking for our hypothesis that the United States was the absolute owner of the waters upon the public domain at this time, and could dispose of them as it saw fit, it is necessary in this argument in attempting to trace the source of the legal right, to again refer to the facts as to how the Government did dispose of them. Did it dispose of these rights one by one as these appropriations were made to the

1 See Secs. 629-631.

2 For statement of California theory, see Secs. 628, 629, and authorities cited.

For statement of the Colorado theory, see Secs. 628, 632, and authorities cited.

3 For the ownership in the *corpus* of the water, see Secs. 456, 554.

individuals, and still retain its ownership in the remainder unappropriated, or did the United States, upon a Territory becoming a State, surrender all of its rights in and to the waters within its boundaries, both as sovereign and owner to the State, as it were in bulk, and thus leave the entire title and jurisdiction to the State? This is the Colorado theory of the question, and, in our opinion, the principal defect of that theory is that it denies that the United States has any property rights in the waters flowing over its public domain within the boundaries of a State. That this assertion is incorrect, is proven by the fact that there has never been any general Act of Congress formally surrendering these rights to the State. Upon the other hand, the very Acts of Congress which have been passed granting certain rights to the waters are some of the strongest arguments that no such thing was intended and never was done, but that what rights were granted were given to individuals and not to the States. Instead of a surrender of all Federal ownership in the waters they are an assertion of that ownership.

§ 637. **Conclusions as to the two theories—Title claimed by United States by Acts of Congress.**—In every Act of Congress passed relative to the use of waters in the Western States there has been an assertion of ownership of all the waters flowing over the public domain, which had not theretofore vested and accrued in some individual. For instance, take the Acts of Congress of 1866 and 1870, and the grants therein contained run to the "possessors and owners" of the rights which had "vested and accrued" prior to the time that the Acts in question went into effect. There was no general relinquishment to the States, but there is a relinquishment to the individual appropriators, but only to the extent of the rights which have vested and accrued by virtue of their compliance with the local laws of the State. And, the Acts in question, as construed by the courts, provide for the acquisition of title to the use of water in the future by means of appropriations by individuals, subsequent to the date of the passage of the Acts. And, these Acts have been further construed to be "a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, rather than the establishment of a new one." [1]

[1] Broder v. Natoma W. & M. Co., 101 U. S. 272, 25 L. Ed. 790, affirming 50 Cal. 621; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; Jenni-

In 1877, an Act was passed by Congress for the sale of desert lands, which contained in its first section a proviso [2] that the right to the use of water by the person so conducting the same on or to "any tract of desert land" shall depend upon *bona fide* prior appropriation, and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public. Clearly this Act shows by its very terms that Congress still laid claim to the waters of the public domain, else why the grant contained in the Act? This Act as amended by the Act of March 3, 1891,[3] and the Act of August 4, 1894,[4] applied to all the public land States, including Colorado and all those States which hold that the United States surrendered to those States the ownership of all the waters within their respective jurisdictions upon their admission to statehood.

By the Act of March 3, 1891,[5] Congress simply granted rights of way through the public lands and reservations of the United States to ditch and canal companies, and nothing in the Act should be construed to interfere with the "control of water for irrigation and other purposes under the authority of the respective States and

son v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

See, also, for Acts of Congress and construction thereof, Sec. 638.

But see Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039, where the statutes are referred to as a declaration upon the part of the United States never to grant riparian rights, assuming that it has the power, which was denied.

See, also, U. S. v. Rio Grande Dam & Irr. Co., 9 N. Mex. 303, 51 Pac. Rep. 674, reversed in *Id.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

[2] 6 Fed. Stat. Ann., 1905, p. 392; 2 U. S. Comp. Stat., 1901, p. 1548; 19 Stat. L. 377. For copy of Act of March 3, 1877, see Sec. 1290.

See, also, Secs. 622, 623.

[3] 6 Fed. Stat. Ann., 1905, p. 396; 2 U. S. Comp. Stat., p. 1548; 26 Stat. L. 1096, 1097.

For copy of the Act, see Sec. 1290.

See, also, Secs. 1288-1311.

[4] 6 Fed. Stat. Ann., 1905, p. 396; 2 U. S. Comp. Stat., 1901, p. 1552; 28 Stat. L. 226.

See, also, Secs. 1287-1311.

[5] 6 Fed. Stat. Ann., 1905, p. 508; 2 U. S. Comp. Stat., 1901, p. 1570; 26 Stat. L. 1101.

For copy of Act, see Sec. 937.

See, also, Secs. 938-950.

Territories." There is nothing in this Act which can be construed as a grant to the States of the title to the waters within their respective jurisdictions. The grant runs "to any canal or ditch company."

And, finally, as far as any Act of Congress is concerned, we have the Act of June 17, 1902,[6] popularly called the National Reclamation Act, which also confirms our contention that Congress has always insisted that the proprietary rights to the waters on the public domain emanates from the United States to the individual appropriator, and not from the State. This Act, in brief, provides that all moneys received from the sale of the public lands in the sixteen Western States and Territories, and where irrigation is mostly practiced, shall be reserved, set aside, and appropriated as a special fund to be known as the "reclamation fund." The Secretary of the Interior is authorized, with this money, to locate and construct irrigation works for the storage, diversion, and the development of waters, and before the said construction the lands susceptible of irrigation under any project may be withdrawn from entry, except as to homestead entries. Where in carrying out the provisions of the Act it becomes necessary to acquire any rights or property, the same may be acquired *for the United States,* by purchase or by condemnation. And in this connection we will say that, relative to water rights, this can only apply to those water rights the titles to which have vested and accrued in individuals prior to the need of the same for the Government project, the Government claiming the title to the unappropriated water, as proprietor, but not as sovereign, for in Section 8 it is provided that in carrying out the provisions of the Act the Secretary shall proceed in conformity with the laws of the State or Territory wherein the project is located. Section 4 provides that "No right to the use of water for land in private ownership shall be *sold* for a tract exceeding 160 acres to any one land owner, and no such *sale* shall be made to any land owner unless he be an actual and *bona fide* resident on such land." Sold by whom? Clearly by the United States to the land owner. There can be no question but that under this Act the United States asserts its proprietorship

[6] 6 Fed. Stat. Ann., 1905, p. 1098; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388. For copy of Act, see Sec. 937. See, also, Secs. 937-950.

to all the waters upon the public domain, the rights to which have not vested and accrued in private individuals; and that, too, regardless of the fact as to whether those waters are in California or those States which follow the California theory as the legal right under the Arid Region Doctrine of appropriation, or are in the State of Colorado or those States which follow its theory as to the legal right.[7]

In the Act of Congress providing for the Forest Service, created for the management and control of National forests or forest reserves of the United States, it is also provided: "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."[8] The Government has not seen fit to take advantage of the above provision, but there is no question but that under the Act it has the power to do so, as the right of the Government is unlimited.[9] As was said by the Circuit Court of Appeals: "That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose, was held by this Court."[10]

§ 638. Conclusions as to the two theories—Acts of Congress ratifying constitutions containing dedication provisions.—We have discussed in another portion of this work the effect of the dedication in a State constitution of the waters within a State to the State or public.[1] We there held that this dedication could not affect the ownership of the general Government of the riparian

7 For statement of California theory as to legal right, see Secs. 628-631.

For statement as to Colorado theory, see Secs. 632-635.

8 7 Fed. Stat. Ann., 1905, p. 315; 2 U. S. Comp. Stat., 1901, p. 1542; 30 Stat. L. 36.

9 See, also, Secs. 411, 448, 480.

10 Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429, 172 Fed. Rep. 615, citing Winters v. United States, 143 Fed. Rep. 740, 74 C. C. A. 666, *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546. For the same case affirmed by the Supreme Court of the United States, see 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662; Conrad Investment Co. v. United States, 161 Fed. Rep. 829, 88 C. C. A. 647, *Id.*, 156 Fed. Rep. 130.

1 See Secs. 387, 388.

rights in the waters which flow through the public lands and reservations owned by it.[2] We now reiterate that statement as to the effect of such a dedication as far as the United States is concerned, even in such States as Colorado and Wyoming, where the waters within the State are declared to be either the property of the State or public, and the constitutions containing this provision were ratified by the acceptance of the constitution by the Government. Hence it follows that such a declaration contained in a constitution declaring the waters within a State to be the *property* of a State is meaningless and of no force and effect as against the United States. A State no more than an individual can acquire property by a mere assertion of ownership. The United States, as the primary owner of the soil of the public domain within the States having these constitutional provisions, is also primarily the owner of the waters of the streams flowing across these lands, and is still the owner of these waters the title to which has not vested in some individual or company. In the case of Farm Inv. Co. v. Carpenter[3] the above proposition is disputed, and the Court says: "So far as any proprietary rights of the United States are concerned, the question would seem to be settled in favor of the effectiveness of the declaration by the Act of admission, which embraces the following provision: 'And the constitution which the people of Wyoming have formed for themselves be, and the same is hereby accepted, ratified, and confirmed.'" Citing McCormick v. Western U. Teleg. Co.,[4] where the Court held that: "The Act of Congress which admitted Utah as a State accepted and ratified its constitution, and invested all its provisions with all the authority conferred by any Act of Congress." A study of this case will reveal the fact that the holding of the Wyoming case is not borne out by the McCormick case as to the *property* rights of the United States. The question in that case was simply as to the power of Congress to give the constitutional convention the right to provide for the transfer of actions pending in the Territorial Courts to the State or Federal Courts, and did not at all involve the *property* rights of the United States.[5]

2 See Sec. 388.

3 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

4 79 Fed. Rep. 449, 25 C. C. A. 35, 49 U. S. App. 116, 38 L. R. A. 684.

5 See, also, for effect of a dedication by a State, Sec. 388.

Winters v. U. S., 207 U. S. 564,

What was granted to these States upon their admission to the Union was the *jurisdiction*, or sovereignty, over the lands and waters within their borders, and not the title or ownership.[6] As well might a State have laid claim to the title to all the public lands within its borders, not allowed in the enabling Act of admission, as to lay claim to the title to the waters flowing within its boundaries. The title has always remained and now remains in the United States, except as to those rights which have vested and accrued in individuals or companies under the various Acts of Congress, and the forbearance of "a just and generous Government."[7] And in these cases the title to the use of the water has emanated from the United States and not from any State. Then, again, in the enabling Acts for the admission of all the States it is provided to the effect that the State relinquishes and disclaims all right to the unappropriated and ungranted public lands lying within the boundaries thereof; and that the State will never interfere with the primary disposal of the public lands within its limits. In these provisions the waters flowing within the boundaries of the State must be included as a part and parcel of the public lands.

In the following section we will show that the great majority of the courts of the country have continually asserted that the title to these waters is in the United States.[8]

§ 639. Conclusions as to the two theories—Continuous assertion of title in the United States by the Courts.—Not only has Congress by the several Acts discussed in the previous sections[1] made repeated assertions of the ownership of the title of the waters flowing over the public domain, but the Federal Courts, including

52 L. Ed. 340, 28 Sup. Ct. Rep. 207; U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; U. S. v. Winans, 198 U. S. 371, 49 L. Ed. 1098, 25 Sup. Ct. Rep. 662; Conrad Inv. Co. v. U. S., 161 Fed. Rep. 829, 88 C. C. A. 647, *Id.* 156 Fed. Rep. 130.

For the Colorado cases holding the unappropriated waters of the State are the property of the public or State, see Secs. 633, 634. Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Fort Morgan Land & Canal Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

6 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

7 Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240.

8 See Sec. 639.

1 See Secs. 635-638.

the Supreme Court of the United States, has, in a number of cases, made the same assertion. Take, for instance, the construction of the Courts of the effect of the Acts of 1866 and 1870,[2] that these Acts were "a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, rather than the establishment of a new one,"[3] and that these rights were only confirmed by the Acts where the same had "vested and accrued" under the local customs and laws prior to the passage of the Acts. As was held by Mr. Justice Field in Jennison v. Kirk,[4] it was for the purpose of securing rights to water and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights where they were not recognized by the customary law of miners. These are all to the effect that the United States had the title to the unappropriated waters of the public domain, and that the appropriator acquired his title from the United States.

In the case of Sturr v. Beck[5] the question was as to the rights of a riparian proprietor as against an appropriator of the water, the Court, adopting the ruling in a former case,[6] that the Government was the sole proprietor of the public lands, whether bordering on the streams or otherwise, in effect also held that the Government was the owner of all the waters flowing over those lands. In the opinion the Court said: "When, however, the Government ceases to be the sole proprietor the right of the riparian owner attaches, and can not be invaded. As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of the upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both the *land and water,* it would seem reasonable that lawful riparian occupancy with intent to

2 For copies of these Acts, see Secs. 611, 615.

3 Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, affirming *Id.,* 6 Dak. 71, 50 N. W. Rep. 486

See, also, cases cited under Secs. 616-619.

4 *Supra.*

5 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, affirming *Id.* 6 Dak. 71, 50 N. W. Rep. 486.

6 Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583, affirming *Id.,* 1 Mont. 561.

appropriate the land should have the same effect." Thereby the Court held that the right of the appropriator must be deraigned from the United States, regardless of the local laws of a State or Territory. See to the same effect, Benton v. Johncox,[7] in which the Court said: "The Government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; but, when it disposed of its riparian lands without *reserving* the water, the latter passed to its grantee free from interference thereafter by the grantor."

In the cases of Howell v. Johnson,[8] and Morris v. Bean,[9] the United States Circuit Court for the District of Montana in a case involving the question of interstate waters between the States of Montana and Wyoming, held that the waters in question were a part of an innavigable stream, the title to which was never acquired by either State, but remained in the Federal Government.[10]

In Anderson v. Bassman,[11] the United States Circuit Court for the Northern District of California, in commenting upon the Howell and Morris cases, *supra*, said: "It was further urged that, as the complainant had obtained his rights from the State of Wyoming by appropriating the water in accordance with its laws, his rights depended upon such laws, and were governed thereby. But the Court very clearly explained that the rights of the complainant did not rest upon the laws of Wyoming, but upon the laws of Congress; that the legislative enactment of Wyoming was only a condition which brought the laws of Congress into force." It must be noted in this connection that Wyoming is one of the States which has so strenuously declared that the title to the water emanated from the State, under the Colorado theory.[12]

In the case of Bear Lake & R. etc. Co. v. Garland,[13] the Court

[7] 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912.

[8] 89 Fed. Rep. 556.

[9] 146 Fed. Rep. 432; affirmed 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703.

[10] See, also, Cruse v. McCauley, 96 Fed. Rep. 369.

[11] 140 Fed. Rep. 14.

[12] See Sec. 385, for constitutional provision of Wyoming dedicating its waters to the State. See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

[13] 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7, affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368.

said: "The Government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued which are recognized or acknowledged by the local customs, laws, and decisions of the Courts, such rights are acknowledged and confirmed." Acknowledged and confirmed by whom or by what Government? Clearly by the Government of the United States. But the question is answered by the Court itself in the next sentence, which is as follows: "Under this statute,[14] no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, *as against the Government,* in the party entering upon possession unaccompanied by the performance of any labor thereon." This clearly claims that the title to the water is in the Government. However, the question as to the validity of an appropriation is a matter for the jurisdiction of the State courts, and not a Federal question.[15]

The later Federal cases are also to the same effect, that the United States claims title to the waters flowing upon the public domain. In the case of the United States v. Rio Grande Dam & Irrigation Co.,[16] the Court held that, in the absence of specific authority from Congress, a State can not by its legislation destroy the rights of the United States, as owner of the lands bordering upon the streams, to the continued flow of the waters; and, after reviewing the Acts of Congress, the Court held that no such right had been granted.[17] This was placed upon two grounds—the right of the United States as riparian owner, and the right of the United States to maintain the navigable capacity of its rivers and streams, even to the extent of prohibiting the appropriations of waters from the tributaries of those streams where the same were in accordance with the local laws of any State or Territory.

14 The Acts of 1866 and 1870, for which see Secs. 611, 615.

15 Telluride Power Transm. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245, where the Court said: "Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by the local customs, laws, and decisions, all of which were questions of State law." See, also, same case, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178.

16 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

17 For the United States as a riparian owner, see Sec. 480.

For the right of the United States to maintain the navigable capacity of its streams, see Secs. 349-356.

The case of Gutierres v. Albuquerque Land & Irr. Co.,[18] reiterated and adopted the language in the Rio Grande case, and again asserts the proprietary rights of the United States, at least so far as Government reservations are concerned.[19] In the case of Kansas v. Colorado,[20] Mr. Justice Brewer, in rendering the decision of the Court, quoted the language used in the Rio Grande case [21] upon this point and adopted it as the law upon the subject, especially as to the question of preserving the navigability of the streams. Thus in adopting this language the Court again held that the United States was the proprietor of the water flowing upon the public domain; and, "that in the absence of specific authority from Congress a State can not, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the Government property." Second, . . . "The jurisdiction of the general Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses, *even as against any State action.*" And yet, in the face of this language, an eminent author says, in referring to this case: "No reference whatever was made to Federal rights on the ground of proprietorship, thereby ignoring the theory on which the California doctrine rests." [22] As we view the question there was the most direct and positive assertion of Government ownership. But upon the question of sovereignty and jurisdiction the Court decided that it rested entirely with the respective States.[23]

The last decisions of the United States Supreme Court also assert the proprietorship of the United States of the waters flowing upon

18 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. Mex. 177, 61 Pac. Rep. 357.

19 See, also, as to reservations, U. S. v. Conrad Inv. Co., 156 Fed. Rep. 123; affirmed in 161 Fed. Rep. 829, 88 C. C. A. 647; Winters v. U. S., 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 208.

20 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

21 *Supra.*

22 Wiel on Water Rights, 1908, p. 90.

23 The case of Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Am. & Eng. Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953, holds to the same effect as to jurisdiction, but is silent upon the question of ownership.

the public domain. In the case of Winters v. United States,[24] decided January 6, 1908, the question was as to the right of the United States to reserve waters flowing over the public lands for use by Indians upon an Indian reservation. And Mr. Justice McKenna, in rendering the opinion of the Court, said: "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, *and could not be.*"[25] The Winters case was also followed in a case decided by the Circuit Court of Appeals for the Ninth Circuit on May 25, 1908, where also the question of the right of the Government to reserve the waters for the use of Indians was involved.[26] In view of these decisions there can be no question but that the United States by its highest Courts has always asserted and now asserts that the Government is the proprietor of all the waters flowing in the natural streams and other bodies of water upon the public domain, with the exception of those waters the titles to which have legally vested in private parties; and that the title to these waters is deraigned from the United States, and not from the respective States.

§ 640. **Conclusions as to the two theories.**—Our conclusions upon this subject are, that the United States, as the original owner of all of the land on the public domain, was also the owner of all the waters of the natural streams and other bodies flowing thereon. By various Acts of Congress the United States has disposed of some of these waters under the Arid Region Doctrine of appropriation; and that the United States is still the owner of these waters, which have not been disposed of, regardless of the action of the State or Territory wherein they are located. The right to the use of other of its waters has also vested in the individuals who have from time to time acquired tracts of land from the Government bordering upon the streams, as a riparian right, in those States where those rights are permitted. It was left to the various States, as a matter of sovereignty or jurisdiction, to prescribe how

[24] 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 208.

[25] Citing U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; U. S. v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

[26] See Conrad Inv. Co. v. U. S., 161 Fed. Rep. 829, 88 C. C. A. 647, *Id.*, 156 Fed. Rep. 130.

the title to the use of the waters might be acquired by individuals, in accordance with its local customs, laws, and decisions of the Courts. When the local customs, laws, and decisions of the Courts had been fully complied with by an individual seeking to acquire a water right the title to the same vested in the individual direct from the United States, and not from any State. Also, in this connection, a State, as a matter of sovereignty or jurisdiction, has the power to declare, through its legislature or by its Court decisions, just what its laws governing waters shall be; that is to say, whether the common law of riparian rights shall be exclusively adhered to, or whether the Arid Region Doctrine of appropriation shall be the exclusive law upon the subject; or again, whether there shall be dual systems composed of both the Arid Region Doctrine of appropriation and a modified or extended rule of the common law, especially as to the use of the waters. "Congress can not enforce either rule upon any State."[1] The title to the use of the water in any case is deraigned from the United States to the individual, and the Colorado theory that it comes from a State is erroneous. The rights of the appropriator, however, are always subject to the rights of the United States to preserve unimpaired the navigable capacity of the navigable rivers and streams of the United States, even to the extent of prohibiting the appropriation of waters from the tributaries of such streams; and also subject to the right of the United States, as the owner of the public lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the Government property, which, as we have seen, include the use by the Indians on the Indian reservations.[2]

1 Kansas v. Colorado, 206 U. S. 41, 51 L. Ed. 956, 27 Sup. St. Rep. 655.

2 See Sec. 480.

CHAPTER 34.

WHAT WATERS MAY BE APPROPRIATED.

§ 641. In general—Scope of chapter.
§ 642. The waters of streams or water courses.
§ 643. The present area of unappropriated and unreserved public lands—Also the present area of National Forests.
§ 644. Waters flowing over the public lands of the United States—Presumption.
§ 645. Waters flowing partly over public and partly over private lands.
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§ 648. The waters of springs.
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§ 651. Water from canyons, gorges, and ravines.
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§ 666. The current of a stream can not be appropriated as an appurtenant to the water right.
§ 667. Waters reserved for Government use can not be appropriated by others.
§ 668. Waters reserved by Government for use on Indian reservations can not be appropriated by others.
§ 669. Waters upon the National Forests may be appropriated.

§ 641. In general—Scope of chapter.—We have seen in a previous portion of this work how the Arid Region Doctrine of appropriation of water for beneficial uses originated.[1] We have also seen how, throughout the entire West, especially in those sections

[1] For Arid Region Doctrine of appropriation, see Secs. 585-594.

of our country where irrigation of the soil is necessary in order to produce agricultural crops, that that doctrine is the prevailing one governing the use of waters, although in some States there are dual systems governing its use—the Arid Region Doctrine of appropriation and the common law of riparian rights.[2] The questions now presenting themselves for discussion in this part of our work are, What waters may be appropriated, by whom they may be appropriated,[3] how appropriation may be effected,[4] and the nature and extent of the rights acquired by an appropriation, as between appropriators only,[5] and between appropriators and those claiming the right to the use of the water as riparian proprietors.[6]

As to what waters may be appropriated, we will say, in general, that all waters upon the public lands theretofore unappropriated, in those States where the Arid Region Doctrine of appropriation is in force, with certain limitations which will be discussed hereafter, are open to an appropriation for some beneficial use; and that, too, whether those waters are found in natural water courses or streams, lakes, or ponds and other natural surface bodies of water, or are merely surface or flood waters, or are found underneath the surface of the earth and known as subterranean waters.[7] We will now discuss in detail just what waters may be appropriated.

§ 642. **The waters of streams or water courses.**—The waters of natural surface water courses, including all rivers and streams, may be appropriated. In fact, this is the most common type of appropriation, and the right is recognized in all jurisdictions where the Arid Region Doctrine of appropriation is in force. As to what constitutes a natural water course has been sufficiently discussed in another portion of this work.[1] The constitutions of all of the States of the Western portion of this country, where there are provisions relative to the appropriation of water, recognize the right to appropriate the waters of natural rivers and streams. Also the statutes of the various States recognize this right.[2] This phase of the

2 See Secs. 507, 621.
3 See Secs. 644-669, 678-689.
4 See Secs. 706-732.
5 See Secs. 775-803.
6 See Secs. 810-823.
7 For subterranean waters, see separate chapters, Secs. 1148-1211.

1 As to what constitutes a water course, see Secs. 301-316.
2 For the constitutions and statutes of the various States upon this subject, see Part XIV.

subject is so thoroughly discussed in many portions of this work that there is no need of citing authorities here.

§ 643. The present area of unappropriated and unreserved public lands—Also the present area of National Forests.—The following tables show the area of unappropriated, unreserved public lands as the same existed on June 30, 1911, according to the report of the Commission of the General Land Office to the Secretary of the Interior:

States and Territories.	Surveyed.	Unsurveyed.	Total.
Alaska	.....	368,011,291	368,011,291
Arizona	12,040,428	28,982,455	41,022,883
California	18,012,903	5,350,061	23,362,964
Colorado	19,069,624	1,529,476	20,599,100
Idaho	6,180,332	17,942,705	24,123,037
Kansas	108,402	.....	108,402
Montana	15,283,718	16,746,928	32,030,646
Nebraska	1,366,499	.....	1,366,499
Nevada	28,924,771	26,058,377	54,983,148
New Mexico	23,093,519	10,677,848	33,771,367
North Dakota	1,300,333	.....	1,300,333
Oklahoma	42,919	.....	42,919
Oregon	13,257,246	3,995,929	17,253,175
South Dakota	3,550,573	122,720	3,673,293
Utah	11,587,569	23,447,035	35,034,604
Washington	1,196,231	781,560	1,977,791
Wyoming	30,965,363	2,664,242	33,629,605

Also the following table shows the estimated area of existing National Forests on June 30, 1911, according to States:

Alaska	26,748,850	Nevada	5,650,247
Arizona	14,898,000	New Mexico	11,111,300
Arkansas	2,225,890	North Dakota	13,920
California	27,735,455	Oklahoma	61,640
Colorado	14,761,900	Oregon	16,148,900
Florida	674,970	Porto Rico	65,950
Idaho	19,643,355	South Dakota	1,287,700
Kansas	303,937	Utah	7,667,585
Michigan	163,771	Washington	11,684,680
Minnesota	1,204,750	Wyoming	8,693,543
Montana	19,305,100		
Nebraska	556,700		190,608,243

In addition to the above, there are many other public reservations which are unnecessary to mention in this connection.

§ 644. Waters flowing over the public lands of the United States—Presumption.—One-half century ago, when the Arid Region Doctrine of appropriation was in the process of formation, practically all of the lands which go to make up the Western States and

were on the public domain of the United States.[1] All of the waters flowing over these lands were practically owned by the United States, as incident to the soil.[2] At this time, while the waters were flowing over lands owned by the United States, the doctrine of appropriation was adopted to apply to this condition of things; that is to say, that waters flowing over the *public* lands of the United States might be appropriated for any beneficial use or purpose. And, that the majority of these lands were public, the Supreme Court of California, in 1859, held that the presumption was that all lands in that State were public lands, until the legal title was shown to have passed from the Government to private parties, and that the burden of proof was upon the party asserting private ownership.[3] In the case of Lytle Creek Water Co. v. Perdew,[4] it was said: "There is nothing in the pleadings or findings to indicate that when all the waters of Lytle Creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership. It must be presumed, therefore, that such lands were public lands of the United States, and the rights to the waters of Lytle Creek acquired by prior appropriation were confirmed by the Act of Congress of 1866."[5] But today no such presumption exists. This is due to the changed conditions in the Western States. Ever since the adoption of the Arid Region Doctrine of appropriation, and largely due to the results obtainable under that doctrine, the Western States of this country have become in some localities, and in others are rapidly becoming, settled up. This is especially true along the streams and other bodies of water, until on many of them the title to lands over which they flow, from their sources to their mouths, is all in private ownership. This is true to such an extent that the presumption as to the ownership of lands in these localities is changed from the old holding that it was the presumption that the title to land was in the Government, to the rule as now held by the same Court, that it devolves upon the

1 For the acquisition of the public domain, see Secs. 390-407.

2 For ownership of the waters, see Secs. 406, 455.

3 Burdge v. Smith, 14 Cal. 380, 12 Morr. Min. Rep. 448; see, also, Rupley v. Welch, 23 Cal. 452, 4 Morr. Min. Rep. 243; Smith v. Doe, 15 Cal. 100, 5 Morr. Min. Rep. 218; Pomeroy on Riparian Rights, Sec. 93.

4 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426.

5 Citing 14 U. S. St. 218.

party claiming a right to the use of water by appropriation to assert and prove that at least some of the lands through which the stream runs are public lands.

In Santa Cruz v. Enright,[6] the Court said: "It does not appear whether the lands through which the stream ran at the time when the defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think it devolved upon the defendant to show that fact." In Cave v. Tyler,[7] the Court held that the burden of showing that the diversion was made on the public domain was upon the party claiming the right.[8]

So, at first, the Arid Region Doctrine of appropriation, as it originated with the early miners of California, applied only to the waters flowing over the public domain of the United States. Also all Acts of Congress relative thereto can apply only to the waters owned by the United States, for the reason that where the title to the waters has passed into private ownership, the Government has nothing to grant.[9] No question is any longer raised as to the right to appropriate water flowing over the public lands of the United States, especially after the passage of the Desert Land Act, wherein it was provided that, "All surplus water, . . . together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights."[10]

[6] 95 Cal. 105, 30 Pac. Rep. 197.

[7] 133 Cal. 566, 65 Pac. Rep. 1089.

[8] See, also, for what lands the diversion may be made, Secs. 670-677.

[9] For Acts of Congress and construction thereof, see Secs. 611-619.

For origin of doctrine of appropriation, see Secs. 609-659.

[10] 6 Fed. Stat. Ann., 1905, p. 392; 2 U. S. Comp. Stat., 1901, p. 1548; 19 Stat. L. 377.

For Desert Land Acts, see Secs. 1287-1311.

See, also, Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

Right to reserve waters for reservations, see Secs. 480, 668.

See, also, U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, for National Reclamation Act, Chap. 65, Secs. 1235-1286.

For right to appropriate water where point of diversion is on private land, see Secs. 673-675.

For right to appropriate water flowing entirely on private lands, see Sec. 646.

In the case of a dedication by a State all waters are subject to appropriation, and no distinction is made regarding the waters flowing over the public lands of the United States and those flowing over the lands of the State.

§ 645. **Waters flowing partly over public and partly over private lands.**—The decisions also hold to the effect that if the waters flow partly over public and partly over private lands there may be an appropriation, even in those Western States which adhere to the common law of riparian rights. This is upon the theory that there are some rights left which may be granted either by the Government or the State, or both, depending upon the ownership of the public lands.[1]

§ 646. **Waters flowing entirely upon private lands.**—In all the States of the arid and semi-arid West which have abrogated the common law of riparian rights the surplus water flowing in the natural streams may be appropriated, where they have their sources upon and flow for their entire lengths upon private lands. The right extends to all of the unappropriated water of all the natural streams or other bodies within the State, whether the lands over which they flow are public, and owned by the State or the United States, or are entirely private, or are part public and part private.[1] As was said by the Idaho Court: "By the adoption of our State constitution all of the unappropriated waters at that time were declared to be public waters, *and it matters not through or over whose land they flow.*"[2] The same rule is in force in Colorado, the decisions in which State hold to the effect that any unused or unappropriated water of the State is subject to appropriation, provided, of course, that lawful access to the stream may be acquired.[3]

1 Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197. There is no reservation protecting riparian rights in public lands remaining unsold. Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726.

See, also, next section, No. 646.

For on what lands diversion may be made, see Chap. 35, Secs. 670-677.

1 See Secs. 644, 645.

2 Idaho Power etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

3 Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

See, also, the chapter as to the two theories as to the source of title, Chap. 33, Secs. 627-640.

Upon the other hand, as we have seen in a previous portion of this work, it was left by the general Government to the various States to determine what rule shall govern, within their respective jurisdictions, the acquisition and use of the waters flowing therein.[4] They may determine for themselves whether the common law of riparian rights shall alone prevail, or whether that law shall be abrogated and the Arid Region Doctrine of appropriation shall be the only law upon the subject. Again, the State may determine to maintain both the common law of riparian rights and also the doctrine of appropriation. The United States can not enforce either rule upon a State.[5] There is no need of discussing the situation in those States which maintain only the common law of riparian rights, as water can not be appropriated under what is known as the Arid Region Doctrine of appropriation. The rights of the use of the water are confined within the limits of the uses permitted under the common law.[6]

In those States which maintain both the common law of riparian rights and the doctrine of appropriation, waters flowing entirely over private lands present a similar situation to those States which maintain only the common law of riparian rights. These waters can not be appropriated, for the reason that the use of the water belongs to the riparian owners as incident to the soil through which or adjoining which it runs; and, that being in private ownership, the title to the soil carries with it everything which is incident to that soil. This includes all of the water of a stream *after* all the lands through or adjoining which it flows have been acquired by private owners.[7] As the proposition was forcibly stated by the

[4] See Sec. 593.

[5] See Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655, and cases cited.

See, also, Sec. 593.

For States abrogating the common law of riparian rights, see Secs. 507, 622.

For States adhering to the common law, see Sec. 507.

For States maintaining both systems, see Sec. 662.

[6] For the common law of riparian rights, see Chaps. 21-28, Secs. 450-569.

[7] Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Curtis v. La Grande Hydraulic Water Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089; Meng v. Coffey, 67 Neb. 500, 93 N. W. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Winters v. U. S., 143 Fed. Rep. 740, 74 C. C. A.

Nebraska Court, where, after stating the history of the Arid Region Doctrine of appropriation, the Court said: "In this way the rule of appropriation became established in the Pacific States, in opposition to the common law, with reference to streams and bodies of water which wholly ran through or were situated upon the public lands of the United States."[8] In fact, in these States the right of appropriation can not be exercised, as against the vested rights of riparian proprietors, whether the lands through which the stream flows is entirely on private lands or not.[9] It has also been held in a State which has abrogated the common law of riparian rights, that an appropriation can be made only of the waters flowing or situated upon the lands over which the sovereignty has dominion, and not to streams or springs or other waters arising through percolation upon land, after it has been segregated from the public domain, and the title thereto has passed into private ownership.[10]

And it is even held by some of the cases that in order to make a valid appropriation, the point of diversion from the natural stream can not be taken out on private lands.[11] However, this subject will be more thoroughly discussed in a subsequent chapter.[12]

But in one of the later California cases is to be found a statement by the Court that is hard to reconcile with the previous holdings of that Court. The Court said:[13] "The right to appropriate water, under the provisions of the Civil Code, is not

666, *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546, affirmed 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 208; Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280; Mason v. Yearwood, 58 Wash. 276, 108 Pac. Rep. 608; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

For the early California cases, see, also Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Tarter v. Spring Creek etc. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Biddle Boggs v. Merced Min. Co., 14 Cal. 279, 70 U. S. 3 Wall. 304, 18 L. Ed. 245.

8 Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

9 For contest between appropriators and riparian owners, see Sec. 594.

10 Willow Cr. Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687.

For the appropriation of the waters of springs, see Sec. 648.

11 See City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089.

12 For on what lands diversion may be made, see Chap. 35, Secs. 670-677.

13 Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338, *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

confined to streams running over public lands of the United States. *It exists wherever the appropriator can find water of a stream which has not been appropriated, and in which no other person has or claims superior rights and interests.*" We believe this should be the rule in all jurisdictions, regardless of any theory as to the source of title to water rights, and also regardless of the fact whether the State has adopted the Arid Region Doctrine of appropriation alone, or whether it has both this and the common law of riparian rights.

§ 647. **Waters flowing over the public lands of a State.**—Also as the law of appropriation is permitted under the statutes of all of the States of the arid and semi-arid West, there is no question as to the right to appropriate the waters flowing over the lands owned by the States within these regions,[1] and especially is this true in those States which by constitutional provisions or by statutory enactment have dedicated the waters flowing within the State to the public or to the people.[2] And, for the purpose of the appropriation of waters, within these States, the waters flowing over the lands owned by the various States are as much public waters as those which flow over the lands owned by the United States.[3]

In Carson v. Gentner,[4] the Court held that a prior appropriator of the waters from a natural stream flowing through State lands has such a vested right to the use of the water and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of such diversion and existence of the ditch, obtains from the State a deed to the premises,

1 For the statutes of the various States, See Part XIV.

2 For the constitutional provisions upon this subject, see the various States, in Part XIV.

3 Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. Rep. 726; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Fort Morgan L. & C. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Combs v. Ag. D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Readjudication of Water Rights in Dist. No. 33 (C. C. D. Colo.), 1 Denver Legal Adv. 300.

4 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130.

without any reservation of any water right.[5] But, as we have seen, both the right to appropriate the waters from the public lands of the United States and from those of a State are subject to the rights of the United States to make reservations to maintain the navigable capacity of the navigable streams of the United States, and for its own use on its reservations.[6]

§ 648. **The waters of springs.**—The waters of a flowing stream may be appropriated at its source in a spring, as well as the waters of the stream itself.[1] It was held in the case of Brosnan v. Harris [2] that the right to appropriate the water of a spring which has no natural stream flowing therefrom exists under a statute providing that all ditches constructed for the purpose of utilizing the spring waters of the State shall be governed by the same laws as ditches constructed for the purpose of utilizing the waters of running streams.[3] But after the waters of a spring have passed into a stream to which the rights of prior appropriators have attached,

[5] See, also, Parkersville Drainage Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Ison v. Nelson M. Co., 47 Fed. Rep. 199; Pomeroy on Rip. Rights, Sec. 29.

For dedication to the public of its waters by a State, see Chap. 18, Secs. 372-389.

[6] Right of Government to reserve water for navigation, see Chap. 16.

[1] As to what constitutes springs, see Sec. 313.

See, also, Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314, Wilkins v. McCue, 46 Cal. 656; Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92; Silver Peake Mines v. Valcalda, 79 Fed. Rep. 886; Cole Silver M. Co. v. Virginia etc. Water Co., 1 Sawy. 470, Fed. Cas. No. 2,989; Orient M. Co. v. Freckleton, 27 Utah 125, 74 Pac. Rep. 652; Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76.

A finding that one has appropriated water from a spring, during a certain period, for purposes of irrigation, does not establish that he is entitled to a specific portion of the flow of the spring. Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; Baker v. Brown, 55 Tex. 377.

[2] 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649.

[3] See, also, Rait v. Furrow, 74 Kan. 101, 85 Pac. Rep. 934, 6 L. R. A., N. S., 157; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567.

the water can not be taken from the spring to their injury by a later appropriator;[4] and it is immaterial whether the water reaches the stream by percolation or seepage.[5]

And again, rights can not be acquired to the waters of springs situated along the channel of a stream and naturally flowing into it, and which constitute its direct source of supply, by entering upon, cleaning out, and thereby increasing the water supply, as against prior appropriators of all of the waters of the stream.[6] But where the spring is not a source of supply of a stream there is no question as to the right to appropriate the waters thereof.[7] So, also, one who first appropriates the waters of a spring on the public lands may continue to use such water, as against one who subsequently acquires title to the land on which the spring is situated.[8]

But upon the other hand, the waters from springs arising upon lands, after they have been segregated from the public domain, and the title thereto has passed into private ownership, can not be appropriated by a person other than the owner of the land,[9]

4 Bruening v. Dorr, 23 Colo. 195, 47 Pac. Rep. 290, 35 L. R. A. 640; but see Wilson v. Ward, 26 Colo. 39, 56 Pac. Rep. 573.

For common law rule, see Delhi v. Youmans, 50 Barb. 316, *Id.*, 45 N. Y. 362, 6 Am. Dec. 100; Paine v. Chandler, 134 N. Y. 385, 32 N. E. Rep. 18, 19 L. R. A. 99; Lord v. Meadville W. Co. 135 Pa. 122, 19 Atl. Rep. 1007, 8 L. R. A. 202, 20 Am. St. Rep. 864; Eckerson v. Crippen, 110 N. Y. 585, 18 N. E. Rep. 443, 1 L. R. A. 487.

5 See subterranean waters, Secs. 1148-1211.

Bruening v. Dorr, *supra;* Beaverhead Canal Co. v. Dillon Elec. L. & P. Co., 34 Mont. 135, 85 Pac. Rep. 880.

6 For appropriation of developed waters, see Sec. 658.

Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914.

7 Leonard v. Shatzer, 11 Mont. 422, 28 Pac. Rep. 475; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

8 Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 71 Am. St. Rep. 949; but see Morrison v. Officer, 48 Ore. 569, 87 Pac. Rep. 896.

9 Willow Creek Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Shenandoah M. & M. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Durning v. Walz, 42 Ore. 109, 71 Pac. Rep. 662; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Smith Canal or Ditch Co. v. Colo. Ice & S. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Gill v. Malan, 29 Utah 431, 82 Pac. Rep. 471; Morrison v. Officer, 48 Ore. 569, 87 Pac. Rep. 896; Berry v. Equitable etc. Co., 29 Nev. 451, 91 Pac. Rep. 537.

Water coming to the surface in a

unless the water from the springs should flow below the tract of land whereon the same are located. In that case it may be appropriated by the first comer to the extent of all the water which is permitted to escape to the lands below.[10] Under the common law, and under the doctrine of appropriation, such a spring belongs to the owner of the land. It is as much his as the earth or the minerals underneath the surface, and none of the rules relating to the appropriation of the water from water courses apply.[11]

spring on private land belongs to the owner of the soil in such a sense and to such an extent that he is entitled to the exclusive right to use and dispose of the same. Metcalf v. Nelson, 8 So. Dak. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 745. See, also, Buffum v. Harris, 5 R. I. 243; Bliss v. Greeley, 45 N. Y. 671, 6 Am. Rep. 157; Clark v. Conroe, 38 Vt. 469.

See, also, Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541; King v. Chamberlain, —— Idaho ——, 118 Pac. Rep. 1099.

In the case of Youngs v. Regan, 20 Idaho 275, 118 Pac. Rep. 499, it was held that where one entered land under the Desert Land Act, on which was situated a spring and an artesian well, which well was constructed prior to the entry of such land, and the water was used for watering stock, and the one who made the well sold his interest in the same to the entryman, and she made application of the water to the lands so entered by her for growing crops thereon, it was held that her appropriation is as valid as though she had made application to the State engineer for a permit to appropriate the same.

10 Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Durning v. Walz, 42 Ore. 109, 71 Pac. Rep. 662; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449, *Id.*, 151 Cal. 587, 91 Pac. Rep. 395; Southern Cal. Inv. Co. v. Wiltshire, 144 Cal. 68, 77 Pac. Rep. 767.

11 Willow Creek Irr. Co. v. Michaelsen, *supra;* Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. Rep. 433, 2 Am. St. Rep. 443; Broadbent v. Ramsbotham, 2 Exch. 602, 25 L. S. Exch. N. S. 115, 4 Week. Rep. 290, 34 Eng. L. & Eq. 553; Rawstron v. Taylor, 33 Eng. L. & Eq. 428, 25 L. J. Exch. N. S. 33, 11 Exch. N. S. 369, 4 Week. Rep. 290; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100, affirming, *Id.*, 50 Barb. 316; Goodale v. Tuttle, 29 N. Y. 459; Ellis v. Duncan, 21 Barb. 230, 11 How. Prac. 515; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519, 19 Hun, 320; Paine v. Chandler, 134 N. Y. 385, 32 N. E. Rep. 18, 19 L. R. A. 99.

The water can not be maliciously diverted by excavations on adjoining land. Stillwater Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541.

For the question of tenants in common in springs and that of ouster by one tenant, see Church v. State, —— Wash. ——, 117 Pac. Rep. 711.

For pollution of springs, see Sec. 1138.

For the question of subterranean waters as affecting springs, see Chap 62, Secs. 1195, 1196.

§ 649. Surface tributaries to water courses or other bodies of water.—The waters of tributaries to water courses or other bodies of water may be appropriated by independent appropriations, provided they do not interfere with the prior rights of those who have appropriated the waters of the main stream or other body.[1] All the streams of water within a single watershed, under the doctrine of appropriation, are considered as a composite body and include not only the main water course, but also all the branches and tributaries to the same. Hence it follows that prior appropriations of the water of the main stream include the right to the waters of the tributaries, above the points of diversion, to the full extent of those prior appropriations.[2]

That an appropriation can not be made originating in trespass, see Marshall v. Niagara Springs Orchard Co. (Idaho), decided June 8, 1912.

1 As to what constitutes tributaries, see Sec. 311.

As long as the prior appropriator receives the water to the extent of his appropriation, he can not interfere with the right to appropriate from a tributary. Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883.

See, also, Creighton v. Kaweah C. & Irr. Co., 67 Cal. 221, 7 Pac. Rep. 658; Salina Cr. Irr. Co. v. Salina S. Co., 7 Utah 456, 27 Pac. Rep. 578.

Since all the streams from which a person is entitled to take water for his lands unite before leaving his lands, it is immaterial to the lower appropriators from which of the streams the water is diverted. Wong Leong v. Irwin, 10 Hawn. 265.

For the appropriation from the tributaries of navigable rivers where it impairs navigation, see Sec. 355.

2 For the appropriation of subterranean tributaries, see Secs. 1193-1198.

See, also, Strickler v. Colo. Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Priest v. Union etc. Co., 6 Cal. 170; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Malad etc. Co. v. Campbell, 2 Idaho 278, 411, 18 Pac. Rep. 52; Bruening v. Dorr, 23 Colo. 195, 47 Pac. Rep. 290, 35 L. R. A. 640; Platte Valley Irr. Co. v. Buckers Irr. M. & Imp. Co., 25 Colo. 77, 53 Pac. Rep. 334; Tonkin v. Winzell, 27 Nev. 88, 73 Pac. Rep. 593; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Water Supply & Storage Co. v. Larrimer & Weld Res. Co., 25 Colo. 87, 53 Pac. Rep. 386, *Id.*, 7 Colo. App. 225, 42 Pac. Rep. 1020; Boyce v. Cupper, 37 Ore. 256, 61 Pac. 642; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Salina etc. Co. v. Salina etc. Co., 7 Utah 456, 27 Pac. Rep. 578; Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Oglivy Irr. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. Rep. 598.

Also prior appropriations of the waters of the main stream include the right to the waters of springs which flow into tributaries of the main stream. Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880.

It is held that it is presumed that the waters of a tributary stream less the evaporation, if not interfered with, will reach the main stream either by surface or subterranean flow, and that the burden of the proof is upon the one attacking this presumption, to show that the waters of the tributary would not reach the main stream.[3]

A prior appropriator of the waters of a stream has a right to the waters of all its tributaries above his point of diversion, of all its sources, of whatsoever nature, to the full extent of his appropriation. Under the recent decisions he even has a right to all of the subterranean tributaries, a subject which we will discuss in a separate chapter.[4] The source of supply may also be springs,[5] surface water,[6] lakes, or ponds,[7] whether formed from percolations or surface water.[8]

Where certain lakes formed a part of the source of supply of a creek, and, with the exception of one of the lakes, formed a part of the natural channel of one of the tributaries thereof, prior appropriators of the waters of the creek were entitled to the same usufructuary rights to the waters naturally flowing and collecting in the lakes, which eventually flowed into the main channel of the creek.[9]

3 Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; Wilson v. Collin, 45 Colo. 412, 102 Pac. Rep. 20.

4 See Secs. 776-782.

In the case of Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065, it was held that a stream, the waters of which have been appropriated, and a tributary gulch may be used to conduct waters not naturally tributary to the stream, and belonging to others, to the place of use.

5 See Appropriation from Springs, Sec. 648.

6 Sec. 654.

7 Sec. 650.

8 Rait v. Furrow, 74 Kan. 101, 85 Pac. Rep. 934, 6 L. R. A., N. S., 157.

For sources of streams, see, also, Sec. 313.

9 Cole v. Richards etc. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962; Ryan v. Quinlan, —— Mont. ——, 124 Pac. Rep. 512.

See, also, New Whatcom v. Fairhaven, 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129; Buckers etc. Co. v. Platte etc. Co., 28 Colo. 187, 63 Pac. Rep. 305.

See, also, for right to natural flow at head of appropriator's ditch, Secs. 801-803.

See, also, appropriation from lakes and ponds, Sec. 650.

For relative rights of prior and subsequent appropriators, see Secs. 776-803.

The appropriator of the waters of a stream also has an interest in the waters of the tributaries of the stream which flow in below his point of diversion, to this extent: Where there are appropriators prior to him below his point of diversion on the stream, and there are also appropriators subsequent to him of the waters of the tributaries, which naturally flow in the stream below his point of diversion and above those of his prior appropriators, and he is called upon to supply the water to which those below him are entitled. In cases of this kind, he is entitled to the flow of the lower tributaries, as against his junior appropriators thereof, when it is necessary to protect the rights of the lower appropriators prior in time to him from the main stream.[10]

In cases involving the right to use the waters of the main stream and the tributaries thereto, the principal questions to be decided are, the priority of the appropriations; and, if the one taking from the main stream is found to be prior in time, then the question arises as to his actual injury resulting from the appropriations from the tributary. If the appropriator on the main stream is prior in time and his right is injured by the appropriation from the tributary, then he has his right of action both at law and in equity.[11]

§ 650. **Lakes and ponds.**—The waters of lakes and ponds may be appropriated, under certain conditions and limitations.[1] In most of the States where the doctrine of appropriation is in force there are statutes permitting the appropriation of the waters of such bodies.[2] Also in the State of California, whose statute does not include, in terms, the right to appropriate the waters from lakes, the Supreme Court of that State has held that such an ap-

10 Water Sup. & S. Co. v. Larimer & W. Res. Co., 25 Colo. 87, 53 Pac. Rep. 386, citing Kinney on Irr., 1st Ed., Secs. 183, 259; Platte Val. Irr. Co. v. Buckers Irr. M. & Imp. Co., 25 Colo. 77, 53 Pac. Rep. 334.

See, also, rights when flow of stream is increased, Secs. 797-800.

For relative rights of prior and subsequent appropriators, see Secs. 776-803.

11 See Remedies, Part XIII.

1 Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147; Denver etc. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

2 See Statutes of Various States, Part XIV.

propriation could be made, especially in cases where streams flow through or terminate in lakes, upon the theory that the lakes are then a portion of the water courses, and what may be appropriated from one may be appropriated from the other.[3] However, in those States which adhere to the common law of riparian rights,[4] other considerations must enter into a case of this kind. As against the rights of the riparian owners, the appropriation operations must not cause the water to rise higher than the high-water mark or to fall lower than the low-water mark. In other words, the right of the riparian proprietors to have the lake remain at its natural level must not be interfered with. And where it is made to appear that the level of the lake is lowered by the operations,[5] or raised above the ordinary high-water line, and to the injury of the property of the riparian owners, the court will furnish relief.[6] However, the appropriation of the waters of a lake will

3 In Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338, *Id.*, 158 Cal. 206, 110 Pac. Rep. 927, it was said: "There is some evidence that Pinto Lake, with its tributaries and outlet, during the rainy season constituted a running stream of water. It is clear that during the dry seasons there was no water flowing out of the lake, but there is evidence that during that period there was a slight flow from a tributary into the lake. We can not agree with the appellant in his contention that the finding that the lake, or its tributaries, constituted a running stream is not sustained by the evidence. We think the better doctrine, in respect to the character of a stream from which the statute provides for appropriations, is that it is not necessary that the stream should continue to flow to the sea, or to a junction with some other stream. It is sufficient if there is a flowing stream; and the fact that it ends either in a swamp, in a sandy wash in which the water disappears, or in a lake in which it is accumulated upon the surface of the ground, will not defeat the right to make the statutory appropriation therefrom, and we can see no reason why the appropriation, in such a case, may not be made from the lake in which the stream terminates, and which therefore constitutes a part of it, as well as from any other part of the water course."

See, also, Turner v. James Canal Co., 155 Cal. 182, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823; Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Osgood v. Eldorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129.

4 For the Western States adhering to the common law, see Secs. 507, 621.

5 Kalez v. Spokane Val. L. & W. Co., 42 Wash. 43, 84 Pac. Rep. 395.

See, also, Fernald v. Knox Woolen Co., 82 Me. 48, 19 Atl. Rep. 93, 7 L. R. A. 459; Cedar Lake Hotel Co. v. Cedar Cr. H. Co., 79 Wis. 297, 48 N. W. Rep. 371; Draper v. Brown, 115 Wis. 361, 91 N. W. Rep. 1001.

6 Kalez v. Spokane Val. L. & Irr. Co., *supra*.

not be permitted where it lowers the level of the waters so that the rights of those who have made prior appropriations from the stream forming the outlet of the lake are injured. In some of these cases the lake may form the tributary and the entire source of supply of the stream, and as such has been treated in another section.[7]

In a recent Utah case[8] it was said: "Counsel for respondents, however, insist that the prior appropriator acquires no right in his means of diversion, but obtains a prior right only to use the quantity of water appropriated and applied to a beneficial use by him. We can not yield assent to this view. We think the original taker or appropriator from a stream or body of water also acquires the right to continue to use his method or means of diverting which he has installed. . . . If it be held, therefore, that a subsequent appropriator of the water need have no regard for the diverting means or methods of the prior appropriator, but may, in fact or effect, make prior appropriations of water unavailable with impunity, then there is in fact no such a right as a prior right, but all rights may, at any time, be invaded or destroyed by a subsequent appropriator by simply making the diverting means used by the prior appropriator useless. To permit such an invasion of a prior right would, in effect, amount to an indirect taking of a prior appropriator's water. This neither the legislative nor the judicial power can allow without permitting confiscation of property rights."[9]

See, also, Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. Rep. 813, 102 Am. St. Rep. 905; Carl v. West Aberdeen Land Co., 13 Wash. 616, 43 Pac. Rep. 890; Sultan W. & P. Co. v. Weyerhouser T. Co., 31 Wash. 558, 72 Pac. Rep. 114.

7 See appropriations from springs, Sec. 648.

Appropriations from tributaries, Secs. 355, 649.

See, also, Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129; see, also, dissenting opinion by Beatty, C. J., 58 Pac. Rep. 374.

Cole v. Richards Irr. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962; Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Osgood v. Eldorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37, 118 N. W. Rep. 255.

See, also, for the appropriation of navigable waters, Secs. 356, 663.

For the appropriation from subterranean lakes, see Secs. 1203, 1204.

See, also, Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

8 Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

9 But see Schodde v. Twin Falls etc. Co., 161 Fed. Rep. 43, 88 C. C. A. 207, affirmed on writ of certiorari by the Supreme Court of the United States on April 1, 1912, 224 U. S. 107, 56 L. Ed. ——, —— Sup. Ct. Rep. ——.

§ 651. Water from canyons, gorges, and ravines.—A valid appropriation of water may be made from a canyon, gorge, or ravine, notwithstanding it is not a running stream, and the greater portion of the year it is entirely dry, there being running water only in time of rainfall and melting snow in the surrounding hills.[1] In a recent Oregon case it was held that a gulch through which water flows, beginning usually about the latter part of February and continuing generally until some time in the early part of June, about which time the positive flow ceases, constitutes a water course, the waters of which may be appropriated.[2]

In many of the States it is provided by statute that the waters of ravines and canyons may be appropriated.[3]

§ 652. Sloughs.—A slough is defined as an arm of a river apart from the main channel.[1] As to whether water may be appropriated from sloughs depends entirely as to whether or not all of the waters of the stream upon which they are dependent have been appropriated before an attempted appropriation from the slough, as the waters in this kind of a slough are in reality the waters of the stream.[2] But, as we have seen,[3] some sloughs may have independent water; these take the nature of water courses, and appropriations may be made from them to the extent of such independent water.[4]

§ 653. Flood or storm waters.—As we have seen, the decisions are in conflict as to whether flood or storm waters are to be treated

1 Denver T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Palmer v. Waddell, 22 Kan. 352.

For ravines as natural water courses, see Sec. 312.

See, also, Los Angeles Cem. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Jaquez D. Co. v. Garcia, — New Mex. ——, 124 Pac. Rep. 891.

2 Borman v. Blackmon, —— Ore. ——, 118 Pac. Rep. 848.

3 For the statutes of the various States, see Part XIV.

1 As to what constitutes sloughs, see Sec. 315.

For riparian rights on sloughs, see Sec. 468.

For the rights of riparian owners to the use of the water of sloughs, see Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

2 Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. Rep. 625, 2 Am. St. Rep. 775; Hagge v. Kansas etc. Co., 104 Fed. Rep. 391.

3 See Sec. 315.

4 Cederburg v. Dutra, 3 Cal. App. 572, 86 Pac. Rep. 838; Green v. Carotto, 72 Cal. 267, 13 Pac. Rep. 685.

as surface waters or a part of the water courses which they overflow. The weight of better authority holds that flood or storm waters are a constituent part of the streams, unless they wander away from them to places where, upon the lowering of the water of the streams, they can not return to them, in which case they become mere surface water.[1]

Flood or storm waters may be appropriated for beneficial uses, under the Arid Region Doctrine of appropriation. In fact, throughout the arid West, there are many irrigation projects which rely almost entirely upon these waters for their source of supply. This is especially true in the case of reservoir projects. In many portions of the arid West the greater portion of the precipitation occurs in the spring or rainy seasons. This, augmented with the melting snow, causes the rivers and streams to overflow their banks and submerge the adjoining lands, and it is not only a matter of safety to these lands, but also of profit to the projectors, that these waters be stored and let down to irrigate lands in the dry seasons, when they are needed. Otherwise these waters would cause much damage, and finally run off to the sea without any beneficial use.

We have said that flood or storm waters may be appropriated. But whether as such they may be appropriated as an independent appropriation is another question. These waters are a part of the waters of the streams, and the original appropriators are entitled to all of the waters of the streams to the full extent of

1 For definition of flood or storm waters, see Sec. 319.

For appropriation of surface water, see Sec. 654.

For definition of surface water, see Sec. 318.

That the flood water of a river, which forms a continuous body with the water flowing in the ordinary channel, or which departs from the channel but returns when the water in the channel lowers, must be regarded as a part of the stream, see Fordham v. Northern Pac. R. Co., 30 Mont. 421, 76 Pac. Rep. 1049, 66 L. R. A. 556, 104 Am. St. Rep. 729.

See, also, Rait v. Furrow, 74 Kan. 101, 85 Pac. Rep. 934, 6 L. R. A., N. S. 157; Palmer v. Waddell, 22 Kan. 352; Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Brinegar v. Copass, 77 Neb. 241, 109 N. W. Rep. 173; Cook v. Seaboard etc. Co., 107 Va. 32, 57 S. E. Rep. 564, 10 L. R. A., N. S., 966, 122 Am. St. Rep. 825; Broadbent v. Ramsbotham, 11 Exch. 602, 25 L. J. Exch. N. S. 115, 4 Week. Rep. 290, 34 Eng. L. & Eq. 553.

their appropriations, which include their waters at their natural flow; and, if that is insufficient to give them the full amount in the order of their appropriations, then they are entitled to the flood waters until the full extent of all of their appropriations is satisfied.[2] The same rules of appropriation apply to flood waters as apply to the waters of the ordinary flow of the stream. They must all be applied to a beneficial use or purpose within a reasonable time.[3] But, upon the other hand, if the flood water does not form part of the amounts included in the prior appropriators' rights, it is subject to appropriation by independent appropriations.[4] But in all cases regarding the rights of the prior appropriators the flood waters must be treated as surplus waters of the streams.[5]

Regarding the rights of riparian owners in those jurisdictions where such rights are allowed, the authorities hold that the flood or storm waters may be all appropriated by independent appropriations. The riparian owners are entitled to only either the ordinary and natural flow of the streams or, at least, to such flood waters as might reasonably be expected. And hence, they can not lawfully claim, as against appropriators, the flow of the extraordinary flood waters of the streams.[6] As was held in a recent case in California, the impounding and distribution of flood and storm waters is encouraged by law where it does not sub-

2 California Pas. & Ag. Co. v. Enterprise C. & L. Co., 127 Fed. Rep. 741; Heilbron v. Fowler S. C. Co., 75 Cal. 476, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

3 Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

See, also, for the application of the water, Secs. 725, 877.

4 Center Cr. W. & Irr. Co. v. Thomas, 19 Utah 360, 57 Pac. Rep. 30; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704.

5 Brown v. Smith, 10 Cal. 508; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Nevada Co. & S. C. Co. v. Kidd, 37 Cal. 282; Smith v. O'Harra, 43 Cal. 371, 1 Morr. Min. Rep. 671.

For appropriation of surface waters, see Sec. 654.

6 See Sec. 470.

Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 341; Fifield v. Spring Valley Waterworks, 130 Cal. 552, 62 Pac. Rep. 1054; California Pas. & Ag. Co. v. Enterprise C. & L. Co., 127 Fed. Rep. 741; Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129, where it was held that the appropriator of flood water must not make any changes in the natural flow of the stream to those below.

Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169.

stantially damage the existing rights of riparian proprietors, and that an injunction will not be granted for the diversion of such waters for use upon behalf of a riparian proprietor unless he can show actual, material, and substantial damage.[7]

§ 654. Surface waters as such can not be appropriated.—Surface water, or diffused surface water as it is sometimes called, we have defined as water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well-defined and substantial existence.[1] No permanent right to the appropriation of this water can be maintained from the fact that its movements are too erratic and capricious. Formed as it is from the rainfall or the melting snow upon the ground, or from the natural drainage from the lands above, no absolute right, by means of an appropriation as that term is understood in the arid region, can attach while it still remains surface water.[2] The question which usually arises in regard to surface water is how to get rid of it, and not how to appropriate it. Under the civil law rule the owner of the upper land has an easement over the lower adjacent land to discharge surface water as it is accustomed naturally to flow, and the lower land owner has no right to interrupt such natural flow to the injury of the upper land owner.[3] Under the common law, however, no such easement is recognized, and either the upper or lower owner may get rid of it the best he can. But there must be no artificial accumulation of the water and the subsequent discharge of the same upon the lands of another, under either rule.[4] Some of the States have adopted one rule and some

7 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, for injunctions in favor of riparian proprietors, Secs. 1611-1615.

1 As to what constitutes surface water, see Sec. 318.

2 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169.

3 Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; Ogburn v. Connors, 46 Cal. 346, 13 Am. Rep. 213.

4 McDaniel v. Cummings, 83 Cal. 515, 23 Pac. Rep. 795, 8 L. R. A. 575; Wood v. City of Tacoma, —— Wash. ——, 119 Pac. Rep. 859; City of Paola v. Garman, 80 Kan. 702, 102 Pac. Rep. 83; Johnson v. Hyre, 83 Kan. 38, 109 Pac. Rep. 1075; Chicago etc. R. Co. v. Groves, 20 Okla. 101, 93 Pac. Rep. 755, 22 L. R. A., N. S., 802; Gray v. McWilliams, 98

the other. But this runs us into the subject of drainage, which will be discussed to some extent in another chapter of this work.[5] However, in the arid region, this drainage from the upper to the lower land may be of great value to the lower land. Hence the lower owner has the right to insist that it continue. As was said in the case of Boynton v. Longley, arising in Nevada,[6] "It is seldom that any land owner in this State has occasion to complain of too much water. The cry is, usually, not for less, but for more." But the moment that surface water finds its way into a water course or other body of water it is no longer surface water, and a permanent right to the use thereof may be acquired by appropriation under the laws regulating such water courses or bodies of water.

Surface water, however, may be captured and impounded in any method available by a land owner over whose lands such waters have flowed, and, when so captured, it becomes the absolute property of such land owner and is not subject to appropriation by others. As was said in a very recent Idaho case:[7] "If a man collect and impound surface and flood waters from his own land before they reach any natural stream or channel and holds the same on his land and premises, the fact that he may not use it for irrigation or any other commercial purpose does not render it any less his property or authorize any one else to invade his property or appropriate and divert the same. A permit from the State engineer can not give any sanction to such a procedure. The State engineer has no right to grant permits to one man to use another man's property."[8]

Cal. 157, 32 Pac. Rep. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Los Angeles Cemetery Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Cushing v. Pires, 124 Cal. 663, 57 Pac. Rep. 572; Larrabee v. Town of Cloverdale, 131 Cal. 96, 63 Pac. Rep. 143.

5 For the drainage of irrigated lands, see Sec. 38.

For California drainage law, see Part XIV, under California.

6 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781.

7 King v. Chamberlin, —— Idaho ——, 118 Pac. Rep. 1099.

8 See, also Neilson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488; Youngs v. Regan, 20 Idaho 275, 118 Pac. Rep. 499; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 746; Davis v. Spaulding, 157 Mass. 431, 32 N. E. Rep. 650, 19 L. R. A. 102; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567.

§ 655. Subterranean or underground waters.—In order to have the subject of subterranean or underground waters together, we will discuss them in chapters by themselves.[1] But in general we will say here, that these waters are subject to appropriation. A few years ago it was considered by the authorities that only the waters of known subterranean water courses might be appropriated. But owing to recent scientific investigations the underground flow of these waters has been practically ascertained, and the legal authorities have kept pace with the scientists, and today practically all of these waters are subject to appropriation, with the exception of what are known as diffused percolations. At least, rights may be secured in and to these waters which can not be interfered with by others.[2]

§ 656. Seepage water.—Seepage waters, as the term is understood by Western irrigators, are those waters which seep from irrigation canals and irrigated fields to the lower lands, and there usually come to the surface and can not be appropriated.[1] In many cases seepage waters find their way back into the stream from which they were originally taken, and from there they may be reappropriated and diverted upon other fields and there again used. In this way the water of streams may be appropriated, diverted, and used a number of times. The seepage waters mingling with the waters of the stream are usually appropriated below as a part of the waters of the stream, and under a special statute a person claiming a right to water as seepage water, has the burden of proving that the water claimed is seepage water, and the quantity thereof.[2] As a general proposition, seepage water coming into a natural stream belongs to the appropriators thereon, and can not be appropriated sepa-

1 See Chaps. 59-62, Secs. 1148-1220.

As to what constitutes subterranean or underground waters, see Sec. 323.

For the classification of subterranean waters, see Secs. 287, 323.

2 That riparian rights attach to certain subterranean waters, see Sec. 471.

1 See, for definition of seepage waters, Secs. 24, 25.

See, also, Garnes v. Rollins (Utah), decided June 20, 1912.

For damage from seepage waters, see Remedies, Part XIII.

2 La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rev. 588; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567.

rately.[3] Seepage waters properly belong to subterranean waters and will be discussed under that subject.[4]

§ 657. **Artesian waters.**—Artesian waters are also subject to appropriation for irrigation and other beneficial purposes.[1] These waters also come under our classification of subterranean waters, and will be more thoroughly discussed under that subject.[2] In general we will say here that the water flowing from artesian wells on the public domain is subject to appropriation, although there may not be any State statute directly permitting the same, and also where the wells were sunk for another purpose and by other parties than the appropriator and abandoned by them.[3]

§ 658. **Developed water may be appropriated.**—Developed water is that water which by artificial works has been discovered and developed by man. This water belongs properly to subterranean waters, and will be treated of more fully in another portion of this work.[1] But in general we will say here that developed water belongs to the person by whom it is developed and appropriated to some beneficial use, so long as he does not interfere with the rights of others. But it must be proved by the party claiming the water that it was not taken from a source of supply to a natural water course, either surface or subterranean, the waters of which were all appropriated prior to the development of the water in question.[2] In those jurisdictions where riparian

3 See, also, Water Supply, etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280.

4 For subterranean waters, see Secs. 1148-1211.

1 As to what constitute artesian waters, see Secs. 1167-1169.

2 See chapters on subterranean waters, Secs. 1148-1211.

3 De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

See, also, Secs. 1116-1184.

1 See chapters on subterranean waters, Secs. 1148-1211.

See, also, for mingled waters, Secs. 798-800.

2 Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 64, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Platte Val. Irr. Co. v. Buckers Irr., Mill & Imp. Co., 25 Colo. 77, 53 Pac. Rep. 334; Cardelli v. Comstock Tun. Co., 26 Nev. 284, 66 Pac. Rep. 950; Evans v. Prosser Falls Land & Power Co., 62 Wash. 178, 113 Pac. Rep. 271.

In the case of Ripley v. Park Center etc. Co., 40 Colo. 129, 90 Pac. Rep. 75, it was held that the right as first appropriator of one who conducted water from mines into a natural stream with the intent there to recapture the water and to appropriate it for irrigation purposes, and who

rights are upheld the owners along a stream, the waters of which have been increased by development, can not claim any of the increment over and above the natural flow of the stream.[3] But in case the increase in flow results merely from the clearing out of obstacles from the channel of the stream, each riparian owner is entitled to the benefit of the increment. The same principle also applies to those cases where all of the waters of the stream have, prior to the cleaning out of the stream, been appropriated.[4]

§ 659. **Surplus waters.**—All surplus or excess waters of the natural streams or other bodies may be appropriated. As we shall see, the right of the prior appropriator is limited to the amount of water which is actually applied to some beneficial use or purpose within the limit and extent of his claim. Hence it follows that those who come after him may appropriate, in the order of their priorities, all of the surplus waters of the stream.[1] This subject, however, will be more thoroughly discussed when we come to that of the nature and extent of rights as between appropriators and others.[2]

§ 660. **Excess waters.**—The terms "surplus" and "excess" waters are sometimes used interchangeably. But excess water has a still more technical meaning. Whenever an appropriator diverts and lays claim to more water than is actually needed for the purposes for which it was appropriated, or fails to use a portion of the water so appropriated for some beneficial use or purpose, his

actually made the first appropriation of the water, relates back to the time when he sought to utilize the water.

3 See authorities cited, *supra*.

See, also, Secs. 544, 549.

4 See Secs. 1205, 1206.

1 For subsequent appropriations, see Secs. 783-786.

That all the water appropriated must be applied to a beneficial use, see Secs. 725-728.

For right to appropriate waste water, see Secs. 661.

For wasting water, see Secs. 911-916.

For the appropriation of excess water, see Sec. 660.

See, also, Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Windsor Res. etc. Co. v. Hoffman Mill. Co., 48 Colo. 82, 109 Pac. Rep. 422, *Id.*, 48 Colo. 89, 109 Pac. Rep. 425, 30 L. R. A., N. S., 615; Anderson Land etc. Co. v. McConnell, 133 Fed. Rep. 581.

2 See Secs. 775, *et seq.*

claim is deemed excessive, and the unused portion of the water is deemed excess water. This excess water may be appropriated by others, not by an independent appropriation and by this means cutting in ahead of other appropriators, but by the subsequent appropriators in the order of their priorities on the stream.[1] This subject will also be further discussed under other heads in this work.[2]

§ 661. **Waste water.**—Under the Arid Region Doctrine of appropriation, it is the duty of each appropriator to use all of the water appropriated for some beneficial use or purpose.[1] When he has so used the water, it is also his duty to return the surplus to the natural stream from which it was taken, for the use of the subsequent appropriators.[2] And it was recently held by the Federal Court that such unused water was not waste water, but excess water which might be appropriated.[3] Or, if the appropriators owning lands below him are second or subsequent to him in the regular order, it is permitted that he pass the water along to them in order that they may use it. In fact, many ditches and canals are constructed with this end in view, sufficient water being taken out of the stream for the use of all the appropriators on the ditch.

Waste water may be defined to be such water as escapes from the works or appliances of appropriators without being used; or, such water as escapes from an appropriator's land after he has made all

1 See Secs. 783-786.

Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Hewit v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 Pac. Rep. 892; Combs v. Agri. D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Fort Morgan Land & C. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Anderson etc. Co. v. McConnell, 133 Fed. Rep. 581.

2 For wasting water, see Secs. 911-916.

Rights of subsequent appropriators, see Secs. 783-786.

1 For beneficial use, see Secs. 725-728.

For wasting water, see Secs. 911-916.

2 See for appropriation of surplus waters, Sec. 659.

For rights of subsequent appropriators, see Secs. 783-786.

Burkart v. Meiburg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rev. 279.

3 Anderson etc. Co. v. McConnell, 133 Fed. Rep. 581.

the beneficial use thereof that is possible and which can not be returned into the natural stream from which it was originally taken. And as to such water it was recently held by the Colorado Court:[4] "Plaintiff's rights were limited and only attached to the water discharged from the Tegeler lateral, whatever that happened to be, after the defendants and cross-complainants had supplied their own wants and necessities. This does not vest her with any control over the ditches or laterals of appellants, or the water flowing therein, nor does it obligate appellants to continue or maintain conditions so as to supply plaintiff's appropriation of waste water at any time or in any quantity, when acting in good faith."[5]

It often happens that the prior appropriator, in irrigating the lower portion of his land, is compelled by the lay of the land to let the water run off from his property to the lands of others, in places where it is impossible to return the water to the natural stream. And it often happens that the water flows upon lands of those who are either not appropriators from the stream, or are appropriators much later than others, who in point of time are entitled to the use of the water. This water is deemed by the courts to be waste water. And the question now arises, can the owners of the lands on which it runs secure a permanent right therein to its continuous use? The authorities hold that while the water, so denominated as waste water, may be used after it escapes, no permanent right can be acquired to have the discharge kept up, either by appropriation, or a right by prescription,[6] estoppel,[7] or acquiescence in its use while it is escaping, and that, too, even though expensive ditches or works were constructed for the purpose of utilizing such waste water, unless some other element enters into the condition of affairs, other than the mere use of the water. In other words, the original appropriators have the right, and in fact it is their duty to prevent, as far as possible, all waste of the water which they have appropriated, in order that the others who are entitled thereto may receive the benefit thereof.[8]

4 Green Valley Ditch Co. v. Schneider, 50 Colo. 606, 115 Pac. Rep. 705.

5 Citing Mabee v. Platte etc. Co., 17 Colo. App. 476, 68 Pac. Rep. 1058; Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725.

6 See for prescription, Secs. 1033-1058.

7 For estoppel, see Secs. 1121-1128.

8 Burkart v. Meiburg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; Mabee v. Platte Land Co., 17 Colo. App. 476,

When such water escapes and returns to the stream or its tributaries, it becomes a part of the water of the stream and subject to reappropriation as though it had never been diverted, and inures to the benefit of the other appropriators on the stream in the order of their appropriations.[9]

In a recent case decided by the Supreme Court of Oregon,[10] it was held that where water is claimed as the "waste" waters from the farm of an adjacent water user, all the water in excess of that caused by seepage is but the quantity diverted by such appropriator in excess of his needs, and accordingly in excess of the quantity to which he may be entitled; and the person receiving and applying the excess to a beneficial use acquires a *vested* right therein, as would an appropriator of any other surplus water, the inception of which right, like that of any other appropriator, dates from the first steps taken to provide for its use. The first part of the holding is correct, as we shall see when we come to the question of beneficial use of the water appropriated. A person is not permitted under the law to appropriate more water than he can use.[11] The last

68 Pac. Rep. 1058; Fairplay Hydraulic M. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Stone v. Bumpus, 40 Cal. 428, 4 Morr. Min. Rep. 271; Hansen v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Correa v. Freitas, 42 Cal. 339, 2 Morr. Min. Rep. 336; Stockman v. Riverside etc. Co., 64 Cal. 57, 28 Pac. Rep. 116, Anaheim etc. Co. v. Semi-Tropic etc. Co., 64 Cal. 185, 30 Pac. Rep. 623; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Cardelli v. Comstock etc. Co., 26 Nev. 284, 66 Pac. Rep. 950, 21 Morr. Min. Rep. 699; Crescent etc. Co. v. Silver King etc. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685.

9 Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; La Jara C. & Live Stock Ass'n v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644.

See, also, for rights of subsequent appropriators, Secs. 783-786.

Waste water from irrigation ditches which is again returned to the stream or its tributaries becomes a part of the waters of the stream as though never diverted, and inures to the benefit of the appropriators in the order of their appropriations. Water Supply & Storage Co. v. Larimer & W. Res. Co., 25 Colo. 87, 53 Pac. Rep. 386, reversing 7 Colo. App. 225, 42 Pac. Rep. 1020.

10 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

11 For beneficial use, see Secs. 607, 725-728.

part of the holding, that the person receiving and applying the same to a beneficial use acquires a vested right therein, is contrary to the great weight of authority. First, the waste water should go to the other appropriators on the stream from which the water was originally taken, and no vested right to its use should be permitted on lands where it happens to run; second, to permit this would be permitting the appropriation from the artificial works of another, to the injury of the other prior appropriators from the stream itself; and, third, this would open up the greatest opportunity for collusion between the appropriator and his neighbors below, in fraud of the rights of the rightful appropriators of the waters from the stream, whereby the first appropriator could appropriate more water than he could use, and then let a portion flow down to his neighbors as "waste water" to be used by them.

The better authorities hold that a claimant to waste water acquires a temporary right only to whatever water escapes from the works or lands of others, and which can not find its way back to the natural stream from which it was taken; that such a use of the water does not carry with it the right to any specific quantity of water, nor the right to interfere with the water flowing in the ditches or works of others lawfully appropriating it, and the appropriators are under no obligation, nor have they the right to permit any specific quantity of water to be discharged as "waste water" for his benefit.[12]

§ 662. **Appropriation from artificial channels.**—After water has been appropriated and diverted from a natural stream into ditches, canals, or other artificial works, it becomes personal property and can not be appropriated from such works.[1] This subject will also be discussed in other portions of this work.[2] That water after it

12 It has been held that one who acquires a privilege of using the waste water of a prior appropriator can be deprived of the same at any time, unless the water has been returned to the stream without any intention of recapture. Woolman v. Garringer, 1 Mont. 535.

See, also, Sharp v. Hoffman, 79 Cal. 404, 21 Pac. Rep. 846; Cache La Poudre Res. Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780.

1 Cardelli v. Comstock Tunnel Co., 26 Nev. 284, 66 Pac. Rep. 950.

2 For relation between carrier and consumer, see chapter of ditch and canal companies, Part XII.

For riparian rights on artificial water courses, see Sec. 473.

is lawfully diverted can not be appropriated by another is upon the theory that it is personal property and as such belongs to the appropriator from the natural stream.[3]

§ 663. **Navigable waters.**—The waters of navigable streams and other bodies may be appropriated, as well as the waters of those not navigable; provided, always, that the navigable capacity of the navigable waters of the United States is not impaired.[1] Owing to the topography of the country the navigable streams in the arid region are comparatively few and small. But nearly all of the streams of this portion of the country, except those which run into the great basin of which Great Salt Lake forms the bottom, are tributaries to some of the navigable waters of the United States. Up to the present time the courts of this country have been called upon to pass upon very few cases which involve the appropriation from navigable waters. But shortly in the future, as more and more water is being appropriated, spread upon the soil for irrigation, and of course a great per cent of the water lost to the navigable portion of the stream, the courts, and perhaps Congress will be called upon to determine which shall be paramount, the right to use the water for navigation or the right to use the water for irrigation. And, in this connection, as far as the cases have gone at the present time, the courts have decided the right of navigation to be the paramount right;[2] and, in the Rio Grande case, the Supreme Court of the United States[3] went so far as to

For statutes in the various States permitting the appropriation of waste water, see Part XIV.

See, also, Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090.

For right to use the ditches of others, in making appropriations, see Secs. 989, 1085.

For eminent domain, see Secs. 1059-1098.

3 For status of water in artificial works, see Secs. 773, 774.

For the larceny of water, see Statutes, Part XIV.

1 As to what constitutes the navigable waters of the United States, see Sec. 348.

For Navigation v. Irrigation, see Secs. 354-357.

See, also, Miller v. Enterprise etc. Co., 142 Cal. 208, 75 Pac. Rep. 770, 100 Am. St. Rep. 115; Hutchinson v. Watson Ditch Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

2 See Secs. 341-357.

3 U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, reversing 9 N. M. 303, 51 Pac. Rep. 674, where it was held that where there is a conflict between the interests of navigation and agriculture in relation to the use of a stream, the lower part of which is navigable for a short dis-

hold that an injunction would be granted in a suit by the United States, not only against the diversion of the water from the upper reaches of a navigable river of the United States, but also against the diversion of the waters from the tributaries of the river where it was proven that the navigable capacity of the navigable portion of the river was impaired. This doctrine was also affirmed in the case of Kansas v. Colorado.[4] Now then, as nearly all of the tributaries of the navigable streams of the United States in the Western portion of this country take their sources in the mountains above the irrigable lands of the arid and semi-arid regions, and, further, almost without exception, the waters of these tributaries are being each year more and more appropriated for irrigation, which in time must impair the navigable capacity of the river below, the question is bound to arise, as to what extent is the doctrine in the Rio Grande case to be enforced in the future. Congress has control over navigable streams and waters thereof. No claim based upon the appropriation of such waters for irrigation made without the sanction of Congress should be recognized by the Department of the Interior as valid.[5]

As far as the navigable waters of a State, or those waters which have no connection with the navigable waters of the United States, it is a matter entirely within the jurisdiction of the State to decide as to which right shall be paramount.[6] But where the navigable

tance, the latter should prevail, where the land over which it flows is an arid region, devoted to agriculture, and depending solely for water upon irrigation, and where navigation would be of comparatively little value.

[4] 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, Secs. 341-357.

[5] Opinion of Atty. Gen. February 6, 1905, 33 Land Dec. 391, in the case of California Development Co., and involving the appropriation of the waters of the Colorado River.

See, also, upon the same subject relative to international waters, Sec. 655.

Where an Act of Congress, giving an irrigation company the right to divert the waters of a navigable river, provided that, if the canal or ditch should not be completed within five years, the rights granted should be forfeited, a forfeiture was properly declared where more than five years elapsed after the dissolution of an injunction originally granted restraining the company from proceeding to construct its system, where the work was still incomplete. U. S. v. Rio Grande Dam & Irr. Co., 13 N. M. 386, 85 Pac. Rep. 393.

See upon the general subject Bulletin No. 100, p. 68, U. S. Dept. of Agriculture.

[6] The State has a right to confer irrigation rights in the waters of a navigable lake, where the irrigation

capacity of a navigable river is not impaired, there is no doubt but that its waters may be appropriated.[7]

The question is always one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact.[8] However, there must be a right on the part of the public of access to the waters, otherwise they may be diverted and drained.[9]

§ 664. **Interstate waters.**—Interstate waters are those waters which flow through or bound two or more States.[1] And here, under this branch of the subject as to what waters may be appropriated, we will say that the waters of interstate streams or other bodies may be appropriated under the Arid Region Doctrine of appropriation. This right, as is the case of appropriations from other streams, depends upon the priority of the appropriation, made in accordance with the laws of the State where the appropriation is made; not in the order of the States where the appropriation is made, but in the order of the appropriations made by individuals. In other words, there is no new rule governing these appropriations, and they depend upon their priority to the extent of each individual appropriation, regardless of State lines. Hence it follows that the rights of prior appropriations made in one State will be protected against diversions by subsequent appropriators in the adjoining State.[2]

operations do not cause the water to rise higher than high-water mark or to fall lower than low-water mark. Kalez v. Spokane Val. L. & W. Co., 42 Wash. 43, 84 Pac. Rep. 395.

7 U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Miller v. Enterprise Co., 142 Cal. 208, 75 Pac. Rep. 770; Heilbron v. Fowler S. Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758.

8 U. S. v. Rio Grande Dam & Irr. Co., *supra*.

9 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. Rep. 532, 12 L. R. A., N. S. 275.

For right of access to navigable streams, see Secs. 335, 336, 344.

For ownership of soil of navigable streams, see Secs. 329-332.

See, also, international waters, Sec. 665.

1 For interstate control of waters, see Chap. 64, Secs. 1221-1234.

2 Howell v. Johnson, 89 Fed. Rep. 556; Hoge v. Eaton, 135 Fed. Rep. 411; 141 Fed. Rep. 64, 72 C. C. A. 14, in the opinion of which Judge Hallett said: "Water is essential to human life in the same degree as light and air, and no bounds can be set to its use for supplying the natural wants of men other than the mighty barriers

The validity of an appropriation from an interstate stream depends upon its validity under the laws of the States where the appropriation is made.[3] And, where an appropriation is valid under the laws of the State where the same is made, it is recognized as valid in all other States.[4] As was held in a very late case, decided by the Supreme Court of the United States,[5] the Federal Supreme Court will assume, in the absence of Montana legislation to the contrary, that prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against junior appropriators of the waters of the same stream in Montana, which rights would be enforceable in the latter State.

The subject of interstate waters, however, will be more fully discussed in a later chapter of this work.[6]

§ 665. International waters.—International waters are those which flow through or bound two or more countries. The appropriation of the waters of an international stream involves other questions than are involved in the appropriation from interstate streams.[1] The rights of the other country must be considered, as

which the Creator has made on the face of the earth."

Conant v. Deep Cr. & C. Val. Irr. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721; Morris v. Bean, 123 Fed. Rep. 618, *Id.*, 146 Fed. Rep. 423, affirmed in 159 Fed. Rep. 651, affirmed 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Perkins County v. Graff, 114 Fed. Rep. 441, 52 C. C. A. 243; Anderson v. Bassman, 140 Fed. Rep. 10, 14; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Rickey etc. Co. v. Miller, 152 Fed. Rep. 11, 81 C. C. A. 207, affirming *Id.*, 146 Fed. Rep. 574.

For the question of diverting the waters of one State for use in another, see Secs. 1228, 1229.

3 Morris v. Bean, 146 Fed. Rep. 432, affirming *Id.*, 123 Fed. Rep. 618, and affirmed in Id., 159 Fed. Rep. 651, 86 C. C. A. 519; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Anderson v. Bassman, 140 Fed. Rep. 10, 14.

See, also, Chap. 64, Secs. 1221, 1234.

4 Morris v. Bean, *supra.*

Willey v. Decker, *supra.*

For a further discussion of the subject of interstate waters, see Secs. 1221-1234.

For pollution of interstate waters, see, also pollution of waters, Sec. 1232.

5 Bean v. Morris, 121 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703, affirming 159 Fed. Rep. 651, 86 C. C. A. 519.

6 See Chap. 64, Secs. 1221-1234.

1 For interstate streams, see Secs. 664, 1221-1234.

well as the rights of the United States and its citizens. This subject will also be more thoroughly discussed in our chapter on international waters.[2] The rights of the citizens of the two countries depend upon the treaty relations between them. It is apparent without treaty stipulations to that effect that this country or its citizens can not take any action on any rivers forming the boundary between this and another country which would impede or interrupt navigation in whole or in part.[3] And for the citizens of one country to subjugate all of the waters of a river to the purposes of irrigation in their country would be contrary to international law, and also contrary to the treaties between this and adjoining countries.[4]

§ 666. The current of a stream can not be appropriated as an appurtenant to the water right.—By the law of appropriation, only the water of a stream can be taken, which includes the right to have the same flow in the natural channel to the intake of the appropriator's ditch or canal.[1] The current of a stream can not be appropriated as an appurtenant to the water right. This is true in all jurisdictions as far as the law of appropriation goes. Hence it follows that an appropriator of a certain amount of water from a stream can not at the same time appropriate, as an appurtenant to his water right, the current of the stream as a means of operating water wheels or other devices to divert the water from the stream, where their use interferes with the rights of other appropriators, even subsequent in time to the one using the device. Where such means of diversion, however, does not interfere with the rights of other appropriators, the current of the stream may be used to lift and divert the water of the stream, but this means of diversion must give way to those coming subsequently and who wish to appropriate and use the water.[2] This is upon the theory that all the waters of the natural streams and other bodies are open to appropriation and use by all who may legally appropriate and use them; and this

2 For international waters, see Chap. 63, Secs. 1212-1220.

3 For appropriation of navigable waters, see Sec. 663.

4 U. S. v. Rio Grande Dam & Irr. Co., 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; see also *Id.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

1 See Sec. 724.

2 See Schodde v. Twin Falls etc. Co., 161 Fed. Rep. 42, 88 C. C. A. 207, affirmed on writ of certiorari by the Supreme Court of the United States on April 1, 1912, Advance Sheets L. Ed. May 15, 1912, p. 470.

See, also, for diversion of water by wheels, Secs. 723, 724.

appropriation and use by others can not be prevented by the mere means of diversion of some individual. Mr. Wiel seems to hold otherwise and says:[3] "Simply putting a large current water wheel in the stream itself would doubtless be an appropriation of enough water to run it." We take issue with the gentleman in this statement. In such an act there are none of the elements of an appropriation.[4] There are no diversion of the water of the stream and the taking of the necessary possession of the same, required in the making of a legal appropriation,[5] but the water remains in the stream itself. The only theory upon which such a statement can be reconciled with the law upon the subject is that in those States which adhere to the common law of riparian rights and also have the doctrine of appropriation, an individual might appropriate a certain quantity of the water of the stream for some beneficial use under the law of appropriation, and claim as a riparian owner the right to the current of the stream for the purpose of running his wheels to divert the water appropriated. We have seen that a person can be both a riparian owner and claim the right to the use of the water flowing by his land, and at the same time be an appropriator of another quantity of the water. But even under both laws upon the subject, it would be a doubtful policy to permit one man to prevent other appropriations of the water simply through his means of diversion of a small quantity of the water of a stream for his own use.

§ 667. Waters reserved for Government use can not be appropriated by others.—In another portion of this work we have discussed the power of the general Government, as owner of both the land and waters of the public domain, to reserve certain waters for its own use and for the use of its wards—the Indians—on Indian, also on military, and other reservations.[1] We also hold that the Government, as such owner, has the power to reserve waters on the public domain to supply its irrigation projects, constructed under the National Reclamation Act, which waters it may afterwards *sell* to the settlers as provided by the terms of the Act.[2] As was said in

3 Wiel on Water Rights in the Western States, 1908, Sec. 129.

4 See methods of appropriation, Chap. 38, Secs. 706-732.

5 For diversion necessary, see Secs. 722-724.

1 See Secs. 414-425, 480.

2 For National Reclamation Act, see Secs. 1244-1260.

For acquisition of land under the Act, see Secs. 1272-1276.

a recent opinion by the United States Circuit Court of Appeals: "That the United States may, where circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose, was held by this Court."[3]

This subject, however, will be more thoroughly discussed under the National Reclamation Act.[4]

In our chapter on the Arid Region Doctrine of appropriation we discussed the two theories of the right of appropriation designated by the authorities as the California and the Colorado theories.[5] Holding with the California theory that the right of appropriation was based upon a grant from the United States, or upon a presumption of a grant, it can be readily seen that these reservations of water by the Government can not be in the nature of an appropriation, for the reason that the Government can not make a grant to itself, and especially of what it already owns. But that the United States has the full power to reserve such waters as it may need for use on its reservations there can be no doubt; and that, too, whether the water is in actual use on the reservation or not.[6] The situation was first recognized in the United States Circuit Court of Appeals in 1897, in the case of Krall v. United States,[7] and, although the case was decided against the right of the Government to reserve the waters running through a military reservation in the face of an appropriation of the same by private parties, Judge Gilbert, in dissenting from the decision of the majority of the Court, held that the Government had that right, and that the reservation to its own use by the United States of public land which is traversed by a running stream, before any rights have accrued to divert the water from its natural channel, includes the reservation

3 United States v. Burley, 179 Fed. Rep. 1, 102 C. C. A. 429, affirming 172 Fed. Rep. 615, citing Winters v. United States, 143 Fed. Rep. 740, 74 C. C. A. 666, *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546, affirmed 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662; Conrad Inv. Co. v. United States, 161 Fed. Rep. 829, 88 C. C. A. 647.

4 See Chap. 65, Secs. 1235-1286.

See, also, for the power of the Government to make reservations of its waters, Sec. 411.

5 See Secs. 627-640.

6 See Secs. 667, 668.

Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

7 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351.

of the water, and the right to have it flow as it was accustomed to flow, and that an appropriation by a private party can not affect the right of the Government to demand the unrestricted flow of the water through the reservation, as it flowed at the time when the land was set aside for a military post.[8] That Judge Gilbert was correct as to his view of the law may be seen from the fact that the same Court and the Supreme Court of the United States afterwards held to the same view.[9] In a very late case decided by the latter Court, Mr. Justice McKenna, in delivering the opinion of the Court, said: "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be."[10]

§ 668. Waters reserved by Government for use on Indian reservations can not be appropriated by others.—Although the same principles of law are involved relative to the reservation by the Government of the waters flowing over the public domain for the use by the Indians, or by the Government itself, on Indian reservations, as apply to the reservations of water for use on other lands reserved by the Government for special purposes, discussed in our previous section,[1] there are some features of this right which should be discussed in this place. The Indian tribes located upon the many reservations set apart for their use are wards of the Government. After taking a greater portion of the lands of this country away from the Indians, and confining them ever upon smaller and smaller areas, the duty devolved upon this Government to educate the Indians and to teach them the ways of civilization, until they have reached that condition whereby they can take care of themselves.

8 For the Government as a riparian owner, see Sec. 480.

9 See United States v. Conrad Inv. Co., 161 Fed. Rep. 829, 88 C. C. A. 647, affirming 156 Fed. Rep. 123; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming 10 N. M. 77, 61 Pac. Rep. 357; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; United States v. Winans, 193 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

10 Winters v. U. S., 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 208, affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546, *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666.

See, also, for reservations for Indian reservations, Secs. 338, 411, 481, 668.

1 See Secs. 338, 411, 481.

In the meantime it is also the duty of the Government to protect them in their rights from the wiles of unscrupulous white men, and also from those who, perhaps unconsciously, would trespass upon those rights.[2] It was early found that, owing to the natural habits of the Indians of an outdoor life, that the industry of agriculture was the surest and quickest method by which this civilization could be accomplished. But, to follow agriculture, the Indians must have land, and not only that, but good land; and, as most of the Indian reservations are located in the Western States where the land is arid, in order to cultivate the land with success, there must be ample water for irrigation. Hence it has been the policy of the general Government, amply sustained by the courts, that in the establishment of an Indian reservation, to reserve sufficient water flowing over the lands for the use of the Indians, in order that they might leave off their nomadic habits and turn "to agriculture and the arts of civilization."[3] Much has been accomplished in the past, but much remains to be accomplished. In a previous portion of this work we have set forth something that has been accomplished in the way of educating the Indians in the ways of agriculture.[4]

We find that there are all grades, from the original aborigines, termed "blanket Indians," and wholly dependent upon the Government rations for their support, to those who have become wholly civilized and are not only entirely self supporting but are acquiring fortunes. The policy of the Government in making Indian allotments in severalty has done much toward the end desired.[5] When an Indian is made to understand that his future depends upon his own industry, and not upon his tribal relations, he is quicker to follow the ways of his white neighbors, and he will work for himself when he will not work for the tribe. The ultimate end of the Government in its policy with the Indians is full citizenship. This has been attained by many, and many more are on the way toward that condition. But until the Indians are fully able to care for themselves and have the education and training to stand up in competition with the white man, this Government asserts and protects their rights.

2 For the Indian right of occupancy, see Secs. 404, 405, 415.

3 Winters v. U. S., 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 208, affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546, *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666.

4 See Secs. 271-285.

5 For Indian allotments, see Secs. 273, 285.

So, while the Indians are still living upon reservations set apart for their use, there is a reservation of the waters flowing through such lands sufficient to supply the reasonable uses of the Indians for irrigation, which the courts will protect, and that, too, whether the water is being actually used for such purpose or not.[6] And, while the Indians are still occupying such lands, the waters can not be appropriated by private individuals, unless there should be a surplus over and above the reasonable needs of the Indians; this, of course, is subject to appropriation. But when the Government abandons an Indian reservation and the Indians give up their right of occupancy, the water of the streams running through the same are open to appropriation under the laws of the State through which they flow and under which the appropriation is sought to be made, and a grantee of the Government of a tract of land included in the former reservation does not take the water right as an appurtenant, unless it is conveyed in clear and explicit language.[7]

§ 669. Waters upon the National Forests may be appropriated.—It is provided by the Act of Congress of June 4, 1897:[1] "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

The last clause of the Act of Congress quoted above, "or under the laws of the United States and the rules and regulations established thereunder," reserves in the United States rights to the use of waters flowing over forest reserves or National Forests. The National Government, however, has not seen fit to take advantage of this provision and has left the appropriation of all waters flowing over such reserves to the laws of the respective States wherein such lands lie. The principal question, however, relative to appro-

6 Winters v. U. S., *supra*.

U. S. v. Conrad Inv. Co., 161 Fed. Rep. 829, 88 C. C. A. 647, affirming 156 Fed. Rep. 123.

7 Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Story v. Woolverton, 31 Mont. 346, 78 Pac. Rep. 589; Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 Pac. Rep. 494; Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028; Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

For appropriation of water by Indians, see Sec. 680.

1 7 Fed. Stat. Ann., 1905, p. 315; 2 U. S. Comp. Stat., 1901, p. 1542; 30 Stat. L. 36.

priation of waters flowing over such reserves is that of securing the necessary rights of way over such lands. These rights of way have to be secured in accordance with the rules and regulations of the department in charge of such reserves and will be hereinafter more fully discussed when we come to the subject of rights of way over public lands.[2]

The various States, in applying their own laws to the appropriation of waters flowing over forest reserves, make the additional requirement that before such waters can be appropriated the license must be secured from the Government in accordance with the rules and regulations thereof, and time is also granted by the statutes of such State, after the inception of a right to appropriate such waters, in which to secure such license from the Government.[3]

2 See Chap. 51, Secs. 927-971.

3 See Inyo Consolidated Water Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 934; Wishon v. Globe Light & Power Co., 158 Cal. 137, 110 Pac. Rep. 290.

See, also, for the statute of California relative to the appropriation of waters upon forest reserves, Part XIV.

CHAPTER 35.

ON WHAT LANDS DIVERSION MAY BE MADE.

§ 670. Scope of chapter.
§ 671. The present situation.
§ 672. Authorities holding that a diversion can not be made on private lands.
§ 673. Authorities holding that a diversion can be made on private lands—Arid States.
§ 674. Authorities holding that a diversion can be made on private lands—Common law States.
§ 675. California authorities.
§ 676. California authorities—Cave v. Tyler.
§ 677. Point of diversion may be made on private lands—Our conclusions.

§ 670. **Scope of chapter.**—Since writing the first edition of this work prior to 1893, a new question has arisen relative to whether or not a valid appropriation of water may be made where the point of diversion is made upon lands after the title to the same has been acquired by private owners. We must not confuse this question with the one involving the appropriation of water which has its source and entire natural course upon private lands. This subject has been discussed in another portion of this work.[1] But the simple question is as to whether or not from a natural stream conceded to flow over public lands for at least a portion of its way, and hence its waters being subject to appropriation, a valid appropriation may be made, where the point of diversion is made upon lands in private ownership at the time of the attempted appropriation. The courts, especially those of California, seem to have had considerable trouble over this question, and we will therefore endeavor to discuss the question fully in the following sections.

§ 671. **The present situation.**—There is no question but that an appropriation otherwise valid may be made where the point of diversion is situated either upon the public lands of the United States or the lands owned by a State, within those States where the Arid Region Doctrine of appropriation is in force. The right granted by the Acts of Congress for an appropriation also granted

1 For the appropriation of waters flowing over private lands, see Sec. 646.

a right of way over the lands owned by the United States for the ditch or canal from the stream; and the lands afterwards patented to private owners are subject to both the water rights and the rights of way for conducting the water to the place where it is used.[1] The States also followed this position taken by Congress as to the waters flowing over lands granted by the general Government to the States.[2]

But, as has been stated in a previous section, as time went on the lands along the streams and other bodies of water have become rapidly settled up, until many of the streams which formerly flowed entirely upon the public domain now flow over or adjoin lands the title to which is now entirely in private ownership.[3] This is especially true as to available points along the streams where diversions may be made of the waters by the appropriators by means of dams, ditches, and canals, or other works. And the question has arisen as to whether or not a valid appropriation of the waters of a stream may be made where the point of diversion is made upon private lands, even if the right of way for that purpose is granted by the owner of the lands, or acquired under condemnation proceedings by virtue of the right of eminent domain.[4] Or, in other words, must the diversion be made upon public lands either of the United States or of the State wherein the appropriation is sought to be made in order to have the appropriation a valid one?

§ 672. Authorities holding that a diversion can not be made on private lands.—Mr. Farnham, in his work on Water and Water Rights, in his strenuous but vain effort to uphold the common law of riparian rights, as against the Arid Region Doctrine of appropriation for beneficial uses,[1] holds to the effect that a valid appropriation can not be made where the point of diversion is upon private land. He says:[2] "A party diverting water on land not belonging to the public domain does not thereby acquire the right to enjoin from using the water from the stream a riparian owner, whose lands are farther up the stream, even if the appropriation

1 See Acts of Congress of 1866 and 1870, and construction thereof, Secs. 611, 615.

See, also, Secs. 611-619.

2 See for the laws of the various States, Part XIV.

3 See Secs. 645, 646.

4 For rights of way, see Secs. 927-993.

1 For which see his argument in Vol. 3, Secs. 649-661.

2 P. 2050.

of water by the former was earlier."[3] Again: "The owner of a mining claim whose flume discharges the refuse water into a ravine on his land may extend his flume so as to prevent the appropriation of the water by a third person who has attempted to construct a ditch over his land to the mouth of the flume to take the abandoned water."[4] And again: "An appropriator's rights begin at the head of his ditch, and he can not enter upon the land of a riparian proprietor to tap streams to increase his supply. It is only when the riparian proprietor prevents the water from flowing to the head of his ditch by an interference with the course of Nature that the appropriator can complain."[5]

Mr. Long, in his work on Irrigation, assumes the same position as Mr. Farnham. At least he makes no distinction between the conditions as to where the waters flow entirely upon private lands, in the common law States, and where part of the waters flow upon public lands, but where the point of diversion contended for is on private lands. He says:[6] "The right to water for irrigation can not be acquired by prior appropriation, where the land has been reduced to private ownership."

Besides the text books referred to above, there is one California case which holds flatly that a valid appropriation can not be made where the diversion of the water is upon private land, and a number of other cases which, without deciding the express point, would seem to the casual reader to hold, by the expressions used, that such an appropriation could not be made. The California case referred to is that of Cave v. Tyler.[7] In that case, in an opinion written by Mr. Justice McFarland, the Court held that the Acts of Congress of 1866 and 1870[8] apply only to diversions made on the public domain of the United States; and one claiming the right to divert water under such Acts must show that his rights vested while the *land on which the diversion occurs was a part of such domain.* We shall contend that this decision is not only contrary to the great weight of authority in the States which recognize the Arid Region Doctrine of appropriation, but also contrary to the decisions of the

[3] Citing Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089.

[4] Citing Correa v. Frietas, 42 Cal. 339.

[5] Citing Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523.

[6] Long on Irrigation, 1902, Sec. 25.

[7] 133 Cal. 566, 65 Pac. Rep. 1089.

[8] See for said Acts and construction thereof, Secs. 611-619.

State of California, both before and since; and not only this, but it is contrary to all reason in the premises.[9]

Relative to the other cases referred to above, we will only add that there are numerous cases where similar expressions may be found to that used by the Supreme Court of Washington, in the case of Benton v. Johncox,[10] where the Court said: "Moreover, the doctrine of appropriation applies only to public lands, and when such lands cease to be public, and become private property, it is no longer applicable." It will be found upon a close examination of this case and the other cases where similar expressions are found that the Court in no way held that a valid appropriation could not be made where the diversion was on private lands. The only contention in the case was the right of an appropriator as against the rights of the riparian owners on the same stream in a jurisdiction where both the common law of riparian rights and the doctrine of appropriation were maintained. In fact the same Court, in a later case, held that a valid appropriation could be made where the diversion was made on private land.[11]

§ 673. Authorities holding that a diversion can be made on private lands—Arid States.—The great weight of the court decisions in the Western States and Territories hold to the effect that a valid appropriation may be made from any public waters,[1] where the point of diversion is upon private lands; provided, of course, that a lawful right is acquired over the private lands for the purpose of making the diversion and conducting the water therefrom.[2] The decisions upon this subject are quite numerous and to the direct point in question, and include both those of the States which have the dual systems of water laws, and those which have abrogated the common law of riparian rights, and have only the law of appropriation.[3]

9 See Sec. 646.

10 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912.

11 Offeld v. Ish, 21 Wash. 277, 57 Pac. Rep. 809.

See, also, Secs. 673-675, 677.

See, also, for appropriation of water where it flows entirely on private lands, Sec. 646.

1 That appropriation can not be made from private waters, see Sec. 646.

2 For acquisition of rights of way, see Secs. 927-972.

3 For the lists of States having one system or both, see Secs. 507, 621.

See, also the laws of the various States in Part XIV.

One of the strongest cases upon the subject and of pre-eminent authority was the case of Clark v. Nash, decided by the Supreme Court of the United States in 1905.[4] In this case the plaintiff sought to make an appropriation of the waters of a certain stream in the State of Utah. He also sought, by the right of eminent domain, not only to acquire a right of diversion upon the lands of the defendants touching upon the stream, but he also sought to make his diversion through the defendants' ditch, already constructed upon their land, by widening the same, "which said ditch is begun on the defendants' land" and "runs" over their lands to a point of about one hundred feet from the plaintiff's land. The Supreme Court of the United States, in affirming the decision of the Utah Supreme Court, held that such an appropriation might be made, and that the right of way to the stream through the ditch of the defendants might be acquired by eminent domain.[5]

The Colorado decisions have always held that such an appropriation could be made, from the case of Yunker v. Nichols,[6] decided in 1872, where the Court held that the private lands in that Territory were held in subordination to the dominant rights of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands; and that, too, without a grant from, and even against the will of, the land owner, and without condemnation proceedings.[7] However, the later Colorado cases do not go to the extent of the case of Yunker v. Nichols,[8] and, while they hold that such an appropriation is valid, the right to go upon another's land must be either obtained by grant, license, or by condemnation proceedings brought by virtue of the right of eminent domain.[9] But

[4] Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, affirming 27 Utah, 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

[5] For right of eminent domain, see Secs. 1059-1098.

[6] 1 Colo. 551, 8 Morr. Min. Rep. 64.

[7] See, also, Schilling v. Romminger, 4 Colo. 100, where the same holding was made; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039; Cusman v. Heiderer, 5 Colo. 589.

[8] *Supra.*

[9] For rights of way, see Secs. 927-993.

Eminent domain, see Secs. 1059-1098.

Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. Rep. 612; United States etc. Co. v. Gallegos, 89 Fed. Rep. 770, 32 C. C. A. 470, 61 U. S. App. 13; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766; *Id.*, 26 Colo. 74, 56 Pac. Rep. 577; Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786; Baldridge v. Leon Lake Ditch & Res. Co., 20 Colo. App. 518, 80 Pac. Rep. 477.

see the recent case decided in April, 1909,[10] where the fact was that the defendant entered the land of the plaintiff and made its diversion, and the Court held that not only was the appropriation valid but that if the defendant had wrongfully taken plaintiff's lands for a right of way, they may obtain appropriate relief therefor in another action. The land in this case was riparian, and the plaintiffs claimed that their rights as riparian owners were trespassed upon.[11] In Utah we have the same rule that such an appropriation is legal, but the right must be acquired from the owner of the land in some legal manner.[12] In Wyoming we also have the same rule.[13] And so the law may be regarded as settled in all of those States which have abrogated the law of riparian rights as to the use of water,[14] and have only the Arid Region Doctrine of appropriation, that a valid appropriation may be made where the point of diversion is on private land. In fact the statutes of the most of these jurisdictions expressly provide for special condemnation proceedings to secure a right of access to and from the streams for this purpose. And that such a statute is constitutional in these arid States, the Supreme Court of the United States has so held, even where the right is sought to be acquired by one individual.[15]

§ 674. **Authorities holding that a diversion can be made on private lands—Common law States.**—In those States which have both the law of appropriation and the common law of riparian rights as to the use of the waters of natural streams, the majority of the cases also hold that a valid appropriation can be made, where the point of diversion is on private land, provided that lawful access to the stream can be had by the appropriator over the private land.

10 Sternberger v. Seaton Mountain El. L. H. & P. Co., 45 Colo. 401, 102 Pac. Rep. 168.

11 In this case the Court also reiterates the abrogation of riparian rights. See, also, for Colorado laws, Part XIV.

12 See Clark v. Nash, *supra*.

13 Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S. 169, 116 Am. St. Rep. 994, where, however, the Court held that condemnation proceedings must be based upon a statute providing for notice to the person whose land is to be taken; but that one who has accepted compensation awarded for a right of way over his property is estopped from questioning the validity of the proceedings.

14 For these, see Sec. 621.

15 See Clark v. Nash, *supra*.

For rights of way, see, also, Secs. 927-993.

The Supreme Court of Oregon, in a case decided in 1909, held that rights to the use of water may be initiated through a ditch tapping the source of supply upon the land of another, and none but the owner of the premises across which the ditch is constructed are in a position to complain.[1] This, of course, assumes that there is sufficient water in the stream to supply the needs of the prior appropriators and that the rights of the riparian owners to the reasonable use of the water is not materially impaired.[2] In Montana we find the same rule,[3] and, again, in Washington.[4] In all of these States, however, it is held that the right of access to the stream must be acquired by either a grant, license, or by proceedings in condemnation.

§ 675. **California authorities.**—From the earliest of its decisions down to the time when the case of Cave v. Tyler was decided in 1901,[1] the Supreme Court of California has either held that a valid appropriation could be made where the point of diversion was made on land after the title to the same had been acquired by private parties or has assumed without question that that right existed, provided that lawful access could be obtained over the private land for that purpose.[2] However, we will say in this connection that,

1 Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083.

2 For irrigation as a riparian right, see Chap. 26, Secs. 498-525.

For contests between appropriators and riparian owners, see Secs. 810-823.

See, also, Morgan v. Shaw, 47 Ore. 333, 83 Pac. Rep. 534, where it was held that the point of diversion may be within or beyond the boundaries of a settler's claim. Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 *Id.*, 193.

3 Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; *Id.*, 23 Mont. 65, 57 Pac. Rep. 557; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081, where it was held that the right could be acquired either by a grant from the owner or by condemnation proceedings. Great Falls Waterworks Co. v. Great Nor. R. Co., 21 Mont. 487, 54 Pac. Rep. 963.

4 Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809.

1 Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089.

2 That an appropriation of water can be made where the stream flows entirely on private lands, see Sec. 646.

For rights of way, see Secs. 927-993.

See, also, California laws, Part XIV.

See Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349, where the Court held that the validity of an appropriation must be determined by the purpose of

prior to the decision in the case of Clark v. Nash by the Supreme Court of the United States,[3] the Supreme Court of California was not as liberal in granting rights of way for this purpose as were some of the other courts, by virtue of the right of eminent domain.[4] The question of a public use was more narrowly construed. And, while it was held that a right to appropriate water on the lands of another for a public use, such as for a municipal corporation, might be acquired through condemnation proceedings,[5] it could not be acquired by private individuals.[6]

the diversion and the use of the water diverted, and not by the mere fact of diversion. In this case the diversion was made upon riparian lands in private ownership.

See, also, Senior v. Anderson, 2d appeal of above case, 130 Cal. 290, 62 Pac. Rep. 563; see, also, 3d appeal, *Id.*, 138 Cal. 716, 72 Pac. Rep. 349.

See, also, Alhambra Addition W. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101, where the Court said: "For so far as it appears, they were at that time the sole occupants of the lands bordering on the stream, and the lands through which it flowed after leaving the lands of Kewen belonged to the United States. Such being the case, they had the right to appropriate the entire stream for any beneficial purpose. . . . There was nothing unlawful or improper in such an . . . appropriation and diversion of the water, as between themselves, or as against the United States."

See, also, San Jose Land & W. Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. Rep. 269; *Id.*, 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. Rep. 432; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

See, also, the opinion in the first appeal in the case of Lux v. Haggin (not officially reported), 4 Pac. Rep. 919, in which Mr. Justice McKee, in rendering the concurring opinion, said: "But an appropriation of the water of a stream flowing upon the public lands, and upon lands held in private ownership, does not affect or destroy riparian rights existing in the stream at the time of the appropriation. Both rights—rights of appropriation and riparian rights—may be acquired by original and derivative acquisition; they may exist together and be held in common as property, and each is entitled to the protection of the law."

See, also, for riparian owner as an appropriator, Secs. 519, 681.

[3] 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; affirming 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

[4] For acquiring rights of way by eminent domain, see Secs. 1059-1098.

[5] St. Helena W. Co. v. Forbes, 62 Cal. 182, 54 Am. Dec. 659.

[6] Lorenz v. Jacobs, 63 Cal. 73, 3 Pac. Rep. 654.

See, also, eminent domain under the California laws, Part XIV.

§ 676. California authorities—Cave v. Tyler.—We now come to the case of Cave v. Tyler,[1] and this case, as we have stated before, was decided contrary to all precedents of the California, as well as all other jurisdictions which adhere to the same theory as to the right of appropriation as does the California authorities.[2] It has been held many times by the California courts that a riparian owner could also become an appropriator.[3]

Under the decision of the Cave case it is held, in effect, that a riparian owner, in order to become an appropriator from the same stream which runs through or by his lands, can not divert the water from the stream as an appropriator, but must go off his land to a point where there is some spot of public land, and there he may make a lawful diversion as an appropriator. Upon the other hand as a riparian owner the same individual is entitled to a reasonable use of the water of the stream for irrigation, and this water he must take from the stream on his own lands. Again, under the decision of this case, it is held that a diversion on private lands militates against the validity of the appropriation. In other words, by the Act of Congress of 1866, in granting a right to the appropriation of the water flowing over the public lands, and also granting a right of way over the public lands for the appropriation, that in order to have a valid appropriation there must be a union of the use of both rights. Hence, under the decision, a person can not make a valid appropriation where the point of diversion is made upon his own lands, provided he has the title thereto. Again, he can not make a valid appropriation on the private lands of others, even where he obtains a right so to do from the owners by grant, lease, or license. Again, upon this theory, a right acquired under the right of eminent domain will avail him nothing, as the point of diversion will still be upon private lands. For as the Court says: "There is no finding that the diversion was made on the public domain of the United States. There are some things in the record which seem to indicate that the diversion was on private land acquired under a Mexican grant in which the Government never had any estate or interest; but there is no finding on this subject. The burden of showing that the diversion was made on the public

1 133 Cal. 566, 65 Pac. 1089.

2 For the different theories as to the right of appropriation, see Secs. 627-640.

3 See Secs. 519, 681.

domain was upon the respondents, if that fact was essential to respondents' asserted right under said laws of Congress, as we think it was." The Court then cites, as its only authority upon this proposition, the case of City of Santa Cruz v. Enright.[4] An examination of that case will disclose that the Court made no such ruling as to hold that the point of diversion must be upon private lands. The question decided in that case was to the effect that waters which flowed entirely over private lands could not be appropriated by a valid appropriation. This is entirely another point. This subject we have discussed in another portion of this work.[5]

That the ruling in the case of Cave v. Tyler,[6] in holding that there must be a finding "that the diversion was made on the public domain of the *United States*," is inconsistent with the previous ruling of the same court, see the case of Wood v. Etiwanda Water Co.,[7] where the Court expressly held that a valid appropriation could be made, where the point of diversion was made on lands owned by the State. And, although the ruling in the Cave case has not been expressly overruled by the Court, the later cases in effect overrule it by contrary decisions. In the third appeal of the case of Senior v. Anderson,[8] the point of diversion was made upon the homestead of another, and the Court expressly held that the appropriation was not invalidated thereby. Again, in a case in which the opinion of the Court was concurred in by the same Justice who wrote the opinion in the Cave case, it was held that not only might the diversion be on private lands, but also that the right to appropriate water, under the provisions of the California Civil Code,[9] is not confined to streams running over the public lands of the United States, but that it exists wherever the appropriator can find water of a stream which has not been appropriated, and in which no other person has or claims superior rights and interests.[10]

We can not leave this phase of the question without referring to

4 95 Cal. 105, 30 Pac. Rep. 197.

5 That a valid appropriation of the waters of streams which flow entirely upon private lands can not be made, see Sec. 646.

6 *Supra.*

7 122 Cal. 152, 54 Pac. Rep. 726; *Id.*, 147 Cal. 233, 81 Pac. Rep. 512.

8 138 Cal. 716, 72 Pac. Rep. 349.

9 For California Code, see Part XIV.

10 Duckworth v. Watsonville W. & L. Co., 150 Cal. 520, 89 Pac. 338, *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

the expressions of an eminent California text-book writer relative to the ruling in the Cave v. Tyler case. Mr. Wiel,[11] in his work on "Water Rights in the Western States," correctly holds that the argument in the opinion is based on a wrong view of the doctrine of appropriation, as indicated by the expression, "Under what local custom or law, under what 'decisions of the courts,' was there 'a vested and accrued right' of the respondents to all of the water of the stream up or through the public domain to its head, thus depriving a large section of country above of its fertility?" The author then cites California authorities to show that the law of appropriation is based on the right to do that very thing in case of priority.[12] And he concludes the criticism of the case with the following: "While, consequently, Cave v. Tyler is a direct and actual decision that an appropriation can not, in California, be made when the point of diversion is on private land, yet it is contrary to the decisions in the other States, to the weight of authority in California, and is so inconsistent with the remark in a recent case in the same court that, though not since mentioned or expressly overruled, it probably does not represent the law even in California." [13]

§ 677. Point of diversion may be made on private lands—Our conclusions.—Where there is unappropriated water flowing upon the public lands of either the United States or of a State, and there is no interference with the rights of the riparian proprietors whose lands border on the stream below, our conclusions upon this subject are that a valid appropriation may be made of those waters, where the point of diversion is made on lands after the title to the same has been acquired by private parties, even in those States which adhere to the common law of riparian rights and also have the law of appropriation under the Arid Region Doctrine; provided, of course, that *lawful access to the stream can be had for that purpose.* Where the point of diversion is

11 Mr. Samuel C. Wiel is a member of the San Francisco Bar.

See Wiel, Water Rights in the Western States, 2d Ed., pp. 157-159.

12 Citing Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Pomeroy on Riparian Rights, Sec. 92. (Mr. Pomeroy was also a California author.)

Also, citing the cases under his own work, 2d Ed., Secs. 45, 46, and the Federal Court decision in Morris v. Bean, 146 Fed. Rep. 435.

13 Wiel, p. 159.

upon the lands of another, lawful access for this purpose may be had in various ways. It may be had by grant or deed, by lease, by license, or by condemnation proceedings by virtue of the right of eminent domain.[1] Our opinion to this effect is not only based upon the authorities discussed in our previous sections [2] but also upon the language of the Act of Congress of 1866,[3] the Desert Land Act of 1877,[4] and upon all reason in the premises. A study of the Act of 1866 will disclose the fact that there were two grants, which were separate and distinct. There was, first, the grant of the right to appropriate the waters flowing over the public domain; and, second, there was the right of way over the public domain for the construction of ditches and canals in order to conduct the water from the streams to the private lands where it was to be used. These two grants are in no way dependent upon each other, the one relating to the water right, and the other relating to the soil. And, so far as the validity of the appropriation of the water is concerned, it might be used in conjunction with the grant of the right of way over the public lands, which also included the point of diversion from the stream, *if it was necessary;* or if it was not necessary, it might be used in connection with ditches and canals which were constructed entirely over private lands, including the point of diversion and their entire length, provided that lawful access might be secured from the owners for this purpose. Hence it follows that, if an appropriator is also a riparian owner on the stream from which his appropriation is to be made, if it is feasible, he may go upon his own lands and make the diversion;[5] or, if it is not, he may go upon the public

1 For acquisition of rights of way, see Secs. 972-993, 1059-1098.

2 See Secs. 672-676.

3 7 Fed. Stat. Ann., 1905, p. 1090; 2 U. S. Comp. Stat., 1901, p. 1437; Rev. Stat. U. S., 1878, Sec. 2339; Act of Congress of July 26, 1866, 14 Stat. L. 253.

For Act of Congress of 1866, and construction thereof, see Secs. 611-619.

See, also, Secs. 931-934.

4 6 Fed. Stat. Ann., 1905, p. 392; 2 U. S. Comp. Stat., 1901, p. 1548; 19 Stat. L. 377.

For Desert Land Act and construction thereof, see Secs. 1287-1311.

5 In Oregon it is held: "The right of prior appropriation is limited to the use of water by the pioneer settler before any adverse claims of riparian proprietors attach upon the stream from which the water is taken, and not to the point of diversion, which may be either within or beyond the boundaries of the tracts selected by such settler." Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

lands of the United States, where a right of way is granted him; or again, he may acquire a right of way from his neighbors for this purpose, either by grant, prescription, license, or by condemnation. As was recently said in an Oregon case:[6] "Concerning the mere diversion and use of water there is no difference between a non-riparian appropriator and a riparian user, provided the former has a lawful right of access for that purpose to the stream from which the diversion is made. The essential condition of appropriation in the first place on public lands was the consent or acquiescence of the then riparian owner, the general Government. The reason of the rule is not changed by the fact that the riparian owner is a private person, provided the appropriator has his consent, or what is equivalent, that the appropriator and the riparian owner are one and the same person. The deduction, then, is that if any one can lawfully gain access for that purpose to a non-navigable stream, and water is there not subject to use by another, such a one may appropriate it for his own use."[7]

This theory of two grants is also emphasized by the language of the Desert Land Act,[8] as follows: "And all surplus water, . . . together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." Here was an express grant of the right in the future to appropriate the waters flowing over the public domain, and without anything being said concerning rights of way. In fact, in none of the Acts of Congress, or in any of the decisions of any court, with the exception of the case of Cave v. Tyler,[9] do we find that, in order to make a valid appropriation, the water *must* be taken out from the natural stream in a ditch

See, also, Morgan v. Shaw, 47 Ore. 333, 88 Pac. Rep. 534; Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Alhambra etc. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101; Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528.

6 Cavinness v. La Grande Irrigation Co., —— Ore. ——, 119 Pac. Rep. 731.

7 Citing Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Morgan v. Shaw, 47 Ore. 333, 88 Pac. Rep. 534.

8 *Supra.*

9 133 Cal. 566, 65 Pac. Rep. 1089.

constructed over a right of way granted by Congress. If Congress had intended this, it is reasonable to suppose that in some Act there would be a law to this effect. Then again, Congress granted by other Acts rights of way over its public lands and reservations.[10] These were also separate and distinct grants, and might be taken advantage of if necessary. Again, in our opinion, as far as the precise point involved is concerned, it is entirely immaterial whether or not the appropriation is made in a State which has only the law of appropriation, or in a State where both it and the common law of riparian rights are enforced. The question depends only upon the general right under the State law to make the appropriation, the surplus or unclaimed water in a stream which, for a part of the way at least, flows over public land either of the United States or of a State, from which the appropriation is claimed, and lawful access through the necessary lands for the point of diversion from the stream and for the ditch or canal to conduct the water from the point of diversion to the lands where they are to be used for some beneficial purpose.

10 See 6 Fed. Stat. Ann., 1905, pp. 508-513; 2 U. S. Comp. Stat., 1901, p. 1570. See, also, for rights of way, Secs. 927-971.

CHAPTER 36.

WHO MAY APPROPRIATE WATER.

§ 678. Scope of chapter.
§ 679. In general.
§ 680. Right of Indians.
§ 681. Riparian owners may also be appropriators.
§ 682. Tenants in common.
§ 683. Several persons may make appropriations in severalty through the same ditch.
§ 684. Corporations—In general.
§ 685. Appropriations by aliens.
§ 686. Title to the soil in appropriators unnecessary.
§ 687. Squatters' rights.
§ 688. Rights of trespassers.
§ 689. Rights of lessees.

§ 678. Scope of chapter.—In this chapter we will discuss the subject as to who are entitled to appropriate water under the Arid Region Doctrine of appropriation. In general we will say that, unlike the doctrine of the common law of riparian rights, the right to the use of the water of the natural streams does not depend upon the ownership of the land adjoining the streams, or, in fact, the ownership of any land, but under this doctrine the waters of natural streams may be appropriated by any one who is prior in time and who will apply such waters to beneficial uses and purposes. In the following chapter we will also discuss the purposes for which water may be appropriated.[1]

§ 679.—In general.—Under the laws of Congress there are no restrictions as to the qualifications of individuals who may appropriate water. The tests of such appropriations are priority and the application of the water appropriated to some beneficial use or purpose, regardless of the personal qualifications of the individuals appropriating. Appropriations may, of course, be made by all land owners, by all citizens of the United States, and by nonresidents of the States where the appropriation is made. It

1 See Chap. 37, Secs. 690-705.

may be made by Indians,[1] by married women, and by minors.[2] Appropriations may be made by municipal corporations,[3] by business corporations, organized under the laws of any State or Territory, regardless of the locality where the water is to be appropriated.[4] It may be made by mutual associations or tenants in common.[5] It may be made by irrigation districts, organized upon the lines of the "Wright" Irrigation District law, which districts are in effect municipal or public corporations.[6] It may also be made by corporations working in conjunction with a State, under the provisions of the Carey Act.[7] It may also be made by the United States, under the provisions of the National Reclamation Act. However, the Government may also reserve its water flowing over its public lands for this purpose.[8]

In fact, the only limitation prescribed by any statute as to the qualifications of appropriators is to be found in some of the State statutes limiting such right, where water is appropriated for irrigation, in some instances, to persons who have a title or a possessory right to the land to be irrigated. But in the statutes of most of the States the right is granted absolutely, the statutes being silent as to the personal qualifications of appropriators.[9]

1 See Sec. 680.

For irrigation by Indians, see Secs. 271-285.

For appropriations by speculators, see Sec. 705.

2 "Married women and minors were, in general, not competent to pre-empt land, but we have never heard that they might not make a valid appropriation of water." Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168, citing Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Norris v. Hoyt, 18 Cal. 217; Racouillat v. Sansevain, 32 Cal. 376; Lobdell v. Hall, 3 Nev. 507.

3 See Secs. 684, 1433-1448.

4 See Secs. 684, 1490-1508.

5 See Mutual Assns., Part XII, Secs. 1479-1489.

6 For the District Irrigation Laws, see Chap. 70, Secs. 1386, *et seq.*

7 For the Carey Act, see Chap. 67, Secs. 1312-1336.

For acquisition of land under the Carey Act, see Secs. 1330-1334.

8 See Sec. 1266.

For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

Under the National Reclamation Act, a person can purchase water only where he is either an owner of land, or has taken up land under the Act, and is in lawful possession thereof. See Secs. 1277-1279.

9 See, for the statutes of the various States, Part XIV.

§ 680. **Right of Indians.**—An Indian may lawfully acquire a right to the use of water by an appropriation thereof, and may also maintain an action against a white man for the wrongful diversion of such water.[1] In an Arizona case,[2] "As found by the Court, the right of the Indians to water from the Utah canal arose, not from ownership of shares of stock in the canal, but from the fact that they and their predecessors in interest contributed to the building, enlargement, and maintenance of the canal by their labor, and that ever since the construction of the canal they have been accorded such rights." And the Court held that a judgment apportioning water to Indians for irrigation according to the rights acquired by prescription on condition that they pay their *pro rata* share of the expense of the maintenance of the common ditch, as provided by a contract, was not objectionable. Again, in a New Mexico case,[3] it was said by the Court: "The ditch in question was built by the Indians very many years ago. It has been maintained by and belongs to them, and we are unable to see how their failure to elect a *major domo* and work the acequia, under the laws of the Territory regulating such election and work, would justify the plaintiffs in error in wrongfully appropriating water flowing through it, which the Court below finds does not belong to them. There is no error in the decree complained of, and the same is therefore affirmed."

In many parts of this country, especially during the last twenty-five years, many Indians have abandoned their tribal relations and savage ways, taken their allotment of land in severalty, and following the ways of civilization have become respected citizens of the United States and of the State where they reside. Where such is the case the Indian has all of the rights of the white man. He can acquire title to land and appropriate water to irrigate the same, and has as equal standing in the courts as any of his neighbors. The Indians, being naturally inclined to an outdoor life, in many localities of this country, when their hunting grounds and reservations have been opened up for settlement, have taken their allotments in severalty, appropriated water for the irrigation of the same and have become in many instances

1 Lobdell v. Hall, 3 Nev. 507.

2 Biggs v. Utah Irr. Ditch Co., 7 Ariz. 331, 64 Pac. Rep. 494.

3 De Baca v. Pueblo Santo Domingo, 10 N. M. 38, 60 Pac. Rep. 73.

the best of farmers.[4] The step from good farmers to good citizens is but a short one. And, it may be remarked in passing, that the principal cause of the change has been the allotment of the lands in severalty and their being educated under the fostering care of the Government in the industry of modern agriculture.[5]

The right of an individual Indian, however, to appropriate water must be distinguished from the right of the Government to make reservations of the waters flowing over the public domain, from private appropriation, where such waters are needed for the use of an Indian tribe located upon a Government reservation. This subject has been treated in other sections.[6]

§ 681. **Riparian owners may also be appropriators.**—As discussed in a previous portion of this work, owners of land through which or by which streams flow may make appropriations of the water flowing therein in all the States which recognize both the doctrine of appropriation and the common law of riparian rights.[1] In other words, the general rule is that a person can be both a riparian proprietor upon the stream and by virtue of the same claim certain rights in the water, and he may also be an appropriator and claim additional rights to the use of the water. This subject has been discussed in another chapter of this work and further discussion is unnecessary under this subject.[2]

However, in those States which have abolished the common law of riparian rights, it is held that riparian owners who desire to appropriate the waters of the stream which their lands adjoin must comply with the provisions of the law of the State the same as those who are not riparian owners.[3]

§ 682. **Tenants in common.**—Several persons may join in making an appropriation of water sufficient for the use of all on their separate lands, and when this is done they are usually treated as tenants in common of the water right.[1] The members of vol-

4 For Indian allotments, see Secs. 273, 285.

5 See Secs. 271-285.

6 See Secs. 388, 411, 668.

1 See Secs. 507, 621.

2 For irrigation as a riparian right, see Chap. 26, Secs. 498-525.

For riparian owner and appropriator, at the same time, see Sec. 519; Little Walla Walla Irr. Union v. Finis Irr. Co., —— Ore. ——, 124 Pac. Rep. 667.

3 Idaho Power etc. Co. v. Stephenson, 16 Ida. 418, 101 Pac. Rep. 821.

1 Lytle Cr. W. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426; *Id.*, 2 Pac.

untary associations or unincorporated companies, appropriating waters by means of the same works, may be tenants in common,[2] and, when the appropriation has been made in that manner there is nothing to prevent the organization of the interests of the respective tenants in common into a corporation for the purpose of maintaining the ditch and other works, distributing the water, and for the protection of the rights of the shareholders.[3] In fact, all through the Western States this has been a very common practice.[4]

Rep. 732; Crowder v. McDonnell, 21 Mont. 367, 54 Pac. Rep. 43; Lorenz v. Jacobs, 65 Cal. 20, 3 Pac. Rep. 654; Abel v. Love, 17 Cal. 233, 11 Morr. Min. Rep. 350; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838; City of Salem Co. v. Salem Flouring Mills Co., 12 Ore. 374, 7 Pac. Rep. 497; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Schilling v. Rominger, 4 Colo. 100; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. Rep. 996, where it was held that, where a claim to water is founded upon an appropriation through a ditch jointly constructed by three persons and jointly held by them in common, into which all the water used by them was diverted, it was immaterial that their lands, upon which the water was thereafter used, were owned by them in severalty.

See, also, Beers v. Sharpe, 44 Ore. 368, 75 Pac. Rep. 717; Rodgers v. Pitt, 89 Fed. Rep. 420, 29 Fed. Rep. 932; Johnson v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

See, also, Spenseley v. Janesville Cotton Mfg. Co., 62 Wis. 574, 22 N. W. Rep. 574; Allard v. Carlton, 64 N. H. 24, 3 Atl. 313; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Jones v. Parsons, 25 Cal. 100; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Carpenter v. Webster, 27 Cal. 524; Park v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522, Duryea v. Burt, 28 Cal. 569; Decker v. Howell, 42 Cal. 636; McConnell v. Denver, 35 Cal. 365, 95 Am. Dec. 107; Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Church v. State, —— Wash. ——, 117 Pac. Rep. 711; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Filmore City v. Filmore Roller Mill Co., 36 Utah 339, 103 Pac. Rep. 967.

2 Smith v. North Canyon Irr. Co., 16 Utah 194, 52 Pac. Rep. 283; Schilling v. Rominger, 4 Colo. 100; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 Pac. 494.

See, also, for voluntary associations, Part XII, Secs. 1453-1463.

3 For corporations, see Part XII.

Hildreth v. Montecito Cr. W. Co., —— Cal. ——, 70 Pac. Rep. 672.

4 For ditch and canal companies, see Part XII.

For appropriation by corporations, see Secs. 684, 1470.

But the majority who have incorporated have no right to regulate and control the minority, who did not join the corporation.[5] In order, however, to be governed by the rules of law relating to tenants in common, there must be no special or other agreement among the joint users of the waters appropriated through a common ditch as to their proprietary interests, and the right to a unity of possession must extend to the right of user, which is essential to the existence of such a tenancy in a water right.[6]

A distinction must be made between tenants in common in a water right and those in the ditch, canal, or other works by which the water is diverted. The appropriation of the water made by tenants in common may be distinct from the means by which that appropriation is made effective. The water right may also be owned by one set of tenants in common and the ditch and other works may be owned by another set.[7] This subject will be treated in another section of this work.[8]

§ 683. Several persons may make appropriations in severalty through the same ditch.—Several persons, who may or may not be tenants in common, may make appropriations at different times and may use the same ditch, dam, and other works for the diversion of the water and for the irrigation of their respective tracts of land without surrendering, joining, or merging their respective priorities. Hence it follows that the same irrigating ditch may have two or more priorities belonging to the same appropriator, or to different appropriators.[1] It is the general custom throughout

5 Bartholomew v. Fayette etc. Co., 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912, affirmed in 31 Utah 220, 87 Pac. Rep. 707.

6 Telluride v. Davis, 33 Colo. 355, 80 Pac. Rep. 1051, 108 Am. St. Rep. 101; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334.

But see Biggs v. Utah Irr. Ditch Co., 7 Ariz. 331, 64 Pac. Rep. 494, where the Court held that tenants in common appropriating water by means of a common ditch are entitled to agree among themselves as to the manner in which they may enjoy their several appropriations.

7 Johnson v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

8 For tenants in common in a ditch, see Part XII. Also, Secs. 683, 1454-1458.

For actions by and between tenants in common, see Part XII.

1 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472,

the entire country to permit persons making appropriations to use the same ditch in making the diversion from the natural stream as far as practicable. If this was not the case the whole country would be cut up by individual ditches. In many States it is provided by statute that the later appropriators may use the works and ditches already constructed upon certain conditions. They then may conduct the water as far as possible in the main ditch, and from thence by other ditches to their own lands.[2]

In most jurisdictions one ditch owner will be compelled in proper condemnation proceedings to share his ditch with another seeking a right of way through the same.[3] This subject, however, will be discussed under that of rights of way over private lands.[4]

§ 684. **Corporations—In general.**—The questions involved as to the powers and rights of corporations relative to the acquisition of water rights and the use and disposal of waters, the construction of the necessary works, the acquisition of rights of way over both public and private lands,[1] and other rights, are so many and varied in the Western States that we have thought it best to consider these questions in separate chapters under their

60 Am. St. Rep. 777, where the Court held that the extensions of an irrigating ditch made for the benefit of later appropriators, as well as the appropriations themselves, must be considered individual rights, where the contemplated use of the ditch did not comprehend later appropriations.

See, also, Weill v. Baldwin, 64 Cal. 476, 2 Pac. Rep. 249.

See, also, on same subject contracts and agreements between appropriators, Secs. 922, 923.

See, also, Romminger v. Squires, 9 Colo. 327, 12 Pac. 213; Farmer's High Line C. & R. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Patterson v. Brown & Champion D. Co. 3 Colo. App. 511, 34 Pac. Rep. 769; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Telluride v. Davis, 33 Colo. 355, 80 Pac. Rep. 1051, 108 Am. St. Rep. 101; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334.

For appropriations by tenants in common, see Part XII, Secs. 1453-1458.

2 See for laws of respective States, Part XIV.

3 Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

4 See Chap. 52, Sec. 972.

1 For rights of way over public lands, see Chap. 51, Secs. 927-971.

For rights of way over private lands, see Chap. 52, Secs. 972-993.

respective heads, and, for the purposes of this work, corporations may be divided into public[2] and private.[3] Public corporations may be divided into what are considered strictly public, and municipal. Private corporations we will divide into two classes: First, corporations which are organized solely for the mutual benefit of their stockholders, or "mutual corporations";[4] and, second, those which are organized for the purpose of furnishing water to others than to their stockholders, and for the express purpose of profit.[5]

In general, we will only say in this place that all of the corporations named above, under certain limitations and restrictions imposed by the constitutions and laws of the States under which they are organized, and of the States where their operations are being carried on, and by their own articles of incorporation or charters, have the right to appropriate the waters of the natural streams and other bodies of water, and to apply them to beneficial uses or purposes, or to furnish such water to individuals who will so apply it. As an individual may appropriate such waters to be used for beneficial purposes, there is no reason why a number of individuals,[6] either associated together as voluntary unincorporated associations, or as copartners, or as formally incorporated under the laws of some State, may not do the same thing.[7] The rights, powers, and duties of all corporations, both public and private, will be discussed in another portion of this work.[8]

§ 685. **Appropriations by aliens.**—An alien may appropriate water and may hold the ditch and water right until he has forfeited the same by a proceeding termed "office found," brought by the State to declare such forfeiture.[1] The alienage of a person

2 For rights of public corporations, see Chaps. 70, 71, Secs. 1386 *et seq.*

See, also, Irrigation Districts, Chap. 70, Secs. 1386, *et seq.*

3 For control by incorporated companies, see Chaps. 72, *et seq.*

4 For mutual corporations, see Part XII, Secs. 1453, 1463.

5 For corporations for profit, see Part XIII.

6 See Tenants in Common, Part XII. For partnerships, see Part XII.

7 Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Hagerman Irr. Co. v. McMurray, —— N. M. ——, 113 Pac. Rep. 823.

8 For private corporations, see Part XII.

1 Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168. "The silent acquiescence with which the Government, prior to the Act of Congress of July 26, 1866,

is a matter between him and the Government, and until "office found," private individuals are not at liberty to treat his appropriation as void, or that the water itself is still open to appropriation by another.[2] Hence it must follow that until forfeiture by "office found" an alien may convey a good title of a water right, founded upon an appropriation made by him, to his grantee.[3] So, again, if the original appropriator of water was a citizen of the United States, such water right may be acquired by an alien by a conveyance from the appropriator.[4]

§ 686. Title to the soil in appropriators unnecessary.—As we have discussed in a previous chapter, under the common law, riparian rights including the use of water vest in the proprietor by virtue of his actual ownership of the land bordering upon the stream, lake, or other body of water, as an incident to the soil owned by him; and, without this ownership, there can be no riparian rights, either as to the use of the water or other rights, recognized by the common law.[1] In the discussion of the Arid Region Doctrine of appropriation it must be borne in mind that the ownership of water rights, in the Western States, does not depend upon a legal title, or, in fact, any title to lands bordering upon a stream, or upon the title or ownership to any lands elsewhere, but is simply

regarded the appropriation of water on its lands, as well as the express recognition extended by that statute to rights so acquired, did not discriminate between Trojan and Tyrian,—citizens or aliens."

2 Santa Paula Waterworks v. Peralta, *supra*.

See, also, Norris v. Hoyt, 18 Cal. 217; Racouillat v. Sansevain, 32 Cal. 376; Wulff v. Manuel, 9 Mont. 279, 23 Pac. Rep. 723; Tibbitts v. Ah Tong, 4 Mont. 536, 2 Pac. Rep. 759; Cross v. Del Valle, 68 U. S. 1 Wall. 56, 17 L. Ed. 515; Osterman v. Baldwin, 73 U. S. 6 Wall. 116, 18 L. Ed. 730.

An alien enemy may take lands in Virginia by devise, and hold the same until office found. Fairfax's Devisee v. Hunter's Lessee, 11 U. S. 7 Cranch 603, 3 L. Ed. 453; Phillips v. Moore, 100 U. S. 208, 25 L. Ed. 603; Craig v. Radford, 16 U. S. 3 Wheat. 594, 4 L. Ed. 467; Mooers v. White, 6 Johns. Ch. 360; 1 Washburn on Real Property, 79, and cases cited.

3 Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741.

See, also, Wulff v. Manuel, 9 Mont. 279, 23 Pac. Rep. 723.

4 Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524.

For the sale and conveyances of water rights, see Secs. 994-1032.

1 For riparian rights as an incident to the soil, see Secs. 451, 458.

For irrigation as a riparian right, see Secs. 498-525.

a possessory right, acquired by an appropriation and diversion of the waters of a stream and consummated by its application to some beneficial use or purpose, either by the appropriator himself or by some consumer acquiring his right from the appropriator.[2] The appropriator need not be the owner of any land in order to make a valid appropriation. Corporations may be organized for the express purpose of appropriating the waters of some stream and selling the right to use the water to consumers, without the title or ownership of any land, except the bare easement over the lands of others for their ditches and other works.[3]

This subject was discussed in a recent Utah case,[4] in which the Court said: "In order that the appropriator may be entitled to the use of such water, it is not essential that he should have located or taken possession of any tract or parcel of the public domain bordering upon the stream or lake from which the appropriation is made, or that he even have an interest in or to the lands proposed to be irrigated, if such be the beneficial purpose of the appropriation. An appropriation may be made of such water for the irrigation of lands not situated upon or near the stream or lake from which it is taken, and the water may be conducted by means of ditches or channels, or otherwise, across the intervening public lands, to irrigate lands possessed by the appropriator or others, or he may sell and dispose of the water thus conducted to others to use it for a beneficial purpose on claims or lands possessed or owned by them, or in which they have an interest, and upon which the water may be and is applied for a beneficial purpose. These views are discussed and enlarged upon by Mr. Kinney in his work on Irrigation."[5]

2 For Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the nature of the right, see Secs. 586, 587.

For Congressional Acts and construction thereof, see Secs. 611-619.

3 Gutierres v. Albuquerque L. & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 77, 61 Pac. Rep. 357.

4 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

5 Citing Kinney on Irrigation, 1st Ed., Chaps. 6, 7.

See, also, Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; Thomas v. Guiraud, 6 Colo. 530; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. Rep. 854; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324.

But see Avery v. Johnson, 59 Wash.

This subject will be more thoroughly discussed in our chapter upon the nature of the right of appropriation.[6]

§ 687. **Squatters' rights.**—The term "squatters" is used in the authorities to designate two classes of persons. First, those who settle upon the unsurveyed lands of the United States, with the intent of filing upon the land when it is surveyed by the Government and opened for settlement; and, second, those who settle temporarily upon the land without any intent of making a permanent settlement, but are here one year and there the next.[1] A squatter or settler upon the unsurveyed lands of the United States has never been regarded as a trespasser, and in many instances the settlement upon the lands has been the inception of his title, a preference right being given him to make his proper filing within a specified time after the lands are opened for settlement. Again, no title to the land being required to obtain the right to make appropriations of water,[2] a squatter may make a valid appropriation of the waters of the natural streams for the purpose of irrigating the public lands occupied by him, or for any other beneficial use or purpose.[3] And, as long as he remains in possession of the lands, he can maintain his right to the use of the waters to

332, 109 Pac. Rep. 1028, where it is said: "If a party seeks to claim water for irrigating agricultural land by expropriation, he must own the land sought to be irrigated, or be an actual, *bona fide* settler having a possessory interest."

For rights of private corporations, see Part XII.

For rights of way, see Chaps. 51, 52, Secs. 927-993.

6 See Chap. 41, Secs. 757-774.

1 For settlement upon unsurveyed lands, see Sec. 445.

2 See Secs. 766, 767.

3 McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648; Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083; Wood v. Lowney, 20 Mont. 273, 50 Pac. Rep. 794; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Rowland v. Williams, 23 Ore. 515, 32 Pac. Rep. 402; Seaweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963.

But see the case of Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028, where the Court used the word "squatter" for "trespasser" in the case of one illegally occupying land on an Indian reservation, prior to the opening of the same for settlement.

For the rights of trespassers to appropriate water, see Sec. 688.

See the case of Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697, where the Court held that in Nebraska a squatter who has appropriated water for a less period than ten years—the statutory period of prescription—can not maintain an exclusive right as against other settlers upon the same stream; but, if he afterwards receives his patent to the land, he may count

irrigate the same. Some of the courts also hold that, even upon the sale of the possession of his lands or the abandonment of the same, a squatter may sell his water right and the transferee will have the benefit of the priority of the appropriation.[4] This, however, runs us into another question, which will be discussed hereafter.[5] However, the right of an appropriator of water can not be tacked to that of a mere squatter, who has abandoned the land.[6] Where a squatter afterward obtains title to the lands in his possession he takes the same, subject to any vested and accrued water rights, and rights of way for ditches and canals, recognized and acknowledged by the local customs, laws, and decisions, or as provided by law.[7]

§ 688. **Rights of trespassers.**—Even trespassers upon the lands owned by others may make valid appropriations of water, provided that the appropriation has the requisite priority, and the water is used for some beneficial purpose.[1] The water may be used for the irrigation of the lands trespassed upon while the trespasser has possession of the same, and after he has been ejected he may change the place of use to other lands.[2] As was said

the time during which he appropriated the water as a mere squatter in making out the statutory period of prescription.

4 McDonald v. Lannen, and other cases cited *supra*.

5 For the sale and conveyance of water rights, see Secs. 994-1032.

6 Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222, where a squatter appropriated water for a placer mining claim and afterwards died, leaving the land vacant, and it was held that the rights of a subsequent appropriator did not relate back to the original rights of the squatter.

For the right of tacking rights, see Sec. 787.

7 Farmers' High Line C. & R. Co. v. Moon, 22 Colo. 560, 45 Pac. Rep. 437.

See, also, for rights of way, Secs. 972-993.

Lands taken subject to water rights, Sec. 447.

Congressional Acts of 1866 and 1870, and construction, Secs. 611-619.

1 Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Alta L. & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. Rep. 963; Patterson v. Ryan, 37 Utah 410, 108 Pac. Rep. 1118; Hutchinson v. Watson D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

See, also, Snyder v. Colorado etc. Co., 181 Fed. Rep. 104, C. C. A. 136.

2 For change of place of use, see Secs. 867, 868.

See, also, cases cited, *supra*.

by the Utah Court: "But the authorities are to the effect that even trespassers upon land may acquire the exclusive right to the use of water that is used either to irrigate such land or is used thereon for other purposes, and that such a right, when once acquired, is paramount to the rights of the true owner or claimant, when he is dispossessed of the land, and the water claimant may divert and use the water elsewhere than on the land if he can so divert and use it."[3]

The water right acquired by a trespasser upon the lands of another and used on the lands while the trespasser is in possession of the same do not become appurtenant to them.[4] But the use of water upon land to which it is already appurtenant by one who is a trespasser thereon will not give him such a right in the water that he may thereafter divert it from the land; or, upon being ejected from the land, he may convey to a stranger a legal title in the water or in the use thereof.[5] No rights to the use of the water can be acquired by a trespasser, against the rights of the owner of the land.[6] It is only when a trespasser institutes an independent right to the use of the water and one which is not hostile to the owner of the land that the right can be maintained.

§ 689. **Rights of lessees.**—Lessees may also appropriate water and the right inures to their own benefit, and not to the lessors,

3 Patterson v. Ryan, 37 Utah, 410, 108 Pac. Rep. 1118, citing Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Alta Land etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028; Snyder v. Colo. etc. Co., 181 Fed. Rep. 62, —— C. C. A. —.

4 See cases, *supra*.

5 Alta L. & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

6 Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Correa v. Frietas, 42 Cal. 339; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968; Richards v. Dower, 64 Cal. 62, 28 Pac. Rep. 113; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780; Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Sloan v. Clancy, 19 Mont. 70, 47 Pac. Rep. 334; Emerson v. Eldorado D. Co., 18 Mont. 247, 44 Pac. Rep. 969; St. Helena W. Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; *Id.*, 23 Mont. 65, 57 Pac. Rep. 557.

See, also, for acquiring rights of way, Secs. 927-993.

For right of injunction against trespassers, Part XIII.

unless there should be some provision in the lease to the contrary, in which case the contract will govern.[1] While occupying the lands of their lessors, lessees appropriating water may use the same for the irrigation of the lands of their landlord, and unless the contract of lease otherwise provides, upon relinquishing this land they may transfer the use of the water to other lands, or may sell their rights to some one else, and give a good title therefor. In a recent case in Colorado,[2] the Court held that the question as to the title of a water right acquired by a tenant at will could not be raised by the owner of the land, for the reason that, even if the tenant did not own the water right, such fact did not vest the title to the same in the landlord.[3]

1 See for contracts, Secs. 917-926.

2 Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

3 See, also, Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. Rep. 963; Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389.

For the leasing of water rights, see Secs. 1025, 1026.

CHAPTER 37.

THE PURPOSE OF THE APPROPRIATION.

§ 690. Scope of chapter—What is a beneficial use?
§ 691. In general.
§ 692. Domestic purposes—Definition and limitations.
§ 693. For irrigation.
§ 694. For all mining purposes.
§ 695. For the furnishing of power—Light—Heat.
§ 696. For all municipal uses.
§ 697. Appropriations for the purpose of health, recreation, and beauty—Lawns and parks.
§ 698. For use by railroads.
§ 699. For making ice.
§ 700. For the propagation of fish.
§ 701. Water can not be appropriated for drainage.
§ 702. Temporary appropriation to preserve works—Flushing ditch.
§ 703. Appropriation may be made for the sale of water.
§ 704. Appropriation for storage.
§ 705. An appropriation can not be made for mere speculation and monopoly.

§ 690. Scope of chapter—What is a beneficial use.—In this chapter we will discuss the various purposes for which water may be appropriated under the Arid Region Doctrine of appropriation.

And, in general, we will say that any purpose which is useful or beneficial may be the object of such appropriations. In some States, however, certain uses are given preference right by statute, but where this is not the case as a general thing any use which is beneficial may claim its right in the order of its priority with the other rights claimed from the same stream. As we stated in the first edition of this work:[1] "The purpose contemplated for the use of the water may be irrigation for agricultural or horticultural purposes, mining, milling, manufacturing, domestic, or any other purpose for which water is needed to supply the natural and artificial wants of man, provided it be for a beneficial use." And, as was said in a recent Federal case:[2] "The courts have not

1 Kinney on Irrigation, 1st Ed., Sec. 150.

2 Cascade Town Co. v. Empire Water & Power Co., 181 Fed. Rep. 1011.

defined, because as yet they are unable to define, the exact boundaries of the territory known as 'beneficial use.'"[3] Therefore, as to what is a beneficial use must depend upon the facts and circumstances surrounding any particular use, until that use has been defined by the courts as beneficial.

§ 691. **In general.**—The purposes for which water may be appropriated are many. And in general it may be said that under the Arid Region Doctrine of appropriation water may be legally appropriated for any beneficial use or purpose. The Act of Congress of 1866[1] names the "use of water for mining, agricultural, manufacturing, or other purposes." The Desert Land Act names the uses of "irrigation, mining, and manufacturing purposes." It will be noticed that the Federal statutes give no preference to any of the uses to which the water may be applied. Also, the Supreme Court of the United States in discussing the subject in one of the early cases,[2] held to the same effect in the language used by Mr. Justice Field, in rendering the opinion of the Court, in which he said: "It has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flourmills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced." But, upon the other hand, there can not be a valid appropriation of water unless there is an intent upon the part of the appropriator to apply the same to some useful or beneficial purpose, followed up with the actual application to such purpose, within a reasonable time.[3] Hence, it follows that the courts hold that the mere passive acceptance of water as it flows at times into one's ditch when another appropriator does not wish to use it,

[3] Quoting from the brief of the learned solicitor for the complainant, Mr. E. F. Ware.

[1] See Secs. 611-619.

[2] Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

[3] For application of water for a beneficial purpose, Secs. 725-728.

For purposes for which water may be appropriated, see sections under this chapter.

without any intent to use it for a beneficial purpose, does not constitute a valid appropriation.[4]

Some of the States, however, have by their constitutions or statutes, given preference rights to certain uses, and usually naming the right to use the water for domestic purposes as the first.[5] In this chapter we will discuss in detail the various uses for which water may or may not be appropriated.

§ 692. Domestic purposes—Definition and limitations.—In all the Western States water may be appropriated for domestic purposes. This use may be defined as a use similar to that which a riparian owner has, under the common law, to take water for himself, his family, or his stock, and the like.[1] The right is based, however, upon the same differences, compared to the right under the common law, as are the other rights which may be acquired to the use of water under the common law and under the Arid Region Doctrine of appropriation. The first is based upon the ownership of the soil through which or adjoining which the stream flows, as an incident thereto, while the second is by virtue of an appropriation for that purpose under the doctrine of appropriation, and without regard to ownership on the stream. Even without statutory regulations, the right to appropriate water for domestic purposes is not without its limitations. The water must be used in a reasonable manner and no more can be appropriated for a purpose, even where it is prior, than will reasonably meet the demands. It is such a use as ordinarily involves but little interference with the water of a stream or its flow, and does not contemplate the diversion of large quantities of water in

4 Smith Canal or Ditch Co. v. Colorado Ice & Storage Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

For the appropriation of waste water, see Sec. 661.

5 For preference rights, see Sec. 791.

For right to use water for domestic purposes, under the common law, see Secs. 486-488.

See, also, laws of the States, Part XIV.

1 For rights of riparian owners, see Sec. 488.

Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Montrose Canal Co. v. Loutsenheizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532.

For domestic uses under the common law, see Secs. 486-488.

For preference right for domestic use, see Sec. 793.

canals or pipe lines.[2] Hence, it has been held that the appropriation by a company, of a large portion of the waters of a stream, for the purpose of furnishing water to a municipality for general municipal purposes, including sprinkling the streets and furnishing power for a lighting plant, and for flushing sewers, is not for a domestic purpose within the terms of a statute permitting an appropriation for such purposes.[3] However, as we shall see in a future section, water may be appropriated for general municipal purposes, which will include domestic purposes, and that, too, either by the municipality itself,[4] or by a corporation for sale to the municipality or to its inhabitants.[5] But where the appropriation is made for domestic purposes only, it is the better rule to keep within the above definition and use. Where there is no statutory preference given for domestic use, the use may be changed from domestic purposes to some other purpose.[6] And, upon the other hand, where water is appropriated for some other purpose, and is actually used for culinary and domestic purposes, it is of itself sufficient to establish a beneficial use of the water.[7]

§ 693. **For irrigation.**—One of the principal uses for which water has been and may be appropriated, in all of the States where the Arid Region Doctrine of appropriation is in force, is for the irrigation of land. This must be conceded by all, and to cite authorities upon this plain proposition would only be a repetition of what has been cited many times in this work to sustain the various phases of the question.

But there is a decided distinction between the question of right to appropriate water for irrigation and the question as to what

2 See, also, Broadmoor Dairy & Live Stock Co. v. Brookside W. & Imp., 24 Colo. 541, 52 Pac. Rep. 792; Patterson v. Ryan, 37 Utah 410, 108 Pac. Rep. 1118.

3 Crawford v. Hathaway (Hall), *supra*.

But see appropriation for municipal use, Sec. 696.

The business of making electric lights and generating power for the same is a manufacturing purpose, and can not be classed as a domestic use. Schwab v. Beam (Colo.), 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279.

4 Sec. 696.

5 Sec. 696. See, also, Chap. 71.

6 For preference right for domestic purposes, see Sec. 793.

For right to change the use, see Secs. 869-872.

7 Silver Peak Mines v. Valcalda, 79 Fed. Rep. 886.

For the preference right to use water for domestic purposes, see Sec. 793.

constitutes an actual appropriation for irrigation. The law permits the appropriation of water only for some beneficial use or purpose. Hence it follows that water can only be appropriated for that purpose when it assists in the raising of some useful crop. This need not necessarily be what is known as a cultivated crop, but the watering of the land to produce hay and grass for the feeding of stock is sufficient to come within the rule.[1] Hence it is held that the careless running of water occasionally over wild, uncleaned and untilled land is not a useful purpose for which a valid appropriation may be made.[2] And again, one who has diverted more water than he needs for the specific purpose for which the appropriation was made, and permits the excess to run over his land, but with no intention of using it to irrigate the land to raise a crop or otherwise apply it to a useful purpose, does not give a valid right to such excess.[3] Again, as we shall see in a subsequent section, that to constitute a valid appropriation there must be an actual diversion of the water from the natural stream.[4] Hence it follows that the mere settling on land on a river bottom and the cutting of the wild grass produced by the natural overflow of the river "coming down and spreading over the land," is not an appropriation of the water for a beneficial purpose within the meaning of the term.[5]

1 Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389; Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 477, where the Court held that an appropriation of water for the purpose of running it over wild hay land for making hay and using the land for pasture was a valid one.

See, also, for the requirements of the Land Department under the Desert Land Act, Secs. 1296-1304.

See, also, Rodgers v. Pitt, 129 Fed. Rep. 932; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652.

2 Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111.

3 Millheiser v. Long, *supra;* Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

See, also, as to the intent of the appropriator, Secs. 708-710.

Appropriation of excess water, Sec. 660.

4 For diversion of the water, see Secs. 722-724.

5 Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

See, also, Cruse v. McCauley, 96 Fed. Rep. 369, citing Kinney on Irrigation, 1st Ed., Sec. 162.

But see Cascade Town Co. v. Empire W. & P. Co., 181 Fed. Rep. 1011.

§ 694. **For all mining purposes.**—In tracing the history of the Arid Region Doctrine of appropriation we found that it had its origin in the rights claimed by the early miners of California to divert the waters from the natural streams for the purpose of working their mining claims.[1] That right has been continued down to the present time. Water may be legally appropriated for all mining uses whether the same be for common placer, hydraulic, or lode mining claims, or for the reduction of ores in all kinds of mills and smelters.[2] In some States the use for mining, after that for domestic uses, is given a preference right.[3] Great care, however, must be exercised by mining companies not to pollute the water, or to wash debris down to the lands of others entitled to the use of the water of the stream lower down.[4] There must be a regular appropriation of the water in accordance with the laws of the State or Territory wherein the same is flowing, and for the purpose of some use in connection with the working of the mining claim, mill, or smelter, as the case may be. The mere

1 See Secs. 596-599.

Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; McDonald v. Bear River Co., 13 Cal. 220; *Id.*, 15 Cal. 145, 1 Morr. Min. Rep. 639.

2 Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Wixon v. Bear River Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Silver Peak Mines v. Valcalda, 79 Fed. Rep. 886; Krall v. U. S., 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351; Copper King v. Wabash Min. Co., 114 Fed. Rep. 991, where a mining company has acquired the exclusive right to the use of the waters of a certain creek in working its mines, another company has not the right, in developing its mine by means of a shaft near the creek, to cut off and divert the waters flowing into it.

Platte W. Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; Saunders v. Robinson, 14 Idaho 770, 95 Pac. Rep. 1057.

See, also, rights in subterranean waters, Chaps. 59-62, Secs. 1148-1211; Clark v. Duval, 15 Cal. 85; Rogers v. Soggs, 22 Cal. 444; Smith v. Cooley, 65 Cal. 46, 2 Pac. Rep. 880.

A squatter on the public lands may make a valid appropriation of water for placer mining. Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222.

For rights of squatters to appropriate water, see Sec. 687.

See, also Madigan v. Kougarok M. Co., 3 Alaska 63.

3 In Idaho the constitution so provides.

See, also, statutes of the various States, Part XIV.

4 For the pollution of water, see Secs. 1129-1147.

For the washing of debris, see Sec. 1136.

location of a mining claim without the use of the water in connection therewith in no way makes an appropriation of the water. And again, the location of a mining claim for the sole purpose of securing a water right invalidates the location of the mining claim.[5]

§ 695. **For the furnishing of power—Light—Heat.**—A valid appropriation of waters may be made for the furnishing of power, and that, too, regardless of the fact whether the power is furnished direct, by the fall of the water upon the machinery where the power is used, or by the medium of electrical appliances the power created by the fall of the water is transmitted to distant points.[1] The generation of electricity to furnish light, heat, and power to the people of adjoining towns is a beneficial use for which water may be appropriated.[2] It also often happens that a secondary appropriation may be made for power purposes, even in cases where prior thereto the water of a stream is all appropriated by appropriators for some purpose which consumes all of the

5 Wm. A. Cheesman, 2 Land Dec. 774; Robert S. Hale, 3 Land Dec. 536; Robinson v. Imperial etc. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370, where the Court held that the mere appropriation of a millsite was not an appropriation of water.

See, also, Leggat v. Carroll, 30 Mont. 348, 76 Pac. Rep. 805, where it was held that the mere location of a placer mining claim did not constitute an appropriation.

But see Schwab v. Beam, 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279, where Judge Hallet held to the contrary. This decision has been criticised. See Wiel on Water Rights, 1908, p. 187, and note.

1 For direct power to run mills, see Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 685; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Tarter v. Spring Cr. W. & M. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Thompson v. Pennebaker, 173 Fed. Rep. 849, 97 C. C. A. 591; Cascade etc. Co. v. Empire etc. Co. 181 Fed. Rep. 1011.

However, the mere appropriation of a millsite is not an appropriation of the water. Robinson v. Imperial Sil. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370.

See, also, the right to appropriate water for mining purposes, Sec. 694.

2 Salt Lake City v. Salt Lake City W. & Ec. Pr. Co., 24 Utah 249, 67 Pac. Rep. 672, and same on rehearing, 25 Utah 456, 71 Pac. Rep. 1069, and both 61 L. R. A. 648, 657.

water of the stream. By going up the stream an appropriation of the same water may often be made for power purposes without interfering with the rights of the prior appropriators. This subject, however, will be treated in another portion of this work.[3]

§ 696. **For all municipal uses.**—Valid appropriations of the waters from the natural streams or other sources of supply may be made for all municipal uses. This may be done either by the municipalities themselves,[1] or by individuals or corporations, for the purpose of furnishing the residents of municipalities with water for drinking, domestic uses, and for all other useful or beneficial purposes; also for all uses required by a municipality itself, such as for sprinkling streets, flushing sewers, furnishing power for a lighting plant, as well as for a supply in case of fires, and other necessary purposes.[2] But in order for a municipality to have the right to the water for all of these uses there must be an appropriation covering them. A corporation or the municipality itself can not, under an appropriation for domestic purposes, allowed by the statute as a preference right, appropriate all of the waters

3 For the rights of power companies, see Secs. 847-855.

For the right of secondary appropriation, see Sec. 783.

For rights of change of use, see Secs. 869-872.

See, also, Salt Lake City v. Salt Lake City W. & Ec. Pr. Co., *supra*.

1 For appropriations by municipal corporations, see Chap. 71.

2 A city may succeed to all the water rights of a Mexican pueblo, and may acquire a right to all the waters of a river where its claim was recognized by all persons owning land along the river, although for a portion of the time it does not use all of the water. Feliz v. Los Angeles, 58 Cal. 73; Elms v. Los Angeles, 58 Cal. 80.

See, also, Platte W. Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711. But a city owning such a water right can not let it remain in abeyance for a long series of years without use.

Lone Tree D. Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W. Rep. 650; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. Rep. 706; People *ex rel.* Ricks W. Co. v. Elk R. M. & L. Co., 107 Cal. 221, 40 Pac. Rep. 521, 48 Am. St. Rep. 125; Town of Ukiah City v. Ukiah W. & Imp. Co., 142 Cal. 173, 75 Pac. Rep. 773, 100 Am. St. Rep. 107; Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120.

See, also Chapter 71 as to rights of municipal corporations.

See, also, for eminent domain, Secs. 1059-1098.

Right of corporations to appropriate water and supply same to cities, Sec. 684. See, also, Chaps. 73-77.

of a stream for "domestic purposes" and use the same for general municipal purposes.[3]

The rights and powers of municipal corporations relative to the acquisition and control of water rights will be fully discussed in another chapter.[4]

§ 697. **Appropriations for the purpose of health, recreation, and beauty—Lawns and parks.**—Although the money-making projects are among the, beneficial, and we will say the most usual uses for which water may be appropriated, they are not the only uses for which appropriations may be made. Where the appropriation is made to preserve the public health, it is a beneficial use. Where the appropriation is made to beautify lawns and ornamental shrubbery, and to make homes attractive, it is a beneficial use. Appropriations by municipal corporations for the purpose of flushing sewers and sprinkling streets and maintaining the grass and ornamental shrubbery on, and the filling of lakes and ponds in, its public parks, must be classed with the beneficial uses for which water may be appropriated, from all the standpoints of health and recreation of the public and the added beauty to the surroundings. The cases upon the subject are few, but there is no reason why such uses are not as beneficial, if not more so, than would be the use of the same amount of water for the irrigation of a crop of potatoes or a field of grain. In a recent Federal case of Cascade Town Co. v. The Empire Water & Power Co.[1] the facts were that the complainant owned several hundred acres of land in the mountains of Colorado, which it had improved at great expense for a summer resort. On the lands is Cascade Canyon, through which a small precipitous stream flows. The seepage from the flow of the stream and the mist and spray from its falls produces a luxuriant and exceptionally beautiful growth of vegetation on the floor and sides of the canyon, thus rendering the canyon and the stream with its falls flowing through it rare in beauty and the chief attraction of a summer resort, and they were so advertised by the complainant. The defendant attempted to cut off the stream above the com-

3 Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, appropriation for domestic purposes, Sec. 692.

4 See Chap. 71.

1 181 Fed. Rep. 1011.

plainant's grounds and divert the water for the purpose of generating electricity to be sold to the public as a commodity. The Court held: "That the maintenance of the vegetation in Cascade Canyon, for the purposes to which it has been devoted by the complainant, by the flow and seepage, and mist and spray of the stream, and its falls as it passes through the canyon, is a beneficial use of such waters within the meaning of said Section 6, Article 16 of the Constitution, that the complainant intended to use the waters of Cascade Creek for that purpose, and has so used them for many years and thereby appropriated the same." And, in its opinion, the Court adopted as a part of the same a portion of the brief of the solicitor for the complainant, Mr. E. F. Ware, and we can do no better than to quote here as being specially pertinent to the subject under discussion. It is as follows: "The public health is a beneficial use, and for that purpose, among others, a city may condemn streams of water. The water, when so obtained, may be used and is used in any manner that will promote the public health; it is used for sprinkling the streets, washing the pavements, and flushing the sewers.

"Rest and recreation is a beneficial use, and for that purpose water is used to make beautiful lawns, shady avenues, attractive homes, and public parks with fountains, lakelets, and streams, and artificial scenic beauty.

"Cities condemn water, and use water for the foregoing purposes. No one questions but that public health, rest, and recreation is a domestic use, as well as a beneficial use. No one, we may add, questions the right to these uses.

"The law inside of a city is not different from the law outside of the city. In one sense there is no commercial value to fountains and parks; they do not bring in a revenue, but they are vastly beneficial to the public health, rest, and recreation, and such fact is recognized the world over; and there can be no question but that water applied to their maintenance and creation is a 'beneficial use.'

"We say that the creation of a summer resort is a beneficial use. Is it no benefit to the public to spend money in making a beautiful place in Nature visible and enjoyable? Is it not in line with public health, rest, and recreation? If a person takes a stream and, after putting in waterfalls, ponds, bridges, walls, shrub-

bery and bluegrass sod, works it into a beautiful home, that is a beneficial use. It is a benefit to the weary, ailing, and feeble that they can have the wild beauties of Nature placed at their convenient disposal. Is a piece of canvas valuable only for a tent-fly, but worthless as a painting? Is a block of stone beneficially used when put into the walls of a dam, and not beneficially used when carved into a piece of statuary? Is the test dollars, or has beauty of scenery, rest, recreation, health, enjoyment something to do with it? Is there no beneficial use except that which is purely commercial?

"It would seem that parks and playgrounds and bluegrass are benefits and their uses beneficial, although there is no profit derived from them; if not, then the contention of the defendant corporation must be maintained—that nothing but money-making schemes are beneficial. The world delights in scenic beauty, but must scenic beauty disappear because it has no appraised cash value? If this defendant corporation takes the water out of Cascade Canyon, it can take the water out of the Seven Falls and Cheyenne Canyon, and Glen Eyrie, and the beautiful parks and homes and summer resorts of the State. We feel compelled to say that there are other beneficial uses of the fall of water than the mere production of commodities in competition with others now existing. When the defendant company says the complainants are putting the fall of the water to no beneficial use, it means that the complainants are not ruining the beautiful scenery for cash." [2]

2 Although the Court was eminently correct as to its holding that the use was a beneficial one, our view of the matter is that the Court erred in holding that the acts of the complainant constituted an appropriation. The rights granted are more akin to riparian rights to the use of the water which the decision itself repudiates, by saying: "There are no riparian rights in Colorado as against a valid appropriation of water." The decision of the Court, however, was justified under Sec. 3165, Rev. St. Colo., 3 Colo. Stat. Ann., p. 2098. This section grants to the owners of land bordering upon a stream the *statutory* right to the use of the water "for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes."

For the physical acts necessary to constitute an appropriation, see Secs. 706-732.

For the Colorado landowners' Act, see Part XIV, Colorado.

§ 698. **For use by railroads.**—The use made by railroads for supplying its engines, keeping its cars supplied with fresh water, washing its cars, and for other necessities, are useful and beneficial purposes for which water may be appropriated. The appropriation may be made either by the company itself or by some other party and the water right sold to the company.[1]

§ 699. **For making ice.**—The appropriation of water and the diversion of the same into ponds, where it may freeze and make ice, is a useful purpose for which a valid appropriation may be made. This precise point does not seem to have been before the courts of last resort for decision. But to the writer's knowledge it has been before the trial courts in a number of cases, and it has always been held with the right. Even under the common law, a riparian owner has the right in the winter season, to construct a dam to collect and retain the water in ponds to a reasonable extent for the purpose of making ice for his own use or for sale.[1] And, under the Arid Region Doctrine of appropriation, there is nothing in the law or in reason which forbids appropriations made for this express purpose. The appropriations are usually made in the winter time, and therefore at a time when the water is not needed for irrigation, hence a secondary appropriation of the waters of a stream may be made during that period, even if all of the water is appropriated during the summer months by others and for different purposes.[2]

1 Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222.

See appropriation of water for sale, Sec. 703.

Sale of water rights, Secs. 995-1002.

1 Gehlen v. Knorr, 101 Iowa 700, 70 N. W. Rep. 757, 32 L. R. A. 697, 63 Am. St. Rep. 416; Myer v. Whittaker, 55 How. Pr. 376; Water Comrs. v. Perry, 69 Conn. 461, 37 Atl. Rep. 1059.

For rights of riparian owners to cut ice, see Secs. 493, 550.

See, also, Farr v. Griffith, 9 Utah 416, 35 Pac. Rep. 506, where the Court held that the measure of damages for breach of contract to keep ice ponds full of water during the ice-making season is the value in the icehouse of the ice that might have been put up with reasonable diligence had there been no breach, less the cost of harvesting and storing it.

2 For subsequent appropriations, see Secs. 783-786.

§ 700. **For the propagation of fish.**—It is a well recognized fact that the propagation of fish for the market is rapidly becoming quite an industry in the Western States; in fact, all over this country. Although this is not one of the principal industries, there is no reason why water may not be appropriated for this use, as it certainly is a beneficial purpose.[1] In those States which give preference rights to other industries, such as irrigation or mining, the appropriation of water for the propagation of fish might have to give way to a higher right. In fact, this was the holding of the Supreme Court of Colorado in a recent case, where the next right to that for domestic purposes is the right to the use of the water for irrigation.[2] Again, as this use does not consume the water, at least to any great extent, there is no reason why a secondary appropriation of the water may not be made for this purpose to run through a series of reservoirs above the point where the prior appropriators take out the water. This may be done, so long as the rights of the prior appropriators are not interfered with; but, of course, if this use does interfere with the rights of the prior appropriators, the rules as to secondary appropriations must apply.[3] It was held in a recent Utah case,[4] that where a stream abounding in fish valuable for food flowed across defendant's lands, he was entitled to change the course of the stream over his own premises and construct fish ponds in the old bed if he could do so without injury to public or private interests and where he permitted the water diverted to his fish ponds and hatcheries to run undiminished and unpolluted back into the natural stream.[5]

1 See Smith Canal or Ditch Co. v. Colo. Ice & S. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148, where the Court said: "The findings were that whenever Baker wished to use the waters for his own domestic purposes, for irrigating lands, or for filling fish ponds," etc., "he did so under a claim or ownership. We think the trial court was right," etc.

2 Windsor Res. & Canal Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

3 For subsequent appropriations, see Secs. 783-786.

For the protection of fish from irrigation ditches, see Secs. 369-371.

For common law right of fishery, see Secs. 358-366.

For statutes of the various States, See Part XIV.

4 State v. Barker, 37 Utah 345, 108 Pac. Rep. 352, 27 L. R. A., N. S., 1138.

5 *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

Also, for the right of fishing and hunting, see Chap. 17, Secs. 358-371.

In this connection it might be well to mention an early case in Nevada, where the Supreme Court held that a beneficial use for the appropriation of water might consist of its diversion for the purpose of catching fish, by permitting the water to run over a flat meadow; and, the fish following the water were more easily caught in the meadow than in the stream.[6] We never considered this case good law, not for the reason that the act was performed by Indians, as Indians may make a valid appropriation of water,[7] but because it is a most unusual and destructive method of catching fish and one which is forbidden in most jurisdictions. It takes the small, as well as the large, and the tendency of the laws of the various States is to prevent the destruction of the fish in the natural streams and lakes. Then, again, it is such an appropriation of the water as should not be allowed.

§ 701. **Water can not be appropriated for drainage.**—Where the question is simply one of drainage, water can not be appropriated. Here the question is one as to how to get the water off the land and into the stream or drainage system and get rid of it, and not how to get it from the stream onto the land. There is also the lack of the intent to use the water for some beneficial purpose, followed up by the actual use of the same.[1] Water flowing in a drainage ditch without any intention to recapture it is abandoned.[2] So, also, water draining from mines, without any intention to recapture it upon the part of the mine owner, is abandoned.[3] So, also, where water drains from an abandoned well bored for oil, without the owner of the well making any attempt to appropriate it for some useful purpose, the owner acquired no title to the water

6 Lobdell v. Hale, 3 Nev. 507.

7 For appropriation by Indians, see Sec. 680.

1 Bartlett v. O'Connor, 102 Cal. 7, 36 Pac. Rep. 513; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175; Nevada etc. Co. v. Kidd, 37 Cal. 282; Thomas v. Guiraud, 6 Colo. 530; Davis v. Gale, 32 Cal. 26, 9 Am. Dec. 554, 4 Morr. Min. Rep. 604; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675.

For drainage, see Sec. 38.

2 Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116.

3 For abandoned water, see Secs. 1113-1115.

See, also, Farmers' Union Ditch Co. v. Rio Grande C. Co., 37 Colo. App. 512, 86 Pac. Rep. 1042.

and his deed to the same passed no title.[4] There may, however, be a dual purpose, consisting of both drainage from one portion of a person's land, and the appropriation of the drainage water for the purpose of irrigating another tract. In a case of this kind a valid appropriation may be made of what would be otherwise strictly drainage water, and that, too, even if the code providing for the notice and the recording of the same is not complied with.[5]

§ 702. Temporary appropriation to preserve works—Flushing ditch.—In an early California case[1] it was properly held that parties having the prior right to the waters of a stream and whose works were in the process of construction had the right to use so much of the waters of the stream as was necessary to preserve their works and flume from injury until such works were completed and ready to utilize the entire quantity of water for the purpose for which the appropriation was made.

In the case of Mann v. Parker,[2] the Supreme Court of Oregon rightly held that an injunction should not be granted in favor of the plaintiff where his only claim for the water was for the purpose of keeping open his ditch, at all seasons of the year, in order that it might take up and carry the flush waters of the spring season to his mining grounds, in the face of the fact that the water was claimed by a secondary appropriation for a beneficial purpose. There is nothing reported in the case to show but that a little labor with a shovel upon the part of the plaintiff might not have accomplished the same result. However, the Court evidently took that view of the subject. As well might a prior appropriator claim, in the face of secondary appropriations, all of the waters of a stream for the express purpose of assisting him in cultivating the land, and not for moistening it, and that, too, when by so doing the land was injured by the excessive moisture. A little work with a plow, cultivator, or shovel will often work wonders not only in saving the water, but in adding to the crops and preserving the soil.

4 De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

5 Lower Tule R. D. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

1 Weaver v. Conger, 10 Cal. 233, 6 Morr. Min. Rep. 203.

2 48 Ore. 321, 86 Pac. Rep. 598.

§ 703. Appropriation may be made for the sale of water.—Water may be appropriated by an individual or company,[1] where the primary purpose of the appropriators is the sale of the water to others. However, the ultimate object of the appropriation must be the use of the water, by some one, for some beneficial use or purpose, and that, too, within a reasonable time after the appropriation is made. The Supreme Court of the United States has held that,[2] a legislature of a Territory might lawfully empower a corporation to make appropriations from the natural streams, to become an intermediary for furnishing water to irrigate the lands of third parties.[3]

Not only is the sale of water permitted, but under certain conditions appropriations of water are encouraged for that express purpose. The time has come, when the water in this Western country which is still unappropriated is each year becoming more and more scarce. There are a very few places left where a farmer, with perhaps the aid of his neighbors, can run a plow furrow to a natural stream and there construct a brush dam, and by that means divert a supply of water sufficient to irrigate his farm. The irrigable lands left, which may be reclaimed by the use of the water, also lie further from the natural streams. The water must be taken out from the larger rivers, or large reservoir and canal systems must be constructed; and all this must be at a large outlay of money. This, the consumers, as a general thing, have not got; and, unless the progress of the country along these lines is to cease, the money for these projects must be obtained from some source. Hence, it has been the policy of the legislation in all of the Western States and Territories in this regard to encourage large

1 For appropriations by corporations, see Sec. 684. See, also, Chaps. 72-77.

2 Gutierres v. Albuquerque Land & Water Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

3 See, also, Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Platte W. Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Lone Tree Ditch Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W. Rep. 650; Yuba County v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740; Souther v. San Diego etc., 112 Fed. Rep. 228; affirming 121 Fed. Rep. 347, 57 C. C. A. 561.

companies with great financial backing to appropriate the waters of the natural streams or other bodies, construct the works, and then sell or rent the water, or at least the use thereof, to the farmers or other consumers. This is always upon the condition that all of the water appropriated must, within a reasonable time, be used for some useful or beneficial purpose.[4] There can not, however, be a valid appropriation for mere speculation; neither can water be appropriated for the purpose of creating a monopoly without the same being used for some beneficial purpose. Hence it follows, that an individual, after making a prior appropriation of the waters of a stream and using what he needs for his own purpose, can not sell or dispose of his surplus water to others to the injury of subsequent appropriators of the waters of the stream.[5]

§ 704. Appropriation for storage.—Again, not only may a valid appropriation of the water from a natural stream be made for immediate use, but the water may be saved up and stored in times of plenty and thus saved for the ultimate purpose of using the same in times of scarcity for irrigation, or any other useful purpose.[1] As the water stored may be sold to consumers, this question is closely allied to the question of the sale of waters, dis-

4 For right of companies to appropriate and sell water, see, also, Chap. 76.

For regulation of water rates, see Secs. 1368-1385.

Appropriation of water for speculation, see Sec. 705.

Storage of water, Sec. 704.

5 Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111, citing Kinney on Irr., 1st Ed., Sec. 231.

See, also, Creek v. Bozeman Waterworks Co., 15 Mont. 121, 38 Pac. Rep. 459; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Colorado M. & El. Co. v. Larimer & W. Irr. Co., 26 Colo. 47, 56 Pac. Rep. 185.

For rights of subsequent appropriators, see Secs. 783-786.

1 Water Supply & S. Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Farmers' High Line C. & Res. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Cache La Poudre Res. Co. v. Windsor Res. & C. Co., 25 Colo. 53, 52 Pac. Rep. 1104; Larimer County Res. Co. v. People *ex rel.* Luthe, 8 Colo. 614, 9 Pac. Rep. 794; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 528, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; New Loveland & G. Irr. & L. Co. v. Cons. Home Supply D. & Res. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Windsor Res. & C. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

cussed in our previous section.[2] But the mere diversion and storage of water and a promise to use it in the future are not sufficient to give a right thereto.[3] The water must be used for irrigation or for some beneficial purpose within a reasonable time. The right of the storage of waters for irrigation and other beneficial uses involves many intricate questions which will be discussed in another portion of this work.[4]

§ 705. An appropriation can not be made for mere speculation and monopoly.—One of the fundamental principles of the Arid Region Doctrine of appropriation is that all of the water appropriated must, within a reasonable time, be put to some beneficial use or purpose.[1] And, while all investments for irrigation projects are in a way speculations, the law is well settled that a person can not, even by prior appropriation, obtain exclusive control of the waters of an entire stream, or any part thereof, and hold the same without any beneficial use thereof within a reasonable time, for mere future speculative profit or advantage.[2] So, also, an irrigation company will not be permitted to appropriate water without limit as a matter of speculation and monopoly, and thus prevent the appropriation by others who wish to use the same for some beneficial purpose, or to impose upon consumers unreasonable conditions, or to exact from them exorbitant rates for the use of water.[3] However, a dis-

2 See Sec. 703.

3 Fort Morgan L. & C. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

4 See Chap. 46, Secs. 837-846.

1 For beneficial use, see Secs. 725-727.

2 Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Revenue etc. Co. v. Balderson, 2 Alaska 363; Miocene D. Co. v. Champion M. Co., 3 Alaska 572.

3 Combs v. Agriculture D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Weaver v. Eureka Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Smith Canal or D. Co. v. Colo. Ice & S. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Revenue etc. Co. v. Balderson, 2 Alaska 363; Colorado Mill & El. Co. v. Larimer & W. Irr. Co., 26 Colo. 47, 56 Pac. Rep. 185; Water Sup. & S. Co. v. Larimer & W. Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, 63 Am. St. Rep. 622; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430; Thomas v. Guiraud, 6 Colo. 530; Beaver Brook Res. & C. Co. v. St. Vrain Res. & Fish Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

See, also, for rights of companies

tinction must be made between those who in good faith appropriate waters with the *bona fide* intent to apply the same to some beneficial use or purpose, and who do within a reasonable time so apply the water, even if there is the expectation of a reasonable return from the investment in the project, and those who appropriate water for the purpose of creating a monopoly of the water, with the expectation of making extortionate charges to the consumers. It is the monopoly for the purpose of extortion which the law condemns.[4] The United States Supreme Court, in the case of Basey v. Gallagher,[5] held to the same effect, and Mr. Justice Field, in rendering the opinion of the Court, after stating that the right of the prior appropriator must be exercised within reasonable limits, said: "We say within reasonable limits, for this right to water, like the right to prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and *vest an absolute monopoly in a single individual.*"

to appropriate water, Sec. 684. See, also, Chaps. 72-76.

Beneficial use of water, Secs. 690, 725-728.

Purposes for which water may be appropriated, Secs. 690-704.

Regulation of water rates, Secs. 1368-1385.

[4] See rights of irrigation companies, Chaps. 72-77.

Regulation of water rates, Secs. 1368-1385.

See, also, Sowards v. Meagher, 37 Utah 212, 108 Utah 1113.

[5] 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 685.

CHAPTER 38.

METHODS OF APPROPRIATION WITHOUT CODE.

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§ 731. There can be no appropriation by prescription.
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§ 706. Scope of chapter.—In this chapter we will discuss the various methods by which a valid appropriation of the waters of the natural streams and other bodies of water may be made under the Arid Region Doctrine of appropriation, as it originated with the early miners of California.[1] But since the first edition of this work was written prior to 1893, the methods of the appropriation

[1] For history of the doctrine, see Chap. 32, Secs. 595-626.

of waters have been modified in a number of the details by the adoption in many of the Western States of what are known as Irrigation Codes, or codes relating to the appropriation and use of water, whatever may be their names. In these codes, however, the principles as laid down by the early rules have not been materially changed. The right to the use of the water depends upon the priority of the appropriation and upon the final application of all the water to some beneficial use or purpose. The only material changes are as to the details of the appropriation, the adjudication of the right, and the forfeiture or loss of the right, in case of failure to comply with some provisions of the code. But as a great many of the rights to the use of the water in all the States and Territories were acquired before the codes were adopted, and now depend as to their validity upon the appropriation in accordance with the old methods, it follows that it is necessary in a work of this nature to discuss those methods. Therefore, in this chapter, we will discuss the methods of appropriation as the same originated in California with the early miners. And in our chapter upon the subject of State control and codes, we will discuss the acquisition of water rights under those systems.[2]

§ 707. Appropriation of water—Definition.—As there can be no valid appropriation of water without its application to some beneficial use or purpose, the element of use must necessarily be embodied in the definition of an appropriation.[1] The element of use is the culminating essential of the series of acts leading up to a valid appropriation.[2] And, again, these acts upon the part of the appropriator must be in accordance with the law upon the subject in the respective jurisdictions where the appropriation is made; the method of an appropriation being left entirely to the various States and Territories.[3] And, although the authorities have attempted a number of times to define an appropriation of water, none of the definitions used seem to embody all of the requisite essentials. As said by the Federal Court, " 'Appropriation' is a much abused

2 See Chap. 68, Secs. 1337-1367.

1 For application to some beneficial use, see Secs. 725-728.

For what purposes water may be appropriated, Secs. 690-705.

2 See Secs. 708-728.

3 See Sec. 593.

For laws of the various States, see Part XIV.

word. It is often loosely spoken of as the preliminary step—such as filing a notice, making a claim to the water, or the like—but in its legal significance is embodied not only in the claim to the water, but the consummation of that claim by actual use."[4] The Supreme Court of California, in an early case, defined the term "appropriation of water" as follows: "Appropriation is the intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use."[5] This definition, although followed in a number of decisions, both in California and in the other States,[6] lacks three essential elements—the appropriation must be from a natural stream or other natural source of supply, it must be according to law, and the water diverted must have been actually applied to some beneficial use or purpose before the appropriation is complete.[7] Although some of the early Colorado decisions followed the definition given in the McDonald case,[8] a recent Colorado case comes nearer the mark. It was there said: "It has been repeatedly decided in this jurisdiction that an 'appropriation' consists of an actual diversion of water from a natural stream, followed within a reasonable time thereafter by an application thereof to some beneficial use."[9] In our opinion the only essential lacking here is that the appropriation must be in accordance with the law of the State of Colorado, if made there. Again, the Supreme Court of Washington defines the term: "Appropriation of water consists in the intention accompanied by reasonable diligence to use the water for the purpose originally contemplated at the time of its diversion."[10]

4 Morris v. Bean, 146 Fed. Rep. 432. "The term 'appropriation' is often loosely used by the authorities, and in general it is used with reference to a claim to the use of water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured." Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

5 McDonald v. Bear River & A. W. & M. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626.

6 See Larimer Co. Res. Co. *ex rel.* Luthe v. People, 8 Colo. 614, 9 Pac. Rep. 794; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Fort Morgan Land & C. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914.

7 See Secs. 725-728.

8 See Colorado cases cited, *supra*.

9 Windsor Res. & C. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

10 Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809.

It is apparent that this definition lacks three essentials and goes too far in prescribing another requisite. The appropriation must be from a natural source of water supply, it must be made according to law, and, before the appropriation is complete, the water diverted must have been actually applied to some beneficial use or purpose; then, again, it is the settled law that the water need not be applied to the identical purpose originally contemplated, but that the original use may be changed to any other use or purpose, so long as the rights of others on the same stream are not interfered with or injured.[11] The Federal Court is more definite, and has held: "An appropriation of water consists in the taking or diversion of it, and its application to some beneficial purpose."[12] There are here but two essentials lacking, the diversion must be in accordance with law, and it must be from some source of natural water supply.[13]

In all of the definitions of the term "appropriation of water," we have failed to discover one which included the element that it

11 See for change of use, Secs. 869-872.

12 Morris v. Bean, 146 Fed. Rep. 432.

13 See, also, for other definitions, Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Carter v. Wakeman, 42 Ore. 147, 70 Pac. Rep. 393; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

"Appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose." Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

"A mere diversion of water from a stream does not constitute an appropriation recognized by the constitution and statutes. To make it such there must be an application of the water to a beneficial use, and in the case of irrigation, it must be applied to the land to make the appropriation complete." Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac Rep. 444, 55 Am. St. Rep. 149.

See, also, Cash v. Thornton, 3 Colo. App. 475, 34 Pac. Rep. 268; Thomas v. Guiraud, 6 Colo. 530.

The Supreme Court of Oregon in Morgan v. Shaw, 47 Ore. 333, 88 Pac. Rep. 534, defined "an appropriation of water" as a grant by the General Government to the settler of the right to its use from a non-navigable stream, to the injury of all public land above the point of diversion, which may be within or beyond the boundaries of the settler's claim. It is evident that the Court used the expression "an appropriation of water" in the sense of a water right, and not in the sense of the act of making an appropriation. For definition of a "water right," see Secs. 758, 759.

must be made in accordance with the law of the jurisdiction where the appropriation is attempted. In every State of this Western country, there is either what is known as an "Irrigation Code" or a water code of some sort, or a line of court decisions of that particular jurisdiction, declaring just how and by what methods an appropriation of water may be made, and what it takes to constitute a valid appropriation. In the definition of the term, this element should not be ignored.[14]

Therefore, we believe that the following definition of the term "appropriation of water" under the Arid Region Doctrine of appropriation comes nearer being correct than any which we have found: The appropriation of water consists in the taking or diversion of it from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial use or purpose, and consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purpose.

In the following sections of this chapter we will take up the various essential elements as set forth in the above definition in detail.

§ 708. Intent to apply to some beneficial use or purpose.—As we have seen under the definition of appropriation of water one of the necessary elements is the intent of the appropriator to apply the water appropriated to some beneficial use or purpose.[1] All of the authorities agree upon this proposition that, in order to make a valid appropriation of waters, under the Arid Region Doctrine, there must be first an intention upon the part of the appropriator to apply the water appropriated by him to some beneficial use or purpose; and, without this intention, it is held that no valid appropriation is made and that the water is subject to appropriation by other parties.[2] As was well said in a recent Montana case:[3] "If

14 For the various codes, see Part XIV.

For appropriation in accordance to a code, see Secs. 1349-1357.

1 For definition of appropriation, see Sec. 707, and cases cited.

2 Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601, 10 Cal. 217, where it was held that merely cutting a ditch for a drain, and using the water for no useful purpose gives no priority.

McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Weaver v. Eureka Lake Co., 15 Cal. 271, where it was held that to render valid a

our statute does not by express terms it does by fair implication require that, at the time of taking the initial steps the claimant must have an intention to apply the water to a useful or beneficial purpose.[4] The law will not encourage any one to play the part of the dog in the manger, and therefore the intention must be *bona fide* and not a mere afterthought."[5] The very birth of a prior right to the use of water under this doctrine is the intention to apply the same to some beneficial purpose.[6] The intention of the claimant is, therefore, a most important factor in determining the validity of an appropriation of water.[7] And, furthermore, from the earliest history of the doctrine of appropriation down to the present time, in all jurisdictions, and under all of the irrigation codes and water systems, the intention upon the part of the appropriator to eventually apply the water so taken to some beneficial use or purpose, has always been considered an essential prerequisite.[8] In a recent de-

claim of water by appropriation the claim must be for some useful or beneficial purpose, or in contemplation of a future appropriation for such purpose, for the parties claiming it. A claim for mere speculation will not answer.

That an appropriation can not be made for mere drainage, see Secs. 690, 691.

3 Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

4 Citing Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Miles v. Butte El. & Pr. Co., 32 Mont. 56, 79 Pac. Rep. 549; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 587.

5 Citing Nevada County & S. C. Co. v. Kidd, 37 Cal. 282.

6 For what purposes water may be appropriated, see Chap. 37, Secs. 690-705.

7 Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396.

8 See Pomeroy on Riparian Rights, Sec. 47.

See, also, cases cited, *supra*.

McDonald' v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Dick v. Caldwell, 14 Nev. 167; Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Dick v. Bird, 14 Nev. 161; Crane v. Winsor, 2 Utah 248, 11 Morr. Min. Rep. 69; Thomas v. Guiraud, 6 Colo. 530; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Munroe v. Ivie, 2 Utah 535, 8 Morr. Min. Rep. 127; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; North American Exploration Co. v. Adams, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727, where the Court said: "There must be some actual beneficial purpose, existing at the time or contemplated in the future, as the object for which the water is utilized."

See, also, Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Smith Canal or Ditch Co. v. Colorado etc Co.,

cision by the Supreme Court of the author's own State, Mr. Justice Stroup, in rendering the opinion of that Court, said: "Says Mr. Kinney in his work on Irrigation: 'There must be, first, some actual beneficial purpose existing at the time, or contemplated in the future, as the object for which the appropriator is to use the water.'"[9] As stated by the Oregon Court, however: "We take it, therefore, that the *bona fide* intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and possessions other than those of the appropriator. Thus, the appropriator is enabled to complete and finally establish his appropriation through the agency of the user."[10]

As we have seen in another chapter, the purpose for which the intention to appropriate the water is made, may be for irrigation, for agricultural or horticultural purposes, mining, milling, power, manufacturing, domestic, or for any other useful or beneficial purpose for which water is needed to supply the natural and artificial wants of man.[11] And, again, a right acquired by an appropriation for any useful or beneficial purpose stands upon an equal footing with the right for any of the other purposes, except in those States where by constitutional or statutory provisions preference rights are given to some particular purpose, and then the preference right is given only in times of extreme scarcity of the water and when it is not sufficient for all who may desire to use it.[12] And, upon the

34 Colo. 485, 82 Pac. Rep. 942, 3 L. R. A., N. S., 1148; Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 587; Snyder v. Colorado etc. Co., 181 Fed. Rep. 62, 104 C. C. A. 136; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

9 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112, citing Kinney on Irrigation, Sec. 151.

Citing, also, Pomeroy on Water Rights, Sec. 48.

Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

10 Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

See, also, Nevada Ditch Co. v. Canyon & Sand Hollow Ditch Co., 58 Ore. 517, 114 Pac. Rep. 86, where the Court adopted the language taken from the above case.

11 See Chap. 37, Secs. 690-705.

12 For preference rights, see Secs. 791-794.

other hand, an appropriation for water for one of these useful purposes is not justifiable when it interferes with or injures the rights acquired by valid appropriations made prior thereto by others for that or for any other purpose.[13]

Under the definition of the appropriation of water it is apparent that mere intention upon the part of the appropriator without some physical demonstration of that intention is not sufficient to constitute a right to the use of the water. But the intention must be followed up by a completion of the necessary works for the diversion and by an actual application of the water to a useful purpose within a reasonable time.[14]

§ 709. Intent to apply—Evidences of.—The question as to the intent to apply the water, attempted to be appropriated, to a beneficial use or purpose [1] is one of fact, and may be proven by any evidence which tends to show the intent. In the first place, there must be the possibility of the water, after it has been appropriated, being applied to either the purpose covered by the intent or to some other useful purpose. In other words, there must be in existence a beneficial use to which an appropriator may apply the water, either at the time of the attempted appropriation, or such a use

13 For priority of right, see Secs. 776-782.

14 For reasonable diligence in the completion of works, see Secs. 733-741.

For application of the water to a useful purpose, see Secs. 725-728.

McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626.

A priority of right for the storage of water can not be acquired by the mere intention to construct the necessary works. New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Larimer Mill. & El. Co. v. Larimer & W. Irr. Co., 26 Colo. 47, 56 Pac. Rep. 185; Ortman v. Dixon, 13 Cal. 33; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Union Mill & M. Co. v. Dangberg, 81 Fed. Rep. 73, where Judge Hawley said: "In the appropriation of water, there can not be any 'dog-in-the-manger' business by either party, to interfere with the rights of others, when no beneficial use of the water is or can be made by the party causing such interference."

See, also, Kelly v. Natoma etc. W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Columbia M. Co. v. Holter, 1 Mont. 296; Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; Carter v. Wakeman, 42 Ore. 147, 70 Pac. Rep. 393.

1 See preceding section.

must, within reason, be expected to exist very shortly after the diversion of the water is made to which the water may be applied or the appropriation can not be consummated.[2] Therefore, if there is no beneficial use or purpose in existence at the time, or one, which with reasonable expectation will exist in the future, to which the water may be applied by the appropriator after it has been diverted, then, of course, the intention to appropriate fails for lack of a purpose.[3] This intention goes to the very foundation of the act of appropriation, and must be evidenced by a constancy, or steadfastness of purpose or labor as is usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs.[4] According to the definition of the appropriation of water given by the early California cases, the intent to take must be accompanied by some open physical demonstration of the intent.[5] There must be such assiduity in the prosecution of the project as will manifest a *bona fide* intention to complete the construction of the works necessary to carry the water to the place where it is to be used, and the actual application of the water to the use intended.[6] And, where there is no evidence of an actual intention at the time the appropriation is attempted to apply the water to some useful purpose, or there is evidence that there is unnecessary delay in the completion of the works for its diversion, then a subsequent appropriator

2 That the consummation of an appropriation is the actual use of the water, see Secs. 725-728.

3 "There must be some actual beneficial purpose, existing at the time or contemplated in the future, as the object for which the water is utilized." Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13.

4 Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, all citing Kinney on Irrigation, 1st Ed., Sec. 150.

See, also, Ortman v. Dixon, 13 Cal. 33, where it was said: "The intent to take and appropriate and the outward act go together."

5 McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626.

See, also, for definition of appropriation, Sec. 587, and cases cited.

6 Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Ophir S. M. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

For reasonable diligence in the prosecution of the works, see Secs. 733-741.

who first makes a valid appropriation has the better right.[7] Hence it follows that an excessive appropriation can not be considered valid as to the excess.[8] This may be illustrated by actual cases which have transpired many times. A farmer having a certain amount of land which requires a definite amount of water to properly irrigate the same, attempts to appropriate twice or three times the amount of water necessary, and tries to hold the same even to the injury of his land. He can not properly use the excess water and if there is no evidence that he intends to apply it to some other useful purpose within a reasonable time, others have the right to make a valid appropriation of the excess.[9]

The contents of the notice of the attempted appropriation is also evidence of the intent of the appropriator, but it should by no means be regarded as conclusive, either as to the amount claimed or the application to the purpose specified. It is the common habit of appropriators to claim in their notice more water than they really intend to use or oftentimes can appropriate or use for the purpose indicated in the notice. However, in connection with the claim set forth in the notice, the Court may also examine all the other facts in any particular case which tend to prove the actual intent of the appropriator. Such facts may be such as the purpose indicated in the notice, the actual amount of water required for such purpose, the acts of the appropriator in prosecuting the work necessary, the size of the ditch and its capacity, the method of diversion from the stream, the method of the application of the water, and any other facts which tend to show the true purpose of the appropriator.[10] As was said in a Montana case,[11] "As every appropriation must be made for a beneficial or useful purpose, it becomes the duty of the courts to try the question of the claimant's

7 Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642.

8 For excessive appropriations, see Sec. 727.

9 For duty of water, see Secs. 902-908.

For wasting water, Secs. 911-916.

For rights of subsequent appropriators, Secs. 783-786.

See, also, Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 398.

In the appropriation of water there can be no "dog-in-the-manger" business. Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

10 See Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; White v. Todd's etc. Co. 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536.

As to necessity of notice, see Secs. 709-716.

11 Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396.

intent *by his acts* and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof." [12]

§ 710. **Notice of intent to appropriate water.**—Having shown in the previous sections that there must be an actual and *bona fide* intention, in order to appropriate water to apply the same to some beneficial use or purpose,[1] one of the first steps necessary for the appropriator to take is to give notice of that intent. This is so in order that others may know of the claim of the appropriator, and that the doctrine of relation may apply.[2] This notice in most jurisdictions under the old statutes must be recorded in order that some sort of a record may be made of the claim.[3] It is true that in some jurisdictions, a notice was not required under the early statutes, and that a failure to post and record such a notice would not be fatal to the appropriation,[4] but it is the better practice that one be given and that the same be recorded. One of the great defects of the early law of appropriation in all of the States and Territories is the absence of a record of the claims to water. Upon the other hand, the ownership to land has been carefully recorded in all jurisdictions from the earliest times; and, at the same time, in many localities there was absolutely no record to the claims of waters of the natural streams running through those lands. By recent legislation in the most of the jurisdictions, an attempt has been made, by a system of adjudication of existing water rights, to remedy this defect, and in a way this has been successful.[5]

There should be as complete a record of the existing claims to water rights claimed in the waters flowing in the natural streams or other sources of supply, as there is of the land over which these waters flow. And the notice of the claims of the various appropriators is one of the methods by which this record may be obtained.

12 See, also, Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32.

1 See Secs. 707-709.

2 For doctrine of relation, see Secs. 742-756.

3 See laws of the various States, Part XIV.

4 Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111.

For the right to appropriate without notice, see Sec. 730.

See, also, Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308.

5 For adjudication of existing water rights, see Secs. 1530-1595.

In most of the jurisdictions, even before the adoption of the so-called irrigation codes, laws were passed upon the subject of the appropriation of waters, in which was the requirement that a notice of the claim of an appropriator be posted on the ground and that the same be recorded in the official records designated in the law, and usually the office of the county recorder.[6] And, further, prior to the enactment of any statute, in most jurisdictions, the local customs of the miners relative to the locating of mining claims required also that the same practice be followed relative to the appropriation of waters. One of these requirements was that a notice be posted on the ground and be recorded.[7] The adoption of these early statutes, was, therefore, the embodiment, in statutory form, of the customs and rules of the miners in this respect. The later irrigation codes and water laws passed in all of the States provide for notice and for the recording of the same. This subject will be discussed in other portions of this work.[8]

§ 711. Notice—Form of—Before statute.—Under the customs of the miners and early settlers, and also under the early statutes

[6] See laws of the various States, Part XIV.

See California Civil Code, Sec. 1415; 2 Kerr's Cyc. Codes, p. 1159.

See, also, for California statute, Chap. 86.

[7] The question, whether a person has made a valid appropriation of water, depends upon the questions, whether he has given a proper notice of his intention to appropriate it, and whether he has prosecuted the work in that behalf with reasonable diligence. Osgood v. Eldorado Water etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

In Arizona it was customary to post notice prior to the statute of 1893. Dyke v. Caldwell, 2 Ariz. 394, 18 Pac. Rep. 276.

In Oregon it was also customary, prior to the passage of the statute of 1905. See Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. Rep. 30.

In New Mexico no notice was required prior to the Act of 1905. Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111.

In Montana, prior to the Act of 1895, no notice of appropriation or record was required. Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137.

Colorado has never enacted any statute requiring the posting of a notice nor the doing of any other act prior to the commencement of the work. Mills' Irr. Manual, 1907, p. 74.

See chapter on State Control, Secs. 1337-1367.

See, also, for laws of Colorado, Chap. 87.

[8] See, for laws of various States, Part XIV.

Also, see chapter on the laws of State control, Secs. 1337-1367.

upon the subject, there was no particular form of notice prescribed, and any form which gave the name of the appropriator, a definite description of the locality, the name of the stream from which the appropriation was to be made, a description of the point of diversion, usually with reference to some natural object or permanent monument, the amount of water claimed to be appropriated, and the purpose of the appropriation, was deemed sufficient. In general, the early appropriators followed the forms used to locate mining claims. All that was considered necessary was that the terms of the notice should be sufficient to put a reasonably prudent man upon inquiry as to the rights claimed by the party posting it. Such notices were admissible in evidence, should there be litigation over the water right claimed under them,[1] and were liberally construed in favor of the party claiming rights under them.[2]

§ 712. **Notice—Form of—Under statutes.**—As we have mentioned before,[1] prior to the adoption of the various modern codes, in most jurisdictions, statutes were enacted, which in a way regu-

1 Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615, where it was held that where parties go to trial in actions for the diversion of water, upon general averments and denials of title, anything which legally supports or attacks a title is admissible in evidence, and hence the notice under which one of the parties claimed title was admissible.

See, also, Yale on Mining Claims and Water Rights, p. 78.

Hess v. Winder, 30 Cal. 349; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; North Noonday M. Co. v. Orient M. Co., 6 Sawy. U. S. 299, 1 Fed. Rep. 522.

2 In Osgood v. Eldorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37, it was held that a notice as follows was sufficient: "In conformity with an Act of Congress, entitled an Act granting a right of way to ditch and canal owners over the public lands, and for other purposes, approved July, 1866, the undersigned truly claims, and are by priority of possession, entitled to the use of the waters of this stream for mining, manufacturing, agricultural, and other purposes, and intend to dam said stream, and carry the same, or a portion thereof, in a flume, ditch, or canal or by natural channels, wherever found suitable, to certain mining and agricultural districts; and that the construction of said flume or ditch will not injure any settler on the public domain.

"J. KIRK.

"F. A. JOHNSON."

See, also, Floyd v. Boulder Flume & Mer. Co., 11 Mont. 435, 28 Pac. Rep. 450, where the Court even went to the extent of curing the obscurity in the notice, and by decree made the rights of the parties under the same definite and certain.

1 See Sec. 620.

lated the appropriation of waters. And, although no exact forms were prescribed as to how the notice should be drawn, in those States requiring notice of appropriation certain essentials were required to be embodied in the notice. And, where this is the case, a notice of appropriation should, of course, contain all of the essentials called for by the statute; and it is held in California that, where the notice did not conform to the requirements of section 1415 of the Civil Code, the party attempting the appropriation could not claim any rights thereunder.[2]

Section 1415, of the Civil Code of California upon the subject of notice went into effect with the rest of the code on the first of January, 1873; and as this was largely followed by other States, and is still in full force and effect, we will here give this section in full.

"Sec. 1415. *Notice of Appropriation.*—A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

"1. That he claims the water there flowing to the extent of (giving the number) inches measured under a four-inch pressure;

"2. The purpose for which he claims it, and the place of intended use;

"The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it."[3]

In the State of Washington, the form provided by the statute

2 Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408.

3 The rest of the section applies to the posting of notice and the change of the point of diversion and the place of intended use. See, also, for the California Code upon the subject, Secs. 1410-1422, Laws of California, *post*, Chap. 86.

See, also, 2 Kerr's Cyc. Codes, pp. 1137-1165, and cases cited.

In a California case it was held that a posted notice of a claim of the waters of a lake for irrigation, stating that the water claimed was to be used on land owned by the plaintiff, describing it, contained sufficient statement of the purpose for which the water was claimed, and place of intended use, although it further stated that the water was also to be used for irrigation by other parties, to whom the plaintiff might furnish it on other lands not described. It was further held that where the notice of appropriation stated that the water was to be conveyed to the place of intended use by a "six-inch pipe or by a pipe of other dimensions," it was sufficient to authorize a diversion of the quantity of water that could be carried in a six-inch pipe. Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

for the notice is almost identical with that of California.[4] The same is true in the State of Montana.[5] In Alaska, by the Act of June 6, 1900,[6] it is provided that the Clerk of the Court as ex-officio Recorder must procure such books for records as the business of his office requires, and such as may be required for the purpose of recording "notices and declarations of water rights." No form of notice is provided.[7] But, as will be seen from the decisions cited in our notes, that the courts in construing these notices hold that as to the form thereof a substantial compliance with the statute is sufficient, and especially is this true if the appropriation is a prior one.[8]

A notice of appropriation need not be verified or acknowledged in order to make it valid, and entitle it to record, unless it is especially provided for by the statute.[9]

§ 713. Notice—Posting and recording.—The first physical act necessary in making an appropriation, and one upon which a great

[4] See Remington & Bal. Ann. Codes and Stats., 1910, Sec. 6317.

[5] "Any person desiring to appropriate water in any stream, creek, canyon, river, or ravine, wherein the rights of water therein have been adjudicated and decreed, shall post a notice in writing in a conspicuous place at a point of the intended diversion, stating therein: 1. The flow claimed, expressed in cubic feet per second; 2. The purpose for which said water is claimed, and the place of intended use; 3. The name of the stream, creek, spring, canyon, river or ravine; 4. The name of the appropriator or appropriators; 5. The date of the posting said notice." Montana Statutes, 1907, ch. 185, p. 489, Sec. 4.

[6] 1 Fed. Stat. Ann., p. 29, Sec. 14, subd. 7; 31 Stat. L. 327.

[7] For other statutes as to the form of notice, see Part XIV.

For the appropriation without any notice, see Sec. 730.

Lower Tule River D. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

See, also, upon the subject of contents of notices: Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Duckworth v. Watsonville etc. Co. 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

[8] See cases cited, *supra*.

Floyd v. Boulder Flume & Mercantile Co., 11 Mont. 435, 28 Pac. Rep. 450; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. Rep. 867; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Osgood v. Eldorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

[9] De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

deal depends, is the posting of the notice of appropriation. The usual mode of giving the notice, at an early period and before any statutory enactment upon the subject had taken effect, was by posting written or printed notices on or near the margin of the stream, or other source of supply, at the point where the diversion was to be made; and, also, perhaps, posting similar notices at various points along the projected line of the ditch or canal.[1]

Later it became customary not only to post the notices as above, but also to file and record the same, either in the office of the county recorder of the county or with the recorder of the mining district where the appropriation was intended. And still at a later period, especially in those States and Territories which have passed statutory enactments relative to this subject, it became necessary to file and record the notice in the office provided for by law, which was usually in the office of the county recorder or the county clerk.[2] At the present time, if an appropriator desires to receive the benefits of the notice as the inception of his right, he is required by statute in all of the Western States to post the notices of appropriation on the stream at the point of diversion, and usually along the line of the projected ditch or canal, and record the same in some official records, which are now designated by the laws of the various States.[3] However, as we shall see in a later section,[4] even in California and other States, where the statutes prescribe that a notice must be given, this is held to be merely directory, and that an appropriation may be made without the posting or the recording of any notice.[5]

1 For form of notice, see Sec. 712.

See, also, Osgood v. Eldorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. Rep. 867; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615.

2 A notice may also be posted within the boundaries of a National Forest, if the Acts of Congress and the laws of the State wherein the appropriation is attempted, are complied with. Kings River Pr. Co. v. Knight, 32 Land Dec. 144.

For the appropriation of waters on the National Forests, see Sec. 669.

For rights of way over National Forests, see Secs. 954-966.

3 See laws of various States, Part XIV.

See, also, laws of State control, Secs. 1337-1367.

4 For appropriation without notice, see Secs. 730, 751.

5 See, also, Lower Tule River D. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

§ 714. Notice—Effect of.—Although it is held in most jurisdictions, that a valid claim to the use of water may be acquired without the posting of a notice,[1] the posting of a notice is necessary to fix the exact date of the inception of the title of the appropriator, and to preserve his inchoate right from that date until the water is actually applied to some beneficial use or purpose. Provided, always, the appropriator has fully complied with all of the essential requisites necessary to make his appropriation, by the doctrine of relation, the inception of his title begins at the date that he posted his notice.[2] As was said in a recent California case:[3] "Such a claimant to the use of water has an incomplete, incipient, conditional right in the water, which is a vested interest in real property."[4] In fact in some States it is provided by statute that by a full compliance with the statutory requirements, "the claimant's right to the use of the water relates back to the time the notice was posted."[5]

Another effect which the notice has is that upon the rights of others attempting to make appropriations subsequent to the notice from the same source of supply. All subsequent appropriators, who date their claim later than the notice of the first appropriator, acquire only rights to the surplus water, if any, after the valid claim of the prior appropriator has been fully supplied.[6]

1 See Secs. 730, 751.

2 For doctrine of relation, see Secs. 742-756.

The notice of appropriation is not a mere declaration of intention to appropriate water, but is evidence of possession; and, although not of itself sufficient, constitutes one of a series of facts, which, taken together, make a perfect right. Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610.

See, also, Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. Rep. 189; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

3 Merritt v. Los Angeles, —— Cal. ——, 120 Pac. Rep. 1064.

4 See, also, Inyo Consolidated Water Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 934.

5 Cal. Civ. Code, Sec. 1418.

Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324.

6 See rights of subsequent appropriators, Secs. 783-786.

See, also, Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 62; Nevada etc. Co. v. Kidd, 37 Cal. 282; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep.

This is also the rule where the right to the use of the water is claimed by riparian owners, in those jurisdictions which have both the law of appropriation and the common law of riparian rights.[7] The notice, therefore, acts as a warning to all later comers that the party posting it has a claim from the date thereof to the waters of the stream to the extent of the amount claimed in the notice, and later comers act at their own risk, and can appropriate the surplus water subject to the actual rights of the prior appropriator.[8] But whether the claim of the prior appropriator can be maintained depends entirely upon the application of all the water claimed to some beneficial use or purpose.[9] Upon the other hand, the failure to post a notice or the posting of a notice which does not conform to the requirements of the statute is a waiver of all advantages that a proper notice would have given.[10]

§ 715. Notice—Limits the extent of the water right claimed.—Another effect that a notice has is in limiting the right of the appropriator to the amount of the water claimed in the notice. It is the settled rule that an appropriator under one appropriation

777; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Cruse v. McCauley, 96 Fed. Rep. 369.

7 Congress, in making grants to railroad companies, can not be supposed to have exercised its liberality at the expense of pre-existing rights, which, though imperfect, are still meritorious and have just claims to legislative protection. Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 62.

See, also, De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Nevada etc. Co. v. Kidd, 37 Cal. 282.

See, also, for the extent of the rights of appropriators, Secs. 775-803.

Contests between riparian owners and appropriators, Secs. 810-823.

8 Nevada etc. Co. v. Kidd, 37 Cal. 282; Salt Lake City v. Salt Lake etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 61 L. R. A. 648; Rincon etc. Co. v. Anaheim etc. Co., 115 Cal. 543; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. Rep. 549.

For notice limiting the extent of the right, see Sec. 878.

9 See Secs. 725-728.

10 Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408, where it is said: "The notice posted by him at the spring did not conform to the requirements of Section 1415 of the Civil Code, and he can not therefore claim any rights thereunder as an appropriator of water."

See, also, De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

But see appropriation by actual diversion, Sec. 730.

depending upon a notice can claim no more water than is called for in the notice.[1] As all the waters are open to appropriation by successive appropriators this rule is necessary to ascertain the claims of those who are prior.[2]

And, upon the other hand, owing to the tendency of appropriators to claim in the notice more water than they can reasonably use for the purpose for which the water is appropriated, the notice can not always be a guide as to the actual extent of the claim of an appropriator. As we shall see in a subsequent section, the amount which within a reasonable time is actually used for some beneficial use or purpose is the extent of the right.[3] As was said in a recent case decided by the Supreme Court of California: "The amount claimed in the notice is no measure of the right. . . . It extends only to the water actually taken and used."[4]

This subject will be further discussed when we come to that of the extent of an appropriation.[5]

§ 716. Notice—Alone not sufficient.—The notice of appropriation, if the law has been fully complied with in that respect, is evidence of possession, but of itself is not sufficient to maintain a claim to a water right. It forms but one of a series of acts which, taken altogether, constitute a perfect right. As we shall discuss in other sections of this work, the notice must be followed up by the commencement and completion of the works for the diversion of the water; there must be an actual diversion of the water; and the consummation of the right is only had when all of the water is actually applied to some beneficial use or purpose.[1] As was held

1 For appropriation without notice, see Secs. 730, 751.

For right of appropriator to make subsequent appropriation, see Secs. 783, 784.

So, where the appropriation was made "in pursuance with a notice duly given and made," a finding by the trial court that the appropriator is entitled to 12 times that amount can not be sustained." Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523.

See, also, Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137.

2 For rights of secondary appropriators, see Secs. 783-786.

3 See Sec. 877.

4 Duckworth v. Watsonville W. & L. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

5 See Secs. 877-885.

1 See Secs. 725-728.

Notice alone of an intention to divert the water of a stream, for a specified purpose, will not, of itself,

in a recent Oregon case,[2] the filing of notice of appropriation of waters merely shows an intent to appropriate them, and the notice alone does not establish an appropriation nor determine the time or amount thereof, but there is the necessity for the actual diversion of the water and for its use and the application to a beneficial purpose before title can be acquired.[3] And, upon the other hand, the mere act of commencing or digging a ditch or canal, even with the intent to appropriate the water of a stream and apply the same to some beneficial use, is not sufficient of itself to hold the water right, as against others, without some notice or publication of the intent.[4] But this right to the use of water being simply

constitute an appropriation, but must be followed up by the commencement and completion of the works for the diversion thereof. Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Columbia M. Co. v. Holter, 1 Mont. 296.

See, also, Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Kimball v. Gearhart, 12 Cal. 28, 1 Morr. Min. Rep. 615.

Robinson v. Imperial S. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370, where the circumstances were that certain parties, Black and Eastman, in December, 1859, posted a notice on a tree, on the bank of the Carson River, of the location of a water right commencing at that point, and of a right of way for a ditch of a certain capacity to a rocky bend of the river below, and within the next six months did some fifteen or twenty days' work on the ditch, but not sufficient to make it of any practical use, *held*, not sufficient acts on the part of Black and Eastman to give them actual possession of the land traversed by the ditch, or to prevent the subsequent appropriation of the same by another party.

2 Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535.

3 See, also, Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Cardoza v. Calkins, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. Min. Rep. 689; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Mitchell v. Amador C. & M. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246; Thompson v. Lee, 8 Cal. 276, 1 Morr. Rep. 610; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. Rep. 549; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Columbia M. Co. v. Holter, 1 Mont. 296; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

For application of the water to a beneficial use, see Secs. 727, 877.

Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 587; Snyder v. Colo. etc. Co., 181 Fed. Rep. 62, 104 C. C. A. 136.

4 In Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615, the Court said: "Thus is put in issue the very question of title, and this involves, necessarily, the due prosecution of the

a possessory one by the appropriator, the giving of public notice of his intent to apply the water to some beneficial use, the surveying the ground, setting stakes along the line of the projected canal, and actually commencing and diligently pursuing the work to its completion, and finally using the water for some beneficial use or purpose, constitute as much possession as the nature of the subject will admit, and form a series of acts of ownership that must be conclusive of his right. Thus under this rule, the giving of notice is merely one of a series of acts which gives possession, but which constitutes only a part of the evidence of the conclusive right of ownership. Indeed, from the very nature and character of these water claims, it is one of the most important acts of the appropriator, and tends more to prevent imposition upon the public than any of his other acts. The appropriator might make a survey, set stakes along the line thereof, and immediately commence work thereon, and continue the same; and yet none of these acts without notice, unless far progressed, would convey an idea to other persons desiring to divert and appropriate the water of a particular stream, that he intended to construct a trail, road, or ditch; but after the notice of the intention to appropriate the water has once been given, in order to hold the right, thus only partially acquired, the works by which the appropriation is to be effected must be actually commenced, and must then be prosecuted with all reasonable diligence, until the same are completed, and the water diverted from its natural stream into the ditch, and conducted to the place where it is to be used, and then actually applied to some beneficial use or purpose.

And again, the notice is of great advantage to the appropriator, as where a valid notice is posted according to law, this constitutes the inception of his title to the water right, and from the date of the posting he can hold his right during the intervening

work after the appropriation, or, in other words, after the indication by some palpable and unequivocal outward sign of the intent to appropriate. The title to the water does not arise, as we have intimated before, from the manifestation of a purpose to take, but from the effectual prosecution of that purpose. This prosecution, therefore, is a necessary element of a title, and the negation of this, the abandonment of the purpose, is not so much matter in avoidance of a title, as it is matter showing that no title was ever obtained." See, also, Robinson v. Imperial S. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370.

time to the consummation of his right by the actual application of the water to some useful purpose, provided, of course, that he uses due diligence in the accomplishment of that purpose.[5]

§ 717. Physical acts necessary other than notice.—An appropriation of water can not be constructive, but it must be actual, and, as was held in the early cases of California, the intent to appropriate must be "accompanied with some open physical demonstration of the intent."[1] It follows, therefore, as we have seen in a preceding section, that a notice of intention to appropriate the water of a specified stream is not of itself sufficient to constitute an appropriation thereof, although, in connection with other acts, it may be sufficient to hold the attempted appropriation, as against all later comers, until the necessary works are complete and the water actually applied to a useful purpose.[2]

5 For due diligence in construction works, see Secs. 733-741.

For the doctrine of relation, see Secs. 742-756.

1 McDonald v. Bear River etc. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626.

For intent to appropriate, see Secs. 707-710.

For definition of "appropriation of water," see Sec. 707.

See Kelly v. Natoma Water Co., 6 Cal. 105-108, 1 Morr. Min. Rep. 592, in which Mr. Justice Heydenfeldt said: "Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows. Such appropriation *can not be constructive*, because there would be no rule or limit to control it, resting, as it must, only in intention. The principle as laid down in Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, must govern this case. The design of the defendants, two years before, to appropriate Alder Creek, as a connecting link of their enterprise, could not give them exclusive rights until it was executed, because it was not the intention to possess, but the actual possession, which gives the right."

In Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594, it was held that the enclosure of the ground used in digging a canal, not being necessary for the work, would give its proprietor no higher rights; nor is it necessary, as notice, to those who have received actual notice of the intended line of the canal.

See, also, Tuolumne W. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34; Coryell v. Cain, 16 Cal. 567.

2 Cruse v. McCauley, 96 Fed. Rep. 369; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111, both citing Kinney on Irr., 1st Ed., Sec. 159.

See, also, Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Jones v. Jackson, 9 Cal. 237; Robinson v. Imperial S. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370; Columbia M. Co. v. Holter, 1 Mont. 396.

As has been shown, there must be, first the *bona fide* intent to appropriate the waters of a stream and apply the same to some beneficial use or purpose. Then, in connection with this intent, there must follow the physical acts necessary to constitute the actual appropriation of the water, which include the notice to the world of the intent, the surveys, and commencement of the digging of the ditches, building of flumes, or other works necessary; their completion within a reasonable time after the notice; the actual diversion of the water appropriated from the natural stream into the appropriator's ditch; and, finally, the actual application of all of the water appropriated and so diverted to some beneficial use or purpose. No one of these acts can stand alone, but all are absolutely essential to the successful and valid completion of the appropriation. But just what physical acts are necessary for its successful termination, depends upon the condition of the stream, the nature of the climate and soil, the length of the canal, the difficulty of obtaining labor, tools, or material, and the many other circumstances connected with each particular case.[3]

§ 718. **The works necessary must be constructed.**—In order to make a valid appropriation of water, certain works must be constructed by means of which the water may be diverted from the stream and conducted to the place where it is to be used. These works must be sufficient to meet the ends of the purpose of the

[3] Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Osgood v. Eldorado Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Kelly v. Natoma Water Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Robinson v. Imperial S. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370; Columbia M. Co. v. Holter, 1 Mont. 296; Thomas v. Guiraud, 6 Colo. 530; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; King v. Edwards, 1 Mont. 235; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; affirming *Id.*, 1 Mont. 561.

See, also, Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Cruse v. McCauley, 96 Fed. Rep. 369; Lower Tule River D. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

For construction of works, see Secs. 716-721.

For actual diversion of the water, see Secs. 722-724.

For reasonable diligence in construction works, see Secs. 733-741.

For actual application of the water, see Secs. 725-728.

appropriation. The law in this respect does not require impossibilities, or useless or vain things to be done. In the appropriating of the unclaimed water flowing over the public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of each particular case and the topography of the country will admit of, and are under the circumstances and at the time practicable. Notices, surveys, stakes, and the blazing of trees, followed by work and actual labor without abandonment, will, in every case where the work necessary is completed within a reasonable time, and the water actually applied to some beneficial use, give title to the water over subsequent claimants.[1] But in every case, in order to make a valid appropriation of water, there must be some physical act upon the part of the appropriator, in order to hold possession of the right. It is just as necessary to the creation and preservation of a water right to provide means for the continual diversion of the water from its natural channel, and for conducting it to the place where it is to be used, as it is to apply it to a beneficial use or purpose. All this must be provided for by the appropriator himself in a lawful manner. Hence he can not arbitrarily seize and use another's ditch, or an interest in a ditch, for that purpose.[2]

Under the law of appropriation the mere settlement upon the banks of a stream is not enough to constitute an appropriation of the water of the stream without some physical act constituting possession.[3] Hence no valid appropriation of water is made by merely settling on land and cutting the wild grass, or grazing on the same, where it is produced by the water of a river naturally coming down, and, in times of high water, overflowing and spreading over the land, without some act upon the part of the settler to take possession of the water.[4] However, in the Federal case of

[1] Kimball v. Gearhart, 12 Cal. 28, 1 Morr. Min. Rep. 615.

[2] McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773; Inyo Consolidated Water Co. v. Jess, — Cal. —, 119 Pac Rep. 934; Wishon v. Globe Light & Pr. Co., 158 Cal. 137, 110 Pac. Rep. 290.

For the acquisition of right to use ditches of others, see Secs. 1084, 1085.

[3] For riparian rights, see Secs. 451, 458.

[4] Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Robinson v. Imperial etc. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370, where the Court held that the mere appropriation of a mill site was not an appropriation of water.

See, also, appropriation for mining purposes, Sec. 694.

Schwab v. Beam,[5] Judge Hallett held to the contrary. The holding in this case is contrary to all precedent in the State of Colorado, and has not been followed since. Since writing the above, the case of Snyder v. The Colorado Gold Dredging Co.[6] was decided by the Circuit Court of Appeals, in which Judge Van Devanter, in rendering the opinion, said: "In Schwab v. Beam[7] a different conclusion was announced, but that decision stands alone, is not in accord with the decisions of the Supreme Court of Colorado respecting the application of the doctrine of appropriation as there prevailing to the use of water for purposes other than irrigation, and is not sustained by what seems to be better reasoning."[8] To hold that the mere settlement upon land bordering upon a stream will give rights to the use of the water flowing therein, and that, too, without any act upon the part of the settler to take possession of the water, would be to return to the common law theories of riparian rights, which have been discussed in a previous portion of this work.[9] This is the rule under the common law States, and also in those States which have both the doctrine of appropriation and still adhere to the common law.[10] Under the doctrine of appropriation, the settlement upon land bordering upon a stream constitutes no element of an appropriation. It requires no ownership to land,[11] and the water may be appropriated to irrigate non-riparian land.[12]

§ 719. The works—Kind necessary.—The kind of the works necessary for the appropriation of water varies with each particular case. In some cases they must be great, but in others they need be but very small. However, some kind of works is necessary, in order to obtain possession of the water and maintain the water right. And,

See, also, Leggat v. Carroll, 30 Mont. 348, 76 Pac. Rep. 805.

5 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279.

6 181 Fed. Rep. 62, 104 C. C. A. 136.

7 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279.

8 But see Cascade Town Co. v. Empire Water & Power Co., 181 Fed. Rep. 1011.

9 For common law theories, see Chaps. 21-28, Secs. 450-551.

For irrigation as a riparian right, see Chap. 26, Secs. 498-525.

For right to subterranean waters, see Secs. 1148-1211.

10 Leigh v. Ind. D. Co., 8 Cal. 323, 12 Morr. Min. Rep. 97; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604.

11 See Secs. 766, 767.

12 See Secs. 766, 767.

whatever works are necessary, in order to hold possession of a water right, they must be fully constructed, and that, too, within what is termed a "reasonable time."[1]

But the character of the works necessary to make an appropriation and hold title to a water right varies greatly and depends entirely upon the features surrounding each particular case. The farmer, living near a small stream, desiring to irrigate his land consisting of but a few acres, may find that in his case all the works necessary to be constructed by him, in order to make and hold his appropriation of the water, is a brush and earth dam in the stream and a couple of plow furrows from that point to the field where the water is to be used. Yet this work must be actually performed in order to secure and preserve his right. Upon the other hand, the irrigation company, with the purpose in view for making the appropriation, of supplying water for the irrigation of perhaps hundreds of thousands of acres of land, will find that in the large river from which this appropriation must be made, that a rock and cement dam only will suffice; also that reservoirs may have to be built, and that canals and ditches of the most permanent and enduring character, perhaps hundreds of miles in length, must be constructed in order to carry the water to all the lands for which the appropriation is made. Yet all these works must be constructed, and that, too, within a reasonable time, in order to hold the right to the water and shut out subsequent appropriators. Hence it follows that the character of the works necessary, and also what constitutes a reasonable time for their construction, must vary with each particular case.[2]

Although usually some kind of a dam is necessary to divert the water from the stream into the ditch of the appropriator, it is not always the case. If the diversion can be accomplished by a simple cut to the stream it is sufficient.[3] In cases where the natural channel is used to conduct the water to the place where it is to be used, there may be required to be constructed dikes or embankments

1 For reasonable time to construct works, see Secs. 733-741.

2 For a more detailed description of the character of the works necessary, see Secs. 824-836; Malad Val. Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592.

See, also, for rights of appropriators in this respect, Secs. 717-721.

3 Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

along the sides of the natural stream to hold the water within the channel, especially at certain seasons of the year. But an actual diversion lower down the stream must be made of the same amount appropriated above.[4] The most common method of conducting the water to the place where it is to be used is by the construction of open ditches and canals. And, for this purpose, flumes or conduits constructed at different parts of the lines of a ditch, can not change the general character of the works, and in all legal respects are the same as an open ditch or canal.[5] These are usually made by the appropriator, and must be so constructed and kept in good repair, as to prevent all unreasonable waste.[6] Whatever ditches and canals are necessary must be constructed in order to hold the right. Again, the dam, ditch, or canal of another may be used by an appropriator, and the only work necessary in this case will be the enlargement of the old works sufficiently to divert and carry the waters of the new appropriation, in addition to the water of the former appropriators.[7]

[4] For use of natural channel of stream for ditch, see Sec. 832; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Hoffman v. Stone, 7 Cal. 46; Town of Suisun v. De Freitas, 142 Cal. 350, 75 Pac. Rep. 1092.

For necessity of an actual diversion, see Secs. 722-724.

See, also, McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976.

"No certain method is necessary to constitute a valid appropriation, so long as the water has been applied to a beneficial use; and this may be done either by ditches or by other methods of diversion and application, such as the placing of dams in the streams and sloughs, and thereby overflowing the land, or sub-irrigating it, as the case may be." Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083.

[5] Ellison v. Jackson Water Co., 12 Cal. 542.

[6] For economical use of the water and the prevention of waste, see Secs. 874-916.

[7] As to how this right may be acquired, see Secs. 989, 990.

See, also, eminent domain, Sec. 1085. Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S. 208, 101 Am. St. Rep. 953, where the only work necessary was the enlargement of the old ditch and the construction of a ditch about 100 feet long to carry the water to the land of the appropriator.

Water Supply & S. Co. v. Larimer & W. Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; North Point Consol. Irr. Co. v. Utah & S. L. C. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

For right to use existing works of another, see Secs. 989, 990, 1085.

As was said upon this subject by the Supreme Court of California:[8] "A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object, and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other."[9]

A distinction, however, must be made in cases where the owner objects to the use of his ditch by another. This subject, however, will be discussed more thoroughly when we come to the subject of rights of way over private lands.[10]

§ 720. **The works—Kind necessary (continued).**—An appropriator may make use of all of the natural advantages of the topography of the country in constructing his works. Many times it is not necessary to construct a ditch, and if so, but for a short distance. The water may be turned from the natural stream into a gulch, ravine, or in any depression in the land along which the water will run to the place where it is needed. Any of these, if available, may be utilized by the appropriator for that purpose.[1] Even in certain places the channel of the stream itself from which the appropriation is made, or the channel of another stream may be

8 Lower Tule etc. Co. v. Angiola Water Co., 149 Cal. 496, 86 Pac. Rep. 1081.

9 Citing Hoffman v. Stone, 7 Cal. 46; Butte C. & D. Co. v. Vaughan, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Richardson v. Kier, 37 Cal. 263.

See, also Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1027.

10 See Secs. 989, 990, 1085.

1 Thomas v. Guiraud, 6 Colo. 530, where it was held that the true test of an appropriation of water is the actual application thereof to the beneficial use intended, and that the method of diverting or carrying the water or in making such application is immaterial; and that the construction of ditches may be unnecessary.

Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Hoffman v. Stone, 7 Cal. 46; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650.

used for the purpose of carrying the water either all or a part of the distance required.[2] Again, the character of the works may consist of the construction of pumps, water wheels or other devices for lifting the water directly from the streams or other sources of supply, and letting the same run into ditches constructed to carry it to the place where it is needed. This may be done either with or without the construction of a dam to facilitate the diversion.[3]

All of the different propositions referred to in this and the preceding sections[4] will be discussed more at length in other portions of this work.[5] The only point which we wish to impress upon the mind here is that a water right under the Arid Region Doctrine of appropriation is a possessory right, and consummated only when the appropriator actually takes possession of the water which he attempts to appropriate.[6] Hence one of the essentials is that the appropriator must construct some work or works nec-

2 Hoffman v. Stone, 7 Cal. 46; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Butte Canal & D. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Ellis v. Tone, 58 Cal. 289; Platte Val. Irr. Co. v. Buckers Irr. etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Paige v. Rocky Ford C. & Irr. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Evans D. Co. v. Lakeside D. Co., 15 Cal. App. 119, 108 Pac. Rep. 1027.

3 For the right to pump water from streams, see Secs. 825, 836.

For pumping from wells, see Secs. 1201, 1202.

For the question as to whether water may be appropriated to irrigate a certain tract of land by taking the water from the stream with a current water wheel, and at the same time appropriate the natural flow of the stream for the purpose of running the wheel, see Sec. 724.

For the right to pump water as a riparian rights, see Sec. 494.

See, also, Charnock v. Higuera, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Earl of Norbury v. Kitchin, 7 Law Times (N. S.) 685, 9 Jur. N. S. 132; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 159, 17 Am. & Eng. Ann. Cas. 823; Miller & Lux v. Rickey, 127 Fed. Rep. 573.

See, also, for means of use, Sec. 825.

4 See Secs. 824-836.

5 See references to other portions, *supra.*

6 See nature of the right by appropriation, Secs. 757-774.

Bybee v. Oregon etc. Co., 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641, affirming 26 Fed. Rep. 586.

essary to take this possession and to conduct the water to the place where its use to a beneficial purpose is the consummating act of his appropriation.[7]

§ 721. **The works—Completed when.**—The works must be deemed completed when they are fully constructed according to the plan thereof, and ready to divert, hold, and to convey all of the water appropriated to the place of use. Some authorities even go to the extent of holding that the works are not completed until the water is actually diverted therein. In California there is a statute to that effect;[1] and, where a statute says that the works can not be deemed completed until the water is actually diverted therein, it is the law in that jurisdiction. But outside of statutory definitions of the word "completion," we never considered that it was necessary to actually divert the water in order to consider the works completed. Of course, the diversion of the water and conducting the same where it is to be used is the ultimate end for which the works are constructed. But they are only the means to an end; and, when the works are fully constructed and ready to divert the water and carry it to the place where it is to be used, we consider the works completed. And, under the definition of the term "appropriation of water,"[2] the taking and diverting the water from the natural stream constitutes a separate and distinct essential element. This we will discuss in other sections of this chapter.[3]

In order, however, to hold the appropriation to the full extent intended, all of the works necessary to that end must be fully completed, and that, too, with reasonable diligence. And it is the doing of the work and the completion of the dams, ditches, and canals or other works, within a reasonable time from taking possession, which gives the right to take possession of the water of which the appropriation is attempted, or the right of way through the public domain.

7 That an actual application of the water is necessary, see Secs. 725-728.

1 See Civil Code of Cal., Sec. 1417. "By 'completion' is meant conducting the waters to the place of intended use." 2 Kerr's Cyc. Codes, p. 1161.

For reasonable diligence in completion of works, see Secs. 733-741.

2 See Sec. 707.

3 For diversion of water, see Secs. 722-724.

In Bear Lake etc. Co. v. Garland,[4] the Court said: "The Bear Lake Company, therefore, never had any legal or equitable right to the land over or through which the ditch for the canal was dug, as against the Government, until the ditch was completed."[5] Where, however, portions of the works are in themselves completed, and are in themselves capable of the diversion of a portion of the water contemplated, they must be deemed completed to that extent, although the project was never fully completed according to the plans of the original scheme. And, if this is followed up with the actual application of the water diverted to some beneficial use or purpose, there is a valid appropriation of the water to that extent. And again, although one may not have completed his works for diverting or using the water, and therefore is not ready to consummate his appropriation by the application of the water to the purpose intended, yet he has the right to use so much of the water, as against intervening rights, as may be necessary to prevent his works from injury while in the process of construction.[6]

§ 722. Diversion of the water—There must be an actual diversion.—As we have seen, the appropriation entire can not be constructive;[1] so, also, no step which it is necessary to take to make the appropriation complete can be constructive. As the whole theory of appropriation for beneficial uses is based merely upon a prior possessory right to the water entirely separate from the property in the land over which it runs,[2] and no possession or exclusive property can be acquired while it is still flowing and remaining

4 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368.

5 For rights of way, see Secs. 927-993.

For mortgages and liens, see Chap. 53, Secs. 1019-1022.

For abandonment by failure to complete works, see Secs. 1104, 1106.

For the necessity of the completion of the works, see Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

6 Weaver v. Conger, 10 Cal. 233, 6 Morr. Min. Rep. 203.

See, also for right of intervenors to use the water between the inception of title of the prior appropriator and the completion of his works, Sec. 702.

1 See Secs. 716, 717.

Gould on Waters, Sec. 235.

Coryell v. Cain, 16 Cal. 567; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592.

2 See Secs. 766, 767.

See, also, Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604.

in its natural channel or stream,[3] it follows, therefore, that in order to obtain possession of the water attempted to be appropriated, it is an indispensable requisite that there must be an actual diversion of the water from its natural channel into the appropriator's ditch, canal, reservoir, or other structure.[4]

In a recent Idaho case [5] it is said: "In the further discussion of this case it must be remembered that the respondent has not alleged or established any appropriation or diversion of the waters of this stream for any useful or beneficial purpose. He makes no claim to the water by reason of any appropriation or diversion in accordance with the statute, but rather bases and asserts his right upon the fact that he is a riparian proprietor, and that as such he has for more than 17 years been using the water for 'domestic, culinary, and household purposes and for the use of his live stock,' and that the waters of the stream have continuously flowed through his lands, 'moistening the same.' Whatever rights, therefore, respondent has established are wholly dependent upon his proprietary rights as a riparian owner of lands through which this stream flows."

So, where the common law, as it is recognized in England and in the Eastern States,[6] forbids a diversion of the water from its natural channel, under almost any circumstances whatsoever, the Arid Region Doctrine of appropriation, which is in force in all of the arid and semi-arid States of this country, makes the diversion of the water one of the most essential requisites of an appro-

3 Parks Canal & M. Co. v. Hoyt, 57 Cal. 44; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

For ownership of the water while flowing in the natural stream, see Sec. 772.

4 Cruse v. McCauley, 96 Fed. Rep. 369, citing Kinney on Irr., 1st Ed. Sec. 162; Parks Canal & M. Co. v. Hoyt, 57 Cal. 44; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Dalton v. Bowker, 8 Nev. 190; Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889.

There must be a diversion of the water; Cardoza v. Calkins, 117 Cal. 106, 48 Pac. Rep. 1010; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

5 Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

6 For the common law, see Secs. 430-551.

For modification of the common law in the Western States, see Secs. 508-511.

For irrigation as a riparian right, see Secs. 498-525.

priation, and an absolute necessity in order to acquire an exclusive property in the water.[7]

But see the case of Cascade Town Co. v. Empire Water & Power Co.,[8] where it is said: "The complainant is not required to construct ditches or artificial ways through which the water might be taken from the stream, in order that it might appropriate the same. The only indispensable requirements are that the appropriator, in order to constitute a valid appropriation, first, must intend to use the waters for a beneficial use, and second, actually apply them to a beneficial use."[9]

In order, therefore, to constitute a valid appropriation of water, within the meaning of the definition as given in a previous section,[10] and within the meaning of the term as understood by the decisions of all the States where the law of appropriation is in force, there must be an actual diversion of the same, with the intent to apply to some beneficial use or purpose, and followed within a reasonable time, by an actual application to such use or to some other.[11]

7 For property in water after diversion, see Secs. 774.

8 181 Fed. Rep. 1011.

9 See, also, Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Hoffman v. Stone, 7 Cal. 46, 4 Morr. Min. Rep. 520; Suisun v. De Freitas, 142 Cal. 350, 75 Pac. Rep. 1092; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Broad Run Inv. Co. v. Deuel & Snyder Imp. Co. 47 Colo. 573, 108 Pac. Rep. 755.

10 For definition of appropriation of water, see Sec. 707.

11 For reasonable time to apply the water, see Secs. 738-741.

For right to change the use, see Secs. 869-872.

For the necessity of actual application in order to hold the right, see Secs. 725-728.

See, also, Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; McDonald v. Bear River etc. M. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Fort Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82, where it is said: "To constitute a valid appropriation of water, three elements must always exist: . . . second, a diversion from the natural channel by means of a ditch, canal, or other structure," etc.; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; Farmers' etc. Res. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195, where it was held that to pump water from a stream was a diversion of it.

§ 723. **Diversion—What constitutes a diversion.**—As long as the water is actually diverted from the natural stream or other body and taken into the actual possession of the appropriator, the means employed to divert the same are immaterial;[1] provided that no extraordinary or unreasonable method is used by the appropriator which will interfere with the rights of subsequent appropriators to the use of the water.[2] The most usual method of diversion is by a dam or some obstruction placed in the stream below the intake of the ditch or canal by which the waters of the stream are raised sufficiently to permit the amount appropriated to flow into the ditch by simple gravitation. Care has to be exercised not to have the dam too high, and to have sufficient spillways to permit the water not claimed under the appropriation to run down the stream should there be others below claiming a portion of the water of the stream. In many streams in the Western country there may be found twenty-five or thirty of these dams, each diverting the portion of the water claimed by the owners, the exact amount of the water to which each appropriator is entitled being measured by weir or other measuring device placed in the ditch near the point of diversion.[3] Oftentimes it is not necessary in order to divert the water that the dams extend entirely across the stream. In cases of this kind wing dams are often used. These are dams constructed from the bank of the stream from which the diversion is made and extending out into the stream at an angle and running usually somewhat higher up the stream than the point of diversion. The character of these works, which are necessary to make the diversion, has been discussed in previous sections. In some cases no dam at all is necessary, the lay of the land being such that the intake of the ditch is sufficient to divert the water claimed.[4] Again, in many places, owing to the fact that the water is so much lower than the land where the diversion must be made in

1 Thomas v. Guiraud, 6 Colo. 530; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

2 For diversion by water wheels requiring a current of the stream to run the same, see Sec. 724.

3 For the measurement of water, see Secs. 888-899.

For the duty of water, see Secs. 902-908.

4 Lower Tule River D. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

order that it flow by gravity to the place where it is to be used, no dam can be constructed by which the water can be raised to the point desired. In these cases pumps may be used, run by any power such as steam, electricity, wind, gasoline, oil, animal, or even by the hand of man.[5] The word "diversion," as applied to a water course, means the turning aside or altering the natural course of the stream;[6] and, whether this alteration is made so that the water flows horizontally, or is forced vertically, is immaterial. So long as the course of the water appropriated is changed from the natural channel of the stream and taken possession of by the appropriator by means of the works constructed by him,[7] whether the same be by a dam and the intake of his ditch, and thus taking the water practically horizontally, or by means of a pump, taking the water vertically from the stream to the bank, makes no difference, so long as the water is actually taken from the stream by some artificial means provided by the appropriator. And, for this purpose, "every diversion of the water from a stream is artificial—a disturbance of the natural order of things. A dam or ditch is as much an artificial mechanism as a pump—it may, indeed, be much more so; and the one alters the natural conditions in the same sense that the other does."[8] As we have seen, the right to appropriate the water of the natural streams, under the Arid Region Doctrine of appropriation, is a possessory right only. Hence, in order to acquire this right, the appropriator must take possession of the water by means of the artificial works constructed by him. The methods employed by him, so long as their use does not infringe the rights of others, are immaterial.[9]

§ 724. Diversion—Unreasonable methods interfering with rights of others—Schodde v. Twin Falls Land and Water Co.—As intimated in our preceding section, no extraordinary or unrea-

[5] For diversion according to ancient methods, see Secs. 30, 63-87.

For diversion by water current wheel, see Sec. 724.

[6] 3 Words and Phrases, p. 2142.

[7] For the works necessary, see Secs. 824-836.

[8] Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Schodde v. Twin Falls Land & W. Co., 161 Fed. Rep. 43, 88 C. C. A. 207, where it was said: "He may change from one method to another, as the situation or circumstances may require."

[9] Where the method employed does infringe upon the rights of others, see next section.

sonable method can be used by an appropriator, whereby the like right to appropriate the waters of any stream by others may be prevented. If there is ample water in the stream for all desiring the use of the same, the appropriation by some should not be prevented by the mere method of diversion by others. The diversion must be made in a reasonable manner, and so as not to deprive others of their rights. For the right to the appropriation of water "is not unrestricted. It must be exercised with reference to the general conditions of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use."[1] So, dams constructed for the diversion of water must be kept within reasonable limits, if their unreasonable height interferes with the rights of others.[2] Hence it follows, that, while any person is permitted to appropriate water for a useful purpose, it must be with some regard for the rights of the public; and, therefore, an appropriator has no absolute right to his original method of diversion if it interferes with the rights of others in the subsequent appropriation of the surplus waters of the same stream. Such an appropriation and unconditional ownership would work a monopoly and disastrous consequences. The waters of the natural streams of this Western country are open, as far as practicable, to the free use for beneficial and useful purposes by all who are in a position to avail themselves of the right.[3]

The above principle was illustrated recently in an action brought in the Circuit Court of the United States for the District of Idaho.[4] In this case, according to the complaint, the plaintiff owned certain lands upon the banks of the Snake River in Idaho amount-

1 Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452.

See, also, Atchison v. Peterson, 1 Mont. 561, *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Doherty v. Pratt, — Nev. —, 124 Pac. Rep. 574.

See, also, for wasting water, Secs. 911-916.

Appropriation for sale, Sec. 703. See, also, Chap. 76.

That there must be no monopoly, Sec. 705.

Rights of subsequent appropriators, Secs. 783-787.

2 Rio Grande W. R. Co. v. Telluride P. & T. Co., 16 Utah 125, 51 Pac. Rep. 146, appeal dismissed 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245.

3 Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, 63 Am. St. Rep. 622.

4 Schodde v. Twin Falls etc. Co., 161 Fed. Rep. 43, 88 C. C. A. 207, affirmed on writ of *certiorari* by the Supreme Court of the United States on April 1, 1912, 224 U. S. 107, 56 L. Ed. ——.

ing to 429 acres, and water from the river was appropriated to irrigate a certain portion of these lands. The amount claimed was 1,250 miner's inches. Soon after the first steps to appropriate the water were made in 1895, water wheels were erected by the plaintiff, varying from 24 to 34 feet in height. Wing dams were also constructed for the purpose of confining the flow of the water of the river, and so the current of the river would drive the wheels and cause them to revolve and carry the water in buckets attached to the wheels to an average height of about 20 feet, where the buckets would be emptied into the flumes and thence carried to the fields to be irrigated, and there used for that purpose. In the year 1903, while the plaintiff was so diverting and using the water from the river, the defendant took legal steps to appropriate a very large amount of the surplus waters of the river, and, in 1905, completed the construction of a dam across the river about nine miles below the plaintiff's land. This dam was so constructed as to impound all of the waters of the river at that point, and with the canals necessary, cost $1,500,000. The appropriation made by this means was for the purpose of supplying water for domestic purposes and irrigation to settlers, amounting to about 5,000 in number, on about 300,000 acres of land. There was no other water supply available for these settlers, except the waters appropriated by the defendant company. By reason of the dam the waters of the river were backed up to and beyond the plaintiff's premises, and thus the current in the river, by means of which plaintiff's water wheels were driven and made to raise the water to the elevation required, was destroyed. It was also alleged that it was now impossible for the plaintiff to change his dams or wheels, or to build or construct other dams, or water wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's land, by reason whereof the plaintiff has not been, nor will he be, able in the future to irrigate said lands or any part thereof or to raise crops thereon, as long as the defendant's dam is maintained. That there was no other supply of water available for use upon plaintiff's lands except the waters of Snake River; that, by reason of the backing up of said water and the stopping of the plaintiff from *using said water wheels* to raise the waters of the river to and upon said lands, and the cutting off of the water supply from plaintiff's lands, he has been damaged in

the aggregate sum of $56,650. It will be noticed that the gist of the action was the stopping of the plaintiff from using the water wheels to raise the water. In other words, it was the old method of the diversion of the water being prevented which was complained of. The defendant interposed a general demurrer to the complaint, on the ground that the facts stated in the complaint did not constitute a cause of action against the defendant. The demurrer was sustained by the Circuit Court, and the plaintiff elected to stand upon his complaint, and judgment was then entered against him, and he then appealed to the United States Circuit Court of Appeals; and, on February 3, 1909, a decision was rendered by that Court affirming the judgment of the lower court. The decision of the Circuit Court of Appeals was placed entirely upon the method of diversion by the plaintiff, and that an appropriator of a certain quantity of water from a stream does not acquire, as an appurtenant to his appropriation, the right to the current of the stream as a means of operating devices used by him to divert the water from the stream, nor is such current subject to appropriation as a water right. Also that the right to appropriate water from a stream is not an unrestricted right, but must be exercised with regard to the rights of the public and other appropriators, and a single appropriator, who has adopted as a means of raising water to his land water wheels operated by the current of the stream, has no right of action because of the construction of a dam below him designed for the irrigation of a large area of land, the property of many owners, which destroys the current of the stream at the place of the location of his wheels and makes it necessary for him to adopt some other method of diverting the water from the stream to his land. We will only add that we regard the decision sound in every particular.[5]

The Court might have added another reason as to why the current in the river can not be appropriated. For every appropriation, as we have seen in the preceding sections,[6] there must be a diversion. And in this case, the current of the river remaining in the channel of the stream and thus turning the wheels, there was no diversion or attempted diversion as to it; and hence there could be no appropriation as to that portion of the stream. Then

[5] As to what constitutes an appurtenance, see Secs. 1005-1018.

[6] See Secs. 722, 723.

again, there is question of economic use and the wasting of the water, which the Court did not touch upon. To hold that one farmer with a small amount of land of 429 acres could in effect appropriate and hold the right to all of the waters of the Snake River capable of furnishing water for domestic and all other purposes to 5,000 settlers upon 300,000 acres of land, would be to hold with the "dog in the manger" theory of the case with a vengeance.[7]

Since writing the above this case was affirmed by the United States Supreme Court on a writ of *certiorari* on April 12, 1912, in which the Court held that the current of a river can not be appropriated by a riparian proprietor in Idaho to the extent necessary to operate the water wheels used by him to divert water actually appropriated for irrigation, so as to give him a right of action for the destruction of the current by subsequent appropriators when exercising their right under Article 15, Section 3, of the Idaho Constitution, to apply the unused water to beneficial uses. In the main, the Supreme Court simply reaffirmed the points made by the Circuit Court of Appeals, as set forth above.

In a recent Utah case[8] it was held that a prior appropriator acquired a vested right to his means of diversion, and that neither the legislative nor the judicial power could allow an invasion of such a prior right without permitting the confiscation of his property rights.

§ 725. Consummating act—There must be an actual use of the water appropriated.—In all the States where there is no Act of the legislature designating the completion of the works as the consummating act of an appropriation,[1] the essential necessary to complete and to finally consummate an appropriation, is the application of all the water attempted to be appropriated to some beneficial use or purpose.[2] Not only must there be an intent

7 "In the appropriation of water there can not be any 'dog-in-the-manger' business by either party, to interfere with the rights of others." Judge Hawley, in Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 119.

See, also, for the economical use and the wasting of water, Chap. 49, Secs. 874-916.

8 Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

1 See Sec. 721.

2 For what purposes water may be appropriated, see Chap. 37, Secs. 690-705.

to apply the water to some such purpose, but as the consummation of that intention, it must be actually applied within a reasonable time; and, as to whether or not this has been done, is a question of fact to be determined from all the circumstances of the case.[3] The actual application of all the water appropriated is the consummating act necessary to complete a valid appropriation, and the continuation of that use, or some other beneficial use, constitutes the continuation of the title to the water right in the appropriator;[4] and there can be no right to take the water unless it is applied to some beneficial use.[5] This proposition is so thoroughly settled by all the statutory law and court decisions that a citation of au-

[3] For reasonable time to apply the water, see Secs. 738, 740.

See, also, Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856, both citing Kinney on Irr., 1st Ed., Sec. 164.

See, also, Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Combs v. Ag. Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275. Priority of appropriation shall determine the right to water of a natural stream, but there is no appropriation until it is applied to some beneficial use. Farmers' High Line Canal Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Peregoy v. McKissick, 79 Cal. 572, 21 Pac. Rep. 967; Thomas v. Guiraud, 6 Colo. 530; Ortman v. Dixon, 13 Cal. 33; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604, where Sanderson, J., said: "Appropriation, use, and non-use are the tests of his right; and place of use, and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges." Woolman v. Garringer, 1 Mont. 543, 1 Morr. Min. Rep. 675; McDonald v. Bear River Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Gibson v. Puchta, 33 Cal. 310; Dick v. Caldwell, 14 Nev. 167; Dick v. Bird, 14 Nev. 161; Munroe v. Ivie, 2 Utah 535; Combs v. Ag. Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275, where it was held that a mere diversion of water is not an appropriation of it within the meaning of the constitution, a diversion without application to a beneficial use is unlawful; and also that the privilege of diverting water extends only to uses truly beneficial, and not to purposes of speculation.

[4] For right to change use, see Secs. 868-871.

[5] Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634, where it was held that an appropriation of water does not mean merely the diverting of it, but includes its use for some beneficial purpose.

Nevada Ditch Co. v. Bennett, 30

Ore. 39, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349; Wellington v. Beck, 30 Colo. 409, 70 Pac. Rep. 687, *Id.*, 43 Colo. 70, 95 Pac. Rep. 297; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Cash v. Thornton, 3 Colo. App. 475, 34 Pac. Rep. 268; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19.

Ft. Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259, where it was held that a priority can only be legally acquired by the application of the water to some beneficial use. "This may now be considered as one of the fundamental principles of our system of irrigation. It is too well established to be open to controversy. A diversion unaccompanied by an application gives no right."

See, also, Becker v. Marble Cr. Co., 15 Utah 225, 49 Pac. Rep. 892; Union M. & M. Co. v. Dangberg, 2 Sawyer 450, Fed. Cas. No. 14,370, Morr. Min. Rep. 113, 81 Fed. Rep. 73; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. Rep. 963; Platte etc. Co. v. Northern Colorado Irrigation Co., 12 Colo. 525, 21 Pac. Rep. 711; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Hagerman etc. Co. v. McMurray, —— N. M. ——, 113 Pac. Rep. 822; Nevada Ditch Co. v. Canyon etc. Co., 58 Ore. 517, 114 Pac. Rep. 86; Cookingham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296.

See, also, Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 25 Utah 441, 67 Pac. Rep. 672, 71 Pac. Rep. 1069, 61 L. R. A. 648; Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Combs v. Farmers' D. Co., 38 Colo. 420, 88 Pac. Rep. 396; Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; Larimer etc. Co. v. Cache La Poudre etc. Co., 8 Colo. App. 237, 45 Pac. Rep. 525, affirmed 24 Colo. 144, 53 Pac. Rep. 318; Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, reversing 3 Colo. App. 255, 32 Pac. Rep. 722; Fort Morgan etc. D. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

For the consummation of an appropriation under statute, see next section, Sec. 726.

thorities seems almost unnecessary.[6] On the other hand, the notice of appropriation may have been properly given according to law, the works for diverting and conducting the water may be constructed within a reasonable time,[7] the water diverted from its natural channel, and yet if the water is not actually applied to some beneficial use or purpose, and that, too, within a reasonable time, or, in other words, without unreasonable delay, no legal appropriation has been made of the water.[8]

In Nevada D. Co. v. Bennett,[9] it is said: "An appropriation proper is not made until there has been an actual application of the water claimed, to some beneficial purpose or some useful industry. All rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation." "Compliance with the law in other respects, that is, the filing with the clerk and recorder of the requisite plats and notices, the commencement and construction of the ditch or canal with due diligence, and even the actual diversion of the water from the natural stream—all of these acts, unaccompanied by the beneficial use of the water, constitute but an inchoate right or interest. And unless such beneficial use follows, the interest thus acquired does not ripen into an appropriation; the inchoate right terminates, and the water goes to the junior claimants who have complied with all the requirements of the law."[10]

In Beers v. Sharpe,[11] it is said: "The rule is settled in this State that to constitute a valid appropriation of water there must be (1) an intent to apply it to some beneficial use, existing at the time or contemplated in the future; (2) a diversion thereof from a natural stream; *and* (3) *an application of it within a reasonable time to some useful industry.*"

As was well stated by Mr. Justice Straup, in rendering the opin-

6 Nearly all of the statutes of the Western States have provisions to the effect that beneficial use of the water shall be the basis, the measure, and the limit of the right. See statutes of the various States, Part XIV.

7 For reasonable time, see Secs. 733-741.

8 Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; McKinney v. Smith, 21 Cal. 341, 1 Morr. Min. Rep. 650; Thomas v. Guiraud, 6 Colo. 530.

9 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

10 Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

11 44 Ore. 386, 75 Pac. Rep. 717.

ion of the Court in a recent Utah case:[12] "The final step, and the most essential element, to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be, or is done, until the actual application of the water is made for a beneficial purpose no valid appropriation has been effected. . . . In other words, if the proposed appropriator is not able to complete and finally establish his appropriation by applying the water to, and using it for, the beneficial purpose for which it was proposed to be appropriated, either by himself or through the agency of some user, his appropriation fails. He may not file his application, construct his works, and then hold the water and wait for something to happen. He can not withhold the water from the proposed beneficial use. He must not only be diligent in constructing the works, and in making the diversion, but he must also be reasonably diligent and expeditious in making application of the water to the beneficial use for which the appropriation was proposed, else he loses his inceptive right. His appropriation will be measured by the quantity of water actually used for the proposed beneficial purpose."

§ 726. **Consummating act—Under statute.**—In all the States where there is no Act of the legislature designating what act in the series of acts necessary to make a valid appropriation shall constitute the final essential, it is held that the true test as to whether the appropriation is finally completed and valid is the actual application of the water to some beneficial use or purpose.[1] This we consider to be the better rule. But, as we have seen in our account of the Arid Region Doctrine of appropriation, this doctrine originated in California with the early miners.[2] That State also was the first to enact any statute upon the subject of appropriation of waters. In the Civil Code of that State may be found the following: "By 'completion' is meant conducting the waters to the place of intended use."[3] This statute was followed in some of the other States, although in the most of them it has been superseded by later irrigation and water codes. But where this

12 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

1 See Sec. 725.

2 For history of doctrine, see Secs. 595-626.

3 Cal. Civil Code, Sec. 1417, enacted 1872. 2 Kerr's Cyc. Codes, p. 1161.

statute is in force the consummating act in making an appropriation is the act of conducting the water to the place of contemplated use. In other words, the water must be in the actual possession of the appropriator and ready for application to the use for which it was appropriated. But the act of appropriation is consummated with the diversion of the water, without an application to the use intended. Then a reasonable time is given to apply the water after the completion of the appropriation to the use intended, or to some other beneficial use; and, if this is not done it works an abandonment. So the ultimate result is precisely the same, whether the appropriation is deemed in law consummated with the conducting of the water to the place of intended use and a reasonable time thereafter given for the actual application to the use, according to the California rule,[4] or whether the actual application of the water to the beneficial use is deemed the consummating act of the appropriation, as under the Colorado rule,[5] a reasonable time always being allowed for the application of the water to the use after its diversion. Under either rule, in order for the absolute, exclusive title to the water right to vest and continue in the appropriator, there must be, within a reasonable time after the water is diverted, a continuous application of the water to some beneficial use or purpose. And a failure to so apply the water, within a reasonable time, under either rule, works an abandonment.[6]

It was held in a recent case in Montana [7] that under the statute of that State all the steps necessary to be taken to secure a complete appropriation are provided for by the statute, and the actual use of the water sought to be taken is not necessary for the con-

4 Heilbron v. 76 Land & W. Co., 80 Cal. 189, 22 Pac. Rep. 62; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 536; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349.

5 "No principle in this connection with the law of water rights in this State is more firmly established than that the application of water to a beneficial use is essential to a completed appropriation." Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

Fort Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

See, also, Colorado cases cited in preceding section.

6 As to what constitutes a reasonable time to apply the water after diversion, see Secs. 738, 741.

For abandonment, see Secs. 1100-1117.

7 Bailey v. Tintinger, —— Mont, ——, 122 Pac. Rep. 575.

summation of an appropriation. The Court, in the opinion, said: "Assume that a corporation, which does not own, control, or possess any land, is organized for the purpose of selling or renting water to settlers to irrigate arid lands; that it proceeds under the statute to make its appropriation and fully complies with all the statutory requirements, completes its distributing system, and is ready and offers to supply water to settlers upon demand. Now, if the corporation can ever make an appropriation, it has done so, for it has performed every act which it can perform. It can not use the water itself, for it has no land or other means of use. Any further acts must be performed by its customers, who are to be the users. . . . The right thus obtained may be lost by abandonment or non-user for an unreasonable time."

§ 727. Consummating act—All of the water claimed must be used.—In the early days prior appropriation was esteemed to cover all in sight, even to the entire amount of water flowing in a natural stream, whether the same was actually used or not. In order to irrigate his land or to work his mine the appropriator might claim the right to all of the water flowing in a certain stream, although the same might have been many times the amount that was actually needed for the purpose for which he made the appropriation. The early irrigators, having no knowledge, even in the slightest degree, of the proper application of water for irrigating their crops, and there being at that time nothing written upon the subject, and, as there was a very plentiful supply of water in the streams for those who wished to use it, it followed as a matter of course that they adopted very wasteful methods in their lavish use of the water. But little cultivation of the land was thought necessary if the ground was kept saturated. As time went on, however, more settlers of the agricultural class came into the arid region and a great many miners also abandoned their search for gold and turned their attention to agriculture. Hence, it did not require any great length of time in order to allow the settlers in many places to appropriate all the waters in the streams under the wasteful methods used, and apportion it among themselves. And with the then prevalent lavish use of water the area of land put under actual cultivation was comparatively small to what it might have been with the same supply of water had ordinary care

been taken in its distribution. And, as there was a continual demand for more water as more land was taken up and cutivated, in the process of time, owing to this demand, many old ideas upon the subject of irrigation were exploded, and it was found that a given amount of water could be made to go further and with far better results than the early settlers had any idea of. In many cases it was demonstrated by actual experiment that five or six times as much land could be irrigated with a certain amount of water and with better results as far as amount and quality of crops were concerned than had been thought possible before.

So, in order to abolish these wasteful methods the rule of "beneficial use" was adopted by all of the legislatures and courts of the Western States where the law of appropriation is in force. And the final test in all jurisdictions now is as to whether all of the water diverted is actually applied to some useful or beneficial purpose.[1] As was said in a recent Utah case:[2] "The ultimate question for determination, however, is not how much water appellants required, but what amount had they applied to a useful and beneficial purpose for a term of years prior to the time when the respondents made their appropriation?" It is, therefore, held that there must not only be a diversion from the stream and a carrying of the water to the place of use, but it must be beneficially applied, and the measure of the appropriation does not depend alone upon the amount diverted and carried, but the amount which

1 Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62, citing Kinney on Irrigation, 1st Ed., Secs. 165, 166.

See, also, Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; White v. Todd's etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Courthouse etc. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986; Riverside etc. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Stanger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147; Crawford Clipper D. Co. v. Needle Rock D. Co., 50 Colo. 176, 114 Pac. Rep. 655; Andrews v. Donnelly, —— Ore. ——, 116 Pac. Rep. 569.

2 Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

is applied to a beneficial use or purpose must also be considered.[3] This subject, however, will be more thoroughly discussed in other portions of this work.[4]

§ 728. Consummating act—Concluding remarks as to when appropriation is complete.—The appropriation becomes perfect only when the dams, ditches, or canals or other works necessary are entirely completed, the water diverted from the natural stream or other source of supply, and all actually used for beneficial purposes.[1] And, to continue the right in the appropriator, the beneficial use of all of the water must be continued. These are two propositions which may be called thoroughly settled by the laws of all the States where the Arid Region Doctrine of appropriation is in force. Where an appropriator fails to use the full amount of the water diverted by him, and for an unreasonable time delays increasing the use, any subsequent increase either in diversion or use thereof is made subject to intervening rights.[2] Upon many questions the laws relative to the subject of irrigation and water rights in this Western country are even now in a state of transition, but it is undoubtedly settled that the actual user of all the water, claimed under an appropriation, for a beneficial or useful purpose is the true and only final test touching the question whether a claim to the water has ripened into an appropriation. There can be no constructive appropriation, nor can any step required to be taken throughout the whole series of acts in the course

3 Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Riverside etc. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; *Id.*, 110 Cal. 122, 42 Pac. Rep. 453; Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349.

4 For extent of appropriator's rights, Secs. 875-885.

For economical use and the prevention of waste, Chap. 49, Secs. 874-916.

1 See authorities cited in preceding three sections.

See, also, Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Rincon W. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 443, both citing Kinney on Irr., 1st Ed., Sec. 167.

See, also, Miles v. Butte El. & Pr. Co., 32 Mont. 56, 79 Pac. Rep. 549; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598.

2 Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083.

of water appropriations be constructively accomplished. It is the actual, physical performance of every essential requisite, from the time that the purpose is definitely conceived down to the ultimate user of the water in connection with the advancement and operation of some useful industry, and that, too, within a reasonable time from the first step to the final application of the water to such a purpose, that matures and finally accomplishes the appropriation.

Upon this subject, Mr. Chief Justice Hayt of the Supreme Court of Colorado, in the opinion in the case of Fort Morgan Land Company v. South Platte Ditch Co.,[3] said: "The Court holds that they must not only take the water out of the stream, but must prove the regular use of it for irrigation. From the first this Court recognized and emphasized the idea that priority can only be legally acquired by the application of the water to some beneficial use. Hence there must not only be a diversion of the water from the natural stream, but the actual application of it to the soil to constitute a constitutional appropriation recognized for irrigation."

The recent legislation and decisions of the courts show more and more the tendency not to permit any water to be wasted by means either of pretended appropriations, where the right to the water has not been finally consummated and has not been actually used for some of the beneficial purposes, or where there is an excessive amount of water claimed for the purpose for which the appropriation is made. And water rights attempted to be held in this manner, without actual user, are subject to appropriation by other parties upon the ground that no appropriation has been made of the excess.[4]

§ 729. **Modification of above rules by local law.**—The above rules laid down, as to how an appropriation may be effected, are the general laws upon the subject relating to the appropriation of public waters for the purpose of applying the same to some beneficial use or purpose. These rules are varied somewhat regarding

[3] 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

[4] For economical use of water and the prevention of waste, see Chap. 49, Secs. 874, 916.

Rights of subsequent appropriators, Secs. 783-786.

Duty of water, Secs. 902-908.

the methods of acquiring water rights by the local laws of the various States that are formed out of the arid region. But we may safely say that in all these States the same principle of priority is at the very foundation of the appropriation. The appropriator who is prior in time has the superior right.[1] Also the principle that the water diverted can only be held as a valid appropriation by the application of the same to some beneficial use or purpose, is now as firmly established in all the States as is the principle of priority. The greatest modifications of the rules, as set forth in this chapter, then, are the local statutes of the various States prescribing the specific steps that must be taken in order to acquire a valid water right within their respective jurisdictions.

These local laws, as will be seen in a subsequent portion of this work, vary in the different States quite extensively, according to the supply and demand of water, the topographical and physical features of the country, the objects for which the water is to be used, and various other matters that are supposed, at least, to be of local importance.

Since the first edition of this work was written, prior to the year 1893, in the most of the Western States irrigation or water codes have been provided by statute. These codes are the law upon the subject of the acquisition of water rights within their respective jurisdictions; and, in order to give the appropriator the full benefits allowed under these codes to the exclusive right to the water appropriated and the doctrine of relation, the rules provided in the codes must be fully complied with.[2] These statutory laws will be discussed in another portion of this work.

§ 730. Notice—Appropriation without—Appropriation by diversion and use.—We can not leave the subject of notice without a discussion of the validity of an appropriation of water without either the posting or recording of notices, in those States where the statutes provide for notices. In all these jurisdictions, the courts hold that the provisions of the statute relative to the posting and recording of notices of appropriation are merely directory, and that

1 For the rights of prior appropriators, see Secs. 776-782.

2 For the laws of State control, see Chap. 86, Secs. 1337-1367.

For the doctrine of relation, see Secs. 742-756.

For the laws of the various States, see Part XIV.

one may, by a prior, actual, and complete appropriation and use, without proceeding under the statute, acquire a right to the water actually beneficially used which will be superior and paramount to the title of one making an appropriation from the same stream by instituting his claim in the manner provided by the statute by posting the notice thereof, subsequent to the actual use of the water by the prior appropriator.[1] In a recent California case the Court said: "In order to make a valid appropriation it was not necessary for Duncan (the appropriator) to post and record a notice of appropriation as provided in the Civil Code, Sections 1415 to 1421. The method of acquiring a right to the use of water as there prescribed is not exclusive."[2] In Idaho the Court holds to the same effect: "A person desiring to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice and commencing and prosecuting his work within the statutory time. . . . In the latter case his appropriation will be entitled to date from the time of posting his notice."[3]

In a late Montana case[4] it was held that the statute of the State intended to provide a method for the appropriation of water in addition to that fixed by early customs, and after its passage an appropriation might be made, either by actual diversion or by compliance with its requirements, the Court saying: "We are of the

1 Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563; *Id.*, 22 Pac. Rep. 198; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. Rep. 432; Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349; Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Cardoza v. Calkins, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. Min. Rep. 689; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Hill v. King, 8 Cal. 336; Hoffman v. Stone, 7 Cal. 46; Wishon v. Globe etc. Co., 158 Cal. 137, 110 Pac. Rep. 290.

2 Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

3 Sand Point W. & L. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 477.

See, also, Neilson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488.

4 Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

opinion that the Act of 1885 intended: (1) To preserve the right which the appropriator had theretofore; and (2) to provide an additional method of making an appropriation. In other words, during the first period of our history above, there was but one method of making an appropriation, and that was by complying with the rules and customs of the pioneer settlers, while during the period since 1885, two distinct methods are prescribed, the first by complying with the rules and customs of the early settlers, and the second by complying with the terms of the statute."

But where the statute requires the posting and recording of the notices of appropriation, the effect of not complying with those provisions may be fatal to the claim of one who would otherwise be a prior appropriator. It is also the universal rule of law upon the subject that by not posting or recording a notice, or the posting or recording of a faulty notice, the appropriator loses his right to apply the doctrine of relation, from the time of the actual application of the water to some useful purpose back to the date of the posting of his notice, and he thus fails to shut off the rights of intervening claimants who have complied with the statute in this respect, and, therefore, his own rights to the use of the water, should there not be ample for all, may be cut off by those who have strictly complied with the statute.[5] For the rule is that where an appropriator of water does not post and file for record his notice of appropriation as provided by law, his right dates only from the last act perfecting such appropriation, which, as we shall see in a subsequent section, is the actual application of the water claimed to some beneficial use or purpose.[6]

[5] For doctrine of relations, see Secs. 742-756.

See, also, cases cited in notes above under this section.

For intervening right to appropriate water, see Sec. 702.

Where one fails to post and record a notice of appropriation in accordance with the statute, the effect is to preclude an appropriator from claiming, by the doctrine of relation, to the time when the work was begun as against one who does comply with the statutory provisions, and prosecuted the work to completion in accordance therewith. Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Cruse v. McCauley, 96 Fed. Rep. 369.

[6] Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 477; Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198.

Where works of others already constructed are used by the appropriator, the statutes for posting notices and the construction of works, etc., need not be followed for the reason that there is no delay in making the diversion, and the appropriation is one by diversion and use, and also one to which the doctrine of relation does not apply.[7]

The rule may be considered as settled that as between the appropriator and the Government or the State the actual possession and use of a water right is a sufficient appropriation where there are no rival claimants to the same, regardless of the fact as to whether or not the steps prescribed by the statute of the particular State wherein the appropriation is made are followed or not. This is true both in the States which have the older statutes prescribing how an appropriation shall be made, and also in those States which have the law of State control, which prescribes more definitely the various steps which must be taken to effect an appropriation.[8] As was said in a recent Utah case,[9] in speaking of the method of making an appropriation of water: "Any person, however, who actually used the water for a beneficial or useful purpose, acquired the right to take the water so used as against all subsequent claimants, regardless of whether the user posted notices or not."[10]

§ 731. **There can be no appropriation by prescription.**—As the right by appropriation is an original right acquired from the Gov-

[7] For this subject discussed under the doctrine of relation, see Sec. 751.

[8] See cases cited above in this section, also, Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Brown v. Newell, 12 Idaho 166, 85 Pac. Rep. 385; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Van Dyke v. Midnight Sun Co, (Alaska), 177 Fed. 90; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Water Supply Co. v. Larimer etc. Co. 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Sand Point etc. Co. v. Panhandle etc. Co., 11 Idaho 405, 83 Pac. Rep. 347; Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Hoge v. Eaton, 135 Fed. 411; 141 Fed. Rep. 64, 72 C. C. A. 14; Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 777; Ophir etc. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091.

[9] Patterson v. Ryan, 37 Utah 410, 108 Pac. Rep. 1118.

[10] See, also, Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

ernment there can be no appropriation by prescription for the reason that there can be no right acquired by prescription as against the general Government.[1] Although there is no right of prescription against the general Government, rights already acquired from the Government by one person may be acquired by another by prescription. This subject, however, will be fully discussed in a subsequent chapter of this work.[2]

§ 732. **Summary of chapter.**—In this chapter we have seen that at the very inception of a valid appropriation of water from a natural stream or lake, there must be a *bona fide* intention upon the part of the one attempting to appropriate the water, to apply the same when his appropriation is completed to some of the beneficial uses or purposes; there must also be sufficient notice to the public of that intent to appropriate the water to put a reasonable man upon his guard; and within a reasonable time after the notice has been given the appropriator must commence his works for the actual diversion of the water, and the same must be prosecuted until they are completed, with all due and reasonable diligence; then there must be an actual diversion of the water into the ditches and works of the appropriator; then all of the water, when so diverted, must be applied to some one of the beneficial or useful purposes.[1] We will also see in other chapters that when the appropriation is completed, if the different steps taken which are necessary to consummate the appropriation, including the application of all of the water to some useful purpose, have been prosecuted with all due and reasonable diligence,[2] by the doctrine of relation the appropriation relates back, as against the rights of all others subsequently attempting to

1 See Matthews v. Ferrea, 45 Cal. 51; Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Wilkins v. McCue, 46 Cal. 656; Wattier v. Miller, 11 Ore. 329, 8 Pac. Rep. 354; Jackson v. Indian Creek etc. Co., 16 Idaho 430, 101 Pac. Rep. 814; *Id.*, 18 Idaho 513, 110 Pac. Rep. 251.

As to the right of prescription as against a State, see State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

2 For rights by prescription, see Chap. 54, Secs. 1033-1058.

1 Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777, citing Kinney on Irr., 1st Ed., Sec. 171.

2 For reasonable diligence, see Secs. 733-741.

appropriate the waters of the same stream, to the time when the first step was taken to secure the right; or in those States requiring notice, to the time when the notice was legally given of the intent to make the appropriation.[3]

[3] For the doctrine of relation, see Secs. 742-756. For the notice of appropriation, see Secs. 709-717.

CHAPTER 39.

REASONABLE DILIGENCE.

§ 733. Scope of chapter.
§ 734. Reasonable diligence in construction of works.
§ 735. What efforts are necessary to constitute.
§ 736. Reasonable diligence—How determined.
§ 737. Works must be completed within what time.
§ 738. Time within which water must be applied—Specific cases.
§ 739. Illness—Pecuniary ability or inability affecting reasonable diligence.
§ 740. Reasonable diligence for future needs.
§ 741. Effect of reasonable diligence, or the lack of.

§ 733. Scope of chapter.—Under the Arid Region Doctrine of appropriation an appropriator is required by the law to exercise reasonable diligence in every step required to make his appropriation complete. Otherwise, even if the appropriation is finally consummated by the actual application of the water to some beneficial use or purpose, if the appropriator has not exercised reasonable diligence in the prosecution of the necessary steps required to complete his appropriation, he can not take advantage of the doctrine of relation.[1] But his attempted appropriation may be either cut off by intervening rights, or, at any rate, it will only date from his actual application of the water, and come within that class of appropriations termed those by diversion and actual use.[2] In this chapter we will discuss the reasonable diligence that is required of appropriators to perfect their claims.

§ 734. Reasonable diligence in construction of works.—Not only must the works necessary to effect the appropriation and diversion of water be commenced soon after the inception of the claims,[1] but the work of construction thereof must be prosecuted with all reasonable diligence until the same shall have been finally completed.[2] In

1 For the doctrine of relation, see Chap. 40, Secs. 742-756.

2 For appropriations by diversion, see Secs. 730, 751.

1 For the works necessary, see Secs. 718-721.

For the time within which work must be commenced under the statutes of various States, see Part XIV.

2 As to what constitutes completion of the works, see Sec. 721.

this the law allows a reasonable time for their construction. No unusual or extraordinary exertions are required in the prosecution of the work of construction in order to hold the appropriation. Where due and legal notice of the intended appropriation has been given,[3] under the beneficent rule of the doctrine of relation,[4] no race with another appropriator is necessary in order to complete the works and be the first to divert and apply the water to some useful purpose.[5] If the work of the prior appropriator is prosecuted with due diligence, his right relates back to the inception of his claim, so that his right is good as against others, the inception of whose claims is later, and that, too, whether the water is actually applied to the purpose for which the appropriation is made or not. All that is required is that, after the notice has been given, the dam, ditch, and canal, and all the other works necessary to effect the diversion and to carry the water to the place where it is to be used must be begun in good faith, and the work thereon must be prosecuted in good faith to its completion with all due diligence. This has been the ruling of the courts in all jurisdictions, and that, too, with or without statutes upon the subject.[6]

[3] For notice of intent, see Secs. 710-716.

[4] For doctrine of relation, see Secs. 742-756.

[5] Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. Rep. 128; Nevada etc. Co. v. Kidd, 37 Cal. 282; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198.

[6] For statutes on prosecution of the work, see Part XIV.

Osgood v. Eldorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; King v. Edwards, 1 Mont. 235; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Keeney v. Carillo, 2 N. M. 480.

See, also, Union M. & M. Co. v. Dangberg, 2 Sawyer 450, Fed. Cas. No. 14,370, 3 Morr. Min. Rep. 113; *Id.*, 81 Fed. Rep. 73; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777, citing Kinney on Irr., 1st Ed., Secs. 160, 161.

See, also, Farmers' High Line C. & Res. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Cruse v. McCauley, 96 Fed. Rep. 369; Highland D. Co. v. Mumford, 5 Colo. 325, 2 Morr. Min. Rep. 3; Colorado Land & W. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Beaver Brook Res. & Can. Co. v. St. Vrain Res. & F. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Gates v. Settlers' etc. Co., 19

The same principle also applies to cases where parties have filed notices of appropriation of water for the purposes of storage in reservoirs.[7] Where the site is located upon private lands, the notice must be followed up with reasonable diligence in taking steps to acquire the land for the site. Where it is upon public lands the steps necessary for the location of the reservoir site must also be proceeded with without unnecessary delay. The work of the construction of the reservoirs must also be prosecuted with the same degree of diligence as is required in other cases. A location notice without subsequent acts to accomplish the object named in the notice

Okla. 83, 91 Pac. Rep. 856; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408; Irwin v. Strait, 18 Nev. 436, 4 Pac. Rep. 1215; Lamborn v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 477; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. Rep. 128; Rio Grande Land & C. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726; Oviatt v. Big Four M. Co., 39 Ore. 118, 65 Pac. Rep. 811; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Wimer v. Simons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Glaze v. Frost, 44 Ore. 29, 74 Pac. Rep. 336; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Nevada D. Co. v. Kidd, 37 Cal. 282; Columbia M. Co. v. Holter, 1 Mont. 296; Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400; Miles v. Butte City etc. Co., 32 Mont. 56, 79 Pac. Rep. 549; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914; Sand Point W. & L. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Windsor Res. & C. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729; Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083; Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368; Kelly v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785; Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028; Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

[7] For the appropriation for storage, see Sec. 704.

For rights of reservoirs, see Chap. 46, Secs. 837-846.

prosecuted with reasonable diligence will neither hold the water right nor the reservoir site.[8]

§ 735. **What efforts are necessary to constitute.**—Probably the best definition of the word diligence was given by Lewis, C. J., in rendering the opinion in an early Nevada case.[1] It is there defined as "the steady application to business of any kind, constant effort to accomplish any undertaking." "It is the doing of an act or series of acts with all possible expedition, with no delay except such as may be incident to the work itself."

As has been said, the law does not require any unusual or extraordinary efforts, but it does require that which is usual, ordinary, and reasonable. The diligence required in the prosecution of the construction of all works necessary for the diversion and application of water in an attempted appropriation of the same is that constancy or steadfastness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. There must be such assiduity in the prosecution of the works as will manifest to the world a *bona fide* intention to complete it within a reasonable time. As to what constitutes diligence is a question of fact and must be determined from all the circumstances surrounding each particular case.[2]

§ 736. **Reasonable diligence—How determined.**—As to whether the work of construction was begun within a reasonable time after the notice was given of the intent to appropriate water,[1] and, after its commencement, was prosecuted with all reasonable diligence, are questions of fact to be determined from all the circumstances surrounding each particular case, as the same are disclosed by the evidence.[2] And upon this question there may be taken into considera-

8 Windsor Res. & C. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729; Cache La Poudre Res. Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Beaver Brook & Res. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

1 Ophir M. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

2 See, also, next section.

Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642.

1 For notice, see Secs. 710-717.

For jurisdictions not requiring notice, see Secs. 710-716.

2 Osgood v. Eldorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Weaver v. Eureka L. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642,

tion the acts of the appropriators such as surveys, stakes set, and the blazing of trees, the time of the commencement of the work and its actual prosecution until the same is completed.[3] In other words, as was said by the Oregon Court:[4] "The appropriator is entitled to a reasonable time within which, by ordinary diligence, he may complete the project and actually apply the water to the useful purpose intended. What is reasonable, both as to the amount of water and as to the time any given project may be completed, must depend upon the facts and circumstances of each particular case."[5]

The climate of the part of the country where the appropriation is attempted is also a proper subject, upon the question as to whether the work can be prosecuted during all the year, or only for a portion of the year;[6] also the topography of the country where the works have to be constructed and through which the canal has to run, as to whether the same be level or rough, and whether the soil is easy to work or whether rock work is encountered, and the like. So, also, the difficulty of obtaining labor, tools, or material; also the extent and magnitude of the works themselves.[7] The financial standing of the parties attempting the appropriation, and their ability to raise the means to prosecute the work to completion, are also facts for con-

where the Court said: "As to what constitutes reasonable diligence must be governed by the circumstances of each particular case, and necessarily varies with each particular case. It is a question of fact, and must be determined from all the evidence in the case."

"It is a question of fact, and must be determined from all the evidence in the case." Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856.

See, also, Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Luckhart v. Ogden, 30 Cal. 547; White v. Todd's Val. W. Co., 8 Cal. 444, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; McFarland v. Alaska etc. Co., 3 Alaska 308; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. Rep. 128; Nevada etc. Co. v. Kidd, 37 Cal. 282; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Thorndyke v. Alaska etc. Co., 164 Fed. Rep. 657, 90 C. C. A. 473; Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. Rep. 876.

[3] Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615.

See, also, cases cited in preceding section.

[4] Andrews v. Donnelly, —— Ore. ——, 116 Pac. Rep. 569.

[5] See, also Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393.

[6] Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777, citing Kinney on Irr., 1st Ed., Sec. 161.

[7] Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914.

sideration.[8] Evidence of any of these facts are proper in the determination of the question as to whether or not reasonable diligence has been exercised in the construction of the works necessary to divert and conduct the water attempted to be appropriated to the place where it is to be used.

§ 737. **Works must be completed within what time.**—The same degree of diligence must be exercised by the appropriator as has been described in the preceding sections, until all of the works are finally completed and ready to divert the water from the natural streams and conduct the same to the place where it is to be used.[1] The commencement of the works and then an unreasonable delay in their completion are as fatal as against the rights of subsequent appropriators—the inception of whose rights began after the works of the first appropriator were started and before they were finished —as though the works of the first appropriator had never been commenced.[2] Where, however, there are no intervening claimants to the water, even if there is unreasonable delay in the completion of the works of the appropriator, when they are finally completed, the right to the water may be maintained as an appropriation by actual diversion.[3]

In most of the States there are statutes upon the subject of the construction of the works, giving a time limit within which they must be completed. So, where a person relies upon the statute for the validity of his appropriation, every provision must be strictly complied with.[4] This also includes the rule that the works must be entirely completed within the time specified in the statute in order to hold the entire claim. Where, however, a part of the works contemplated in the entire scheme are in themselves capable of diverting and conducting a portion of the water at-

8 See Sec. 739.

1 As to what constitutes completion of works, see Sec. 721.

2 New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39, where the Court held that where an appropriator never completed his ditch, until the rights of others had intervened, that no water right ever became vested in him on account thereof.

See, also, for effect of unreasonable delay, Sec. 741.

3 Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324.

For appropriation by actual application of the water, see Sec. 730.

4 See chapter on the laws of State control, Secs. 1337-1367.

See, also, the laws of the various States, Part XIV.

tempted to be appropriated to the place of use, and there is an actual application of this amount to some beneficial use or purpose, the title in the appropriator to the water right to this extent is complete, without the completion of the remainder of the works. Unreasonable delay, however, will work an abandonment as to the rest of the water claimed under the original scheme.[5]

§ 738. Time within which water must be applied—Specific cases.—As we have seen in previous sections, the last step necessary to the consummation of a water right, under the doctrine of appropriation, is the actual application of all the water appropriated to some beneficial use or purpose.[1] After the works are completed,[2] all of the water attempted to be appropriated must not only be applied to some such use or purpose, but this must also be done within what is known in law as a reasonable time. And, as was said while discussing the subject as to the time within which the works must be completed,[3] as to what constitutes a reasonable time within which the water must be applied to some useful purpose is a question of fact and depends upon the circumstances surrounding each particular case.[4] Therefore what would be reasonable diligence

[5] For abandonment, see Secs. 1100-1117.

Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82.

[1] For the consummation of the right, see Secs. 725-728, and cases cited.

For the uses or purposes for which the water may be applied, see Chap. 37, Secs. 690-705.

[2] For completion of works, see Sec. 721.

Time within which works must be completed, see Secs. 737, 738.

[3] For reasonable time to construct works, see Sec. 739.

[4] Beaver Brook Res. & C. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901, where it is said: "What constitutes such reasonable time is a question of fact depending upon the circumstances connected with each particular case."

Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. Rep. 128, where it was held that a prior appropriator did not lose his right to the water by unavoidable delay in applying the water, where such delay was due to the accidental breaking of his ditch.

See, also, Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250; Ophir Silver M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640, where it was held that matters which will excuse delay must be incident to the enterprise and not to the person.

Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856,

in one case might be inexcusable delay in others. Take for example an Idaho case,[5] where 14 years was held to be a reasonable time for a settler to apply all of the water claimed under an appropriation to the land for irrigation. Upon the other hand, take a California case, where under the facts four years was held to be an unreasonable time within which to apply the water.[6]

In a recent case in California it was held that where an appro-

where it is said: "There seems to be no serious difficulty in determining the law on these questions; but the difficulty, if any, lies in the application of the law to the facts. The law requires that there must be reasonable diligence by one intending to appropriate water from a stream, both in the prosecution of the improvements necessary to conduct the water to the place of use and in the application of the water to beneficial uses."

See, also, Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 73, 90 Am. St. Rep. 700; Ft. Morgan Land Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Becker v. Marble Cr. Co., 15 Utah 225, 49 Pac. Rep. 893; Union M. & M. Co. v. Dangberg, 2 Sawyer 450, Fed. Cas. No. 14,370; 81 Fed. Rep. 73, 119.

5 Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19.

6 Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349.

For other cases holding certain periods of time reasonable, see the following:

Where 60 days had elapsed during which nothing but the survey had been made. Dyke v. Caldwell, 2 Ariz. 394, 18 Pac. Rep. 276.

One Year: Oviatt v. Big Four etc. Co., 39 Ore. 118, 65 Pac. Rep. 811.

Two Years: Nevada D. Co. v. Canyon D. Co., 58 Ore. 517, 114 Pac. Rep. 86.

Three Years: Nevada D. Co. v. Bennett, 20 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

Four Years: Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

Seven Years: Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743.

Thirteen Years: Rodgers v. Pitt, 129 Fed. Rep. 932.

Fourteen Years: Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19.

For other cases holding that the period of time was unreasonable, or that there was unreasonable delay, see:

Ten months to conduct the water one-half mile: Cruse v. McCauley, 96 Fed. Rep. 369.

Two and one-half years: Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

Three years where work was not completed and no water diverted: Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580.

Five Years: Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. Rep. 963; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453, 19 Morr. Min. Rep. 243; *Id.*, 120 Cal. 86, 52 Pac. Rep. 139; Still v. Palouse Irr. & Pr. Co., 64 Wash. 606, 117 Pac. Rep. 466.

Ten Years: Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568.

priator of the water of a stream, pursuant to a notice thereof of a specific quantity, and his successors for 30 years failed to make any beneficial use of the water, they lost any right by virtue of the appropriation and the waters became subject to the appropriation by others.[7]

However, it is settled in all jurisdictions that the right of the first appropriator is limited by the amount of water that is actually applied to some beneficial use within a reasonable time for its diversion.[8] Any other rule would permit the appropriator to divert the water from the natural stream and store the same up without the use thereof, and thereby create a monopoly,[9] or to permit him to simply run the water through his land without the use of all of it for some beneficial purpose.[10]

In the consideration of the facts relating to each particular case as disclosed by the evidence, it is proper to consider the magnitude of the enterprise, and the natural obstacles encountered.[11] The difficulty of procuring settlers under a colonization project,[12] and the demand for the water appropriated by a company for the purpose of sale, are proper subjects for consideration.[13] Until there

Thirteen Years: Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82.

Eighteen Years: New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989.

7 Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

8 See, also, Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Cache La Poudre Res. Co. v. Water Sup. & S. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; *Id.*, 27 Colo. 532, 63 Pac. Rep. 420; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856.

9 For appropriation for monopoly, see Sec. 705.

For appropriation for sale, see Sec. 703.

For rights of reservoir and canal companies, see Secs. 837-846.

See, also, Chap. 76.

10 For economical use and the prevention of waste, see Secs. 874-916.

11 Seaweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963, where it is said: "What is a reasonable time in which to apply the water originally intended to be used for some beneficial purpose, depends upon the magnitude of the undertaking and the natural obstacles encountered in executing the design."

12 Nevada D. Co. v. Bennett, 30 Ore. 39, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

13 For the right of irrigation companies to appropriate and store water, see Sec. 704.

has been some demand for the water, I take it that a company may hold the water indefinitely unless there is some statute of forfeiture, providing that unless within a certain time the water is actually applied the right shall be forfeited and subject to appropriation by others. In case of statute limiting the time of application it must be complied with.[14]

This whole subject is summed up in the decision of a recent Utah case,[15] in which the Court said: "He must not only be diligent in constructing the works, and in making the diversion, but he must also be reasonably diligent and expeditious in making application of the water to the beneficial use for which the appropriation was proposed, else he loses his inceptive right. His appropriation will be measured by the quantity of water actually used for the proposed beneficial purpose." And, again, as said by the Arizona Court:[16] "The mere fact that by his notice of appropriation he sought to appropriate all of the flood waters of the stream does not entitle the appellant to relief against the appellee. To make his appropriation effectual, he must make use of the water within a reasonable time. He may then be protected only to the extent that he makes a beneficial use of the water. Whenever there is water in excess of his needs, others may appropriate it."[17]

In California the statute provides: "If the place of intended diversion or any part of the route of intended conveyance of water so claimed, be within, and a part of, any National park, forest reservation, or other public reservation, and be so shown in the notice of appropriation of water, then the claimant shall have 60 days, after the grant of authority to occupy and use such park or reservation for such intended purpose, within which to commence the excavation or construction of said works."[18] It was held relative to this provision by the Supreme Court that the section was to protect claimants who were unable to proceed with the work necessary to perfect their claims by reason of the fact that the place of intended diversion or a part of the route is within some National

[14] For statutes upon subject, see Part XIV.

[15] Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

[16] Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

[17] See, also, Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

[18] Civil Code of California, Sec. 1422; 2 Kerr's Cyc. Code, p. 1164

reservation, pending the procurement, with due diligence, the authority, from the Federal Government.[19]

§ 739. Illness—Pecuniary ability or inability affecting reasonable diligence.—As a general proposition, matters incident to the person of the appropriator are circumstances which will not excuse any great delay in the prosecution of the construction of the works necessary. It is held that the illness of the appropriator is no excuse.[1]

The mere lack of means with which to prosecute the work is not a sufficient excuse for delay. As was said in an early Nevada case:[2] "It would be a most dangerous doctrine to hold that ill health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time, or the diligence which is usually required in the prosecution of the work necessary for the purpose. We find no recognition of such doctrine in law. Nor are we disposed to adopt it as the rule to govern cases of this kind." Again, as was said in an Oregon case:[3] "The authorities clearly show that the claimant's pecuniary condition is not an excuse; and, though the doctrine may seem harsh, it is nevertheless right."[4] The authorities all agree upon this proposition and there is no conflict upon this point. If the rule were otherwise, a person might post and record his notice to appropriate the waters from a certain stream prior to any one else, and thus take the preliminary step for the inception to his title to the water right; a company might also take this initial step to secure a water right for the purpose of the sale of the water to consumers; and, if

19 Wishon v. Globe Light & Power Co., 158 Cal. 137, 110 Pac. Rep. 290.

1 Ophir M. C. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Keeney v. Carillo, 2 N. M. 480; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Nevada etc. Co. v. Kidd, 37 Cal. 282.

See, also, Oviatt v. Big Four etc. Co., 39 Ore. 118, 65 Pac. Rep. 811; Mitchell v. Amador Canal Co., 75 Cal. 464, 483, 17 Pac. Rep. 264.

2 Ophir M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

3 Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568.

4 See, also, Keeney v. Carillo, 2 N. M. 480; Mitchell v. Amador C. & M. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Nevada etc. Co. v. Kidd, 37 Cal. 282; United States v. Whitney, 176 Fed. Rep. 593, holding that the difficulty of financing a large project is not excuse for delay in the prosecution of the work.

the individuals or company were without means to prosecute the construction of the works necessary, they might hold the water right indefinitely, and thus prevent those who desire to appropriate the water for immediate use from acquiring any right to the water, and they themselves might never complete their appropriation. Hence the courts hold, and properly, that this can not be done. This is true whether there are statutes upon the subject or not, requiring that the work be commenced and prosecuted to completion within a certain time.[5]

However, the term "reasonable diligence" is but a relative one, and the courts recognize this fact. Therefore what might be reasonable diligence in one case might be a great lack of diligence in another. As a general thing the settlers who go upon the public domain to make homes are comparatively poor men. They have to go upon these wild and vacant lands, put up their buildings and fences, "grub" and clear their lands and get it ready for cultivation, construct their ditches and other works necessary for the appropriation of the water to irrigate their lands, and at the same time make a living for themselves and their families. Hence it follows that what is reasonable diligence in their cases is not in the case of an individual having plenty of means, or in the case of the corporation attempting to appropriate the water for the express purpose of selling it to these very settlers.[6] There is also no conflict of authorities upon this point, but the courts have always considered, in the cases of *bona fide* settlers, that they might take a longer time in the construction of their works for the diversion of the water which they attempt to appropriate, and in the actual application of the water to their lands, than was required of those with ample means, and still these works might have been constructed within a time which, in their cases, might be justly considered with reasonable diligence.[7] Hence the wisdom of the rule that, what shall constitute a reasonable time for the construction and completion of

[5] For statutes, see laws of various States and Territories, Part XIV.

See, also, State control, Chap. 68, Secs. 1337-1367.

[6] For right to appropriate water for sale, see Sec. 703.

See, also, for irrigation and ditch companies, Chaps. 73-77.

See, also, reasonable diligence in applying water for future needs, Sec. 740.

[7] See Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153, where Mr. Justice Reed said: "Men of limited means in a new territory, who have not only to 'grub' and clear land, but erect houses, and provide means of living while making a home,

the works necessary is a question of fact depending upon the circumstances connected with each particular case.[8] And, so long as the settler does not abandon his claim to the water, but continues in good faith to prosecute the construction of his ditch and other necessary works, and to make the application of the water to his land as rapidly as his demands and circumstances will permit, he should be held to be within the limit of a reasonable time.[9]

§ 740. **Reasonable diligence for future needs.**—As we said while discussing the subject of the construction of the works necessary,[1] the term "reasonable diligence" is a relative one. What may be reasonable diligence in one case might be a great lack of diligence, or unreasonable delay, in another. And, the fact as to whether or not there has been reasonable diligence in actually applying the water to some useful purpose depends upon the facts of each particular case.[2] Upon this subject there is one class of cases which deserve special notice. The law has always looked with special favor, and in some cases great leniency, upon the efforts of "the poor but honest farmer" who goes upon the public lands, and, often with no capital but his brawn and muscle, attempts to make a home for himself and his family. We will say, for example, that he has filed upon 160 acres of land, all of which is irrigable from some

should not be held to the same rule with those more favored, and having abundant of capital."

See, also, Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250.

8 As to what constitutes reasonable diligence, see Secs. 733-741.

See, also, Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 477; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Britt v. Reed, 42 Ore. 76, 70 Pac. Rep. 1029.

It will be noticed that the last three cases are from the Oregon Court, which also rendered the decision in the case of Cole v. Logan, *supra*, adhering to the strict rule, as set forth in the first proposition stated in the text. Upon an examination of the opinion in the case of Cole v. Logan, it will be found that the completion of a ditch about one and one-half miles long in ten years was held, in the face of the rights of subsequent appropriators, not reasonable diligence where the only excuse given for the delay was pecuniary inability.

9 For rights of settlers to make appropriations for future use, see Secs. 886, 887.

1 See Secs. 737-739.

2 See previous section, and cases cited.

natural stream flowing in the neighborhood. The land is raw and covered with sagebrush, greasewood, mesquite, or other wild growth, and when he first files upon the land there is not an improvement of any kind. The first year he has to build some sort of a house; his corrals, and sheds, and fences have to be built if he would protect his stock from the storms and his land from trespass of the cattle running wild upon the range. He has to break up some land and plant crops if he would raise sustenance for his family, himself, and his horses and stock for this year. If, with all that he has to do, the first year he breaks up and puts in crop 10 acres out of the 160 he is doing remarkably well. In order to mature his crop, if his land is within the arid or semi-arid regions, he finds that it must be irrigated. There is plenty of water unappropriated in the stream near by with which he can properly irrigate the whole 160 acres. He properly posts and records a notice of appropriation, stating thereby that he intends to appropriate sufficient water for the whole 160 acres. But he finds, before the water can be used, that a dam for its diversion and ditches for conducting it to his field where it is to be used have to be constructed. All this requires additional labor, and a portion at least must also be done the first year if he would mature his first crop. Therefore he constructs a temporary dam and a small ditch, but of a capacity sufficient only to carry the water to irrigate the 10 acres which he has broken up and put in crop. He conducts the water to this tract and applies it to the land, and thereby saves his crop. He has done the best he could under the circumstances the first year. The next year, we will say, he breaks up and irrigates 20 more acres. In doing this his dam may have to be strengthened and his ditch enlarged to hold the additional water. He continues in this way, each year breaking up additional land, and enlarging his works so as to divert and carry more water, and actually applying the water to the land, until all of it is cleared, plowed, under cultivation, and properly irrigated. He may or may not during the last years be able to progress more rapidly than he did at first. He has finally broken up all of the land, constructed all of the works necessary to divert and carry all of the water necessary for the irrigation of his entire tract, and has applied the water to the land for that purpose. And, although this work might have taken 10 or even 15 years to accomplish, he did it as quickly as he was able under all of the circumstances of his particular case. Under this state of facts, the law holds that

he has used "reasonable diligence," and that "the additional application of water annually to meet the augmented demand causes the appropriation to relate back to its inception, thereby cutting off all intervening rights of adverse claimants to the use of the water." [3]

The law in such a case does not require impossibilities of the appropriator; neither does it require him to do vain or useless things. Therefore it was unnecessary for the settler in our illustration to entirely construct during the first year all of his works necessary for him to make the entire appropriation of the water for all the land; it was also unnecessary for him during that year to apply the entire amount of the water claimed under the full appropriation. The land was not broken up and in a condition to receive it at that time. It would be a vain and useless thing for him to do this in order to hold his entire appropriation. And, again, the proximity to market is a proper subject for consideration. Very many of the agricultural lands of the Western country, when they are first taken up for settlement, are far from transportation and market. This is a proper subject for consideration in determining the question of

[3] Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. Rep. 963.

See, also, Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113, 81 Fed. Rep. 73; Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400; New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250; Brown v. Newell, 12 Idaho 166, 85 Pac. Rep. 385; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Glaze v. Frost, 44 Ore. 29, 74 Pac. Rep. 336; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308, where the Court held that an appropriation of water sufficient for a whole tract of land will relate back to the first step taken to make the appropriation, in case the water is used continuously and the area of cultivation is extended with reasonable diligence.

See, also, Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Weldon Valley Ditch Co. v. Farmers' Pawnee Canal Co., —— Colo. ——, 119 Pac. Rep. 1056.

See, also, for quantity of water appropriated for future needs, Secs. 886, 887.

Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19.

See, also, cases cited in last section, No. 739.

For quantity of water which may be appropriated, see Secs. 877-886.

reasonable diligence in this class of cases. It was held in an Idaho case that where crops could not be disposed of at a reasonable profit it was not necessary to cultivate all of the land, and still the water right might be held pending such a time.[4] Therefore, as said before, the law is very considerate of the farmer in this class of cases. To hold that the law required settlers to cultivate all of their land within a very short time or lose a large portion of the water right which they had taken the proper steps to appropriate for their entire irrigable area, would result in defeating the very purpose of the public land laws of Congress, and defeat most settlers in acquiring the right to the use of sufficient water to properly irrigate their lands. Hence the statutes in some of the States, especially the more recent irrigation codes, provide that forfeiture for the statutory period of non-use shall not apply to the class of cases under discussion in this section.[5]

§ 741. **Effect of reasonable diligence, or the lack of.**—If, after notice has been given of the intent to appropriate the water of a certain stream, the dam, ditch, and other works are soon thereafter begun in good faith, and all due and reasonable diligence exercised in the prosecution of the construction of the same to its final completion, the full enjoyment of the water attempted to be appropriated does not, of course, commence until the works are finally completed and capable of conducting all of the water; but, as against all others subsequently attempting an appropriation of the waters of the same stream, the right of the first appropriator to the use of the water dates or relates back, by what is known as the doctrine of relation,[1] to the date of the posting of the notice or the first step taken to make the appropriation.[2] If, however, on the other hand, the work of construction be not prosecuted with all due and reasonable diligence, and the water attempted to be appropriated be not actually

4 Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19, where it is said: "If the demands for the products of the farm were not great enough to make such products bring a little profit over and above the cost of growing, harvesting, and marketing them, the farmer must become bankrupt if he be required to raise crops on all of his lands under those conditions."

5 See Idaho Stats., 1907, p. 507. For the laws of the other States, see Part XIV.

1 For doctrine of relation, see Secs. 742-756.

2 Under the more recent statutes a notice is required in nearly every State. For notice, see Secs. 710-716.

applied to a beneficial use or purpose within a reasonable time after the first step is taken to appropriate the same, then the right to the water does not relate back to the date of the posting of the notice or the first step taken to make the appropriation, and it will either work an abandonment,[3] or, if there is a statute upon the subject in that jurisdiction, a forfeiture [4] of either the entire original claim to the water, or the portion that is not within a reasonable time actually applied to some beneficial use. In the latter case, the right to the use of the water will be confined to the quantity of water which has been actually applied before any subsequent rights had accrued.[5]

It therefore follows that in cases where there has been a lack of reasonable diligence, or, in other words, there has been an unreasonable delay in any of the steps necessary to the final consummation of the right, which, as we have seen, is the actual application of the water, and during this delay all or a portion of the water claimed by the first appropriator has been appropriated by others, the first man may either lose all his right to the water of the stream, or he may only take any water of the stream that may be left, subject to the rights acquired by others who have intervened and have strictly complied with all of the conditions of the law.[6] Unreasonable delay in the final consummation of the right is always fatal as against the rights acquired by subsequent appropriators. This has been the rule from the first in all States and Territories where the law of appropriation is in force.[7] If, however, the work is resumed

[3] For abandonment, see Secs. 1099-1117.

[4] For forfeiture of right under statute, see Secs. 1118-1120.

[5] Conklin v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 138 Cal. 716, 72 Pac. Rep. 349; Nevada etc. Co. v. Kidd, 37 Cal. 282; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Keeney v. Carillo, 2 N. M. 480.

[6] For extent of rights of subsequent appropriators, see Secs. 783-786.

For doctrine of relation, see Secs. 742-756.

For extent of rights of intermediate appropriations, see Sec. 786.

[7] Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Kelly v. Natoma Water Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Maeris v. Bicknell, 7 Cal.

and the appropriation is finally consummated, before the rights of subsequent parties have vested, then it is not fatal to the appropriation, as the right may then be claimed by actual diversion and use.[8]

261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; King v. Edwards, 1 Mont. 235; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. M. Rep. 583; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Irwin v. Strait, 18 Nev. 436, 4 Pac. Rep. 1215; Keeney v. Carillo, 2 N. M. 480; Megerle v. Ashe, 33 Cal. 74; Smith v. Athern, 34 Cal. 507; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Nevada etc. Co. v. Kidd, 37 Cal. 282; Still v. Palouse Irr. & Pr. Co., 64 Wash. 606, 117 Pac. Rep. 466; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; New Loveland etc. Co. v. Consolidated etc. Res. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Cruse v. McCauley, 96 Fed. Rep. 369.

See, also, the statutes of the respective States, Part XIV.

[8] For appropriations without the compliance with the statute, see Secs. 730, 751.

See, also, Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563; *Id.*, 22 Pac. Rep. 198.

CHAPTER 40.

THE DOCTRINE OF RELATION.

§ 742. Scope of chapter.
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§ 756. Effect of doctrine as between appropriators and settlers or purchasers of land.

§ 742. Scope of chapter.—As we have seen in the preceding chapters of this work, an appropriation is instituted or begun by the filing of a notice of the same or by the actual commencement of the work of construction.[1] The doctrine of relation has also been referred to as that doctrine which enables an appropriator, where he has followed up the inception of his appropriation with all reasonable diligence, to hold his rights to the full extent of his intended appropriation until such appropriation is finally consummated or completed.[2] In this chapter we will discuss more at length the subject of the doctrine of relation and its effect upon appropriations and other rights to either the waters or lands upon the public domain.

§ 743. Doctrine of relation—What it is.—By the doctrine of relation is meant that principle by which, when an act is done at one time, it is considered, by a fiction of law, as if done at some

1 See Secs. 710-718.

2 For the consummation of an appropriation, see Secs. 725-728.

antecedent time.[1] This doctrine is usually invoked where several acts are essential to complete a particular transaction, or to establish an estate; the last act of the series of acts which consummates the transaction is held for certain purposes to take effect by relation as of the day when the first proceeding was had.[2]

This doctrine is a fiction of law adopted by the courts solely for the purpose of justice; and "there is no rule better founded in law, reason, and convenience,"[3] as it is based on broad, equitable principles. But this doctrine is never applied when it would wrongfully defeat the rights of third persons; for, as it is said, "relations are fictions in law which will never do wrong, and can never be applied to a void act."[4]

This doctrine had become an accepted principle of law, and applicable to many subjects, long before it was ever applied to the subject of the appropriation of waters in the arid and semi-arid States and Territories of this country. It is often applied to the acquisition of mining claims, a kindred subject to the acquisition of water rights.[5] It also is applied to the acquisition of title to the public lands by private individuals, and especially as to their right to cut the timber growing thereon; and, in those jurisdictions which maintain both the common law of riparian rights and the Arid Region Doctrine of appropriation,[6] it is applied to determine the relative rights to the water flowing by a certain tract of land, which has been legally filed upon by a settler, as between the appropriators of the water of the stream and the settler's right as a riparian

1 Bouvier, Law Dict., Sub., Relation.

2 Gibson v. Chouteau, 80 U. S. 13 Wall. 92, 20 L. Ed. 534; Lessieur v. Price, 53 U. S. 12 How. 60, 13 L. Ed. 893; U. S. v. Detroit Timber & L. Co., 200 U. S. 321, 50 L. Ed. 499, 26 Sup. Ct. Rep. 282; affirming 131 Fed. Rep. 668, 67 C. C. A. 13.

3 Cruise on Real Property, Vol. 5, pp. 510, 511.

4 Butler and Baker's Case, 3 Coke, 23; Barrington v. Parkhurst, 13 East. 489, 104 Eng. Reprint 460; Jackson v. Crafts, 18 Johns. (N. Y.) 110; Williamson v. Field, 2 Sandf. Ch. (N. Y.) 533, 568; Landers v. Brandt, 51 U. S. 10 How. 348, 13 L. Ed. 449; Ormison v. Trumbo, 47 Mo. App. 316; Clarke v. White, 37 U. S. 12 Pet. 178, 9 L. Ed. 1046.

For the application of the doctrine of relation, in the acquisition of real property, see Secs. 445, 755, 756.

5 See Snyder on Mines, 1902, Secs. 425, 426.

Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; McEvoy v. Hyman, 25 Fed. Rep. 596; McKay v. McDougall, 25 Mont. 258, 64 Pac. Rep. 526, 87 Am. St. Rep. 395.

6 For these States, see Secs. 507, 621.

owner.[7] And it is also often applied to determine the rights between appropriators of the water of the same stream, and often has the effect of cutting out entirely the claims of subsequent appropriators, or in decreasing the amounts of their claims.[8]

§ 744. History of doctrine as applied to appropriations of water.—One of the first questions which the courts were called upon to settle, under the Arid Region Doctrine of appropriation, was at what date the rights to the water of the same stream accrue as between rival claimants to the same. As we have seen in previous sections,[1] an appropriation of water is not perfected and finally consummated until the works necessary for diverting and conducting the water are completed, and the water actually applied to some beneficial use or purpose. To consummate any appropriation requires some time. It is true that the construction of some of the works necessary require but little time, as, for instance, is the case of farmers whose lands lie near a stream from which the waters may be easily diverted. In other cases in order to consummate and finally complete an appropriation it may require years to construct the works necessary to divert the water and to finally apply it to the purposes for which the appropriation is made. Such is the case of the large irrigation enterprises, where immense dams must tbe built, reservoirs constructed, and canals and ditches dug many miles in length, and where the purpose of the appropriation is the irrigation of several thousand acres of land. And, from these two illustrations may be readily seen the evil of the situation, and a question which the courts at an early day were called upon to settle. Assuming that the necessary steps to perfect the appropriation were first taken by the parties promoting the large irrigation enterprise, that the construction of their works was prosecuted with all due and reasonable diligence to their final completion, that they were all ready to divert and apply the water to the useful purpose for which the appropriation was being made, and at this time they found that all of the water of the stream was being diverted by the farmers who lived along the banks of the stream and

[7] See Secs. 755, 756.

[8] See Secs. 748-751.

For rights of subsequent appropriators, see Secs. 783-786.

[1] See for the consummation of an appropriation, Secs. 725-728.

was being applied to the irrigation of their lands, and no other subject entering into the case for consideration, the question was, who was entitled to the water?

We will also take another illustration. Two farmers, each with 160 acres of land, attempt to appropriate water from the same stream for the purpose of irrigating their full acreage. The land of one borders upon the stream and the water is easily diverted and applied to the same. The land of the other is further back from the stream and its natural condition is such that it requires much more labor and time to break and prepare it for crops and irrigation. But this man posts his notice of appropriation, or takes the first step necessary to make the appropriation in that jurisdiction prior in time to the other. He also takes all the necessary steps to complete and consummate his appropriation with all reasonable diligence. But he finds, when he is ready to apply the full quantity of the water claimed under his appropriation and necessary for the use intended, that the other farmer, although he was subsequent in time in taking the first step necessary, has taken such a quantity of the water from the stream and is actually applying it to the irrigation of his own land, that there is not water left running in the stream sufficient to irrigate the land of the one who first took the preliminary step to make the appropriation. It was such questions as these at the time of the earliest history of the doctrine of appropriation, that the courts were called upon to settle. The doctrine of relation was invoked and thus the rights of the one who took the first step necessary to make the appropriation were protected while he was constructing his works and preparing his land for its irrigation. This is the correct rule, for otherwise the doctrine of appropriation would have resolved itself into a scrambling rush for the possession of the water right, and always the question would be decided in favor of the one who either had the most money or the one who had the least to do to effect the diversion of the water. The Supreme Court of California was the first to adopt the rule.[2] And, as was said in one of the first cases where this question was directly involved: "The question now arises, at what point of time does the right commence, so as to protect the undertaker from the subsequent settlements or enterprises of other persons. If it does not

2 Stark v. Barnes, 4 Cal. 412; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592.

commence until the canal is completed, then the license is valueless, for after nearly the whole work has been done, any one, actuated by malice or self-interest, may prevent its accomplishment; any small squatter settlement might effectually destroy it."[3]

The conclusion of the early California courts as stated above as to the application of the doctrine of relation became the rule of decision throughout all the Western States and Territories before there was any statutory law enacted upon the subject. The courts of Nevada, in 1866, followed the rule established in California.[4] And, in 1884, the Supreme Court of Colorado said: "We accept the rule adopted in California and Nevada in this connection."[5] These States were followed by all of the other States and Territories where the doctrine of appropriation is in force,[6] and in most jurisdictions the rule adopted originally by the courts has been adopted in statutory enactments to the same effect.[7]

§ 745. Rule stated as applied to appropriation.—The rule of the doctrine of relation as applied to the appropriation of waters, as stated by the Colorado Court, is as follows: "Although the appro-

[3] Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

[4] Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537.

See, also, Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640, decided in 1866.

[5] Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901.

[6] For cases where the doctrine of relation was applied, see Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Ophir Silver Mining Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Irwin v. Strait, 18 Nev. 436, 4 Pac. Rep. 1215; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Nevada etc. Co. v. Kidd, 37 Cal. 282; Osgood v. Eldorado Mining Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Nevada etc. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 822; Sand Point etc. Co. v. Panhandle etc. Co., 11 Idaho, 405, 83 Pac. Rep. 347; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Wright v. Cruse, 37 Mont. 177, 95 Pac. Rep. 370; Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. Rep. 867; Van Dyke v. Midnight Sun Co. (Alaska), 77 Fed. Rep. 90, 100 C. C. A. 503; Miocene Ditch Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106; McFarland v. Alaska etc. Co., 3 Alas. 308.

[7] For the appropriation of water in accordance with the statutes of the respective States, see Part XIV.

priation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates back to the time when the first step was taken."[1] We will adopt this statement of the rule as the present law on the subject in all jurisdictions. It is broad enough to cover the law of all the States, regardless of the questions as to what is considered a consummation of the appropriation,[2] or the first step necessary to be taken toward that end.[3] In some States, as will be seen, the consummation of the appropriation is the actual application of the water to some useful purpose, but in others it is the act of conducting the water to the place of intended use.[4] Again, in the States where a notice of appropriation is required, the act of posting a proper notice is considered the first act necessary to the inception of title to the right. But, in the States where the notice is not required, the actual commencement of the construction of the works is deemed sufficient. In any case the right relates back from the last act considered necessary in the jurisdiction where the appropriation is attempted to the first necessary act, or "the first step" as stated in the rule above. In the following sections we will discuss these differences.[5]

As was stated by Judge Hawley for the Federal Court of Nevada:[6] "In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the

1 Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901, citing Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592.

Where the construction of the works was prosecuted with reasonable and proper diligence: "It is well settled in this State that, under such circumstances, plaintiffs' rights relate back to the commencement of the work." Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

So long as it prosecuted the work with reasonable diligence, "it was entitled to have its appropriation relate back to the posting of its notice; and, in that event, appellant would be entitled to protection as a prior appropriator as against the respondent." Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338.

2 For consummation of the appropriation, see Secs. 725-728.

3 For notice of appropriation, see Secs. 710-717.

4 See Secs. 725-728.

For consummation of an appropriation, see Sec. 725.

5 See Secs. 746-756.

6 Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume, or other appropriation is effected, provided the enterprise is prosecuted with reasonable diligence."[7]

The doctrine of relation, however, can not be invoked where the ditch or works of another are used to make the diversion and there is no delay in making the same. Such an appropriation is termed an appropriation by actual diversion and use, to which the doctrine of relation does not apply. Such a diversion, as was said by a leading California case, "must stand or fall upon its own merits."[8] It therefore follows that such an appropriation dates only from the new use, and not from the original building of the ditch or the inception of the right thereto, or the old water right used in connection therewith. In other words, the new appropriation can not be tacked on the old one and relate back to its inception.[9]

§ 746. In appropriation of water—From what act it relates.—As we have seen in previous sections, in most jurisdictions, an appropriation is not deemed consummated until there is an actual application of the water to some beneficial use or purpose.[1] Hence, it follows that, this being the final act to complete an appropriation, the right to relate back can only begin from such actual use. So, if there be no actual use of the water for some such purpose within a reasonable time, there is no valid appropriation; and, therefore, the doctrine of relation can not apply to the first step taken toward an attempted appropriation, but one not finally consummated.[2]

7 Citing cases and Kinney on Irrigation, 1st Ed., Secs. 160, 161; Black's Pomeroy on Water Rights, Sec. 55.

8 Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

9 See, also, Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113, 81 Fed. Rep. 73; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Chiatovich v. Davis, 17 Nev. 133, 28 Pac. Rep. 239; Salina Irrigation Co. v. Salina Stock Co., 7 Utah 456, 27 Pac. Rep. 578; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222; Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761.

See, also, for tacking rights, Sec. 787.

1 For consummation of an appropriation, see Secs. 725-728.

2 Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. Rep. 963; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Nevada D. Co. v. Bennett,

In other jurisdictions, especially in California and those States which have followed the statute of California, the statutes fix the date of the completion of the appropriation, at the time when the water is conducted to the place of intended use; and, therefore, this being the final act for the consummation of an appropriation, the right relates back from the time when the water is actually conducted to the place of intended use.[3]

Hence, it follows that in either case the date from which the right to the use of the water relates is the date of the last act, which is deemed, in the jurisdiction where the appropriation is attempted, to be the final and consummating act, and that, too, whether that act be the actual application of the water to some useful purpose, or the conducting the water to the place of intended use; provided, always, that the appropriation is consummated within what is deemed a reasonable time.[4]

§ 747. In appropriation of water—To what act it relates.—There are also different rules in different jurisdictions as to the act to which the right to the water relates; or, in other words, the act, which in that particular State where the appropriation

30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

See, also, cases cited under Secs. 747-751.

See, also, Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Colorado Land & Water Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580.

"We doubt whether a party could ever invoke the doctrine of relation until his appropriation was completed; and we are led irresistibly to the conclusion that, before the statute makes applicable the doctrine, a completed appropriation must have been effected." Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

[3] Cal. Civil Code, Sec. 1417. "By 'completion' is meant conducting the waters to the place of intended use." And Cal. Civil Code, Sec. 1418. "By compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." See, also, 2 Kerr's Cyc. Codes, p. 1161.

For the consummation of an appropriation, see Secs. 725-728.

If the water is not then applied to some useful purpose, within a reasonable time, it works an abandonment; see Sec. 738.

For abandonment, see Secs. 1100-1117.

See, also, Osgood v. El Dorado Water etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Irwin v. Strait, 18 Nev. 436, 4 Pac. Rep. 1215.

[4] For reasonable time, see Secs. 733-741.

is attempted, constitutes "the first step," or inception of the right. In all of those jurisdictions where it is required that a notice of appropriation of the water be posted,[1] the claimant's right to the use of the water relates back, from the last act necessary, to the time when the notice was posted; provided, of course, that the appropriation is consummated in a reasonable time.[2] In these jurisdictions the act of posting the notice constitutes "the first step" necessary to be taken.[3] In many of the States it is provided by statute that by compliance with the statutory rules and consummating the appropriation with reasonable diligence, the right to the use of the water relates back to the time when the notice of appropriation was posted.[4]

But, in some of the States, as we have seen, no notice is required, or has been required until the adoption of the recent irrigation and water codes.[5] In the States which require no notice of appropriation as the inception of the title, the right to the use of the water relates back to the first act taken by the appropriator for the construction of his works for the purpose of diverting and conveying the water to the place of intended use, provided that

1 For the necessity of notice, see Secs. 710-717, 730.

2 For what constitutes a reasonable time, see Secs. 733-741; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

3 For the States requiring notice, see Sec. 712.

See, also, Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137; Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 477, where it was held that, where an appropriator does not post and file a notice as provided by law, his right only dates from the last act perfecting his appropriation; Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198.

The mere possession by one person of a water right, originated by another, does not show contractual relation between him and the original appropriator, and the rights of the latter do not relate back to the inception of the original appropriator's claim. Kenck v. Deegan, —— Mont. ——, 122 Pac. Rep. 746.

4 See Cal. Civil Code, Sec. 1418. "By compliance with the above rules the claimant's right to the use of the water relates back to the time when the notice was posted." 2 Kerr's Cyc. Codes, p. 1161.

For other statutes on the subject, see Part XIV.

5 For appropriation of water under the irrigation codes, see Secs. 1337-1367.

For States not requiring notice, see Sec. 710, and notes.

reasonable diligence is exercised thereafter in finally perfecting the appropriation. This is the present rule in Colorado, as that State never enacted a statute requiring the posting of a notice of appropriation, or the doing of any act prior to the actual commencement of the construction of the works necessary.[6] But the courts of that State have always recognized the doctrine of relation, and hold that the right relates back to the first substantial act of the appropriator, for the acquisition of the right, whether that act be the actual commencement of the construction of the works necessary, or whether it be the survey necessary prior to the beginning of the construction work proper.[7] This was also the rule in all States and Territories prior to the enactment of a statute requiring notice as the inception of title.[8]

Hence, it follows, that in either case the date to which the right to the use of the water relates is the date of the first act, which is deemed, in the jurisdiction where the appropriation is attempted, to be the first act necessary for the inception of the right, and that, too, whether that act be the posting of a notice of an appropriation or whether it be the commencement of the construction of the works necessary to consummate the appropriation; provided always that

[6] See Mill's Irr. Manual, 1907, p. 74. See, also, on the question of notice, Secs. 710-717, 730.

For the declaratory statements required under the recent irrigation codes, see Sec. 1350.

[7] Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, where the Court said: "The priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch." Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Water Supply & S. Co. v. Larimer & W. Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Cache La Poudre Res. Co. v. Windsor Res. & C. Co., 25 Colo. 53, 52 Pac. Rep. 1104.

Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, Judge Hawley said: "In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume, or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence."

[8] See Irwin v. Strait, 18 Nev. 436, 4 Pac. Rep. 1215; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213; Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615.

from that date the appropriation is finally consummated within what is deemed a reasonable time.

§ 748. **Reason of doctrine as between appropriators.**—As between parties who claim the waters of the same stream by its appropriation, the doctrine of relation is often a very important factor in determining both the priority and the extent of the respective rights of the claimants. The application of the doctrine of relation depends largely upon the question of reasonable diligence in the construction of the works necessary to effect the appropriation and the actual application of the water to some useful purpose. Therefore, there are two essential elements absolutely necessary to permit the doctrine to be successfully invoked to the claim of an appropriator. These are, first, the priority in the inception of the right;[1] and, second, reasonable diligence in its consummation. Therefore, its application is oftentimes fatal to the entire claim of one or more of the parties interested, and, that, too, regardless of the fact whether the loser was prior in time in taking the first step or not. This may appear to those who are used to the common law of riparian rights to be a harsh rule, as in the case of the rights of subsequent appropriators of the water of the same stream, the appropriation of all of which had been properly instituted by other parties prior to the time that the first step was taken by the later comers. The intent of the subsequent appropriators may have been just as *bona fide*,[2] as that of the ones prior; the work of construction may have proceeded with all reasonable diligence; they may have actually applied the water to the useful purpose before the prior appropriators were ready to apply the water; yet, under the rule embodied in the doctrine of relation, the first step having been taken by the others and their work toward the consummation of their appropriation also having been prosecuted with reasonable diligence, those first may successfully claim all the water of the stream to the entire exclusion of those who initiated their claims last. This is not as harsh a rule as it would seem, when we consider that the very basis of the right of the first appropriator is based upon his priority. There may be unfortunate circumstances which deprive those subsequent of water which they need, but they are circum-

1 For rights of prior appropriators, see Secs. 776-782.

2 For intent of appropriation, see Secs. 707-709.

stances which grow out of the physical conditions of this Western country.[3] It is an unfortunate circumstance that there is not water enough for the use of all who may be in need of it in this part of the country. The percentage of the water available to irrigate the amount of land which might be irrigated if there was plenty is exceedingly small. Hence, the rule that the one who is prior in time has the superior right, is an absolute necessity in this part of the country. And, then again, in order to successfully maintain their claims to the water the prior appropriators must have given some sort of notice of their claims, and the extent thereof;[4] and this notice should have put those attempting a subsequent appropriation upon their guard.[5]

§ 749. **Effect of doctrine upon prior appropriators.**—When the right to appropriate water has been once perfected, by taking all of the necessary steps for the same, as set forth in another chapter of this work,[1] should any question arise as to the priority of the parties claiming the rights to the water of the same stream, the doctrine of relation is invoked to settle and determine this question. And the rule of law upon this subject, as laid down by the decisions and the statutes where enacted, is that if the first appropriator had given the proper notice in accordance with the law of that jurisdiction,[2] of his intention to appropriate the water of a certain stream, and his works for diverting and conducting the same were begun thereafter in good faith and their construction prosecuted with all due and reasonable diligence to their completion, and he is all ready to apply the water to the beneficial use for which the appropriation is made, then he acquires an exclusive right to the use of the water of the stream to the full extent of his appropriation,[3] as against the rights of all others instituted subsequent to the date of the posting of the notice, even if those subsequent, at the time that the first was ready to apply the water, were actually diverting and using the water for some beneficial purpose. By the doc-

3 For physical conditions of the West, see Secs. 239, 268.

4 For the necessity of notice, see Secs. 710, 717, 730.

5 For rights of prior and subsequent appropriators, see Secs. 776-786.

1 For methods of appropriation, see Secs. 706-732.

For reasonable diligence, see Secs. 733-741.

2 For the necessity of notice, see Secs. 710-717.

3 For extent of right, see Sec. 781.

trine of relation the right of the first relates back to the time of the inception of his title, the date of the posting of the notice; or in jurisdictions where notice is not required, to the date of the first step of the actual commencement of the work, which in itself is considered notice.[4] It can thus be readily seen that the doctrine of relation protects the rights of the first appropriator from the time that he gives the proper notice to the time of the final consummation of the appropriation. It gives him a reasonable time to construct the works necessary, and also a reasonable time within which to actually apply all of the water claimed to the use for which the appropriation was made.[5] And, although there may be intervening

[4] See early cases cited in previous sections, and the Colorado cases cited in Sec. 746.

Nevada etc. Co. v. Kidd, 37 Cal. 282. Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Atchison v. Peterson, 1 Mont. 561; aff'g 187 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; King v. Edwards, 1 Mont. 235; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Columbia M. Co. v. Holter, 1 Mont. 296; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Irwin v. Strait, 18 Nev. 436, 4 Pac. Rep. 1215; Stark v. Barnes, 4 Cal. 412; Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106, where in the absence of statute requiring notice to be posted, the right was held to relate back to the commencement of the work.

Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Morgan v. Shaw, 47 Ore. 333, 83 Pac. Rep. 534; Water Supply Co. v. Larimer D. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

An appropriation of sufficient water for the whole tract will relate back to the first diversion, in case the water is used continuously and the area of cultivation extended with reasonable diligence, in a case where at the time there was no statute providing for notice. Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308.

See, also, Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Gallahan v. Sullivan, 9 Land Dec. 6; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Brown v. Newell, 12 Idaho, 166, 85 Pac. Rep. 385; Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. 963; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146.

See, also, appropriations for future use, Sec. 740.

[5] For appropriation for future uses, see Sec. 740.

Where a delay in the application was caused by the breaking of a ditch

and subsequent appropriations of the water claimed, the prior appropriator need take no notice of them, as, provided he has used but a reasonable time between the first step and the last one necessary for the consummation of the appropriation, he may then successfully claim all of the water to the full extent of his appropriation.[6]

Upon this point the Supreme Court of Montana, in Woolman v. Garringer,[7] said: "The notices posted on the stream, of the appropriation of so much water, for general mining purposes, and the immediate entering upon the continued prosecution of the construction of the dam and ditch, and its extension or branches, were sufficient to put the plaintiffs on their guard, and to apprise them of the prior appropriation of the defendants and of their riparian rights to the premises. And from these facts they were bound to take and were charged with notice of the defendants' prior appropriation, and if they then proceeded, it was at their own option and peril. Nor were the defendants required to take notice of any subsequent appropriation by the plaintiffs."[8]

§ 750. **Effect of doctrine upon subsequent appropriations.**—As may be readily seen from our previous section,[1] if the party who took the first step consummated his appropriation within a reasonable time thereafter, one of the effects that this would have would be either to cut off entirely, or to reduce the claims of the subsequent appropriators, provided, of course, that there was not water in the stream sufficient to supply the wants of all. But the rule works both ways. There must not only be priority but there must be also reasonable diligence. If, therefore, there was unreasonable delay upon the part of the one who took the first step, in any of the proceedings necessary for the consummation of the right, and the rights of subsequent appropriators have been properly instituted and the same have been followed up by a strict compliance with the

of the first appropriator, a reasonable time is given to repair it. Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. Rep. 128.

[6] Nevada etc. Co. v. Kidd, 37 Cal. 282; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Osgood v. Eldorado etc. Co., 56 Pac. Rep. 571, 5 Morr. Min. Rep. 37.

[7] 1 Mont. 535, 1 Morr. Min. Rep. 675.

[8] See, also, for intervening appropriations, Sec. 788.

For subsequent appropriations, see Secs. 783-786.

[1] See Sec. 749.

law and with all due diligence, then, in that case, the rights of the parties are reversed. The right of relating back does not apply to the one who took the first step, and his right only begins with the actual consummation of his appropriation. Upon the other hand, the rights of those who started their first steps to make the appropriation after the first party started and before the actual consummation of his right, become prior appropriators as against the rights of the first party, and take their places in the order of priority as between themselves. The one who started first then takes what water he may, subject to the rights of those who instituted their rights prior to the actual diversion and use by himself,[2] and the doctrine of relation does not apply to his right, but it does to the rights of the others.

The beneficial effect of the rule of the doctrine of relation may thus be readily seen. It does not permit the water to remain under the claim of any person unless he applies it to some beneficial use or purpose within what the law deems a reasonable time, which, as we have seen, depends upon the circumstances of each particular case.[3] The title to the water does not vest in the appropriator at the time of his giving notice, but in order to acquire title, and to acquire the right of the application of the doctrine of relation, he must comply with all of the conditions subsequent required by the law. Therefore, upon the consummation of his appropriation and from that time only will the doctrine of relation apply, and then only when that consummation has been accomplished within a reasonable time.[4]

§ 751. Effect of doctrine upon appropriators who do not comply with the statute.—Where one attempting an appropriation of

2 Doctrine of relation as applied to those who do not comply with the law, see Sec. 751.

See, also, Ophir S. M. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Irwin v. Strait, 18 Nev. 436, 4 Pac. Rep. 1215; Keeney v. Carillo, 2 N. M. 480; Megerle v. Ashe, 33 Cal. 74; Smith v. Athern, 34 Cal. 507; Colo. Land & Water Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580.

See, also, cases cited under question of lack of diligence, Secs. 738, 741.

3 See Secs. 738, 740.

4 Nevada etc. Co. v. Kidd, 37 Cal. 282; Salt Lake City v. Salt Lake etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543.

water fails to comply with the requirements of the statute, as, for example, in the matter of notice in those States requiring it, a valid appropriation may be made,[1] but the effect is to preclude the appropriator from claiming, by the doctrine of relation, to the time when the first step was taken by him as against one who does comply with all the statutory provisions, and has prosecuted his works to completion in accordance therewith. The rule in a case of this kind is that the right of one who has not complied with all of the statutory provisions dates only from the last act perfecting such an appropriation which is, in the majority of States, held to be the actual application of the water to some beneficial use.[2]

§ 752. As between appropriators and Congressional grantees.— We have seen in the previous sections of this chapter that an appropriation of water if properly instituted and followed up by all due and reasonable diligence until the water is diverted and actually applied to some beneficial use or purpose, relates back to the first step taken.[1] The inception of the title to land in Congressional grantees is ordinarily at the date of the grant.[2] Where grants have been made to railroad companies, these grants have been usually *in praesenti*, and under them the title to the land has been adjudged to pass, not at the date of the completion of the road, but at the date of the grant. It creates a present interest, and does not indicate a purpose to give in the future. The phrase usually used in these grants, "there be and is hereby granted" are words of absolute donation, and import a grant *in praesenti*. The Supreme Court of the United States has held repeatedly that they could have no

1 See appropriation without complying with statute, Sec. 730; appropriation without notice, Sec. 714.

2 Cruse v. McCauley, 86 Fed. Rep. 369; Pyke v. Burnside, 8 Idaho 487, 69 Pac. Rep. 477; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324.

Where the right to use water was decreed to one by a void probate decree, such use constituted an original appropriation as of that date. Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334.

Where one, at the time the law did not authorize it, filed a notice claiming a certain amount of water, but did not divert the same and apply it to a beneficial use, he acquired no rights. Kendall v. Joyce, 48 Wash., 489, 93 Pac. Rep. 1091.

1 See Sec. 747.

2 For land grants for internal improvements, see Secs. 427-429.

other meaning, and the Land Department on this interpretation of them, has uniformly administered all similar grants.[3] But it has also been held by the same line of authorities that the title to the land in the railroad company is imperfect as long as the route of the road had not been actually fixed, and the lands surveyed; and, until the line of the road has become definitely fixed, the grant was a float.[4] But after the location of the road, the grant became certain, and by relation had the same effect upon the selected parcels as if they had been specifically named at the date of the Act in the grant itself.[5]

Under a grant, a railroad company becomes a riparian owner in all those natural streams and other bodies of water which flow through or adjoin the lands granted or otherwise acquired, where those lands lie within States which recognize the common law of riparian rights.[6] Now, the question for determination is: When does a grant made to a railroad company in these States take effect so as to cut off the right of appropriation of the waters flowing through or by the lands granted? If the rights of appropriators of water have vested, prior to the date of the Act granting the lands, there is no question but that those rights will be protected. And, again, if the first step was taken toward the accomplishment of an appropriation which was finally consummated within a reasonable time, before the date of the granting Act there will still be no question as to the rights of the appropriator. By the application of the doctrine of relation the rights of the appropriator would still antedate the granting Act; the doctrine, in the case of the railroad

3 Leavenworth etc. R. Co. v. U. S., 92 U. S. 733, 23 L. Ed. 634; Schulenberg v. Harriman, 88 U. S. 21 Wall. 44, 22 L. Ed. 551; Hannibal etc. R. Co. v. Smith, 76 U. S. 9 Wall. 95, 19 L. Ed. 599; 1 Lester, Land Laws, 513; 8 Ops. Atty.-Gen. 257; 11 Ops. Atty.-Gen. 47; St. Paul etc. R. Co. v. Phelps, 137 U. S. 528, 34 L. Ed. 767, 11 Sup. Ct. Rep. 168; St. Paul etc. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 35 L Ed. 77, 11 Sup. Ct. Rep. 389; U. S. v. Southern Pac. R. Co., 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152; U. S. v. Detroit Timber & L. Co., 200 U. S. 321, 50 L. Ed. 499, 26 Sup. Ct. Rep. 282; aff'g 131 Fed. Rep. 668, 67 C. C. A. 13.

4 See cases cited above.

When the route was fixed their location became certain, and the title to the lands, which was previously imperfect, acquired precision and became attached to the land. Schulenberg v. Harriman, *supra*.

5 Leavenworth etc. R. Co. v. U. S., *supra*.

6 For the Western States which adhere to the common law in this respect, see Secs. 507, 621.

company, relating back to the date of the granting Act, and, in the case of the appropriators, to the date of the first step taken to accomplish the appropriation, provided, of course, that the appropriation was consummated within a reasonable time from its inception.[7] And, the railroad company, in both instances above named, would take the title to the lands subject to all rights of the appropriators, whatever they may be. As was held in the early case of Broder v. Natoma Water & M. Co. by the Supreme Court of the United States: Congress, in making donation grants to railroad companies, can not be supposed to have exercised its liberality at the expense of pre-existing rights to water which, though imperfect, were still meritorious, and had just claim to legislative protection.[8] This rule not only applied to the appropriation of the waters flowing over these lands but to the acquisition of the title to the lands themselves.[9]

§ 753. **As between appropriators and Congressional grantees—Railway companies—Grants in aid of construction.**—The title to the land granted by Congress to a railroad company in aid of construction being imperfect until the route of the road has been definitely fixed; [1] and, after it has been so fixed, it relates back to the date of the granting Act, another question has arisen in this connection. Usually a considerable period of time has elapsed between the date of the Act of Congress granting the land to the company and the time when the line of the road was definitely established. Sometimes this period has been of several years' duration. In the meantime, perhaps upon the strength of the coming of the road, the country along its proposed line became settled up and the water of the streams was appropriated and used for irrigation and other useful purposes. Now, during this period of time, can claims

7 See Secs. 725-728, 737-741.

8 Broder v. Natoma W. & M. Co., 101 U. S. 274, 25 L. Ed. 790; aff'g 50 Cal. 621.

See, also, Acts of Congress of 1866 and 1870, and construction thereof, Secs. 611-620.

See, also, Wolcott v. Des. Moines N. & R. Co., 72 U. S. 5 Wall. 681, 18 L. Ed. 689; Williams v. Baker, 84 U. S. 17 Wall. 144, 21 L. Ed. 561; Leavenworth etc. R. So. v. U. S., 92 U. S. 733, 23 L. Ed. 634; San Jose Land & W. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; aff'g 129 Cal. 673, 62 Pac. Rep. 269.

See, also, rights of prior appropriators as against Congressional grantees, Secs. 804-809.

9 See cases cited *supra*.

1 See Secs. 427, 428.

to water from streams flowing through the tracts granted be acquired by private parties; or, can the railroad company, under the application of the doctrine of relation, claim the water as a riparian owner, in those jurisdictions where that right is in force, back to the time of the granting Act? The authorities hold upon this point that rights to water can be so acquired up to the time when the route to the road is "definitely fixed."[2] As was held by the Supreme Court of the United States, the rights of settlers or others who acquire rights, between the passage of the Act and the actual location and identification of the lands, are preserved unimpaired, even though these rights should be found to be acquired within the boundaries of lands granted to a railroad in aid of construction. Hence, in cases of this nature the railroad company has not the right of relation back to the date of the granting Act. But a distinction is made between the lands granted in aid of the construction of the railroad and the land granted for the right of way. In the latter case, a person acquiring any interest, subsequent to the date of the grant, takes it subject to the prior rights of the railroad, and the right of the railroad relates back to the date of the granting Act.[3]

The inquiry then arises, when is the route of the road to be considered as "definitely fixed" so that the grant attaches to the land and cuts off all subsequent claimants? The route is "definitely fixed," within the meaning of the Act of Congress when the company files with the Secretary of the Interior a map of its lines, as the route has thus ceased to be subject of change at the volition of the company. And up to the time when the company files with the Secretary a map of its route, thus identifying the same, and the lands included in the grant, claims to water by appropriation re-

[2] Childs v. Sharai, 8 Idaho 378, 69 Pac. Rep. 111, where it was held that, where one settles upon a part of the unsurveyed lands of the United States and constructs a ditch across the same, he secures a right of way therefor, although such land, when surveyed, is found to be within the grant to a railroad company. Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

[3] Bybee v. Oregon & Cal. R, Co., 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641, aff'g 26 Fed. Rep. 586; St. Joseph etc. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578; Doran v. Wilson & Central Pac. R. Co., 24 Cal. 245.

lating back to the first or preliminary act taken, if prior to the time the route is definitely fixed, are not affected by the grant.[4]

Upon the point as to when the route of the road is "definitely fixed," Mr. Justice Field, in rendering the opinion of the Supreme Court of the United States, in the case of Van Wyck v. Knevals,[5] said as follows: "The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer the route is established; it is, in the language of the Act, 'definitely fixed,' and can not be the subject of future change so as to affect the grant, except upon legislative consent. No further action is required of the company to fix the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty the neglect would not impair the rights of the company, however prejudicial it might prove to others."

§ 754. **As between conflicting grantees.**—As we have seen, a railroad company, as grantee of the Government, in those jurisdictions which recognize the common law rights in water, upon taking the title to the lands granted becomes the riparian proprietor of all such lands as border upon streams flowing through those lands, provided that their waters have not been appropriated prior to the time that the route of the road was "definitely fixed."[1]

Now, as to controversies between different parties claiming two Congressional grants of lands to aid in the building of railroads or for any other purpose, the title to the lands granted relates, after the road is definitely located according to law, to the date of the grant; and in cases where the lands granted, as between different

[4] See cases cited *supra*.

See, also, Glidden v. U. P. R. Co., 30 Fed. Rep. 660; Missouri etc. R. Co. v. Noyes, 25 Kan. 340, 5 Am. & Eng. Ry. Cas. 440; Atchison etc. R. Co. v. Pracht, 30 Kan. 66, 1 Pac. Rep. 319, 12 Am. & Eng. R. Cas. 267.

[5] 106 U. S. 360, 27 L. Ed. 201, 1 Sup. Ct. Rep. 336, 10 Am. & Eng. R. Cas. 664.

[1] See Secs. 427, 428.

roads, conflict or encroach upon each other, priority of the date of the Act of Congress and not priority of the location of the line of the road gives priority of title to the land; and, of course, as the road only takes the waters as riparian proprietor, the same principle of relation also applies to the rights in waters flowing over or adjoining those lands. When, however, the Acts of Congress in such cases are of the same date, or when grants are made to different roads by the same statute, priority of location gives no priority of right to the lands and waters granted; but where the limits of the grants which are finally settled by the roads being definitely located conflict by crossing or lapping the railroad, companies building the roads under those grants take the lands and water as an incident thereto within the conflicting limits of the location in equal undivided moieties, without regard to priority of location of the line of the road, or priority of construction, provided that both companies complete their roads within the time limited by law.[2] However, a different rule is in force in case of lands to be selected in lieu of those within the limits of a primary location, which have been sold or pre-empted; the definite location of the roads is fixed, where the limits of selection interfere or overlap. In such cases neither the priority of the grant, nor the priority of location gives priority of right; but this is determined by priority of selection, where the selection is made in accordance to law, and therefore the title can only relate back to this date.[3]

§ 755. **As applied to the rights of settlers.**—The doctrine of relation is also applied to the rights of settlers in the acquisition of their title to the land filed upon or "taken up" by them. The final step in the acquisition of title is the issuance of the patent from the Government to the settler. Yet it is held that a patent from the United States operates to transfer the title, not merely from the date of the patent, but, by applying the doctrine of relation, from the very inception of the equitable right upon which the

[2] St. Paul & S. C. R. Co. v. Winona etc. R. Co., 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334; Van Wyck v. Knevals, 106 U. S. 360, 27 L. Ed. 201, 1 Sup. Ct. Rep. 336; Grinnell v. Chicago etc. R. Co., 103 U. S. 731, 26 L. Ed. 456; St. Paul & Pac. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 35 L Ed. 77, 11 Sup. Ct. Rep. 389.

[3] St. Paul etc. R. Co. v. Winona etc. R. Co., *supra*.

patent is based.[1] The inception of the right may be the filing in the proper land office of the application or declaratory statement required under the particular law under which the land is being taken up;[2] or it may be the *bona fide* settlement of the unsurveyed public lands of the United States, followed with the proper filing within the time limit after such lands have been surveyed.[3] Although the patent to the land is not issued until the time limit has expired, and the settler has fully complied with the law governing that particular class of entries, yet when issued, by relation, it becomes operative as of the date of the original entry or the *bona fide* settlement upon the land, and thus cuts out all subsequent claims of others whether they be to the land itself, or to any of the incidents attached thereto. This doctrine has been frequently recognized by the Supreme Court of the United States and by other courts.[4]

1 For the inception of title under the various land laws, see Chap. 20, Sec. 445.

2 See Secs. 433-445.

For the purchase of timber lands, see Sec. 439.

See, also, St. Paul etc. Co. v. Donohue, 210 U. S. 21, 52 L. Ed. 941, 28 Sup. Ct. Rep. 600; William Boyle, 38 Land Dec. 603; Morgan v. Shaw, 47 Ore. 333, 88 Pac. Rep. 534; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Redwater etc. Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702; Lonetree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Redwater etc. Co. v. Jones, — S. D. —, 130 N. W. Rep. 85; Faull v. Cook, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836.

3 See Sec. 445.

4 Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Landers v. Brandt, 51 U. S. 10 How. 348, 13 L. Ed. 449; Simmons v. Wagner, 101 U. S. 260, 25 L. Ed. 910; Lynch v. De Bernal, 76 U. S. 13 Wall. 315, 19 L. Ed. 714; Stark v. Starr, 73 U. S. 6 Wall. 402, 18 L. Ed. 925, where, in fact, the patent does issue, it relates back to the inception of the right of the patentee so far as may be necessary to cut off intervening claimants; French v. Spencer, 62 U. S. 21 How. 228, 16 L. Ed. 97, where the Court held that in the case of a military land warrant, the patent related back to the location of the warrant; Gibson v. Chouteau, 80 U. S. 13 Wall. 92, 20 L. Ed. 534; U. S. v. Detroit Timber & L. Co., 200 U. S. 321, 50 L. Ed. 499, 26 Sup. Ct. Rep. 282; aff'g 131 Fed. Rep. 668, 67 C. C. A. 13; Jackson *ex dem.* DeForest etc. Co. v. Ramsey, 3 Cow. (N. Y.) 75, 15 Am. Dec. 242; Welch v. Dutton, 79 Ill. 465; Ormiston v. Trumbo, 77 Mo. App. 310; Larsen v. Oregon Ry. & Nav. Co., 19 Ore. 240, 23 Pac. Rep. 974; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350; aff'g 6 Dak. 71, 50 N. W. Rep. 486; Lone Tree Ditch Co. v. Cyclone etc. Co., 15

The above rule, which is the one now in force, was not always the rule. Some of the early cases did not hold with the above proposition, but held that the right could only relate back to the date of the patent so as to cut off intervening rights.[5]

It is also held that the settler does not have to wait until the patent is actually issued by the Government before the doctrine of relation will apply to the inception of his claim. Where the right to the patent has once become vested in a settler or purchaser of a tract of the public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. And the courts hold that from the date that the settler or purchaser has fully complied with the law and is entitled to his patent, by applying the doctrine of relation from that date to the date of the inception of his claim it cuts off all subsequent and intervening claims.[6] The issuance of the receiver's receipt is the perfection of the full equitable title, and the execution and delivery of the patent thereafter are mere ministerial acts of the officers charged with that duty.[7] But in either event the right to the land and to all incidents thereto relates back to the very inception of the claimant's title. We will next discuss the doctrine of relation as the same is applied between the rights of settlers or purchasers of Government land and appropriators of waters flowing over those lands, in those States where

S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Redwater etc. Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702; Cruse v. McCauley, 96 Fed. Rep. 369; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; *Id.*, 81 Fed. Rep. 73; McGuire v. Brown, 106 Cal. 660, 39 Pac. Rep. 1060, 30 L. R. A. 384; Conklin v. Pacific etc. Co., 87 Cal. 296, 25 Pac. Rep. 399; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978; Van Dyke v. Midnight Sun etc. Co. (Alaska), 177 Fed. Rep. 90; Snyder v. Colorado etc. Co., 181 Fed. Rep. 62; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Faull v. Cook, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836.

[5] See Covington v. Becker, 5 Nev. 281; Hobart v. Ford, 6 Nev. 77, 15 Morr. Min. Rep. 236; Lake v. Tolles, 8 Nev. 285.

[6] U. S. v. Detroit Timber & L. Co., 200 U. S. 321, 50 L. Ed. 499, 26 Sup. Ct. Rep. 282; aff'g 131 Fed. Rep. 668, 67 C. C. A. 13; Simmons v. Wagner, 101 U. S. 260, 25 L. Ed. 910; U. S. v. Freyberg, 32 Fed. Rep. 195.

[7] Barney v. Dolph, 97 U. S. 652, 24 L. Ed. 1063; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. Ed. 687, 10 Sup. Ct. Rep. 341: Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. Ed. 999, 12 Sup. Ct. Rep. 158.

the common law of riparian rights and the Arid Region Doctrine of appropriation are both in force.[8]

§ 756. Effect of doctrine as between appropriators and settlers or purchasers of land.—In those States which maintain the dual systems of water rights, that of appropriation and the common law of riparian rights, the doctrine of relation is often applied to determine the rights of claimants of water from the same stream as between the appropriators upon the one hand and the settlers on or purchasers of Government land. We have seen in previous sections that,[1] the right of an appropriator relates back from the act consummating the appropriation to the first step taken toward its inception, provided that due and reasonable diligence was exercised from that first step until the final consummation. The rights of settlers and purchasers of land also relate back to the inception of their title or also to the "first step" taken to acquire their equitable and legal title.[2] Hence, it follows that where there is a clash between the rights of the appropriators of water and the settlers or purchasers of the land through which the water flows, the doctrine of relation is applied and it becomes simply a question as to which took the first step. The one prior in time takes the superior right; and, the later comers take their rights, if any, subject to the right of the one who was first in time in instituting his right.[3] This may be considered the settled rule in these controversies in all jurisdictions, and no extended discussion upon the subject is now necessary,[4] although when the first edition of this work was written,

8 See Secs. 507-621.

1 See Secs. 743-754.

2 See Sec. 445.

3 See, also, rights to water as between appropriators and riparian proprietors, Secs. 810-825.

Riparian owners who located claims in 1876 and were residing thereon on February 28, 1877, when the lands were opened to public settlement, and continued to reside thereon until after patents were issued to them, had a claim to the water rights prior to the water rights of an appropriator locating in 1878. It was held that the patents related back to the date of settlement upon the land, so that a provision in the patents that they were subject to vested and accrued water rights did not apply. Redland Land & Canal Co. v. Jones, — S. D. —, 130 N. W. Rep. 85.

4 Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, aff'g 6 Dak. 71, 50 N. W. Rep. 486; Cruse v. McCauley, 96 Fed. Rep. 369; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Id., 81 Fed. Rep. 73, 119; Atkinson v. Washington Irr. Co., 44

prior to 1893, the question was by no means settled. At this time the California and Washington courts were holding that, in those jurisdictions, the rights of settlers did not relate back to their inception of title; and, as against later appropriators, their rights were not protected, until after the patent had issued for the land, or at least until full payment had been made.[5] However, the early ruling of both the California and Washington courts upon this subject have in effect been overruled; both courts later adopting the rule as stated above, to the effect that the riparian rights of a patentee of the Government attach by relation at the time of the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land.[6]

Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836, where it was held that a homestead claimant's riparian rights attach from the date of the settlement, provided that he afterwards complies with the law, and obtains a patent for the land.

See, also, Morgan v. Shaw, 47 Ore. 333, 83 Pac. Rep. 543; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Ison v. Nelson M. Co., 47 Fed. Rep. 199; Wood v. Etiwanda W. Co., 122 Cal. 152, 45 Pac. Rep. 726; Irwin v. Philipps, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; *Id.*, 147 Cal. 233, 81 Pac. Rep. 512.

For cases holding to the same doctrine in Nevada, while the common law of riparian rights was in force in that State, see Vansickle v. Haines, 7 Nev. 249; Hobart v. Ford, 6 Nev. 77; Lake v. Tolles, 8 Nev. 285.

Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, where the Court applied the same rule to the sale of State lands, and said: "While the contract of purchase is recognized by the State authorities as alive, the water of the stream flowing through the land can not be diverted by a mere appropriator."

[5] See Farley v. Spring Valley etc. Co., 58 Cal. 142; Osgood v. Eldorado Water etc. Co., 56 Cal. 751, 5 Morr. Min. Rep. 37; Thorpe v. Tenem D. Co., 1 Wash. 566, 20 Pac. Rep. 588; Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. Rep. 27, where it was held that the water in water courses on the public lands of the United States are subject to appropriation by use in accordance with the local customs and laws; and vested rights so acquired can not be divested by relation back of a patent granted. "Until final proof then he (the patentee) had no vested right and his patent could not, therefore, relate back, under any circumstances, to his original filing."

See, also, Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314.

See, also, De Necochea v. Curtis, 80 Cal. 397, 22 Pac. Rep. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146.

[6] McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384, where the Court, after citing the Farley and Osgood cases cited *supra*, said: "But to the extent that they

And it is further held, and correctly, that the inception of a settler's title may be only the actual *bona fide* settlement upon the unsurveyed public lands of the United States; and, that his right to the water relates back to the settlement, as against all subsequent rights. This is so, provided, of course, he makes his filing on the land as provided by law, and follows this up by fully complying with the law and finally securing his patent. In fact, under the statute an actual settler upon the public lands before survey is given a preference right, after the lands have been surveyed and opened for entry to make his filing. And hence the settlement in this case must be the inception of his title, and his rights to the water are protected under the rule stated above by relating back to the very

must find support in the proposition that the interest of a settler on the public lands under the pre-emption or homestead laws attaches as against the appropriators of water rights on his tract only as of the time of his final proof or obtaining a patent, they appear to be in conflict with the decision of the Federal Supreme Court in Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350; aff'g 6 Dak. 71, 50 N. W. Rep. 486; and the views of that Court, as those of the tribunal of last resort in cases of this impression, must, of course, prevail." Citing, also, Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836; Black's Pomeroy on Water Rights, Secs. 40-42; Kinney on Irr., 1st Ed., Secs. 212-220.

In Washington, in the case of Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, where the appellant was contending that, under the previous ruling of the Court in Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. Rep. 27, the rights of the patentee did not relate back of the patent granted, the Court, after citing Sturr v. Beck, *supra*, and referring to that case, said: "While the Court fully recognized the doctrine of prior appropriation of water on the public lands, in accordance with the local customs, laws, and decisions of courts, it announced and established the just and equitable rule that the riparian rights of a patentee of the Government attach, by relation, at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land. That case, it would seem, settles the law adversely to the contention of the appellants in this case." Citing Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Larsen v. Oregon R. & Nav. Co., 19 Ore. 240, 23 Pac. Rep. 974; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836, Kinney on Irr., 1st Ed., Sec. 210; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

See, also, to the same effect, Scott v. Toomey, 8 S. D. 639, 67 N. W. Rep. 838, citing Kinney on Irr., 1st Ed., Sec. 219; Lone Tree etc. Co. v. Cyclone etc. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596, citing Kinney on Irr., 1st Ed., Sec. 220.

inception of his title to the land.[7] This rule applies to valid mining locations, as well as to other lands.[8]

However, the doctrine of relation can not be invoked in the case of the mere settlement or squatting on the land without any intention of acquiring the title to the land, and without the necessary steps being taken therefor, as mere squatters can have no riparian rights.[9]

The effect, therefore, of the doctrine of relation, as between appropriators and settlers upon the public lands, is the basis which underlies all appropriations, and that is: "The one first in time is the first in right." Therefore, the one who takes the first step either to make the appropriation or to settle upon his land is the one to whose rights the doctrine of relation applies, and the other must take subject to the rights of the first; provided, of course, that both have followed up their claims by taking all the steps necessary for their completion and with reasonable diligence.[10] The same rule applies as between the rights of an appropriator, the owner of a mining claim;[11] also, as between a ditch located upon the public land when in conflict with a townsite location.[12]

7 See Morgan v. Shaw, 47 Ore. 333, 83 Pac. Rep. 534; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836; Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596.

8 Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Leigh v. Independent D. Co., 8 Cal. 323, 12 Morr. Min. Rep. 97.

9 Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191, where it was held that a trespasser on public lands is for some purposes deemed the owner, but when one asserts riparian rights as against an upper appropriator of water, he must show some right, inchoate or otherwise, to the land. Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Scott v. Toomey, 8 S. D. 639, 67 N. W. Rep. 838; Morris v. Bean, 146 Fed. Rep. 423; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Hobart v. Ford, 6 Nev. 77; Lake v. Tolles, 8 Nev. 285.

For riparian rights of squatters, see Sec. 478.

10 See De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001, where an appropriator posted notice on an abandoned artesian well, and thereafter a settler homesteaded the land upon which was the well, and where it was held by the Court that the appropriator was entitled to continue building his ditches and complete his appropriation.

11 Miocene etc. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106.

12 Baker etc. Co. v. Baker City, 58 Ore. 306, 113 Pac. Rep. 9.

PART IX.

THE NATURE, EXTENT, AND CHARACTER OF RIGHTS ACQUIRED IN WATERS BY APPROPRIATION—RIGHTS OF WAY AND THE POLLUTION OF WATERS.

CHAPTER 41.

THE NATURE AND CHARACTER OF A WATER RIGHT.

§ 757. Scope of this part of the work—Scope of chapter.
§ 758. What is a water right?—Court decisions.
§ 759. Our definition of a water right.
§ 760. A water right is an exclusive right.
§ 761. The water must be appropriated according to law.
§ 762. It is but a conditional possessory right.
§ 763. The right is conditional upon continuous use.
§ 764. The right exists independent of the right to the ditch or other works.
§ 765. The right exists independent of any property in the channel of the stream.
§ 766. Title or possession of land on stream unnecessary.
§ 767. Title or possession to any land unnecessary.
§ 768. A water right is property.
§ 769. A water right is real property.
§ 770. A water right is not an easement.
§ 771. A water right is an incorporeal hereditament.
§ 772. Title to the water before diversion.
§ 773. Title to the water after diversion.
§ 774. Water, after diversion—Nature of property in.

§ 757. Scope of this part of the work—Scope of chapter.—Having discussed in previous portions of this work the different phases of the subject of the law governing waters, down to and including the acts necessary to make a valid appropriation of water under the Arid Region Doctrine of appropriation, it now devolves upon us to discuss the nature and character of the right so acquired and the extent to which it may be exercised. The following chapters of this part will be devoted to these subjects.

In the present chapter we will discuss the nature and character of a water right under the Arid Region Doctrine of appropriation.

§ 758. What is a water right?—Court decisions.—A "water right," under the Arid Region Doctrine of appropriation, was defined by the Supreme Court of Montana to be "the legal right to use water."[1] The defect of this definition is obvious. It is a self-evident fact and defines nothing. It would apply equally as well to the use of water under the common law of riparian rights as under the doctrine of appropriation. As well might the Court have said that a water right is a water right. This definition was afterward modified by the same court and a water right was there defined to mean the right to the use of water appropriated according to law from the streams of the State for any useful or beneficial purpose.[2] There are other definitions of the term "water right" to be found in the decisions, but none of them seem to us to embody all of the essential elements.

The Supreme Court of Oregon, in the case of Morgan v. Shaw,[3] using the term "an appropriation of water" for the term "water right," says: "An appropriation of water is a grant by the general Government to the settler of the right to its use from a non-navigable stream, to the injury of all public land above the point of diversion, which may be within or beyond the boundaries of the settler's claim."

The Supreme Court of Colorado says:[4] "The plaintiffs allege a right to have a certain quantity of water flow through the irrigation company's ditch. This right is an easement in the ditch. It is a right annexed to realty, and, being a perpetual right, is an incorporeal hereditament, descendible by inheritance to plaintiff's heirs,

1 Smith v. Deniff, 24 Mont. 21, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

2 See City of Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798; *Id.*, 27 Mont. 135, 69 Pac. Rep. 709, where, after quoting the definition in the Smith case, it is said: "This may be modified to mean, in this case, the right to use water appropriated according to law from the streams of the State for any useful or beneficial purpose."

See, also, for definition of "appropriation," Secs. 586, 587.

For nature and character of a riparian right, see Secs. 450-456.

3 47 Ore. 333, 83 Pac. Rep. 534.

4 Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 28, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

and hence a freehold estate." "A water right is a freehold estate."[5] "Under our decisions a water right is real estate, and not personal property."[6]

At an early day, and during the formative period of the law of appropriation,[7] the California Court, following a wrong definition as applicable to the common law, and as actually used in a decision involving a common law question, said: "The right to running water is defined to be a corporeal right, or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes."[8]

§ 759. Our definition of a water right.—We have found in the decision no definition as to what in our opinion constitutes a water right under the Arid Region Doctrine of appropriation. In some of the decisions some particular elements are given, and in others other elements are given, but there seems to be no definition which in our opinion is entirely complete. Therefore, we will define a water right in our own language, taking the essential elements from the various cases deciding the same, and afterward we will discuss these particular elements in the following sections of this chapter.

A water right, acquired under the Arid Region Doctrine of appropriation, may be defined as the exclusive, independent property right to the use of water appropriated according to law from any natural stream, based upon possession and the right continued only so long as the water is actually applied to some beneficial use or purpose; it is an incorporeal hereditament, so far as it includes the right to have the water flow over the lands of others down to the head of the appropriator's ditch; but the water is a

5 Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753.

6 Travelers' Ins. Co. v. Childs, 25 Cal. 360, 54 Pac. Rep. 1020.

"What a 'water right' was is defined by the following language in the deed: 'That is to say, the right to the use of water flowing through the canal of said first party, each water right representing one and forty-four one-hundredths (1.44) cubic feet of water flowing under a weir per second.'" La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; aff'd 31 Colo. 1, 71 Pac. Rep. 415.

7 For history of the doctrine of appropriation, see Secs. 596-626.

8 Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 1 Morr. Min. Rep. 513, citing Sackett v. Wheaton, 17 Pick. 103; 1 Cruise's Digest, 39; Angell & Ames on Water Courses, p. 3.

That riparian rights are not corporeal hereditaments, see Secs. 454, 455.

corporeal hereditament after it has been once taken into the ditch or reservoir of the appropriator and is in his actual possession for the purpose of application to his uses.

With this definition, we will proceed to discuss the nature and characteristics of the property in a water right, and also the property in the water after its diversion.

§ 760. **A water right is an exclusive right.**—In our definition of the term "water right" under the doctrine of appropriation, we said that it was an exclusive right.[1] This is one of the most important distinctions between the right to the use of the water of natural streams under the common law of riparian rights and under the doctrine of appropriation. Under the common law the right to the use of the water by one individual depends upon the equal or correlative rights to its use by all of the riparian owners upon the same stream.[2] In this dry and arid country, where the water is exceedingly scarce and there is not enough for all, instead of following the common law rule as to its use, or "parceling it out generally and making it practically valueless to any,"[3] in the early days of the settlement of this portion of the country, there was adopted the only rule founded in equity that could be rightfully adopted in the premises, based upon priority of the appropriation. He who first appropriated a certain amount of water from a natural stream should be rewarded for his industry and enterprise by the right to the use of the water to the full amount of his appropriation as long as he applied the same to some beneficial use or purpose, and to the exclusion of all others where they interfered with his right.[4] As was stated by the California Court, in a case decided in 1857:[5] "A party appropriating water has the sole and exclusive right to use the same for the purposes for which it was appropriated, and so long as he is not obstructed in the use thereof, he has no ground of action." He does not have to divide

1 See Sec. 759.

2 For right to use the water of a stream under the common law, see Secs. 483-497.

For irrigation as a riparian right, see Secs. 498-525.

3 Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235.

4 For the history of the doctrine of appropriation, see Secs. 595-626.

For rights of prior appropriator, see Secs. 776-782.

5 Hoffman v. Stone, 7 Cal. 49, 4 Morr. Min. Rep. 520.

his right with any one, even if it covers all of the water of the stream.[6]

One of the principal distinctions between the right to the use of water by a riparian proprietor and the same right by an appropriator is that in the former the proprietors are tenants in common, and in the latter there is a tenancy in severalty. In other words, an appropriator has the several and exclusive right to the use of the water included within the extent of his appropriation. As was said in a recent Oregon case:[7] "One of the distinctions between appropriation of water and use by a riparian proprietor is that the former contemplates tenancy in severalty, while the latter is essentially a tenancy in common with all other riparian proprietors on the same stream." This exclusive right of the prior appropriator of the waters of a certain stream also includes the right to the tributaries of that stream,[8] or other sources of its water supply.[9] However, this exclusive right does not include the

6 Hillman v. Hardwick, 3 Idaho 255, 28 Pac. Rep. 438; Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235.

The prior right to use water for irrigation, acquired by priority of appropriation, is absolute, regardless of whether the stream furnishes a sufficiency for all. Hunning v. Porter, 6 Ariz. 171, 54 Pac. Rep. 584.

Keeney v. Carillo, 2 N. M. 480; Schilling v. Rominger, 4 Colo. 100; Wellington v. Beck, 30 Colo. 409, 70 Pac. Rep. 687; *Id.*, 43 Colo. 70, 65 Pac. Rep. 626; Trade etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37, where the United States Circuit Court for Idaho said: "Beyond question, under our laws, a party may be protected in the use of all the water he actually appropriates and uses, even if it be every drop that flows in as great a river as the Snake."

See, also, Dunniway v. Lawson, 6 Idaho 28, 51 Pac. Rep. 1032; Malad Val. Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Coffin v. Left Hand D. Co., 6 Colo. 443.

The prior appropriator of a particular quantity of water of a stream is entitled to the use of that water or so much thereof as naturally flowed into the stream, unimpaired or unaffected by subsequent changes therein by spring and seepage waters finding their way into a tributary of the stream in the course of nature unaffected by artificial works constructed by a subsequent appropriator. Beaverhead Canal Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880.

See, also, for the rights of prior appropriators, Secs. 776-782.

7 Caviness v. La Grande Irr. Co., — Ore. —, 119 Pac. Rep. 731.

8 See, for appropriation from tributaries, Sec. 649.

9 For appropriation from springs, see Sec. 648.

For appropriation from lakes, see Sec. 650.

For subterranean waters tributary to a stream, see Sec. 655.

For the right of an appropriator to insist on the flow of the stream as it was wont at the time he made his appropriation, see Sec. 801.

right to prevent others from using the same water, or the surplus waters of the same stream, where such use does not interfere with his rights. The same water may be appropriated for power purposes higher up the stream, and, after it has been so used, if it is returned to the stream undiminished in quantity, or undeteriorated in quality, the prior appropriator can not complain.[10] So, again, if there is more than sufficient water flowing in the stream for the full use of the prior appropriator, others have the right to make subsequent or secondary appropriations of the surplus, and[11] the exclusive right of the first appropriator to his own appropriation can not prevent them. However, all later comers can only take their rights, if any, subject to the full, exclusive right of the prior appropriator. These subsequent rights are each in turn as exclusive rights as that of the appropriator who was first. Each appropriation must stand alone, and each appropriator has the exclusive right to the same to the full extent of his appropriation as though he was the first to make it; provided, always, that there is sufficient water in the stream so that the rights of those prior are not infringed upon. As stated by the California Court in a recent case:[12] "The principle in brief is this: That where one is entitled to the use of a given amount of water at a given point, he may not complain of any prior use made of the water which does not impair the quality or quantity to which he is entitled, and, upon the other hand, he may not claim to any excess of water over the amount to which he is entitled, however it may be produced."[13]

§ 761. The water must be appropriated according to law.—One of the essential elements of a water right is that the water upon which it is based must have been appropriated according to the

10 For right to appropriate for power purposes, see Secs. 695, 847-855.

For the pollution of water, see Secs. 1129-1147.

11 For rights of subsequent appropriators, see Secs. 783-786.

12 Pomona Land & Water Co. v. San Antonio Water Co., 152 Cal. 618, 93 Pac. Rep. 881.

13 Citing Creighton v. Kaweah Irr. Co., 67 Cal. 221, 7 Pac. Rep. 658; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

law of the State where the appropriation is made.[1] An unlawful diversion confers no right and is actionable, unless it has been for the time, and has all of the elements which are required to acquire a right by prescription.[2] If there is a statute or a water code in the State where the appropriation is attempted, its provisions must be strictly complied with in order to secure the benefits allowed under it.[3] To be sure, a water right may be acquired by the mere diversion and use of the water without following the statutes in that regard; but in cases of this character the doctrine of relation will not apply, as in the case where the statute is followed.[4] All of the subject referred to in this section will be found in other portions of this work and there treated more fully.

§ 762. **It is but a conditional possessory right.**—As we have seen in our historical review of the subject of the doctrine of appropriation, water rights originated in the taking possession of the waters of the natural streams and other sources of water supply on the public domain, and followed in that respect the custom of the miners in taking possession of mining claims.[1] Therefore, a water right in early times was considered and was merely a possessory right. And today a water right is but a possessory right. Upon the other hand, statutes have been enacted whereby the owner of a mining claim having but a possessory right thereto can secure an absolute title in fee to the same.[2] There is no law whereby a possessory owner of a water right can secure an absolute title in fee to his right. The title to a water right has never been "elevated to the dignity of a fee."[3] And, furthermore, the right is but a con-

1 For definition of a water right, see Sec. 759.

See, also, City of Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798; *Id.*, 27 Mont. 135, 69 Pac. Rep. 709.

For definition of appropriation of water, see Sec. 587.

2 For prescription, see Secs. 1033-1058.

For remedies for unlawful diversion, see Part XIII.

3 For the appropriation of water without code, see Secs. 706-732.

For appropriation with code, see Secs. 1349-1356.

4 For appropriation by diversion and use, see Sec. 730.

For the doctrine of relation, see Secs. 742-756.

1 For the history of the doctrine of appropriation, see Secs. 595-626.

2 For sale of mining lands, see Secs. 440-443.

3 As held by Wiel in Water Rights in Western States, 1908, Sec. 66, where he says: "It was called a

ditional possessory right; the possessory right depending upon the condition that all of the water claimed under the right is continually applied to some beneficial use or purpose.[4] With the failure to comply with the condition of use for a certain time the right terminates, and it is either deemed abandoned,[5] or forfeited under a statute, as the case may be.[6] This is as it should be. If the law were otherwise, and if a person could secure the absolute title in fee to a water right, calling for a definite amount of water flowing in a certain stream, and then continue to own and hold the same, and that, too, whether he applied the water to any beneficial use or purpose or not, and thereby prevent others from using the water, it would subvert and overturn the whole system of the doctrine of appropriation as it is in force today. It is true that a water right has acquired the dignity of real property;[7] but real property is owned and held by many kinds of title, the one highest in degree being an absolute title in fee simple. If the law remains as it is no one can hope to secure an absolute title in fee simple to a water right, but he may, as long as he complies with the condition of applying the water claimed to some beneficial use or purpose, acquire an exclusive possessory right.[8]

Some of the decisions and statutes term a water right a privilege, franchise, or license.[9] In all jurisdictions a water right is conditioned as to its continuance upon the compliance with the

'possessory right,' though today elevated to the dignity of a fee.'' However, see Sec. 67, where he says: ''The right is *conditional*. This is a feature in common with all *possessory* rights on the public domain.'' The writer of this does not recall where there can be a title in fee, which is conditional and based only upon possession.

4 See upon this subject, Secs. 727, 728, 877, 911-916.

5 For abandonment, see Secs. 1099-1120.

6 For forfeiture under statute, see Secs. 1117-1120.

7 Water right real property, see Secs. 768, 769.

8 That a water right is but a possessory right, see Sec. 762.

For what purposes water may be appropriated, see Secs. 690-705.

The consummation of the right of appropriation, Secs. 725-729.

Water right an exclusive right, see Sec. 760.

See, also, Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610.

9 Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Mitchell v. Amador Canal Co., 75 Cal. 483, 17 Pac. Rep. 246; Natoma Water Co. v. Hancock, 101 Cal. 42, 31 Pac. Rep. 112, 35 Pac. Rep. 334.

See, also, for the statutes of the various States relative to the nature of a water right, Part XIV.

local laws of the State wherein the same is situated. And, upon a failure to comply with these laws, it either works an abandonment or a forfeiture of the right.[10]

The Act of Congress of 1866 [11] only recognizes the right as a possessory one: "Whenever, by priority of possession, rights to the use of water . . . have vested and accrued, . . . the possessors and owners of *such* vested rights shall be maintained and protected in the same." [12]

§ 763. The right is conditional upon continuous use.—Not only must there be an actual application of the water to some beneficial use or purpose, or at least a diversion of the water from the natural stream and the same conducted to the place where it is to be used [1] before the possessory title to the water right is acquired, but the continuation of the right is also conditional upon the continuous use of the water. In other words, the right is merely usufructuary, and the right to the water lasts so long as it is in actual use and occupation, but no longer. The property in the water in the appropriator ceases the instant the water escapes and is out of his possession, and another man may appropriate it to his own use.[2] The same is true also as to the water right itself. If the right is not used, or rather, if the water claimed under the right is not used for a period of time sufficient to work an abandonment or forfeiture, the right ceases in the original appropriator, and the water claimed by him under it may be appropriated by others. But as long as the first appropriator holds possession of the right by the use of the water claimed under it his possessory title is good, and exclusive in himself, as against all later comers,

10 For abandonment, see Secs. 1099-1117.

For forfeiture, see Secs. 1118-1120.

11 For Act and construction thereof, see Secs. 611-619.

12 For the Act of 1866, and its construction, see Secs. 611-619.

1 For the consummation of an appropriation, see Secs. 725-729.

2 Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175; Farmers' Union D. Co. v. Rio Grande Canal Co., 37 Colo. 512, 86 Pac. Rep. 1042; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888; Colorado Land & Water Co. v. Rocky Ford Canal etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580.

See, also, Secs. 783-786.

and the water right arises to the dignity of a distinct, exclusive usufructuary estate.[3]

§ 764. **The right exists independent of the right to the ditch or other works.**—A water right is a species of property in and of itself, and exists separate and independent of the right to the ditch, canal, reservoir, or other works constructed to divert, conduct, or store the water. This is so, although they may be all owned by the same person; and again, the water right may be owned by one person and the ditch or other works by another. A valid water right, although intimately related to and connected with the dam and canal, is a different thing, and that, too, although each is necessary to make the other available and useful. They are each capable of several and distinct injuries, giving rise to separate and distinct causes of action, for which there are separate and distinct remedies.[1] As was said in an early California case: "The dam and canal may be trespassed upon, broken down, destroyed, or taken into possession under a claim of right, without taking away the water, or preventing its use in any other mode or place, or without questioning the plaintiff's right to it, and the plaintiff may have his cause of action for the trespass, or to recover possession of the land constituting the dam and canal, or their site; and the water may also be diverted and taken away without in any way disturbing or interfering with the dam and canal.[2] Ownership of a ditch and the water right for the waters to flow through the ditch may, and often do, exist in different parties. The existence of the one right does not necessarily imply the existence of the other right in the same party."[3] A ditch may be conveyed,

[3] For the nature of a usufructuary right under the common law, see Book II, Blackstone Com. p. 395.

See, also, Coffin v. Left Hand D. Co., 6 Colo. 443; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Nevada etc. Co. v. Kidd, 37 Cal. 282; Rominger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213.

The diversion ripens into a valid appropriation only when the water is utilized by the consumer. Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

Armstrong v. Larimer Co. D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Cash v. Thornton, 3 Colo. App. 475, 34 Pac. Rep. 268.

[1] For remedies, see Part XIII.

[2] Nevada etc. Co. v. Kidd, 37 Cal. 282.

[3] Swank v. Sweetwater Irrigation & Power Co., 15 Idaho 383, 98 Pac. Rep. 297.

reserving the water right, or the water right may be conveyed, reserving the ditch.[4] Ditches in and of themselves may be abandoned without there being an abandonment of the water right, and the ditches may then be constructed elsewhere to divert the water claimed.[5] Ditches may also be constructed by parties for the express purpose of conveying the water to the place where it is to be used by other owners of the water right.[6] Although the title to the ditch and the water right may be in different parties, or they may be held by one and the same party and are separate and distinct property, one may be appurtenant to the other. And it is held that the water right may be appurtenant to the ditch, if used specifically therewith;[7] and also that the ditch may be ap-

In McLear v. Hapgood, 85 Cal. 555, 24 Pac. Rep. 788, it is said: "The ownership of this ditch is entirely distinct from the right to divert the water of the stream."

See, also, Zimmler v. San Luis Water Co., 57 Cal. 221; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891; Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045.

4 For the sale and conveyance of water rights, see Secs. 994-1032.

See, also, Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95; Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875.

5 See abandonment, Secs. 1099-1117.

See, also, for change of point of diversion, Secs. 856-873; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598.

Where one constantly uses water appropriated for his land, but from time to time diverts it through different ditches, the abandonment of one ditch does not constitute an abandonment of the water right, so long as the water continues to be diverted through another ditch. Kleinschmidt v. Greiser, 14 Mont. 484, 35 Pac. Rep. 5, 43 Am. St. Rep. 652; Wood v. Etiwanda Water Co., 147 Cal. 233, 81 Pac. Rep. 512; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

6 For ditch companies as carriers, see Chap. 76.

7 For appurtenances, see Secs. 1005-1018; Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Reynolds v. Hosmer, 51 Cal. 205, 1 Morr. Min. Rep. 6; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405, where it was held that, where a water right has been acquired by means of a ditch used in carrying the water, a conveyance of the ditch was a conveyance of the water right.

See, also, Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Nevada etc. Co. v. Kidd, 37 Cal. 282; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577.

purtenant to the water right.[8] A decree adjudicating the rights in one does not adjudicate the rights in the other unless both are the subjects of the action.[9] The revocation of a license to construct a ditch does not affect the right to the water carried through the ditch.[10]

§ 765. The right exists independent of any property in the channel of the stream.—As is the case of the ditch or canal or other means of the conveyance of the water, a water right exists independent of any property right which may be acquired in the channel of the stream.[1] By the appropriation itself the appropriator acquires no right in and to the channel of the stream from which the appropriation is made. The channel of the stream is land, the title to which can only be acquired from the Government in some way provided by the Federal laws, or from some one having the title. Mere user of Government land, however, long continued, gives no title, as against the Government; and, where the use thereof in connection with an irrigation ditch is not such as under the law gives an easement, a patent thereof passes the title free of any right on account thereof. So it was held in a Colorado case that, where a river flowing over Government land changes its course, the abandoned bed becomes part of the surrounding land and passes with the subsequent patent to the patentee; and, after the title to the land had passed from the Government the land can be burdened by a right of way for water only by consent of the owner, or by proper legal proceedings.[2] The ruling under the facts stated in the Colorado case was correct. The right claimed was more in the nature of a question of drainage than of the right to conduct the water in the channel of the natural stream a portion of the way to the place where it is to be used, where such

8 See Sec. 1018.

Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119, where it was said: "Appellant's contention that the water right must be appurtenant to a certain ditch is not sound. The water right is the principal thing, and, if either is appurtenant to the other, the ditch is appurtenant to the water right."

See, also, Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577.

9 Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045.

10 Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535.

1 See previous Sec. 764.

2 Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. Rep. 612.

use, under the law, gives an easement. That the channel of the stream may be used to conduct the water in the place of an artificial ditch, while the land over which the stream flows belongs to the Government, has been generally recognized from the earliest times as a permanent easement. And, if the Government afterward disposes of the land, the grantees take it subject to the easement of the right of an appropriator to so convey his water, the same as though he had constructed an artificial ditch over the same land for that purpose.[3] This right, however, is as separate and distinct from the water right as it is separate and distinct from the artificial ditch or canal or other works discussed in the preceding section.[4]

But the title to the channel of a non-navigable stream may be acquired from the Government and held in private ownership. Where this is so the channel may be sold by the owner without affecting the water rights of himself or of others.[5]

§ 766. Title or possession of land on stream unnecessary.—Contrary to the rule of riparian rights at common law, where the right to the use of the water is dependent upon the ownership of the land adjoining which or through which the stream flows,[1] a water right based upon the doctrine of appropriation in the Western States does not depend upon the legal title, nor, in fact, upon any title to or the possession of lands on the streams or other bodies of water, or elsewhere. But a water right is simply an exclusive possessory right, acquired by the diversion of the waters of a stream in a lawful manner, and the appropriation consummated by either its application to some beneficial use or purpose, or at least conducted to the place where it is to be used, prior to its appropriation, diversion, and use by some one else.[2] All the authorities

3 Hoffman v. Stone, 7 Cal. 46; Butte Canal etc. Co. v. Vaughn, 2 Cal. 143, 10 Am. Dec. 769, 4 Morr. Min. Rep. 552; Campbell v. Flannery, 29 Mont. 246, 74 Pac. Rep. 450; *In re* Nelson, 27 Land Dec. 511, both citing Kinney on Irr., 1st Ed., Sec. 246.

See, also, for the right to use the channel of natural streams for conducting the water, Secs. 718-720, 832.

4 See Sec. 764.

5 Doyle v. San Diego etc. Co., 46 Fep. Rep. 709.

1 See Secs. 451, 458.

For irrigation as a riparian right, see Secs. 498-525.

2 For history of Arid Region Doctrine of appropriation, see Secs. 595-626.

For the consummation of the right, see Secs. 725-729.

agree upon the proposition that it is unnecessary that the appropriator in order to be entitled to the use of the water, as at common law, should have located or taken possession of any tract or parcel of the public domain bordering upon the stream from which the appropriation is made. A valid appropriation may be made for the irrigation of lands, or for any other beneficial use, not situated upon or near the stream from which the water is taken. The very object of the appropriation may be to conduct the water from the stream through a ditch or canal, across the intervening lands, to irrigate a tract of land which the appropriator possesses far from the natural stream, or to work a mining claim or run a mill.[3] In other words, the universal rule is that a water right, or the right to the use of the water, under the doctrine of appropriation, is not in any way dependent upon the *locus* of its application to the beneficial use designed.[4]

§ 767. **Title or possession to any land unnecessary.**—Not only is it unnecessary for the owner of a water right, under the doctrine of appropriation, to own or possess land adjoining the stream from which the water is taken, as stated in our last section,[1] but a perfect title to a water right may be had and maintained without the owner thereof having the title to, or in the possession of, any land anywhere, with the bare exception of the easement or other

3 Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 110 Am. St. Rep. 939; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777, both citing Kinney on Irr., 1st Ed., Sec. 156; and, in the last case cited it is said: "And we think this proposition is conceded in every jurisdiction where the doctrine is to any extent enforced."

Coffin v. Left Hand D. Co., 6 Colo. 443; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258, where it was held that the valid appropriation of the waters of a stream, to the exclusion of a riparian owner, may be made for the purpose of irrigation, although the lands to be irrigated are not located on the banks of the stream.

See, also, Sec. 767.

4 Coffin v. Left Hand D. Co., 6 Colo. 443; Town of Sterling v. Pawnee D. Ex. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Thomas v. Guiraud, 6 Colo. 530; Mahoney v. Neiswanger, 6 Idaho 750, 59 Pac. Rep. 651, where the appropriator made a mistake and irrigated the wrong land.

See, also, for place of use, Secs. 867, 868, 871, 872.

For change of use, see Secs. 869-871.

1 See Sec. 766.

right of way for the ditch or canal to conduct the water to the place of use.[2] While the common law requires ownership or the possession of land adjoining the stream in order to acquire a riparian right to the use of the water,[3] the Arid Region Doctrine of appropriation is the doctrine of the separate ownership of the land and the water right. Hence it follows that a good title to a water right may be had without the owner thereof having the title or possession of any land, except the ditch or canal; and, upon the other hand, if the water of a certain stream has all been appropriated before the settlement of the land upon its banks, even in those States which recognize both the common law of riparian rights and the doctrine of appropriation, the settlers who afterward become the riparian owners may acquire no right to the use of the water.[4] In fact, it has been held by the Supreme Court of the United States that corporations may be organized for the express purpose of appropriating the waters of some stream and selling

For the rule under the common law, see Secs. 451, 458.

2 For rights of way, see Secs. 927-993.

See, also, Secs. 1045, 1063-1086.

3 See Secs. 451, 458.

4 Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Crawford Co. v. Hathaway (Hall), 60 Neb. 754, 84 N. W. Rep. 271; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 477; Elliott v. Whitmore, —— Utah ——, 24 Pac. Rep. 673; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. Rep. 1094; Tenem D. Co. v. Thorpe, 1 Wash. 566, 20 Pac. Rep. 588, where it was held that, conceding that the statutes of Washington Territory of 1873 do not extend the right to appropriate waters to any except landowners, they are not intended to restrict the right of prior appropriation as it existed by the local customs and under the decisions of the courts, by which it was immaterial whether the appropriator was a land-owner or not.

Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Hayes v. Buzzard, 31 Mont. 74, 77 Pac. Rep. 423; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389; Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986; Hawaiian etc. Co. v. Wailuku etc. Co., 15 Hawn. 675.

For water rights as appurtenances inseparable from the land, see Secs. 1015, 1016.

the water to consumers; that the corporations need not own or possess any land except the bare right of way for their ditch, nor need the stockholders of the corporation be a combination of land owners.[5] However, because the owner of a water right is not required to own land in connection therewith does not dispense with the rule that all of the water appropriated must be used by some one for some beneficial purpose in order to hold the water right.[6]

§ 768. **A water right is property.**—The distinct, exclusive, usufructuary estate acquired by an appropriator to the use of water, by its lawful appropriation, is property of the highest order, and oftentimes of the highest value. The water right is protected by the law as such, and is subject to all of the usual incidents of property. This property right in water is as important, as valuable, and as extensive as the use to which it is applied, and especially so where that use is the irrigation of lands. The land is comparatively valueless without the water to irrigate it. Without the water it can be purchased for from $1.00 to $2.00 per acre, but with the water its

5 Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588; affirming 10 N. M. 77, 61 Pac. Rep. 357, where Mr. Justice White, in rendering the opinion of the Supreme Court of the United States, said: "We perceive no merit in the contention that the proviso in the Desert Land Act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation, must be *directly* appropriated by the owners of the land upon which a beneficial use of water is to be made, and that in consequence a territorial legislature can not lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate lands of third parties." And the Court held that the finding of the Court below that "surplus" water existed negatived the idea that any legitimate appropriation of water which can be made by the company can in anywise violate the rights of others, and therefore holding that a legal appropriation could be made by the company, although it did not use the water, but sold it to others who did.

For appropriation of water for sale, see Sec. 703.

For sale and conveyance of water rights, see Secs. 994-1032.

For water rights as an appurtenance to land, see Secs. 1009-1018.

Rights of private corporations, see Chaps. 72-77.

6 See for purposes for which water may be appropriated, Secs. 690-705.

That the water must be used for a beneficial purpose, see Secs. 874-916.

value at once jumps from the above prices to $100 to $200 per acre, and sometimes to a very much higher price. The property in a water right consists not alone in the amount of water claimed under an appropriation, but also in the priority of the appropriation. And it very often happens that the chief value of an appropriation consists in its priority over other appropriations from the same stream. Hence, to deprive one of his priority to appropriate would be to deprive him of a most valuable property right.[1] A perfected water right is a vested property right and its value capable of estimation in money, and one which the law protects.[2] A water right is such a property right that it comes clearly within the Constitutional provisions that property shall not be taken or damaged for public or private use, except upon due process of law and upon just compensation.[3] A water right is such prop-

1 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Union Colony v. Elliott, 5 Colo. 371; Strickler v. Colo. Sprs., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Ft. Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Cash v. Thornton, 3 Colo. App. 475, 34 Pac. Rep. 268; Montpelier Mill Co. v. Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Coffin v. Left Hand D. Co., 6 Colo. 443; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Rominger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213; City of Denver v. Bayer, 7 Colo. 113, 2 Pac. Rep. 6; Dalton v. Bowker, 8 Nev. 190; Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. Rep. 1074; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

Rights to the use of water for beneficial purposes, whatever the use may be, are property in the full sense of that term. Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 431, 15 L. R. A., N. S., 238.

2 Waha v. Lewiston Co. (Idaho), 158 Fed. Rep. 137.

The right to the use of water when acquired by appropriation, is, in its nature, a property right, and becomes a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently. Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

3 Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; Mohl v. Lamar Canal Co., 128 Fed. Rep. 776.

A clear distinction exists and should be drawn between the rights that a party acquires by contract with a canal company, whereby he purchases a water right sufficient for the irrigation of his land, and the rights acquired on the other hand under Sec. 4, Art. 15,

erty that it is capable of being estimated in money.[4] And one who has acquired a legal water right can only be deprived of it by his own voluntary act in conveying it to others,[5] by abandonment,[6] forfeiture under some statute,[7] or by operation of law. And, as long as one is the owner of a valid water right it is such a property right that he has the right to exercise complete dominion, control, and management thereof.[8] The owner may change the use of the water to any other beneficial use, so long as the change does not interfere with the vested rights of others.[9]

Having seen that a water right is a property right, we will now discuss the class of property to which it belongs.[10]

§ 769. **A water right is real property.**—Having seen that a water right is a property right of high order,[1] it remains to determine the class to which it belongs. A water right has none of the characteristics of personal property, although some of the early statutes declared that it might be deemed such property.[2] It is generally conceded by all of the authorities that a water right, or

Const. of Idaho. Knowles v. New Sweden Irr. Dist. 16 Idaho 217, 101 Pac. Rep. 81.

See, also, Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 660, 77 Am. St. Rep. 261; Montpelier etc. Co. v. Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

4 Waha-Lewiston etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137.

5 For the sale and conveyance of water rights, see Secs. 994-1032.

"The water in the stream is not his property, but his right to use that water, based upon his prior appropriation, for beneficial purposes, is a property right, and, as such, is capable of transfer." Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 110 Am. St. Rep. 986, 70 L. R. A. 341.

See, also, Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

For the right to sell and transfer a water right, see Secs. 994-1018.

That the water right is not an inseparable appurtenance to land, see Secs. 1015, 1016.

6 For abandonment, see Secs. 1099-1117.

7 For forfeiture, see Secs. 1118-1120.

8 Fisher v. Bountiful City, 21 Utah 29, 51 Pac. Rep. 520.

9 For the change of the use of water, see Secs. 869-872.

10 See Secs. 769-771.

1 See Sec. 768.

2 "Such right may be appurtenant to the land upon which such water is used, or it may be personal property, at the option of the rightful owner of such right." Comp. Laws of Utah, 1888, p. 135.

an interest in a water right, is real property, and it is so treated under all the rules of law appertaining to such property.[3] It was held in a recent Idaho case [4] that under the laws of that State a water right is real property, and one who actually diverted the water of a stream and applied the same to a beneficial purpose is in actual possession of such real property, and this possession constitutes actual notice to any subsequent appropriator of the water of the same stream, or to any person who subsequently applies to the State Engineer for a permit to appropriate and divert the water of the same stream, the Court saying: "But where one has actually diverted water, and is using it, the right to its use may, by analogy, be likened unto the doctrine that one purchasing real estate must take notice of the rights of those in possession, notwithstanding the recording statutes." [5]

[3] Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Lower Kings River etc. Co. v. Kings River etc. Co., 60 Cal. 408; Fudickar v. East Riverside Irr. Dist. 109 Cal. 29, 41 Pac. Rep. 1024; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Butte T. M. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; Lick v. Madden, 25 Cal. 202; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Gard v. Thompson, —— Idaho ——, 123 Pac. Rep. 497; Last Chance etc. Co., v. Emigrant D. Co., 129 Cal. 277, 61 Pac. Rep. 960; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032; Standart v. Round Valley Co., 77 Cal. 399, 19 Pac. Rep. 689; Stanislaus Water Co v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Santa Paula etc. Co. v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Rickey etc. Co. v. Miller, 152 Fed. Rep. 14, 81 C. C. A. 207; Travelers Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020, where it is said: "Under our decisions a water right is real estate, not personal property."

See, also, Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Talcott v. Mastin, 20 Colo. App. 488, 79 Pac. Rep. 973; Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Middle Creek D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

For a water right as an appurtenance to land, see Secs. 1005-1018.

[4] Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488.

[5] See, also, California etc. Co. v. County of Los Angeles, 10 Cal. App.

A water right is an inheritable estate, and, being real property, upon the death of the owner, passes to his heirs or devisees, subject only to the payment of his debts. Hence it therefore follows that an action to quiet title, or to recover possession, does not lie at the instance of the administrator.[6] However, an inchoate or incomplete right is not real property. It is, therefore, held that a water permit granted under the laws of the State of Idaho is not real property, nor is it an appropriation of the public waters of the State, but it is simply the consent given by the State to make an appropriation, and therefore acquire real property.[7] However, at the instance of the proper party[8] a suit to quiet title to a water right for irrigation purposes, and to determine the right to divert the waters from a stream for such purposes, is in the nature of an action to quiet title to real estate.[9] And, in an action to quiet title,

185, 101 Pac. Rep. 547; Fudickar v. East Riverside Irr. Dis. 109 Cal. 29, 41 Pac. Rep. 1024; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Gleason v. Hill, 65 Cal. 17, 2 Pac. Rep. 413; South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535; Ada County Farmers' Irr. Co. v. Farmers' etc. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020; Hale v. Jefferson County, 39 Mont. 137, 101 Pac. Rep. 973; Rickey etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207; Conant v. Deep Creek etc. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721.

6 Travelers Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020.

7 Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

In a recent case in California, it was held that an appropriator's right, pending the determination of his application to use public lands, was an "interest in real property." And the Court said: "The person who has an interest in real property may maintain an action to determine the validity of a conflicting claim which is adverse to his own claim." Inyo Consolidated Water Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 934.

8 For parties to actions, see Part XIII.

9 Rickey etc. Co. v. Miller, 152 Fed. Rep. 11, 81 C. C. A. 207. An action to quiet and determine title and to establish the right to divert and use water for such purposes is in the nature of an action to quiet title to real estate. Conant v. Deep Creek etc. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721; Gutheil Park Inv. Co.

brought by an irrigation company, it is immaterial whether the company owned the water right in question, or merely distributes the water to the stockholders, who were the owners of the right before the company was organized.[10] So, a water right being real property, a justice of the peace has no jurisdiction over an action for the diversion of the water.[11] An injury to a water right or a wrongful diversion of the water is an injury to real property, and a proper action may be maintained for the same.[12] And, where the injury and the property are both in the same county, an action must be brought in the county where the land is situated.[13] But, where water is wrongfully diverted in one county to the injury of plaintiff's rights in another, it constitutes one cause of action and the plaintiff may elect in which county he will bring the action.[14] Upon the question of the sale or transfer of a water right, it being a species of realty requires for its valid transfer the same form and solemnity as is necessary for the conveyance of any other real estate.[15] It is also such a right that in the case

v. Town of Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Grand Val. Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Pacific etc. Co. v. Sausalito etc. Co., 98 Cal. 487, 33 Pac. Rep. 322; Fritts v. Camp, 94 Cal. 393, 29 Pac. Rep. 867; Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

For actions to quiet title, see Chap. 79.

10 Arroyo Ditch & Water Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874.

See for rights of ditch and canal companies, Chaps. 72-77.

11 Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513.

See, also, Pacific etc. Club v. Sausalito etc. Co., 98 Cal. 487, 33 Pac. Rep. 322.

12 Last Chance D. Co. v. Emigrant D. Co., 129 Cal. 277, 61 Pac. Rep. 960.

13 Pacific etc. Co. v. Sausalito etc. Co., 98 Cal. 487, 33 Pac. Rep. 322.

14 Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628.

For jurisdiction of actions, see Part XIII.

15 Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 661; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Union W. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Dalton v. Bowker, 8 Nev. 190; Farmer v. Ukiah W. Co., 56 Cal. 11; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601; Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054.

The right to the use of water for irrigation is real property, and the proper method of conveying title thereto is by deed. Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

of sale or transfer the rule under the statute of frauds applies, and a verbal sale is held to be void and to work an abandonment.[16] The recording statutes applicable to the sale and conveyance of real property also apply to the sale and conveyance of water rights.[17]

Water rights may also be assessed and taxed as real property. However, in many of the States they are made exempt from taxation, separate and apart from the lands upon which they are used.[18] This subject will be discussed in another portion of this work. Water which has been diverted from the natural stream or other works may be taxed as personal property.[19] The rules of the statute of limitations, as the same are applied to land, are also applied to water rights. And to acquire title to a water right the use must be continuous for the full period of the statute of limitations, in the State where the action is brought, governing actions for the recovery of other real property.[20]

It was said in a very recent Colorado case:[21] "That a water right is a 'freehold' is not in doubt. . . . A water right has been held to be a freehold or 'real estate' in the following cases."[22]

16 Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034, citing Kinney on Irr., 1st Ed., Secs. 253, 255, 264.

That such an estate in water rights is real property, and that an agreement for the conveyance thereof is within the statute of frauds, there is no question in this State. Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020.

For sale and transfer of water rights, see Secs. 994-1018.

17 Lyles v. Perrin, 119 Cal. 264, 51 Pac. Rep. 332; Partridge v. McKinney, 10 Cal. 181, 1 Morr. Min. Rep. 185.

18 For the taxation of water rights, see Part XIV.

19 Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135.

See, also, for the nature of property in water severed from the natural stream, Secs. 773, 774.

20 South Tule Ind. D. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032; Yankee Jim etc. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196.

For the different periods required by the statute of limitations, see Sec. 1035. See, also, Part XIV.

For adverse use and prescription, see Secs. 1033-1058.

21 Monte Vista Canal Co. v. Centennial Irr. D. Co., —— Colo. App. ——, 123 Pac. Rep. 831.

22 Citing Wyatt *et al.* v. Larimer & Weld Irr. Co. *et al.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing 1 Colo. App. 480, 29 Pac. Rep. 906; Insurance Co. v. Childs,

§ 770. A water right is not an easement.—A water right is an independent property right, and is not a servitude upon some other thing. Therefore, a water right itself is not an easement. This, however, must be distinguished from a right of way or the right to conduct the waters claimed under a certain water right over the lands of others, which is an easement.[1] This subject, however, will be discussed in a subsequent portion of this work.[2]

§ 771. A water right is an incorporeal hereditament.—A water right is descendible by inheritance; and, being neither tangible nor visible, it is an incorporeal hereditament.[1] There has been some

25 Colo. 360, 54 Pac. Rep. 1020; Daum *et al.* v. Conley *et al.*, 27 Colo. 56, 59 Pac. Rep. 753; Knowles v. Lower Clear Creek D. Co., 27 Colo. 469, 63 Pac. Rep. 317; Gutheil etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050.

1 For rights of way over private property, see Secs. 972-993.

"The right to the use of water in a natural stream is in no sense an easement, but its use by diversion, in an artificial water course, is strictly an easement." Yale on Mining Claims and Water Rights, p. 204.

2 See Chap. 52, Secs. 972-993, 1059-1086.

1 Incorporeal hereditament — Anything, the subject of property, which is inheritable and not tangible or visible. Bouvier, Law Dict.

2 Woodd. Lect. 4.

"The right of a party to have the water of a stream or water course flow to or from his lands or mill over the lands of another is an incorporeal hereditament." Cary v. Daniels, 8 Metc. 466 (Mass.), 41 Am. Dec. 532.

The right of an appropriator "to have the water flow in the river to the head of his ditch is an incorporeal hereditament appurtenant to its water course." Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408.

"The right to the use of the water is an incorporeal hereditament; an intangible right. From its nature a contract with respect to it can not, technically speaking, establish the relation of landlord and tenant." Custer Consolidated Mines Co. v. City of Helena, —— Mont. ——, 122 Pac. Rep. 567.

"If a riparian owner grants a right to divert the water and convey it away to and upon the lands of the grantee, the grant becomes an easement appurtenant to such lands, which become thereby the dominant estate, and the grant an incorporeal hereditament." Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701.

"The right of plaintiffs to have that portion of the river, to which they were entitled, flow in the natural water course to the heads of their ditches, is an incorporeal hereditament appurtenant to the water course." Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628.

"That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, can not be well disputed." Wyatt v. Larimer & Weld

slight confusion among the decisions as to whether a water right was a corporeal or an incorporeal hereditament. This originated undoubtedly in the formative period of the Arid Region Doctrine of appropriation, and in the failure to distinguish the common law right of a riparian owner to the running water in the stream which adjoins his land and the right acquired by an appropriator to the use of the water under the doctrine of appropriation. "The right to running water, under the common law, is defined to be a corporeal right, or hereditament, which follows or is embraced by the ownership of the soil adjoining which the water naturally flows."[2] This definition was used by the California Supreme Court, in 1855, in a most inconsistent opinion, in the case of Hill v. Newman;[3] and, it is undoubtedly largely due to this decision that this confusion arose. The Court, after giving a wrong common law definition, as above stated, then said: "From the policy of our laws, it has been held in this State to exist *without private ownership* of the soil, upon the ground of the prior location upon the land, or prior

Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

"The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch, and coextensive with his right to the ditch itself." Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Rickey Land & Cattle Co. v. Miller, 152 Fed. Rep. 11, 81 C. C. A. 207.

"In determining this question we have to consider the peculiar nature of the property designated 'a water right,' and the title thereto, as distinguished from land. This 'right' is said to be intangible and incorporeal." Monte Vista Canal Co. v. Centennial Irr. D. Co. —— Colo. App. ——, 123 Pac. Rep. 831.

See, also, Monte Vista Canal Co. v. San Luis Valley Irr. L. Co. —— Colo. App. ——, 123 Pac. Rep. 835.

"A right to divert and use the waters of a stream, acquired by appropriation, is a hereditament appurtenant to the land for the benefit of which the appropriation is made." Conant v. Deep Creek etc. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721.

See, also, Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Gutheil v. Town of Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561.

That a water right is real property, but not within the term "land," see Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826.

2 For the nature of the common law right, see Secs. 450-456.

Sackett v. Wheaton, 17 Pick. 105; 1 Cruise's Digest 39; Angell & Ames on Water Courses, p. 3.

3 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513.

appropriation and use of the water." This statement was ambiguous, but if it held anything, it held that the doctrine of appropriation was based upon the use of the water independent of the ownership of any land. Then the Court turns around and makes a ruling for the common law by saying: "The right to water must be treated in this State as it has always been treated, as *a right running with the land*, and as a *corporeal privilege* bestowed upon the occupier and appropriator of the soil," etc. Here, again, the Court failed to make the proper distinction. From the very nature of the definition of the word "privilege," it can not be corporeal, having no body or substance, and being neither tangible nor visible. It does not say that a water right is a corporeal or incorporeal hereditament. But this decision has been followed as though the Court had declared it to be a corporeal hereditament. This can not be as the water right itself is not a "substantial, permanent object"[4] and is neither tangible nor visible. It is, therefore, correctly held by the greater weight of authority that a water right is an incorporeal hereditament.[5]

Again, the subject is somewhat confusing from the fact that the right of a riparian owner to have the water flow in the stream as a part and parcel of his land adjoining the same, is, according to the better authorities, an incorporeal hereditament.[6] However, by some of the cases this riparian right is deemed a corporeal hereditament. As was said in an Oregon case:[7] "The plaintiff's riparian right to have the water flow in the stream undiminished in quantity, except by the reasonable use thereof by riparian proprietors, is appurtenant to the land running with it as a corporeal hereditament." It is also a well settled proposition that a riparian owner may grant his riparian rights or any portion thereof, so long as the use of the same by the new owner does not materially and substantially affect the correlative riparian rights of the other owners upon the same stream.[8] A riparian owner may also lose his right to the natural flow of the stream by adverse user on the part of an appro-

4 Corporeal hereditaments: Substantial permanent objects which may be inherited. The term land will include all such. Bouvier, Law Dict.

5 See cases cited above.

6 See Sec. 454.

7 Oregon Construction Co. v. Allen Ditch Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701.

8 For conveyance of riparian rights, see Secs. 526-535.

priator amounting to prescription.[9] And, where a riparian right is deemed a corporeal hereditament, as was stated by the Oregon Court cited above:[10] "So that we are confronted with the anomalous proposition that plaintiff has lost a corporeal hereditament appurtenant to its land by reason of the operation of the statute of limitations, and the defendant has acquired an easement or incorporeal hereditament appurtenant to its lands by virtue of the same statute; in other words, that the statute has operated to convert a corporeal hereditament into an incorporeal hereditament, and at the same time to devest plaintiff of the one and invest defendant with the other."

Again, there is a tendency upon the part of some of the courts in defining a water right as an incorporeal hereditament to add that it is appurtenant to something, "to the water course," "to his ditch," "to the land for the benefit of which the appropriation is made," or to something else, the authorities do not agree what. Again, in some cases the water right is called an easement.[11] This seems to be from the wrong impression of the term "incorporeal hereditament," and that it must be subordinate to some land. This is not the fact, as under the definition an incorporeal hereditament may be anything the subject of property which is inheritable and not tangible or visible. A chose in action may be an incorporeal hereditament.

A water right may or may not be an appurtenance to land. It depends upon the circumstances of each particular case, and the question usually arises under statutes, the object of which was to make a water right appurtenant to a particular tract of land,[12] and the sale of land which carries with the water right used in connection therewith.[13] But, for many reasons, a water right should never be considered an inseparable appurtenance to any particular tract of land.[14] But the only point that we wish to impress here is that a water right is not necessarily an appurtenance because it is an incorporeal hereditament. Upon the ques-

9 For loss of riparian right by prescription, see Secs. 1039-1041.

See, also, Oregon Construction Co. v. Allen Ditch Co., *supra*.

10 Oregon Construction Co. v. Allen Ditch Co., *supra*.

11 See quotations from cases in first note under this section.

12 For the discussion of these statutes, see Secs. 1015, 1016.

13 See Secs. 1005-1014.

14 That it is not an inseparable appurtenance, see Secs. 1015, 1016.

tion of a water right being an easement, we will add that there may be an easement over the lands of another for the conveyance of the water claimed under a water right, but from no standpoint of the case can the water right itself be an easement,[15] although there are some loose statements in some of the decisions which might lead one to believe that the Court so considered it.[16]

A water right, then, is a property right independent in itself, based upon the application of the water claimed thereunder to some beneficial use or purpose, and not subordinate to any land, but may exist independent of any ownership thereof,[17] as well as of the ditch or other works,[18] or of any ownership in the channel of the stream or water course.[19]

§ 772. **Title to the water before diversion.**—The rule under the Arid Region Doctrine of appropriation is similar to that under the common law of riparian rights with respect to the ownership of the water itself while it is still flowing in the stream.[1] A water right is the property of the appropriator, only so long as it is based upon the actual use of the water for some beneficial purpose. Before diversion the appropriator acquires no title to the *corpus*, or "the very body of the water," while it is still flowing naturally in the stream.[2]

[15] See Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[16] See Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

When part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator, who holds his rights against this land under an express grant. Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453, 19 Morr. Min. Rep. 243.

The right of an appropriator to take water from or over the land of another is in the nature of an easement in gross, which may *or may not be* annexed to the land on which the water is used as an appurtenance thereto. Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

For the question of easements, see Secs. 990-992.

[17] See Sec. 766.

[18] See Sec. 764.

[19] See Sec. 765.

[1] For title to the *corpus* of the water at common law, see Secs. 455, 456.

[2] See McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384, where it is said: "It must be remembered that the appropriator is not the owner of 'the very body of the water' until it passes into the appliances he has provided for its reception."

The only rights which were granted by the United States under the Acts of Congress of 1866 and 1870 were "rights to the use of water."[3] No title to the *corpus* of the water itself was, or, in fact, could be, granted. Even the Government of the United States has no title to the water itself while it is naturally flowing, any more than it has to the air over the lands owned by it. The water may be in this country today, and tomorrow it may be in Mexico,

Nevada etc. Co. v. Kidd, 37 Cal. 282; Ortman v. Dixon, 13 Cal. 33; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Los Angeles v. Baldwin, 53 Cal. 469; Hanson v. McCue, 42 Cal. 308, 10 Am. Rep. 299; Parks etc. Co. v. Hoyt, 57 Cal. 44; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 61 L. R. A. 648; also, *Id.*, on rehearing, 25 Utah, 441, 71 Pac. Rep. 1069, 61 L. R. A. 657; Dalton v. Bowker, 8 Nev. 190; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; *Id.*, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Middle Creek D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533; Heyneman v. Blake, 19 Cal. 579; Pope v. Kinman, 54 Cal. 3; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Green v. Carotta, 72 Cal. 267, 13 Pac. Rep. 685; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022; People v. Truckee, etc. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. Rep. 1094; Hesperia etc. Co. v. Gardiner, 4 Cal. App. 357, 88 Pac. Rep. 286; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Monte Vista Canal Co. v. Centennial Irr. D. Co., —— Colo. App. ——, 123 Pac. Rep. 831; Monte Vista Canal Co. v. San Luis Valley etc. Co., —— Colo. App. ——, 123 Pac. Rep. 835.

[3] Boise City Irr. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

For Acts of 1866 and 1870 and construction thereof, see Secs. 611-619.

Canada, or in the sea. "For water is a movable, wandering thing,"[4] and no man, State, or Nation can receive or give an absolute title to it while it is still flowing naturally in the streams or other bodies, and that, too, regardless of any law upon the subject, whether it be the common law of riparian rights, the civil law, or the Arid Region Doctrine of appropriation for beneficial uses.

It therefore follows, from the above principles, that the sale of a water right by its owner, does not convey any specific quantity of the water itself, but only sells the right to the use of the water, for the reason that the only property in the water owned by an appropriator is the right to use it.[5] Again, an appropriator can not sue for the value of a specific quantity of water at so much per cubic foot, or so much per inch or gallon diverted from the stream above him, but he must sue for the damages to his enterprise caused by the unlawful diversion.[6] Nor can an appropriator lay claim to water which he has permitted to escape and run off, but this is open to the appropriation of others. Water permitted to escape after it has been appropriated by one, and which finds its way into the natural channel of the same stream from which it was taken or into the channel of another stream, can not be reclaimed by the original appropriator as against subsequent appropriators who have made use of it.[7] But, after the water itself has been actually diverted from the stream, and is taken into the possession of the appropriator in his ditches, canals, or reservoirs, the title to the

4 2 Blackstone Com., p. 18.

5 For the sale and conveyance of water rights, see Secs. 994-1032.

"What the appropriator may sell is his water right. That is all he has to sell . . . The water in the stream is not his property, but his right to use that water, based upon his prior appropriation, for beneficial purposes, is a property right, and, as such, is capable of transfer. . . . The only property in the water owned by an appropriator is a right to use it as measured by his appropriation." Johnson v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 26, 70 L. R. A. 341, 110 Am. St. Rep. 986.

See, also, Booth v. Chapman, 59 Cal. 149; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111.

6 Parks etc. Co. v. Hoyt, 57 Cal. 44; Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889.

7 Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, 15 Morr. Min. Rep. 175; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116.

For abandonment of water, see Secs. 1099-1117.

same changes and it becomes the absolute property of the appropriator.[8]

§ 773. **Title to the water after diversion.**—After the diversion of the water from the natural streams into the ditches, canals, pipes, reservoirs, or other works of the appropriators, the title to the same changes, and the body or *corpus* of the water becomes the absolute property of the appropriators.[1] Water, when collected in the works of the appropriator, and thus separated from the original source of supply, is considered his individual property, as much as the fish which might have been lawfully captured from the depths of the natural stream or the wild fowl which might have been shot or captured on its surface.[2] In fact, it is a general principle of law that where an individual by his labor reduces to his control or use any object, animate or inanimate, which otherwise could not be brought under the control or use of man, that he acquires a right of property in such object, from which he can not be unlawfully dispossessed. One of the most apt illustrations of this proposition used by the authorities is that of the fish and fowl. As said by Mr. Justice Field, in the Supreme Court of the United States:[3] "The wild fowl in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. . . . So, when the fisherman drags by his net fish from the sea, he has property in them, of which no one is permitted to despoil him."[4] So it is with water. While it is flowing naturally in the channel of the stream or other source of supply, it "is a movable, wandering thing, and must of necessity continue common by the law of Nature,"[5] and, therefore, is nobody's property, or property common to everybody. After it has been captured, as it were, or diverted from the natural channel of the stream by an individual, and taken absolute possession of by him in the ditches, canals, reservoirs, or other receptacles constructed or prepared by

8 For which, see Secs. 773, 774.

1 That there can be no title to the water while flowing in the stream, see Secs. 455, 772.

2 For the title to the fish or fowl before and after capture, see Secs. 359-368.

3 Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.

4 See, also, Wiel, Water Rights in the Western States, 1908, Sec. 153; 2 Blackstone Com. 289-295.

5 2 Black. Comm. 18.

See, also, Sec. 455.

his work and labor, it is as much his private property as anything else that is reduced to possession which otherwise would be lost to the uses of man. And, furthermore, this is not a rule peculiar to the Arid Region Doctrine of appropriation, but it is the universal rule under the common law,[6] and also under the civil law.[7] It is also the rule under the Western doctrine of appropriation.[8]

This is illustrated by a recent Idaho case,[9] in which it was held that if a man collect and impound surface and flood waters from his own land before they reach any natural stream or channel and hold the same in a reservoir on his lands and premises, the fact that he does not actually use it for irrigation or for any other commercial purpose does not render it any less his property or authorize any one else to invade his property or appropriate and divert the same. It was also held that a permit from the State Engineer can not give any sanction to such a procedure. The Court said: "The State Engineer has no right to grant permits to one man to use another man's property."[10]

6 See Sec. 455.

2 Black Comm. 14, 392-395; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch., N. S. 212, 15 Jur. 633.

7 See Sec. 555.

Mason v. Hill, 5 Barn. & Adol. 1, 2 Nev. & M. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692.

8 McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384, where it is said: "It must be remembered that the appropriator is not the owner of the 'very body of the water' until it passes into the appliances he has provided for its reception."

"The ownership is in the water itself." Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135.

"The appropriator certainly does not become the owner of the very body of the water until he acquires control of it in conduits or reservoirs created by art or applied to the purpose of leading or storing water by artificial means." Parks Canal Co. v. Hoyt, 57 Cal. 44.

Riverside Co. v. Gage, 89 Cal. 418, 26 Pac. Rep. 889; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

For the nature and character of water after diversion, see Sec. 974.

For the sale of water after diversion, see Sec. 1032.

9 King v. Chamberlin, —— Idaho ——, 118 Pac. Rep. 1099.

10 See, also, Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488; Youngs v. Regan, 20 Idaho 275, 118 Pac. Rep. 499; Hagerman Irr. Co. v. McMurry, —— N. M. ——, 113 Pac. Rep. 823; King v. Chamberlin, 19 Idaho 727, 118 Pac. Rep. 1099; Nevada Ditch Co. v. Canyon etc. Co., 58 Ore. 517, 114 Pac. Rep. 86; Menthow Cattle Co. v. Williams, 64 Wash. 457, 117 Pac. Rep. 239.

See, also, for stealing water, Statutes, Part XIV.

§ 774. Water after diversion—Nature of property in.—After water has been diverted from the natural stream and taken into the ditches, canals, and reservoirs of the appropriator and is thus in his absolute possession, by the great weight of authorities he has an absolute property right in the *corpus*, or very body of the water,[1] which then takes the nature and character of personal property, and it is so regarded.[2] It may be sold as personal property, and as such is subject to contract.[3] As such personal property it is the subject of larceny.[4] In an action for the recovery for water furnished and delivered to the defendants from the water system of the plaintiff, the question of the title to real property is in no way involved, and hence if no other question enters into consideration,

[1] See Sec. 773.

For the sale of water after diversion, see Sec. 1032.

[2] Heyneman v. Blake, 19 Cal. 579, in which Mr. Chief Justice Field said: "Water collected in reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise."

See, also, Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48, in which Mr. Justice Field, then Associate Justice of the Supreme Court of the United States, also said: "When the plaintiff brought water to the City of San Francisco, it had a right to sell the property at such reasonable prices as it could obtain, as it might have sold grain or fruit or coal, had it brought those articles to market."

See, also, Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

"After it has been diverted from its original channel, and is conveyed elsewhere in pipes for distribution or sale, it loses its original character, and becomes personal property." Dunsmuir v. Port Angeles etc. Co. 24 Wash. 104, 63 Pac. Rep. 1095; Parks Canal etc. Co. v. Hoyt, 57 Cal. 44; Wheeler v. Northern Colo. Irr. Co. 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135; Riverside Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Hesperia Land & Water Co. v. Gardner, 4 Cal. App. 357, 88 Pac. Rep. 286; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Nevada etc. Co. v. Kidd, 37 Cal. 282; Green v. Carotto, 72 Cal. 267, 13 Pac. Rep. 685; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 61 L. R. A. 648; Butte Canal & D. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Los Angeles v. Baldwin, 53 Cal. 469; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384.

[3] See for sale of water after diversion, Sec. 1032.

See, also, cases cited above.

[4] Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135; Fallon v. O'Brien, 11 Q. B. D. 21.

a justice of the peace has jurisdiction.[5] Again, water collected in reservoirs or other works and reduced to actual possession may be taxed as personal property.[6] Upon every phase of the question the great weight of authority has always treated the water which is severed from the stream or other source of natural supply and taken possession of in the works constructed by an appropriator, as personal property. However, a very recent California case, against the almost unanimous authority seems loth to adhere to the rule, and held to the extent only that it may become personal property by being *severed from the land* and confined in *portable* receptacles. The Court, however, fails to cite any authorities upon the proposition and fails to make the proper distinction between the property in a water right and the water after it has been diverted into the ditch, canal, or pipes of an appropriator.[7]

As was well said by the New Mexico Court in a recent case:[8] "While water flowing in a natural stream is not the subject of private ownership any more than the fish in it, yet, when it is impounded and reduced to possession by artificial means, it becomes personal property, as the fish do when caught, or as the common, ownerless air does, when it is liquefied and held in a vessel. Water once reduced to possession and control may be the subject of purchase and sale, or of larceny; and it makes no difference in that respect whether the captured fluid is held in a skin or cask, by an itinerant water vendor, or in the pipes of a modern aqueduct company."

As a hereditament, a canal or reservoir full of water is certainly inheritable. There is a body or *corpus* to the water and it is visible and tangible. It follows, therefore, that such a body of water is a corporeal hereditament. After water has once been taken into the ditch, canal, or reservoir of the appropriator so as to be in his possession for the application to his uses it is a corporeal hereditament.[9]

5 Hesperia etc. Co. v. Gardner, 4 Cal. App. 357, 88 Pac. Rep. 286.

6 Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135.

7 See Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858.

8 Hagerman Irr. Co. v. McMurry, —— N. M. ——, 113 Pac. Rep. 823.

9 See Fudicar East Riverside Irr. Dist. 109 Cal. 29, 41 Pac. Rep. 1024.

CHAPTER 42.

RIGHTS TO WATER AS BETWEEN APPROPRIATORS.

§ 775. Scope of chapter.
§ 776. Priority of right.
§ 777. The rights of the prior appropriator.
§ 778. The date fixing the priority.
§ 779. Priority—Circumstances under which question arises.
§ 780. Prior appropriator's right to take all the water of a stream—Origin of rule.
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§ 782. Enjoyment of the right of priority.
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§ 785. In any event any appropriator is limited to the quantity of water actually needed and applied to a beneficial purpose.
§ 786. Subsequent periodical appropriations.
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§ 791. Priority as between different uses.
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§ 793. Domestic purposes—Preference right for.
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§ 795. Classification of rights.
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§ 797. Distribution of increase in volume of stream.
§ 798. Mingled waters.
§ 799. Mingled waters—Intent to recapture.
§ 800. Mingled waters—Must be no injury to other vested rights—Extent of right to recapture.
§ 801. Right to flow of water to point of prior appropriator's use.
§ 802. Right to natural flow of stream where it sinks below the surface before reaching prior appropriator's ditch.
§ 803. Right to flow of water to point of subsequent appropriator's use.

§ 775. Scope of chapter.—The present chapter will be devoted to a discussion of the rights acquired by appropriations of water under the Arid Region Doctrine of appropriation, as between appropriators, leaving the rights acquired as against other classes

to subsequent chapters.[1] We will also discuss in a subsequent chapter the quantity of water which may be diverted and used under any appropriation,[2] and the changes which are permitted after an appropriation has once vested.[3]

§ 776. **Priority of right.**—As we have seen in a previous portion of this work in tracing the history of the adoption of the Arid Region Doctrine of appropriation, which originated with the customs and regulations of the early miners in California, a new element was, at that time, introduced in the laws governing waters theretofore unknown either in the civil or common law upon the subject.[1] This was the element of the superior right granted to the one who was prior in time. This principle, as has been seen, has not the age of centuries, but it is comparatively a new one. It is entirely contrary to the principles of the common law of riparian rights, where priority of the use of the waters of a certain stream confers no exclusive or superior right as against any one or all the other riparian proprietors, but where the rights of all of the proprietors upon the same stream are equal or correlative.[2] Neither was the right of priority recognized under the civil law of the Romans.[3] It was also an additional principle to the use of waters under the civil law as modified by the Spanish-Mexican law, whereunder the State, ever guarding its own interests, granted the right to certain persons under certain conditions to divert the waters from the natural streams and to use the same for irrigation or other purposes under strict Government control.[4]

This element of priority, as we have said, originated with the miners of California, at a time when practically all of the lands and waters in that part were a portion of the public domain of the United States. It followed the rule adopted as to the possessory right to mining claims. The man who first set his stakes and thus

1 For rights as against Congressional grantees, see Chap. 43, Secs. 804-809.

For rights acquired against riparian owners, see Chap. 44, Secs. 810-823.

2 See Chap. 49, Secs. 874-916.

3 See Chap. 48, Secs. 856-873.

1 For the history of doctrine, see Secs. 595-626.

2 For riparian rights, see Secs. 483-497.

For irrigation as a riparian right, see Secs. 498-525.

3 See Chap. 29, Secs. 552-569.

4 For the Spanish-Mexican Law of Waters, see Secs. 570-584.

located a claim had the superior right to the same as against all later comers. So, too, with the waters of the natural streams. The man who took the first step to appropriate the water of a certain stream for the purpose of working his mining claim had the superior right to the use of the water, and later comers could only appropriate water from the same stream subject to the rights of the first. The maxim, *"Qui prior est tempore, potior est in jure,"* became the universal rule; a maxim taken from the common law governing successive grants of real property by a common owner to different persons, and meaning, he who is prior in time is stronger in right;[5] a maxim, strange as it may seem, used to overturn the principles of the common law itself upon the subject of riparian rights.

§ 777. **The rights of the prior appropriator.**—Under the Arid Region Doctrine of appropriation, as between persons who claim the right to the use of the waters of a certain stream, lake, or other source of supply, by a valid appropriation [1] and for some beneficial purpose, he who is first in time has the superior right to such use to the full extent of such appropriation, even if, at times, it takes all of the water of the stream. This rule is one of the fundamental principles of the doctrine of appropriation.[2]

"By the custom which has obtained among the miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the Government, as the source of title in all controversies relating to the property." [3]

"He who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a

[5] Broom, Legal Maxims, 353; Bouvier, Law Dict.: Maxims.

For the history of the Arid Region Doctrine of appropriation, see Secs. 595-626.

[1] For methods of appropriation, see Secs. 706-732.

[2] We deem it unnecessary to cite all of the cases deciding this point, and the following are a portion only.

[3] Mr. Justice Field, in Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414; affirming 1 Mont. 561, 1 Morr. Min. Rep. 583.

better right to its use and enjoyment than others who had not given such labor."[4]

"By the customary laws of miners in California, as we understand it, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed."[5] This rule

[4] Mr. Justice Field in Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, affirming 1 Mont. 455, 1 Morr. Min. Rep. 683.

[5] Mr. Justice Field in Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665.

See, also, Hewitt v. Story, 51 Fed. Rep. 101; *Id.*, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; Krall v. U. S., 79 Fed. Rep. 241, 24 C. C. A., 543, 48 U. S. App. 351; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Trade etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37; Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493, affirming 11 Ariz. 128, 89 Pac. Rep. 504; Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

See also:

Alaska.—Revenue etc. Co. v. Balderson, 2 Alaska 363.

Arizona.—Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Hill v. Lenormand, 2 Ariz. 354, 16 Pac. Rep. 266; Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483; Hunning v. Porter, 6 Ariz. 171, 54 Pac. Rep. 584, where it has held that the prior right to the use of water for irrigation, acquired by priority of appropriation, is absolute.

Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504; affirmed 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493.

California.—Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Hoffman v. Stone, 7 Cal. 46; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Tarter v. Spring Cr. etc. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Ortman v. Dixon, 13 Cal. 33; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; McDonald v. Bear River etc. Co., 13 Cal. 220; *Id.*, 15 Cal. 145, 1 Morr. Min. Rep. 625; Hill v. King, 8 Cal. 336; Tenney v. Miners' D. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31; Bear River Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129; Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Maeris v. Bicknell, 10 Cal. 217; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Himes v. Johnson, 61 Cal. 259; Osgood v. Eldorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Junkans v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; San

Jose etc. Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. Rep. 269; Davis v. Angelo, 8 Cal. 305, 96 Pac. Rep. 909; Kelly v. Natoma Water Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Esmond v. Chew, 15 Cal. 137, 5 Morr. Min. Rep. 175; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Nevada etc. Co. v. Kidd, 37 Cal. 283; Mitchell v. Amador C. & Co., 75 Cal. 464, 17 Pac. Rep. 246; Ramelli v. Irish, 96 Cal. 214, 31 Pac. Rep. 41.

Colorado.—Schilling v. Rominger, 4 Colo. 100; Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Vogel v. Minnesota etc. Co., 47 Colo. 543, 107 Pac. Rep. 1108; Armstrong v. Larimer etc. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Bloom v. West, 3 Colo. App. 212, 32 Pac. Rep. 846; Strickler v. Colo. Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245, where it is said: "A priority to the use of water is a property right."

Fort Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; U. S. etc. Co. v. Gallegos, 1 Leg. Adv. 412, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Colorado etc. Co. v. Larimer & Weld Irr. Co., 26 Colo. 47, 56 Pac. Rep. 185; Cache La Poudre Res. Co. v. Water Supply etc. Co., 27 Colo. 532, 62 Pac. Rep. 420; Wellington v. Beck, 30 Colo. 409, 70 Pac. Rep. 687, 65 Pac. Rep. 626; Fulton etc. Co. v. Meadow etc. Co., 35 Colo. 558, 86 Pac. Rep. 748; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Windsor etc. Co. v. Hoffman Mill Co., 48 Colo. 89, 109 Pac. Rep. 425; Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. Rep. 205.

It may be considered as *stare decisis* in Colorado that there may be circumstances in which consumers of water from the same irrigation ditch may not be compelled to prorate with each other, but the appropriators may have different priorities based on the time of the several appropriations. Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416.

See, also, Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Farmers etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Sieber v. Frink, 7 Colo. 149, 2 Pac. Rep. 901; Wheeler v. Northern Colorado Irrigation Co. 10 Colo. 583, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Platte Water Co. v. Northern Colorado Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

The same irrigation ditch may have two or more priorities owned by the same or different persons. Park v. Park, 45 Colo. 347, 101 Pac. Rep. 403.

Idaho.—Both the constitution and statutes of the State of Idaho recognize the right of a prior appropriator in and to the public waters of the State, and Sec. 3245 of the statutes declares that the "First in time is the first in right." Nielson v. Parker, —— Idaho ——, 115 Pac. Rep. 488.

See, also, Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; Lee v. Hanford, ——

Idaho ——, 121 Pac. Rep. 558; Malad Val. Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Dunniway v. Lawson, 6 Idaho 28, 51 Pac. Rep. 1032, where it is held, in case of conflict between appropriators of water in a given stream, the appropriation that is first in time is first in right.

Hillman v. Hardwick, 3 Idaho 255, 28 Pac. Rep. 438; Moe v. Harger, 10 Idaho 302, 77 Pac. Rep. 645; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Farmers' etc. Co. v. Riverside Irr. Dist. 14 Idaho 450, 94 Pac. Rep. 761; Hutchinson v. Watson Slough D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250; Krall v. United States, 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351.

Kansas.—Clark v. Alleman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

Montana.—"The right to the use of water in the streams of this state is public. 'As between appropriators, the one first in time is first in right.' (Rev. Codes, Sec. 4845); but when the first appropriator has finished his use he must return the water to the stream, to be used by subsequent appropriators." Featherman v. Hennessy, 43 Mont. 310, 115 Pac. Rep. 983.

See, also, Boyd v. Huffine, —— Mont. ——, 120 Pac. Rep. 228; Thorp v. Woolman, 1 Mont. 168, 8 Morr. Min. Rep. 87; Stafford v. Hornbuckle, 3 Mont. 485; Thorp v. Freed, 1 Mont. 651; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Alder Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581; Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Toohey v. Campbell, 24 Mont. 30, 60 Pac. Rep. 396; State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

Nebraska.—Clark v. Cambridge etc. Co., 45 Neb. 798, 64 N. W. Rep. 239; Crawford Co. v. Hathaway (Hall), 67 Neb. 235, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

Nevada.—Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Ophir et. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; James v. Goodenough, 17 Nev. 324; Dalton v. Bowker, 8 Nev. 190; Chiatovich v. Davis, 17 Nev. 133, 28 Pac. Rep. 239; Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Reno Smelting Co. v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; Ennor v. Raine, 27 Nev. 178, 74 Pac. Rep. 1; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289.

New Mexico.—Keeney v. Carillo, 2 N. M. 480; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Albuquerque etc. Co. v. Gutierres, 10 N. M. 177, 61 Pac. Rep. 357; affirmed in 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

Oklahoma.—Gates v. Settlers etc. Co., 19 Okla. 82, 91 Pac. Rep. 856.

Oregon.—"Where several rights are acquired from the same stream, they will have priority in the order of the time of their diversion." Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393.

See, also, Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Nevada Ditch Co. v. Canyon & Sand Hollow Ditch Co., 58 Ore. 517, 114 Pac. Rep. 86; Caviness v. La Grande Irrigation Co. —— Ore. ——, 119 Pac. Rep. 731;

of superior right based upon priority, as we have seen, first adopted by the miners of California in their customs and regulations as applied to the use of the waters from the natural streams on the public domain only to the working of their mines, afterward allowed by the decisions of the courts and by statute of that State,[6] was then "acknowledged and confirmed" by the General Government by the Acts of Congress of 1866 and 1870,[7] as applying to the

Hayden v. Long, 41 Ore. 244; Kaler v. Campbell, 13 Ore. 596, 11 Pac. Rep. 301; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Britt v. Reed, 32 Ore. 76, 70 Pac. Rep. 1029; Bolter v. Garrett, 44 Ore. 304, 75 Pac. Rep. 143; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Speake v. Hamilton, 21 Ore. 3, 26 Pac. Rep. 855; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13.

South Dakota.—Lone Tree D. Co. v. Cyclone etc. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 591.

Texas.—Mud Cr. etc. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078.

Utah.—Crane v. Winsor, 2 Utah 248; Munroe v. Ivie, 2 Utah 535, 8 Morr. Min. Rep. 127; Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Herriman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 920; Fisher v. Bountiful, 21 Utah 29, 59 Pac. Rep. 520; Salt Lake City v. Salt Lake etc. Pr. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 456, 71 Pac. Rep. 1069, 61 L. R. A. 648; Cole v. Richards Irr. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah 456, 27 Pac. Rep. 578; Salt Lake City v. Gardner, —— Utah, ——, 114 Pac. Rep. 147; Sowards v. Meagher, 37 Utah, 212, 108 Pac. Rep. 1112; Patterson v. Ryan, 317 Utah 410, 108 Pac. Rep. 1118.

Washington.—"It is true that the appellant at one time attempted to file an appropriation of certain water under the statute, but such appropriation was clearly not effective, under the rule in Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, because the water was already appropriated by the respondents." Weidensteiner v. Malley, 55 Wash. 79, 104 Pac. Rep. 143.

See, also, Atkinson v. Washington Irrigation Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772.

Wyoming.—Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

[6] For the history of the doctrine of appropriation, see Secs. 595-626.

[7] For Acts of 1866 and 1870, see Secs. 611-616.

use of such waters for any beneficial purpose. "Whenever, by *priority of possession*, rights to the use of water for mining, agricultural, manufacturing, or other purposes," etc., is the language of the statute; and this has been made the basic principle governing the law of the use of waters in all of the States and Territories of the arid and semi-arid West. In all of these States statutes have also been adopted to this effect;[8] and in some States this rule as to the superiority of right based upon priority is even embodied in their constitutions,[9] and in most of the States it is found in some form or other in the statutes. As was said in a recent Idaho case:[10] "The doctrine prevailed prior to statehood, and in the earliest Territorial history, that the 'first in time is the first in right,' in the diversion and use of public waters. Indeed, this is the doctrine that has prevailed throughout the States and Territories of the arid West; it is found, expressed in some form or other, in the Constitution of most of the arid States, and has been reinforced by statutes in practically all of the irrigation States." A priority right to the use of water under the law of appropriation is a property right, which is the subject of purchase or sale,[11] and its character and method of use may be changed by the appropriator, provided such change does not injure the rights of others.[12]

It is held that one who purchases a water right from a ditch or canal company that has made the appropriation of the same for the purposes of sale, rental, or distribution of the water is entitled to the priority of use as against other subsequent purchasers; and that such priority dates from the time of the *bona fide* settlement

8 See for laws of the States and Territories, Part XIV.

9 "Priority of appropriation shall give the better right as between those using the water for the same purpose." Colorado Const., Art. 16, Sec. 6. See, also, for the other provisions of the constitution Part XIV, under Colorado.

"Priority of appropriations for beneficial uses shall give the better right." Wyoming Const., Art. 8, Sec. 3. For other provisions, see Part XIV, under Wyoming.

"Priority of appropriation shall give the better right as between those using the water." Idaho Const. Art. 15, Sec. 3. For other provisions, see Part XIV, under Idaho.

10 Nielson v. Parker, 19 Idaho 729, 115 Pac. Rep. 488.

11 For the sale of water rights, see Secs. 994-1032.

12 For the change of use, see Secs. 869-872.

See, also, Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S. 329.

upon the land and the beginning of his improvements. And in a recent case,[13] it was held that a settler who actually settled upon a tract of land lying under a canal owned by such a company with a view to receiving water therefrom for agricultural purposes is entitled to a priority over one who has previously purchased a water right from such canal company, but who has failed to either settle upon the land or to improve the same. Both a prior and subsequent appropriation may be made through the same ditch or by one person or by others. In other words, a single ditch may convey water under several appropriations having separate and distinct priorities.[14]

§ 778. **The date fixing the priority.**—The date fixing the priority of an appropriator differs somewhat in the different jurisdictions, and also depends upon the circumstances of the appropriation itself. Provided, always, that reasonable diligence is used in the construction of the necessary works,[1] and the application of the water to some beneficial purpose, in those States which require no notice of appropriation, the date of the actual commencement of the work is the date fixing the priority of the appropriation. This was also the rule in those jurisdictions the statutes of which at first did not provide for a notice of appropriation, up to the time such a provision was enacted.[2] But, at the present time, the statutes of nearly every State provide for the posting of a notice of appropriation. Where this is so, and the appropriation is finally consummated with reasonable diligence thereafter,[3] the date of the priority, by the doctrine of relation, is fixed as of the date of the posting of the notice.[4] In those jurisdictions in which are to be found the more modern irrigation codes, and which follow what is known as the rule of State con-

[13] Mellen v. Great Western Beet Sugar Co., —— Idaho ——, 122 Pac. Rep. 30.

[14] Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 42 Colo. 315, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

[1] For reasonable diligence, see Secs. 733-741.

[2] For notice of appropriation, see Secs. 710-717.

See, also, the laws of the States, Part XIV.

For methods of making appropriations, see Secs. 706-732.

[3] For the consummation of an appropriation, see Secs. 725-728.

[4] For the doctrine of relation, see Secs. 742-756.

trol, based upon the Wyoming system of laws relating to appropriation, the date of the priority is fixed by the date of the application to the proper officer, and upon which the permit is afterward issued.[5] But in all jurisdictions, a valid appropriation may be made by the actual use of the water for some beneficial purpose, and that, too, without complying with the formalities of the statute.[6] Where this is the case, the date of the priority is that of the actual use of the water. This is also the rule in cases where there was an attempt to follow the statutes, but where there was unreasonable delay in the consummation of the appropriation from the date of the posting of the notice or from the date of the commencement of the work as the case may be. The doctrine of relation in these cases does not apply.[7] These rules have been discussed in other portions of this work, and outside of their bare statement in this connection there is no need for further discussion.[8]

It is the history of the law of appropriation in every Western State and Territory, that in the early days the methods were very lax especially as to the perpetuation of the evidence of the dates of the appropriations. As a general thing, even if the law required a notice, no record of the same was required. Therefore, in many instances appropriations have been made which were in every respect valid, but the parties making them have moved away or have died, witnesses have also disappeared, and it is impossible for the successors in interest to prove the date of the priority. In cases of this nature, as was held by the Supreme Court of Montana, the trial court is justified in arbitrarily fixing an appropriate day or date. "In water right suits, testimony relating to original appropriations, some of them made many years before the controversy arises, is very often indefinite as to dates, and when this condition arises at the end of the suit the trial court, for the purpose of framing a decree specifically settling the respective rights of the parties, of necessity must often arbitrarily fix a particular day or days for appropriations of water."[9]

§ 779. Priority—Circumstances under which question arises.—The circumstances under which the question of priority of right

[5] For the laws of State control of waters, see Chap. 68, Secs. 1337-1367.

[6] For appropriation by use of water, see Secs. 730, 751.

[7] See Sec. 751.

[8] See citations above.

[9] McDonald v. Lannan, 19 Mont. 78, 47 Pac. Rep. 648.

arises are many. It arises, of course, to determine the rights between all persons claiming the right to the water of a certain stream by virtue of an appropriation and all claiming that they were prior. The one being actually first in time is first in right. The question also arises to determine the extent or the amount of the water to which the one who is actually prior in time is entitled under his appropriation.[1] Then, it arises to determine the rights of the prior appropriator as against the rights of the subsequent appropriators,[2] and the intervening appropriators;[3] and, also, as to the rights between the individuals of either of these classes. Again, the question of priority is applied to determine the rights of appropriators from the same stream who divert their water through the same ditch;[4] and, also, the relative rights of the individuals of any group of this kind and the individuals of another group.[5] Then, again, where the constitutions or statutes of certain States give a preference right for certain uses, as between those using the water for the same purpose, priority of use gives the better right.[6] Then, the rule is applied where the consumers of the water receive it from a ditch or canal constructed by a company which diverts the water from the natural stream and furnishes it to the farmers, and that, too, regardless as to whether the canal company or the consumers are deemed in law to be the actual appropriators of the water.[7] Then, again, the right of priority applies to the appropriation of water where it is stored in reservoirs for future use as between the rights of the companies storing the

1 See for the extent or amount of water which may be claimed, Secs. 877-887.

2 Secs. 784, 785.

3 See Sec. 788.

4 That appropriators of water through the same ditch may have different priorities of right to the use of the water based upon the time of the several appropriations, see Sec. 776.

See, also, Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722.

See, also, Secs. 831, 1085.

5 See Secs. 780-786.

6 For preference rights, see Secs. 791-794.

7 For the rights of ditch companies and consumers, see Chaps. 72-77.

See, also, Farmers Highline C. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

water.[8] And it again applies to determine the rights of those storing the water for future use as against the rights of those who appropriate the water for immediate use.[9] And it is also applied to determine the rights between appropriators from interstate streams. In this case also the priority governs the right to the use of the water.[10] The rule of priority is also applied to settle the rights to the use of water as between appropriators and riparian proprietors.[11] In all these questions, the maxim, "*qui prior est tempore, potior est in jure,*" is the rule of law upon which is determined not only the right to the use of the water but also the extent of the right.

§ 780. **Prior appropriator's right to take all the water of a stream—Origin of rule.**—If there had been water enough flowing in the natural streams or other sources of water supply in this Western country to satisfy the wants of all, the question of superiority of right based upon priority would never have arisen; in fact, the Arid Region Doctrine of appropriation would never have been adopted. However, owing to the great scarcity of water in this part of the country, compared with the amount which might be used if every one got what he wanted, or needed, the rule of priority of right is the only one which could have been adopted, and at the same time have the water do the greatest good to the greatest number. In a strictly agricultural country, it is better that one man who was first in appropriating the water of a certain stream should have a well irrigated farm from which he can raise plentiful crops than that a hundred families who have settled near the stream have barely enough water for domestic purposes. Men in this part of the country, as well as in other parts, have to eat as well as to drink in order to live. And, in certain portions of the country, if they can not secure water for irrigation sufficient to mature crops for the sustenance of themselves and families their efforts will be

8 For extent of rights acquired for storage, see Secs. 837-846; Water Supply & Storage Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Cache La Poudre Res. Co. v. Windsor Res. Co., 25 Colo. 53, 52 Pac. Rep. 1104.

9 Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185, citing Kinney on Irr., 1st Ed., Secs. 230, 231, 232.

10 See Sec. 664.

11 See Secs. 810-823.

in vain. So, the rule of priority of right was adopted, in order that the few who were first might live and live well, rather than that the many should starve or eke out a miserable existence.

Owing to the topography of the country, a great many of our Western streams become nearly dry in the summer, just at the time when the water is most needed for irrigation, although in the spring they may carry a large volume of water. And, so, if a certain stream in the spring time has a flow of 500 inches; and, in the summer time the flow is reduced to 100 inches or less, and the first appropriator of the waters of the stream has legally consummated his appropriation for 250 inches, and he actually has need of this amount of water for the purpose for which he made the appropriation, and uses it at all times when he can get it, he is entitled under the law as regards all subsequent claimants to all of the water that flows in it during the period that it is equal to 250 inches or less, although he entirely shuts off the supply of the subsequent appropriators.[1] This may seem a selfish rule to one who is acquainted with only the principles of the common law upon the subject, but it is based upon the general and uniform principle applicable to all claims by appropriation to waters upon the public domain of the arid and semi-arid West that, "he who has the prior has the superior right," or, stated in other words, "first in time, first in right."[2] Under this principle, the general doctrine is settled by a long line of authorities, which will be discussed in our next section,[3] that the prior appropriator of the waters of a certain stream or other source of water supply is entitled to the exclusive use of the water up to the amount embraced in his appropriation, even if it cuts off the rights of valid subsequent appropriations, when the stream flows more than the amount claimed by the first appropriator.

As was said in a very recent California case:[4] "Undoubtedly, the plaintiff, under the evidence, as the original appropriator of the

1 See, also, next section and cases cited.

2 "An inspection of the various Acts plainly shows that the guiding star has always been to so legislate as to protect all users of water in the most useful, beneficial way, keeping in view the rule existing all over the arid region, First in time first in right." Hard v. Boise City Irr. & L. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

3 See Sec. 781.

4 Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

water, had a paramount right to the first flow thereof to his land and in a full ditch because the best results through irrigation are attained with the ditch at that capacity, and a right to the use of all the waters at such times as was necessary for him to use them and to the extent of such previous use. But when this is conceded to him he has secured all he is entitled to."

§ 781. Prior appropriator's right to take all the water of a stream—Authorities.—As set forth in the preceding section, with the exception of the cases where there is a question of preference rights granted under some constitution or statute,[1] the first appropriator on a certain stream is entitled, by virtue of his prior right, to the use and enjoyment of the water to the full extent of his original appropriation, even when this includes all of the water of the stream, and this right continues so long as he applies all of the water appropriated to some beneficial use or purpose.[2] By the

1 For preference rights as affecting priority, see Secs. 791-794.

2 Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704.

Prior appropriation of all the waters of a stream, applied to irrigation purposes, gives the better right to all the tributaries and all the direct and immediate sources of supply of the stream; and when the right once vests, it must be protected. Malad Val. Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52.

See, also, Strickler v. Colorado Sprs., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

The prior appropriator of the water of a stream is entitled to the use of all of it, if necessary to irrigate his land under cultivation. Bolter v. Garrett, 44 Ore. 304, 75 Pac. Rep. 143.

The prior right to the use of waters for irrigation acquired by priority of appropriation, is absolute, regardless of whether the stream furnishes a sufficiency for all; and this even where it is sufficient for all appropriators up to the time of determining the different priorities. Hunning v. Porter, 6 Ariz. 171, 54 Pac. Rep. 584.

"Beyond question, under our laws, a party may be protected in the use of all the water he actually appropriates and uses, even if it be every drop that flows in as great a river as the Snake." Trade etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37.

"Under such doctrine the first appropriator may appropriate the entire flow of a stream, if used in proper irrigation. Also, a non-riparian may appropriate and get an exclusive right to the whole water of a stream for non-riparian lands." Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

"It follows that respondents' title to the waters of Antoine Creek must date from the time of their entry in 1904, at which time they were subject to the prior appropriation of the appellants, who, as the evidence shows, will probably need the entire flow in the dry season of the year. . . . It is unfortunate that the

term, "to the full extent of his original appropriation," is meant the full amount of water he is entitled to take out of the stream

flood waters of Antoine Creek can not be conserved for the use of all, but so long as our laws measure the rights of the appropriator of water by the necessities of the dry season, the first in time must be held to be the first in right. The just purpose of the trial judge to apportion the waters can not be sustained in the light of the evidence showing that there is no excess of water running to, or waste by, the appellants. . . . This cause is remanded with instructions to enter a decree fixing the amount of water actually necessary to irrigate the lands of appellants, even to the full flow of the stream in the dry season, leaving the residue, if any, subject to the riparian right of respondents." Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028.

"An appropriator, subject to rights in existence at the time his appropriation is made, may take all the water he can use reasonably and without waste for a beneficial project, although it may be the lion's share, and none may be left for those who come afterwards." Caviness v. Le Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 735.

See, also, Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A., 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416; Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Moe v. Harger, 10 Idaho 302, 77 Pac. Rep. 645; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Mahoney v. Neiswanger, 6 Idaho 750, 59 Pac. Rep. 651; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; James v. Williams, 31 Cal. 211; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Ophir etc. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Gale v. Tuolumne W. Co., 14 Cal. 25, 44 Cal. 43; Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161; Wellington v. Beck, 30 Colo. 409, 70 Pac. Rep. 687; *Id.*, 43 Colo. 70, 95 Pac. Rep. 297; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053; Thorp v. Freed, 1 Mont. 651; Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Hillman v. Hardwick, 3 Idaho 255, 28 Pac. Rep. 438; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; Alhambra etc. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101; Brown v. Mullin, 65 Cal. 89, 3 Pac. Rep. 99; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; United States v. Burley, 172 Fed. Rep. 615.

But see Anderson v. Bassman, 140 Fed. Rep. 14; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089.

The Supreme Court of Nevada, at an early day, seems to have had considerable difficulty upon the question as to whether all of the water of a stream could be diverted by the prior

when his appropriation is finally entirely consummated.[3] It does not mean that his rights will be limited simply to the partial amount of his appropriation that he may have taken out while his works were in the course of construction, provided that he prosecuted their construction with all due and reasonable diligence.[4] Neither does it mean that his rights will be limited to the amount required for the land first put under cultivation.[5] But, "one is not permitted to obtain the exclusive control of an entire stream by appropriation 'unless his appropriation is made for some beneficial purpose, presently existing or contemplated.'"[6] In those jurisdictions which adhere to the common law of riparian rights, and at the same time have the law of appropriation, the above rule applies only to cases between appropriators, or the rights of appropriators as against the rights of riparian owners who have settled the lands bordering on the stream subsequent to the appropriation; it does not apply where the land through or adjoining which the stream runs was settled prior to the appropriation.[7] As we have seen,[8] a riparian owner may be an appropriator; and, as such an appropriator he does not lose his right, by being a riparian proprietor, of making an appropriation of all of the water of a stream if it is necessary to his use, and such an appropriation is made prior to the vesting of the rights of others to the waters of the stream.[9]

The appropriator can not exceed the amount of water covered by

appropriator, if it is all necessary for his use, and within the extent of his original appropriation. See Vansickle v. Haines, 7 Nev. 249, overruled in Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; and in Reno S. & M. Co. v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364. So in that State the law may be considered settled that the first appropriator is entitled to the enjoyment of the water to the full extent of his original appropriation, even when it includes all the water in the stream.

3 For the consummation of an appropriation, see Secs. 725-728.

4 For reasonable diligence, see Secs. 733-741.

5 For appropriation for future use, see Sec. 740.

6 Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 587.

See, also, Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 Pac. Rep. 727, 97 Pac. Rep. 838.

7 For rights as between appropriators and riparian owners, see Chap. 44, Secs. 810-823.

For the Western States adhering to the common law, see Sec. 507.

8 For riparian owner as an appropriator, see Secs. 507, 621.

9 Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528.

his appropriation and thus cut out the rights of others. Hence, one who has acquired the right to all of the water of a stream at its ordinary flow can not successfully claim the surplus water in the stream during times of freshets when the stream is swollen by unusually heavy rains.[10] The rule permitting the prior appropriator to take all of the water flowing in a certain stream, if his appropriation calls for that amount, is by no means a variation of the general rule upon the subject. It is, however, what might be called the most extreme illustration of the point in question. If the stream flows more than an amount sufficient to cover the claim of the first appropriator, he has also the right to an amount of water to the full extent of his appropriation before others can take any surplus. But, upon the other hand, if the stream, at times, only flows an amount sufficient for his needs or a less amount, he has the right to all of the water.[11]

From the above propositions which are supported by the cases cited in our notes it is evident that it is the well settled rule in every Western State, with the exception of the preference rights mentioned above,[12] that an appropriator, if he is prior in time to other vested rights to the use of the waters of a certain stream, can take the waters of that stream to the full extent of his original completed appropriation, and that others claiming a right to the use of the waters of the same stream subsequent to the rights acquired by the first appropriator must take subject to his rights, even if the first diverts and uses all of the water at times flowing in the stream.[13]

In summing up this subject, we have no reason to change the statement which we made in the first edition of this work, which is as follows: "From these authorities it is apparent that the rule in the arid region is settled that a prior appropriator can take the waters of a stream to the full extent of his original completed appropriation, and others claiming an appropriation in the waters subsequent to the first appropriation can not devest the first of his

[10] Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650.

[11] For rights of subsequent appropriators, see Secs. 783-786.

For general rights of prior appropriator, see, also, Secs. 776-778.

[12] For preference rights as affecting priority, see Secs. 791-794.

[13] For the rights of subsequent appropriators, see Secs. 783-785.

For the rights of appropriators and riparian proprietors, see Secs. 810-823.

rights, even if the first diverts all the water of the stream, provided he applies it all to some beneficial use or purpose." [14]

§ 782. **Enjoyment of the right of priority.**—A water right, acquired by a valid, prior appropriation gives the owner thereof an absolute, exclusive property right,[1] which the owner thereof may maintain and defend against all the world, with the exception of the United States Government where the enjoyment of the right interferes with the navigable capacity of the navigable streams of the United States,[2] and the right of the United States, as the owner of the lands bordering upon a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the Government property,[3] which, as we have seen, include the use of waters by Indians upon Government Indian reservations.[4] As we have seen in previous sections of this work, so long as the waters continue running in the channel of the natural streams, prior appropriators acquire no title or ownership of such waters; [5] and it is only after the water has been actually diverted and taken in to the works of the appropriator that he acquires a title to the *corpus* or very body of the water itself. However, after a valid appropriation has been made, and so long as the water is continued to be applied to some beneficial use or purpose by the appropriator, the water right remains the subject of exclusive ownership and control and is the property of the appropriator in every legal sense of the word.[6] He has an absolute right to the use of the water to the extent of his appropriation, and may maintain this right unimpaired by subsequent appropriators of the waters of the stream; [7]

[14] Kinney on Irr., 1st Ed., p. 369.

[1] That a water right is property, see Secs. 760-768.

[2] For the interference with navigation, see Secs. 353-357.

[3] See Sec. 480.

See Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

[4] For the right to reserve waters for Indian reservations, see Secs. 388, 480, 668.

For irrigation by Indians, see Secs. 271-285.

[5] See Sec. 772.

[6] See Secs. 768-771.

See, also, Wyatt v. Larimer etc. Irr. Co., 1 Colo. App. 480, 29 Pac. Rep. 906; Britt v. Reed, 42 Ore. 76, 70 Pac. Rep. 1029; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976.

As to ownership of *corpus* of the water, see Secs. 455, 555, 772.

[7] For rights of subsequent appropriators, see Secs. 783-786.

and the courts will protect in a proper action this right of the prior appropriator to the use of the water.[8] And subsequent appropriators can appropriate only the surplus water of the stream subject to the right of the first. He has, however, no control over the surplus water, and this may be appropriated by subsequent appropriators.[9] He has such an interest in the stream from his point of diversion to its source that he is entitled to the natural flow of the stream to the extent of his appropriation undiminished in quantity,[10] and undeteriorated in quality.[11] He has the right to change his point of diversion,[12] the means of conducting the water to the place of use,[13] the place of use,[14] and even the use of the water itself from that for which it was originally appropriated to some other, so long as the water is actually used for some beneficial purpose,[15] and so long as he does not interfere with the rights of others. He can not, however, in making these changes interfere with the rights of others or enlarge his rights to the injury of later comers by increasing the amount of water from that claimed under the original appropriation. But he can make an appropriation which will be subsequent to his original appropriation and also subsequent and subject to that of others intervening.[16] However, this appropriation must stand upon its own merits as an independent appropriation and can not be tacked on his first.[17] The prior appropriator may also sell and dispose of his water right, and his grantee will take the portion originally enjoyed by himself, and all subsequent appropriators must continue to take the water subject to the right of such

[8] Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58, 1007; Cache La Poudre etc. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Dunniway v. Lawson, 6 Idaho 28, 51 Pac. Rep. 1032.

See, also, for the adjudication of water rights in equity, Chap. 78.

For statutory adjudications of water rights, Chap. 79.

For protection of water rights by injunction, Chap. 81.

[9] Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880.

[10] For right to the natural flow of stream, see Secs. 802, 803.

[11] For the pollution of waters, see Secs. 1129-1147.

See, also, Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814.

[12] See Secs. 857, 858.

[13] See Secs. 860-862.

[14] See Secs. 867, 868.

[15] For change of use, see Secs. 869-872.

[16] See Secs. 783, 784.

[17] See Sec. 787.

grantee, whose source of title is traced back to that of the original appropriator.

The most of the propositions referred to in this section have been or will be discussed in other sections of this work under their respective subjects. We will now discuss the rights of subsequent appropriators, after which we will discuss the general propositions which relate to the extent of rights as applicable to all.

§ 783. **The rights of subsequent or junior appropriators.—In general.**—The rights of the prior appropriator being fixed by the extent of his appropriation, as discussed in previous sections of this chapter,[1] and the quantity of water which he may lawfully claim, as discussed in another chapter,[2] others later may appropriate all of the surplus water that is left flowing in the natural stream, provided that no interference with, or injury to the rights of the prior appropriator is thereby caused. These later parties are termed under the law subsequent or junior and, sometimes, successive appropriators, and are themselves prior appropriators as regards those whose rights are still subsequent to theirs. Or, in other words, among the successive appropriators, in the order in which they make their respective appropriations, each is in the position of a prior one towards all, the inception of whose valid rights is subsequent in time to the inception of his own rights.[3]

1 See Secs. 776-782.

The taking up of the water of a certain stream for a special limited purpose is an appropriation of only so much water as is necessary for that particular purpose. The surplus may be the subject of a new appropriation, which will give to the second appropriator a paramount use to all the waters of the stream not required for the specific purpose of the first appropriator. McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650.

See, also, Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Nevada etc. Co. v. Kidd, 37 Cal. 282.

2 See Secs. 874-887.

3 For the date fixing priority, see Sec. 778.

For doctrine of relation, see Secs. 742-756.

Appropriators of the waters of a stream have priorities of rights in their chronological order of appropriation, the later appropriator being limited to the rights not interfering with those of the earlier appropriator. McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976.

See, also, Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200; Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222; Hutchinson v. Watson Slough D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125;

And each successive appropriator acquires the same rights, if there is surplus water flowing in the stream, as the one whose rights are

Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Stein Canal Co. v. Kern Island etc. Co., 53 Cal. 563; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Brown v. Mullin, 65 Cal. 89, 3 Pac. Rep. 99; Branstetter v. Williams, 6 Idaho 574, 57 Pac. Rep. 433; Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Montana Co. v. Gehring, 49 Fed. Rep. 430, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629; Farmers etc. Co. v. Cozad M. Co., 65 Neb. 3, 90 N. W. Rep. 951; Higgins v. Barker, 42 Cal. 233; Junkins v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; American Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Byrne v. Crafts, 73 Cal. 641, 15 Pac. Rep. 300; Butte Canal etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Brown v. Smith, 10 Cal. 508; Ortman v. Dixon, 13 Cal. 143; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Procter v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Ophir S. M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Natoma etc. Co. v. Hancock, 101 Cal. 42, 31 Pac. Rep. 112, 35 Pac. Rep. 334; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139; Salina Cr. Irr. Co. v. Salina Stock Co., 7 Utah 456, 27 Pac. Rep. 578; Moe v. Harger, 10 Idaho 302, 77 Pac. Rep. 645, where it was held that, so soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that a subsequent appropriator is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted.

See, also, Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Creek v. Bozeman etc. Co., 15 Mont. 121, 38 Pac. Rep. 459; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Salt Lake City v. Salt Lake etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 61 L. R. A. 648, 25 Utah 441, 71 Pac. Rep. 1069; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867.

The prior appropriator of water is entitled to the use of all of it if necessary to irrigate his land under cultivation, but the surplus, after a reasonable use by him, should be distributed to the subsequent claimants in the order of their respective appropriations. Bolter v. Garrett, 44 Ore. 304, 75 Pac. Rep. 142.

See, also, Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep.

prior to him; each taking all that is necessary for his needs, if that amount is within the extent of his appropriation, of the water in the stream after the prior rights have been satisfied. As was said in a recent Oregon case:[4] "Where several rights are acquired from the same stream, they will have priority in the order of the time of their diversion. If more water is diverted by a settler than is needed for the purpose intended, or is actually used for such need, he acquires a right only to the amount so needed and used."

From some streams there may be a large number of successive appropriations, or appropriations subsequent in time to the first. In fact, there is no limit to the operation of the doctrine, except such physical limits as arise from the size of the stream itself, and the amount of water taken by each claimant. The right of each successive appropriator is independent of the rights of the others on the stream, and one appropriator can not dictate to another as to the manner of the use of the water as long as his rights are not in any way infringed upon.[5] So, again, where the majority of the appropriators of the waters of a certain stream incorporated, and regulated the use of the water in their corporate capacity among the stockholders, still the corporation has no power to regulate the use of the water of the other appropriators of the stream who did not come into the corporation, at a meeting or proceeding in which they have no right of representation nor voice in the action taken.[6]

A prior appropriator on a stream may also acquire a right to the waters of the same stream as an appropriator subsequent in time to his first appropriation and also subsequent to the rights of others intervening. But his subsequent right will depend wholly upon the validity of the new appropriation; such an appropriation is entirely independent of his former appropriation and can not be tacked on to the same.[7] But, as affecting the right of subse-

396; Featherman v. Hennessy, 42 Mont. 535, 113 Pac. Rep. 751; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Mann v. Parker, 38 Ore. 321, 68 Pac. Rep. 598; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

4 Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393.

5 Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520.

6 Bartholomew v. Fayette etc. Co., 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912; affirmed in 31 Utah 220, 87 Pac. Rep. 707.

7 Healy v. Woodruff, 97 Cal. 464, 32 Pac. Rep. 528.

quent appropriators, as was said in a recent Oregon case:[8] "He had the right to make one appropriation and to follow it up by actual application to the useful purpose designed within a reasonable time; but that would determine his right as of that date, if, indeed, it did not exhaust his privilege under that license. At any rate, each new enterprise or material enlargement of the old one requiring additional water would call for a new appropriation," as against others who had appropriated water from the stream in the meantime.

§ 784. The rights of subsequent as against those of prior appropriators.—Each subsequent appropriator is entitled to have the water flow in the stream in the same manner, as far as the interference by others is concerned, and he may insist that the prior appropriators shall confine themselves strictly within the rights which the law gives them, that is, to the amount of water within the extent of their appropriation which they actually apply to some beneficial use or purpose. The rights of the prior appropriator being fixed, he can not enlarge his rights to the injury of the subsequent appropriators by increasing his demands, even if used for a beneficial purpose.[1] This principle is illustrated by the

8 Andrews v. Donnelly, —— Ore. ——, 116 Pac. Rep. 569.

1 "A subsequent appropriator has a vested right as against his senior, to insist upon the continuance of the conditions that existed at the time he made his appropriation." Handy D. Co. v. Louden Irr. C. Co., 27 Colo. 515, 62 Pac. Rep. 847, citing Kinney on Irr., 1st Ed., Secs. 175, 231, 248.

"The rights of the former being thus fixed he can not enlarge his rights to the detriment of the latter by increasing his demands, or by extending his use to other lands, even if used for a beneficial purpose." Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, citing Kinney on Irr., 1st Ed., Secs. 175, 176; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Salina Cr. Irr. Co. v. Salina S. Co., 7 Utah 456, 27 Pac. Rep. 578; Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Strickler v. Colorado Sprs., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; Junkins v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A.

rule that a priority to waters for irrigation confers no right to appropriate them for storage in any greater quantity or at any other time than they can be appropriated for irrigation, as against another appropriator, whose right is subsequent to the appropriation for irrigation, but prior to that for storage.[2] Hence, it follows, that a prior appropriator for some purpose which does not consume the water, can not, as against subsequent appropriators, enlarge his claim to some use which does consume it.[3] Upon the other hand, water which has already been appropriated is subject to a subsequent appropriation above the head of the ditch of the prior appropriator, for some purpose which does not consume it, as for furnishing power, provided that the water is delivered to the prior appropriator, above the point where it is needed for use by him,

311, 67 Am. St. Rep. 634; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423; Columbia M. Co. v. Holter, 1 Mont. 296; Dunniway v. Lawson, 6 Idaho 28, 51 Pac. Rep. 1032; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Union W. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Rommiger v. Squire, 9 Colo. 327, 12 Pac. Rep. 213; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; White v. Todd's Val. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Ophir etc. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Caruthers v. Pemberton, 1 Mont. 111; Alder etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Dougherty v. Haggin, 56 Cal. 522; *Id.*, 61 Cal. 305; Wilson v. Devine, 80 Cal. 385, 22 Pac. Rep. 224; Byrne v. Crafts, 73 Cal. 641, 15 Pac. Rep. 300; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Rutherford v. Lucerne Co., 12 Colo. 299, 75 Pac. Rep. 445; Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139.

[2] Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185.

[3] For right of appropriator to change the use of water, see Secs. 869-872.

A prior appropriator of water for mill purposes only, the water to be returned to the stream when used, can not confer on another by contract or otherwise the right to use the water, as against appropriators below the mill having the right to use the water for irrigation purposes. Cache La Poudre etc. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131.

See, also, Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A., 311, 67 Am. St. Rep. 634; Featherman v. Hennessy, 43 Mont. 310, 115 Pac. Rep. 983.

whose rights must not be impaired or interfered with.[4] We have seen, in previous sections of this chapter while discussing the rights of the prior appropriator, that he who is first in time has the superior right to the use of the water, as against subsequent appropriators, even if, at times, it takes all of the water of the stream.[5] After the prior appropriator's legal claim has been supplied, the same rule applies to the rights of the subsequent appropriators in the exact order of the time of their respective appropriations. So, if the subsequent appropriators do in no way impair the rights of the first, they may take in the order of their respective appropriations an amount of water from any part of the stream, sufficient for the purpose for which they may claim it, even if they take all of the water remaining in the stream.[6] The right of the prior appropriator includes the water legally appropriated and used, within the extent of his appropriation. So long as there is enough to supply him with the quantity of water which he has been so using, he has, in the protection of this right, "no concern with the disposition of the remainder."[7] The subsequent appropriators being entitled to the surplus, a prior appropriator, who has attempted to appropriate all of the water of the stream, can not deprive them of the water by selling the surplus to others.[8] He can not give away or dispose of surplus water to the injury of subsequent appropriators, for the reason that it being surplus to his rights he has no title to the same.[9] He can not charge the subsequent appropriator for the use of the surplus water.[10] A second appropriator is entitled to protection against the acts of a third which will in any way injure his right to the enjoyment of the water appro-

4 Salt Lake City v. Salt Lake etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

For the appropriation of water for power purposes, see Secs. 695, 847-855.

5 See Secs. 780, 781.

6 Thomas v. Guiraud, 6 Colo. 530.

7 Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

8 Johnston v. Little Horse Cr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986; Creek v. Bozeman W. Co., 15 Mont. 121, 38 Pac. Rep. 459; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111.

For sale of water, see Secs. 1027, 1028.

9 Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111, citing Kinney on Irr., 1st Ed., Sec. 231; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

10 Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598.

priated.[11] Hence, it follows, that a senior appropriator from a main stream may require a junior from a tributary which joins such stream below the point of the intake of the former's ditch to surrender, before the senior does, his use of the water, in favor of appropriators from the main stream, still prior to both, below the point where the tributary joins the stream.[12]

There are many other propositions which we might discuss under this heading, but as they relate to the general subject as between appropriators, they will be taken up together in the latter part of this chapter.

§ 785. **In any event any appropriator is limited to the quantity of water actually needed and applied to a beneficial purpose.**—As we shall discuss in a subsequent chapter of this work, any appropriator either prior or subsequent is limited in his right to the actual quantity of the water which he applies to a beneficial use or purpose.[1] As was said in a recent Oregon case: "Where several rights are acquired from the same stream, they will have priority in the order of the time of their diversion. If more water is diverted by a settler than is needed for the purpose intended, or is actually used for such need, he acquires a right only to the amount so needed and used."[2]

§ 786. **Subsequent periodical appropriations.**—It makes no difference in the application of the doctrine of subsequent appropriations from what source the surplus or residue of the water may

11 For injuries and remedies therefor, see Chaps. 81-83.

A subsequent appropriator of water from a stream, who is required to permit a certain amount of water to flow by his head gate to supply a prior appropriator, may maintain an action against a third appropriator, or one junior to him, to abate a ditch so constructed along the stream as to withdraw water by seepage from the stream. Platte Val. Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334.

12 Water Sup. etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386; reversing *Id.*, 7 Colo. App. 225, 42 Pac. Rep. 1020; Platte Val. Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334.

1 For the economic use of water, and suppression of waste, see Chap. 49, Secs. 874-916.

2 Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393.

See, also, Andrews v. Donnelly, — Ore. ——, 116 Pac. Rep. 569; Caviness v. Le Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

arise. It may be constant, resulting from a prior appropriation of a portion only of the water, or it may be intermittent, resulting from a prior appropriation of all the water only a part of the time. At such times as a prior appropriator is not using the water under his appropriation for a beneficial purpose, such waters are considered and treated, under the doctrine of appropriation, as unappropriated public waters, and for such periods of time are subject to appropriation and use by others.[1] There is no difference in principle between appropriations measured by time and those measured by volume. As was said in a Colorado case: "It seems, both upon principle and authority, that one may make a prior appropriation of a certain quantity of water to be enjoyed for a designated period of time, and another person an appropriation of a like quantity from the same source during another period, and, as to the same, he is a prior appropriator himself. In other words, there is no difference in principle between an appropriation measured by quantity and an appropriation measured by time."[2] As was said by the

1 Hutchinson v. Watson etc. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

At all times when the water is not required by one appropriator it should be at the disposal of another for irrigation or other uses. Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

2 Cache La Poudre Res. Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131, citing Kinney on Irr., 1st Ed., Secs. 177 *et seq.;* McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713, citing Kinney on Irr., 1st Ed., Secs. 177, 178.

See, also, Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Peregoy v. Sellick, 79 Cal. 568, 21 Pac. Rep. 966; Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762; Wilfong v. Bailey, 3 Hawn. 479; Kaanaana v. Richardson, 5 Hawn. 235; Santa Paula W. Co. v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Salina Cr. Irr. Co. v. Salina S. Co., 7 Utah 456, 27 Pac. Rep. 568; Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290; Lytle Co. W. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426; *Id.*, 2 Pac. Rep. 732; Southside etc. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598.

One may establish a right to the use of water of a stream during one part of the year, while another may at the same time acquire a perfect right to the use of the water for the remainder of the season. Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Davis v. Chamberlain, 51 Ore.

Federal Court:[3] "There is no doubt that where a party in the appropriation of water limits himself in using it to certain specific dates, subsequent appropriators may acquire vested rights to the water to be used at times not embraced in the claim of the first appropriator."[4]

In a very recent California case,[5] it was held that where the evidence showed that waters of a stream were not used by the prior appropriator for irrigation purposes except for occasional periods during the irrigation season, a subsequent appropriator could make an appropriation of the waters for use on his land at such times as the former had no use for them. The fundamental principle underlying this rule is that, under the Arid Region Doctrine of appropriation, in order that they may do the greatest good to the greatest numbers, all of the waters flowing in the natural streams or other sources of supply are for use all of the time. Hence, one person can appropriate the water in such a manner that he only diverts and uses it on certain days of the week or month, or certain hours of each day, and other appropriators who are actually subsequent in time to him may acquire a vested right to the same amount of water flowing in the stream on the other days or hours not embraced in the claim of the first. As, where the first only diverts and uses the water on Mondays, Wednesdays, and Fridays of each week, a subsequent appropriator may acquire a perfect right to use the same quantity of water on Sundays, Tuesdays, Thursdays, and Saturdays. And, again, the days may be likewise divided, as where the first uses the water only in the day-time or certain hours of the day, later parties may acquire a vested right to use the water in the night-time, or during the remaining hours of the day-time when it is not being used by the first. One of the most common divisions is by seasons. The farmers along a certain stream may successfully lay claim to all of the waters thereof during the "irrigating sea-

304, 98 Pac. Rep. 154; Hesperia etc. Co. v. Rogers, 83 Cal. 10, 23 Pac. Rep. 196, 17 Am. St. Rep. 209; McCoy v. Huntley, — Ore. ——, 119 Pac. Rep. 481.

3 Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932.

4 See, also, Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 283, 89 Pac. Rep. 289; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

5 Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

son." This season varies somewhat in certain parts of the country from March to November. It is synonymous with the expression "dry season of the year," which the Supreme Court of California defines as meaning that season, regardless of the time of the year, when resort to irrigation is necessary for the preservation and cultivation of the crops.[6] During the remainder of the year when the water is not needed by the farmers for the purpose of irrigation, the water may be appropriated for some other purpose, as for municipal purposes,[7] for mining,[8] for the storage of water for future use,[9] or for any other beneficial use or purpose which does not infringe upon the rights of the first appropriators. Hence, the law may be regarded as settled that if a certain portion of the water of some source of supply is appropriated only for certain periods of time by the first appropriator, others following may not only appropriate the surplus in whole or in part, but may also take the quantity of water appropriated by the first at such times as it is not used or needed by him, and when so appropriated by the second parties, their right thereto is as perfect and entitled to the same protection as that of the first appropriator to the portion claimed by him. Even in those States which recognize the right to use the water for irrigation as a riparian right, it is held that the water may be divided between the riparian owners periodically, rather than by specific quantities.[10]

This principle was well summed up in a recent Oregon case,[11] in which it is said: "We see no reason why, even in cases involving prior and subsequent appropriations of water, the courts can not

6 Daly v. Ruddell, 137 Cal. 671, 70 Pac. Rep. 784.

7 Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290.

8 An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year, and so may several persons appropriate the water for use during any different periods. Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671.

Where plaintiffs claimed the water of a stream for mining purposes, and where the stream only flowed during the winter season, the fact that they did not use the water the entire year did not prevent their adverse use from being continuous. McDougal v. Lane, 39 Ore. 212, 64 Pac. Rep. 864.

9 See, for right to store water, Secs. 837-846.

10 Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

For use of accumulated flow, see Secs. 790, 909, 910.

11 McCoy v. Huntley, — Ore. —, 119 Pac. Rep. 481.

require the appropriators to alternate in the use of the water. The time when water may be used recklessly or carelessly has passed in this State. With increasing settlement water has become too scarce and too precious to justify any but an economical use of it. An appropriator has only the right to use so much as his needs require at the time his needs require. And if these are satisfied by a use of the whole flow every other day, or every alternate week, he ought not to be heard to complain." And, the Court held, upon the ground that it tended toward a more economical use of the water that the parties might be required to alternate that use by a decree of the Court.[12]

§ 787. **Tacking rights.**—The right of a person to tack a water right originated by another, and to claim it either as an independent right or in connection with other rights owned by him, depends entirely upon the contractual relations between the two parties. If he can deraign his title to the right back to the original appropriation, he may then successfully claim and protect the right. This he may do by a purchase of the water right or a purchase of the land to which the water right was appurtenant.[1] But, upon the other hand, where one in the possession of land fails to connect his claim to the water with the right of the original appropriator, he can not tack the right to his other interests, and his own appropriation must be considered as the inception of all of his rights to the water. So, the right of a person claiming an appropriation of water can not be tacked to that of a mere squatter on the land, who, while he was in the actual possession of the land acquired a right in the water to irrigate it, but who had afterward abandoned it.[2] Neither can an appropriator tack his rights to the rights originally appropriated through an abandoned ditch. His right in

12 See, also, for the economic use of water and suppression of waste, Chap. 49, Secs. 874-916.

1 For the sale of water rights, see Secs. 994-1032.

2 For right of squatters to appropriate waters, see Sec. 687.

Where plaintiff failed to connect himself in interest with those who first cultivated his land and appropriated the water for the irrigation of the same, the right to tack was denied as against the rights acquired by subsequent appropriators. Chiatovich v. Davis, 17 Nev. 133, 28 Pac. Rep. 239.

See, also, Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Low v. Shaffer, 24 Ore. 239, 33 Pac. Rep. 678; Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Simpson v. Will-

such a case will depend for priority, as against other appropriators of the waters of the same stream, upon the date of his possession and appropriation, and not upon the date of the original construction of the ditch and appropriation by some person under whom he does not hold, and between whom and himself there is no privity of estate. His appropriation in such a case is a new and independent one, and must stand or fall upon its own merits.[3] As was said in a late Montana case:[4] "The mere possession by one person of a water right originated by another does not show such privity. In order to make good his claim to the right as of the date at which it was initiated, the possessor must show some contractual relation between himself and the original appropriator, or privity with him under the laws of succession. Otherwise, the initiation of the right will be fixed as of the date at which possession was taken."[5] Neither can an appropriator tack a new use of the water to an old use, where the new use requires a greater quantity of water than the old one. So, a right to store water can not be tacked to a right for direct irrigation, as against intervening reservoir rights, since the priority of water for irrigation does not carry priority for storage use.[6]

§ 788. Intermediate or temporary appropriations.—Between the time of the inception of the right of the prior appropriator and the time of the full consummation of his appropriation,[1] intermediate or intervening appropriators may acquire a right to the use

iams, 18 Nev. 432, 4 Pac. Rep. 1213; MacRae v. Small, 48 Ore. 139, 85 Pac. Rep. 503.

A riparian proprietor in no way connecting with a prior occupant and appropriator of water can not avail himself of such prior appropriation, but his own appropriation must be treated as the inception of his right. Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

[3] Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Wood v. Etiwanda etc. Co., 122 Cal. 152, 54 Pac. Rep. 726; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. Rep. 220.

[4] Kenchk v. Deegan, — Mont. —, 122 Pac. Rep. 746.

[5] Citing Hayes v. Buzzard, 31 Mont. 74, 77 Pac. Rep. 423; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222.

[6] New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185.

See, also, for changes in use, Secs. 869-872.

[1] For consummation of appropriation, see Secs. 725-729.

of the water by an appropriation of the same; this, however, is but a temporary right and must give way to the rights of the prior appropriator when he has completed his appropriation and is ready to use the water claimed, provided, of course, his appropriation was consummated with due diligence;[2] and, provided, further, that the prior claimant has the use of so much of the water as is necessary to preserve his works from injury while in the process of construction.[3] But, while the prior appropriator's dam, canal, or other works are in the process of construction, but he is not yet ready to actually use the water for the purpose intended, its use by other persons causing no injury to the first appropriator gives him no cause of action for relief, either equitable or legal.[4]

The same rule includes the appropriation for future use during the time in which the farmer is getting his land broken up and ready for irrigation and where he has instituted an appropriation for all of his land.[5] Again, it may be said that it is the general rule, that at any time that the water is not in actual use by the appropriators who have the legal right to its use, it may be taken from the stream and used by others for the time being, but by this means no legal right can be acquired when those who are entitled to it again claim it, unless there has been a failure upon the part

2 Nevada W. Co. v. Kidd, 37 Cal. 282; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Rincon etc. Co. v. Anaheim etc. Co. 115 Fed. Rep. 543.

Until a claimant is himself in a position to use the water of a stream, the right to the water or water right does not exist in such a sense that the mere diversion of the water by another is ground of action either to recover the water, or for damages for the diversion. Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. Rep. 549.

See, also, Bear River etc. Co. v. Boles, 24 Cal. 354; Brown v. Smith, 10 Cal. 508; Harvey v. Chilton, 11 Cal. 114; Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196.

3 Weaver v. Conger, 10 Cal. 233, 6 Morr. Min. Rep. 203.

4 A court of equity will not restrain the diversion of water by injunction until the party complaining is in a condition to use it. While the dam and canal of the party claiming the water are in the process of construction, but are not yet in a condition to receive the water, the use of the water by the other parties is no injury, and such use affords no ground for relief, legal or equitable. Nevada etc. Co. v. Kidd, 37 Cal. 282.

Bear River etc. Co. v. Boles, 24 Cal. 354.

See, also, cases cited *supra*.

5 For appropriation for future needs, see Sec. 740.

of the legal claimants to use the water for a time sufficient to work an abandonment,[6] or the right is acquired by adverse user and prescription.[7] But it is held that as against the rights of a subsequent appropriator, regardless of the question of prescription, that non-user by the prior appropriator will work a forfeiture of the right and that the right of the subsequent appropriator will become permanent.[8]

§ 789. **Enjoyment of subsequent appropriations.**—As we have seen in the preceding sections,[1] the waters of a natural stream are subject to successive appropriations; and, so long as the subsequent appropriators do not injure or impair the rights of those prior to them, they may use such methods of appropriation[2] and such amounts of water within the legal extent of their own appropriations as they may choose to apply to some beneficial use or purpose, as though they were each the only one taking the water from the stream. There may thus be numerous and different appropriations of the waters of the same stream; the rights of each depending, as against the others, on the date or time of his appropriation. The enjoyment of each of these rights is independent in itself as far as the rights of those subsequent in time are concerned, but is dependent upon the rights of those prior to them in that they must be supplied with the water first to the full extent of their appropriations. Hence, it follows that, one who acquires rights subsequent to another can not question the prior appropriator's right to the amount of water actually diverted and used by him on the ground that such an appropriation may interfere with the rights of some one else. The validity of such an appropriation as against subsequent appropriators does not depend upon, and is not affected by, the fact that there may be still prior vested rights on the stream, either above or below.[3] Thus, if a subsequent appropriator takes the water of a certain stream for mechanical purposes, from the stream above the point of diversion of one having the primary

6 For abandonment, see Secs. 1099-1120.

7 For prescription, see Secs. 1033-1038.

8 Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243.

1 See Secs. 783, 784.

2 For methods of appropriation, see Secs. 706-732.

3 McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976, citing Kinney on Irr., Sec. 181.

right to the water for the purpose of irrigation, he may do so and use it to drive his mill or to generate electricity, provided he returns all of the water after its use, undeteriorated in quality, to its natural channel in the stream before it reaches the prior appropriator's point of diversion; and, further provided, that in his use of the water the rights of the prior appropriator are in no manner impaired.[4] But, upon the other hand, the diversion of the waters from a stream, by either a subsequent appropriator or a riparian proprietor the inception of whose rights are subsequent to the rights of the prior appropriator, without returning it to the channel for his use, is an unreasonable exercise of the right of a subsequent appropriation.[5] What diminution in quantity or deterioration in quality will constitute an invasion of the rights of the first appropriator by those subsequent in time to him will depend upon the special circumstances of each case. The question for determination is whether the use and enjoyment by the prior appropriator of the water to the extent of his original appropriation has been impaired by the acts of other parties.[6] So long as the prior appropriator obtains all the water of satisfactory quality[7] to the full extent of his appropriation, he has no right to interfere with or complain of the enjoyment of the rights of subsequent appropriators on the stream.[8] And, furthermore, the Court will protect the rights of the

4 New Bear Valley etc. Co. v. Roberts, 30 Land Dec. 382; Chicala W. C. v. Lytle Creek etc. Co., 26 Land Dec. 520; both citing Kinney on Irr., 1st Ed., Sec. 181.

See, also, the appropriation of water for power purposes, Sec. 695.

Also, see Chap. 47, Secs. 847-855.

5 Weiss v. Oregon etc. Co., 13 Ore. 496, 11 Pac. Rep. 255; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130.

6 Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

See, also, for injuries and remedies therefor, Chaps. 81-83.

See, also, Union W. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597.

7 For pollution of water, see Secs. 1129-1147.

8 Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483; Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 29 U. S. App. 155, 30 L. R. A. 265; *Id.*, 51 Fed. Rep. 101; Salt Lake City v. Salt Lake etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1062, 61 L. R. A. 648, where the Court held that appropriated water is subject to a secondary appropriation above the head of the ditch of the prior appropriator for the purpose of

subsequent appropriator, both as against the invasion of the prior appropriator or as against that of those who are subsequent to him.[9] And, further, where there can be two uses of the *same* water under a prior and subsequent appropriation, neither one interfering with the other and both for beneficial purposes, the two appropriations will be allowed, and the prior appropriator can not complain simply because of the use by the subsequent appropriator, where there is no injury to his rights. This is the law of appropriation as well as the law of eminent domain.[10] Again, where the prior appropriator is not using the water covered by his appropriation during certain periods of time, a subsequent appropriator may store the same for future use, provided, of course, that the rights of the prior appropriator are not injured or interfered with. This subject, however, will be discussed more thoroughly in a subsequent chapter.[11] Hence, it follows that, if there has been no injury done to the rights of the prior appropriator, the results of the act of the subsequent appropriators will at most be *damnum absque injuria.* Upon the other hand, where there has been an injury done, what diminution in quantity or deterioration in quality will injuriously affect the use of the water by the prior appropriator under his rights, is a

furnishing power, the water to be delivered to the prior appropriator near the head gate of his ditch and the point where it is needed for use by him; and, further, that, so long as a prior appropriator's use of the water is neither interfered with nor abridged, he has no cause to complain, although another appropriator above him also uses the water for a beneficial purpose. Rio Grande etc. Co. v. Telluride etc. Co., 16 Utah 125, 51 Pac. Rep. 146.

9 Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Mann v. Parker, 48 Ore. 323, 86 Pac. Rep. 598; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

See, also, the adjudication of water rights in equity, Chap. 78.

For the statutory adjudication of water rights, see Chap. 79.

10 For eminent domain, see Secs. 1059-1098.

"Where two public uses can stand together without material impairment or impediment of one by the other, they must so stand." Salt Lake City v. Salt Lake etc. Co., *supra.*

See, also, Postal Tel. etc. Co. v. Oregon Short Line R. Co., 23 Utah 474, 65 Pac. Rep. 735, 90 Am. St. Rep. 705; Boston Water & Pr. Co. v. Boston etc. Corp., 23 Pick. (Mass.) 360; Lewis, Em. Dom., Sec. 274; Overman S. M. Co. v. Corcoran, 15 Nev. 147; West River Bridge Co. v. Dix, 46 U. S. 6 How. 507, 12 L. Ed. 535.

11 For reservoir and storage rights, see Chap. 46, Secs. 837-846.

question of fact to be determined under all of the circumstances of the case.[12]

§ 790. **Rotation or the use of accumulated flow of the water.**—There is another phase of the question, which is closely allied to the question of periodical appropriations, although it is somewhat different in principle, and that is what is termed the use of the accumulated flow of the waters at stated periods, or by rotation, by those who are entitled to a certain quantity of the water all of the time. These cases arise among appropriators of the waters of a certain stream, either of the same or of different rank, where they are each entitled to a certain quantity of the water of a stream all of the time; and, upon certain occasions, owing to the small amount of water flowing in the stream, find that if the water is divided according to the exact quantity to which each is entitled it would be practically worthless to all. Where this is the case there is no objection in law why they may not agree among themselves that each shall have the use of all of the water during certain stated periods of time.[1] In fact, this is one of the principal methods of division between the appropriators taking the water through the same ditch. It is also a common practice between the owners taking through different ditches from the same stream. By this means during exceedingly dry periods by "doubling up" the flow in one ditch for a time while the other is dry, and then reversing conditions, the users thereunder are enabled to maintain a stream which may be utilized to good advantage while the ditch is receiving the water, when, otherwise, if divided according to quantity, the stream would be so small that the most of it would be wasted. As was said in an Idaho case:[2] "Rotation in irrigation

12 Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Hill v. King, 8 Cal. 336; Woodruff v. North Bloomfield etc. Co., 8 Sawy. 628, 16 Fed. Rep. 25; *Id.*, 9 Sawy. 141, 18 Fed. Rep. 753.

See, also, for injuries and remedies therefor, Chaps. 81-83.

1 Hewitt v. San Jacinto etc. Dist., 124 Cal. 186, 56 Pac. Rep. 893, where it was held that, where water for irrigation is worthless unless delivered in an accumulated flow, at stated periods, a general usage to so deliver it is reasonable and valid.

An arrangement as to periods of user of water, by co-tenants, affects them only, and is for their convenience. Lytle Cr. W. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426.

2 Helpfrey v. Perault, 12 Idaho 451, 86 Pac. Rep. 417.

undoubtedly tends to conserve the waters of the State and to increase and enlarge their duty and service and is, consequently, a practice that deserves encouragement in so far as it may be done within legal bounds." In a Federal case,[3] the Court entered a decree applying the system of rotation, by restraining the defendants from diverting the waters in excess of five days in every ten days, during the irrigation months of June, July, August, September, and October of each year. In a recent case in Oregon,[4] the Court also applied the same rule and by decree required the appropriators to rotate in their use of the water.[5]

In another portion of this work, we will discuss the subject of rotation as a matter of economy.[6]

§ 791. **Priority as between different uses.**—In discussing the subject of the purposes for which water may be appropriated, we stated that under the doctrine of appropriation, water may be appropriated for any beneficial use or purpose.[1] Outside of the preference rights for certain uses granted by constitutional or statutory provisions in some of the States in times of scarcity, and discussed in other sections,[2] the general law of appropriation gives no preference right to any particular use to which the water may be applied over other uses. Hence, it follows that the right of priority is based upon the date of the particular appropriation regardless of the use for which the appropriation is made. In other words, as far as the acquisition of a priority of right is concerned, with the exception above mentioned, all uses stand upon equal ground. This was recognized by Congress in the Act of 1866,[3] by describing the uses of water the right to which might be acquired by priority of possession, as "mining, agricultural, manufacturing,

[3] Anderson v. Bassmann, 140 Fed. Rep. 14.

[4] McCoy v. Huntley, — Ore. —, 119 Pac. Rep. 481.

[5] See, also, Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337. This case was cited with approval in Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728, and in Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119.

[6] See Secs. 909, 910.

See, also, Shafford v. White Bluffs Land & Irr. Co., 63 Wash. 10, 114 Pac. Rep. 883; McCoy v. Huntley, — Ore. —, 119 Pac. Rep. 481.

[1] See Secs. 690, 691.

For the purpose of the appropriation, see Secs. 690-705.

[2] See Secs. 791-793.

[3] See Secs. 611-614.

or other purposes." Soon thereafter the right was also recognized by the Supreme Court of the United States,[4] and was also recognized by the Supreme Court of every Western State and Territory of this Western country where the law of appropriation is in force. This subject has been discussed under other phases of the subject, hence there is no need for an extended discussion here.[5]

§ 792. Priority—As affected by constitutional or statutory preference rights.—Under the early law of appropriation no preferences were given to any particular use or purpose for which the water might be applied, so long as it was a beneficial one. And, as we stated in the previous section, the Federal statutes gave no preferences, but that "the right of water by prior appropriation for any beneficial purpose is entitled to protection."[1] Later on the constitutions of some of the States, and legislative enactments in others, provided for preferences for certain uses of the water in times when there was not water enough for all purposes. The use for domestic purposes was usually placed first; and after that the use for the principal industry of the particular State was placed second, and after that followed the uses for other industries. In Colorado and Idaho there are constitutional provisions. In Col-

[4] Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

[5] See Secs. 690-705.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629; Natoma etc. Co. v. Hancock, 101 Cal. 42, 31 Pac. Rep. 112, 35 Pac. Rep. 334; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Tarter v. Spring etc. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Ortman v. Dixon, 13 Cal. 33; Revenue etc. Co. v. Balderson, 2 Alas. 263; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629; Windsor etc. Co. v. Hoffman etc. Co., 48 Colo. 82, 89, 109 Pac. Rep. 422, 425.

[1] Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; aff'g *Id.*, 1 Mont. 561; Yale on Mining Claims and Water Rights, p. 49.

See, also, Tarter v. Spring Creek W. & M. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Natoma W. & M. Co. v. Hancock, 101 Cal. 42, 35 Pac. Rep. 334; rev'd, *Id.*, 101 Cal. 42, 31 Pac. Rep. 112.

orado it is provided: "But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the water for manufacturing purposes."[2] And, in Idaho, under the same conditions in the constitution, it is provided that the preference rights shall be: First, domestic uses; second, mining, in mining districts; third, agriculture, and, fourth, manufacturing.[3] In other States similar statutes exist, but not in all.[4] These rules, in the States adopting them, modify the doctrine of priority of right to the extent of their provisions only in times of scarcity of the water. At other times the rule of priority governs, regardless of the use to which the water is put. It is also held that these provisions are prospective in their operation, and do not apply to water rights acquired prior to their adoption.[5] As between those using the water for the same preference right, the priority of right generally governs, although in Colorado by the Act of the legislature of 1879 an attempt was made in times of extreme scarcity to prorate the water appropriated through the same ditch, among the different users.[6] But the courts of that State, while not declaring the Act unconstitutional, have at times been loth to follow its provisions, and in

2 Const. Colo., Art. 16, Sec. 6.

See, also, for constitution and laws of Colorado, Chap. 87.

Const., Art. 16, Sec. 6, giving an appropriator of waters for irrigation priority as against appropriators for other purposes, does not affect the rights to the waters acquired prior to the adoption of the constitution. Colorado etc. v. Larimer & W. Irr. Co., 26 Colo. 47, 56 Pac. Rep. 185.

See, also, Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

See, also, preference for domestic uses, Sec. 793.

3 Idaho Const., Art. 15, Sec. 3.

For constitution and laws of Idaho, see Chap. 89.

It will be noticed from the above that the second preference given under the constitution is for mining. The Supreme Court in a recent case held that this did not give the miner such a preference right that he could pollute the stream by debris, as against prior appropriators of the waters for irrigation below. Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907.

4 For these statutes see laws of respective States, Part XIV.

5 Strickler v. Colorado Sprs., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

6 See Gen. Stat. Colo., 1883, Sec. 1722.

the face of the statute have held that different users of water, obtaining their supply through the same ditch, may have different priorities, even in times of scarcity.[7] These priorities are protected by the constitution of that State, and can not be interfered with by legislative action. Therefore, it is held that the most favorable view that can be taken of the statute is that in times of scarcity it may be resorted to among consumers having priorities of the same or nearly the same date.[8] California has never adopted any statute as to preference rights, but the question of priority governs as to all industries; even the question of domestic uses being left to the same rule.[9] This seems to us to be the better rule, unless it may be in times of extreme scarcity domestic uses should have the preference. And even then the use should be kept within the rule of what are known as strictly domestic uses.[10]

§ 793. **Domestic purposes—Preference right for.**—As we have seen in a previous section, that in those States, which by their constitutions or statutes, grant in times of scarcity a preference right for the use of water for certain purposes, the right of the use for domestic purposes is placed first.[1] This right granted modifies to that extent the doctrine of priority, and the courts do not permit it except in extreme cases, and confine the use within the limits as defined in the previous section,[2] that is to say for drinking

7 Farmers etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416, where it is said: "It therefore may be considered as *stare decisis* in this jurisdiction that there may be circumstances in which water consumers from the same ditch may not be compelled to pro-rate with each other." Citing Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Farmers' High Line Canal Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

8 Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

See, also, for pro-rating among consumers under canals of ditch companies, Chap. 76. See, also, Sec. 796.

For pro-rating in accordance with contract, see Secs. 922, 923.

9 Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Tarter v. Spring etc. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371; Ortman v. Dixon, 13 Cal. 33.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Montana Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 41 U. S. App. 629.

10 For domestic uses, see Secs. 486, 487, 793.

1 See Secs. 791, 792.

2 See Sec. 792.

and cooking purposes and for the watering of the stock of the appropriator. Where a preference right is given without limitation to use the water for domestic purposes it has been exercised as a subterfuge to use the water for other purposes. Take, for instance, the case of Crawford Co. v. Hathaway (Hall),[3] where a company claimed a right, under a statute granting a preference right for domestic purposes,[4] to divert the greater portion of a stream to furnish water to a municipality for general purposes, including sprinkling streets, furnishing power for a lighting plant and for flushing sewers. The Court, in holding that this could not be done under the preference right given by the statute, said: "If all the water of a stream may be diverted by a canal for so-called domestic purposes involving identical use for power, the priority given agricultural uses is rendered nugatory." The same rule has also been followed in other jurisdictions. In Colorado it was found necessary to enact a law supplementary to the constitutional provision, permitting the use of water for domestic purposes as first in times of scarcity, making it a misdemeanor where water is claimed under the constitutional provision for domestic purposes and is used for irrigation to any extent whatever.[5]

As a general thing statutory preference rights have not given satisfaction throughout the Western States where they have been enacted. It tends to modify the Arid Region Doctrine of appropriation based upon priority. They should never be allowed as against a prior right for any purpose without compensation, even for domestic purposes, and then that use should be kept within the limits of "domestic purposes" as defined in our previous section.[6]

[3] 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

[4] Laws, 1897, Sec. 43, Art. 2, Chap. 93a; Comp. Stat. 1903, Sec. 6451.

[5] See Mill's Ann. Stat. 1905, Sec. 2269a; Rev. Stat. Colo. 1908, Sec. 3179; Colo. Stats. Ann., Sec. 3179.

See, also, Montrose Canal Co. v. Loutzenheizer, 23 Colo. 233, 48 Pac. Rep. 532; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245, where the Court held that even for domestic purposes, the rights acquired to the use of water for irrigation, prior to the adoption of the constitution, could not be taken by a city, without compensation. Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Town of Sterling v. Pawnee D. Ex. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; Fulton Irr. D. Co. v. Meadow Island Irr. Co., 35 Colo. 588, 86 Pac. Rep. 748; Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185.

[6] See Sec. 792.

Domestic uses under this preference right are held to be similar to the common law right of each individual riparian proprietor to domestic use on his land, that is to say, for household purposes and for the watering of stock.[7] It is, therefore, held that any claim to the waters under such preference right for any extension or further use than the above will not be sustained. Therefore, it is held that the preference right given by the statute does not include the right of a municipality to take waters from prior appropriators for municipal purposes without condemnation and payment for such rights.[8] As was said in a recent case:[9] "It clearly was the intention of the framers of the constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section, which declare that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right."

§ 794. **Theory of granting preference rights.**—The theory under which preference rights are granted by the provisions of the constitutions or statutes of some of the States, outside of the right for domestic purposes, is to assist in protecting some favored industry in which the State is particularly interested. With the rapid growth of all industries in all of the Western States, there is no telling which one will predominate over the others in a few years. And where such a law is enacted in a certain State to protect a certain industry at the time of its passage, and, especially where such a provision is in the constitution, with the change of the situation, the progress of the State may be greatly impeded. Take,

7 For domestic use by riparian proprietors, see Secs. 486-488.

8 See cases cited *supra*.

See, also, Crawford County v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

9 Montpelier M. Co. v. City of Montpelier, 19 Ida. 212, 113 Pac. Rep. 741.

for example, the State of Idaho. At the time of the adoption of its constitution the mining industry of the State was predominant. But during recent years, since the great Snake River valleys have been settled, due to the great irrigation enterprises along the river and its tributaries, the agricultural interests are ahead, and it looks now as though they were bound to stay ahead, and it will not be many years before it will be found that the provisions of the constitution will greatly hamper these interests, when it could have been avoided by permitting the priority rule to govern. Then, again, there is the great question of the use of water for the development of power in the Western States. This is becoming a most important industry. In the lists of preferences in those States which have them, this would come under the classification of manufacturing purposes and is usually placed at the last. This also may greatly hamper the progress of the State where this rule is in force. With mountains of coal, iron, and other materials at hand, which go to make up a manufacturing country, the question here has always been the want of cheap fuel and power. Fuel and power have always been higher here than in the East. Both of these, owing to the inventions along electrical lines during recent years, may be furnished by the water rushing down the mountain streams found everywhere in this Western country. If the Western States are to compete with the East in manufacturing, the question of the development of power must be given at least an equal chance with the other industries requiring the use of water. In many instances, however, we will state that the water may be used for power several times over before it is consumed by other industries.[1]

In Idaho the second preference use is given to mining, but the Court has held that this right did not permit miners to pollute the stream, to the injury of the farmers below.[2] But, upon the other hand, in Colorado the second preference right is given for the purpose of irrigation.[3] In California after the first preference right for domestic use, the right to the use of water was given at first

1 For the appropriation of water for power, see Secs. 695, 847-855.

2 For pollution of waters, see Chap. 58, Secs. 1129-1147.

See, also, McCarthy v. Bunker Hill etc. Co., 164 Fed. Rep. 927, 92 C. C. A. 259; Hill v. Standard etc. Co., 12 Idaho 223, 85 Pac. Rep. 907.

3 Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093.

to mining and afterward to agricultural uses.[4] Later all preferences were abolished and the right to the use of water was given to any beneficial purpose, which was first in time to the full extent of such appropriation.

§ 795. **Classification of rights.**—The Idaho statute provides that any ditch or canal company shall classify the rights as between the various consumers, whom such company furnish with water. The statute upon the subject reads as follows:[1] "When any ditch, canal, or reservoir delivering or distributing water to several users, has one or more rights or priorities by reason of enlargements made from time to time, the rights of the land being irrigated by such works shall be divided into classes; rights of the first class belonging to those lands reclaimed between the dates of the first and second priorities or rights of such works; rights of the second class belonging to those lands reclaimed between the dates of the second and third priorities of such works; rights of any other class being determined in like manner; but all rights belonging to the same class shall be equal and subject alike to the regulations of their respective classes."

In a recent Idaho case,[2] decided by the Supreme Court of that State, in construing the above statute, the Court said: "The statute is merely administrative, and is the declaration of a policy in the administration of the distribution of water by irrigation companies which the legislature deems proper and just, and which is to be followed by the canal company in the absence of a judgment of a court of competent jurisdiction directing such matters." And the Court further held that the statute did not require any impossibility but it was intended that the owner of a ditch shall make a classification upon such information as he may be able to obtain in fairness and in accordance with the terms of the statute. The object of the statute as explained by the Court was, no doubt, in contemplation of the possibility that owners of irrigation systems might possibly make water contracts in excess of the capacity of the system, and that a shortage might thereby be created in the supply to the consumers under the system and because of that fact the legislature

[4] See Sec. 606.

[1] Rev. Codes of Idaho 1908, Sec. 3287.

[2] Brose v. Board of Directors of Nampa etc. Co. Irr. Dist., 20 Idaho 281, 118 Pac. Rep. 504.

thought it best to require the owners of all water systems to make a classification according to the rights acquired upon the reclamation of lands between the dates of the priorities named in the statute; and by making such a classification a record would thereby be made by the distributors of water which would be a reminder of the limit in capacity of the irrigation system and irrigation companies would be less liable to make contracts in excess of the capacity of the system.

§ 796. Prorating statutes.—There is another statute found in some of the States which interferes with the priority rights as between the respective appropriators, and that is the prorating statute. This statute applies only in times of extreme scarcity of water, and is a beneficial law enacted for the purpose of saving crops of the farmers which otherwise would perish without the application of some water.[1] This subject we will discuss in different portions of this work, and no further mention of the same need be made here.[2]

§ 797. Distribution of increase in volume of stream.—There is another important question which arises as to the relations between the prior and subsequent appropriators who claim the waters of a certain stream by the successive appropriations thereof, and that is the disposition of the increase of the water flowing in the stream by natural or artificial means after the respective appropriations have been made. This subject does not relate to the subject of developed water where there is an intent and a right to reclaim it by the party who does the developing. This subject will be treated under the subject of subterranean waters in a subsequent portion of this work and also under the subject of mingled waters in the following section.[1] It does, however, relate to waters which may have been developed as an incident to some other business, as, for instance, mining, and where there is a resultant increase in the flow of a stream, without any intention upon

1 For the pro-rating statutes of the respective States, see Part XIV.

2 See rights of corporations to prorate the water, Chap. 76.

For contracts to pro-rate water, see Sec. 923.

1 For developed waters, see Secs. 1205, 1206.

For the extent of rights to recapture mingled waters, See Secs. 798-800.

the part of the miner of recapturing it, or for using it for any beneficial purpose, after it leaves his control. It also relates to all natural increase of the flow of a stream from any cause. And the question before us is to whom does this increase belong? The authorities upon the subject hold that if several parties have acquired successive rights to the use of the waters of a certain stream and the volume of the flow is afterward increased from natural causes, the increased flow belongs to the several appropriators respectively, according to their priority of right, and within the limits of their respective rights. That is to say, if the first appropriator is fully supplied at all times when he needs the water to the full extent of his appropriation, he can take none of the increase. If the next subsequent to him is also fully supplied, the same result follows, and so on, until the right reaches a subsequent appropriator who is at times short of obtaining the full amount to the extent of his claim. This one may take from the increased flow sufficient water up to the full quantity lawfully claimed by him, and the surplus, if any, of the increased flow passes on to the next subsequent appropriator and so on.[2] The same rule also applies where the increase in the flow of a stream is due to artificial means, as where water from an artificial source is turned into the stream without any intention of recapturing it; also, to waste water which seeps or finds its way on the surface to augment the flow of the stream. There is no difference in principle between waste water thus added to a natural stream and water which, by natural law, so finds its way

2 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Drew v. Hicks, 35 Pac. Rep. 563, 101 Cal. 17.

The prior appropriator of a particular quantity of water of a stream is entitled to the use of that water or so much thereof as naturally flowed into the stream unimpaired or unaffected by subsequent changes therein by springs and seepage water finding their way into a tributary of the stream in the course of Nature unaffected by artificial works constructed by a subsequent appropriator. Beaverhead C. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Raymond v. Wimsette, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; Glassell v. Verdugo, 108 Cal. 503, 41 Pac. Rep. 403.

Only the actual increase resulting from the addition of water to a natural stream, which would not otherwise pass down either its surface or subterranean channel, can be diverted as against those entitled to its natural flow. Buckers etc. Co. v. Farmers' Ind. D. Co., 31 Colo. 62, 72 Pac. Rep. 49.

into such channel by percolation, surface, or subterranean flow.[3] So, also, where by the removal of obstructions which formerly held back the waters of a stream which strictly belonged to it its flow was increased, this increased flow belongs to the appropriators on the stream in the order of their priorities.[4] So, again, where the natural channels of the stream are combined in order to avoid seepage, a subsequent appropriator can not take any of the water of the stream on the theory that he is only taking what would be lost by seepage.[5]

It will be noticed that there is nothing new in principle in the rule as stated above, but the water from an increase in the flow of a stream under these conditions belongs to those who are prior in time and in the order of their priorities, and who have not theretofore been able to obtain the full quantity of water which might be legally claimed under their respective appropriations.

§ 798. **Mingled waters.**—Where, by artificial means, the waters from a different source of supply than that of a natural stream are turned into the channel of the stream, there necessarily follows a commingling of the waters from the two sources. Therefore, where the right to the use of the water from the two sources is in different ownership, there is a commingling of property belonging to the different owners. This commingling of property may also result where the water is from the same stream. As, for example, where a portion of the water of a stream is diverted for some use by an appropriator above, and, after such use, it is again turned into the stream for the object of using the stream as a portion of the ditch or canal of the appropriator in conducting the water to a point lower down the stream and there to be again diverted or recaptured and used by the owner. Again, the mingling of water

[3] La Jara Creamery etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 171; Water Supply etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386, all citing Kinney on Irr., Secs. 183, 259.

See, also, Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280.

[4] Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875.

[5] Howcroft v. Union & Jordan Irr. Co., 25 Utah 311, 71 Pac. Rep. 487; Platte Val. Irr. Co. v Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334.

may result from what are known as developed waters being turned into the natural channel of a stream and there mingling with the waters flowing therein. No matter what the source from which the water comes, causing the mingling of the waters, in the following sections we will discuss the question of the rights between the various appropriators of the waters of a stream as to these mingled waters, or waters which are purposely turned into a stream for the express purpose of using the channel of the stream as a portion of the ditch or canal of the appropriator and with the intent of recapturing it at some point lower down the stream for use at that point.[1]

As we shall see in the following two sections, the courts have often been called upon to settle this question of the rights to mingled waters as between the various parties interested. But as was held in one of the earliest and one of the latest California cases, the difficulty which the trial court experiences in cases of this nature in arriving at the facts is not an unusual one, but it is one which, nevertheless, must be met. It is the duty of the trial court, with the evidence before it, to determine the question with such exactness as may be possible. The Court said: "There may be some difficulty in cases like the present, in determining with exactness the quantity which parties are entitled to divert. Similar difficulty exists in the case of a mixture of wheat and corn. The quantity to be taken by each owner must be a matter of evidence. The courts do not, however, refuse the consideration of such subjects because of the complicated and embarrassing character of the questions to which they give rise. If exact justice can not be obtained, an appropriation to it must be sought, care being taken that no injury is done to the innocent party."[2]

§ 799. **Mingled waters—Intent to recapture.**—Assuming that a certain amount of water is added to the natural flow of a stream by artificial means, the right to recapture the same at a point lower down depends largely upon two facts: First, the right to the water as acquired by the appropriation of the same in the first instance for some beneficial purpose; and, second, at the time the water is

1 For developed water, and the right thereto, see Secs. 1205, 1206.

2 Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881, quoting Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769.

discharged into the stream, there must be clearly evidenced the intent to recapture it. The acquisition of the right to the water in the first instance does not differ in any respect from the right acquired to other waters by appropriation, and has been fully treated under the rules for the appropriation of water under the Arid Region Doctrine.[1]

As to the second proposition stated above, the clear intent to recapture must be present at the time the water is turned into the stream. For, without this intent to recapture the increase due to the artificial discharge into the stream will be treated as abandoned by the one discharging the same,[2] and will go to those appropriators of the stream, in the order of their priorities, as is the case of any natural increase in the flow of the waters of the stream, the rule governing which has been treated in another section of this chapter.[3] In fact, the rule governing the right of recapture is just the converse of the rule governing discharged waste into a stream.[4] In this case there must be the intent to recapture; and, in the latter case, the water is turned into the stream without any intent to recapture.[5] As was held by the Supreme Court of Nevada in making this distinction, in the former case the water was turned into the stream for the purpose of diverting a like quantity at a point further down—this was the end to be accomplished; while in the latter case the water is discharged into the stream as a matter of convenience and without any intention of recapturing it.[6]

[1] How water is appropriated, see Secs. 706-732.

Where claimants of the right to recapture water whose point of diversion was upwards of 30 miles below the point of inflow from a tunnel, and who had neither expended money nor labor in driving the tunnel, nor had purchased any rights from the persons who had driven it, it was held that they were not entitled to segregate from the stream a volume of water equal to that flowing from the tunnel, and assert an exclusive right thereto as against others diverting waters from the stream, even if it appears that the water from the tunnel causes an actual increase to its natural volume, but that the water from the tunnel finding its way to the stream had become a part thereof, and inured to the benefit of all taking water therefrom. Farmers' etc. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042.

For the right to mingle waters in the ditches and canals of others, see Sec. 800.

[2] For abandonment, see Secs. 1099-1117.

[3] For the right to the increase in flow, see Sec. 797.

[4] See Sec. 661.

[5] See abandonment, Secs. 1099-1117.

[6] Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888.

And hence it follows that, where water is discharged into a natural stream that there must at that time be an intention upon the part of the owner to reclaim it, otherwise it becomes a part of the volume of the stream and inures to the benefit of the appropriators of its waters, in the order of their respective appropriations, and the original owner will be held to have abandoned all further rights to the use of such water.[7] But, upon the other hand, where there is a certain amount of water added to the flow of a stream by artificial means and where there is, at the time of the discharge of the water into the channel of the stream, an actual and *bona fide* intention upon the part of the owner thereof to redivert or recapture the water, to use the term used frequently by the courts, but to use a better term, to divert an amount of water equal to the amount turned into the stream, less seepage and evaporation, at some point lower down the stream, at the same time coupled with a beneficial use at that point to which the water can be applied by the owner, and where the rights of others are not injured thereby, there can be no doubt but that it is one of the settled principles of the law of appropriation that this may be done.[8] In other words, where

See, also, Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108.

"There is no difference in principle between waste water added to a natural stream and water which, by natural law, so finds its way into such a channel by percolation, surface, or subterranean flow." La Jara etc. Assn. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644.

7 For abandonment, see Secs. 1099-1117.

See, also, Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Butte C. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888; Dodge v. Marden, 7 Ore. 456; Platte W. Co. v. Northern Colo. Irr. Co., 12 Colo. 525; McCauley v. McKeig, 8 Mont. 389, 21 Pac. Rep. 22, 16 Morr. Min. Rep. 1; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666.

8 This right is provided for by the statutes of some of the States. See Part XIV.

See, also, for developed waters, Secs. 1205, 1206.

The right as first appropriator of one who conducted water from mines into a natural stream, with the intent there to appropriate it for irrigation purposes, and who actually made the first appropriation thereof, relates back to the time at which he sought to utilize the water. Ripley v. Park etc. Co., 40 Colo. 129, 90 Pac. Rep. 75.

See, also, Platte Val. Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac.

water from an artificial ditch is turned into a natural water course and mingled with the natural waters of the stream, whether the same is the stream from which it was originally taken or not, for the express purpose of conducting it to another point lower down, to be there used by the original appropriator, it is not thereby abandoned, but may be taken out and again used by the appropriator, provided that he does not, in so doing, diminish the quantity of the waters otherwise flowing naturally in the stream by taking out more than his share, to the injury of those who have previously appropriated such natural waters.[9] Therefore, it is held that the

Rep. 49; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Farmers' Union etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065, citing Kinney on Irr., 1st Ed., Sec. 246.

One making an appropriation of water from a natural stream may make use of any natural or artificial channel available and convenient for the purpose of conducting the water, so long as other persons interested in such conduit do not object, and his appropriation so made will be as effectual as if he had carried it through a ditch or pipe line made for that purpose and no other. Lower Tule River D. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

See, also, Hoffman v. Stone, 7 Cal. 46; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Richardson v. Kier, 37 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; Weaver v. Eureka L. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Burnet v. Whiteside, 15 Cal. 35; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416.

One may appropriate water from a river by a ditch from it to another river, letting it flow down the latter, and then diverting it therefrom by a ditch. Wutchumna etc. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362.

See, also, Paige v. Rocky Ford C. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Creighton v. Kaweah etc. Co., 67 Cal. 221, 7 Pac. Rep. 658; Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Fuller v. Sharp, 33 Utah 431, 94 Pac. Rep. 817; Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045; Herriman etc. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Herriman etc. Co. v. Butterfield etc. M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Parks etc. Co. v. Hoyt, 57 Cal. 44; Malad Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52.

[9] See cases cited *supra*.

Butte etc. Co. v. Vaughn, 11 Colo. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Richardson v. Kier, 37 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612.

waters of a stream flowing in one watershed may be conducted to a stream flowing in another and rediverted for the irrigation of lands in that locality.[10]

§ 800. Mingled waters—Must be no injury to other vested rights—Extent of right to recapture.—Where waters are purposely turned into a stream, with the intent to recapture them at a point lower down, there is one fundamental rule which must be observed, and that is that the rights of others to the use of the waters naturally flowing in the stream must not be interfered with or impaired. The quantity of water to which they are entitled is fixed by their respective priorities and the extent of their appropriations.[1] And, although the rule is that, where it is possible, an appropriator has the right to use the channel of a stream as a part of his ditch system, it must be done with reference to the vested rights of others, who have appropriated the waters of the stream.[2] In the recapture of the water he is entitled only to such a quantity as he can clearly show that he may recapture without the impairment of the rights of others. As was said in an early California case by Mr. Justice Field, rendering the opinion: "The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity."[3] Where, however, it is clearly

10 For change of water from one watershed to another, see Sec. 866.

See, also, Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

1 For quantity of water an appropriator is entitled to, see Secs. 877-887.

2 For the use of a stream as part of ditch, see Secs. 719, 720.

For the right to mingle waters in the ditches and canals of others, see Sec. 683.

3 Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552.

See, also, Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S. 1065, where it was held that persons who use a stream, the waters of which have been appropriated, as a conduit for other waters can take out only what they put in, after making allowance for natural waste and evaporation and for cutting off or drying up any original tributaries of the stream.

See, also, Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 587; Evans v. Prosser etc. Co., 62 Wash. 178, 113 Pac. Rep. 271; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Farmers' Union etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Mentone etc. Co. v. Redlands

shown that the water turned into the stream by artificial means actually increases the flow of water therein over and above the natural flow of the stream, the one turning the water into the stream is entitled to be protected from interference in the enjoyment of it, provided that his appropriation of it is valid in other respects.[4] As was said in a California case, the right to the artificial increment is quite distinct from the title to the natural flow, and the owner thereof may reclaim it from the channel."[5] The same principle is applied to the rights of riparian owners in those States which have both the common law of riparian rights and the doctrine of appropriation. The riparian owner is under no circumstances entitled to have more water flow down to his lands than the natural flow of the stream. If he receives this his rights are satisfied. Hence, it follows that water may be added to the flow of the stream and an equal quantity taken out before it reaches the land of the riparian owner as long as the natural flow of the stream is not impaired in quantity or quality.[6]

The burden of proof, where waters are thus mingled with the natural waters of a stream which have been fully appropriated, is upon the party mingling the waters, to show that he does not take out more water than he is entitled to after allowing for seepage and evaporation. He must show clearly to what portion he is entitled. He can only claim and redivert such a portion of the water as is established by decisive proof that he has a prior right to the use of by reason of his turning it into the stream.[7] The en-

etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Ripley v. Park, 40 Colo. 129, 90 Pac. Rep. 75.

[4] Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045.

[5] Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 69; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Paige etc. Co. v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875, where it is held that the right to such waters was held by an entirely different claim than that to the natural flow of the stream.

See, also, Hoffman v. Stone, 7 Cal. 46; Parks Canal Co. v. Hoyt, 57 Cal. 44.

[6] Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Elliott v. Fitchburg Railway Co., 10 Cush. 191, 57 Am. Dec. 85; Fox etc. Co. v. Kelly, 70 Wis. 298, 35 N. W. Rep. 744.

[7] Where one turns water developed from his land into a natural stream, and takes it out lower down the stream, the burden is on him to show that he does not take out more than he is entitled to after allowing for seepage and evaporation. Herriman Irr.

forcement of his right must leave the opposite party in the full use of the quantity to which he was originally entitled, and a party conducting water in this manner to a point lower down the stream can not there recapture more water than he turns into the stream above; and, after allowance for seepage and evaporation, not as much.

§ 801. **Right to flow of water to point of prior appropriator's use.**—Although, as we have seen in previous sections, the appropriator has no property in the *corpus* or very body of the water while it is still flowing in the natural stream above the head of his ditch or canal,[1] yet, by virtue of his prior appropriation, he acquires a most important legal and equitable property right in and to such water and the right to have the same flow down, either to his point of diversion, as it flowed at the time of the inception of his appropriation, or, at least, in lieu thereof, to have the full amount of water and of the same quality to which he is entitled, delivered to him by some artificial means at a point above his place of use. In regard to the latter method, owing to the multiplication of uses to which the same water can be put without interfering with the rights of others, and in order that the greatest good shall accrue to the greatest number, we can see no legal objection, so long as the rights of the prior appropriator are in no way infringed upon to his material injury, and he receives the full amount of water that his appropriation calls for and at a point where he can use it to the same advantage as though it was left flowing in the natural stream to the intake of his ditch. In the matter of the right to have the water flow in the natural stream to his point of diversion, and in cases where the question of artificial delivery was not involved, it has been repeatedly held that the right of the prior appropriator to have the water continue to flow in its usual manner

Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Herriman etc. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Burnett v. Whitesides, 15 Cal. 35; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Hoffman v. Stone, 7 Cal. 46; Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Ellis v. Tone, 58 Cal. 289; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888.

[1] See Sec. 772.

through its natural channel to the full extent of his appropriation down to the head of his ditch, without diversion or interruption by others claiming subsequent to him, is an incorporeal hereditament appurtenant to the ditch and co-extensive with the appropriator's right to the ditch itself.[2] Of course this is upon the assumption that the appropriation through the ditch is a valid one, as a ditch might exist for which no water could be legally claimed. But the prior appropriator of the waters of a certain stream has the right to insist that the water continue to flow as it did when he first made the appropriation, as far as the interference by other subsequent appropriators is concerned. "The appropriator took the water with the right to have the stream flow as it was wont to flow" is the language of the law under the Arid Region Doctrine of appropriation,[3] which is as strict a rule as that of the common law of riparian rights, *aqua currit et debet currere ut currere solebat.*[4] He has also the right to insist on this flow and that no change be made in it by later comers to his material injury.[5] And in this connection

2 Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939, citing Kinney on Irr., 1st Ed., Sec. 247.

See, also, Lower Kings River etc. Co. v. Kings River etc. Co., 60 Cal. 408; Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628, where the right was held to be "appurtenant to the water course." Conant v. Deep Creek Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721; Smith v. Deniff, 23 Mont. 65, 57 Pac. Rep. 557, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Wyatt v. Larimer & W. Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

Upon the question of a water right being an appurtenance, see Secs. 1005-1018.

Parks etc. Co. v. Hoyt, 57 Cal. 44; Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Natoma W. Co. v. McCoy, 23 Cal. 290, 4 Morr. Min. Rep. 590; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Mokelumne Hill Co. v. Woodbury, 10 Cal. 185; Pilot Rock Cr. Co. v. Chapman, 11 Cal. 162; Bear R. etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526.

3 Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703.

4 Wiel on Water Rights, 1908, Sec. 62.

For the common law of riparian rights, see Secs. 450-551.

5 Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059.

See, also, Cole v. Richards Irr. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814, both citing Kinney on Irr., 1st Ed., Sec. 249;

the authorities also hold that a mere temporary irregularity in the flow of the water of the stream, such as does not cause actual injury to the prior appropriator, will not be actionable.[6] The gist of the question is, Are the rights of the prior appropriator injured to any material extent? If not, then other seeming irregularities are allowed by the law. For instance, the water need not be delivered to him in the channel of the natural stream, but may be delivered in his ditch or canal above the place of his use, and the prior appropriator can not complain if his rights are not injured and he receives his full quantity of water at that point.[7] But, upon the other hand, if a positive and material injury is caused, by the actions of subsequent appropriators, an action will lie, not only to

Coffin v. Left Hand D. Co., 6 Colo. 443; Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Cushman v. Highland D. Co., 3 Colo. App. 437, 33 Pac. Rep. 344; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Junkins v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684.

[6] See injuries and remedies therefor, Chaps. 81-83; Ball v. Kehl, 87 Cal. 505, 25 Pac. Rep. 679.

[7] Salt Lake City v. Salt Lake etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1062, 61 L. R. A. 648, where the Court held that the water might be delivered in the ditch of the prior appropriator above his place of use.

See, also, Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483.

Where one is entitled to use a given amount of water at a given point, he may not complain of any prior use made of the water not impairing the quantity or quality to which he is entitled, and he may not claim any excess of water over the amount to which he is entitled, however it may be produced. Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881.

"The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream, or by artificial means." Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Pomona W. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Fuller v. Sharp, 33 Utah 431, 94 Pac. Rep. 817; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Harrington v. Demarris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Miller v. Bay City Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

"So long as they were being conveniently supplied with the water to which they were entitled, they had no right to demand that it should come from one or another source of supply." Smith v. Cucamonga Water Co., 160 Cal. 611, 117 Pac. Rep. 764.

recover damages, but also to enjoin the future commission of the wrong. The first appropriator of the waters of a stream has the right to insist that the water shall be subject to his use and enjoyment to the full extent of his original appropriation.[8] It is well settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus acquired carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained, and any interference with the stream by a party either having no interest therein, or an interest subsequent in time to the right of the prior appropriator, that materially deteriorates the water previously appropriated in quantity or quality, to the injury of the rights of those entitled to its use, is unlawful and actionable.

An appropriator of the waters of a stream can not claim the waters which are turned into the same by artificial means by others with the intent to recapture them or an equivalent amount below. He has no rights in such artificial flow, but in the recapture of the same his own rights must not be infringed upon.[9]

§ 802. **Right to natural flow of stream where it sinks below the surface before reaching prior appropriator's ditch.**—It is a matter of common knowledge that, in the arid region, in many of the streams the water flowing on the surface, at times, sinks from sight and flows slowly through the rocks, gravel, and sand which form the bed of the stream. In some cases the surface flow, during the dry season, disappears entirely for considerable distance, but it usually reappears lower down and again flows on the surface. This process may be repeated several times during the course of the entire stream. Where these physical conditions are present, it will be presumed at law, until the contrary is proven, that water once flowing on the surface in a natural channel of a stream, and there disappearing in the sands of the bed by percolation and seepage, finds its way down the stream and augments the surface flow in the

[8] For priority of right, see Secs. 776-785.

[9] For recapture, see Secs. 799, 800. For the use of a stream as a part of a ditch system, see Secs. 718-720, 832.

For developed water, see Secs. 1204, 1206.

stream below.[1] It is not our intention to discuss here the rights in the "underground" or "subsurface" flow of streams as such,[2] except so far as those waters relate to the surface flow of the streams by reappearing again on the surface. The question here, then, is what right, if any, has a party to appropriate the waters of such a stream while they are flowing on the surface, upon the assumption that they will be lost anyway, unless so appropriated, by sinking in the ground before they reach the point of diversion of a prior appropriator below, who is short in his water supply under a legal claim? This can not be done, unless the party attempting to make the appropriation can show that if the water continued to run in its natural course it would not have reached the intake of the prior appropriator's ditch in any event, but would have been wasted; and the burden of proof is on the party diverting such water to establish by legal evidence that it would not have augmented the flow of the stream below had it not have been diverted by him.[3] As was said in a Colorado case: "Where a senior seeks to enjoin a junior appropriator of water from diverting the same to the injury of the former, and the junior appropriator seeks to avoid the same upon the ground that if the use which he threatens to make of it is restrained the owner of the senior right will derive no benefit, such a defense ought to be established by clear and satisfactory evidence. The infringement of a prior by the owner of a junior right constitutes a legal injury, and, before the junior can justify his acts of interference with the prior right upon the ground stated, a strong showing should be made."[4] Where there was evidence in an action to enjoin a diversion of water from a stream from which plaintiffs irrigated their lands, which showed that there were long stretches of sandy bottom between the defendants' pro-

1 Platte Val. Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Howcroft v. Union etc. Co., 25 Utah 311, 71 Pac. Rep. 487, both citing Kinney on Irr., 1st Ed., Sec. 44.

2 See subterranean waters, Secs. 1148-1211.

See, also, for the definitions of waters, Secs. 292-323.

3 Platte Val. Irr. Co. v. Buckers, *supra;* Howcroft v. Union etc. Co., *supra.*

4 Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

See, also, Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; Bruening v. Dorr, 23 Colo. 195, 47 Pac. Rep. 290, 35 L. R. A. 640; Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875.

posed works and the lands of the plaintiffs, and that the water flowing over the rocky bed above sinks into the sand which must become saturated before there can be a flow over its surface, and to so fill this sand, required, as was testified, several weeks; it was held that "the Court was justified in drawing from this testimony the inference that an interruption to the flow of this water would prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to plaintiffs' lands. Such postponement would be a clear injury to the plaintiffs, whose interest in the waters of the stream included the right to have the river bed continue to hold sufficient water to supply and support the surface stream in its natural state."[5] This, as can be readily seen, is oftentimes hard to prove, for the reason that, owing to the porous beds of these streams, it requires water to saturate them before any of it will flow upon the surface below. As water always flows downward, whether it is on the surface of the stream or through the bed under the surface, secondary appropriations should never be allowed upon this ground unless the evidence is clear and convincing that the water would never have reached the prior appropriators so that they might have the use of the same. As was said by the Circuit Court of the District of Montana: "That water would not reach one lower down on the stream is quite a common defense. It is often urged in irrigation suits by trespassers for their invasion of the rights of others. It is probably as old as irrigation and perhaps as

5 Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424, citing Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

See, also, McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Cohen v. La Canada Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584; Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

See, also, Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Howcroft v. Union etc. Co., 25 Utah 311, 71 Pac. Rep. 487; West Point etc. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 24 Pac. Rep. 1102, 23 Pac. Rep. 875; Raymond v. Wimsette, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; Booth v. Trager, 44 Colo. 409, 99 Pac. Rep. 60; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 336; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; *Id.*, 151 Cal. 587, 91 Pac. Rep. 395; Fuller v. Sharp, 33 Utah 431, 94 Pac. Rep. 817; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053.

trespass itself."[6] There are, however, some cases which hold to the effect that, before an appropriator can be enjoined for the diversion of these waters by an appropriator further down the stream, it must satisfactorily appear that had the water been allowed to pass down the stream it would have reached the land of the prior appropriator.[7] Upon principle, the ruling in these cases is wrong, as the water diverted is the water of the stream whether it flows over the bed or through the bed. Then, again, due to recent scientific investigations, the later authorities relative to subterranean water hold that if percolating waters form a source of supply to a stream the waters of which have been appropriated, any attempt to divert these underground waters by subsequent appropriators will be enjoined.[8] Why there should be any distinction in respect to percolating waters which gradually find their way through the soil and through the banks of the stream to the stream itself, and waters which are already within the banks of the stream and flowing part of the time upon the surface and a part of the time through the bed, we are unable to see.

§ 803. **Right to flow of water to point of subsequent appropriator's use.**—The right of those who are subsequent in time to the first appropriator in the order of their respective priorities to have the water flow down the natural stream to their point of diversion, or at least to a point above their place of use, as against those whose rights are still subsequent to them, is the same as discussed in the previous sections relative to the right of the prior appropriator in this respect.[1] In other words, a second appro-

6 Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703.

7 West Point etc. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053; Raymond v. Wimsette, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; Beaverhead C. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880.

It will be noticed that there is a conflict of authority upon this point between the Supreme Court of Montana in the last two cases cited, and the Federal Court for Montana as decided in Morris v. Bean, *supra*.

8 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, for subterranean waters, Secs. 1148-1211.

1 See Secs. 779-782.

priator is entitled to protection against the acts of a third which will deprive him of the enjoyment of his rights.[2]

And, upon the other hand, a subsequent appropriator has a vested right, as against those prior in time to him, to insist upon the continuance of the conditions that existed at the time he made the appropriation; and if a change in these conditions is made by the prior appropriator, which interferes with the flow of the water to the material injury of his rights, he may justly complain.[3] As was said in a Colorado decision:[4] "When a subsequent appropriator makes his diversion, he acts under the belief that the water appropriated by his senior will continue to be used as it was at the time of the making of the appropriation of the junior. So, a subsequent appropriator has a vested right as against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation."[5] This question usually arises when there is an attempt upon the part of the prior appropriator to make some change, such as changing his point of diversion, which interferes with the rights of the subsequent appropriator to his injury.[6] It has also arisen many times where the prior appropriator has attempted to increase the amount of water for his own use after the rights of the subsequent have vested. The first appropriator can not increase his appropriation where this would materially injure the rights of the subsequent appropriator.[7]

2 Platte Val. etc. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Water Supply etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386.

See, also, Sec. 782.

3 Handy D. Co. v. Louden etc. Co., 27 Colo. 515, 62 Pac. Rep. 847, citing Kinney on Irr., 1st Ed., Secs. 175, 231, 248.

See, also, Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

4 Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265.

5 See, also, Handy Ditch Co. v. Louden Canal Co., 27 Colo. 515, 62 Pac. Rep. 847.

6 For changes which may be made, see Secs. 856-873.

7 See Secs. 784, 785; Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 Pac. Rep. 892; Munroe v. Ivie, 2 Utah 535; Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153; Procter v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

CHAPTER 43.

APPROPRIATION, AS AGAINST CONGRESSIONAL GRANTS.

§ 804. Scope of chapter.
§ 805. Review of subject.
§ 806. Rights of prior grantees of Government to waters flowing over land.
§ 807. Priority gives the better right as between appropriators and grantees —In general.
§ 808. Rights of prior appropriators as against rights of grantees.
§ 809. Grants to States as affecting water rights.

§ 804. Scope of chapter.—We have discussed in a previous chapter how, by special Acts of Congress, vast tracts of the public domain have been granted for various purposes.[1] In this chapter we will discuss the extent of rights acquired by appropriators of the waters flowing over these lands so granted as against the rights of railway and other companies, and to the States, as grantees of the Government, leaving the question as to the rights as between appropriators and private grantees of the Government to the chapter following.[2]

§ 805. Review of subject.—A land grant, as has been seen in a previous portion of this work,[1] is the term used for a grant by Congress, either by special or general legislation, of a portion of the public domain of the United States. The term "public land grants" is usually used to indicate those larger tracts granted, and generally for the purpose of internal improvements. The grantee is, of course, the party receiving the land, and it may be a person, a corporation, or a State. The Government, as the source of all title both to the lands and waters of the public domain, has the unlimited right to dispose of its lands and the waters flowing thereon as it sees fit.[2] It had the power to dispose of the lands and waters together, or it might have disposed of the soil only and reserved the waters; or, again, it might have disposed of the waters and reserved the lands. But, as we have seen in previous sections,[3]

1 See Chap. 20, Secs. 408-449.
2 See Secs. 810-823.
1 See Secs. 409-449.
2 See Sec. 409.
3 See Sec. 411.

it chose to enact specific laws relative to the disposal of its lands, while as to the waters flowing over those very lands, it enacted no laws as to their disposition, but they were left to the jurisdiction and control of the respective States and Territories where they happened to flow. These States and Territories, as we have seen, adopted different rules as to the control and disposition of the waters, or rather the use of these waters. Some States and Territories abrogated entirely the common law of riparian rights, while others followed that rule of law alone. Other States, and we may say all of the States and Territories of the arid and semi-arid West, have adopted the later law upon the subject known as the Arid Region Doctrine of appropriation.[4] And in some of these Western States we find a dual system of laws governing waters within their respective jurisdictions, that of the doctrine of appropriation and the common law of riparian rights.[5] The Government as the original owner of the public domain was also at that time the sole riparian owner in the streams and other sources of supply.[6] But the Government instead of enforcing this right, first, by its acquiescence and afterward by direct recognition, permitted the right to the use of the waters flowing over its lands to be acquired by appropriation; and, when the Government eventually disposed of these lands, in many cases, the title to the waters flowing over them, or to the use thereof which, to all practical purposes is the same thing, had passed to others. When water first began to be appropriated from the natural streams and other sources of supply flowing over the public lands in the arid and semi-arid regions of the West, the Government, as the proprietor of the lands over which the waters flowed, might have put a stop to all such appropriations, and thereby forever have put an end to the doctrine of appropriation. But the policy of the Government was different, due partially to ignorance upon the part of the members of Congress as to the values of both the land and water in this Western country and partially to the desire to have this part of the country settled up at any cost. The country at that time was considered nothing but a vast desert, covered only as far as vegetation was concerned with

[4] For history and cause of its adoption, see Secs. 595-626.

[5] For those States having both systems, see Secs. 507, 621.

[6] For the United States as riparian owner, see Sec. 480.

sagebrush, greasewood, and mesquite, and inhabited only by savages and wild animals. The streams were comparatively small, and washed but a very limited portion of the country, and what water did flow in them flowed uninterruptedly, and was lost in the ocean or sank out of sight in the sands. Land in this part of the country was considered absolutely worthless, and, without the application of water was indeed so. The Government could not give it away. No one would take it as a gift and much less settle on it for a home for himself and family. Gold was discovered in California, and afterwards agriculturists settled in these arid regions. But the mining claims and farms could not be worked without water, and so it was diverted from the natural streams and conducted, in many cases, at a vast expenditure of money, to other lands than those bordering upon the streams and there applied to these useful purposes. It was not too late then to interfere, and the Government might have denied this right to the miners and treated it as non-existing, as it could also have denied the right to those who appropriated the water for the purpose of agriculture after the gold excitement had died out. But, what would have been the result? The country would have remained in its primitive condition, except, perhaps, small strips of land bordering upon some of the streams. The mines would have remained unworked. The railroads would have remained unbuilt. And the Government, through its selfishness, would still be the owner of nearly all of its public domain, intact and uninhabited. In looking back over the history of this Western country, we, living here in these later times, can say that the policy of the Government relative to the subject of the use and control of its waters, whether the same resulted from the ignorance of the majority of the members of Congress, guided by a few wise members from this part of the country, or from whatever cause, although not as wise as it might have been, in the light of subsequent events, was the best under the then existing conditions, and its results have been most beneficent. Transcontinental railroads have been built with their numerous branches and feeders. Settlers have followed in their wake. Vast tracts of land have been brought under cultivation, cities and towns have been built, and a general prosperity has sprung up on what was termed by Mr. Webster, in speaking of the Western territory which we had acquired from Mexico, "that region of savages and wild beasts, of deserts, of shifting sands, and whirling wind, of dust, of cactus, and prairie dogs."

§ 806. Rights of prior grantees of Government to waters flowing over land.—The United States, as the proprietor of the public lands, and waters flowing over them, originally had the same rights and property in the streams and other sources of water supply as is possessed by any other riparian proprietor.[1] In those States only, which adhere to the common law of riparian rights, when the Government has granted tracts of its public lands to corporations, or individuals,[2] the question has often arisen, as to what rights, if any, did the grantees acquire to the waters flowing in the natural streams over those lands? The only answer to this question is that the grantees of the Government acquired the same rights which the Government had, that is to say, the rights of a riparian proprietor, unless there was an express limitation in the grant itself, or by appropriation rights in and to these waters had vested in others prior to the taking effect of the grant. In those States which have only the doctrine of appropriation and have abolished the common law of riparian rights,[3] no question arises as to the rights to waters by mere grantees of the Government for the reason that the acquisition of a tract of land is in nowise an appropriation of waters, but waters have to be appropriated by other methods.[4]

So, confining our discussion to the larger grants of land to railroad and other corporations, and leaving the subject of the rights of settlers as against the rights acquired by appropriation to the next chapter,[5] we will say that, in the common law States mentioned above in the absence of actual vested rights in the waters by appropriation, or limitations in the grant itself, the grantee of the Government receives not only the title in fee to the soil, but also, as incidents thereto, the benefit of all the natural streams which flow through it.[6] The grantee then becomes a riparian owner and can insist that the stream continue to flow as it was wont, without

1 For riparian rights, see Secs. 450-551.

For United States as a riparian proprietor, see Sec. 480.

2 For riparian rights of settlers as against appropriators, see Secs. 810-823.

3 See Secs. 507, 621.

4 For methods of appropriation, see Secs. 607-732.

5 See Secs. 810-823.

6 Union etc. Co. v. Ferris, 2 Sawyer 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Los Angeles v. Baldwin, 53 Cal. 469; Pope v. Kinman, 54 Cal. 3; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128.

any material alteration in quality or quantity, and that he have such other rights in and to the waters of the same as are allowed at common law in England and the Eastern States, or, at least, as are allowed by that law as modified to meet Western conditions.[7] So, where there was no prior appropriation of the waters flowing over a tract of land granted to a railway company, the company takes the fee to the land without any limitation or burden as regards the waters which naturally flow over the same.[8] And in this case the company became the riparian owner of all the lands bordering upon the natural stream flowing through them, and all subsequent rights to the waters flowing therein must be acquired from such riparian proprietor, either by grant, prescription, license, or by some other method according to the laws of the State where such waters flow.[9]

§ 807. **Priority gives the better right as between appropriators and grantees—In general.**—As between the right of a railroad company as the grantee of the Government and the rights of an appropriator of the waters of a stream flowing through the lands granted, in those States which adhere to the common law of riparian rights, the same rule applies as in the case as to the rights between appropriators; that is, priority in time gives the better right.[1]

[7] For the modification of the common law of riparian rights, see Secs. 509-512.

[8] When a railroad company has by grant from Congress a right of way over the public lands, a person subsequently acquiring any part of such right of way takes it subject to the prior right of the railway company. Bybee v. Oregon etc. R. Co., 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641; affirming 26 Fed. Rep. 586; Doran v. Wilson & Central Pac. R. Co., 24 Cal. 245.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[9] For the right to divert water acquired by prescription as against a railway company, see Wood v. Etiwanda etc. Co., 122 Cal. 152, 54 Pac. Rep. 726; Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200.

See, also, for prescription, Secs. 1033-1058.

[1] Broder v. Natoma etc. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621, where it was held that if the right of appropriation was preexisting, although imperfect, the above rule applied.

See, also, for cases holding that the appropriator had the better right, San Jose etc. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; affirming 129 Cal. 673, 62 Pac. Rep. 269; Childs v. Sharai, 8 Idaho 378, 69 Pac. Rep. 111; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

The same rule also applies in those States which have abrogated the common law of riparian rights. This was the principal question before the Court in the two appeals taken to the Supreme Court of the United States from the Supreme Court of Utah, in the case of the Telluride Power Transmission Co. v. Rio Grande W. R. Co.[2] After discussing the statute of 1866,[3] Mr. Justice Brown, in the opinion on the first appeal said: "But the difficulty in this case is that, before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws, and decisions." And the Court further held that these were local and not Federal questions. The same language was reiterated by Mr. Justice McKenna in rendering the opinion on the second appeal of the same case.

It may be regarded as a settled question of law that, if the grant to a railroad company took effect before the inception of any right of appropriation, in the common law States, the railroad takes the rights to the water flowing in the streams included within the area of the grant as a riparian owner and a successor to the Government, and the grantees of the company also take the same rights. But, upon the other hand, if appropriations had been made of the waters before the grant to the company took effect, then in that case the company took the land subject to all vested rights to the water and rights of way then existing. The same rule may also be said to be in force in those States which have abrogated the common law of riparian rights. The one who is first in time in the inception of an appropriation of the water has the superior right. But a railroad grantee in these States can not claim any rights as a riparian owner. However, upon the question of rights of way for ditches and canals over granted railway lands, a similar principle is applied.

For cases holding that the railway company had the better right, see Bybee v. Ore. Central Pac. R. Co., 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641; affirming 26 Fed. Rep. 586; Doran v. Wilson & Central Pac. R. Co., 24 Cal. 245.

2 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245, dismissing 16 Utah 125, 51 Pac. Rep. 146; *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178, dismissing 23 Utah 22, 63 Pac. Rep. 995.

3 For Act of Congress of July 26, 1866, and construction thereof, see Secs. 611-618.

§ 808. Rights of prior appropriators as against rights of grantees.—As between persons who claim the waters of the natural streams and other sources of water supply by appropriations of the same while they were flowing upon what was then the public domain of the United States and the subsequent grantee of the Government of a tract of land through or adjoining which the waters ran, the appropriator, first in time, has the exclusive right to the use of the water to the extent of his appropriation, and the grantee takes the land subject to all such valid appropriations. And, in construing the grant to the Pacific railroad companies, this principle is eminently applicable.[1] This principle is based upon the general policy of the Government as embodied in the Acts of Congress to protect the rights of all those, who by its license or forbear-

[1] Broder v. Natoma etc. W. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621, where it was held that Congress, in making donation grants to railroad companies, can not be supposed to have exercised its liberality at the expense of pre-existing rights which, though imperfect, were still meritorious and had just claims to legislative protection; and, in construing the grant to the Pacific railroad companies, this principle is eminently applicable. Telluride etc. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; dismissing 16 Utah 125, 51 Pac. Rep. 146; *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; dismissing 23 Utah 22, 63 Pac. Rep. 995.

One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by the Act of Congress of July 26, 1866, subsequent purchasers of land from the Southern Pac. R. Co., whose only claim to such land rests upon the right of purchase of March 3, 1887 (24 Stat. L. 556, Chap. 376, U. S. Comp. Stat. 1901, p. 1595), Sec. 5, to *bona fide* purchasers from railway companies to forfeited lands. San Jose etc. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; affirming 129 Cal. 673, 62 Pac. Rep. 269.

See, also, Childs v. Sharai, 8 Idaho 378, 69 Pac. Rep. 111.

In an action for damages for wrongfully interfering with the plaintiff's irrigation ditch by a railroad company, in which the plaintiff showed possession of the land and defendant claimed no title, and where plaintiff could show by parol evidence priority of possession and right to use the water and the ownership of the ditch and land, it was held that the bare possession was sufficient to maintain the action as against the defendant. Chicago etc. R. Co. v. McPhilamey, —— Wyo. ——, 118 Pac. Rep. 682.

Secs. 2339, 2340, Rev. Stat. 1878, are a recognition of the legality of water rights given by local customs and laws, and the lands granted to the Pacific railroads continued subject to the rights and easements given by such customs and laws, including rights of way for irrigation ditches. Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

ance appropriated water upon the public domain before the lands were granted to others. The general policy of the Government has been, instead of pursuing the selfish policy mentioned in a previous section,[2] of a more generous nature and many inducements have been offered to those who in good faith have settled upon and improved any portion of the public domain. In the first place, as we have seen,[3] the Government remained passive and permitted water to be appropriated from its natural channels upon the public domain, and by costly artificial works to be conducted for perhaps miles over mountains and ravines, to be used for mining operations, irrigation, and other useful purposes. So fully did the Government recognize these rights of the appropriators, and tacitly encourage them, that it has been held by the Supreme Court of the United States that, even without any Act of Congress, the appropriators had secured rights to the use of the water, which "the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866."[4] However, the Government did not rest there; but, on the contrary, instead of trying to repudiate these claims, Congress formally acknowledged the rights acquired in waters, whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, had vested and accrued, by the Act of July 26, 1866. This Act made the National ownership of the public domain, over or adjoining which streams of water flowed, subject to the rights of the appropriators of such streams. Thus, wherever the water was appropriated, or there was the inception of *bona fide* rights to appropriate, the public domain was burdened to that extent, and the same burden would, under the law of real property, accompany the title if afterwards the lands were transferred to a railroad company or other corporation, or to a private individual.[5] And, so, whoever succeeded to the title of the United

2 See Secs. 432-435.

3 For history of doctrine of appropriation, see Secs. 595-626.

4 Broder v. Natoma etc. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

5 For appropriation as against rights of settlers, see Secs. 810-823.

For Act of 1866, and construction thereof, see Secs. 611-618.

States through any mode of acquisition whatsoever, took only what the United States had to give at the time of the grant taking effect. And, therefore, if the waters of the natural streams flowing through the lands granted had been appropriated, the company would take the land subject to the same servitude, which before existed in favor of the prior appropriator. But this is not all. There being some doubt as to the rights of the parties even after the Act of 1866 was passed, Congress amended that Act by the Act of 1870, which still more strengthened the positions of the appropriators of waters flowing over lands prior to the time the grants to the same took effect.[6] By this Act, "all patents granted" were made subject to any vested and accrued water rights. And all Congressional grants to railroad companies and others since that time have been made with a clause reserving all vested rights of appropriators of the waters flowing through the lands granted. But, whether a reservation clause of this nature is embodied in the grant itself or not, it has become the settled law that, where the right of appropriation has once vested a subsequent grantee of the Government takes the land subject to this right, even in cases where the claims at the time of the grant taking effect were still in an imperfect condition, but *bona fide* and meritorious.[7]

In a recent Wyoming case,[8] it was held that rights acquired while the land was unoccupied public land of the United States were vested rights within the provisions of sections 2339 and 2340, as against one who is not in a position to dispute such water right and deraigns title by grant from the Government thereafter. And the Court said: "There are numerous decisions to the effect that if an appropriator is first in time with reference to possession and use as compared with the date an entry is made, the rights of the entryman are junior and inferior."[9]

[6] For Act of 1877, as amended by Act of March 3, 1891, and construction thereof, see Sec. 622.

[7] Broder v. Natoma etc. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621.

See, also, Wolcott v. Des Moines R. Co., 72 U. S. 5 Wall. 681, 18 L. Ed. 689; Williams v. Baker, 84 U. S. 17 Wall. 144, 21 L. Ed. 561; Leavenworth etc. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634.

[8] Chicago etc. R. Co. v. McPhillamey, —— Wyo. ——, 118 Pac. Rep. 682.

[9] Citing Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621; Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649;

It was said by the Federal Court:[10] "When land included in a railway grant reverts to the Government a subsequent patentee under the homestead laws takes the title subject to the right of way for a ditch or canal over it which was acquired prior to his entry, and it is immaterial whether the appropriation was made prior or subsequent to the time the Government was reinvested with title."[11]

§ 809. **Grants to States as affecting water rights.**—As we have seen in a previous portion of this work, the Government has granted tracts of land to the different States for various purposes.[1] In general the waters flowing through these granted lands are subject to the laws of the respective States, as are the other waters within their jurisdiction. If the State law permits the acquisition of water rights by appropriation only, that law prevails. If, upon the other hand, the State laws permit the dual system of water rights, either the rule of appropriation or the common law of riparian rights may prevail, depending upon the right which was prior in time.[2] In California and the most of the other States, by statute, the law of appropriation is made to apply to the waters flowing over State lands,[3] and a prior appropriator acquires a good title to the water, to the extent of his appropriation, as against a subsequent purchaser from the State of lands lying upon the stream below the point of diversion, in those jurisdictions which have both laws.[4] Upon the other hand, riparian rights

Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Maffet v. Quine, 93 Fed. Rep. 347; *Id.*, 95 Fed. Rep. 199; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; South Yuba Water & Min. Co. v. Rosa, 80 Cal. 333, 22 Pac. Rep. 222; Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 121, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

10 Maffet v. Quine, 93 Fed. Rep. 347.

11 See, also, Le Quine v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S. 76; San Jose Land & Water Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. Rep. 269; Southern Pacific etc. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 873, 19 L. R. A. 92.

1 See Sec. 430.

2 For appropriations as against riparian rights, see Secs. 810-823.

3 For laws of the various States, see Part XIV.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

4 Wood v. Etiwanda etc. Co., 122 Cal. 152, 54 Pac. Rep. 726; Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130, where it is said that it is immaterial whether

may attach to State lands, and descend to the grantees of the State where the common law is in force.[5]

In a case arising in Montana, where Congress granted to the State one section of land of a former military reservation, to be selected "so as to embrace the buildings and improvements thereon," it was held that the grant did not include any right to the use of the water of a stream from which the Government had taken water by means of a ditch across other lands to the land granted to the State, but that it was the intent of the Government, when it abandoned the reservation, that the water should continue to flow in its natural channel, and be subject to appropriation by any one who should take and use it for beneficial purposes.[6]

the title to such lands passed to the State, or whether the United States held the title in trust for the State, or for the use and benefit of the general Government, for in either case the rights of the original appropriators and their successors in interest are protected.

For the State as a riparian proprietor, see Sec. 481.

[5] "Our conclusion upon this branch of the case is that Sec. 1422 saves and protects the riparian rights of all those who, under the land laws of the State, shall have acquired from the State the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the code." Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

The riparian rights of a grantee of the State are not affected by the claim of an appropriator of water, made after such selection, though made before his grant. Ison v. Nelson M. Co. (Ore.), 47 Fed. Rep. 199.

NOTE. The above ruling is not in accordance with the general rule.

[6] Story v. Woolverton, 31 Mont. 346, 78 Pac. Rep. 589.

CHAPTER 44.

APPROPRIATION AS AGAINST RIPARIAN RIGHTS.

§ 810. Scope of chapter.
§ 811. The two doctrines of water rights may exist in the same State.
§ 812. Priority also gives the better right as between appropriators and riparian owners.
§ 813. Appropriations made prior to riparian rights gave the better right, even before statute.
§ 814. Appropriations made prior to riparian rights give the better title after statute.
§ 815. Riparian rights vested prior to appropriations give the better title.
§ 816. Vested riparian rights in those States which afterward abrogated the common law rule.
§ 817. Appropriations and riparian rights—Effect of Desert Land Act of 1877.
§ 818. Mixed rights on the same stream—Some inconsistencies.
§ 819. Mixed rights—Appropriations prior to vesting of riparian rights.
§ 820. Mixed rights—Appropriations subsequent to vested riparian rights—Rule in California.
§ 821. Mixed rights—Appropriations subsequent to vested riparian rights—Rule in other States.
§ 822. Mixed rights—Appropriations subsequent to vested riparian rights—Effect of Kansas-Colorado case.
§ 823. Mixed rights on the same stream—Our conclusions.

§ 810. Scope of chapter.—In previous portions of this work, we have discussed the rights which riparian proprietors have under the common law rules of riparian rights in and to the streams or other sources of supply, which flow through or adjoin their lands, and also the uses which they may make of the water flowing therein, as permitted under that law.[1] In a separate chapter we also discussed the subject of irrigation as a riparian right under the common law as in force in England and the Eastern States, and also as that law was modified to meet the conditions in the Western States.[2] We have also mentioned several times that in some States in the semi-arid and arid West there are dual systems of laws governing waters, including both the common law of riparian rights and the Arid Region Doctrine of

1 For common law theories of riparian rights, see Secs. 450-551.

2 For irrigation as a riparian right, see Chap. 26, Secs. 489-525.

appropriation for beneficial uses.[3] In the present chapter we will discuss the rights acquired by appropriation, as against the riparian rights of settlers or other private owners, and the reverse of the proposition, where these rights clash or are continually "jostling" each other, as it were, yet still existing side by side.[4]

§ 811. The two doctrines of water rights may exist in the same State.—The rules of these two systems being based upon entirely different fundamental principles of law—under the common law, that the water must continue to flow in the channels of the streams as it was wont to flow by Nature, without any material diminution in quantity or alteration in quality, and the law of appropriation that, in order to acquire a right to the water, it must be diverted from the natural channels of the streams and applied to some beneficial use—it necessarily follows that the rights of persons claiming under these different systems, where they are both in force in the same jurisdiction, are constantly clashing.[1] In some States, as we have seen, owing to the view that the common law of riparian rights was entirely inapplicable to the physical conditions of an arid country,[2] they have done away with this confusion by entirely abolishing the common law of riparian rights.[3] In other States, usually in the more humid regions,[4] it is held that the two doctrines of water rights—one the right of a riparian proprietor, and the other the right of appropriation and application to a beneficial use by a non-riparian owner—may exist in the same State at the same time; and, the fact that they do actually so exist concurrently is sufficient argument upon our part that they may exist.[5] As was said in a Nebraska case: "The two

3 For list of States having both systems, see Secs. 507, 621.

4 Mill's Irr. Manual, 1907, p. 28.

1 For the common law of riparian rights, see Secs. 450-551.

For the Arid Region Doctrine of appropriation, see Secs. 585-594.

2 See Secs. 588-593.

3 For the list of States abolishing the common law of riparian rights, see Secs. 507, 621.

4 For list of States having both systems, see Secs. 507, 621.

5 "The two doctrines are not necessarily so in conflict with each other as that one must give way when the other comes into existence. . . . The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other." Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep.

doctrines stand side by side."[6] The riparian owner acquires title to his riparian rights to the water when he takes the first step to appropriate the land to which the stream is incident,[7] and, when

674; California P. & A. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741; Ison v. Nelson M. Co. (Ore.), 47 Fed. Rep. 199; Howell v. Johnson, 89 Fed. Rep. 556; Cruse v. McCauly, 96 Fed. Rep. 369; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350; affirming *Id.*, 6 Dak. 71, 50 N. W. Rep. 486; Crandal v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308, 598; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Oregon Iron Co. v. Trullenger, 3 Ore. 1; Taylor v. Welch, 6 Ore. 198; Weiss v. Oregon etc. Co., 13 Ore. 496, 11 Pac. Rep. 255; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 1 L. R. A., N. S., 756, 82 Pac. Rep. 14; Crook v. Hewitt, 4 Wash. 749, 31 Pac. Rep. 28; Rigney v. Tacoma etc. Co. 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Sander v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280; City of New Whatcom v. Fairhaven etc. Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Missouri P. R. Co. v. Keys, 55 Kan. 205, 40 Pac. Rep. 275, 49 Am. St. Rep. 249; Parker v. City of Atchison, 58 Kan. 29, 48 Pac. Rep. 631; Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62.

The doctrine of prior appropriation may exist in the same State with the common law of riparian rights. Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

See, also, Clark v. Cambridge etc. Co., 45 Neb. 798, 64 N. W. Rep. 239; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Dunn v. Thomas, 69 Neb. 683, 96 N. W. Rep. 142; McCook etc. Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996; *Id.*, 70 Neb. 115, 102 N. W. Rep. 249; Haass v. Chussard, 17 Tex. 588; Baker v. Brown, 55 Tex. 377; Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 746; Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Bigelow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570.

[6] Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

[7] For the inception of title to land, see Sec. 756.

For the doctrine of relation, see Secs. 742-756.

the right has once vested it can not be devested except by some established rule of law, such as by grant,[8] adverse user, and prescription,[9] or by eminent domain under condemnation proceedings, and then only for a public use and upon the payment of just compensation.[10] The appropriator acquires his title to the use of the water by the appropriation thereof in some lawful manner and the application of the water to some beneficial use or purpose, the right to which he can not be deprived of except in some of the modes prescribed by law.[11]

§ 812. Priority also gives the better right as between appropriators and riparian owners.—In California and in other Western States, which have both the doctrine of appropriation and the common law of riparian rights governing the waters within their jurisdictions,[1] we find that it is now the settled rule of law that the priority of the inception of the respective claims gives the better, and often the exclusive right to the use of the waters flowing in the natural streams or other sources of water supply over the riparian lands through which or adjoining which the waters in question flow.[2] Or, in other words, if the appropriator is first in time in the institution of his claim, and, before the inception of the claim of the settler or other owner of the riparian land, then the appropriator can take the waters of the stream to the full extent of his appropriation, regardless of the subsequent settlement of the land on the stream. However, if, upon the other hand, the inception of the claim of the riparian owner is first, he can successfully claim all of his riparian rights to the use of the waters flowing in the stream, to, perhaps, the prohibition of the acquisition of any claim to the use of the waters of the stream by appropriation. As will be seen, this rule is no new departure, but is the general rule governing the rights to waters throughout the arid and semi-arid West, that he who is first in time has

8 Grant of riparian rights, see Secs. 526-535.

9 Prescription as against riparian rights, see Secs. 1038-1040.

10 For eminent domain, see Secs. 1059-1098.

11 For the loss of the right of appropriation, see Secs. 1099-1128.

1 For States having both rules, see Secs. 507, 621.

2 For inception of a right by appropriation, see Secs. 708-712.

For the inception of right in the settlement of land, see Secs. 445, 815.

the superior right to the use of the waters.[3] Or, as was said in a Nebraska case: "The time when either right accrues must determine the superiority of title as between conflicting claimants."[4]

§ 813. Appropriations made prior to riparian rights gave the better right even before statute.—Prior to the 26th day of July, 1866, there was no legislation by Congress which tended in any way to limit the rights of the patentee of the Government, or to recognize the rights acquired by the appropriator of water of the streams upon the public domain and no authority for the same except the local customs and laws of the respective States and Territories where the appropriation was sought to be made. Therefore the laws governing all controversies between those who claim the waters of a stream upon the public domain by the mere appropriation of the same for some useful purpose, and those who claim the waters of the same stream as riparian owners by virtue of a patent from the Government to the lands adjoining the stream, have been divided by the authorities into two periods—those laws in force governing the transfer of lands by the Government prior to the Act of Congress of July 26, 1866, and those in force relative to

[3] For priority as between appropriators, see Secs. 775-803.

For priority as between appropriators and Congressional grantees, see Secs. 804-809.

[4] Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Nevada D. Co. v. Bennett, 30 Ore. 59, 54 Pac. Rep. 472, 60 Am. St. Rep. 777; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675.

Both the right to occupy Government land and the right to appropriate water flowing thereon were derived from the implied consent of the Government, and the first possessor had the better right. Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

the same subject subsequent to that date. The latter period brings us down to the present time, and is the present law upon the subject, which we will discuss in the next section. In the first edition of this work we discussed at considerable length the rights as between appropriators and the grantees of the Government, where their rights to the land and the incidents thereto had vested prior to the passage of the Act of 1866. Since that time the law on the subject has not only become settled, but it has also become obsolete, for the reason that all conflicting claims arising prior to the Act of 1866 have long since either been adjudicated or have been settled. Hence, no extended discussion is necessary in this edition.

As to the title to the lands which had gone to patent before there was any Act of Congress limiting the effect of the grant, the early authorities were somewhat divided, even in the arid portion of the country, as to whether the patentee took the title to the land, with all the riparian rights to the waters flowing through or adjoining the same, even if there were prior appropriations, or whether the land was taken subject to the rights of the prior appropriators. This conflict seems to have originated in the State of Nevada, which is in the very heart of the arid region. And in that State it was first held by the State and Federal courts, that the rights of an appropriator, even if prior in time, were subordinate to those of subsequent patentees of the Government in cases where the patent was issued prior to the Act of 1866.[1] Later, however, the ruling of the State court in this respect was expressly overruled by the same court, upon the ground that the common law of riparian rights was inapplicable to the wants and necessities of the people in an arid region,[2] whether engaged in mining,

1 Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201.

An appropriator can acquire no right as against the United States or its subsequent grantee unless there was a reservation in the grant itself, and the Act of 1866 did not affect the right of persons whose patents had been issued prior to its passage. Union M. & M. Co. v. Ferris (Nev.), 2 Sawyer 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90.

See, also, Union M. & M. Co. v. Dangberg (Nev.), 2 Sawyer 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

2 For the cause of the abrogation of the common law of riparian rights, see Secs. 585-594.

agriculture, or other pursuits, and that the Act of Congress of July 26, 1866, merely confirmed to prior appropriators the rights and privileges they had formerly enjoyed by local customs and the decisions of the courts, even as against persons who had, prior to its passage, obtained patents to the lands through which or adjoining which the waters flowed.[3] And afterward, in the State of Nevada, the common law doctrine of riparian rights was entirely abolished in that State.[4] So, the law may be regarded as settled, at least by the great weight of decision, that the rights of an appropriator will be protected, where he was prior in time to the inception of the title of a riparian proprietor as a grantee of the Government, even though the statute establishing the right of appropriation was not passed until after the rights of the grantee had become perfected.[5]

[3] Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Redwater etc. Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702; Redwater etc. Co. v. Jones, —— S. D. ——, 130 N. W. Rep. 85; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12.

[4] Reno etc. Co. v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364.

See, also, Sec. 591.

[5] In the case of Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788, the decision in the case of Vansickle v. Haines, 7 Nev. 249, holding that the rights by appropriation could not be acquired as against the riparian rights of a grantee of the Government, who obtained his patent prior to the Act of 1866, was expressly overruled. Mr. Chief Justice Hawley, whose decisions have been universally regarded as sound, in rendering the opinion of the court upon the point in question said:

"We are of the opinion that the ninth section of the Act of Congress confirmed to the owners of water rights on the public lands of the United States *the same rights* which they held under the local customs, laws and decisions of the Courts prior to its enactment; that the Act of Congress did not introduce, and was not intended to introduce, any new system, or to evince any new or different policy upon the part of the general Government; that it recognized, sanctioned, protected and confirmed the system *already established* by the customs, laws, and decisions of Courts, and *provided for its continuance.*"

See, also, Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Shoemaker v. Hatch, 13 Nev. 261; Hobert v. Wicks, 15 Nev. 418, 2 Morr. Min. Rep. 1; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12.

In Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. 685, the Court, after quoting the ninth section of the Act of Congress of 1866, said: "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law

The acquiescence and consent, prior to any Act of Congress relative to the use of the waters flowing over the public domain, at first amounted only to a license on the part of the Government, which license might have been revoked at any time, but which, instead, was actually ratified and confirmed by the ninth section of the Act of July 26, 1866. And, after this Act, the right of appropriation had the effect of a grant, where it was prior in time to the rights of riparian proprietors, and related back to the

with respect to the use of water which has grown up among the occupants of the public land under the peculiar necessities of their condition."

In Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. 504, the Court, referring to the same section, said: "The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously solely rested upon the local customs, laws, and decisions of the Courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the Act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States."

In Broder v. Natoma etc. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621, the same Court, after again referring to the Act, said: "But we do not think that defendants are under the necessity of relying on that statute. We are of the opinion that it is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who have constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866.

See, also, Ross, J., in Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Coffin v. Left Hand D. Co., 4 Colo. 443.

A grant of Government lands is subject to a prior appropriation of waters made according to the customary law of the locality, although the Act of Congress on the subject had not then been passed. Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772.

See, also, San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Hayden v. Long, 8 Ore. 244; Hindman v. Risor, 21 Ore. 112, 27 Pac. Rep. 13; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Parkersville v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 208, 89 Pac. Rep. 289; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

inception of the right. This Act simply put in statutory language what the Government had before allowed, and gave the prior owners of water rights upon the public lands of the United States the continuation of the same rights which they had held before the passage of the Act under the local customs, laws, and decisions of the courts. Upon the other hand, in those States which still enforce the common law of riparian rights, where the inception of the title of the riparian owner was prior in time to the inception of the right by appropriation, the riparian rights are upheld. From the authorities cited it can be determined that the doctrine of appropriation has existed in the West from the dates of the earliest appropriations of water as a valid right, even as against the riparian rights of those who obtained a patent to their lands adjoining the streams prior to the Act of July 26, 1866, where the waters had been appropriated before the inception of the patentee's title. And, that as between these rights the same rule applies that is applicable in other cases—he who was first in time has the superior right.

§ 814. Appropriations made prior to riparian rights give the better title after statute.—As we have seen in a previous portion of this work, the inception of a right to appropriate water is the posting of the notice of appropriation,[1] or the actual commencement of the work,[2] or, in some cases, where the statute of the State has not complied with, the actual application of the water to some beneficial use or purpose.[3] We have also seen that the inception of the right of a settler or other owner of riparian land is either the settlement upon the land or the first act necessary in the proceedings to acquire title, and hence it follows that any riparian rights which he may acquire date from this first act.[4] Bearing in mind the dates of the inception of

1 For notice, see Secs. 710-716.

2 For the inception by commencing work, see Secs. 716-718.

3 For appropriation by application, see Sec. 730.

4 For the inception of title to lands, see Sec. 445.

For the doctrine of relation as applied to settlers' rights, see Secs. 755, 756.

The doctrine that the rights of a patentee or grantee of the Government relate back to the first act of the settler in the proceedings to acquire title is also announced in the following cases: Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, citing Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Larsen v. Oregon etc. Nav. Co.,

title under these two rights, it is the settled rule of law in those Western States which have not abolished the common law of riparian rights and have both systems of laws governing waters[5] that, where the inception of a valid appropriation of the waters of a certain stream flowing over the public lands is prior in time to the inception of a right of a settler, or other riparian owner, to the land through or adjoining which the stream flows, the appropriator has the paramount and superior right to the use of the waters of the stream to the full amount and extent of his appropriation, as against the riparian rights of the owner of the land.[6] And, in this connection, we will also state that the same rule applies to the rights of the appropriator in and to his right of way for his ditches, canals, or other works, which are constructed, or are about to be constructed, over the lands subsequently acquired by the riparian owner, for the purpose of making his appropriation available. And hence it follows that the subsequent rights in and to the land acquired by the riparian owner are subject to both the right of the appropriator to the use of the water of the stream, and also to the right of way for his ditch, canal, and other works; and that, too, regardless as to how or for what purpose the land is acquired, whether it be for agricultural purposes, acquired under the general laws of Congress appertaining to those lands,[7] whether it be for mining purposes, acquired under the Acts of Congress relating to the obtaining of title to mineral lands, or for any other purpose, or under any other laws providing for the acquisition of title to the public lands by either private individuals or by companies.[8] It has been the universal holding of the courts, especially

19 Ore. 240, 23 Pac. Rep. 974; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836; Union etc. Co. v. Dangberg, 2 Sawyer 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384.

See, also, for doctrine of relation, Secs. 742-756.

[5] For list of States having both systems, see Secs. 507, 621.

For list of States which have abolished riparian rights, see Secs. 507, 621.

[6] For the rights of prior appropriators as against Congressional grantees, see Chap. 43, Secs. 804-809.

[7] For the acquisition of title to agricultural land, see Secs. 432-441.

For rights of way, see Secs. 927-993.

[8] The right to the use of water when acquired by appropriation is, in its nature, a property right, and becomes a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently. Crawford Co. v. Hathaway (Hall), 67

where rights to water were acquired by appropriation after the passage of the Act of 1866, as the same was amended by the Act

Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

"From the foundation of the State, waters pertaining to the public lands of both the Federal and State Governments have been appropriated and used for mining, agriculture, and other useful purposes. . . . It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States, as well as the State, was bound to take notice." Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

"Thus under the laws of Congress and the Territory (Dakota) and under the applicable custom, priority of possession gave priority of right." Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

Any rights acquired by a discovery of mineral on a mining claim subsequent to the construction of a ditch across the claim by a third person are subject to the easement of the ditch, and to the owner's rights as prior appropriator. Tuolumne Consol. M. Co. v. Maier, 134 Cal. 583, 66 Pac. Rep. 863, 21 Morr. Min. Rep. 678.

See, also, Broder v. Natoma M. Co., 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621.

"Upon well-settled principles, the plaintiff's earlier rights of appropriation are superior to Pogue's (defendant's) later rights either as an appropriator or as a riparian landowner." Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362, citing Osgood v. Eldorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; San Jose etc. Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. Rep. 269; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665; Telluride etc. Co. v. Rio Grande etc. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; Union etc. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Morris v. Bean (Mont.), 146 Fed. Rep. 435; *Id.*, Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Cruse v. McCauley, 96 Fed. Rep. 369; San Jose etc. Co. v. San Jose R. Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; affirming *Id.*, 129 Cal. 673, 62 Pac. Rep. 269.

All public lands are open to occupation and settlement by citizens of the United States, and the law is settled that the water flowing from springs on public lands may be diverted to other lands and there used for irrigation or other necessary purposes, and the right to the same acquired, as against any one who subsequently obtains title to the land on which the springs are situated. Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405.

See, also, De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563; *Id.*, 22

of 1870,[9] that they were valid, and must be protected as against one who subsequently obtained title to the land from the Government.[10]

Pac. Rep. 198; Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587.

See, also, for appropriation from springs, Sec. 648.

[9] For Acts of 1866 and 1870, see Secs. 611-618.

[10] See cases cited above.

Osgood v. Eldorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Farley v. Spring Val. etc. Co., 58 Cal. 142; Himes v. Johnson, 61 Cal. 259; Judkins v. Elliott, 70 Cal. 116, 12 Pac. Rep. 116; Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Patterson v. Mills, —— Cal. ——, 68 Pac. Rep. 1034; Lytle Creek etc. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426; *Id.*, 2 Pac. Rep. 732; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; South Yuba W. Co. v. Rosa, 80 Cal. 333, 22 Pac. Rep. 222; DeWolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Shoemaker v. Hatch, 13 Nev. 261; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788.

Riparian rights were entirely abolished later in Nevada. Reno etc. Co. v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364.

See, also, Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Ramelli v. Irish, 96 Cal. 214, 31 Pac. Rep. 41; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Land v. Johnston, 156 Cal. 449, 104 Pac. Rep. 449; Tuolumne Water Co. v. Maier, 134 Cal. 583, 66 Pac. Rep. 863, 21 Morr. Min. Rep. 678; Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 121, 101 Pac. Rep. 825, 104 Pac. Rep. 281; Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Parkersville etc. Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Kaler v. Campbell, 13 Ore. 596, 11 Pac. Rep. 301; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Tolman v. Casey, 15 Ore. 83, 13 Pac. Rep. 669; Speake v. Hamilton, 21 Ore. 3, 26 Pac. Rep. 855; Dodge v. Marden, 7 Ore. 456, 1 Morr. Min. Rep. 63; Britt v. Reed, 42 Ore. 76, 70 Pac. Rep. 1029; Nevada W. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Scott v. Toomey, 8 S. D. 639, 67 N. W. Rep. 838; Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Driskill v. Rebbe, 22 S. D. 242, 117 N. W. Rep. 135; Thorpe v. Tenem D. Co., 1 Wash. 566, 20 Pac. Rep. 588; Geddis v. Parish, 1 Wash. 587, 21 Pac. Rep. 314; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

The same rule as above applies in the more arid States which have abrogated the common law, and it is universally held that one who takes possession of unoccupied public land does so subject to existing conditions as to the appropriation of water and rights of way for ditches and canals thereover.[11] In the patents issued by the Government there are now clauses to the effect that the land is taken subject to all vested rights to the appropriations of water and rights of way for ditches and canals. Although where the patent did not reserve any right to the water or to the ditch, the rights of a prior appropriator and his successors in interest are protected. This is the rule, whether the patentee receives his patent from the Government [12] or from a State.[13]

§ 815. **Riparian rights vested prior to appropriations give the better title.**—In those States which enforce both the Arid Region Doctrine of appropriation and the common law of riparian rights,[1] in all controversies between the rights acquired under these respective laws, the time when either right accrues must determine the superiority of title as between the conflicting claimants.[2] Hence it follows that, where the inception of title of a riparian owner to the lands, through or adjoining which a stream or other source of water supply flows, is prior in time to the inception of a claim by appropriation of the waters of the stream, the appropriator can not acquire any right, by appropriation merely,[3] to the injury of the rights of the riparian owner. In

11 Miller v. Douglas, 7 Ariz. 41, 60 Pac. Rep. 722; Hill v. Leormand, 2 Ariz. 354, 16 Pac. Rep. 266; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Le Quine v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039; Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Coffin v. Left Hand Ditch Co., 6 Colo. 443; Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312; Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867.

12 For appropriations made prior to riparian rights, and before statute, see Sec. 813.

13 Parkersville etc. Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772.

See, also, cases cited, *supra*.

1 For list of States having both laws, see Secs. 507, 621.

2 See previous Secs. 812-814.

3 For rights by adverse use and prescription as against a riparian appropriator, see Secs. 1039, 1040.

For right by eminent domain, see Secs. 1059-1098.

this case, following the general rule, the riparian owner being first in time has the superior right. As was said by the Supreme Court of the United States in deciding this question, "No subsequent attempt to take the water only can override the prior appropriation of both land and water."[4] This rule originated at an early day in California in the cases of Irwin v. Phillips,[5] and Crandall v. Woods,[6] and the ruling in these cases was affirmed in what may be considered the leading case in that State upon this subject—the often cited, greatly criticised, and much misunderstood case of Lux v. Haggin.[7] And, since the decision in the latter case, the law may be regarded as settled in that State that both the law of appropriation and the common law of riparian rights may exist together in that State, at least; and, as against each other, the right which was instituted first in time under one system is superior and paramount to a claim instituted subsequently under the other system in and to the use of the waters of the same stream.[8] But this rule is not a peculiar characteristic of the laws of California. Other States, upon the Pacific Coast or in the Middle West, have adopted the same rule. In fact, it is now the

4 Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

As to the extent of the right of the riparian owner, see discussion under subject of mixed rights on the same stream, Secs. 818-823.

5 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178.

6 8 Cal. 136, 1 Morr. Min. Rep. 604.

7 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

8 That the two may exist in same State, see Secs. 507, 621.

See, also, McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384, where the Court, after referring to the rule as laid down by the Supreme Court of the United States, in the case of Sturr v. Beck, *supra*, said: "The views of that Court, as those of the tribunal of last resort, in cases of this impression, of course, must prevail." Also, citing Kinney on Irr., 1st Ed., Secs. 212-220.

See, also, Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308, 598; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Rice v. Meiners, 136 Cal. 292, 68 Pac. Rep. 817; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Bliss v. Kaweah etc. Co., 65 Cal. 502, 4 Pac. Rep. 507; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811.

universal rule of all of the Western States which have the dual systems of laws governing water rights.[9]

It was held, in a South Dakota case,[10] that riparian owners who located on claims in 1876, and were residing thereon on February 28, 1877, when the lands were opened to public settlement, and continued to reside thereon until after patents were issued to them, had a claim to the water rights prior to the water rights located in 1878 by another, the patents relating back to the date of the settlement, so that a provision in the patents that they were subject to vested and accrued water rights did not apply.

This rule applies to all riparian lands, whether they be the

[9] For list of States having both systems, see Secs. 507, 621.

See, also, Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647, where it is held that the common law of riparian rights is underlying and fundamental, and takes precedence of appropriations of water if prior in time. Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

"The right to appropriate water for mining and agricultural purposes from water courses on the public domain is sanctioned by Acts of Congress, and recognized by all the Courts; but, when the Government ceases to be sole proprietor, the right of the riparian owner attaches, and can not be subsequently invaded in those States where the common law doctrine of riparian rights prevails." Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032.

See, also, Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Sander v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280.

Title by relation gives the first settler upon the public land the priority of possession of the water flowing through the same, though he may never appropriate the water to a beneficial use. Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

See, also, Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Larsen v. Oregon etc. Co., 19 Ore. 240, 23 Pac. Rep. 974; Johnson v. Bridal Veil L. Co., 24 Ore. 182, 33 Pac. Rep. 528.

Settlers on the public land, by asserting their right to water for irrigation by reason of their priority of appropriation, thereby waive their riparian rights. Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

See, also, Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Scott v. Toomey, 8 S. D. 639, 67 N. W. Rep. 838; Thorp v. Freed, 1 Mont. 651; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; U. S. etc. Co. v. Gallagos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577.

[10] Redwater Land & Canal Co. v. Jones, 26 S. D. 466, 130 N. W. Rep. 85.

lands of settlers who acquire their lands under some of the land laws of the United States,[11] the claims of miners,[12] or the lands held by a railroad company under a Congressional grant.[13]

The riparian rights of settlers will attach to the surplus water flowing in a stream over and above prior appropriations, and such riparian rights to the surplus water can be successfully claimed over the claims of appropriators attempting to appropriate the water from the same stream.[14]

In all States, whether they recognize the common law of riparian rights or not, all prior grants of land are protected against the invasion of subsequent parties attempting to acquire rights of way thereover, unless such rights of way shall be acquired in some lawful manner by contract, prescription, or by eminent domain.[15]

§ 816. **Vested riparian rights in those States which afterward abrogated the common law rule.**—Many of the States and Territories of the West, upon the theory that the common law rule was inapplicable to their conditions, by constitutional provisions, statute, or by court decisions, entirely abrogated riparian rights, as they had the power to do, and in lieu thereof adopted the Arid Region Doctrine of appropriation.[1] The adoption of the new rule could not and did not have the effect of abolishing riparian rights which had already accrued and vested, but only prevented the acquisition of such rights in the future. The substitution of the law of appropriation, instead of the common law rule of

11 For the methods of the acquisition of lands by settlers, see Secs. 432-445.

12 Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Lehigh v. Independent D. Co., 8 Cal. 323, 12 Morr. Min. Rep. 97.

13 For rights under Congressional grants, see Secs. 427, 428, 805-809.

14 For discussion under mixed rights on the same stream, see Sec. 823.

15 For rights of way over private land, see Secs. 972-993.

1 For list of States abolishing riparian rights, see Secs. 507, 621.

For right to abolish, see Secs. 586-594.

For cause of abolishing, see Secs. 588, 593.

"While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

See, also, Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665.

riparian ownership, is applicable only to those waters in the State which are unappropriated; or, in other words, which have not become the property of riparian proprietors.[2] Hence it follows that even in those States which have abolished riparian rights there may be old rights of this nature which the new rule can not affect. As between these early rights and rights claimed by appropriation the same rule of priority applies, that the one which was first in time has the superior right.

§ 817. Appropriations and riparian rights—Effect of Desert Land Act of 1877.—Section 1 of the Desert Land Act of March 3, 1877,[1] among other things, provided: "And all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." It is viewed by some authorities that this provision abolished even "the so-called modified doctrine of riparian rights,"[2] as to all lands through which non-navigable streams flow, the title to which has been acquired from the Government of the United States since the passage of that Act, even in those Western States which had theretofore adhered to this common law rule as one of their dual systems of laws governing the use of the waters flowing within their respective boundaries; and, that thereafter all waters flowing within the boundaries even of these States were subject to the law of appropriation only.[3] We do not believe that this is the correct construction to give to the

2 Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

1 6 Fed. Stat. Ann., 1905, p. 392; 2 U. S. Comp. Stat., 1901, p. 1548; 19 Stat. L. 377.

For Act and construction thereof, see Sec. 622.

2 For modified doctrine, see Secs. 508-512.

3 "It is a serious question whether the Desert Land Act does not abolish the so-called modified doctrine of riparian rights, which gives to riparian proprietors the right to use water for irrigation as to all lands through which non-navigable streams flow, the title to which has been acquired since the passage of the Act. . . . And it is at least a debatable question whether, by the language quoted, Congress did not intend to recognize and assent to the appropriation of such waters in contravention to the common law doctrine of riparian rights as to persons subsequently acquiring title from the United States." Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200.

provisions quoted in the Act of 1877. The trouble seems to be in confusing the rights of the United States as the proprietor and as sovereign. To be sure, the United States was primarily the owner and proprietor of both the public lands and the waters flowing over them. The Government is still the owner and proprietor of all the surplus waters flowing over its lands, to which vested rights have not attached. But the United States has not the sovereign control over waters which flow within the boundaries of a certain State, except so far as it has reserved the waters of the natural streams for the general use of the public for navigation,[4] and for its own uses as a riparian owner or otherwise upon the Government reservations and lands used by the Government itself for some purpose.[5] We do not believe that Congress has the power to abolish the law of riparian rights either in the Western or Eastern States, where a State by its laws has declared that, governing the subject of waters, the common law shall be followed. The sovereignty, jurisdiction, and control over all waters flowing within the boundaries of a State are left, with the exceptions above mentioned, to the laws of that State upon its admission to the Union. That State may adopt the common law as it is strictly construed in England and in the Eastern

Citing U. S. v. Rio Grande Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770.

"We are of the opinion that all lands settled upon after the date of the latter Act (that of 1877) were accepted with the implied understanding that the first to appropriate and use the water for the purposes specified in the Act should have the superior right thereto." Hough v. Porter, 51 Ore. 318, 372, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

In the recent case decided by the Supreme Court of the United States of Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; *Id.*, 11 Ariz. 128, 89 Pac. Rep. 504, while not deciding the question under discussion, said: "The opinion that we have expressed makes it unnecessary to decide whether lands in the arid region, patented after the Act of March 3, 1877, Chap. 107, 19 Stat. L. 377, 2 U. S. Comp. Stat., 1901, p. 1548, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that Act, construed with the Rev. Stat., Sec. 2339, U. S. Comp. Stat., 1901, p. 1437." And referring to the above decision in the Hough v. Porter case, the Court said: "The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds."

[4] For the right of protection of navigation, see Secs. 341-357.

[5] For the United States as a riparian owner, see Sec. 480.

For Governmental use upon Indian reservations, see Sec. 668.

States of this country; it may adopt the modified form of that law, as has been done to meet the peculiar conditions in the Western States; or, upon the other hand, it may entirely abolish the common law upon the subject of waters and adopt in lieu thereof the Arid Region Doctrine of appropriation only; or again, it may adopt both the common law and the doctrine of appropriation. But, as far as Congress is concerned, it can not force any particular law governing waters upon any State. As was said by Mr. Justice Brewer in the case of Kansas v. Colorado,[6] "It may determine for itself whether the common law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation, shall control. Congress can not enforce either rule upon any State." Hence it must follow that the Desert Land Act of 1877 did not, nor could it, abolish the common law of riparian rights in a State where that law had been adopted as at least one of the rules of law governing waters within its boundaries. The only effect that that Act had, or could have had, in regard to the subject under consideration, was to emphasize the right already granted under the Act of 1866 and as amended in 1870, to the effect that the surplus waters of the natural streams, or other sources of water supply, flowing over the public lands might be taken under the doctrine of appropriation, as far as the rights of the Government as the owner thereof were concerned, for irrigation or other beneficial purposes.[7]

There was no intent upon the part of Congress to change, nor could it change by the Act in question, the rule that any State has the right to govern the waters within its boundaries. As the owner of the surplus water flowing over the public domain, however, the effect of this clause in the Desert Land Act was merely for the Government to emphasize the fact that the waters flowing over its public lands were subject to further appropriation; and

[6] 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, upon this subject, Secs. 593.

[7] "If any consent of the General Government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in the several enactments of Congress, beginning with the Act of July 26, 1866, and including the Desert Land Act of March 3, 1877." Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

in doing this the Government, also as the riparian proprietor of these waters, waived its right to the undiminished flow of the natural streams, in order that these appropriations might be effected.[8] But as far as changing the rule in any State, from that of the common law of riparian rights to that of the Arid Region Doctrine of appropriation, Congress did not and could not, for the reason that this right has been entirely left to the various States themselves.[9]

§ 818. **Mixed rights on the same stream—Some inconsistencies.**—In those States which have both the Arid Region Doctrine of appropriation and the common law of riparian rights,[1] the continual clashing between these two rights is nowhere so apparent as where there are mixed rights on the same stream or other source of supply. This may seem a paradoxical statement to those who are unfamiliar with the conditions in this Western country and the laws in force here governing the use of the waters in the natural streams. For, under the strict construction of the common law, as it is enforced in England and in the Eastern States, a riparian proprietor is entitled to the full flow of the stream by his land as it was wont to flow by Nature. In other words, he is entitled to the natural flow of the stream undiminished in quantity and undeteriorated in quality, and, when his riparian rights have once attached, subsequently there could be no appropriation of the waters of the stream which would diminish the quantity naturally flowing therein. But, as we have seen in a previous portion of this work, the common law of riparian rights itself has been greatly changed and modified in this Western country to meet the conditions here.[2] In all of the Western States adhering to the common law the water may be diverted from its natural channels and used for irrigation and other purposes by the riparian owners, which uses were either not allowed at all or were very reluctantly granted under the strict enforcement of that law.[3]

8 For the modern Western rule, as to the undiminished flow of streams, see Sec. 549.

9 See Sec. 593.

1 For list of States, see Secs. 507, 621.

2 For the modification of riparian rights, see Secs. 509-513.

3 For irrigation as a riparian right, see Secs. 498-525.

And, there is no use of denying the fact, in this Western country the rights allowed under either law are very much the same, and depend largely upon the same rule, and that is the application of the water to some beneficial use or purpose. Or, to state the rule in more definite language, that right of the appropriator depends upon his actual use of the water to some beneficial purpose, and the right of the riparian owner depends either upon what he actually uses, or upon what he *might* use for some such purpose. Therefore, water being an exceedingly scarce article in this part of the country, compared to the amount which might be used beneficially if there were plenty, the authorities hold that there must be no water wasted, or permitted to run to waste, which is the same thing. In many parts of the country the very life of the community depends upon the use of all of the water flowing in the streams. Therefore, the time has long since passed when a riparian owner in the common law States in the West, although prior in time to any attempted appropriations from the stream running by his land, is permitted by virtue of a small holding of land near the mouth of the stream, which flows more water than he can possibly use on his land, to successfully maintain that the surplus of the water over and above the amount which might be used by him, must continue to flow by his land, and, perhaps, be wasted in the sea, and that, too, regardless of the needs of appropriators higher up on the stream. And, strange as it may seem, it is to California to which we must look for the modification of this rule of riparian rights, as it is to California to which we must look for the history of the Arid Region Doctrine of appropriation.[4] And it is that State which first held so tenaciously to the doctrine that both the law of appropriation and that of riparian rights might exist together in the same jurisdiction in a sort of fraternal relationship, although when each is strictly enforced, on principle, they are as antagonistic as it is possible for two laws to be—the law of riparian rights holding to the rule that the water in a stream must continue to flow in the natural channel as it was wont to flow by Nature, and the law of appropriation that, in order to acquire a right to the use of the water, it must be diverted from the natural stream and applied to some beneficial use or purpose. In the following sections we will dis-

[4] For history of doctrine, see Secs. 595-626.

cuss the law, upon the subject of mixed rights upon the same stream, as it is today held by the courts.[5]

§ 819. **Mixed rights—Appropriations prior to vesting of riparian rights.**—Where there are appropriations of the waters of a stream before the vesting of any riparian rights, of course, the appropriators can successfully claim the full amount of water in the order of their priorities to the extent of their respective appropriations.[1] But where, after certain appropriations have been made, the riparian rights of settlers attach, and afterward there are other appropriations or attempted appropriations, the rights of the later appropriators must be made in some method known to law, as against the rights of the riparian owners. The riparian right of a settler will attach to the surplus of the water of the same stream from which there are prior appropriations. If, however, the prior appropriators do not use the whole of the stream, the riparian rights of the settler will attach to the unused surplus and will prevail over the rights claimed by the later appropriators.[2] As to what extent the riparian owners are entitled to the full flow of this surplus water, as against the subsequent appropriators, we will discuss in the subsequent sections of this chapter.[3]

§ 820. **Mixed rights—Appropriations subsequent to vested riparian rights—Rule in California.**—As we intimated in the previous section,[1] the tendency of the courts in their later decisions in the Western common law States is more and more toward the rule that the extent of a claim to the use of the waters of the natural streams, either under the common law as modified to suit the conditions of the country, or under the law of appropriation, depends largely upon the application of the water to some beneficial use or purpose; and, that the application of either law in this respect was very much the same.[2] This is especially true,

5 See Secs. 818-823.

1 For amount of water, see Secs. 866-877.

2 Peregoy v. McKissick, 79 Cal. 572, 21 Pac. Rep. 967; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028; Hutchinson v. Watson Slough D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

3 See Secs. 820-823.

1 See Secs. 509-513.

2 For the application of the water to some beneficial use under the doctrine of appropriation, see Secs. 725-729.

as we shall see in a subsequent portion of this work, where injunctive relief is sought by a riparian owner to prevent the appropriators above on the same stream from interfering with the natural flow of the stream by the land of the owner, or in actions for damages for diverting the water, and where he either does not use the water at all, or uses but a small quantity.[3] This we deem to be the correct rule and one tending to effect the utmost use of the water without waste.[4] In sections of the country where irrigation is greatly needed, and where large tracts of land are comparatively worthless unless the water is applied to the same, it is true that where there are mixed rights on the same stream it is difficult to lay down any definite rule as to the extent of riparian rights which will be applicable to, and cover, all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, that the natural flow of the stream be not interfered with, when the water is needed by appropriators above, simply because the riparian owner wishes to see the stream flow by or through his land undiminished in quantity. In other words, a riparian owner ought not to be permitted to successfully claim the "undiminished flow" of a stream as a riparian right, under the strict construction of the common law, and thereby prevent the actual use of the water of the stream by appropriators above, when the amount diverted by them would not be used by the former, and would cause no loss or injury to him or to his land, present or prospective, but would greatly benefit the parties diverting it. The leading case holding to this view, and the one most often cited, is that of Modoc Land etc. Co. v. Booth,[4a] and was decided by the California Supreme Court in 1894. Since that time this decision has been followed, not only by some of the later decisions by the California courts, but also by the courts of the other Western common law States, and the same principle announced.[5] And again, where the riparian owner has use for a

3 For injunctive relief, see Chap. 81.

For actions for damages by riparian owners, see Chap. 83.

4 For wasting water, see Secs. 911-916.

4a 102 Cal. 151, 36 Pac. Rep. 431.

5 In a later California case, the Court, in refusing an injunction, in an action brought by the plaintiff, said: "There is no evidence or finding that its lands are susceptible of cultivation, or can be made productive, or that plaintiff is or can be injured as to its riparian lands, though deprived of all the water flowing in

certain amount of the water of the stream, instead of strictly enforcing the common law rule of permitting all of the water to flow by his land, the California court in a recent case held that, to authorize an award to a riparian owner to take water from the stream for irrigation, the owner must plead his riparian rights, the amount of his irrigable lands, and the amount of water reasonably necessary for his use thereon.[6] Again, in a case decided in the Supreme Court of that State in 1908,[7] in which Mr. Justice McFarland rendered the opinion, who, by the way, dissented to the decision in the Modoc case,[8] a still more advanced step was taken, and it was held that the patentee of land situated on a stream, in a State where the common law of riparian ownership prevails to the full extent, would have the right to have the water of the stream flow down to his land without any material diminu-

the stream." Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

Riparian rights can only entitle the owner to a reasonable use of the water on his land. Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563.

See, also, Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935; *Id.*, 144 Cal. 578, 77 Pac. Rep. 1113; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Fifield v. Spring Val. Water Works, 130 Cal. 552, 62 Pac. Rep. 1054.

But see Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062, where it is held that a wrongful diversion of the waters of a stream will be restrained at the instance of a person having riparian rights in the stream, although no actual damages are averred or proved.

See, also, Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

[6] Wutchumna etc. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362.

"He (plaintiff) did not, however, allege that he was entitled as a riparian owner to any definite quantity of water for the irrigation of his riparian lands, nor did he allege any facts showing or tending to show what proportion of the waters of the stream he could reasonably exhaust for that purpose." Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889.

And, in a very recent case, where it was alleged that "many of said parties are owners of land through which said stream flows," it was held that the answer was uncertain in not alleging which of said defendants are owners of riparian land or the quantity of water required for any of their lands as such riparian owners. Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 341; *Id.*, 137 Cal. 432, 70 Pac. Rep. 288.

Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075.

[7] Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. Rep. 869.

[8] *Supra.*

tion in quantity; but such right would not accrue to a patentee of land in an arid region of a Western State where irrigation is necessary to successful agriculture. Again, in a case decided in 1909 by the same court,[9] it was asserted by the plaintiffs that under the common law rule the riparian proprietor had the right to the full flow of the stream in its natural course through his land.[10] But the Court, by Mr. Justice Shaw, said: "It is obvious, of course, that, if this *supposed* rule were strictly enforced against riparian owners, as well as appropriators, the waters of the streams in the State could not be used at all, but would flow to the sea, or until they disappeared in the sands and washes, without benefit to any one, except in the few instances where flood waters might escape and flow upon lands situated similarly to those of the plaintiffs. *The rule is evidently not suited to the conditions of a dry climate, such as we have in this State.*" Again, the California court, in a case decided in 1910,[11] held that even if at common law or under the civil law it was a part of the usufructuary right of the riparian proprietor to have the water flow by his lands for no purpose than to afford him pleasure in its prospect, such was not the present rule of decision in that State. And the Court further held that a lower riparian owner must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water.[12]

And these later decisions practically overruled all previous de-

9 Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

10 And the Court said: "The cases are numerous wherein the right of a riparian proprietor to have the stream flow to his land undiminished by any diversion made by an appropriator for use on non-riparian lands has been declared. Among them may be cited Lux v. Haggin, 69 Cal. 396, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Heilbron v. Last Chance etc. Co., 75 Cal. 117, 17 Pac. Rep. 65, and Heilbron v. Fowler etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183."

11 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

12 See, also, the Western theory as to the undiminished flow, in Sec. 549.

Right of riparian proprietors to injunction, Chap. 81.

Right of riparian proprietors to damages, Chap. 83.

See, also, Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

cisions of the California courts holding to the right of a riparian owner to the full flow of the waters of a stream through his lands, and especially those cited by the Court, as set forth in our note, and which include the case of Lux v. Haggin, so long relied upon and so many times cited to sustain the riparian right of a proprietor to this flow. From these cases it is very evident that it is the tendency of the California court to still further limit the right of the riparian proprietor to the flow of the water of natural streams by or through his lands to either the water which he actually uses, or to the amount which he might use for some beneficial purpose. And, as the country is fast becoming settled up and the demand for water is each year becoming greater and greater, we believe that the time is not far distant when the courts will hold that the riparian owner's right to have the water of a stream flow down to his land, as against appropriations above him from the same stream, will depend upon the amount which he actually applies to a beneficial use or purpose, upon the principle that his right to the water is simply usufructuary; and, if he does not use the water, it is an abandonment of this right, and others may take the water who will use it.[13] This ruling would then be uniform with the ruling as to the extent of the right of an appropriator of the waters, to the effect that he can only successfully claim such an amount of water as he actually applies to some beneficial use or purpose.[14]

§ 821. **Mixed rights — Appropriations subsequent to vested riparian rights—Rule in other States.**—From the previous section [1] we have shown that there is a radical change in the decisions of California of more recent date, as against the earlier decisions of that State upon the subject of the right of the riparian proprietor to the "undiminished flow" theory of the common law, or the right of the riparian owner to have a stream which flows through or adjoins his land, undiminished in quantity, as of right, simply by virtue of the fact of his riparian ownership, and regardless of his use of the water for some beneficial purpose. As will be seen,

13 See, also, irrigation as a riparian right, Secs. 498-525.

Injuries and remedies therefor, Chaps. 81-83.

For the holding upon this proposition in other States, see Sec. 549.

See, also, injunctions, Chap. 81.

14 For beneficial use, see Secs. 690-705.

1 See Sec. 820.

it is the later rule of the Supreme Court of that State to limit the right to the flow of a stream by riparian lands, as a riparian right, to the amount which the owner actually uses, or might use, for the irrigation of the irrigable tract of riparian land owned by him. But we do not have to depend entirely upon the California cases to sustain the rule to the effect that so long as the usufructuary estate of the riparian owner is in no way injured, the waters of the stream may be appropriated as against his prior location on the land. The riparian owner does not own the *corpus* or very body of the water. He has the right only to enjoy the advantage of a reasonable use of the water of the stream as it flows by his land. It is also well settled in all of the Western States that even a riparian owner himself has a right to use a reasonable amount of the water flowing by his land for the purpose of irrigating that land.[2] Hence, under this phase of the question, the rule of the common law right of "undiminished flow," as to the other riparian owners on the same stream, falls. The Nebraska Court has held to the effect that the mere fact that the riparian proprietor is deprived of the full flow of the stream adjacent to his land would furnish no basis for compensatory damages. At most the naked right to the full flow of the stream, and its loss by diminishing the volume of the water when appropriated for irrigation purposes, could result only in *damnum absque injuria*.[3] The Kansas Court followed the ruling of the Supreme Court of Nebraska in the Crawford case, and quoted largely from the opinion in that case.[4] The Oregon Court also

2 For irrigation as a riparian right, see Secs. 498-525.

3 "In order to entitle the riparian owner to compensation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right." Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Cline v. Stock, 71 Neb. 70, 102 N. W. Rep. 265, 98 N. W. Rep. 454.

4 Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971, and the Court added: "In other words, a diminution of the flow of water over riparian land, caused by its use for irrigation purposes by upper riparian proprietors, occasions no injury for which damages may be allowed, unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the landowner is able to enjoy."

lays down the same rule.[5] And the most recent exposition of what we deem to be the correct rule, as laid down by the Oregon Court, is in the recent case of Hough v. Porter, wherein Mr. Justice King, in an exceedingly well argued case, held that the rigid rules of the common law, as interpreted and sought to be applied by those insisting upon the "undiminished flow" theory, are inapplicable to the many new and intricate questions arising throughout the arid and semi-arid sections.[6] This is also the rule in South Dakota,[7] and in Washington, where it was held that a subsequent appropriator had the right to enjoin a prior riparian owner from interfering with the free flow of the creek, for the reason that it did not appear from defendant's answer that he was making any beneficial use of the water he was diverting.[8] The Federal Court for the State of Montana has also announced the same rule.[9]

As we view the question, the great weight of authority, as well as all of the reason and common sense, is with this side of the proposition. All of the water should be put to some actual use, and one riparian proprietor, on account of a small holding upon the bank of some stream should not be permitted to successfully contend that the water must continue to flow in the stream as it was wont to flow by Nature, regardless of the requirements of

5 "The plaintiffs, therefore, were not entitled to an injunction restraining the defendant from using the water of the stream for the purpose of irrigation, because such use was no injury to them." Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 54 L. R. A. 630, 87 Am. St. Rep. 634.

See, also, Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642.

6 Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728. For further reference to this case in this connection see Sec. 549.

7 See Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596, where the Court held that a subsequent appropriation was valid as against the rights of a riparian owner, after the Court had fixed by decree the amount of 100 inches of water as the amount necessary for his use on his riparian land.

But see the case of Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350. For the argument that this case was practically overruled as to the undiminished flow question, in the case of Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655, see Sec. 549.

8 Northport Brewing Co. v. Perrot, 22 Wash. 243, 60 Pac. Rep. 403.

9 Cruse v. McCauley, 96 Fed. Rep. 369; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703.

But see decision of the Federal Court for California in the case of California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741.

those above who are in need of the water. If riparian rights must be sustained, the very utmost that should be granted is that which was allowed by the South Dakota case,[10] where the amount of water necessary to irrigate the land of the riparian owner was set apart for his use and the surplus of the stream given to the appropriators. The riparian owner might then use the water set apart to him or not.

§ 822. **Mixed rights — Appropriations subsequent to vested riparian rights—Effect of Kansas-Colorado case.**—The greatest example illustrating this question of the extent of the right of a riparian proprietor in this Western country to the flow of the water of a stream, from which there were appropriations above, arose in the facts in the case of Kansas v. Colorado, an original action brought in the Supreme Court of the United States [1] by the State of Kansas, as a riparian owner, to enjoin the diversion by the State of Colorado and a great number of defendant corporations within that State of the waters of the Arkansas River, which river has its source in the Rocky Mountains in the central part of the State of Colorado, thence flowing through the eastern portion of that State, Southwestern Kansas, and into Oklahoma. It was the State of Kansas which invoked the action of the Court, alleging that, through the action of the defendants, a large portion of its territory was threatened with disaster, and the plaintiff prayed for injunctive relief. In other words, Kansas maintained the position that, as a riparian proprietor, it was entitled to the rule of the "undiminished flow" theory of the common law as the same is recognized and enforced under the strict construction thereof, and, that it was entitled to injunctive relief under the common law, as a matter of right, regardless of the rights or needs of the appropriators above, and that, too, without having shown that the plaintiff had been damaged to any considerable extent. The Court, through Mr. Justice Brewer, in summing up its conclusions upon the point in question, held: That the appropriation of the waters of the river by Colorado, for the purposes of irrigation, had dimin-

10 Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596.

1 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, in demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

ished the flow of the water into the State of Kansas; that the result of the appropriation had been the reclamation of large areas of land in Colorado, transforming thousands of acres into fertile fields, and rendering possible their occupation and cultivation, when otherwise they would have continued barren and unoccupied; that while the influence of such diminution had been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those closest to the Colorado line, yet, to the great body of the valley it had worked little if any detriment, and the Court, not being satisfied that Kansas had made out a case entitling it to an injunction, dismissed the bill. It will be noticed that the Supreme Court of the United States went much further in this ruling than did the Supreme Court of California in the case of Modoc Land etc. Co. v. Booth,[2] discussed in a previous section.[3] In the latter case the Court held that a riparian proprietor ought not to be permitted to successfully claim the "undiminished flow" of the stream, when the amount diverted by the upper appropriators would cause no loss or injury to him or to his land, present or prospective, while in the Kansas-Colorado case it was found that "the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas," and still the Court refused to grant an injunction. This ruling of the Supreme Court of the United States, while in no way changing the law that a State has the right to adopt whatever rule governing waters it sees fit, and expressly stating that a State "may determine for itself" what law "shall control," will undoubtedly have a wide influence upon the future decisions of the State courts upon the subject of the common law right of a riparian owner to the "undiminished flow" of a stream which runs through or adjoins his land, when the waters of the same are needed for irrigation by appropriators above. In fact, it can only be regarded that the Court upon this point overruled its decision in the case of Sturr v. Beck,[4] where the facts were identically the same, only as between private individuals. In this case it was held by the Court that, "As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption by upper proprietors," the plaintiff could make no appropriation as against Beck, who was a ripa-

[2] 102 Cal. 151, 36 Pac. Rep. 431.
[3] See Sec. 549.
[4] 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

rian proprietor, and who was entitled to the undiminished flow of the stream. This is already the view taken by some of the State courts, notably the Supreme Court of Oregon. In the recent case of Hough v. Porter,[5] Mr. Justice King, in a most well-reasoned case, said: "The opinion in the Kansas-Colorado case not only brushes aside the rule claimed to have been announced in Sturr v. Beck, regarding riparian rights, but disclosed what, in the opinion of the writer, is a strong and commendable tendency on the part of that great court to recognize that the rigid rules of common law, as interpreted and sought to be applied by those insisting upon the 'undiminished flow' theory, are inapplicable to the many new and intricate questions necessarily arising under our form of government and throughout the arid and semi-arid sections."

§ 823. **Mixed rights on the same stream—Our conclusions.**—In closing our argument upon the phase of the question of mixed rights on the same stream, we will add that owners of land adjacent to streams and other bodies of water, in the Western States which still adhere to the doctrine of the common law upon the subject of waters, have riparian rights other than those presented in this controversy, and which are not affected by any rule which a State may adopt as to the flow of streams by the lands of the riparian owners.[1] These rights the riparian owner may hold unimpaired in these States. But in this part of the country, where water is so very scarce, compared with the amount which might be used if there were plenty, where the very life of certain communities now depend upon the utmost use of all of the water available, and where the demand for water is each year becoming greater and greater, as the country is becoming more and more settled, we consider that, upon the question of the flow of the stream adjacent to the lands of a riparian owner, the correct rule should be that if the riparian owner does not actually apply the water to some beneficial purpose, others should be permitted

[5] 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

[1] For riparian rights, see Secs. 450-584.

See, also, Morton v. Oregon etc. R. Co., 48 Ore. 444, 87 Pac. Rep. 151, 1046, 7 L. R. A., N. S., 344, 120 Am. St. Rep. 827; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Coquille etc. Co. v. Johnson, 52 Ore. 547, 98 Pac. Rep. 132, 132 Am. St. Rep. 716.

to appropriate it who will so use it. The extent of the right of the riparian owner to the "undiminished flow" of the stream should be conditional upon his application of all of that flow to some beneficial use or purpose; and, where he either does not use the water at all, or uses but a small portion of it for such a purpose, appropriators above should be entitled to appropriate all the surplus. This would make a uniform rule as between the rights of appropriators and those of riparian owners in this respect, where there are both rights upon the same stream. The tendency of the decisions, as will be seen from the preceding sections, is already in that direction. And we predict that it will not be many years before this rule is adopted in each of the Western States which has both the Arid Region Doctrine of appropriation and the common law of riparian rights as the same has been modified from time to time to meet the conditions in the arid and semi-arid States. In fact, this is the only method of reconciling these two principles of law, which, if each is strictly enforced, are so irreconcilable. Thus in those States which still adhere to the common law, there would be at least one uniform rule of law applicable to both systems, and that is, that in order to hold a right to the use of the water under either system, there must be an actual application of all of the water claimed to some beneficial use or purpose.

CHAPTER 45.

MEANS OF THE USE AND CHARACTER OF THE WORKS.

§ 824. Scope of chapter.
§ 825. Means of the use of the water appropriated.
§ 826. Right to construct dams.
§ 827. Reservoir dams—Diverting dams.
§ 828. Means of conducting the water to the place of use.
§ 829. The right to construct ditches on the public lands.
§ 830. The right to construct ditches on private lands.
§ 831. The ditches of others may be used.
§ 832. The natural channel of stream may be used for the ditch.
§ 833. Ditches, canals, etc., are not in themselves easements.
§ 834. Character of property in ditches, canals, and reservoirs.
§ 835. Reservoirs and storage rights.
§ 836. Character of construction of works—In general.

§ 824. Scope of chapter.—In the acquisition of a water right under the Arid Region Doctrine of appropriation, as we have seen in a previous chapter,[1] it is necessary that certain artificial works be constructed by the appropriator, in order to divert and conduct the water to the place of use.[2] In the previous chapter we discussed the nature and character of a water right.[3] The discussion in this chapter will be devoted to the means of the use of water and to the character of the works required to be constructed by an appropriator, including the dam, ditch, canal, flume, reservoir, and other works necessary to the appropriator as a means of diverting, conducting, storing, and using the water claimed under an appropriation.

We will leave the discussion of the question of the injuries to and from the works of this nature to the portion of this work treating of injuries and remedies,[4] and, although in this chapter we refer to the rights of way for these works, we will leave the discussion of that subject to another chapter.[5]

§ 825. Means of the use of the water appropriated.—The means by which water may be diverted from the natural streams or other

1 For how water is appropriated, see Secs. 706-732.
2 See Secs. 717-721.
3 See Chap. 41, Secs. 757-774.
4 See Part XIII, Chaps. 81-83.
5 See Secs. 927-993.

sources of water supply, stored, or conducted to the places of use are many. We have referred to this subject in a previous chapter in tracing the steps necessary to make a valid appropriation, under the subject of the construction of the works necessary to make a valid appropriation,[1] and also that these works must be completed with reasonable diligence.[2] And, in general, we will only add here that any means which will divert, store, or conduct the water to the places of use may be used so long as the rights of others are not injured or infringed upon. The means, by which the appropriation is made, are immaterial so long as the water appropriated is actually applied to some beneficial use or purpose, and the rights of others are not injured thereby.[3] All that is necessary to make a valid appropriation is that there be an actual diversion of the water from the natural channel or other source of supply, with an intent to apply it to some beneficial use, followed by an actual application of the water either to the use designed or to some other within a reasonable time,[4] and any lawful means toward attaining that end may be used.

§ 826. **Right to construct dams.**—The right to construct dams in the channels of the streams is based upon one of the fundamental propositions of the Arid Region Doctrine of appropriation, namely, that in order to acquire a right to the use of the water, it must be diverted from its natural channel.[1] As was said in the

1 See Secs. 717-721.

2 See Secs. 733-741.

3 See, also, McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Thomas v. Guiraud, 6 Colo. 530; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Miller & Lux v. Rickey, 127 Fed. Rep. 573; Coleman v. Le Franc, 137 Cal. 214, 69 Pac. Rep. 1011; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 159, 17 Am. & Eng. Ann. Cas. 823.

For appropriations of water by unusual methods, see Sec. 724.

4 For appropriation of water, see Secs. 706-732.

1 That the water must be diverted, see Secs. 722-724.

See Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594, where it is held that the building of a dam is a taking possession of the right to use the water.

California case of Charnock v. Higuerra:[2] "Every diversion from a stream is artificial—a disturbance of the natural order of things. A dam or a ditch is as much an artificial mechanism as a pump—it may, indeed, be much more so; and the one alters the natural conditions in the same sense that the other does. The right to take the water at all is a right to change the ordinary course of Nature; and the methods employed, so long as their use does not infringe the like and equal rights of others, are immaterial." It is also held that a riparian owner may place a dam in the stream if he takes thereby no more than his proportion of the water, taking into consideration the correlative rights of the other owners upon the same stream. In such a case it is held that the dam is not *per se*, an improper structure as to lower owners.[3] In a recent Arizona case it was held that one who had a prior appropriation of surplus and flood waters in a gulch or wash could construct a dam above a subsequent appropriator and impound so much of the water falling above it as he required for his beneficial purpose; but it was further held that he must maintain the dam so as to permit such water as he does not require to pass to the lower appropriator and to so construct the dam as not to endanger the dam of the other appropriator.[4] This right also depends, as is the case of ditches, canals, or other works, upon the right of way, for the purpose acquired by the appropriator. Of course, if the site of the dam is upon his own premises, or upon the public lands, not reserved, there is no question as to his right in this respect; but, upon the other hand, if the site is upon the lands of others, or upon Government reservations, the right to construct the dam must be acquired in some lawful manner. This subject will be more fully treated when we come to the question of rights of way.[5] There is another general rule which must be adhered to, and that is that the rights of others upon the stream or elsewhere must not be interfered with, trespassed upon, or injured. Otherwise, the courts will interfere and possibly the destruction of the dam may be ordered. This is not always the case, however, where

[2] 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195.

[3] Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874.

[4] Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

[5] For rights of way, see Secs. 972-1032.

For eminent domain, see Secs. 1059-1098.

the party whose rights are injured can use the water as well through the works of the owner of the dam. This is illustrated by the decision in a case which arose in Oregon. In the first hearing of the case before the Supreme Court, it having been found that the dams maintained by the defendant interrupted the flow of the water to which the plaintiff was entitled, the Court made a mandatory order that the dams "be removed sufficiently to permit the quantity of water awarded to plaintiff to flow to his premises." Upon a rehearing, however, the Court modified its former order, it having been found that the destruction of the dam would injure the lands of the defendant, and it was ordered that the defendant conduct the water, to which the plaintiff was entitled and which the dam prevented from flowing down the stream, by means of his dam and ditch to the plaintiff's land, it having been found that this could be done without loss or injury to the plaintiff's rights.[6] The rule adopted under the facts in this case was undoubtedly correct, but it is an exception to the general rule that a dam may be constructed to the injury of the rights of others.[7] The appropriator can not construct a dam of such a height that it will back the water upon the lands of others, unless he in some legal way acquires the right to do so.[8] The rule in this respect under the doctrine of appropriation is the same as it is at common law.[9] Neither can one maintain a diverting dam to such a height that it backs up the water over a flat part of the country, and thereby

[6] Harrington v. Demarris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; on rehearing, see 82 Pac. Rep. 14.

[7] Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Phoenix Water Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185.

A change in a dam is permissible if no injury is done to others. Seweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963.

[8] Right to back up water, see Secs. 547.

For eminent domain, see Secs. 1059-1098.

See, also, for right to back up water under the common law, Sec. 547.

See, also, Atchison etc. Co. v. Herman, 74 Kan. 77, 85 Pac. Rep. 817.

[9] See Sec. 853; Larimer etc. Res. Co. v. People *ex rel.* Luthe, 8 Colo. 614, 9 Pac. Rep. 794.

Dams must be kept within reasonable limits. Rio Grande W. R. Co. v. Telluride etc. Co., 16 Utah 125, 51 Pac. Rep. 146; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Krause v. Oregon etc. Co., 45 Ore. 378, 77 Pac. Rep. 833; Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; North Alabama etc. Co. v. Jones, 156 Ala. 360, 47 So. Rep. 144.

much is lost by evaporation, when this infringes upon the rights of others who have a right to the water.[10] Under the law, therefore, dams may be constructed, but this right is not unrestricted. They may be constructed so far as may be reasonably necessary to the appropriation and use of the waters claimed, and provided always that in their construction the rights of others are not infringed upon or injured. The right must be exercised within reasonable limits.[11]

§ 827. **Reservoir dams—Diverting dams.**—One of the most common and necessary instrumentalities included within the means of use of water by appropriation is the dam. The water must be diverted from the natural channel of the stream, and the dam is the most usual method. Dams may be divided into two distinct classes, the reservoir dams and the diverting dams. The first class includes those which are used in the construction of reservoirs for the purpose of storing the water for future use. The second class may be defined as those dams constructed for the immediate diversion of the water into the ditches or canals.

The right to build a reservoir dam is coincident with the right to construct the reservoir itself, discussed in previous sections. As to the matter of their construction, any dam which is used for the impounding of any great quantity should be strongly constructed, and the owners thereof are liable for any injuries to life or property caused by their negligence, at least, in defective construction, or careless inspection.[1] And, in some jurisdictions, by statute, they are made liable for all damages caused, regardless of the element of negligence. Such is the case in Colorado.[2] However, no rule for the construction of these dams can be stated which will be applicable to all cases. But the one attempting to store water must exercise in the construction of his dams such care as will be com-

10 Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128.

11 Rio Grande W. R. Co. v. Telluride etc. Co., 16 Utah 125, 51 Pac. Rep. 146; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

1 For liability for injuries from defective works, see Chap. 83.

2 Rev. Stat. 1898, Sec. 3213; 2 Colo. Stats. Ann., Sec. 3213.

See, also, Larimer etc. Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. Rep. 1111; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Garnett D. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79; Doherty v. Pratt, —— Nev. ——, 124 Pac. Rep. 576.

mensurate with the amount of water which he attempts to store and the other facts connected with the magnitude of his undertaking.[3]

As a general proposition, diverting dams need not be constructed with the same solidity as is the case of reservoir dams. They are not used for the storing of any water, but simply to raise the water to such a height as will cause it to flow by gravity into the ditches and canals of the appropriator for immediate use. These dams are sometimes very small and crude, but they are just as effective, so far as the rights of appropriators to the use of the water are concerned, as the larger ones.[4] In cases where small amounts of water are only required from a small stream, often a very crude dam will suffice. It may be constructed of rocks thrown in the stream below the intake of the ditch, so that the water will be raised high enough to permit it to run freely into the ditch. Very often these small dams are constructed out of brush, with gravel or earth thrown on, to hold the water. They need not necessarily be water tight; and, oftentimes, on account of the rights of those who claim the water below, are not permitted to be. In many cases they are constructed only a part of the way across the stream, and these are called wing dams. In many instances these crude dams are washed away in times of high water, and they are so constructed that they will wash away. In this way the adjacent lands are protected from injury by the stream cleaning its own channel in times of flood. If they are replaced when the water lowers, the right of the appropriator to the use of the water is not impaired. In cases of larger appropriations of water, the larger streams and rivers must, of course, be used, and the dams must be of a more substantial character, both in order to divert sufficient water for the purpose intended, both from the standpoint of the injuries liable to be caused from their breaking, and also from that of economy. It is a costly undertaking to have to replace one of these large dams; and hence it is much cheaper to build one which will withstand the ordinary floods in the first instance than to be compelled to reconstruct it when washed out. Then, again, in cases where the appropriation is made for the sale of water to others, comes the question of liability for damages for the failure to furnish water to consum-

[3] See Sec. 836.

[4] See Secs. 718-720.

ers, as well as those to life and property, where the dam is destroyed.[5]

§ 828. **Means of conducting the water to the place of use.**—The most common method of conducting the water, after it is diverted from the natural streams to the place of use, is by open ditches and canals. These words mean the same, but the word "ditch" is usually applied to the smaller works of this nature, and the word "canal" to the larger. Sometimes, in order to more economically conduct the water and to prevent waste by seepage and leakage, the ditch or canal is lined with cement, stone, or wood. There has also been a tendency during the later years to construct closed conduits, or to use wooden or iron pipes. By these methods all leakage and seepage are prevented, and the water is conducted to the place where it is needed without loss. This, of course, requires considerable expense in the construction in the first instance. But it is generally conceded that it pays not only in the amount of water saved to the appropriator, but it also prevents injuries to land from seepage and leakage. But, again, these also prevent seepage to lands which would be benefited thereby. These water-tight conduits are used in the older countries of the world, where water is scarce and the population dense. In this country they are bound to come more and more into use as the same conditions arise.[1] It is not always necessary that the appropriator construct his works for the carrying of the water in these expensive methods.[2] However, he is required to employ means which are reasonably economical, and which will prevent unnecessary waste. He must, at least, keep his ditches, canals, and flumes in reasonably good repair, as the amount appropriated is the amount which he actually applies to some beneficial use or purpose, less a reasonable amount for seepage in conducting the water to the place of use.[3] Wooden flumes may be used where necessary to conduct the water over depressions in the land, but these must be so constructed as to prevent leakage

5 For damages for failure to furnish water, see Chap. 83.

1 For irrigation in Italy, see Secs. 144-159.

For irrigation in India, see Secs. 103-118.

For the economical use of water and the prevention of waste, see Secs. 874-916.

2 See Sec. 913.

3 Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811.

For the amount of the water appropriated, see Secs. 877-887.

or waste. And, in general, any waste from faulty or leaky means of conveying the water will be enjoined, if it in any way interferes with the rights of others.[4]

§ 829. **The right to construct ditches on the public lands.**—The right to construct ditches and canals and other works for the conveyance of the water to the place of use, as in the case of dams,[1] is based upon one of the fundamental propositions of the doctrine of appropriation. In order to acquire a right to the use of water it must be diverted from the natural stream and conducted by some means to the place of use. In tracing the history of the doctrine of appropriation, we found that this right originated with the customs of the early miners of California, and was based upon the acquiescence of the Government, amounting to a grant, or at least a license, both as to the right to the use of the water and also as to the right to conduct it over the public domain to the place of use, and the rights which originated in these customs were afterwards enacted into statutory law.[2] Relative to the construction of ditches over the public domain, the Act of Congress of 1866 as the same was amended by the Act of 1870, first granted the right.[3] These Acts were supplemented by the Act of March 3, 1891,[4] under the provisions of which rights of way may be acquired for the construction of ditches, reservoirs, and canals over the public lands and the reservations of the United States. This subject will be more thoroughly discussed in another portion of this work under the subject of rights of way.[5]

§ 830. **The right to construct ditches on private lands.**—When land has once passed into private ownership no person has the right

4 Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Town of Sterling v. Pawnee Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; Montrose Canal Co. v. Loutsenheizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532.

For the prevention of waste, see Secs. 911-916.

Injuries by ditches, see Chap. 83.

1 See Sec. 827.

2 See Secs. 595-626.

3 For Acts of Congress of 1866 and 1870, see Secs. 611-618.

4 6 Fed. Stat. Ann. 1905, p. 313; 2 U. S. Comp. Stat. 1901, p. 1570; 1 Supp. Rev. Stat. 942, 946; 26 Stat. L. 1101.

For copy of Act and construction thereof, see Secs. 937-952.

See, also, Secs. 928-971.

5 See Chap. 51, Secs. 927-971.

to construct a ditch or canal across it without the owner's consent, unless the right is obtained by virtue of the right of eminent domain.[1] Hence it follows that as far as the right to construct ditches and canals over the lands of others is concerned, it depends largely upon the right of way which must be acquired for this purpose over these lands.[2] This may be acquired by grant,[3] license,[4] prescription,[5] or by the right of eminent domain,[6] and will be fully discussed in this work in the chapter on rights of way.

§ 831. The ditches of others may be used.—Although works of some description must be constructed to conduct the water to the place of use, it is not necessary that they be always owned by the appropriator of the water or the consumer. He may acquire a right to convey the water to the place of use, or a portion of the way, through the ditch or canal owned by others, and he is then in the same position to protect his rights to the use of the water as though he owned absolutely the ditch or canal.[1] Or, as said by the Supreme Court of California, "and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he carried it through a ditch or pipe line made for that purpose and no other."[2] In fact, it has been the policy of the law in most of the States and Territories of the West, in order to

1 Emerson v. El Dorado D. Co., 18 Mont. 247, 44 Pac. Rep. 969; Weimar v. Lowery, 11 Cal. 104, 4 Morr. Min. Rep. 543; McGregor v. Silver King M. Co., 14 Utah 47, 45 Pac. Rep. 1091, 60 Am. St. Rep. 883; Johnston v. Meagher, 14 Utah 426, 47 Pac. Rep. 861.

2 For the acquisition of rights of way over private lands, see Secs. 972, 993.

3 See Secs. 976-979.

4 See Secs. 983-985.

5 See Secs. 1033-1045.

6 See Secs. 1059-1086.

1 Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397; Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Butte etc. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Hoffman v. Stone, 7 Cal. 46.

2 Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

See, also, Richardson v. Kier, 37 Cal. 263; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976.

For extent of rights to mingled waters, see Secs. 797, 798.

avoid having the country cut up with a multiplicity of ditches and canals, that where one ditch can answer the purpose of more, the right to use the same is granted by statute to others than the owner thereof.[3] Of course, this right is in the nature of a right of way, and must be acquired in a lawful manner.[4] It may be acquired in the same manner as a right of way for the ditch, that is, by grant, contract, license, and by eminent domain.[5] But the appropriations, in cases of this nature, stand alone, and the later comer can claim nothing from the rights of those who were prior, although the method of use is through the same works.[6] And in such a case it is held also that the appropriator need not proceed under the statutory formalities, but that he is an appropriator by actual diversion and use.[7] Where the water of several appropriators are thus mingled in one ditch, great care must be exercised in the measurement to determine the rights of each.[8] And, further, after the enlargement is completed, the duty of keeping the ditch or canal in repair is upon all parties interested in and using the same, and the expense may be equitably adjusted by the Court.[9] And in the enlargement of a ditch for this purpose, the owner can not be compelled to pay any of the cost or expense of the enlargement.[10]

§ 832. The natural channel of stream may be used for the ditch.—As was mentioned in a previous section, an appropriator

[3] See the statutes of the States, Part XIV; Sand Cr. etc. Irr. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742; Downing v. Moore, 12 Colo. 316, 20 Pac. Rep. 766; Junction Cr. etc. Co. v. City of Durango, 21 Colo. 194, 40 Pac. Rep. 356; Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695.

[4] For a right of way to use ditches of others, see Secs. 831, 1084, 1085.

One can not arbitrarily seize and use another's ditch, or interest in a ditch for that purpose. McRae v. Small, 48 Ore. 139, 85 Pac. Rep. 503; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773.

[5] For eminent domain, see Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

[6] Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

[7] McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. Rep. 220; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Wood v. Etiwanda etc. Co., 122 Cal. 152, 54 Pac. Rep. 726.

See, also, for appropriation by diversion and use, Sec. 730.

[8] For the measurement of water in cases of this nature, see Secs. 789-800.

[9] Patterson v. Brown etc. Co., 3 Colo. App. 511, 34 Pac. Rep. 769.

[10] Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

has the right to make use of all of the natural advantages of the country, and even to use the channel of the same stream from which the water was appropriated, or the channel of another stream, for a portion of his ditch in conducting the water to the place of use.[1] One of the essential elements of a valid appropriation is that there must be an actual diversion of the water from the natural stream.[2] But the authorities have held from the earliest history of the doctrine of appropriation that, after the water has been once diverted from its natural channel, it may be turned back into the stream from which it was originally taken and be recaptured at a point below by the same appropriator, provided that the rights of others are not injuriously affected thereby; thus using the channel of the natural stream for the time being as a link in a ditch or canal for conducting the water to some lower point.[3] It would be a harsh

1 For kind of works necessary, see Secs. 824-831.

2 For the diversion of the water, see Secs. 722-724.

3 Campbell v. Flannery, 29 Mont. 246, 74 Pac. Rep. 450; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; *In re* Nelson, 27 Land Dec. 512, all citing Kinney on Irr., 1st Ed., Sec. 246.

See, also, Hoffman v. Stone, 7 Cal. 46, 4 Morr. Min. Rep. 520; Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Richardson v. Kier, 37 Cal. 263; Brown v. Mullin, 65 Cal. 89, 3 Pac. Rep. 99; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875.

It was held in the recent Oregon case of Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535, that an appropriator of waters of a stream acquired no exclusive right to the channel of the same which carries more water than his appropriation and is used by others. Parks Canal Co. v. Hoyt, 57 Cal. 44; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Creighton v. Kaweah Irr. Co., 67 Cal. 221, 7 Pac. Rep. 658; Ellis v. Tone, 58 Cal. 289; Malad Val. Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Herriman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Platte Val. Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

One may adopt as a part of his ditch a depression, slough, or high-water channel, and have his right to the possession and use thereof protected, the same as if such ditch had been wholly artificially made. Parke v. Boulware, 4 Idaho 692, 43 Pac. Rep. 680.

One who by dikes or dams prevents water from flowing from the main stream at low places or by natural channels, thus confining it to the main stream, and by it conveying it down to his land, where he uses it for necessary and reasonable irrigation, appropriates it. McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976.

rule to require those engaged in these enterprises to construct an actual ditch or canal along the whole route through which the water has to be carried, and to refuse them the economy which Nature occasionally affords in the shape of a dry ravine, gulch, canyon, or the channel of a natural stream.[4] Not only may the water from the same stream be turned back into its channel and reclaimed, but also the waters from any different source of supply may be turned into the channel of any stream, conducted therein for a distance, and again taken out by the appropriator thereof.[5] In order to take advantage of the right to use the channel of the stream for a part of a ditch, there must be an intention to recapture it, otherwise the water belongs to the other appropriators on the stream, according to their priority of rights, the water being treated as abandoned by the one who turned it into the stream.[6] Then, again, no more water can be taken from the stream than was turned in after

See, also, Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Wiggins v. Muscupiabe, 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Pomona Water Co. v. San Antonio Water Co., 152 Cal. 618, 93 Pac. Rep. 881; Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1027;. Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. Rep. 854; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Ripley v. Park, 40 Colo. 129, 90 Pac. Rep. 75; Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965; Malad etc. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 587; Kelly v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785; Schultz v. Sweeney, 19 Nev. 359, 116 Pac. Rep. 253, 3 Am. St. Rep. 888; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Fuller v. Sharp, 33 Utah 431, 94 Pac. Rep. 817; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

See, also, for abandonment, Secs. 1099-1117.

For recapture, Secs. 798-800.

4 Hoffman v. Stone, 7 Cal. 46.

5 Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Campbell v. Flannery, 29 Mont. 246, 74 Pac. Rep. 450.

6 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888.

For abandonment, see Secs. 1099-1117.

making due allowance for natural seepage and evaporation.[7] This branch of the subject will be discussed when we take up the subjects of the rights in mingled waters[8] and developed waters.[9]

Another limitation to the right to use the channel of a stream for this purpose is that the capacity of the stream must be considered, and no more water must be turned into it than can be safely carried within the banks, together with the water naturally flowing therein. The flooding or overflowing of property along the stream from this cause will render the party turning the water into the stream liable for injuries caused by the overflow.[10] The appropriator, however, may clean out the channel of the stream, and remove obstructions therefrom, in order to prevent injuries of this nature,[11] provided that in making such changes he does not injure the rights of the other appropriators on the stream.[12]

§ 833. Ditches, canals, etc., are not in themselves easements.—The works constructed for the means of use of water, consisting of ditches, canals, flumes, or reservoirs, are not in themselves easements, but are land.[1] Where these works are constructed upon the lands of the appropriator, the portion whereon they are located is held by no different title from the rest of the land.[2] The same is also true where they are constructed over lands owned by others than the appropriator. They are still land, although the fee to the same may belong to a person other than the appropriator. What the appropriator acquires in this instance is not a ditch or canal as an easement, but an easement *for* a ditch or canal or other

7 Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Burnett v. Whitesides, 15 Cal. 35; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875.

8 See Secs. 798-800.

9 See Secs. 1205, 1206.

10 Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612.

11 Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102.

12 Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773.

1 See Secs. 928, 973.

2 No easement exists so long as the unity of possession and ownership remains, because the owner of the whole may at any time rearrange the quality of the several servitudes. Quinlan v. Noble, 75 Cal. 250, 17 Pac. Rep. 69.

See, also, Cave v. Crafts, 53 Cal. 135; Lampman v. Milks, 21 N. Y. 505; Dixon v. Schurmeier, 110 Cal. 582, 42 Pac. Rep. 1091.

works, as the case may be. The very definition of the word easement precludes the idea that a ditch or canal in and of itself is an easement. It is simply a privilege or private way, "in which a particular man may have an interest or right, though another be the owner of the soil." It is an incorporeal hereditament.[3] Or, again, "an easement is a liberty, privilege, or advantage without profit which the owner of one parcel of land may have in the lands of another. . . . They are incorporeal."[4]

Upon the other hand, the ditch or canal is land; and, being visible and tangible, is corporeal. Because a ditch or canal is dug on land in no way changes its character as land. It is still land, although the bed of the same may be sunk below the surface of the land adjoining it. It has the bed and sides still consisting of the same character of soil or rock as that of the adjoining land, and it is as much a part of this land as though the ditch or canal had never been dug. This may be illustrated by another easement, for a right of way given for a private roadway. Because an easement or privilege is given by the owner of lands to another person to pass over those lands in a private roadway in no way changes the character of the roadway from land, and that, too, although in this case the surface of the bed of the road may be elevated above the surface of the adjoining land. It is still land, and a part and parcel of that adjoining. It is visible and tangible, and therefore corporeal. What is granted is simply the right or privilege to pass over this land, as the easement. This right or privilege is intangible and invisible, hence it follows that the road itself is not the easement. But the easement consists of the invisible, intangible, and incorporeal right or privilege of passing over the road. So it is with a ditch or canal. The ditch or canal itself is not the easement. But the easement consists of the invisible, intangible, and incorporeal right or privilege, or right of way, *for* the ditch, canal, or other works, as the case may be, which the owner of certain lands may have over the lands of another. As was said in an early California case, brought in ejectment: "Substantially the conveyance was of

[3] 2 Blackstone, Chap. 3, Incorporeal Hereditaments, p. 35.

Bouvier, Law Dict. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. They are incorporeal.

[4] 14 Cyc. 1139.

the ditch, for there can be no distinction taken between a 'right of way in a ditch' or 'for' an existing ditch, and the ditch itself.'' [5]

That a right of way for a ditch or canal is an easement we will concede, and will fully discuss this subject in a subsequent chapter.[6] The only point which we wish to make here is that the character of property in a ditch, canal, reservoir, or other means of diversion and use of water, is not in and of itself an easement, or servitude, but is a corporeal estate or land, and relative to which any action at law or in equity will lie, which may be maintained as to any other real property.[7]

The reason that we have elaborated upon this subject to this extent is the fact of the misconception of some of the authorities, including some Courts, as to the nature and character of the property in a ditch or canal where it passes over lands of others than those of the appropriator, and the loose expressions found in some of the decisions, to the effect that the ditch or canal was in itself an easement.[8]

§ 834. Character of property in ditches, canals, and reservoirs.—Ditches, canals, flumes, and reservoirs used for the conveyance or storage of water are artificial water courses, lakes, or ponds, and are real property, and the rules of law governing the same are, in general, the same as the rules governing other real property.[1] A ditch, canal, or reservoir is not a mere easement or incorporeal

5 Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330.

See, also, Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. Rep. 985; Ada County etc. Co. v. Farmers' etc. Co., 5 Idaho 793, 51 Pac. Rep. 990, 4 L. R. A. 485.

But see Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561.

6 For rights of way over private lands, see Chap. 51, Secs. 972-993.

7 Fudickar v. East Riverside Irr. Dis., 109 Cal. 29, 41 Pac. Rep. 1024.

For injuries to ditches, see Chap. 83.

8 ''That a ditch is an easement has been frequently declared.'' Wiel on Water Rights in the Western States, 3d Ed., Sec. 455.

1 For the sale and transfer of this class of property, see Secs. 976-979; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Clark v. Willett, 34 Cal. 534; Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 845, citing Kinney on Irr., 1st Ed., Sec. 224.

An interest in a ditch is realty. Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Bashore v.

hereditament. It is itself land,[2] for the recovery of the possession of which an action in ejectment will lie the same as for the possession of any other real property.[3] An action to quiet title to such property will lie, it being real estate. And although in a suit to quiet title to an irrigation ditch the complaint alleged the plaintiff to be the owner of the ditch in fee, it did not preclude the Court from finding that the right or ownership was in the nature of an easement.[4] One who constructs a ditch on the land of another may acquire title to the ditch by adverse use for the statutory period.[5] Ditches dug for the purpose of irrigating land occupied as a homestead, and where without the use of the water thereon the

Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601; Welch v. Garrett, 5 Idaho 639, 51 Pac. Rep. 405, 19 Morr. Min. Rep. 193; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Hunt v. Plum, 14 Cal. 59; California etc. Co. v. County of Los Angeles, 10 Cal. App. 185, 101 Pac. Rep. 547; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Corea v. Higuerra, 135 Cal. 451, 95 Pac. Rep. 884, 17 L. R. A., N. S., 1018.

2 Black's Pomeroy on Water Rights, Sec. 59.

3 Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 397, 21 C. C. A. 409, 44 U. S. App. 566, where the action was in ejectment for the recovery of a water ditch known as the "Boston Ditch," and the Court held that the suit was for the recovery of the ditch itself, and that the action of ejectment would lie.

See, also, the case of Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330, where an action in ejectment was brought to recover possession of the "Mountain Brow Water Company's ditch." The decision of the Court depended upon the construction of a certain deed in which there were two independent descriptions of the property intended to be conveyed, first by name: "A way to, in, and for the ditch called 'Mountain Brow Water Company'; second, by indicating the land which the way crosses, namely, 'the land owned by Spicer.'" And the Court in the opinion said: "Substantially the conveyance was of the ditch itself. . . . If a mining ditch is to be regarded as a mere easement or incorporeal hereditament, it would follow that this action could not be maintained."

See, also, Nevada etc. Co. v. Kidd, 37 Cal. 282; Dondero v. O'Hara, 3 Cal. 633, 86 Pac. Rep. 985; Mitchell v. Amador etc. Co., 75 Cal. 483, 17 Pac. Rep. 246.

See, also, injuries and remedies therefor, Chaps. 81-83.

4 Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024.

For actions to quiet title, see Chap. 78.

5 Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. Rep. 224; Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60.

For adverse use and prescription, see Secs. 1033-1058.

land would be of but little value for agricultural or horticultural purposes, are treated as a part of the land itself, and not severable therefrom, and hence, therefore, exempt from liability for debts contracted prior to the issuing of the patent to the full extent to which the homestead is exempt.[6] Nor is there anything in the decision in the case of Mt. Carmel Fruit Co. v. Webster [7] to the contrary, as some have been led to believe. In that case the homestead entryman conveyed "an interest in appropriated water, and the right to convey the same over and across the land." This conveyance was attacked as being in violation of Sections 2290, 2291, of the Revised Statutes of the United States,[8] as an attempt to alienate a portion of his homestead claim. In deciding against this contention, the Court, by Mr. Justice Van Dyke, said: "Such a transaction, so far from being prohibited by the Acts of Congress in question, or against public policy, is favored and encouraged, not only by the legislation of Congress, but by the decisions of the courts, Federal and State." The ruling in this case was correct, as there was no conveyance of any land as prohibited under the Homestead Act. The only conveyance outside of the water right, which must have been acquired as a separate right to the homestead,[9] was an incorporeal privilege, right, or easement "to convey the water over and across the land, the title to which remained in the homestead entryman." [10]

These works are inheritable, and as hereditaments, being substantial, permanent, visible, and tangible, are corporeal.[11]

§ 835. **Reservoirs and storage rights.**—The right to construct reservoirs and store waters is also given under the laws of the United States, and also the laws of every State within the arid and

6 Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198.

7 140 Cal. 183, 73 Pac. Rep. 826.

8 See 6 Fed. Stat. Ann. 1905, pp. 290, 292; 2 U. S. Comp. Stat. 1901, pp. 1389, 1390; 14 Stat. L. 67, 26 Stat. L. 1098.

9 For appropriation of water, see Secs. 706-732.

That the location of land is not an appropriation, see Sec. 767.

10 But see Cascade Public Service Corporation v. Railsback, 59 Wash. 376, 109 Pac. Rep. 1062.

See, also, for the sale of rights of way, Secs. 972-985.

11 See, also, 2 Blackstone Comm. 17; 3 Kent Com. 401; Rex v. Trustee, 3 B. & Ad. 216, 110 Eng. Reprint 80.

semi-arid regions. The subject, however, of reservoirs and storage rights will be fully discussed in a separate chapter of this work, and no further discussion is necessary here.[1]

§ 836. **Character of construction of works—In general.**—In previous sections we have discussed the kinds of works necessary to be constructed by an appropriator in order to consummate an appropriation,[1] and also that these works must be completed with all reasonable diligence.[2] We did not there discuss the character of the construction of these works, which the law requires in order that the lives and property of the people below them may be safe from breakage and overflow.[3] Water, like fire, when unrestrained, is one of the most dangerous elements known to man. Unfortunately, this has been illustrated many times in this and other countries by the breakages in the works constructed by man to regulate, control, and especially to store water. Upon the other hand, when these works are properly constructed and made safe, and thereby the water is retained on the upper lands of the water courses during periods of flood, there are no means known to man which will so surely prevent the great inundations and floods that recur almost annually in the lower valleys,[4] and at the same time, during the periods of low water, insure a uniform flow in the rivers, which may be utilized for navigation and other purposes.[5] In fact, in the construction of great storage reservoirs along the upper reaches of the great water courses, man is but an imitator of Nature, which, by the forests along the headwaters of these very rivers, so rapidly becoming depleted in this country, stored up the waters in times of plenty and let it gradually seep down to the streams during the hot, dry summer months, and thus secured a uniform and permanent flow at times when the water was needed the most in the lower portions of the rivers. But, in order for man to successfully imitate Nature in this respect, and in order to artificially maintain these many benefits and uses of water, and to prevent the

1 For reservoir and storage rights, see Chap. 46, Secs. 837, 846.

See, also, for the storage rights under the various State laws, Part XIV.

1 See Secs. 826-834.

2 See Secs. 733-741.

3 For actions for damages from negligent construction and maintenance, see Chap. 83.

4 For irrigation as a prevention of floods, see Secs. 11, 14.

5 For irrigation as an aid to navigation, see Sec. 12.

danger to life and property, when like a wild beast the water unrestrained tears through the land, these works of man should be so constructed that they will be as safe as human foresight can determine. And in the construction of these works we should remember that at all times we are dealing with a most dangerous element, and one which ever is seeking to escape. It may in our hands, under proper safeguards, be one of the greatest blessings to humanity; but if, upon the other hand, it breaks from control, it may become one of the greatest of curses.

Upon this subject I do not at all agree with the policy of some of our laws, and especially with some of the decisions of our Courts, discussed in subsequent sections of this work.[6] But in those sections we will discuss the law as we find it, and not what we think it ought to be. However, we believe it to be the duty of the text-book writer to call attention to the defects of the law, as well as to the law as it actually exists. There has been too great a tendency upon the part of some of the statutes and the decisions of the courts to relieve companies constructing these works, especially in the cases of dams and reservoirs where enormous bodies of water are held back or stored, upon the ground that there was no failure to use the care which an ordinarily prudent man would have used under the circumstances. And especially is this true when the question to be determined is the correct strength required in the construction of a certain dam to resist and hold back not only the water of a certain stream at its ordinary stages, but also in times of extraordinary high water and floods, which might reasonably be expected, and those which are unexpected. Hydraulic engineering requires much technical learning, and the layman, although he may be an "ordinarily prudent man," has not, nor can he be expected to have, the technical knowledge required to make a correct computation in such a case. Hence these matters should be referred to a skillful engineer, and one particularly trained in this class of work. As was said in a recent Oregon case,[7] "The true test, considering all the circumstances, is: Ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff, and to have made provisions therefor?" But it may be

[6] For actions for damages from negligent construction and maintenance, see Chap. 83.

[7] Price v. Oregon etc. R. Co., 47 Ore. 350, 83 Pac. Rep. 843.

said, in reply to this argument, the ordinarily prudent man, projecting works of this nature, might employ a skillful engineer and still come within the general rule of negligence. That may be true in certain cases, but it is not always so. Sometimes "the ordinarily prudent man" employs no engineer, and at other times he employs unskillful engineers. This was the fact in a leading case arising in England involving this subject,[8] where the work was done through the agency and inspection of an engineer, who, as the Court said, did not exercise that reasonable care and caution which might have been exercised, and where the Court held that the true rule of law is that a person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, he is *prima facie* answerable for all damage which is the natural consequence of its escape. In other words it is the duty of a person storing water on his property to keep it at his peril. This we believe to be the correct rule of law in such cases, and was the theory upon which certain recent statutes have been enacted in a number of States, making the owners of such works liable for all damages from leakage or overflow of the water or by floods, causing the breaking of embankments. Such statutes have been upheld by the courts.[9]

As was said by the United States Circuit Court of Appeals in the Salton Sea cases:[10] "The fact that an extraordinary flood came down the river, contributing to the disaster, does not relieve the defendant from responsibility. Under the conditions prevailing in that locality and known to have existed for many years, it was the duty of the defendant to have maintained proper control of the water at its headgates."[11]

We do not mean by this that every man who constructs a duck

8 Rylands v. Fletcher, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, affirming L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, which reversed 3 Hurlst. & C. 774.

9 Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79; Canon City etc. Co. v. Oxtoby, 45 Colo 214, 100 Pac. Rep. 1127; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

See, also, for statutory liability for damages, Chap. 83.

10 California Development Co. v. New Liverpool Salt Co., 172 Fed. Rep. 792, 97 C. C. A. 214.

11 Citing Kinney on Irrigation, 1st Ed., Secs. 314, 315.

See, also, for damages from breakage and overflow, Chap. 83.

pond upon his premises should do so under the directions of a skilled engineer. But in this Western country dams have been and are now being constructed sometimes a hundred and fifty feet and over in height, and thereby holding back great quantities of water in the reservoirs spreading out above them. Settlers are being induced by the very parties who have constructed, and are now constructing, these great reservoirs to settle upon the lands under them and make them their homes, which lands are directly in the path of the flood which will follow should these reservoirs break. In many instances cities and towns are also situated under them. Great property interests also lie below. Should these dams or reservoirs break, irreparable injury is liable to be done to life and property. Many dams have broken in the past, caused by unskillful construction, extraordinarily high floods, or cloudbursts. Some of these works will undoubtedly break in the future. When they do break, injuries to property alone are liable to exceed in value an amount so great that few of these companies would be able to respond in damages, not taking into consideration the lives which may be destroyed. And therefore what we do mean is this, that these works should be so constructed as to withstand all pressure of water on both ordinary and extraordinary occasions, so far as *skilled* human foresight may determine, and with that reasonable care which is commensurate with the nature and character of the undertaking.[12]

12 See, also, Chap. 83.

CHAPTER 46.

RESERVOIR AND STORAGE RIGHTS.

§ 837. Scope of chapter.
§ 838. Storage reservoirs.
§ 839. Right to construct reservoirs on Government land.
§ 840. Right to construct reservoirs on State and private lands.
§ 841. Jurisdiction over the construction of reservoirs.
§ 842. The right to store water.
§ 843. The right of storage as against the rights of appropriators for immediate use.
§ 844. "Direct irrigation," "immediate use," and "storage" distinguished.
§ 845. The right of storage as against other reservoir rights.
§ 846. The right to the use of stored water.

§ 837. Scope of chapter.—In this chapter we will discuss certain features concerning reservoir and storage rights which are not discussed in other portions of the work. Many of the laws regulating these rights are the same as those which apply to other water rights, and have been discussed in various parts of this work. And in this chapter, in order to avoid duplication, we will not discuss them again.

The subject of damages from reservoirs will be treated in another chapter under the general subject of damages.[1] Also the question of the adjudication between reservoirs will be treated elsewhere.[2] The question of condemnation of lands for the construction of reservoirs will also be discussed in the chapter upon the subject of eminent domain. We will also treat in a separate chapter the rights of way over public lands for the construction of reservoirs in accordance with the Acts of Congress provided therefor.[3]

§ 838. Storage reservoirs.—In the first edition of this work we referred to the necessity of the adoption of systems of storage reservoirs to store the flood and waste waters of the non-irrigating season so that it can be used when needed.[1] At that time irrigators looked

1 For damages, see Chap. 83.

2 For the adjudication of rights in equity, see Chap. 78.

For statutory adjudication of rights, see Chap. 79.

3 For rights of way over public lands, see Chap. 51, Secs. 927-971.

1 Kinney on Irr., 1st Ed., Secs. 29, 31.

forward to that method as one of the most effectual means of obtaining relief from the troubles and uncertainties resulting from the ever-growing shortage of water. Since then much has been accomplished in that direction. Progress, however, has been slow, from the fact that in undertakings of this kind the outlay of capital before any return can be realized must be very large. Much remains to be done, but the activity in this direction is yearly increasing from both Governmental aid and private enterprise. The work in this direction has been greatly encouraged by the National Reclamation Act of 1902, private capitalists deeming that if the Government considers such an enterprise a safe investment, they can afford to assume the risk in backing such enterprises.[2]

In the States of the Western part of this country there are millions of acres of arid land still lying wild and uncultivated. The soil is of a most excellent character, and, according to the locality, with irrigation, will raise anything from the tropical fruits to hay and grain; but without irrigation it will raise nothing except the wild vegetation found growing naturally thereon, unless the extensive experiments along the lines of scientific "dry farming" prove a success.[3] It is also a matter of common knowledge that the rivers and streams flow their largest volume of water during the seasons when it is not needed and can not be used for irrigation. In some sections of the country, such as parts of New Mexico, Arizona, and Nevada, owing to the physical features of the country, the cultivation of land by irrigation must depend almost absolutely upon the storage of the water supply. There are also certain sections of the Great Plains where this can be successfully accomplished. But this system has been most satisfactorily applied upon the small mountain streams which take their source in the high mountains and flow rapidly down into the valleys, where their waters may be used for irrigation. Without storage systems during the spring and early summer months, water sufficient to irrigate millions of acres of land runs to waste and is lost in the sea. This might be hoarded up for the summer season, when it becomes of inestimable value at a time when these very streams themselves are so reduced in the volume of their flow as to be barely sufficient perhaps to supply the

2 For Act of Congress, 1902, see Chap. 65, Secs. 1235-1286. For the acquisition of land under the Act, see Secs. 1271-1275.

3 See Secs. 1309-1311.

few farmers who lay claim to all of their waters at that period by prior appropriation. The ever-increasing demand for homes and good farm land, and the ever-present shortage of water in this Western country will require that this work of the construction of storage reservoirs for the conservation of water for use in time of need shall continue.

The laws of all the States favor these storage enterprises upon the part of private parties, and in a number of the States these reservoirs are constructed by the States themselves, or special aid is given to private enterprise for this purpose.[4]

§ 839. **Right to construct reservoirs on Government land.**—By the Act of Congress of March 3, 1891,[1] a right was granted to any corporation duly organized under the laws of any State or Territory, individuals, or association of individuals, upon taking the proper steps, to construct reservoirs upon the public lands and reservations of the United States;[2] and also in connection with this right there was also granted rights of way for the ditches and canals connecting with these reservoirs; and upon approval by the Secretary of the Interior all lands thereafter granted, over which such rights of way shall pass, shall be disposed of subject to such rights. The Act only applied to the vacant and unoccupied public land, and the last clause of Section 19 provided: "Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." This has been correctly held to apply to the rights of settlers upon the public lands who are lawfully in possession without title.[3]

[4] For the laws of the States upon the subject, see Part XIV.

[1] 6 Fed. Stat. Ann. 1905, p. 313; 2 Comp. Stat. 1901, p. 1570; 1 Supp. Rev. Stat. 942, 946, 26 Stat. L. 1101.

For copy of Act and construction thereunder, see Secs. 937-950.

For right of way thereunder, see Secs. 945-947.

[2] For a further discussion of this subject, see rights of way over public land, Secs. 927-970.

In the case of Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577, affirming *Id.*, 9 Colo. App. 106, 47 Pac. Rep. 766, it was held that a person is not entitled to an easement over any public lands for a reservoir, until he has first acquired a vested and accrued water right.

[3] Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577.

Under this Act many reservoirs have been constructed upon the public lands of the United States in every State of the arid West, and many additional acres of land have been reclaimed and brought under cultivation by this means. The general effect of the Act has been good. Some complaints have been made of the technical difficulties which applicants under the law had to overcome in getting their plats approved by the Secretary of the Interior. Then, again, during the early history of the Act the rights thereunder granted were abused somewhat by unscrupulous parties acquiring reservoir sites, and even constructing the reservoirs, and then inducing settlers to take up lands under them, when the projectors had no water with which to fill the reservoir. Thereby the settlers were not only defrauded, but also the parties who furnished the money for the construction.

Another right to construct reservoirs upon the public domain which we will barely mention here, and fully discuss in a subsequent portion of this work, is the right granted by Congress to the General Government itself to construct reservoirs upon these lands.[4] A great many reservoirs have been and are now being built by the General Government under the terms of the Act. Some of these reservoirs are of great capacity, and require millions of dollars to construct. The money required for the construction of some of these works in a number of instances is too great, and the time required before substantial returns can come in is too long for private capital to undertake. In the construction of these irrigation works the Government is following the precedent set by England in India and Egypt, where works of enormous capacity have been constructed at the expense of the government.[5]

§ 840. Right to construct reservoirs on State and private lands.—The right to construct reservoirs for the storage of water for future beneficial uses is not limited to those which may be constructed upon the public lands of the United States.[1] But the right is given to construct them upon State as well as upon private lands

For possessory rights of settlers, see Sec. 445.

[4] For the National Reclamation Act of June 17, 1902, and discussion thereunder, see Chap. 65, Secs. 1235-1286.

[5] For irrigation in India, see Secs. 103-118.

For irrigation in Egypt, see Secs. 88-102.

[1] See Secs. 927-971.

by the statutes of nearly all of the States of the Western portion of this country.[2] The storage of water for this purpose is declared by statute to be a public use, and hence it follows that the right to sites for the construction of reservoirs may be acquired under the right of eminent domain.[3] Outside of this, the rights of others either as to their water rights or lands in their lawful possession must not be injured or trespassed upon, but are protected, and the construction of reservoirs can only be made subject to them.[4]

In the location of a reservoir site the natural depressions in the land may be utilized, and also the bed or channel of a natural stream may be used, or lakes or ponds at the source of supply, but always provided that the superior rights of others are not impaired.[5]

§ 841. Jurisdiction over the construction of reservoirs.—The details of the construction of all of these reservoirs, with the exception of those constructed by the Government under the National Reclamation Act,[1] and the jurisdiction and control of the water rights used therewith are left to the respective States. By Section 18 of the Act of Congress of March 3, 1891,[2] it is provided: "And the privilege herein granted shall not be construed to interfere with the water for irrigation and other purposes under the authority of

2 For these various statutes, see Part XIV; see, also, Sec. 840.

In a recent California case it was held that a deed conveying a reservoir site in which was the following description, "All that real property . . . described as follows": (being a full description of all of the land) expresses an intention to grant the fee or the entire estate in the land described, and not merely an easement of flooding. Van Slyke v. Arrowhead Res. & Power Co., 155 Cal. 675, 102 Pac. Rep. 816.

3 For the right of eminent domain, see Secs. 1059-1098.

4 Larimer County Res. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322, where it was held that the priority between reservoirs belongs to the first one begun, although the other was first completed, if, of course, the first was completed with reasonable diligence.

For the extent of right to store appropriated water, see Secs. 837-846.

5 Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Phœnix Water Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Larimer etc. Res. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794.

For the right to construct dams in the bed of a stream see Secs. 826-828; Leamington Water and Land Co., 15 Land Dec. 468.

But see Pecos Irr. & Imp. Co., 15 Land Dec. 470; Penasco Reservoir, 13 Land Dec. 682.

1 See Secs. 1235-1236

2 For this Act and construction thereof, see Secs. 937-948.

the respective States and Territories." And the Secretary of the Interior, in construing this Act, held that the department can not inquire into the merits of protests against the construction of a reservoir, but must refer the parties to the courts for their proper remedies, if in anywise they are injured in their possession by the building and use of a proposed reservoir.[3] Therefore, in nearly all of the Western States, by statute, the construction of reservoirs, at least of considerable size, whether upon public or private land, is under the direct supervision or inspection of some public officer, and usually the State engineer. The object of this is to protect the public as far as possible from the danger to life and the injuries to property from weak and faulty construction.[4] It is the duty of these officers to closely inspect the site of the proposed reservoir and the plans relative to the construction of the same, as well as to inspect and supervise the construction as it progresses, and take such other steps as the safety of the public may demand.[5]

§ 842. **The right to store water.**—Having discussed sufficiently in the previous sections of this chapter the right to the construction of storage reservoirs, we will now discuss the legal right to store water. And in the first place we will say in order to give this legal right there must be a valid appropriation of the water proposed to be stored, and which water must be applied within a reasonable time to a beneficial use or purpose. As was held in a Colorado case, that one has no right to store water to be disposed of for irrigation purposes unless he first appropriates the water in accordance with the provisions of the constitution and statutes of the State.[1]

But upon the general right to store water we will say that it is the policy of the law in this Western country that all of the available supply of water may be utilized for some beneficial or useful purpose or purposes. It therefore follows that any water which is found running to waste may be appropriated either for immediate

3 *In re* Gibson, 19 Land Dec. 304.

See, also, Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766; 26 Colo. 74, 56 Pac. Rep. 577.

4 See statutes on subject, Part XIV.

5 See character of construction of works, Sec. 836.

For liability from faulty construction, see Chap. 83.

1 Beaver Brook etc. Co. v. St. Vrain Res. etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

use or it may be stored up in reservoirs for future use. The mere fact that water appropriated and diverted from the natural stream is not put to an immediate use, but is kept in reservoirs until needed does not necessarily affect the legality of the appropriation. As we have seen in a previous chapter of this work, a reasonable time is given to an appropriator to apply the water which he claims by virtue of his appropriation to the beneficial use or purpose for which the appropriation is made.[2] It therefore is held that the storage of water as an aid to irrigation or to any other beneficial use is a useful purpose, and that water may be appropriated for such storage.[3]

In most of the States direct authority is given by the statute to store the unappropriated and unused waters of the natural streams for future use. In Colorado it is provided: "Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take from any of the natural streams of the State and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes; to construct and maintain ditches for carrying such water to and from such reservoir, and to condemn lands for such reservoirs and ditches in the same manner provided by law for the condemnation of lands for right of way for ditches."[4] Similar provisions are also to be found in the statutes of many of the other States. Also provisions are found for the conducting of waters from reservoirs by means of

2 For the question of consummation of the right, see Secs. 725-728.

For reasonable diligence, see Chap. 39, Secs. 733-741.

3 For cases upon the general subject of the right to store water, see Ruply v. Welch, 23 Cal. 452, 4 Morr. Min. Rep. 243; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Cache La Poudre etc. Co. v. Windsor etc. Co., 25 Colo. 53, 52 Pac. Rep. 1104; Windsor Res. etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729; Cache La Poudre Res. Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; Rockwell v. Highland Ditch Co., 1 Colo. App. 396, 29 Pac. Rep. 285; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Larimer County etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Water Supply Co. v. Tenny, 24 Colo. 344, 51 Pac. Rep. 505; Newby v. People, 28 Colo. 20, 62 Pac. Rep. 1036; Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 387, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

4 Rev. Stat. Colo. 1908, Sec. 3202; 3 Colo. Stat. Ann., Sec. 3203.

the natural streams to the place of use and the general supervision of the same by State officials.

Of course, following the general rule, in the storage of water for future use the rights of others must not be materially injured. But it is held that so long as the required volume of water is maintained at the heads of the irrigated ditches of the parties entitled to a priority thereto, other parties damming the sources of supply need not permit any flow from their reservoirs, whether it consists of the natural outflow of the stream or of the stored body of water.[5] The most that an appropriator is entitled to claim at any time is that the amount to which he lays claim shall flow to the headgate of his ditch for his use.[6]

It is also held that a riparian owner has the right to store the water in reservoirs for future use so far as is consistent with the rights of the lower riparian owners upon the same stream; but such use of the water by one owner as will prevent a lower owner from storing water for irrigation is not reasonable.[7] And in a recent Washington case [8] it was held that an upper riparian owner did not have the right to impound all of the waters flowing in a stream for fourteen hours out of every twenty-four without the consent of the lower owners.[9]

It was held in a recent Utah case,[10] that a corporation, the object of which as specified in its articles was "to construct, manage, and control the number of canals and ditches hereinafter described taken from Huntington Creek," followed by a description of such ditches, had no power to build reservoirs for the purpose of storing water. And the Court said: "It follows that the board of directors,

5 Kelly v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785; Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389.

6 Where the plaintiff appropriated the waters from a stream, defendants brought onto their lands, in the watershed of such stream, waters from another watershed, it was held that such appropriation did not prevent defendants storing the overflow or waste of such waters after use on their lands and using it on other lands. Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

7 Stacy v. Delery, 57 Tex. Civ. App. 242, 122 S. W. Rep. 300.

8 Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. Rep. 1091.

9 See, also, upon the general right of riparian owners to store water, Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Parry v. Citizens etc. Co., 59 Hun, 109, 13 N. Y. Supp. 471.

10 Seeley v. Huntington etc. Assn., 27 Utah 179, 75 Pac. Rep. 367.

having had no power to build reservoirs for the purpose of storing water, had no authority to levy an assessment upon the capital stock for that purpose. Under the circumstances and the law applicable to this case, the assessment was unauthorized, and therefore null and void."

§ 843. **The right of storage as against the rights of appropriators for immediate use.**—The question of the right of appropriators to store water for future use as against the rights of appropriators entitled to water for immediate use has been the subject of considerable discussion by the courts and others. In general it may be said that the owner of a priority for direct irrigation is entitled to use his discretion as to whether he shall store the water up in reservoirs for future use or use it immediately. This was the direct ruling in a recent Colorado case,[1] wherein it is said: "If water for direct irrigation can only be utilized for that purpose, the result would be to retard agricultural progress and limit the growth of agricultural products to those which can be matured by means of direct irrigation early in the season." But, on the other hand, if the rights of other appropriators upon the stream are materially injured, no change can be made from direct irrigation to storage; neither can any change be made which requires a greater quantity of water flowing in the natural stream. It is, therefore, held that reservoirs can not be added to an irrigation system if thereby other appropriators' rights would be materially injured by such addition and the storage of water instead of the immediate use of the same.[2]

It is held in Colorado that water which is appropriated for direct irrigation can not be stored and afterwards drawn off and used so as to do double duty.[3] And in a recent Colorado case it was held

1 Seven Lakes Reservoir Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329.

2 Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Windsor Res. etc. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. Rep. 729; Greeley etc. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985; Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329.

3 See Fort Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37, where it is held that the owner of a water right would not be permitted to make it do double duty, and when he had applied it for the purpose for which

that it was error to grant two separate reservoir priorities of the same capacity and date to the same reservoir as result of the same construction and the same act of storing the water.[4]

Nor can a system of exchanges of water between reservoirs be made so that the effect would be to convert a junior into a senior right. As was said by the Colorado Court in a recent case:[5] "We do not attribute to the inventors of this scheme a design to obtain an undue advantage over other appropriators; but if such system of exchange, taken in connection with other parts of the decree in favor of the owner of the Fossil Creek reservoir, is put into practice, it will necessarily convert a junior into a senior right. It will make many of the reservoirs of the appellants, which were built and used for storage a decade before Fossil Creek reservoir was conceived, subordinate to the latter. No device or combination of appliances that would produce such a flagrant injustice should be looked upon with favor or sanctioned by a court of equity." It was also held in this case that that there could be but one filling of the reservoir under one appropriation, and upon this subject the Court said: "A double filling in effect would give two priorities of the same date and of the same capacity to the same reservoir, on the same single appropriation, which is impossible in fact and in law, and if allowed would violate the fundamental doctrine of the law of appropriation—he who is first in time is first in right—by making a junior superior to a senior reservoir appropriator." In other words, as was held in an earlier case of the same court,[6] a priority to water for irrigation confers no right as against subsequent appropriators to appropriate it for storage in any greater quantity or at any other time than they could be appropriated for direct irrigation, and the Court said, relative to the rights of subsequent appropriators: "An appropriator of water from a

it was appropriated, he could not loan or lease it to another for irrigation purposes.

See, also, Seven Lakes Res. Co. v. New Loveland Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S. 329; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. Rep. 868; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A., 266.

4 Windsor etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729.

5 Windsor Res. etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729.

6 Colorado Mill etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185.

stream already partly appropriated acquires a right to the surplus or residuum he appropriates; and those in whom prior rights in the same stream are vested can not extend or enlarge their use of water to his prejudice, but are limited to their rights as they existed when he acquired his; because, in such case, each, with respect to his particular appropriation, is prior in time and exclusive in right."[7]

The valid rights of the owners of stored water will be protected both at law and in equity, and it is held in a recent Colorado case[8] that where there was at all times water enough in the stream for both parties, it did not justify the defendants in going upon plaintiff's premises and withdrawing water which he had stored in his reservoir, especially where the rights of the plaintiff in the waters of the stream were superior, and an injunction was therefore granted against such acts. In a still later case it was held that it was no defense to a suit by a reservoir company to enjoin interference with its water flowing in the canal of an irrigation company that there was a large volume of water in the natural stream available under the irrigation company's appropriation.[9]

§ 844. "Direct irrigation," "immediate use," and "storage" distinguished.—Considerable confusion seems to have arisen, especially in Colorado, as regards the terms of "direct irrigation," "immediate use," and storage"; and it is well to define these terms and afterwards discuss their distinguishing features and characteristics.

"Direct irrigation" may be defined as the diversion and carriage of water by means of canal, flume, or some other way of conveyance and the application of the water to the land in practically one and the same operation.

"Immediate use" may be defined as the immediate application of the water after diversion from the natural stream to the land as

7 Citing Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Cache La Poudre Res. Co. v. Water Supply & Storage Co., 53 Pac. Rep. 331, 25 Colo. 161, 46 L. R. A. 175, 71 Am. St. Rep. 131; Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Kinney on Irr., Secs. 230, 232.

8 Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

9 Hackett v. Larimer & Weld Res. Co., 48 Colo. 178, 109 Pac. Rep. 965.

See, also, for protection of rights by injunction, Chap. 81.

Actions for damages, Chap. 83.

limited by the appropriator's actual present needs, and as distinguished from the storage of the water for future needs. This term is held to be practically synonymous with the term "direct irrigation."[1]

"Storage" may be defined as the temporary accumulation, conservation, or the storage of water for future use, as distinguished from either "direct irrigation" or "immediate use." The water stored may be from two sources: First, the residue from heavy flows or flood waters during the spring or winter months, where economical use requires the construction of reservoirs for collecting these fragments for use when most needed. Second, it may be from the waters of the normal flow of the stream. The impounding or the storage of water in reservoirs is not in and of itself a beneficial use of the water. "Storage" is not a use. The storage is merely an incident of the means of making the use occurring between the diversion and the application. Storage, therefore, like diversion and the conducting of the water to the place of use, is but a "means to an end."[2] The appropriation is not made for the mere purpose of storage; it is made for the irrigation of lands or for some other useful or beneficial purpose. It might just as well be said that the waters diverted into a ditch were diverted for the purpose of carriage only, because they are conducted into a ditch on the way from the stream to the land. Under the prevailing authorities the direct test of an appropriation is not the method of diverting or carrying the water, but the successful application of all the water claimed to a beneficial or useful purpose.[3]

The question has arisen, Can the owner of a prior right to make direct application of appropriated water for irrigation purposes during the irrigation season store the water for use later in the season? The existence of the right to store water as long as it did not interfere with the vested rights of others has long been recognized by the courts,[4] but the extent of the right to store water as against direct irrigation or immediate use has been passed upon in but few cases.

1 Water Supply etc. Co. v. Tenny, 24 Colo. 344, 50 Pac. Rep. 505.

2 Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

3 See Secs. 227, 877.

4 For the right to store water, see Sec. 842.

In a late Colorado case,[5] as clearly stated by Mr. Justice Gabbert, the question before the Court was as follows: "The question presented by this appeal is the right of the owner of a priority for direct irrigation to store the water thereby represented for use later in the season." The right as stated was upheld by a bare majority of the Court. Mr. Justice Gabbert, in rendering the decision of the majority of the Court, said: "The particular question presented by this appeal has not been determined in the concrete by any previous decision of this Court; but it is by no means a new one, because it merely involves the application of principles which have been announced in numerous cases. A priority to the use of water is a property right, which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others."[6] And further in the opinion he stated: "It appears from the record that the stockholders of appellant, instead of planting crops which require irrigation during the early part of the season, utilize their lands by growing crops which do not require irrigation until about August, when the direct supply through the ditches is not sufficient to furnish the volume of water necessary to irrigate such crops. And so, instead of applying the water to which they are entitled for direct irrigation in the early part of the season, they store this water for use later to mature crops, like beets and potatoes, which do not require irrigation until about the month of August. It would be unfortunate, indeed, if the law were such that it could not be adapted to changed conditions resulting from the character of crops grown by those engaged in agricultural pursuits. If water for direct irrigation early in the season. If the judgment of the trial would be to retard agricultural progress, and limit the growth of agricultural products to those which can be matured by means of direct irrigation early in the season. If the judgment of the trial court should be sustained upon the theory that one owning a priority for direct irrigation may not cease to utilize it for that purpose

[5] Seven Lakes Res. Co. v. New Loveland & Greeley Irr. Land Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329.

[6] Citing Fuller v. Swan River P. M. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Cache La Poudre I. Co. v. Larimer & Weld R. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525.

upon crops in May, June, and July, and store it for use during the same season thereafter, the result would be to take from the owner of such priority his rights and confer them upon others growing crops of a different nature. Such a rule would make the right to the use of water dependent upon the character of crops grown instead of upon the right to utilize it in any manner which does not injuriously affect the vested rights of others. In principle the case is no different from that of Strickler v. Colorado Springs,[7] wherein the right to change the use of water from agricultural to domestic purposes was recognized. If the right to change from agricultural to domestic, and from mining to agricultural uses, and *vice versa*, is legal, certainly no good reason can be advanced why the change from one agricultural use to another may not be allowed."

In the opinion denying the petition for rehearing in the same case, Mr. Justice Gabbert stated the reasons of the majority of the Court more strongly than before, and more clearly defined what had been determined by the decision of the Court. He said: "The arguments of counsel for appellee, and *amici curiae* in support of the petition for rehearing of appellee, are evidently based upon an erroneous assumption of what has been determined in this case. It is contended that adjudication decrees are disturbed, and appellant, by the decree directed, will be awarded an enlarged use of water represented by its purchases, both in quantity and time. It must be borne in mind that this decision is based upon the fact, which is undisputed, that the stockholders of appellant are growing crops which do not, from their nature, require irrigation during the early part of the season, but do later, and that they desire to utilize the water in controversy for this purpose. Based upon these facts, we have declared, what has time and time again been decided by this Court, that the character and method of use of a priority to the use of water may be changed, provided such change does not injuriously affect the rights of others, and that appellant is entitled to divert and store the water represented by the priorities purchased for the use of its stockholders for application to crops later, but in no greater quantity and at no other or different time than could be diverted and applied to land directly to nourish crops requiring irrigation at the time of such diversion; or, otherwise expressed, appellant is permitted to divert and store the water in controversy,

[7] *Supra.*

but this right is measured and fixed by the limitations which the law would impose upon its use for diversion and application to crops requiring irrigation at the time of such diversion. This does not conflict with any previous decisions of this Court.[8] This does not enlarge the use of the priorities of appellant, either in time or quantity; neither does it confer upon it any right to divert and store the water represented by its priorities every day during the irrigation season, or to convert such priorities into a storage right during the non-irrigating season, as contended by counsel, but limits its rights strictly to the diversion of water, both as to volume and time, to the same quantity and the same time we have indicated. Thus it is apparent that no rights are infringed, that no one is deprived of water to which he is entitled by reason of the change in the method of use, and that to supply appellant with the water which it will be entitled to store under the decree directed there can not possibly be any greater burden imposed upon the common source of supply of the respective ditches owned or controlled by the parties to this appeal. Neither are any priorities disturbed; but, on the contrary, the decree directed leaves the relative rights of the parties to this appeal precisely as they were, whereas, if the judgment of the lower Court should be affirmed, the result would be, where an appropriator had no use for water represented by his priorities in the early part of the season, because of the fact that he was growing crops of a character which did not require irrigation during that period, and he could not store it at that time for use upon these crops, when later it was necessary to irrigate them, to take from him and give to another."

In conclusion upon this subject we will add that the withdrawal of water from a natural stream and the storage of the same for future use does not in any manner injuriously affect other appropriators, nor does it lessen the common source of supply to any greater extent than had the water been applied in direct irrigation or immediate use. But in allowing this right two principles must be kept in mind, namely, that the vested rights of no one must be injured by the withdrawal of the water for storage, and no more water must be withdrawn, measured by the volume and time, than the previous use allowed. This rule, as it appears

8 "But, on the contrary, is sustained by Colorado M. & E. Co. v. Larimer & Weld I. Co., 26 Colo. 47, 56 Pac. Rep. 185."

to us, is an equitable and just one, for it permits the appropriator to apply the water to his use at such time as the particular use needs the water the most, and it also permits the greatest good to be derived from the use of the water. And as long as the rights of others are not injured thereby, this right should be allowed.

§ 845. The right of storage as against other reservoir rights.—In the previous section we discussed the subject of the right of storage as against the rights of appropriators for immediate use of the water. In this section we will briefly discuss the rights of reservoirs as between each other. As in the case with other rights acquired under the Arid Region Doctrine of appropriation, the rule of priority governs, and it is held that the reservoir having the prior right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor.[1] But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.[2] And it was further held that if a double filling were permitted, it would in effect give the same reservoir two priorities, to which it was not entitled.[3]

§ 846. The right to the use of stored water.—After water has been once stored in reservoirs, it becomes personal property, and

1 Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395, where it was held that defendant's acquiescence in plaintiff's filling his reservoirs first, while the waters of the stream were sufficient to fill both reservoirs, did not estop the defendant from questioning plaintiff's right to priority. And the Court further held that where the water was sufficient for both, a right by one could not be gained by prescription.

2 Windsor Res. etc. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. Rep. 729.

3 See, also, Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266, wherein it is said: "The defendant having completed its reservoirs long before the time when plaintiff first began the work of construction of its reservoir, and having continually used them for a beneficial purpose, we think the District Court was clearly right in awarding to it priorities ahead of that of plaintiff."

may be sold, contracted for, and disposed of as such property.[1] It is protected in such reservoirs by the statutes of the various States, providing that the stealing of water from a canal, ditch, or other works is a criminal offense, and also providing for the punishment therefor.

Also, in the States which have advanced in the process of the construction of reservoirs for the storage of waters are to be found statutes regulating the distribution and the use of such waters. It is also provided that these stored waters may be conducted down the natural streams to the place of use under certain specific regulations and the supervision of the State officials. And while the water from the reservoir is passing down the stream it is provided that the headgates of all ditches taking out of such stream may be closed temporarily until the stored water passes to the place of its intended use. All this must be done, however, without injury to the vested rights of those entitled to the use of the waters of the regular flow of the stream. And in taking out the artificial increase of the flow of the stream it is provided usually that due allowance must be made for seepage and evaporation. These subjects, however, will be discussed when we come to a discussion of the statutes of the various States.[2]

[1] That water severed from the source of supply is personal property, see Secs. 773, 774.

[2] For reservoir rights of the various States, see Part XIV.

CHAPTER 47.

MILL AND POWER RIGHTS.

§ 847. Scope of chapter.
§ 848. The use of water for power purposes.
§ 849. Importance of subject.
§ 850. Who is to own and control the water power of the country.
§ 851. Recent action by States relative to power rights.
§ 852. The development and transmission of power for general distribution a public use.
§ 853. Right of a riparian owner at common law to make a reasonable use of the water for power purposes.
§ 854. Under common law—Non-riparian transmission of power.
§ 855. Use of water by appropriators for power purposes.

§ 847. Scope of chapter.—As we stated under a previous section, appropriations of water may be made for the purpose of power, light, and heat.[1] They may be also made for all mining and milling purposes.[2] In another portion we will discuss the right of eminent domain for power purposes.[3] The apportionment of the use of water between riparian owners for mill and other purposes will be discussed under the subject of the adjudication of water rights in equity.[4] We have incidentally discussed many of the features relating to the appropriation of waters for power, and, therefore, herein will only discuss those questions which have not been considered elsewhere.

§ 848. The use of water for power purposes.—There are many methods for the utilization of water for power purposes, but there are two general classifications which are recognized: First, the energy derived from falling water and transmitted by a shaft and belt to near-by machinery, where the power is consumed; and, second, the generation of electrical energy at the stream and its long-distance transmission to the place of use.

The first of these methods is the more primitive, and will be found in the small mills, factories, and plants located along the

1 See Sec. 695.
2 See Sec. 694.
3 See Secs. 1072, 1073.
4 See Chap. 78.

streams both in the Eastern and Western portions of this country, where the direct force of the current is applied to the machinery and thereby such mills or factories are run. The second classification of the long-distance transmission of electrical power is more modern, and has sprung into active operation within, comparatively speaking, the last few years. But in regard to the latter use, as said by President Taft in his message of January 14, 1910: "The development in electrical appliances for the conversion of the water power into electricity to be transmitted long distances has progressed so far that it is no longer problematical, but it is a certain inference that in the future the power of the water falling in the streams to a large extent will take the place of natural fuels."

§ 849. **Importance of subject.**—Although the United States and the respective States have regarded the development and use of electrical energy by means of water power in a somewhat indifferent manner, the importance of the subject can not be overestimated. Its development is still in its infancy, and during even the next decade great changes therein will be brought about.

No better statement can be made of the situation than was made by W. J. McGee, Secretary of the Section on Waters, in his report to the National Conservation Commission,[1] taking his data from those furnished by Mr. Marshall O. Leighton, Chief Hydrographer of the United States Geological Survey. Mr. McGee said: "The theoretical power of the streams is reckoned by Leighton at 230,000,000 horse-power. The amount now in use is computed by the census office at 5,350,000 horse-power, and the amount running over Government dams and not used is estimated by the chief of engineers at about 1,400,000 horse-power. The amount now available at a cost comparable with that of steam installation is estimated by the hydrographic branch of the Geological Survey at 37,000,000 horse-power, and the amount prospectively available at 75,000,000 to 150,000,000 horse-power. The 37,000,000 horse-power today available exceeds our entire mechanical power now in use, and would operate every mill, drive every spindle, propel every train and boat, and light every city, town, and village in the country. The nominal value is $20 per horse-power year; the price ranges up to

1 See Vol. 1, Report of the National Conservation Commission 1909, p. 41. See, also, p. 22.

$100 or $150. While the utilization of water power ranks among our most recent and most rapid industrial developments, little effort has been made to control catchment areas or storm waters in any large way for power development, though most plants effect control through reservoirs and structures. Nearly all of the freshet and flood water runs to waste, and the low waters, which limit the efficiency of power plants, are increasing in frequency and duration with the increasing flood run-off."[2]

§ 850. **Who is to own and control the water power of the country.**—There has been a great deal of discussion during the last few years as to who should own and control the water power of the country, that is to say, whether the ownership and control should be by the United States, the State, or by private corporations. Considerable agitation has been caused by recent utterances of prominent officials of the Government, and this agitation has been followed by some legislation. However, it is not our province in this work to discuss what the law ought to be, but what it is.

There is no question but that a transfer of sovereignty from the Federal Government to the States upon their admission to the Union includes the government and control and sovereignty over the water power in the rivers, with all other waters and rights to the same within the boundaries of the State.[1] The only possible exceptions to this are the rights that were owned by riparian proprietors within the territory covered by the State. And as we have discussed before upon the public domain of the United States, the Government is the riparian proprietor upon all streams, the lands adjoining which have not been granted to others. This right of the Government was recently recognized by President Taft in his message to Congress, under date of January 14, 1910, in which

2 See, also, the article on Undeveloped Water Power by Marshall O. Leighton, statistics in the article compiled by the Bureau of Census, Vol. 2 of the report of the National Conservation Commission 1909, p. 141.

See, also, the article by Marshall O. Leighton upon the subject "Undeveloped Water Power," p. 159, same report as last above.

See, also, article on Concentration of Ownership of Water Power by Herbert Knox Smith, Commissioner of Corporations, p. 171 of the same report as last above.

1 See United States v. Hansen, 167 Fed. Rep. 881; United States v. Burley, 172 Fed. Rep. 615.

he said: "With respect to the public land which lies along the streams offering opportunities to convert water power into transmissible electricity, another important phase of the public-land question is presented. There are valuable water-power sites through all the public-land States. The opinion is held that the transfer of sovereignty from the Federal Government to the Territorial governments as they become States includes the water power in the rivers, except so far as that is owned by riparian proprietors. I do not think it necessary to go into a discussion of this somewhat mooted question of law. It seems to me sufficient to say that the man who owns and controls the land along the stream from which the power is to be converted and transmitted owns land which is indispensable to the conversion and use of that power. I can not conceive how the power in streams flowing through public lands can be made available at all except by using the land itself as the site for the construction of the plant by which the power is generated and converted, and securing a right of way thereover for transmission lines. Under these conditions, if the Government owns the adjacent land—indeed, if the Government is the riparian owner—it may control the use of the water power by imposing proper conditions on the disposition of the land necessary in the creation and utilization of the water power. . . . In the disposition of the domain already granted, many water-power sites have come under absolute ownership, and may drift into one ownership, so that all the water power under private ownership shall be a monopoly. If, however, the water-power sites now owned by the Government—and there are enough of them—shall be disposed of to private persons for the investment of their capital in such a way as to prevent their union for purposes of monopoly with other water-power sites, and under conditions that shall limit the right of use to not exceeding fifty years, with proper means for determining a reasonable graduated rental, and with some equitable provision for fixing terms of renewal, it would seem entirely possible to prevent the absorption of these most useful lands by a power monopoly. As long as the Government retains control and can prevent their improper union with other plants, competition must be maintained and prices kept reasonable."

And in this connection we will say that the suggestion made by President Taft in the message above referred to was followed by

Congress in the Enabling Act for the admission of New Mexico and Arizona to Statehood,[2] in which Act it was provided: "There is hereby reserved to the United States and exempted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission, and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants, there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in Section 11 of this Act."

Also, by the Act of Congress, approved June 25, 1910,[3] it was provided that the Secretary of the Interior, in his discretion, might reserve from location, entry, sale, allotment, or other appropriation any lands within Indian reservations valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project theretofore or thereafter to be authorized by Congress. The Secretary of the Interior was also given the authority, after notice and hearing, to cancel any trust patents issued to Indian allotments within any Indian reservation for irrigation purposes.

By the Act of Congress of March 4, 1911, the Secretary of the Interior is authorized to grant a fifty-year easement for power development projects. This Act may be taken advantage of by persons previously holding revocable permits, as well as by those instituting new projects.

§ 851. Recent action by States relative to power rights.—But as to the other States which were admitted to the Union without

2 See Act approved June 20, 1910, Stat. of the United States, passed at the 2d Session of the 61st Congress, 1909-1910, Chap. 310, Secs. 10, 28.

3 See Laws of Congress, 61st Congress, 1910, 2d Session, Chap. 431, Secs. 13, 14.

any specific reservation by the Government of power sites, there is no question that such States upon their admission acquired full sovereignty, jurisdiction, and control over such sites.

And the legislatures of some of these States have recently enacted laws regulating and controlling the use of water for the generation of electricity or of electrical or other power and providing for the appropriation of such water for such purposes, and also providing that all appropriations of water or the use of water for the generation of electricity or electrical or other power shall be subject to the right of the State to regulate and fix the rights of compensation for which such electricity or electrical or other power may be sold, rented, or distributed, and also fixing the term of years during which any person, firm, association, or corporation may exercise the franchise for such purposes.[1]

Also, in the State of Oregon by the Act of 1909,[2] as supplemented by the Act of 1911,[3] the right is granted to any person, firm, or association to the right to the use of water for power development for a period of forty years from the date of the application, subject to a preference right of renewal, and also subject to a graduated scale of charges per horse-power for the right.[4]

§ 852. **The development and transmission of power for general distribution a public use.**—Although in the early history of power rights especially as relating to the generation and distribution of electrical energy the courts were somewhat loth to declare that such a use of the waters of a stream was a public use, the decisions are rapidly changing to hold that the use of water in generating electric energy and the use of lands for the stringing of poles and wires, in order to transmit such energy, is a public use, in the strict sense of the term. And in this connection it may be said that a public utility must be absolutely defined by the controlling conditions of the times. What is today private use may tomorrow be a public one. The term "public use" must readily adapt

1 For the various Acts for the generation of electrical power, see Part XIV.

For the California Act of 1911, see Stat. and Amendments 1911, p. 813; Kerr's Biennial Supp. Ann. 1911, p. 1468.

2 Lord's Oregon Laws, Secs. 6575-6580; Laws 1909, Chap. 221, p. 370.

3 Laws 1911, Chap. 236, p. 418.

4 For further discussion of the Oregon law upon the subject, see Part XIV, under Oregon.

itself to new demands and conditions imposed by the ever-increasing necessities of the general public and society. Today the distribution of electric energy is one of the foremost necessities of the general public, and is rapidly becoming more and more a public use. Already we have lines of railways whose cars are propelled by the electrical energy which is generated on some distant stream. The propulsion of trains over the great continental lines in this country is now in the process of development, and it will be but a few years before the coal and oil locomotives will be relegated to the scrap heap, and the trains pulled by the more modern electric engines. As the operation of railroads has for many years been held a public use, this shows how the development and transmission of electrical energy is becoming merged into one of the greatest public utilities known.

Again, take a power company organized for the purpose of furnishing light, heat, and power, to distant cities and towns and to the inhabitants thereof, and we often find that under the modern methods of electrical transmission a single company is able to transmit its energy to a distance of from five to six hundred miles from its generating plant upon the river, and this distance is rapidly becoming greater, and will progressively increase with the increase in efficiency of electrical transmission. No one would contend for a moment that such a use is not a public one, and that such a company is not a public service company.[1]

Of course, upon the other hand, we can readily see that where an individual or a company uses the water of a stream to develop electrical energy for use upon their respective individual properties and without the general distribution of the energy to the public, that it might be contended that this was strictly a private use, and not a public one. However, in a recent case arising in Utah, decided by the Supreme Court of the United States,[2] it was held that a mining company might condemn a right of way across private land for the purpose of the erection of an aerial bucket line of the mining company and for its own private use where the same was

1 For public service corporations and companies, see Chap. 76.

For eminent domain for the purpose of developing and transmitting power, see Sec. 1072.

2 Strickley v. Highland Boy Min. Co., 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301, 4 Am. & Eng. Ann. Cas. 1174.

authorized by the statutes of the State, and that the granting of the right was not contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.[3] Therefore it may be said that the use of water for the development and transmission of electricity in all cases, at least where the same is for distribution to others than the owners of the generating plant, is a public use.[4] This subject, however, will be discussed more at length in the chapter devoted to the question of eminent domain.[5]

§ 853. Right of a riparian owner at common law to make a reasonable use of the water for power purposes.—In the early history of the Government and in fact in the early history of the common law, it has always been held that a mill owner upon the banks of a stream had the right to make a reasonable use of the water for power purposes, after taking into consideration the relative or correlative rights of the other riparian owners upon the same stream. In a previous section of this work, we have discussed what is a reasonable use of the water by riparian owners for power purposes.[1] And in this connection it may be said that in the early history of this country, especially in New England, certain mill rights were granted which are commonly termed the "New England Mill Acts," which granted to the owners of mills upon the banks of streams certain rights, which without such statutes would have been deemed extraordinary or rights in excess of the common law rule relative to such use of the water. For instance, the right was granted under these Mill Acts to flood lands of others by damming the stream and holding back the water. To be sure, the actual land taken had to be paid for by the mill owner, but the granting of

3 See, also, Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Am. & Eng. Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

4 The taking of land for a right of way for a ditch and flume to convey water used in furnishing electricity to the public generally or to all persons within reach for lighting, power, and heating purposes is a public use. Walker v. Shasta Power Co., 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725.

See, also, Rockingham etc. Power Co. v. Hobbs, 72 N. H. 531, 58 Atl. Rep. 46, 66 L. R. A. 581; Brown v. Gerald, 100 Me. 351, 61 Atl. Rep. 785, 109 Am. St. Rep. 526, 70 L. R. A. 472.

5 For eminent domain, see Chap. 55, Secs. 1059-1098.

1 See Sec. 492.

such right was somewhat an extraordinary one. This subject, however, will be more fully discussed when we come to the chapter upon the question of eminent domain.[2]

In a leading case decided by the Supreme Court of Minnesota,[3] the question of reasonable use for mill purposes was discussed and defined in language which meets our approval. Upon this subject the Court said: "The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian owner. What constitutes a reasonable use is not a question of law, but of fact, to be determined by the jury or the Court from all the circumstances of the case. But, like any other finding of fact, it is subject to review, and will be set aside if against the evidence or not supported by it. In determining what is a reasonable use, regard must be had to the subject-matter of the use; the occasion and manner of its application; the object, extent, necessity, and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases; and all the other and ever-varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration."[4]

Outside of domestic uses the early common law cases had to

2 For eminent domain, see Chap. 55, Secs. 1072, 1073.

3 Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. Rep. 167, 44 Am. Rep. 194.

4 See, also, Hayes v. Waldron, 44 N. H. 584, 84 Am. Dec. 105; O'Riley v. McChesney, 49 N. Y. 672; Prentice v. Geiger, 74 N. Y. 341, 9 Hun, 350; Merritt v. Brinkerhoff, 7 Johns. R. 306; Snow v. Parsons, 28 Vt. 450, 67 Am. Dec. 723; Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573; Hetrich v. Deachler, 6 Pa. St. 32; Thurber v. Martin, 2 Gray 394, 61 Am. Dec. 468; Gould v. Boston Duck Co., 13 Gray 442, 79 Mass. 442; Angell on Water Courses, Sec. 140d; Cary v. Daniels, 8 Metc. 466, 41 Am. Dec. 532; Pitts v. Lancaster Mills, 54 Mass. 13 Metc. 156; Corse v. Dexter, 202 Mass. 31, 88 N. E. Rep. 332; Timm v. Bear, 29 Wis. 254; Mentone v. Redlands etc. Co., 155 Cal. 223, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Barrett v. Parsons, 10 Cush. (Mass.) 367; Pollitz v. Long, 58 Barb. 20.

deal chiefly with the mill or direct power rights claimed by the various riparian owners upon the streams. These rights of riparian owners to use the water of the streams upon which their lands adjoin have been brought to the Western part of this country in those States wherein the common law of riparian rights is in force and it may be said that in this portion of the country the use of the water for this purpose is practically the same as defined in the earlier common law decisions of New England and in the Eastern States.[5] And, in this connection it may be said that one of the most invariable rules is that, after the water has been used for the propulsion of machinery by one owner, it must be returned to the natural stream undiminished in quantity[6] and undeteriorated in quality,[7] for the use of the other riparian proprietors upon the same stream. A riparian proprietor has the right to maintain obstructions across navigable streams of a State for the development of power, if he does not materially affect its use as a highway, during the season when it may be so used in its natural condition. But if such obstructions prevent the use of the stream for navigation or for the driving of logs, they may be prevented.[8]

§ 854. Under common law—Non-riparian transmission of power.—Although the cases are few upon the subject, the question has arisen as to whether or not a riparian owner who developed electric energy upon the banks of the stream had the right to transmit the same to distant and non-riparian lands for use there. It must be borne in mind that the actual use of the water by such riparian proprietor is made at or near the stream to which his land is riparian. Hence, it follows that, under the general rule of

5 That the use of the water of the streams is permissible for power purposes in the Western States, see Kalama El. etc. Co. v. Kalama Driving Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R. A., N. S., 641, 135 Am. St. Rep. 948; Trullinger v. Howe, 53 Ore. 219, 97 Pac. Rep. 549, 99 Pac. Rep. 880, 22 L. R. A., N. S., 545; Mentone etc. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

6 For the return of water to the stream, see Secs. 496, 522.

7 For the pollution of waters, see Secs. 1129-1147.

8 Kalama etc. Co. v. Kalama Driving Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R. A., N. S., 641, 125 Am. St. Rep. 948; Trullinger v. Howe, 53 Ore. 219, 97 Pac. Rep. 549, 99 Pac. Rep. 880, 22 L. R. A., N. S., 545.

For the protection of navigation, see Chap. 16, Secs. 341-357.

law, a riparian owner may make a reasonable use of the water of the stream upon his riparian land, taking into consideration the rights of the other riparian owners upon the same stream. And in this connection it must be remembered that the water itself is not conveyed away from the riparian lands but it is only the electrical energy or power which is so transmitted. The cases are very few upon this particular phase of the subject, but the Supreme Court of California had a recent occasion to decide this question. And in that case[1] it was held that the owner of riparian land has the right to use the water either in its natural course on his land for the generation of electric power, or, if it is more convenient, he has the right to turn the water out of its natural channel at the upper end of his land and carry it in an artificial channel over the land and use it for the generation of such power, although the power is carried away and used on the non-riparian lands of others, provided that he turns all the water back into the stream, without unduly interfering or injuring the rights of those below. And, upon the point under discussion, the Court said: "The electricity generated at the power house by the use of water from the pipe is carried away to Redlands and other places not on the stream, and there used for light, heat, and power. The plaintiff makes the novel proposition that the use of the water to generate electric power by means of a power house situated on riparian land is not a use within the scope of the riparian rights which attach to the land, unless the electric power is not only generated upon that land, but is also applied and used within its confines. There is no merit in this proposition. The riparian owner, by reason of the situation of his land on the stream, has the right to make any use beneficial to himself on the riparian land which his situation enables him to make, except that, if his use involves a consumption of water, he may not use more than his reasonable share as compared with other riparian owners, and that he must not pollute the water to the injury of others entitled to it, and that the water he does not consume must be returned to the stream before it passes his land.[2] There may be other qualifications of

1 Mentone Irr. Co. v. Redlands El. L. & P. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

2 Citing Gould on Waters, Secs. 204, 208, 213; 2 Farnham on Waters, Sec. 495, p. 1645; Sec. 471, p. 1591; Secs. 475, 476; Gould v. Eaton, 111 Cal.

his right, but they do not affect the present question. The use of water in its passage through his land to operate a power plant thereon is as clearly within his rights as is his right to operate a mill thereon with which to grind grain, or to operate any other machinery, than which there is no more ancient or well-established feature of riparian rights. The theory of the plaintiff on this point would seem to come to this: That in the process the water is in some way transformed into electricity, and in that form is carried away and used on non-riparian land. If this were correct, perhaps the use would not be included in the riparian right, and perhaps even a prior appropriator below could prevent such use if it worked injury to his right. But no such thing occurs. The water is not changed into electricity, nor carried away by the process. It is not the water that becomes electricity. It is the force of gravity, the weight of water, which turns the wheels, and, being converted into electric power, is carried away on the wires, the water itself being turned back into the stream, precisely as in the case of its use to turn an ordinary mill wheel. The power company, being the owner of the riparian land, has the full right to use the water in its natural course on its land for that purpose."

§ 855. **Use of water by appropriators for power purposes.**—As we discussed in previous sections the use of water for power purposes is among the beneficial uses for which water may be appropriated under the Arid Region Doctrine of appropriation.[1] But, as is the case with all uses of water where the appropriation is for some purpose which does not consume the water, it must be returned to the stream in order that other appropriators may also receive its benefits. The general rule is that all water which is not actually consumed by the use for which it is appropriated is subject to other

639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; *Id.*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

1 See Secs. 694-696.

See, also, that the generation of electricity for light, heat, and power is a beneficial use, for which an appropriation can be made, Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365; Tompson v. Pennebaker, 173 Fed. Rep. 849, 97 C. C. A. 591; Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289; Cascade etc. Co. v. Empire etc. Co., 181 Fed. Rep. 1011; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

For the appropriation of water for power, light, and heat, see Sec. 695.

and subsequent appropriations.[2] It is also the general rule that where water has been appropriated for power purposes, where very little, if any, is actually consumed, the appropriator can not change the nature of the use in any manner where it will require a greater quantity of water or a greater draft upon the flow of the stream, and where the vested rights of others would be injuriously affected thereby. This subject, however, has been discussed in other sections of this work and no further argument need be made here.[3]

2 For rights of subsequent appropriators, see Secs. 783-789.

3 For changes which may be made, see Chap. 48, Secs. 856-873.

For changes of the use of the water, see Secs. 869-872.

CHAPTER 48.

CHANGES WHICH MAY BE MADE.

§ 856. Scope of chapter—Changes in general.
§ 857. Point of diversion may be changed.
§ 858. Point of diversion—Effect of change—Others must not be injured.
§ 859. Changes in dams—Flooding lands.
§ 860. Changes in location of ditch or canal.
§ 861. Changes in the character of the works for conveying the water—As against the rights of the land owner.
§ 862. Changes in the character of works for conveying the water—As against the rights of the ditch owner.
§ 863. Changes in the mode of collecting the water.
§ 864. Changing the channel of a stream—Changing back.
§ 865. Changes in time of diversion.
§ 866. Change of water from one watershed to another.
§ 867. Changes of place of use—May be made where no injury is done the rights of others.
§ 868. Changes in place of use—Can not be made where injury is done to the rights of others.
§ 869. The change in the use of the water appropriated.
§ 870. Change in the use of water—What changes may be made.
§ 871. Changes in the use and the place of use—Statutes authorizing and restricting.
§ 872. Changes on sale—Rights of the purchasers.
§ 873. The nature and extent of injuries to others which will prevent changes.

§ 856. Scope of chapter—Changes in general.—In the taking of the first steps of an appropriation, it sometimes happens that the appropriator can not always make his plans with sufficient definiteness so that afterward it is necessary to make changes. Again, it often happens that the channel of the stream from which he takes the water changes, and other changes are made, due to natural causes; and hence this necessitates a change in the works of the appropriator. These changes are quite numerous and will be discussed in this chapter in detail. Among them may be named the right to change the point of diversion,[1] the location of the ditch or canal,[2] the changes necessarily due to the shifting in the channel

1 See Secs. 857-859. 2 See Sec. 860.

of the natural stream,[3] the change of the water from one watershed to another,[4] of the place of use,[5] in the application of the water from one use to another,[6] of the manner of use, and the time of diversion and other changes which may be made by the appropriator.

In general, it may be said that any change in the point of diversion, location of the ditch or canal, the use of the water, and its application, may be made by an appropriator, provided that the rights of others are not materially impaired or injured. But, on the other hand, as said by the Colorado Court in a recent case:[7] "An appropriator of water for irrigation may not change the place of use, the point of diversion, the character of the use, or make an enlarged use of his original appropriation, to the prejudice of the rights of the other appropriators from the same source of supply after their rights have attached."[8]

And in general it may be said that any change for any purpose by one appropriator which injures the vested rights of others either prior or subsequent to the date of his right can not be made. And in the statutes relating to this subject it is always provided that the change may be made if others are not injured thereby. And the courts in construing these statutes have always held that the converse of the proposition was also true, to the effect that the change could not be made if the rights of others were materially injured by such change.

3 See Sec. 864.

4 See Sec. 866.

5 See Secs. 866-868.

6 See Secs. 870-872.

7 Diez v. Hartbauer, 46 Colo. 599, 105 Pac. Rep. 868.

8 See, also, Vogel v. Minnesota etc. Co., 47 Colo. 543, 107 Pac. Rep. 1108; Windsor etc. Co. v. Hoffman etc. Co., 48 Colo. 82, 109 Pac. Rep. 422; Windsor etc. Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. Rep. 729; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Santa Paula etc. Works v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Nevada etc. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Higgins v. Baker, 42 Cal. 233, 7 Morr. Min. Rep. 525; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Davis v. Chamberlin, 51 Ore. 304, 98 Pac. Rep. 154; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

§ 857. **Point of diversion may be changed.**—It often happens that where an appropriation has been legally made, owing to the fall of the land or to some other physical condition of the country, or in order to more easily divert the water, or, again, by the construction of a new ditch or canal higher up, in order to bring more land under cultivation,[1] that the appropriator desires to change his point of diversion of the water from the natural stream. This change can be made only upon certain conditions. The law is settled beyond all question that where an appropriation has been once legally consummated,[2] or before the consummation of the right, for that matter, and the appropriator is entitled to the use of a certain quantity of the water flowing in a natural stream, he may originally take out the same at any point on the stream that he may see fit, if the vested rights of others are not injured thereby.[3] Again, under the same limitation he may change his point of diversion at pleasure, provided in so doing the rights of others, either prior or subsequent in time to him, are not materially injured by the change. The authorities upon the subject hold that, in all changes of this nature the effect of the change upon the rights of others which have vested at the time is the controlling consideration, and that, in the absence of any injurious consequences to the rights of others, any change an appropriator desires to make is legal and proper.[4] The use to which the water is applied makes no difference as to the right to change the point of diversion, so long as the rights of others are not injured.[5] This right is usually pro-

1 For the right to change the ditch or canal, see Secs. 860, 861.

2 For the consummation of an appropriation, see Secs. 728, 752.

3 For diversion of the water, see Secs. 722, 723.

4 Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Anderson v. Bassman, 140 Fed. Rep. 14, both citing Kinney on Irr., 1st Ed., Sec. 248.

See, also, Handy D. Co. v. Louden Irr. Canal Co., 27 Colo. 515, 62 Pac. Rep. 847, citing Kinney on Irr., 1st Ed., Secs. 175, 231, 248.

5 Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252.

Alaska.

Miocene D. Co. v. Campion M. Co., 3 Alaska 572.

Arizona.

"The circumstances under which Gould changed his mode of diversion by taking water from the Maricopa Canal instead of the Wilson ditch can not be held to have been an interruption of his original right of appropriation. We know of no provision of law by which a right of appro-

priation may be thus lost." Gould v. Maricopa C. Co., 8 Ariz. 429, 76 Pac. Rep. 598.

See, also, Miller v. Douglass, 7 Ariz. 41, 60 Pac. Rep. 722.

California.

A person entitled to divert a given quantity of water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change. Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

See, also, Civil Code of California, Secs. 1412, 1415.

For other California cases, see Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Nevada etc. Co. v. Kidd, 37 Cal. 282; Junkans v. Bergen, 67 Cal. 267, 7 Pac. Rep. 684; Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Ramelli v. Irish, 96 Cal. 214, 31 Pac. Rep. 41; Gallagher v. Montecito W. Co., 101 Cal. 245, 35 Pac. Rep. 770; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 42 Am. St. Rep. 195; Santa Paula etc. Co. v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Byers v. Colonial etc. Co., 134 Cal. 553, 66 Pac. Rep. 732; Craig v. Crafton etc. Co., 141 Cal. 178, 74 Pac. Rep. 762; Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

Colorado.

The right to change the point of diversion of water which has been obtained as the result of an appropriation is one of the incidents of ownership, and existed and was exercised in this State independent of statute, and the only limitation is that the rights of others must not be infringed. Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483.

For Colorado statutes providing for change of point of diversion, see Chap. 87. See, also, Sess. Laws 1899, p. 235, Chap. 105.

For other Colorado cases see New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Strickler v. Colorado Sprs., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Fuller v. Swan etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Knowles v. Clear Cr. etc. Co., 18 Colo. 209, 32 Pac. Rep. 279; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Baer Bros. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; City of Telluride v. Davis, 33 Colo. 355, 80 Pac. Rep. 1051, 108 Am. St. Rep. 101; Robertson v. Wilmoth, 40 Colo. 74, 90 Pac. Rep. 95; Crippen v. Glasgow, 38 Colo. 104, 87 Pac. Rep. 1073; New Cache etc. Co. v. Arthur etc. Co., 37 Colo. 530, 87 Pac. Rep. 799; Hallett v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317; Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469; New Cache La Poudre etc. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781; Cache La Poudre etc. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Fort Lyon C.

Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Wyatt v. Larimer etc. Co., 1 Colo. App. 480, 29 Pac. Rep. 906; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Thomas v. Guiraud, 6 Colo. 530; Coffin v. Left Hand D. Co., 6 Colo. 443; Fulton Irr. D. Co. v. Meadow Island Irr. Co., 35 Colo. 558, 86 Pac. 748; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. Rep. 868; Vogel v. Minnesota etc. Co., 47 Colo. 543, 107 Pac. Rep. 1108.

Hawaii.

Peck v. Bailey, 8 Hawn. 658.

Idaho.

The person entitled to the use may change the place of diversion if others are not injured by such change. Rev. Stat., Idaho, 1908, Sec. 3157.

See, also, Hard v. Boise City etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907; Walker v. McGinnis, 8 Idaho 540, 69 Pac. Rep. 1003.

A person entitled to the use of water may change the point of its diversion, provided, always, other parties are not injured thereby. Even in the absence of statutory declaration, the rule would be the same. Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222.

See, also, Rev. Codes, Mont., 1907, Sec. 4842.

Montana.

For other Montana cases, see Columbia M. Co. v. Holter, 1 Mont. 296; Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Alder Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Carlson v. City of Helena, 43 Mont. 1, 114 Pac. Rep. 110.

Nebraska.

Farmers' etc. Co. v. Gothenberg etc. Co., 73 Neb. 223, 102 N. W. Rep. 487.

See, also, Nebraska Comp. Laws, 1905, Sec. 6403.

New Mexico.

Sess. Laws, 1905, p. 270.

Nevada.

Hobart v. Wicks, 15 Nev. 418; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213.

Oklahoma.

See Sess. Laws 1905, p. 274, Sec. 10.

Oregon.

A prior appropriator of water for a beneficial use from a stream or other natural source of supply may change the point of diversion so long as it does not prejudice the rights of subsequent claimants. Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200. Tolman v. Casey, 15 Ore. 83, 13 Pac. Rep. 669; Bolter v. Garrett, 44 Ore. 304, 75 Pac. Rep. 142; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Cole v. Logan, 24 Ore. 204, 33 Pac. Rep. 568; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Glaze v. Frost, 44 Ore. 29, 74 Pac. Rep. 336; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

But the place of diversion can not be changed if it prejudices the rights of other appropriators. Hough v. Porter, 50 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

South Dakota.

See Sess. Laws 1905, p. 201, Sec. 48.

Utah.

Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672; *Id.*, 25 Utah 441, 71 Pac. Rep. 1062, 61 L. R. A. 648; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac.

vided for by the statutes of the various States.[6] In Colorado a regular proceeding is provided for by an action brought in the District Court, and in each case if the change is allowed a decree must be entered to that effect. As this law is local in character, it will be discussed under the laws of Colorado.[7] However, the statute is held by the Court to be purely remedial, and the right to make the change exists as one of the incidents of ownership and independent of the statute.[8] In some of the recent Irrigation Codes, enacted in some of the States, before a change in the point of diversion can be made the appropriator must apply to the State engineer for a permit for that purpose, which, after due notice to the parties liable to be affected thereby, may or may not be allowed. We will discuss this phase of the subject in our chapter on the laws of State Control.[9]

In all the States it may be said that the change in the point of diversion may be made, and such change will not affect the priority of right,[10] and neither does it affect the quantity of water which the appropriator is entitled to under the extent of his appropriation.[11] But where the statute of a State prescribes a mode of procedure for making the change, it must be complied with.[12] The rule as to the right to change the point of diversion

Rep. 567, 41 L. R. A. 311, 67 Am. St. Rep. 634.

Wyoming.

Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

The place of diversion of appropriated water may be changed if it can be done without injury to subsequent appropriators. Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

See Sess. Laws 1905, p. 147.

6 See citations to statutes above.

See, also, for the statutes of the various States on the subject, Part XIV.

7 See Mills' Ann. Stat., 2d Ed., Secs. 2273d *et seq.*

See, also, laws of Colorado, Chap. 87.

8 Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483; New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781; Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060.

9 See Secs. 1337-1367.

10 See cases cited *supra.*

Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

11 See cases cited *supra.*

Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725.

12 "The interests of the State and the protection of its rights require that Sess. Laws 1899, p. 235, prescribing the procedure necessary to the exercise of the right to change the point of diversion of irrigating water, should be enforced." New Cache La Poudre etc. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781.

See, also, Sec. 871.

is the same for subterranean waters as it is for the water of natural streams. And one having the right to take a definite quantity of water from a basin of permeable material saturated therewith, and not composing a part of any stream, may change his place of diversion, so long as the total amount of water taken is not thereby increased.[13] Again, a secondary appropriation may be made of the same water for power purposes, where it does not interfere with the rights of the prior appropriator.[14] Therefore, a decree conferring upon a power company a secondary use of the water of a river so long as the prior appropriator "shall continue to divert its water at its present point of diversion, and to use the same at its present place of use," does not prevent the prior appropriator from thereafterwards changing the point of diversion, the decree only dealing with the present place of diversion.[15] A consumer of water who takes it from a canal company has also the right to change his point of diversion, and his right in this respect is that of an appropriator.[16] An appropriator may also have more than one point of diversion, taking the water sometimes from one and sometimes from the other.[17]

§ 858. Point of diversion—Effect of change—Others must not be injured.—In the preceding section we stated that any change in the point of diversion might be made which did not injuriously affect the rights of others.[1]

Upon the other hand, one entitled to divert a quantity of water from a stream can not change his point of diversion if by such change the vested rights of others are materially injured.[2] This

13 Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331, where it is held that new artesian wells sunk in an artesian basin constituted a mere change of the place of diversion, and others who were entitled to the waters of the basin could not complain unless their rights were injured.

See, also, Vineland etc. Co. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820.

For rights in subterranean waters, see Secs. 1148-1152.

14 See Secs. 783-785, 855.

15 Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672; *Id.*, 25 Utah 441, 71 Pac. Rep. 1062, 61 L. R. A. 648.

16 Knowles v. Clear Creek etc. Co., 18 Colo. 209, 32 Pac. Rep. 279.

For rights of canal companies, see Chaps. 72-77.

17 Hobart v. Wicks, 15 Nev. 418, 2 Morr. Min. Rep. 1.

1 See Sec. 857, and cases cited.

2 Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; Nevada

is true both as to the rights of the prior appropriator,[3] and also as to the rights of the subsequent appropriator. The subsequent appropriator has a vested right as against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation, and if the change of the place of diversion by the senior interferes with or changes those conditions to the prejudice of a subsequent appropriator, an action will lie to prevent the change.[4] As was said in a recent Montana case:[5] "But though

W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Columbia M. Co. v. Holter, 1 Mont. 296, 2 Morr. Min. Rep. 14; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Handy D. Co. v. Louden, 27 Colo. 515, 62 Pac. Rep. 847, citing Kinney on Irr., 1st Ed., Secs. 175, 231, 248. Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Walker v. McGinnis, 8 Idaho 540, 69 Pac. Rep. 1003; Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. Rep. 1108; Montpelier etc. Co. v. Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Hill v. Standard Min. Co., 12 Idaho 23, 85 Pac. Rep. 907.

"The fact that the appellant was the owner of 128 shares of stock in the Montpelier Irrigation Company, an appropriator of water prior in time to that of the respondent, did not give the appellant the right to change the point of diversion of the Montpelier Irrigation Company to a point above the point of diversion of the respondent, if such change resulted in injury to the respondent." Montpelier etc. Co. v. Montpelier, 19 Idaho 212, 113 Pac. Rep. 475.

[3] For rights of the prior appropriator, see Secs. 776-782.

"The right to change the point of diversion existed before the statute and has always been recognized in this State. It is a property right. . . . But it is a *qualified* right, and has always been made subject to the condition or provision that it can be exercised only in case it appears that such change will not impair or injuriously affect the vested rights of others." Monte Vista Canal Co. v. Centennial Irr. D. Co., —— Colo. App. ——, 123 Pac. Rep. 831, citing Union Colony *et al.* v. Elliott, 5 Colo. 371; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Wadsworth Ditch Co. *et al.* v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; New Cache La Poudre Irr. Co. v. Water Supply & Storage Co., 29 Colo. 469, 68 Pac. Rep. 781; Lower Latham Ditch Co. *et al.* v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483; Vogel *et al.* v. Minnesota Canal Co. *et al.*, 47 Colo. 534, 107 Pac. Rep. 1108; Fuller *et al.* v. Swan River Placer Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252.

[4] "If the appellant was the only appropriator, it would have the right to change the point of diversion or place of use of the water as frequently as desired, because there would be none having rights which might be affected; but when a subsequent appropriator makes his diversion, he acts under the belief that the water appropriated by his senior will

he may change the point of diversion or may use it for other purposes, his right to do so is subject to the well-settled rule that the change may not affect injuriously the rights of subsequent appropriators."[6]

As to whether or not an appropriator may change his point of diversion depends upon the facts of each particular case, and that, too, whether his rights are prior or subsequent in time.[7] And as said in a recent Colorado case:[8] "One who seeks to have made a change in the point of diversion of his ditch should make it appear to the Court that the same will not injuriously affect the vested rights of others, although in a sense this may involve proof of a negative."[9]

The right to change is not absolute, and should not be allowed where the owners of another ditch would be injuriously affected thereby, in case it is impossible to make such conditions as would

continue to be used as it was at the time of the making of the appropriation of the junior. So a subsequent appropriator has a vested right as against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation." Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265.

For the rights of subsequent appropriators, see Secs. 783-789.

See, also, Handy D. Co. v. Louden C. Co., 27 Colo. 515, 62 Pac. Rep. 847; Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485; Butte Table etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820; Fuller v. Swan etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Cache La Poudre etc. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525; Junkans v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430; Walker v. McGinnis, 8 Idaho 540, 69 Pac. Rep. 1003; Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907; Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626.

[5] Featherman v. Hennessey, 43 Mont. 310, 115 Pac. Rep. 983.

[6] Citing Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222; Kinney on Irr., 1st Ed., Sec. 234.

[7] Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. Rep. 1108.

[8] New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 111 Pac. Rep. 610.

[9] See, also, Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. Rep. 1108; Bowman v. Virdin, 40 Colo. 247, 90 Pac. Rep. 506.

obviate the injury.[10] Nor can an appropriator make such a change in the point of diversion which will injuriously affect the rights of riparian proprietors which have vested since the appropriation was made.[11] But it is held that an appropriator entitled to a certain amount of water may change the place of diversion, even upon the servient tenement, when others are not injured by the change.[12] However, without the consent of the owner of the servient estate, as we view the law, the only correct method is by condemnation proceedings.[13] Again, where the change of the point of diversion is to the land of another, the right must be acquired in some legal method.[14] However, where an appropriator committed an actual trespass by entering the inclosure of another to change his point of diversion, and continued so to divert the water for six years, the owner was held to be estopped by acquiescence from denying the appropriator's right on the ground that he was a trespasser.[15]

§ 859. Changes in dams—Flooding lands.—An appropriator may change the dimensions of his dam or raise the height thereof

10 Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

11 McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

12 San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Miller v. Douglass, 7 Ariz. 41, 60 Pac. Rep. 722; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

13 For condemnation proceedings, see Secs. 1092-1097.

14 For rights of way, see Secs. 927-993.

As to lands other than those subject to his easement, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights. Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

See, also, McGuire v. Brown, 106 Cal. 660, 39 Pac. Rep. 1036, 30 L. R. A. 334; Vogel v. Minnesota etc. Co., 47 Colo. 534, 107 Pac. Rep. 1108; Snyder v. Colo. etc. Co., 181 Fed. Rep. 62, 104 C. C. A. 136; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381.

Where an appropriator has a right merely to divert at a certain point on defendants' land water from a stream and conduct it by a certain route over such land the fact that defendants will not be injured by his so diverting it at a different point on their land and conducting it by a different route and a different means, does not entitle him to make the change, though, through the elements, a diversion at the original point and the conducting of the water by the original route and means were rendered impossible. White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 Pac. Rep. 497.

15 Miller v. Douglass, 7 Ariz. 41, 60 Pac. Rep. 722.

See, also, Crescent etc. Co. v. Montgomery, 143 Cal. 248, 76 Pac. Rep. 1032, 65 L. R. A. 640.

as he sees fit, so long as the rights to the water of a stream acquired by others are not affected or injured thereby, or so long as the lands owned by others are not flooded or injured by the back water caused by the changed dimensions of the dam,[1] or the rights of others injured.[2]

But, upon the other hand, an appropriator who, by means of a dam of certain dimensions, has diverted a certain portion of the waters of a stream sufficient for his purpose, according to the condition and height of the stream at the time of making his appropriation, can not change his dam by raising the height thereof, if such alterations interfere with the rights of appropriators. This is held to be the rule even where the stream changes from natural causes or becomes filled with mud and silt.[3] Where the facts were that a party first appropriated a portion of the waters of a certain stream at a given point, and diverted and enjoyed the water by means of a dam of a certain height, from these facts alone no legal presumption arises that the right was also acquired at the time of the appropriation to take the water out either by moving his dam to a point higher up the stream, or to build his dam higher, so that the back water would injure the rights of other appropriators, either subsequent or prior in time to his right to the water. On the contrary, the legal presumption from these facts alone would rather be that his right to the use of the water was no more extensive than his present enjoyment, if such change interfered with the vested rights of others. The fact that subsequent changes occurring in the bed of the stream render it impossible to longer divert the water at the point chosen, without raising the dam, can make no difference if the rights of others were injured by the change. Whatever water in the stream was left unappropriated at the time the first made his appropriation was open to appropriation by subsequent parties.[4] And if they, by lawful subsequent appropriations, acquired the right to use a certain amount of the

1 Seaweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963.

2 Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985.

3 Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Ramsey v. Chandler, 3 Cal. 90, 4 Morr. Min. Rep. 240; Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161; O'Keefe v. Cunningham, 9 Cal. 581; Jones v. Jackson, 9 Cal. 237.

4 For the rights of subsequent appropriators, see Secs. 783-789.

water of the stream for any purpose, according to the condition that the stream was then in, the first appropriator, in spite of his priority, is not authorized, by erecting a higher dam, to interfere with or injure those rights. Such, also, is the case relative to the flooding of lands along the stream which were acquired subsequent to the first appropriation. And, again, the same rule applies where the stream was caused to rise through the acts of others in filling the channel with debris.[5] The prior appropriator may have legal remedies against the parties who filled up the stream and thereby destroyed the use of the water right he had acquired, but the remedy is not by building his dam higher, and thereby destroying the property and rights of other parties who have acquired rights upon the stream above, subject only to the rights of the first appropriator, whatever they were, as they then existed at the time of his appropriation, and which parties were entirely innocent of the injury to the rights of the first appropriator.[6] If this was the law, its exercise might lead to the flooding of a large part of the country above the dam, to the irreparable injury of those owning lands where they would be affected by the back water from the changed dam.

§ 860. **Changes in location of ditch or canal**—In the change of the point of diversion of the water from a natural stream it necessarily follows in most cases that there must also be a change in the location of the ditch or canal of the appropriator. There must be some new means of conveying the water from the new point of diversion.[1] There are many cases, however, where the new ditch takes its water from an old ditch, the point of diversion of which is not disturbed. In general, subject to the same limitation that applies in the change of the point of diversion, an appropriator may change the locality of his ditch or canal without his rights being affected thereby, provided, always, that the rights of others are not injured by the change.[2] And as far as his right to

5 For rights in debris cases, see Secs. 1136, 1141.

6 Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253.

For injuries from flooding lands, see Chap. 83.

1 For change in point of diversion, see Sec. 857.

2 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278, where it was held that an appropriator could secure an adjudication of his priorities through any substituted ditch, instead of his

the water is concerned, the fact that a party has changed the head of a ditch to a point higher up the stream, or that he built a new ditch to carry the water of a former appropriation, does not affect his right to such water.[3] Subject to the same limitations, changes may also be made during the course of construction of an original ditch, and the original surveyed line of the ditch be departed from where it is found necessary.[4] Cases of this kind occur where the line of ditch is upon the land of the appropriator, upon the public lands, or upon the lands of another whose consent is obtained therefor.

But when the change is attempted upon the lands of another, who refuses to give his consent thereto, we come to another question, and although the right to the change is often granted in these cases, the necessity for the same must be apparent and the right to make the change must be acquired in some manner known to law. An appropriator can not go upon the lands of another through which his old ditch may run and through which he has a right of way for that purpose where the ditch is located only, and without first obtaining the consent of the owner, arbitrarily change the line of the ditch to some other. He can not do this any more than he could have originally gone upon the lands of the other and thus secured his right of way and constructed his old ditch, without first securing a legal right to do the same.[5] A right of way for a ditch

original ditch, if he desires so to do, and that the abandonment of an old ditch was not an abandonment of the water right where he continued to use the water.

For abandonment, see Secs. 1100-1117.

See, also, Lilioukalani v. Pang Sam, 5 Hawn. 13; Peck v. Bailey, 8 Hawn. 658; Higgins v. Baker, 42 Cal. 233.

In a proceeding for change of water rights from one ditch to another, the Court should ascertain the volume of petitioners' right in cubic feet per second, but should not determine the duration of petitioners' use, unless such duration necessarily resulted in an enlarged use. Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

3 Greer v. Heiser, 16 Colo. 606, 26 Pac. Rep. 770.

4 Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522.

5 For securing a right of way against the consent of the owner, see Secs. 1075-1086.

For the change in the character of the means of conveyance, see Secs. 861-863.

The privilege of changing the point of diversion does not extend to making new ditches on land lawfully held under a homestead claim. McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384.

or canal over the lands of others is an easement.[6] And when the ditch or canal is once constructed, it is well settled that the owner of the easement, against the consent of the owner of the fee, can not arbitrarily change the location of the ditch or materially increase the burden upon the servient estate, or injuriously affect the rights of the owner thereof.[7] The granting of a right of way over one portion of a person's land gives the grantee no right over any other portion.[8] And an indefinite easement for this purpose upon the construction and use of the ditch becomes fixed and definite as to its location.[9] And after this no change in the location can be made without the consent of the owner by prescription, which, of course, presupposes a grant or consent, or by some other legal method. As was said in a recent Washington case:[10] "The alteration by the action of the elements of the physical conditions so as to make the enjoyment of the easement impossible or more difficult was appellant's misfortune as an impairment of its property, just

6 See Secs. 991-993.

7 It is entirely immaterial in this connection that the new line was only from 1 to 20 feet distant from the old line. It was upon the property of the plaintiff, over which defendants had no right whatever; and the principle is the same as if the new line had been hundreds of feet away from the old one. Vestal v. Young, 147 Cal. 715, 721, 82 Pac. Rep. 381, 383.

See, also, Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. Rep. 69; Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422.

8 See Jagui v. Johnson, 27 N. J. Eq. 526, 552.

Where a ditch already in a street was taken possession of and used, the grant as to the location of the ditch became fixed and certain, and does not carry any right to make another ditch upon a new line. Kern Island Irr. Co. v. City of Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052.

See, also, Colegrove W. Co. v. City of Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904; Winslow v. Vallejo, 148 Cal. 725, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; also, as to the right to change the location of a community ditch.

9 Winslow v. Vallejo, 148 Cal. 725, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, and note, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851; Jennison v. Walker, 11 Gray 423 (Mass.); Wyncoop v. Berger, 12 Johns. 222; Bannon v. Angier, 2 Allen 128 (Mass.); O'Brien v. Goodrich, 177 Mass. 32, 58 N. E. Rep. 151; Garraty v. Duffy, 7 R. I. 476; Arthur Irr. Co. v. Strayner, 50 Colo. 371, 115 Pac. Rep. 724.

10 White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 Pac. Rep. 497.

as if the elements had impaired the enjoyment of its property of any other character. This furnishes no reason why another should be required to contribute to restore the enjoyment of the property, even if the thing to be contributed be something the other does not need, and the surrender of which will not injure him."

§ 861. **Changes in the character of the works for conveying the water—As against the rights of the landowner.**—As in the case of other changes which may be made by an appropriator, as far as his right to the use of the water is concerned, he may change the character of his works for conveying the water, provided that the vested rights of others are not materially injured.[1] He may, therefore, change an open ditch to a flume, pipe line, or to a cement conduit, or the reverse, provided that the rights of others are not materially injured thereby; and also provided that the line of his ditch is either upon his own lands, the public lands, or upon the lands of others whose consent he has obtained. But where it appears that by permitting the water to flow in its usual way through open ditches, some of it would seep into and percolate through the soil, and again reach the stream, to the benefit of other users of the water, and riparian owners, the mode of conducting the water can not be changed to a pipe line by means of which all seepage back into the stream is prevented, to the injury of those using the water thus returned to the stream.[2] And in cases where the change proposed is upon the lands of others, whose consent can not be obtained, as is the rule in cases proposing the change in the location of the ditch or canal,[3] no change can be made in the character of the use of an easement which is more burdensome to the servient tenement than was the old use. Therefore, the owner of a right of way through the lands of another for a ditch or canal can not permit the ditch to fill up and obstruct the flow of water so as to cause it to overflow and injure the lands of the land owner.[4] Again, he can not enlarge his ditch or canal or increase the flow of water therein, or so operate or use his ditch or canal as to increase

1 For character of works, see Secs. 824-836.

2 Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767.

3 See Sec. 860.

4 Board etc. v. Hutchinson, 46 Ore. 57, 78 Pac. Rep. 1028.

For keeping ditches and canals in repair, see Secs. 992, 993.

See, also, Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922.

the burden on, or unnecessarily damage, the servient estate, without acquiring the right in some legal manner.[5] An indefinite easement for the purpose of a ditch becomes fixed and definite as to the size of the ditch upon its construction and use, and thereafter no change in its size or character can be made without the consent of the owner of the land, by prescription or by some other legal method.[6] As was said by the California Court:[7] "Where the right not definitely limited by grant has become fixed by the manner of its use, it can not be enlarged without the consent of the parties who may be affected.[8] The laying of pipe on a new line, or the substitution of pipe for a ditch or wooden conduit, or for pipe of a smaller size, was therefore not authorized by the mere fact that water had already been conducted across the highway in another manner."

In regard to the question as to the change in the character of the mode of conveyance from an open ditch to a flume, pipe line, or conduit, or the reverse, upon the lands of others where there is an easement for the means of the conveyance of the water through works of one class, we will say that the change should never be allowed without the consent of the owner of the land, where the

5 Board etc. v. Hutchinson, 46 Ore. 57, 78 Pac. Rep. 1028; North Fork W. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69; Joseph v. Anger, 108 Cal. 517, 41 Pac. Rep. 422; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Onthank v. Lake Shore etc. R. Co., 71 N. Y. 194, 27 Am. Rep. 35, where the grantee laid a 4-inch pipe in the place of a 2-inch pipe as originally consented to.

See, also, Winslow v. Vallejo, 148 Cal. 725, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851.

Where a street was taken possession of and used for a ditch, the grant as to the size of the ditch became certain, and does not carry any right to enlarge the old ditch. Kern Island Irr. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052; Colegrove v. Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. Rep. 69; Snyder v. Colorado etc. Co., 181 Fed. Rep. 62, 104 C. C. A. 136; Welty v. Gibson, 42 Colo. 18, 93 Pac. Rep. 1093; Oahu etc. Co. v. Armstrong, 18 Hawn. 258.

6 Winslow v. Vallejo, 148 Cal. 725, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Kern Island Irr. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052.

7 Colegrove v. City of Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904.

8 Citing Winslow v. Vallejo, 148 Cal. 725, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Kern Island Irr. Co. v. City of Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052.

burden to the servient estate is increased, or actual injury to the rights of the land owner are incurred thereby. The Supreme Court of California goes to the extent of holding that an easement to carry water in an open ditch over another's premises does not give the right against the will of the land owner to carry the same quantity of water in pipes, even if the change would be beneficial to both parties.[9] The same was also held in a recent Washington case.[10] It is true that this is the common law rule upon the subject, and the case referred to was decided entirely upon common law authorities; but at the same time, under the Arid Region Doctrine of appropriation, where the common law has been abrogated or modified in so many cases, the extreme rule laid down by the California and Washington courts was wrong. Every easement is a restriction upon the right of the property of the servient tenement, and no alteration can be made in the mode of enjoyment by the owner of the dominant tenement, or the easement, the effect of which will be to increase such restriction.[11] But where no injury is done to

9 Allen v. San Jose W. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93, where it was held that, where plaintiffs in such a case sought to enjoin the laying of pipe to carry water in lieu of carrying it through an open ditch, it is immaterial that the alteration would be less burdensome to the servient estate and more convenient to the defendant. Citing Merritt v. Parker, 1 N. J. L. 460; Dickinson v. Grand Junction Canal Co., 7 Exch. 299, 21 L. J. Exch. N. S. 241, 16 Jur. 200; Johnston v. Hyde, 33 N. J. Eq. 632; Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124.

10 White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 Pac. Rep. 497, where it was said: "Counsel argues with much force and persuasiveness that, inasmuch as the respondents will in nowise be injured by a change from ditch and flume to pipe line, the right to make the change should be accorded to the appellant; that the taking of the additional right of way and conducting the water in a pipe line invades no substantial right of the respondents. But, even if it were shown that the change would be an actual benefit to the respondents, we would have no power to compel them to accept the benefit. The question is one of property rights, not of benefits or injuries. Many authorities so hold, and we have been cited to none to the contrary. 'No one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury.'" Citing Merritt v. Parker, 1 N. J. L. 460; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93; Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355.

11 See cases cited *supra;* Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; North Fork W. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69; Oliver v. Agasse, 132 Cal. 297, 64 Pac. Rep. 401.

the servient estate, and where it is even beneficial to both parties, the change should be allowed.[12]

§ 862. Changes in the character of works for conveying the water—As against the rights of the ditch owner.—As was said in a previous section, the character of the works and the means of the use of the water are immaterial so long as the water appropriated is actually applied to some beneficial use or purpose and the rights of others are not injured thereby.[1] It therefore follows, as long as the appropriator makes a reasonably economical use of the water without unnecessary waste it is immaterial as to the character of the works which he uses as a means of effecting his appropriation and applying the water to the beneficial use or purpose for which it is made. The owner of a ditch over the lands of another can not be compelled against his will to change the character of his works upon behalf of the owner of the fee where no unnecessary damage by the use of such works is being done. As was said by Mr. Justice Sprague in an early California case:[2] "I know of no principle of law or power in a court of equity to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience, or necessities of another private party. Such a principle, if once adopted by judicial tribunals, upon grounds of necessity, in view of the peculiar relations and character of private property rights of miners on the public domain, would readily be invoked as applicable to other property rights, and its practical application would result in a system of judicial condemnation of the property of one citizen to answer an assumed paramount necessity or convenience of another citizen. It is the duty of courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property, or to compel the owner to exchange the same for other property to answer private purposes or necessities." And, again, as was said in a still later California case:[3] "Ditches and flumes are the usual and ordinary means of diverting water in this State, and parties who have made their appropriations by such means, can not be compelled to substitute iron pipes, though

12 Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39.

1 See Sec. 825, and cases cited.

2 Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124.

3 Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811.

they may be compelled to keep their flumes and ditches in good repair, so as to prevent any unnecessary waste."

In a recent Utah case [4] it was held that a prior appropriator from a lake acquired a vested right to his means of diversion and the right to continue to use his method or means of diversion which he had installed, and that if he was compelled by the withdrawal of unappropriated water from the lake by subsequent appropriators which required a change of method the additional expense for such change should be borne by the subsequent appropriator as a condition to the right to appropriate the unappropriated waters of the lake. However, the United States Circuit Court of Appeals in a recent case [5] held almost exactly contrary to the holding of the Utah Court.

It may be stated, however, as a general proposition, which we will discuss in a subsequent chapter,[6] that where any particular method of use of the water by an appropriator involves great and unnecessary waste, and there are other claimants to the water thus wasted, the appropriator may be compelled by a court of equity to change his method of diversion, carrying of the water, or its application, and thus suppress all unnecessary waste.

§ 863. **Changes in the mode of collecting the water.**—An appropriator of a certain quantity of water may take the same from the stream and conduct it directly to the place of use, or, if he does not desire to use the same immediately, he may collect the water in reservoirs in times of plenty, and afterwards, when he needs the water, conduct it to his place of use. He may also make the change from the direct application of the water by means of his ditches and canals to the indirect application of the water by means of his storage reservoirs, as he sees fit, but always provided that the rights of others to the waters from the same source of supply are not materially impaired or injured.[1] But an appropriator of water from a certain stream already partly appropriated acquires a right

[4] Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

[5] Schodde v. Twin Falls etc. Co., 161 Fed. Rep. 43, 88 C. C. A. 207; aff'd on writ of *certiorari* in the Supreme Court of the United States, 224 U. S. 107, 56 L. Ed. ——.

[6] For economic use of water and suppression of waste, see Chap. 49, Secs. 874-916.

[1] For rights for storage reservoirs, See Secs. 837-846.

to only the surplus or residuum of the water left flowing in the stream within the extent of his appropriation.[2] And, again, if he was the first to appropriate the water from the stream he is limited to the extent of his right as against those who come later.[3] So, where an appropriation is made for the direct application of the water to the purpose for which the appropriation was made, a priority of right to a certain quantity of water confers no right to it for storage and the indirect application of it in any greater quantity or at any other time, or to change his method of collecting the water by adding reservoirs to the system, if by this means other appropriators will suffer injury by the change.[4]

In the case of subterranean waters, changes may be made in the mode of collecting the water which is afterwards conducted by means of ditches or canals to the place of use.[5] This right is subject, however, to the same limitations as in the case of other changes, that the rights of others must not be injured by the change. Therefore, where a water company had been diverting a certain amount of water for fifteen years, by means of cuts and trenches, it was held by the Supreme Court of California that the company was entitled, when its supply from this means began to fail, to drive wells in the wash by means of which the requisite quantity previously diverted was obtained from the same source of supply, as the wells constituted only a different means of collecting the water.[6]

§ 864. Changing the channel of a stream—Changing back.—The location of a channel of a natural stream can not be changed by artificial means and still remain the natural stream. The flow of water of a natural channel may be changed into an artificial

2 For rights of subsequent appropriators, see Secs. 783-789.

3 For the rights of prior appropriators, see Secs. 776-782.

4 Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185, citing Kinney on Irr., 1st Ed., Secs. 230, 231, 232; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266, citing Kinney on Irr., 1st Ed., Secs. 230, 232.

See, also, Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116.

5 For rights in subterranean waters, see Secs. 1148-1211.

6 Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

See, also, Vineland Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820.

channel, but then it is no longer in the natural channel, but it is in a ditch or canal. But the channel of a natural stream may be changed by Nature or by "act of God." This usually occurs from one of two causes or by a combination of both. The channel may gradually become filled with silt so that it will no longer carry the waters, especially during the period of heavy storms and freshets, and the water breaking through its old banks may cut out a new channel for itself. Or the waters of a great freshet may cause the same thing, and that, too, without there being any accumulation of silt in the bottom of the old channel. A channel of a natural stream having once been changed by Nature, the question arises as to what right, if any, have appropriators of the waters from the old channel, or the owners of land riparian to the same, to change back the flow of water from the new channel to the old? Under the common law a riparian owner has no right to go upon another's land and restore to the old channel the water which has been suddenly diverted by an act of God so as to flow elsewhere. And a water course, therefore, running between the lands of A and B, which leaves its course and suddenly and sensibly makes its channel entirely on the land of A, wholly belongs to A.[1] This rule is adhered to by the common law of States of the arid West, especially California, as far as riparian rights are concerned.[2]

1 Angell on Water Courses, Sec. 57; 3 Kent Com. 525; Gould on Waters, Sec. 160.

2 Wholey v. Caldwell, 108 Cal. 95, 41 Pac. Rep. 31, 30 L. R. A. 820, 49 Am. St. Rep. 64, where the Court held that a lower riparian proprietor has no right, independent of contract, to go on the land of an upper proprietor to return the stream to its original channel, when it has been diverted therefrom by natural causes.

But see Morton v. Oregon etc. R. Co., 48 Ore. 444, 87 Pac. Rep. 151, 1046, 7 L. R. A., N. S., 344, 120 Am. St. Rep. 827, where it is held that the person across whose land a freshet in a natural stream suddenly causes a new channel to be formed, may, within a reasonable time, restore the flow of water to its natural bed.

See, also, Mathewson v. Hoffman, 77 Mich. 420, 43 N. W. Rep. 879, 6 L. R. A. 349.

Where a public stream, abounding in fish, valuable for food, flowed through the premises of the defendant, it was held by the Utah Court that he was entitled to change the course of the stream over his own premises and construct fish ponds in the old bed, where this could be done without injury to the public or private interests or interfering with the passage of the fish up and down the stream, the Court saying: "We know of no reason why such person should not be permitted to change the course of the stream across his premises

Under the law of appropriation, as we view the same, a different rule appertains. Where a person has acquired the right to a certain amount of water in a stream by the appropriation of the same, he also acquires the right to have that water flow in the natural stream and over the lands of others down to the head of his ditch.[3] The appropriation of the water also carries with it an implied authority to do all that may become necessary to secure the benefit of the appropriation. He therefore has the right to enter the bed of the stream above the head of his ditch, even on the lands of others, and to remove sediment or obstructions which may have changed or obstructed the course of the current so as to prevent it from flowing down to and entering his ditch. Thus to this extent the appropriator acquires an easement in the lands through which the stream flows; but the right thus acquired is one which must be held to the narrowest limits compatible with the principal right, which is the use of the water.[4] No unnecessary injury must be done to the lands of another in making the change, or the party making it will be liable in damages.

§ 865. **Changes in time of diversion.**—As we have seen an appropriation of water may be made for the diversion and use of the water according to periods of time.[1] Where this is done the appropriator can not take the water at any other time, where it would interfere with the rights of others. Such a change in effect would be a new appropriation, and would be subject to all the rights which had vested prior to the date of the change.[2] The time of the actual application of the water, diverted during the period of time when

where, as in this case, neither public nor private interests are affected by such change." State v. Barker, 37 Utah 345, 108 Pac. Rep. 352, 27 L. R. A., N. S., 1134.

3 Right to flow of water to head of ditch, see Secs. 801-803.

4 Crisman v. Heiderer, 5 Colo. 589; Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875.

1 For periodical appropriations, see Sec. 786.

2 Santa Paula Waterworks Co. v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Colorado Mill etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185; Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Salina Cr. Irr. Co. v. Salina Stock Co., 7 Utah 456, 27 Pac. Rep. 578.

the appropriator is entitled to its use, may be changed. Therefore, the owner of a priority for direct irrigation is entitled to store, during the irrigation season, the quantity of water measured by volume and time which he would be entitled to divert during that period for the purpose of direct irrigation, and use the same later in the same season for crops requiring irrigation at that time, when the direct supply would be insufficient.[3] But the draft upon the natural stream must not be any greater than if the water had been directly applied to the land at the time of the diversion.

As there is no difference in principle between an appropriation measured by quantity and an appropriation measured by time,[4] there is also no difference in principle in the trespass upon the rights of another regardless of the fact as to whether the water was measured by him by quantity or by time. And where a trespass is made by the wrongful diversion of the water during the period of time when it rightly belongs to another, an injunction will issue to prevent such future trespasses.[5] A person entitled to divert water from a ditch during specified hours each day has no right to the water in the ditch below his point of diversion at the moment of the commencement of his right.[6]

§ 866. **Change of water from one watershed to another.**—There is no question now as to the right of an appropriator to divert the water from a stream flowing in one watershed and by any means conduct it for the irrigation of lands in another watershed. Yet in an early case in Colorado the validity of the appropriation and use of the water by this method was questioned, but the Court upheld the right.[1] Under a similar state of facts to those in the Colorado case, the Supreme Court of Washington in a very recent case also upheld the right.[2] Both cases also involved the

3 Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329.

4 See Sec. 786.

5 Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290.

For injunctions, see Chap. 81.

6 Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762.

1 Coffin v. Left Hand D. Co., 6 Colo. 443.

See, also, Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Thomas v. Guiraud, 6 Colo. 530.

2 Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S. 1065.

question of mingling the waters of one watershed with the waters of the stream of another and the right to redivert the water from the latter stream and use the water for irrigation, and the right to do this was upheld.[3] The general rule is that under the law of appropriation, as contrary to the law of irrigation as a riparian right,[4] the water may be used in any locality, however remote from the stream from which it is taken. Therefore, it may be used on the lands of the valley of the stream from which it is taken, or it may be carried over or through the intervening ridge to land lying in another watershed, and there used, provided that the vested rights of others are not injured thereby. Where, however, water has been used in one watershed for irrigation and domestic purposes by an appropriator, and other parties were receiving the benefit of the seepage and percolations, it was held that it could not be conducted to another watershed by a pipe line, whereby all seepage is lost, and in such a case it is held that an action for an injunction will lie without proof of damages.[5]

§ 867. **Changes in place of use—May be made where no injury is done the rights of others.**—Under the law of appropriation, not only may the water appropriated be used in the first instance upon any lands, or in any locality,[1] but the appropriator may also afterward change his place of use without losing any of his rights to the water, provided that he actually applies all of the water appropriated to some beneficial use or purpose, and, provided further, that the rights of other persons are not materially injured by such change. This has been a rule of the doctrine of appropriation ever since the early California cases upon the subject, and has never been questioned, except where statutes have been enacted endeavoring to make a water right, where the water was appropriated for the irrigation of lands, an inseparable appurtenance to a certain tract of land.[2] And in these instances it has been held by the Supreme

3 For mingling waters, see Secs. 798-800.

4 That riparian owners can use the water only on riparian lands, see Secs. 460-466.

5 Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767.

1 That riparian owners can only use the water on riparian lands, see Sec. 517.

Place of use by appropriators, see Sec. 782.

2 That a water right can not be made an inseparable appurtenance to land, see Secs. 1015, 1016.

Courts of some of the States which have made such an attempt that the appropriator could either sell his water right separate and apart from the land for which the water was appropriated, or could use the water on other lands.[3] So it may be regarded as the settled law, in at least the most of the States, that the place of the use of the water may be changed at the will of the appropriator, and the only questions to be determined in cases of this nature are, Is all of the water being applied to some beneficial use or purpose at the new place of use, and whether or not others are materially injured by the change.[4] A change in the place of use can not be

For statutes authorizing and restricting the place of use, see Sec. 871.

[3] For the sale of water rights, see Secs. 994-1032.

For the effect of statutes limiting the place of use, see Sec. 871.

That the change in the place of use can not be made where the rights of others are injured, see next section, No. 868.

[4] *Arizona.*

An appropriator may permanently change his water right from one tract of land to another, subject to the condition that such change in place of use does not injuriously affect others, who have previously acquired rights to the use of the water from the common source. Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

"Natural justice, therefore, is subserved by recognizing the right of a water-right holder to change his appropriation to lands capable of profitable cultivation." Slosser v. Salt River etc. Co., 7 Ariz. 367, 65 Pac. Rep. 332.

See, also, Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598.

California.

"The right to change the place of use is subject to the qualification that, where there are other persons having subordinate rights to the waters of the stream, the right to change the place of use can only be exercised when and to the extent that such change will not injure the subordinate right." Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767, holding that, where there were subordinate rights to the seepage water used for irrigation, that the place of use of the water could not be changed so that it could be conducted in a pipe to another watershed and there used for municipal purposes.

See, also, Kidd. v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 341, 1 Morr. Min. Rep. 650; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Junkans v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Ramelli v. Irish, 96 Cal. 217, 31 Pac. Rep. 41; Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; North Fork etc. Co. v. Edwards, 121 Cal. 666, 54 Pac. Rep. 69; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45

Pac. Rep. 168; San Luis etc. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Southside Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Vineland etc. Co. v. Azusa etc. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820; Byers v. Colonial etc. Co., 134 Cal. 553, 66 Pac. Rep. 732; Craig v. Crafton, 141 Cal. 178, 74 Pac. Rep. 762; South Side etc. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107; Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. Rep. 1094.

In the case of Walnut Irrigation District v. Burke, 158 Cal. 165, 110 Pac. Rep. 518, it was held that where an owner of a certain water right in use from a common dam was entitled to irrigate sixty acres of a certain tract, he was entitled to use such right to irrigate a similar quantity of other land, such new use involving a mere change of place of use and where no injury to any other person occurred.

Colorado.

The right to change the place of use of water appropriated is one of the incidents of ownership, independent of statute, and the only limitation upon it is that the rights of others be not infringed upon. Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483, holding that the statute upon the subject was purely remedial.

See, also, Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Strickler v. Colorado Springs Co., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Handy D. Co. v. Louden C. Co., 27 Colo. 515, 62 Pac. Rep. 847; Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; Town of Sterling v. Pawnee D. etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238, where it is held that the right to water appropriated for domestic purposes does not depend on the *locus* of its use for that purpose.

See, also, City of Telluride v. Davis, 33 Colo. 355, 80 Pac. Rep. 1051, 108 Am. St. Rep. 101; King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906; Cache La Poudre Res. Co. v. Water Supply Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131.

"It is now the settled law that water rights, though primarily applied to a certain tract of land, may be severed from it, used on other land by the owner, or sold." Larimer etc. Res. Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 Pac. Rep. 525; affirming 24 Colo. 144, 53 Pac. Rep. 318.

See, also, Nichols v. McIntosh, 19 Colo. 26, 34 Pac. Rep. 278; Bloom v. West, 3 Colo. App. 212, 32 Pac. Rep. 846; Knowles v. Clear Cr. etc. Co., 18 Colo. 209, 32 Pac. Rep. 279; Fuller v. Swan River etc. M. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. Rep. 854; Larimer etc. Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 Pac. Rep. 525; affirmed in 24 Colo. 144, 53 Pac. Rep. 318; Diez v. Hartbauer, 48 Colo. 599, 105 Pac. Rep. 868.

Hawaii.

Peck v. Bailey, 8 Hawn. 658; Lonoaea v. Wailuku Sugar Co., 9 Hawn. 651; Palolo I. Co. v. Wong Quai, 15 Hawn. 554; Hawaiian Com. Co. v. Wailuku Co., 15 Hawn. 675, 14 Hawn. 50.

Idaho.

Mahoney v. Neiswanger, 6 Idaho 750, 59 Pac. Rep. 561.

For the Act of 1901, attempting to make a water right an inseparable appurtenance to a certain tract of land, see Sess. Laws 1901, p. 200.

Users of water from a ditch or canal acquire such a property right as they may transfer to other lands under such ditch or canal. Hard v. Boise City etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325; Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86.

See, also, that a water right can not be an inseparable appurtenant to land, Sec. 1015.

For statutes attempting to restrict the place of use, see Secs. 1015, 1016.

Montana.

A prior appropriator can not encroach upon the rights of the sub sequent appropriator by changing the place of use. Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959.

But if others are not injured it may be changed. Smith v. Deniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Fabian v. Collins, 3 Mont. 215; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Last Chance M. Co. v. Bunker Hill M. Co., 49 Fed. Rep. 430.

Nebraska.

"It has been the uniform rule to allow appropriators of water, after it has been actually taken and applied to some beneficial purpose, to change the place and character of its use." Farmers' etc. Co. v. Gothenberg etc. Co., 73 Neb. 223, 102 N. W. Rep. 487, holding that the proceedings provided for by the statute must be complied with and that in the application for the change of use the new lands upon which the water is to be used must be specified.

See Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

Nevada.

Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Lobdell v. Simpson, 2 Nev. 278, 90 Am. Dec. 537.

New Mexico.

Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312.

Oregon.

A prior appropriator of water for beneficial purposes may change the place of use if it does not prejudice the rights of subsequent claimants. Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200; *Id.*, 97 Pac. Rep. 539; Bolter v. Garrett, 44 Ore. 304, 75 Pac. Rep. 142; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685.

However, the same Court holds that such a change in the appropriation can not be made, either of the point of diversion or place of use, where to make such change will substantially prejudice the interests of other appropriators. Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

made which results in an alteration of the point at which the water is returned to the natural stream, if subsequent appropriators are injured thereby.[5] In placer mining it is held that the use of the water for that purpose is in effect notice to subsequent appropriators that as the ground is worked out the place of use of the water must be from time to time changed.[6] So, again, where the water is used for irrigation for a certain definite tract, the land becomes "seeped,"[7] or in a condition so that it can not be cultivated profitably, or at all, natural justice is subserved by recognizing the right of the appropriator to change the place of use to lands capable of profitable cultivation, or to sell his water right to some person

See, also, Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

Utah.

Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634, citing Kinney on Irr., 1st Ed., Sec. 154; Elliott v. Whitmore, 8 Utah 253, 24 Pac. Rep. 673, 30 Pac. Rep. 984; Patterson v. Ryan, 37 Utah 410, 108 Pac. Rep. 1118.

Washington.

Thorpe v. Tenem D. Co., 1 Wash. 566, 20 Pac. Rep. 588.

Wyoming.

Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See for the passage of the statute attempting to make a water right an inseparable appurtenance to a certain tract of land. Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

[5] Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430.

See, also, Saunders v. Robison, 14 Idaho 770, 95 Pac. Rep. 1057, in which it was held that where a prior appropriator claimed the right to the use of waters of a stream and made his appropriation on one branch or fork of the stream and a subsequent appropriator made his lower down the stream and below the forks, such subsequent appropriator could not be injured and has no cause of complaint on account of the prior appropriator conveying the waters of the fork or branch of the stream on which he made his appropriation to the other branch of the stream, for the reason that the subsequent appropriator got the full benefit of all the water left after it had been used by the prior appropriator.

[6] Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Lowden v. Frey, 67 Cal. 474, 8 Pac. Rep. 31.

But see Alder Gulch etc. Co. v. Haynes, 6 Mont. 31, 9 Pac. Rep. 581; Schwab v. Beam, 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279.

[7] King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906.

who can so use the water.[8] Then, again, for the reason of economy and the prevention of waste, the right to change the place of use should be permitted. The water can then be made to go as far as possible.[9]

§ 868. **Changes in place of use—Can not be made where injury is done to the rights of others.**—But as is the general rule in regard to all changes relative to the diversion and use of water, a change in the place of use by one appropriator can not be made where vested rights of others are materially injured thereby. When not needed for the purpose by a prior appropriator, the waters are subject to appropriation by others, and one appropriator can not so change his place of use or enlarge his use so that others are injured by such change.[1] In fact, this proposition is but the converse of the proposition stated in the title of the preceding section,[2] in which section the subject has been fully discussed, and no further discussion is necessary here.

§ 869. **The change in the use of the water appropriated.**—When water has been once lawfully appropriated and the extent of the appropriation determined, the right thus acquired and the priority therefor is not lost by changing the use or purpose for which it was first appropriated and applying the water to some other use or purpose, provided that the change made does not materially injure the rights of others which have vested prior to the change.[1] By

8 Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

9 For economical use and the prevention of waste, see Secs. 874-916.

1 Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

2 See Sec. 867, and cases cited.

1 Anderson v. Bassman, 140 Fed. Rep. 14; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685, both citing Kinney on Irr., 1st Ed., Sec. 233; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634, citing Kinney on Irr., 1st Ed., Sec. 154; Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131, citing Kinney on Irr., 1st Ed., Secs. 234, 253, 254, 259; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222, citing Kinney on Irr., 1st Ed., Sec. 234.

"Appropriation, use, and non-use are the tests of the right, and the place of use and the character of use are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it. Any other rule would lead to endless complications, and most materially impair the

his legal appropriation of the amount of water sufficient for his original purpose, he is entitled to that amount so long as he applies it to any of the beneficial uses he may see fit, as against all other parties, provided that the amount of the water is not thereby

value of water rights and privileges." Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604.

It has been the uniform rule to allow appropriators of water, after it has been actually taken and applied to some beneficial purpose, to change the character of its use. Farmers' etc. Co. v. Gothenburg etc. Co., 73 Neb. 223, 102 N. W. Rep. 487. But holding that under the statute the change must be made by the permission and subject to the administrative control of the board of irrigation.

"A different use of the water does not affect the right." Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 115.

See, also, Maeris v. Bicknell, 7 Cal. 261, 68 Am. St. Rep. 257, 1 Morr. Min. Rep. 601; Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597; *Id.*, 32 Cal. 166; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Nevada etc. Co. v. Kidd, 37 Cal. 282; Nevada W. Co. v. Powell, 34 Cal. 118, 19 Am. Dec. 685, 4 Morr. Min. Rep. 253; Junkans v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Ortman v. Dixon, 13 Cal. 33; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Gallagher v. Montecito etc. Co., 101 Cal. 245, 35 Pac. Rep. 770; Lowden v. Frey, 67 Cal. 474, 8 Pac. Rep. 31; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Ramelli v. Irish, 96 Cal. 214, 31 Pac. Rep. 41; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693; Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525; Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312; Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Fabian v. Collins, 3 Mont. 215; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Dalton v. Bowker, 8 Nev. 190; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617.

increased beyond the amount of his original appropriation, and the rights of others are not materially injured by the change in any manner. The true test of the right is appropriation, use, or non-use; the beneficial purpose to which the water is applied, or the place where it is applied, is not.[2] This has been held to be the law from a very early period of the Arid Region Doctrine of appropriation, as will be seen from the authorities cited, and is the present law in all jurisdictions, unless it may be in some of the States where there has been an attempt upon the part of the legislature to make a water right an inseparable appurtenance to a certain tract of land. But, as will be seen in a subsequent section, the statutes in this respect have not been generally upheld by the courts.[3] It will be seen upon examination that the authorities hold that, in all cases of the changes in the use of the water, the effect of the change upon the rights of others is the controlling consideration; and in the absence of any injurious consequences, any change which the appropriator chooses to make as to his use of the water is legal and proper, as is also the case as to the change of place of use.[4] In fact, it will be found that many of the cases treat these two subjects together. It is true that changes may be made in the use and the place of use, if others are not injured thereby. But there is a distinction between these two rights which should be observed. An appropriator may change his use of the water without changing the place of use. As, for example, he may have a water right for power for running a grist mill. He can change this right to one for the generation of electricity for municipal or other purposes. He thereby changes the use without changing the place of use. Again, he may change the place of use without changing the use, as where he transfers his water right for irrigation from one field to another.

Again, the change of the point of diversion and the change of use are sometimes treated together. While these two subjects are usually considered different, it is upon the general theory that any change which does not injure others may be made, and any change which does cause injury to the vested rights of others can not be

2 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604.

3 That a water right is not an inseparable appurtenance, see Secs. 1015, 1016.

4 For change in the place of use of the water, see Secs. 867-871.

made. As was said in a recent Montana case:[5] "But though he may change the point of diversion or may use it for other purposes, his right to do so is subject to the well-settled rule that the change may not affect injuriously the rights of subsequent appropriators."[6]

§ 870. Change in the use of water—What changes may be made.—After the rights of an appropriator have once vested and the amount of water to which he is entitled has once been determined, there is one general rule relative to the change from one use to another which must be observed, and that is he can not change to any use so as to enlarge the quantity of water to a greater amount than that to which he was entitled under the old use if others are materially injured thereby. For this purpose the uses of water acquired by an appropriation may be divided into two classes—those which practically consume none of the water and those which practically consume all of the water. Of course, these are the extreme cases, and there are all degrees between; but the extent of the appropriator's claim is limited to the needs of the purpose for which he makes the appropriation. And if the original purpose is for the generation of electrical power, which comes under the first class above named, and consumes none of the water, it is obvious that he can not change his use to that of irrigation, which comes under the second class, and which would consume all of the water, where the rights of subsequent appropriators have vested, and which rights would be injured by the change. Hence it follows that for the new use he can only consume an amount of the water equal to the amount consumed under the old use or a less amount. He can never consume more water for the new use than was consumed under the old use if the rights of others are injured thereby.[1]

In an early California case[2] it was held that, where water was appropriated for placer mining, the use might be changed to the running of a quartz mill; and from the use for a saw mill to that of

5 Featherman v. Hennessey, 43 Mont. 310, 115 Pac. Rep. 983.

6 Citing Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222; Kinney on Irrigation and Water Rights, 1st Ed., Sec. 234; Rev. Codes of Mont., Sec. 4842.

1 For extent of appropriator's right fixed by purpose, see Sec. 879.

2 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604.

a grist mill.[3] But where the appropriation was for placer mining, and by the use of which very little of the water was consumed, a change to a use for irrigation can not be sustained.[4] However, where a certain amount of water is consumed in the mining operations, the same amount may be changed to irrigation.[5] But a prior appropriator for mill purposes only, the water to be returned to the stream when used, can not, as against appropriators below the mill, use the water for irrigation purposes.[6] But in a recent Nebraska case, where the same principle was involved, it was held that a prior appropriation for power might be changed to irrigation purposes, and the case was reversed only upon the ground that the land to which the water should be applied was not specified in the decree.[7] The ruling in this case we consider as wrong under the authorities cited by the Court, as it appears that

[3] See, also, McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626.

But a contract for the use of water as the motive power for a mill gives the owner no right to use the water for any other purpose. Fresno M. Co. v. Fresno etc. Co., 126 Cal. 640, 59 Pac. Rep. 140.

Where the change was made from a grist mill to a distillery, it was upheld. Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312.

Also, see Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783, where a change was allowed from the use for a flour mill to an electric light plant.

[4] Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 537; Head v. Hale, 38 Mont. 302, 100 Pac. Rep. 222.

[5] The use may be changed from mining to agricultural, and *vice versa*, provided such changes do not injuriously affect the rights of others. Seven Lakes Res. Co. v. New Loveland etc. Co., 46 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329.

However, an upper appropriator on a stream after his mine where he used the water is worked out, can not change the use of the water which under the use was accustomed to flow back into the stream, to mines lower down the stream, if the rights of intervening mine owners would be thereby cut out. Alder Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581.

But where there is no injury, see Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601.

[6] Cache La Poudre Res. Co. v. Water Sup. etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131.

[7] Farmers' etc. Co. v. Gothenburg etc. Co., 73 Neb. 223, 102 N. W. Rep. 487, citing Maeris v. Bicknell 7 Cal. 261, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Woolman v. Garringer, 1 Mont. 535; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685.

others were injured by the change, and that the water after its use for power by the defendants had been appropriated by the plaintiff. This decision violates the rule laid down by the decisions that no greater quantity can be consumed after the change than before. Where, however, all of the water is practically consumed by its use for irrigation, its use may be changed to that of furnishing water to a city for domestic purposes.[8] A change from one agricultural use to another is also permitted, as is the case where the water is stored during the period when an appropriator is entitled to its use for irrigation, and used by him to mature crops requiring a later irrigation.[9] But this can not be done to the injury of the rights of those who have subsequently appropriated the water for immediate irrigation.[10] But a change even from one agricultural use to another is not permitted where the appropriator uses more water for the second use than he was entitled to under the first use.[11] However, any change from any use to any other use may be made, provided that the change does not injure the rights of others entitled to the water.[12] But a change can not be made in the use of the water which results in an alteration of the point where the water was returned to the stream under the old use.[13] As between appropriators, it is obvious that one can not under the law change his use of the water so that he may acquire a larger quantity as against one prior in time to him if his rights are injured.[14] But, also, the rights of the subsequent appropriators must not in the same manner be injured by one who is prior to them. If the prior appropriator's right to the water was for irrigation or for some other use which practically consumes all of the water, by his

8 Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Springfield v. Fulmer, 7 Utah 450, 27 Pac. Rep. 577.

9 Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 486, 17 L. R. A., N. S., 329.

10 See Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185; Drake v. Russian R. Co., 10 Cal. App. 654, 103 Pac. Rep. 167; Windsor v. Lake Supply Co., 44 Colo. 214, 98 Pac. Rep. 729; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. Rep. 868.

11 North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713.

12 See previous section, No. 867.

13 Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430.

14 For rights of the prior appropriator, see Secs. 776-782.

valid appropriation, distinct notice is given to all that not only is so much water withdrawn from the public supply, but that its appropriation is such that it can not be appropriated a second time or any rights gained therein by later comers. But, on the other hand, if the water of the first appropriator is for running a mill or for some use which does not consume the water, the same notice is given to all by this use, that the same water may be again appropriated either for other mills, or it may be appropriated lower down the stream for irrigation or for some other beneficial use or purpose. And after this notice has been given of the extent of the water consumed by the prior appropriator, he can not change his use after the rights of the subsequent appropriators have vested to irrigation or to some other use which will consume all of the water.[15]

Upon the other hand, where no greater quantity of water is taken after the change, measured either by time or quantity, it makes no difference to others that the water is more economically used and extended over a greater acreage.[16]

In general it may be said that where the new use of the water required a less quantity than the old use, the change may be made unless other elements of injury enter into the proposition. Hence, a change may be made from the use for irrigation, mining, or manufacturing where practically all of the water is consumed to the development of electrical power, where very little is consumed.[17]

15 For the rights of the subsequent appropriators, see Secs. 783-789.

See Last Chance M. Co. v. Bunker Hill etc. M. Co., 49 Fed. Rep. 430.

A change of purpose which would increase the amount of water diverted will not be allowed as against subsequent claimants whose rights are injured thereby. See Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Ortman v. Dixon, 13 Cal. 33; Higgins v. Baker, 42 Cal. 233; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Atchison v. Peterson, 1 Mont. 561, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

16 Fulton Irr. D. Co. v. Meadow Island Irr. Co., 35 Colo. 558, 86 Pac. Rep. 748; Fort Lyon C. Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Platte Val. Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525.

17 Thompson v. Pennebaker, 173 Fed. Rep. 849, 97 C. C. A. 591.

§ 871. **Changes in the use and the place of use—Statutes authorizing and restricting.**—The statutes of the various States vary greatly upon the subject of the change of the use of the water and the place of use. Some provide simply that the right is given if others are not injured by the change, of which the statute of California is an example.[1] Others provide for the right upon the approval of certain officers or the Court, and also in order to effect the right to change the place of use certain formalities and proceedings must be gone through. Of this class the statutes of Colorado are an example.[2] Other States have endeavored by statute to make a water right an inseparable appurtenance to a certain tract of land, inherent in that tract only, and to be used only on that tract, and that, too, whether the land needs it or not, and if the owner thereof attempts to change the place of use to another tract owned by him, or to sell the water right to another person separate and apart from the land for use on his land, it works either an abandonment or forfeiture of the water right. Wyoming was the first State to lead off on this attempt to make a water right an inseparable appurtenance to a certain tract of land. It was followed by Idaho, and in a modified form by Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, and Utah.[3]

When some of these statutes, attempting to restrict the change in the place of use, reached the courts they did not always meet with the consideration or construction that their engineer progenitors expected. In Colorado, where a mode of procedure was prescribed, it was held that the statute was purely remedial, as the right to make the change of the place of use was one of the inherent rights of property, and is one of the incidents of ownership, and exists independent of the statute, and that the only limitation upon it is that the rights of others must not be injured by the change.[4]

1 See Sec. 1412, Civil Code of Cal., 2 Kerr's Cyc. Codes, p. 1153. It is to be noted that this statute is silent upon the question of the change of the use, and only provides for changes in the point of diversion, and the place of use.

2 See Sess. Laws Colo. 1899, p. 235, Chap. 105; Rev. Stat. 1908, Sec. 3226; 3 Colo. Stat. Ann., Sec. 3226.

3 For the statutes of the various States upon this subject, see Part XIV.

4 See Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483; New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781; Wadsworth v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060.

In Nebraska it was held to the same effect, but that while a prior appropriator may change the place of the use of the water, he can only do so under the permission and subject to the administrative control of the board of irrigation.[5] In the State of Arizona the water appropriated need not be applied to the same tract of land, although under the statutes of the old Territory the original appropriations must have been made in connection with some definite tract of land.[6] In Oregon it is, however, held that a prior appropriator is not entitled to use the water on lands other than those for whose benefit the appropriation was made.[7]

But it was the statutes of Wyoming and Idaho, whose legislatures attempted to pass the most drastic measures, especially upon the subject of the forfeiture of the water right unless it was used upon a certain tract of land for which it was originally appropriated, which met with the greatest objection when they came to be construed by the courts. In Idaho, in the face of the statute, the Supreme Court holds that appropriators of water acquire such a property right to the use of the water that they may transfer it to other lands than the land for which it was appropriated, or that they may sell the right separate from the land to others who may transfer the water to other lands.[8] In Wyoming, the statute met with a similar fate by a similar ruling of the Supreme Court; and when it was urged by the engineer, who in effect tried the case for the defendant and whose views were urged upon the Supreme Court in behalf of the appellant as of greater weight than the views of the Court, on account of a greater practical experience in irrigation matters,[9] that to permit the sale of a water right separate

5 Farmers' Irr. Co. v. Gothenberg Irr. Co., 73 Neb. 223, 102 N. W. Rep. 487.

See, also, Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Clague v. Tri-State etc. Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637.

6 Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494; Slosser v. Salt River etc. Co., 1 Ariz. 376, 65 Pac. Rep. 332; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598.

7 Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

8 Hard v. Boise City etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Boise City v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325; Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86.

9 See opinion in Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

from the land would be a source of litigation, Mr. Justice Potter in delivering the opinion of the Court, very aptly said: "It may be accepted as true that the rule permitting the sale of a water right separate from the land has been the source of litigation. But that affords no sufficient reason for destroying property rights. We can not agree that, in order to discourage litigation or render it impossible, the courts should devest the citizen of his property."[10]

We shall have more to say upon this subject when we come to the discussion of appurtenances.[11] We are in hearty accord with the ruling both of the Idaho and Wyoming courts. A water right may be an appurtenance to a certain tract of land, but it can not be made an inseparable appurtenance, for the many reasons given in a subsequent portion of this work.[12]

§ 872. Changes on sale—Rights of the purchasers.—As we shall discuss in a subsequent portion of this work, in all jurisdictions water rights acquired by appropriation are such property rights that they may be sold and transferred by the appropriators to others, who in turn may again sell and transfer them.[1] Again, in most, if not in all jurisdictions, where the acquisition of water rights were for the irrigation of certain definite tracts of land, they may be sold, separate, and apart from the land for which the water was appropriated. It is true that in certain States an attempt has been made by legislation to prevent this, but even in the face of this the courts have held that a water right could not be made an inseparable appurtenance, and that in the face of the statutes they might be sold separate and apart from the land.[2] Upon the sale and transfer of a water right the purchaser is vested with the same right to change the point of diversion, the place of use, and the use or purpose of the appropriation itself as the original appropriator had, but no more; and the vested rights of others must

10 See, also, McPhail v. Forney, 4 Wyo. 566, 35 Pac. Rep. 773; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

11 See Secs. 1005-1018.

Water right as an inseparable appurtenance, see Secs. 1015, 1016.

12 See Secs. 1015, 1016.

1 For the sale of water rights, see Secs. 994-1032.

2 Statutes authorizing and restricting changes in use and place of use, see Secs. 871, 1015.

That a water right can not be made an inseparable appurtenance, see Secs. 1015, 1016.

not be materially injured by the change.[3] As was well said by the Wyoming Court: "The only limitation upon the right of sale of a water right separate from the land to which it was first applied, and to which it has become appurtenant, laid down by any of the authorities, is that it shall not injuriously affect the rights of other appropriators. In other words, the burden upon the use must not be enlarged beyond that which rested upon it under the original appropriation, and while in the hands of the original appropriator as he was entitled to and did use it."[4]

The use of the water can not be enlarged so that more water is diverted by the purchaser than was permitted by the original appropriator.

[3] For the right of the original appropriator to make changes, see the previous sections, 857-871.

[4] Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 97 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

See, also, Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

The purchaser may transfer the water to other lands, so long as the change does not interfere with the right of others. Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

See, also, Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Crippen v. Comstock, 17 Colo. App. 8[illegible], 66 Pac. Rep. 1074; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325; Smith v. Denniff, 23 Mont. 65, 57 Pac. Rep. 557, 50 L. R. A. 737; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1054, 105 Am. St. Rep. 91; Clague v. Tri-State etc. Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; Dodge v. Marden, 7 Ore. 456, 1 Morr. Min. Rep. 63; Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; Cave v. Crafts, 53 Cal. 135; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Crooker v. Benton, 93 Cal. 365, 29 Pac. Rep. 953; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Mount Carmel etc. Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571, Sweetland v. Olsen, 11 Mont. 27, 27 Pac. Rep. 339; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Toyaho etc. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101.

See, also, for sale and conveyance of water rights and rights of purchaser, Secs. 1030, 1031.

For water rights as appurtenances, see Secs. 1005-1018.

§ 873. The nature and extent of injuries to others which will prevent changes.—A water right being a property right of the highest order, its owner may do what he wishes with his own, including the making of such changes as he sees fit to make, provided that he does not materially injure the rights of others in making them.[1] It is evident that no general rule can be laid down which will govern every change attempted, but that whether the change should or should not be allowed is a question of fact and is to be determined from all the facts and circumstances surrounding each particular case. The principal question to be determined in cases of this nature is whether or not any other appropriator's rights are injured by the change. The restriction to the right to make the change, that others must not be injured by the change, is a matter of defense; and, therefore, the burden of proof showing that injuries have been done to the rights of others is upon the one seeking damages for injuries actually committed or seeking an injunction against contemplated injuries.[2] There is no presumption that a greater quantity of water was diverted, or is about to be diverted, after the change than was diverted before, even if the water is used to irrigate a greater acreage after the change than it irrigated before;[3] nor, under this state of facts, will it be presumed that the vested rights of others, have been or will be injured by the change.[4]

1 That a water right is a property right, see Secs. 768-771.

A priority to the use of water is a property right, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others. Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329.

See, also, Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483.

2 Lorenz v. Jacobs, 98 Cal. 332, 33 Pac. Rep. 119.

See, also, for injuries and the remedies therefor, Chaps. 81-83.

3 "The mere fact that it is the intention of the appellee to apply the water, diverted from its original headgate into the new headgate and new ditch, upon a greater acreage, does not even presumptively establish that more water, measured in time or quantity, will be used than was diverted through the original headgate, nor will it presumptively establish injury to the vested rights of others." Fulton etc. Co. v. Meadow Island Irr. Co., 35 Colo. 558, 86 Pac. Rep. 748.

See, also, Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Fort Lyon C. Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525.

4 See cases cited *supra*.

The injury to the rights of others must be proven as is any other fact by the party alleging the injury.

Upon the question of the extent of an injury to the vested rights of others, which must exist before any change is prevented, we will say in general here that it must be of such a nature that it is a real substantial injury and seriously affecting the rights of others. A mere fanciful or trifling injury will not prevent the change.[5]

[5] For injuries and remedies therefor, See Chaps. 81-83.

CHAPTER 49.

ECONOMICAL USE AND THE SUPPRESSION OF WASTE.

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§ 914. Wasting water—By application to land of extravagant amounts.
§ 915. Wasting water—Influence of statutes upon the waste of water.
§ 916. Wasting water—Duty of the courts to suppress.

§ 874. Scope of chapter.—In this chapter we will treat of the quantity of water which may be diverted under an appropriation of the same for a given purpose, how the water is measured, the duty of water essential to the successful cultivation of land, and how the water must be used economically and without waste, and with general respect to the rights of others. The subject of wasting water will also be treated, and the methods of preventing waste, and the effect where the water is wasted.[1] The economical use of percolating or underground waters will be discussed in a future chapter, in order that those subjects may be discussed together.[2]

§ 875. At an early day settlers had little knowledge as to economical use of the water.—The time has passed in the history of irrigation and water rights when an appropriator can lawfully claim all the water in sight by virtue of his appropriation, or as was recently said in an Oregon case,[1] "To keep all you get, and get all you can." Even though prior in time to all others, unless all of the water claimed is actually applied economically and without waste to the beneficial use for which it is claimed, it is held in most jurisdictions that as to the surplus not so used there is no appropriation.

As the population of this Western country has increased and the demand for water has correspondingly increased, the principle of "beneficial use" is becoming each year in all jurisdictions more

1 For the wasting of water, see Secs. 911-916.

2 For subterranean or underground waters, see Chaps. 59-62, Secs. 1148-1211.

1 Andrews v. Donnelly, —— Ore. ——, 116 Pac. Rep. 569.

and more strictly enforced. More stringent regulations may still be made in certain jurisdictions, which will benefit not only those who at present have water rights in certain streams, but also those subsequent who need the water and desire to appropriate sufficient for their purposes. There are many appropriators who still demand the amount of water claimed by them at first, although the amount is many times more than was originally or is now needed by them for the purpose to which they apply it. At an early day, and when they first made the appropriation, the settlers had no knowledge whatever of the proper amount of water necessary to irrigate certain tracts of land; and there was at that time an entire absence of written authority from which they could learn, and water then being plentiful, it followed, as a matter of course, that the settlers claimed extravagant amounts, and also used very wasteful methods in the diversion and use of it.[2] Many of them still keep up those methods, notwithstanding that it has been demonstrated by practical experience and scientific experiments as to the "duty of water" that by so doing they are raising smaller and poorer crops than they could raise by using the water more sparingly. In many places it has been shown that from a given amount of water five or six times as much land could be irrigated than had been thought possible in early days, and with much better results. Then, again, there is another subject which must be mentioned in this connection. In the earlier days the lower lands, or those nearest the streams, were usually settled upon. The higher, or bench lands, were considered only fit for grazing. During the later years these lands are also being cultivated and irrigated, and

2 "When irrigation first began, little attention was paid to the economical use of water or to the just division of rivers among irrigators. The area watered was so small that the owners of ditches did not need to consider how much was used or how much was wasted. They had all they wanted, and because it cost nothing and they were free to take it as they pleased they failed to realize its coming scarcity and importance. Every transaction which had to do with the disposal of streams was marked by a lavish prodigality. Ditches diverted more water than was used. Their owners claimed more than they could divert, while decrees gave appropriators titles to more water than the ditches could carry and many times what the highest flood could supply. Little was known of the quantity of water needed to irrigate an acre of land, and in the absence of such information the ignorance and greed of the speculative appropriator had its opportunity." Elwood Mead in U. S. Dept. of Agriculture, Bulletin 86, p. 15.

the seepage from the upper lands affects the quantity of the water now needed by those lands lying under them. Not near the amount of water is needed now as was actually needed at first to irrigate these lower lands. Then, again, the changes in the conditions in the land itself also have had its effect upon the amount needed. As the land becomes covered with trees and vegetation from the effects of cultivation and irrigation, it does not require the same amount of water as at first.[3] As a general thing, all of these influences tend to lessen the lawful claims of the early settler, as he can only claim the amount which he actually applies to some beneficial use or purpose. But in many localities throughout this Western country there are those who still claim the amount of water originally diverted by them, even to the injury of their own lands. It seems as though, if they can get the water originally claimed by them, or an extra amount of water, that they had rather raise cat tails and tules than to raise useful crops. But by the strict enforcement of the rule that only such quantity of water can be claimed under an appropriation as is actually applied to a useful purpose, and that the surplus over and above that amount is subject to appropriation by others, the days of "the dog-in-the-manger"[4] or the water hog—to be more accurate, as he not only prevents others from being benefited, but injures himself by so doing—are numbered.

§ 876. **At an early day the courts had little knowledge as to economical use.**—Owing to the general lack of knowledge upon the subject, the courts were as ignorant as to the essential amount of water to successfully irrigate a given tract of land as were the settlers and practical irrigators. That this was the case one has but to examine some of their early decrees adjudicating water rights to various users. There being at this time no accurate method in

3 "Again, it has been so often demonstrated as to become a matter of common knowledge that lands after years of irrigation do not require the amount which, when first applied, was essential to the successful growing of crops thereon. This law of Nature, added to the improved methods, greatly reduces the quantity now required." Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, U. S. v. Conrad Invest. Co., 156 Fed. Rep. 123.

4 An expression used by Mr. Chief Justice Sanderson in the case of Nevada etc. Co. v. Kidd, 37 Cal. 282, 309, and also used by Judge Hawley in the case of Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

practice for the measurement of water, either of the amounts flowing in the streams or the amounts diverted and used, and where any measurements were attempted at all, the miner's inch being used,[1] which at best is a most inaccurate method of measurement, it is not to be wondered at that many of the early decrees adjudicating the rights of the various appropriators from certain streams were usually indefinite as to the amounts of water allowed, were often inconsistent with other decrees rendered by the same Court relative to the waters of the same stream, many times inconsistent with themselves and the facts as disclosed by the evidence, oftentimes ridiculous, and are now treated as legal curiosities. Of course, the courts have to decide cases upon the weight of the evidence presented before them, and there being no evidence or no reliable evidence, upon the quantity of water essential to irrigate a certain tract of land, they oftentimes decided the question upon their best judgment, which was sometimes right and sometimes wrong, and oftentimes gave excessive amounts of water for the area to be irrigated. There is no better example of this subject than that of the district irrigated by the Cache la Poudre River, in Colorado. This region, as we have seen in a previous section,[2] was settled by intelligent Eastern people. A high standard of irrigation had been established, and excellent methods, for that period, had already been employed, both in the distribution of the waters from the stream among the various irrigators and in their application of the water. Then the whole matter was thrown into the court for the adjudication of these rights. When this adjudication took place there were twenty-three early ditches, which, taken together, irrigated about 1,000 acres of land. These ditches were small, and could not do more than irrigate the bottom lands along the stream, yet their combined appropriations, as fixed by the decree of the Court, amounted to 692 cubic feet per second, or enough water to have irrigated 41,520 acres on a duty of water of sixty acres per cubic foot per second, or more than forty times the amount of water actually used under the then wasteful methods, and more than one hundred times the water actually needed under the methods now prevailing on the same stream. The mean annual flow of the Cache la Poudre River, as taken from the report of the State

1 For measurement of water by the miner's inch, see Secs. 889-891.

2 See Secs. 247, 248.

engineer of Colorado for 1889, was 735 cubic feet per second, and for 1890 was 770 cubic feet per second, and during those years this volume served to irrigate 139,000 acres of land. This was a duty of water of 189 acres for each cubic foot of water per second in 1889, and 180 acres in 1890. The Court decree, therefore, gave to 1,000 acres of land almost as much water as now serves to irrigate nearly 140,000 acres.[3]

There are many other illustrations of the extravagant quantities of water which were awarded by the courts in early days, all owing to the lack of knowledge of the actual necessities of irrigation, both upon the part of the witnesses who testified in these cases and upon the part of the courts which rendered the decrees. But two more examples will suffice, the case of Hillman v. Hardwick,[4] decided by the Supreme Court of Idaho in 1891, and one of more recent date, decided by the Supreme Court of Oregon. In Idaho the testimony before the trial court was to the effect that the entire flow of the stream was about 100 inches of water. The District Court decreed to the various parties the amount of 370 inches during the early part of the irrigating season to June 15, and smaller amounts later as the volume of the water decreased, and in making the decree entirely disregarded the priority of the plaintiff to the amount of 125 inches. The Supreme Court, in setting aside the decree and awarding the plaintiff the prior right up to 125 inches, by Mr. Justice Huston, said: "The individual who causes two blades of grass to grow where but one grew before is held in highest emulation as a benefactor of his race. How, then, shall we rank him who, by judicial fiat alone, can cause 400 inches of water to run where Nature only put 100 inches? (We veil our faces, we bow our heads before this assumption of judicial power and authority.) . . . Evidently the (district) Court assumed that Gooseberry Creek was as inexhaustible as the widow's cruse, or else that its decree possessed the potency of Moses' rod."

Also, in a recent Oregon case,[5] the trial court in a suit awarded

3 See Boyd's History of Greeley and the Union Colony, pp. 124-126.

See, also, U. S. Dept. of Agriculture, Experiment Stations Bulletin No. 86, pp. 16, 17.

See, also, Water Supply and Irrigation Papers, U. S. Geological Survey, No. 9, 1897, by David Boyd.

As to the duty of water, see Secs. 902-908.

4 2 Idaho 255, 28 Pac. Rep. 438.

5 Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

a continuous flow of seventeen inches per acre under the Oregon standard of a six-inch pressure. This was considered excessive by the Supreme Court, which, in the opinion, said: "A flow of seventeen inches, therefore, would cover an area equal to one acre to a depth of twenty-five and one-half feet each month, or 102 feet in depth (102 acre feet) during an irrigation season of four months. The absurdity of such a quantity, being essential to the proper irrigation of lands, is manifest." The Supreme Court modified the decree of the lower court without the taking of additional testimony.[6]

We cite these instances relative to the early decrees of the courts simply to show the ignorance which universally prevailed through the West as to the quantity of water necessary to irrigate a given tract of land, and also upon the question of the measurement of water generally. In following sections we will endeavor to trace the results of modern scientific investigation as to the duty of water,[7] and the more modern methods of measurement.[8]

§ 877. Quantity of water limited to amount needed and economically used.—As we have seen in the previous portions of this work, the first appropriator is entitled to the use and enjoyment of the water to the full extent of his original appropriation,[1] even if it takes all of the water naturally flowing in the stream.[2] He is also given a reasonable time within which to apply the water to the purpose for which the appropriation is made.[3] The terms used by some of the courts in some of their early decisions, that "the first appropriator has a prior right to such water to the extent of his appropriation,"[4] and later, that "the priority of right is limited to the amount of water actually appropriated and to the amount actually needed"[5] are both vague and indefinite as to the quantity

6 See, also, for decrees of Court, Chap. 78.

7 See Secs. 902-908.

8 See Secs. 889-900.

1 See Secs. 777-782.

2 See Secs. 780, 781.

3 For time within which to consummate an appropriation, see Secs. 725-728.

For reasonable time, see Secs. 733-741.

For the appropriation for future needs, see Sec. 740.

4 Schilling v. Rominger, 4 Colo. 100; Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530. See, also, Sec. 777.

5 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

or amount of water which can be lawfully claimed by an appropriator for any purpose within "the extent of his appropriation." Therefore, it becomes necessary in the succeeding sections of this chapter to ascertain by what methods and upon what basis the extent of a prior appropriator's right to the use of a certain quantity of water for a given purpose is to be determined.

Upon this proposition there is one general rule which may now be considered as settled law in all of the States where the law of appropriation is in force, and that is that the quantity of water which can be lawfully claimed under a prior appropriation is limited to that quantity or amount which is needed and within the amount claimed, and within a reasonable time, is actually and economically applied to the beneficial use or purpose for which the appropriation was made or to some other beneficial use or purpose.[6]

[6] For the right to change use, see Secs. 869-872.

The following are but a part of the cases sustaining the proposition that actual beneficial use limits the amount of water which may be taken under a prior appropriation:

Alaska.

Ketchikan Co. v. Citizens' Co., 2 Alaska 120.

Arizona.

A person may appropriate to his use the waters of a non-navigable stream, and maintain his right thereto against everybody to the extent of his use. Others may appropriate subject to his right. Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

California.

Civ. Code of Cal., Sec. 1411.

A proprietor of a water right is entitled to so much water as he can put to a useful purpose on his lands within a reasonable time by the use of reasonable diligence. Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563.

See, also, Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. Rep. 397.

The extent of an appropriation is limited, not by the quantity of water diverted, but by the quantity of water which is, or may be, applied to a beneficial use. Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811.

See, also, Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Santa Paula etc. Works v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Dougherty v. Haggin, 61 Cal. 305, 56 Cal. 522; White v. Todd's etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. 119, 108 Pac. Rep. 1027; Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

Federal Court for California: Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101.

Colorado.

A mere diversion of water is not an appropriation of it. A diversion

without application to a beneficial use is unlawful. The very birth and life of a prior right to the use of water is actual user. An excessive diversion can not be regarded as a diversion to a beneficial use. Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

See, also, Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Weldon Valley Ditch Co. v. Farmers' Pawnee Canal Co., —— Colo. ——, 119 Pac. Rep. 1056.

A priority of waters for irrigation confers no right to appropriate them for storage in any greater quantity than they could be appropriated for irrigation as against another appropriator whose right is subsequent to the appropriation for irrigation, but prior to that of storage. Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185.

See, also, Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; X. Y. etc. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. Rep. 720; Burkart v. Meiberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; Platte Val. Co. v. Cent. Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. Rep. 220; Windsor etc. Co. v. Hoffman etc. Co., 48 Colo. 82, 109 Pac. Rep. 422; *Id.*, 48 Colo. 89, 109 Pac. Rep. 425, 30 L. R. A., N. S., 615; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Town of Stirling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

Federal Court for Colorado: U. S. etc. Co. v. Gallegos, 89 Fed. Rep. 772, 32 C. C. A. 470, 61 U. S. App. 13.

Idaho.

The appropriators and users of the waters within this State will be required and commanded to so divert, use, and apply the waters as to secure the largest duty and the greatest service therefrom. Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752.

See, also, Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. Rep. 189; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Hutchinson v. Watson D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

Kansas.

Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62, quoting Kinney on Irr., 1st Ed., Secs. 165, 166.

Montana.

See Montana Stats. 1907, pp. 109, 489; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Kelley v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785.

No one, by prior appropriation, can obtain exclusive control of an entire stream, or any part thereof, for irrigation purposes, unless the appropriation is for some beneficial purpose. Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396.

See, also, Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Creek v. Bozeman W. Co., 15 Mont. 121, 38 Pac. Rep. 459; Hilger v. Zabel, 38 Mont. 93, 98 Pac. Rep. 881.

Nebraska.

Courthouse etc. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463; Farm-

ers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

Nevada.

Nevada Stats. 1907, p. 30, Sec. 4; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

The first appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. When he has that he can not prevent others from making use of the surplus. Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867.

See, also, Twaddle v. Winters, 29 Nev. 88, 89 Pac. Rep. 289; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213; Berry v. Equitable etc. Co., 29 Nev. 451, 91 Pac. Rep. 537; Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8; Doherty v. Pratt, —— Nev. ——, 124 Pac. Rep. ——.

Federal Court for Nevada: Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932, where it is held that, in determining the amount of water which a user applies to a beneficial use, and to which he is entitled to a prior right, the system of irrigation in common use in the locality is to be taken as the standard, though a more economical method might be adopted.

See, also, *Id.*, 129 Fed. Rep. 932.

New Mexico.

Capacity of a ditch alone does not constitute a valid appropriation of water, unaccompanied by an application of the water to some beneficial use. Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Hagerman Irr. Co. v. McMurry, —— N. M. ——, 113 Pac. Rep. 823.

North Dakota.

Rev. Codes 1905, Secs. 7604 *et seq.*

Oklahoma.

"The law requires that there must be reasonable diligence by one intending to appropriate water from a stream, both in the prosecution of the improvements necessary to conduct the water to the place of use and in the application of the water to beneficial uses." Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856, citing Kinney on Irr., 1st Ed., Sec. 164.

Oregon.

"On the other hand, an appropriator, subject to rights in existence at the time his appropriation is made, may take all the water he can use reasonably and without waste for a beneficial project, although it may be the lion's share and none may be left for those who come afterwards." Caviness v. Le Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731; Andrews v. Donnelly, —— Ore. ——, 116 Pac. Rep. 569; McCoy v. Huntley, —— Ore. ——, 119 Pac. Rep. 481; Donnelly v. Cuhna, —— Ore. ——, 119 Pac. Rep. 331; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Bolter v. Garrett, 44 Ore. 304, 75 Pac. Rep. 142; Glaze v. Frost, 44 Ore. 29, 74 Pac. Rep. 336; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Little Walla Irr. Union v. Finis Irr. Co., —— Ore. —, 124 Pac. Rep. 666.

South Dakota.

Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402.

This rule is now strenuously insisted upon by the courts in all jurisdictions, as will be seen from selections from very recent decisions from various courts. As was said in a leading Oregon case:[7] "Again, the use of the water by each, for reasons given in the case last cited, must also be limited in its application to the acreage of land upon which previously applied, except at such times as the water or some part thereof may not be needed by others; and the owner not requiring its use should not be permitted to complain of its application to a beneficial use by others interested. In other words, at all times that the water is not required by one or more, it must be at the disposal of others in the order of their relative rights thereto." And, again, as was said in a more recent Arizona case:[8] "The mere fact that by his notice of appropriation he sought to appropriate all of the flood waters of the stream, does not entitle the appellant to relief against the appellee. To make his appropriation effectual he must make use of the water within a reasonable time. He may then be protected only to the extent that he makes a beneficial use of the water. Whenever there is water in excess of his needs, others may appropriate it." And, again, as was said by Mr. Chief Justice Frick, for the Supreme Court of Utah, in a still more recent case:[9] "The ultimate ques-

Utah.

An individual may appropriate as much water as the purpose requires at any time; but, if the use of the amount is not actually needed all the time, subsequent appropriators are entitled to take it in the order of their rights to the extent of their necessities and appropriations. Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; Nephi Irr. Co. v. Vickers, 29 Utah 315, 81 Pac. Rep. 144; Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112; Salt Lake City v. Gardner, —— Utah —, 114 Pac. Rep. 147.

Washington.

Rem. & Bal. Ann. Stat. 1910, Secs. 6315 *et seq.;* Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Shafford v. White Bluffs etc. Co., 63 Wash. 10, 114 Pac. Rep. 883.

Wyoming.

Wyoming Stats. 1907, p. 138, Sec. 12; Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 968; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

7 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

8 Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

9 Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

tion for determination, however, is not how much water appellants required, but what amount had they applied to a useful and beneficial purpose for a term of years prior to the time when respondents made their appropriation?" [10]

This rule has been embodied in many of the irrigation or water codes recently enacted in a number of the States, and in which the common expression is found: "Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this State." [11]

§ 878. Quantity of water limited by claim.—The quantity of water which may be diverted under any single appropriation is limited by the amount originally claimed under that appropriation. The more modern method of laying claim to a certain amount of water, and one which the statutes of the most of the States provide for, is by means of the notice of appropriation, or by an application to appropriate.[1]

These statutes usually provide that the notice of intention to appropriate water shall state specifically the quantity of water which the appropriator intends to take and the beneficial purpose for which the appropriation is made. In most cases the notice is sufficient to fix the maximum rights of the appropriator. He can not take any more water than is called for in the notice,[2] but he may be compelled to take less, if he does not put all of the water claimed in the notice to a beneficial use. For, as we have seen in a previous

10 That all the water appropriated must be applied to a beneficial use or purpose, see Secs. 725-728, and 738.

See, also, as to the rights of the prior appropriator as against the rights of subsequent appropriators, Secs. 776-782.

11 Compiled statutes of Utah, 1907, Sec. 1288x20.

For the statutes of the various States, see Part XIV.

1 For notice of appropriation, see Secs. 710-716.

For effect of notice, see Sec. 714.

For application to appropriate under the irrigation codes, see Secs. 1349-1353.

2 Where the complaint states that the water was appropriated "in pursuance of notice duly given and made," a finding that the appropriator was entitled to water in twelve times the amount claimed in the notice can not be sustained. Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523.

See, also, Becker v. Marble Creek etc. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454.

section, the true test of the quantity of water which can be lawfully claimed under a single appropriation is limited to the quantity actually needed and economically used for some beneficial purpose.[3]

An appropriator can not reserve to himself a certain amount of water claimed for a public use, and not actually applied to a useful purpose. As was said in a late California case:[4] "As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purposes any part of this water. If he could reserve a part he could reserve all, and thus, by his *ipse dixit*, convert a public use into private ownership; or if he could reserve a part for himself he could with equal authority give away parts of the supply to others, and by this method destroy what the constitution itself has declared shall forever remain a public use. Therefore, the only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch. If this be so, then his rights to water would be measured, as are the rights of every other private appropriator—not by the amount which he took, not by the amount which he claimed, not, as the Court decrees, by an amount sufficient thoroughly and properly to irrigate a thousand acres of land, but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water would also be measured by and limited to this quantity."[5]

But, in cases where notice was not given, as was often the case during the early history of the law of appropriation,[6] or where the appropriation is made by actual diversion and the code provisions are not followed, the quantity of water which can be claimed must be determined by the use to which the water is put, together with the capacity of the ditch as indicating the maximum amount of the claim.[7] The amount of water which can be lawfully appropriated under any claim depends largely upon the priority of right,[8]

[3] See Secs. 727, 877.

[4] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213.

[5] Citing Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288.

[6] As to the early laws requiring notice, see Secs. 711, 712.

[7] For modern rule as to the capacity of the ditch, see Sec. 882.

[8] For rights of prior appropriators, see Secs. 777-782.

and the intention to make the appropriation for a certain purpose. And such intention, where not established by notice, application, or in some other public manner, can in no way be known by or control others wishing to make secondary appropriations from the same stream. This intention may then be established from the capacity of the ditch, and the amount of water reasonably required, when economically used, for the purpose for which the appropriation is made,[9] and the time which the appropriator has already consumed in the final consummation of the appropriation [10] and the application of the water to a beneficial use or purpose.[11] And it is held that, where one has appropriated water for irrigation and has actually used the water for such purpose, he can not be deprived of his rights by the fact that he did not in the first instance describe a definite measurement of what he uses, and does not furnish clear and satisfactory evidence of the amount he requires. The exact amount of water required for his purposes under his claim may be ascertained by further proceedings.[12] In some of these methods the maximum claim of the prior appropriator must be determined, for the reason

[9] This is the rule in Colorado, where no notice is required.

See Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153.

For early cases, see Ortman v. Dixon, 13 Cal. 33, 1 Morr. Min. Rep. 626; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; McKinney v. Smith, 21 Cal. 347, 1 Morr. Min. Rep. 650; White v. Todd's Val. etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536.

Every appropriation of water must be for a beneficial or useful purpose, either existing or contemplated, and the claimant's intent at the time of the appropriation must be determined by his acts, and by surrounding circumstances, its actual and contemplated use, and the purpose thereof. Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396.

[10] For reasonable time, see Secs. 733-741.

[11] For actual application of the water, see Secs. 727, 877.

For the appropriations for future use, see Sec. 740.

See, also, U. S. etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Elliot v. Whitmore, 23 Utah 324, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652.

[12] In a case involving this point arising in Washington on appeal the Court reversed the judgment with instructions to the trial Court to hear and consider only such further evidence as might be produced before it upon the quantity of water required to irrigate the land owned by the plaintiff and for which the appropriation was made. Longmire v. Smith,

that all of the water of the streams are subject to appropriation and use, and subsequent appropriators must be given the opportunity to take the surplus.[13] However, where there are no subsequent appropriators on the stream, an appropriator may enlarge his claim. But this must be done in the same method as is necessary in the making of a new appropriation.[14] And, again, where a party appropriated water, and by failure to apply it to a beneficial use within a reasonable time forfeited his rights, he may afterwards reappropriate the same amount of water if intervening rights have not attached.[15]

§ 879. Quantity of water limited by special purpose for which appropriation is made.—The special purpose or object for which the appropriation is originally made often determines the extent of the appropriator's right to the use of the water, and in such a case the appropriator is entitled to only so much as is reasonably necessary for that purpose, and that, too, whether he continues to use the water for that identical purpose or subsequently applies it to some other. In other words, the measure of the right of the prior appropriator as to the quantity of water depends upon the reasonable amount necessary for the beneficial use or purpose for which it was originally appropriated.[1] The uses or purposes for which

26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308.

13 For rights of subsequent appropriators, see Secs. 783-786.

14 Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. Rep. 205.

15 Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

1 Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Butte C. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Ortman v. Dixon, 13 Cal. 33; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537.

The appropriation of water for a specific purpose qualifies such appropriation by limiting the volume to the quantity necessary for that purpose. Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185, citing Kinney on Irr., 1st Ed., Sec. 231.

"The need of the purpose for which the appropriation is made is the limit to the amount of water which may be taken." Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7.

See, also, Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Seaweard v. Pacific L. Co., 49 Ore. 157, 88 Pac. Rep. 963; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Union M. & M. Co. v. Dangberg, 81 Fed. 73; Anderson v. Bass-

water may be appropriated[2] may be divided into classes: First, those which practically consume the water; and, second, those which do not. It is true, as we have seen in the preceding chapter of this work, that an appropriator may, under certain conditions, change his use of the water from one purpose to another,[3] but in making this change he is bound by the original limitation as to the quantity of water as that for his original use. And if he attempts to divert more water than his original use called for, he may be prevented by any subsequent claimants who may have secured rights in the waters of the stream, and whose rights are thereby injured.[4]

§ 880. **Capacity of ditch or canal.**—The general rule for the capacity of a ditch or canal, after making due allowance for evaporation and seepage, is the continuous amount of water which it will carry from the point of diversion to the point of use, and the point on the ditch of the least carrying capacity fixes its general capacity.[1]

man, 140 Fed. Rep. 14; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

"No person can by virtue of a prior appropriation claim or hold any more water than is necessary for the purpose of his appropriation. Reason is the life of law, and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it is not necessary to use the same for the purpose of his appropriation." Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

2 For what purposes water may be appropriated, see Secs. 690-705.

3 For change of the use of water appropriated, see Secs. 869-872.

4 For right to make change of use, see Secs. 869-872; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111, citing Kinney on Irr., 1st Ed., Sec., 231; Handy D. Co. v. Louden Irr. Co., 27 Colo. 515, 62 Pac. Rep. 847, citing Kinney on Irr., 1st Ed., Secs. 175, 231, 248; New Loveland & Greeley etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266, citing Kinney on Irr., 1st Ed., Secs. 230, 232; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213; Byrne v. Crafts, 73 Cal. 641, 15 Pac. Rep. 300; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541.

1 Posachane W. Co. v. Standart, 97 Cal. 476, 32 Pac. Rep. 532; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116; Ophir etc. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

It is measured by the smallest space in the upper part of the ditch. Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304.

The carrying capacity of a ditch is not established by a mere showing of

The carrying capacity of a ditch may be determined by its width, depth, and grade or the velocity of the flow of the water therein.[2] The carrying capacity of a ditch or canal means its continuing carrying capacity. Upon the other hand, the capacity of a reservoir means the amount of water that the reservoir is capable of holding at one filling.[3]

§ 881. Early rule as to the capacity of ditch as related to the quantity of water appropriated.—During the history of the formative period of the Arid Region Doctrine of appropriation, on account of the inexperience of the practical irrigators, as well as of the legislators and of the courts, and the entire lack of scientific knowledge upon the subject, a number of rules were adopted which are now considered erroneous and have long since been repudiated. One of these rules was, that without taking into consideration the beneficial use to which the water was applied, the capacity of the ditch itself was considered at least *prima facie* evidence of the quantity of water which might be claimed under a certain appropriation, upon the theory that the diversion of a ditchful was the taking into possession of an amount of water to that extent, and therefore an appropriation of that amount.[1] So, in the early days, when settlers in

the width and depth of the ditch, but the velocity of the flow must be shown. Caruthers v. Pemberton, 1 Mont. 111, 4 Morr. Min. Rep. 622.

See, also, Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523.

For the measurement of this capacity, see Sec. 881.

2 Bates v. Hall, 44 Colo. 260, 98 Pac. Rep. 3; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

3 See Windsor etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729.

1 The appropriator is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch, as it existed at the time of the subsequent appropriations of the stream. "This right is essential to the protection of the ditch owner." Bear River etc. Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; approved in Hill v. King, 8 Cal. 336, Mokelumne Hill Co. v. Woodbury, 10 Cal. 185, but modified in Pilot Rock etc. Co. v. Chapman, 11 Cal. 162; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185.

See, also, Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Moore v. Clear Lake Water Works, 68 Cal. 147, 8 Pac. Rep. 816.

"Here the point is made that the count fails to show that the plaintiff is in a position to use the water himself, or that he is in any position

the arid and semi-arid regions were few and scattering and there was plenty of water for all, if a person constructed a ditch of a certain capacity and diverted water enough to fill it, before the rights of subsequent claimants to the water from the same stream had vested, the first appropriator's rights to a certain quantity of water were considered fixed by the amount that filled his ditch to its full capacity. And although the ditch might have a capacity of ten times the amount of water which he needed for the purposes for which he used it, but little regard was paid to that fact, and the only restriction placed upon his right was that he was not permitted to still further enlarge the capacity of his ditch and thus increase the amount of his appropriation of the water as against the rights of others, who had subsequently appropriated the surplus flowing in the stream.

Under the later decisions relative to the capacity of the ditch being the limit of the extent of the appropriator's rights in and to the waters of a stream, it is held to be against the general policy of the entire modern system of the doctrine of appropriation that the greatest good shall accrue to the greatest number. For if this was the law upon the subject a person might lay claim to the water of whole rivers for the ostensible purpose of irrigating immense tracts of lands, which with the utmost diligence it would take years to accomplish; and although others might intervene an attempt to appropriate the water of a stream they could only lay claim to it for a temporary period of time, and until the works of the first appropriator were eventually completed, and they would then be deprived of their appropriation. Thus would the way for speculation, and monopoly be opened, and the main object of the law defeated.[2]

which gives him a right to furnish the water to others. The allegation of these matters is not essential to plaintiff's right of action." Moore v. Clear Lake Water Works, 68 Cal. 147, 8 Pac. Rep. 816.

The quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at the smallest point; that is, at the point where the least water can be conveyed through it. Ophir M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

See, also, Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Caruthers v. Pemberton, 1 Mont. 111, 4 Morr. Min. Rep. 622; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; overruled in Donnelly v. Cuhna, —— Ore. ——, 119 Pac. Rep. 331.

2 Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111, quoting Kinney on Irr., 1st Ed., Sec. 161.

The true test, as we have seen, of the quantity of water which may be lawfully claimed, under a prior appropriation, is the quantity or amount of water which is needed and is actually and economically applied to some beneficial or useful purpose within a reasonable time; and any surplus over and above this amount is subject to the appropriation and use by others.[3]

§ 882. **Modern rule as to the capacity of ditch as related to quantity of water appropriated.**—The right of the prior appropriator to the use of a certain quantity of water, as already stated in the previous sections,[1] being limited by his necessity and that, too, when the water is economically used, it therefore follows that the carrying capacity of the appropriator's ditch has no bearing upon the question as to the amount of water which he can lawfully claim, where the ditch carries more water than the needs of the appropriator require.[2] As was said in a Nevada case, "If the capacity

That water can not be appropriated for speculation and monopoly, see Sec. 705.

3 For later rule as to the capacity of ditch, see Sec. 882.

For reasonable time in which to consummate an appropriation, see Secs. 733-741.

1 See Sec. 877.

2 That all the water appropriated must be so applied, see Secs. 727, 877.

For seepage and evaporation as affecting quantity, see Sec. 908.

"The law has become well settled that beneficial use and needs of the appropriator, and not the capacity of the ditches or quantity first applied, is the measure and limit of the right of such appropriator." Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728, citing Kinney on Irr., 1st Ed., Sec. 30.

Capacity of ditch does not alone constitute a valid appropriation of water, unaccompanied by application of water to some beneficial use. Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111, citing Kinney on Irr., 1st Ed., Sec. 161.

See, also, Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266, both citing Kinney on Irr., 1st Ed., Secs. 230, 232.

See, also, Seaweard v. Pacific L. Co., 49 Ore. 157, 88 Pac. Rep. 963; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116; Anderson v. Bassman, 140 Fed. Rep. 14.

The paramount right to the use of water is measured by the owner's necessities, and not by the capacity of the ditch. Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546.

See, also, Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560.

An appropriation of water by the means of a ditch is not measured by the capacity of the ditch, but is limited to such quantity as the appropriator may put to a useful purpose.

of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irrigation, for watering his stock, and for domestic purposes."[3] Those who are at all familiar with the conditions in the West will recognize that it is quite a customary occurrence for appropriators to construct ditches much larger than the actual extent of their appropriation demands. Where this is the case and the water of the stream is diverted to the full capacity of the ditch, even if the appropriator is prior to all others in point of time, where such an amount is not beneficially used it is the law that the claim must be cut down to the amount of water actually used for such purposes and, furthermore, economically applied;[4] and the surplus water is either treated as abandoned,[5] or forfeited under some statute for failure to use within the time specified,[6] or it is held that no legal appropriation was made as to such surplus.

In a Colorado case, where it was found that a ditch had a carrying capacity of 33 cubic feet of water per second of time, and where it was constructed to irrigate only 120 acres of land, it was decided that the appropriator was entitled only to so much water as he could beneficially apply upon the land.[7]

Where the appropriation is made without notice, as allowed in Colorado,[8] or is by actual diversion without complying with existing statute, the capacity of the ditch may be evidence of the intent to appropriate a certain quantity of water, when taken in connection with the facts of use.[9] But a decree based alone on the capacity of a ditch is erroneous as it should further be limited to

Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; affirming *Id.*, 110 Cal. 122, 42 Pac. Rep. 453.

See, also, Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. Rep. 397; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454.

[3] Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

[4] That water must not be wasted, see Secs. 911-916.

[5] For abandonment, see Secs. 1100-1117.

[6] For forfeiture, see Secs. 1118-1120.

[7] New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989.

See, also, Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

[8] For notice, see Secs. 710-716.

[9] "Such intention, unless established by notice or in some other public manner, could in no way be known, or to control others wishing to take the

a beneficial use of all of the water up to that capacity.[10] This principle was illustrated in a recent Colorado case,[11] where a decree was rendered by the trial Court giving as excessive amount of water, and where the Supreme Court in reviewing the same said: "The Court apparently based the first appropriation upon the amount of water carried through the canal, and not the amount necessary for the irrigation of the land, applied to a beneficial use. The complaint, on the same line, ingeniously alleges that the ditch was originally constructed 12 feet wide on the bottom, with a capacity of 100 cubic feet per second, and capable of irrigating 5,000 acres of land. Admitting all this, the ditch might not be entitled to any decree. We have endeavored to show these settlers could not make a beneficial use of more water on the tracts than was necessary for their irrigation. It is immaterial whether the Buffalo ditch was 10, 12, or 15 feet wide on the bottom, or whether it was capable of irrigating 5,000 acres of land, and was filled to its capacity. Any one familiar with irrigation knows that 47 cubic feet of water per second is not necessary for the irrigation of 640 acres of land. That amount, therefore, was not beneficially applied thereto." Again, in a recent Oregon case,[12] involving the same question, the Court said: "The defendant's attorney, invoking the rule adopted in Coventon v. Seufert[13] that the capacity of the ditch at the smallest place affords the measure of the right, insists that the quantity of water awarded by the decree was a just distribution. The principle announced in the case referred to is not now controlling, when more careful methods of irrigation have been discovered, so that water is not wasted, and a larger area of land is adequately moistened, thereby promoting a greater and better development of the country. The adaptability of arid lands to the

water from the same stream, and such intention could only be inferred or deduced (1) from the capacity of the ditch at its head and perhaps (2) the amount of irrigable land of the ditch proprietors upon which it could be reasonably supposed that they intended to apply it." Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 153.

For intent to appropriate, see Secs. 708, 709.

10 Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Lakeside etc. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Medano v. Adams, 29 Cal. 317, 68 Pac. Rep. 431.

11 Weldon Valley Ditch Co. v. Farmers' Pawnee Canal Co., — Colo. ——, 119 Pac. Rep. 1056.

12 Donnelly v. Cuhna, —— Ore. —, 119 Pac. Rep. 331.

13 23 Ore. 548, 32 Pac. Rep. 508.

growth of particular crops by careful irrigation furnishes the test of the quantity of water reasonably necessary for that purpose. The number of acres of such land that is susceptible to cultivation, the degree of sterility of the premises, the most profitable crops that can be raised by artificial application of moisture, and the quantity of water reasonably necessary to produce the harvest on an acre by careful husbandry, are elements to be considered in determining the measure of an appropriation."

In a very recent Montana case [14] the modern rule relative to the capacity of the appropriator's ditch as relating to the quantity of the water appropriated by him was well stated in the following language: "The appropriator's needs and facilities, if equal, measure the extent of his appropriation. If his needs exceed the capacity of his means of diversion, then the capacity of ditch, etc., measures the extent of his right. If the capacity of his ditch exceeds his needs, then his needs measure the limit of his appropriation." [15]

§ 883. **Quantity of water limited by size of ditch.**—Upon the other hand, where the ditch carries no more water than is reasonably required by the necessities of the appropriator, with the appropriation fully consummated,[1] the capacity of the ditch has the effect of definitely fixing and limiting the maximum quantity of the water that the appropriator is under any circumstances entitled to.[2] And,

14 Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

15 Citing Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 496; Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389; McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648.

1 For the consummation of an appropriation, see Secs. 725-729.

For the appropriation for future needs, see Secs. 740, 886.

2 "If, however, the capacity of his ditches is not more than sufficient for those purposes, . . . he must be restricted to the capacity of his ditches at their smallest point; that is, at the point where the least water can be carried through them." Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673.

See, also, Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304, citing Kinney on Irr., 1st Ed., Sec. 230; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Dougherty v. Haggin, 61 Cal. 305, 56 Cal. 522; Posachane etc. Co. v. Standart, 97 Cal. 476, 32 Pac. Rep. 532; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Higgins v. Baker, 42 Cal. 233; San Luis etc. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep.

again, where at times the flow of the stream is not up to the full capacity of his ditch, he is entitled to all the water up to that capacity, provided that the extent of his prior appropriation covers that amount.[3]

The capacity of the appropriator's ditch being the maximum amount of water which he can divert by virtue of his appropriation, the quantity of water to which he is entitled is limited to that amount, and he must apply this quantity with reasonable economy to the purpose for which he makes the appropriation, or to some other purpose.[4] His prior right thus limited becomes fixed and certain, and others may appropriate the remainder of the water running in the stream and acquire a title thereto as perfect as that of the right of the prior appropriator.[5] And after the rights of others have vested to the remainder of the water by the appropriation of the same, the first appropriator can not in any way increase his appropriation by enlarging the capacity of his ditch, or by any other method increase the amount of the water diverted by him, if the later comers are in any way materially injured or their rights infringed upon.[6]

§ 884. Capacity of ditch or canal—Rule in adjudicating priorities.—It seems to be the tendency of appropriators to construct ditches and canals of a larger capacity than the utmost extent

39; Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108; White v. Todd's Valley etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Driskill v. Rebbe, 22 S. D. 242, 117 N. W. Rep. 135.

3 Where one appropriates a specified amount of water, and his ditch will carry this amount, he is entitled to such an appropriation if that amount of water is ever in the stream. Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389.

4 For the right to change the use, see Secs. 869-872.

5 For rights of subsequent appropriators, see Secs. 783-787.

6 Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185, citing Kinney on Irr., 1st Ed., Secs. 230, 232; Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Proctor v. Jennings, 6 Nev. 83, 3 Am. St. Rep. 240, 4 Morr. Min. Rep. 265; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Ortman v. Dixon, 13 Cal. 33; Higgins v. Baker, 42 Cal. 233; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; South Side Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107.

of their lawful claim to the waters of the stream demands, or of a capacity larger than the aggregate volume of their priorities where there are more than one taking their water through the same ditch. But the physical size of a ditch and the aggregate volume of its priorities do not alone determine its capacity when it comes to the question of its ability to supply or deliver water. Upon this phase of the question, a ditch or canal can convey no more water than it can obtain from its source of supply.* Hence, in the construction of a contract contained in water deeds issued by vendor companies, wherein their authority to sell water rights was limited to the "estimated capacity" of the canal system, it is held that this term means the ability of the canal to supply or deliver water. And, further, in determining this question, there must be taken into consideration not only the physical capacity of the canal, but also the volume of its decreed priorities, in connection with the probability of obtaining water from the stream supplying them under normal conditions during the season of irrigation.[1] Therefore, in adjudicating the capacity of ditches and canals, it is within the particular province of the Court to determine their ability to supply and deliver water to consumers under all of the facts in each particular case.[2] And when this has once been determined, and a decree entered to that effect, it becomes *res judicata* when attacked in a subsequent action.[3] The courts have often been called upon to determine the carrying capacity of ditches; and, it is held

1 The words "estimated capacity," limited and modified as they are by the words "to furnish," must be construed as meaning the ability of the canal to supply or deliver water. Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

See, also, Blakely v. Ft. Lyon C. Co., 31 Colo. 224, 73 Pac. Rep. 249; Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528; La Junta etc. Co. v. Hess, 31 Colo. 1, 71 Pac. Rep. 415.

2 Blakely v. Ft. Lyon C. Co., *supra*.

3 Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116.

"It has been so frequently determined by this Court that, except as specially provided by the statutes, or in case of fraud, decrees rendered in statutory proceedings under the Irrigation Act are conclusive upon the parties thereto, that an extended discussion of the question would not seem necessary." Farmers' Union etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. Rep. 1042, citing New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Louden C. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac.

that, where the court has once determined the carrying capacity of a ditch, it is as much *res judicata* when attacked in a subsequent action for review of the decree as the determination of the physical dimensions of the ditch. The discovery of a new or more accurate formula for the measuring of the carrying capacity of a ditch, which was not known at the time of the decree, is no ground for setting aside the decree and the entering of a new one, for the reason that there would be no end of litigation, provided still new and more accurate tests for measurement are afterward discovered.[4]

§ 885. Quantity of water limited to that economically used.—As we have seen in previous sections, the later authorities do not look so much to the size of the appropriator's ditch or canal as determining the extent of his right to the use of the waters of a certain stream [1] as did the early authorities, but upon the amount of water which is actually needed by the prior appropriator for the use or purpose for which he applies it.[2] This change of the rule has been gradual and is undoubtedly due to the fact that the irrigable portion of the arid and semi-arid West is rapidly becoming settled up. As the population increased and additional lands were settled upon, which also required water in order that they might be successfully cultivated, the demand for water, of course, became each year greater and greater. Then, again, as the knowledge of practical irrigators has become greater from both the result of experience and from technical education, to which the General Govern-

Rep. 540; Montrose C. Co. v. Loutzenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532.

4 "If we should now correct the decree of 1882 for the reason urged, then at the end of the next decade there may be evolved a new method of determining the carrying capacity of ditches, giving even more accurate results than under the Kutter formula, and, in an action then brought to correct the mistake made by us now in applying the Kutter test, the Court must set aside our decree and enter a new one, and so there would be no end to the litigation, provided new and more accurate tests are discovered." Water Supply etc. Co. v. Larimer etc. Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116.

See for decrees as to inchoate rights, Sec. 1587.

See, also, Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989.

1 See Sec. 882.

2 See Sec. 877.

ment and the agricultural colleges in every Western State and Territory throughout the West have largely contributed, it has been demonstrated in thousands of instances that the soil will yield larger and better crops by not using so large a quantity of water in the irrigation of the same as was at first thought necessary. And as the demand became greater, the legislatures and the courts have often stepped in and prevented the wasteful diversion of water by laying down the rule that the mere diversion of the water was not a legal appropriation of it, but there must be an application of all of the water diverted, within a reasonable time, to some beneficial use or purpose, and that the diversion of any portion of the water which is not so applied is unlawful and subject to appropriation by later comers who will so apply it.[3] Still later the authorities have gone one step further in holding that not only is the quantity of water under an appropriation limited to the amount which is necessary to the use of the appropriator, but that as against other appropriators his right is limited to such an amount which is reasonably necessary for his purposes, when diverted, conducted to the place of use, and applied to that use in a reasonably economical manner. As was held in a Washington case, it becomes the duty of the irrigator to use proper means to bring the water to points where it is needed; to use it only at such times and in such quantities as are necessary for his purposes; and then, if others situated like himself require the water, to stop its flow until it shall again become necessary.[4] As well stated by the Oregon Court in a case decided in 1911:[5] "Before the country was so thickly settled as it is now, the practice for the appropriator of water 'to keep all you get and get all you can' was in many cases tolerated; but, yielding to reason and justice to all, the later authorities have established a different rule. We conceive it to be the law, except as modified by statute, that the right of a prior appropriator is paramount, but the right is limited to such an amount of water as is reasonably necessary for such useful purpose and project as may be fairly within contemplation at the time the appropriation is made."[6]

[3] See cases cited under Sec. 877.

[4] Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254.

[5] Andrews v. Donnelly, —— Ore. ——, 116 Pac. Rep. 569.

[6] "Owing to the little demand and large proportionate supply in use by those along Silver Creek and its branches in the early '80s, together with the lack of general knowledge

Again, as was said in a recent California case:[7] "It is the well-settled law of this State that one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose. His right is not measured by the extent of his appropriation, as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes. Beyond that his appropriation or diversion of more than can be applied by him gives him no right to the excess, and this is subject to appropriation by any other person who may use it for similar beneficial purposes."[8] Again,

and experience on the subject throughout the State, wasteful methods at that time were, no doubt, common; but of recent years improved means throughout the West have come into use, and a scarcity of the supply has made a more economic use necessary. The result is that the law has become well settled that beneficial use and needs of the appropriator, and not the capacity of the ditches or quantity first applied, are the measure and limit of the right of such appropriators." Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, Seaweard v. Pacific L. Co., 49 Ore. 157, 88 Pac. Rep. 963; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116; Anderson v. Bassman, 140 Fed. Rep. 14.

[7] Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

[8] A prior appropriator has the right to use the water to the full extent of his appropriation when the condition of his premises is such as to require the use of the water for his purposes; but he has no right to waste it, or to use it extravagantly or imprudently, so as to injure the rights of others. Huston v. Bybee, 17 Ore. 140, 20 Pac. Rep. 51, 2 L. R. A. 568.

See, also, Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

But, whatever he may be irrigating, he is only entitled to the amount he needs, economically and reasonably used, and when he has that he can not prevent others from using the surplus. Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867.

See, also, Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Natoma W. Co. v. Hancock, 101 Cal. 42, 35 Pac. Rep. 334; reversing 101 Cal. 42, 31 Pac. Rep. 112; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678.

"As before stated, the measure and limit to the use of water is determined by the quantity applied to a beneficial use." Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

See, also, Burkart v. Meiberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288; Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

in a very recent Idaho case it is said: "Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water."[9] As to what constitutes a reasonably economical use of the water will be more thoroughly discussed in the sections of this chapter upon the subjects of duty of water [10] and the suppression of waste.[11] In general, we will say here, however, that what constitutes a reasonable, economical use of the water depends upon the circumstances surrounding each particular case, and is therefore a question of fact. In determining this question there must be taken into consideration the amount of water claimed, the area of land to which it is applied, the character of the soil, the nature of the crops planted, the distance of the land from the source of supply of the water, the condition of the ditches and canals, and other like subjects.[12]

§ 886. Quantity of water—Appropriations for future use for irrigation.—Under the subject of reasonable diligence as regarding appropriations for future use, we discussed the time which might be allowed a settler appropriator for the purpose of the irrigation of new lands, to finally consummate his appropriation and apply the water to the full amount claimed by him.[1] We have seen in the previous sections that a person could not appropriate more water than was necessary for the purpose or use to which it was intended to be applied and that for this purpose it must be economically

9 Farmers' etc. Co. v. Riverside Irr. Dist., 16 Idaho 52, 102 Pac. Rep. 481.

See, also, Abbott v. Reedy, 9 Idaho 577, 75 Pac. Rep. 764; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

10 See Secs. 902-908.

11 See Secs. 811-916.

12 Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Heilbron v. 76 Land & Water Co., 80 Cal. 189, 22 Pac. Rep. 62; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

1 See Sec. 740.

used.[2] But the authorities agree upon the proposition that, where the purpose of the appropriation is for the irrigation of new land by a settler, although the quantity first used is not the full amount claimed, the settler may year by year increase the quantity used, as he gets his land ready for cultivation, up to the full amount of his claim, and that, too, as against the claims of subsequent appropriators, provided that he does not delay the final use of all the water claimed for an unreasonable time.[3] Under this state of facts, it is the well-settled rule that where he has used reasonable diligence the additional application of the water annually to meet the augmented demand causes the appropriation to relate back to the inception of the claim, thereby cutting off all adverse claimants to the use of the water, where their claims interfere with the rights of the settler who was prior in time.[4] Or, in other words, the rule is that, at the time of the inception of his claim, he may lay the foundation for the appropriation of such a quantity of water as will be necessary, when economically used, for the reclamation of his entire tract of land, and he will not lose his priority of right, provided he makes use of all of the water claimed within a reasonable time.[5] But this rule must not be construed to mean that a

2 See Secs. 877, 885.

3 See Sec. 740 and cases cited.

4 Seaweard v. Pacific Live Stock Co., 49 Ore. 157, 88 Pac. Rep. 963; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Rodgers v. Pitt, 129 Fed. Rep. 932, 89 Fed. Rep. 420; Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250; Brown v. Newell, 12 Idaho 166, 85 Pac. Rep. 385; Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400; Kleinschmidt v. Greiser, 14 Mont. 482, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Glaze v. Frost, 44 Ore. 29, 74 Pac. Rep. 336; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Hubbs & Miners' D. Co. v. Pioneer W. Co., 148 Cal. 407, 83 Pac. Rep. 253; Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028; Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

See, also, for decrees as to inchoate rights, Chaps. 78, 79.

5 "That all the water which was appropriated can not be used at that time by the appropriator will not put his right down to what he actually

person may attempt to appropriate and hold in reserve a quantity of water which he can have no use for on his own land.[6] And, again, in order for an appropriator to successfully lay claim to a quantity of water sufficient for his future needs, and for the doctrine of relation to apply thereto, these needs must have entered into the intent of the appropriator, and have been claimed at the inception of his appropriation.[7]

In this connection the Utah Court, in a recent case,[8] said: "May an application be made to appropriate water for a beneficial purpose so contemplated in the future? We confess that the question is open to debate, and is not free of doubt. We have, however, with some hesitancy, reached the conclusion that such an application may properly be made when it is made in good faith and with an actual *bona fide* intention and a present design to appropriate the water

uses, in favor of a subsequent appropriator, if the amount appropriated was not greater than could be profitably used on his own land, and he intends, as rapidly as possible, to make use of the whole of it." Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652.

"If the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; the appropriator is entitled not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his land, if the right is otherwise kept up." Judge Hawley in Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116.

6 Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 700.

7 For the doctrine of relation, see Secs. 742-756.

"Hence the wisdom of statutory provision requiring a claimant of water to file a plat and statement as public notice of intention and extent of the right claimed." Taughenbaugh v. Clark, 6 Colo. App. 235, 40 Pac. Rep. 151.

See, also, Rutherford v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. Rep. 445; Becker v. Marble Cr. etc. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; Farmers' Union etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799; *Id.*, 66 Pac. Rep. 193; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 379, 110 Pac. Rep. 535; Porter v. Pettingill, 57 Ore. 247, 110 Pac. Rep. 393; McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 468; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

8 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

for a beneficial use, though contemplated in the future, and when it is not made for the purposes of mere speculation or monopoly." A very recent Colorado case [9] also held that a settler upon 160 acres of Government land who constructs a ditch or buys a water right with a view to irrigate the entire tract may use such an amount of water as is sufficient to irrigate all his land when needed, provided the water is beneficially used and with reasonable diligence for the improvement of his land; and it was said by the Supreme Court: "The test is not necessarily the number of acres irrigated each year. If these tracts were farmed, and all the water necessary to irrigate them was beneficially used with reasonable diligence in the improvement of the land, it is sufficient. What was a sufficient amount of water, and was it applied to a beneficial use, is the test."

As we have seen in a previous section, the quantity of water which may be diverted under a single appropriation is limited by the amount originally claimed under that appropriation,[10] and the quantity of water for future needs must be claimed at the time of the inception of the original appropriation and not be the result of a mere afterthought, and not contemplated at the time of the original appropriation. We have also seen in a previous section that an appropriator can hold the unused quantity of the water in an appropriation for future needs only for what is deemed a reasonable time.[11] And as to what constitutes a reasonable time for the final consummation of an appropriation and the application of all the water to some beneficial use or purpose depends upon all of the pertinent facts surrounding each particular case.[12]

9 Weldon Valley Ditch Co. v. Farmers' Pawnee Canal Co., —— Colo. —, 119 Pac. Rep. 1056.

10 See Sec. 878.

11 See Sec. 740.

12 See Secs. 735-741.

See, also, Seaweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Rodgers v. Pitt, 129 Fed. Rep. 932, 89 Fed. Rep. 420; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856; Brown v. Newell, 12 Idaho 166, 85 Pac. Rep. 385; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250.

That in California a reasonable time for the application of water is held to be five years, see Smith v.

Where the amount of the full quantity of water was also claimed in the notice of appropriation or the application to appropriate, there is no reason in law why the same principle should not apply to appropriations other than for the use of the water for irrigation. In fact, the same doctrine has been applied to an appropriation for future uses for the development for power purposes. Of course, the same rules as to reasonable time for the full consummation of the appropriation, and the final application to the use intended of all the water covered by the claim, must be observed.[13]

In a number of States the time within which the water must be actually applied to the beneficial use or purpose is fixed by statute.[14]

Owing to the recent decisions sustaining the rule as above set forth, we have no reason to change our statement made in the first edition of this work, which is as follows: "We find that the rule is that he may make an appropriation of all the water that he will need upon his land, and that the fact that he does not make immediate use of the whole land will not destroy his priority of right if he continues the development of his land and makes a full use of his water right within a reasonable time."

§ 887. **Appropriator not always limited to first amount used.**—In addition to the question of the appropriation of water for future use, discussed in our previous section,[1] there are other circumstances by which the appropriator will not be required to divert and use the full quantity of the water covered by his claim. If, by reason of any obstructions or irregularities in the grade of the ditch it is not capable of diverting as much water as its general size would indicate and as the area of the land to be irrigated for which the appropriation is made would reasonably require, and also claimed for in the notice of application of appropriation, the appropriator will be allowed a reasonable time to remove such obstructions or to adjust the grade.[2]

Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; *Id.*, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243.

13 See Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37; McFarland v. Alaska etc. Co., 3 Alaska 308; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 116.

14 For the statutes upon the subject, see Part XIV.

1 See Sec. 886; see, also, Sec. 740.

2 Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; White v. Todd's Valley etc. Co., 8 Cal. 442, 68 Am. Dec. 334, 4 Morr. Min. Rep. 536; Nevada etc. Co. v. Kidd, 37 Cal. 282, 309.

§ 888. Measurement of water.—It is not the purpose of this work to treat the subject of water rights, or the appropriation of water for any beneficial purpose, from the standpoint of the engineer. But a general discussion upon the subject of measuring water and some of the most approved methods for the same will not be out of place, leaving the details of the subject to engineering works, or, better still, to the engineers themselves. The subject of measuring running water has always been a most difficult one; and, although science in this respect has kept pace with the subject of the duty of water, or the exact quantity of water essential to irrigate a given tract of land under all conditions,[1] the results in many respects are far from satisfactory. If the water was always quiet and at rest, it would be an easy matter to determine the exact quantity in any body in gallons or any other unit of measurement by simply measuring the dimensions of the body, and then making the proper computation. This would be like measuring wheat in a bin or corn in a crib. But, as "water is a movable, wandering thing,"[2] when we come to the measurement of running water, we have a different proposition, and one which has taxed the best efforts of some of the greatest scientists of the ages, and even now it can not be claimed there is any certain rule by which this can be done and always obtain the exact result. Under certain conditions by the present methods in practice, the measurement of the running water may be exact, or as near exact as is necessary to determine for the use or uses to which the water is applied. But the conditions where the measurements are taken are never the same at the different places of measurement. And, then again, the method and formula, which are applicable to give the correct result under certain conditions are found to be wholly inapplicable and inadequate to give the correct result under different conditions. Then, again, under the same conditions, and the running water measured at the same place, and the computation made by a different formula, claimed to be a standard for measuring water, and an improvement upon some old standard, by which the water previously had been measured, different results may be obtained. And, as said by Mr. Justice Campbell, in rendering the decision of the Supreme Court of Colorado: "It further appears that no computations are ever the

1 For duty of water, see Secs. 902-908.

2 2 Black Comm. 18. See, also, Sec. 455.

same, even with the same formula. Hydraulics is said to be one of the most complex sciences."[3] And the courts hold that in order for a witness to be competent to testify as to the measurement and duty of water, he must have had experience and training along these lines.[4]

In a recent case in Oregon,[5] it was held that the testimony of a witness that a flow of 17 inches of water per acre was necessary for the irrigation of certain lands, was so obviously unreliable that it could not be accepted by the Supreme Court upon review of the case although the testimony was undisputed. And the Supreme Court, relative to this point said: "The absurdity of such quantity, being essential to the proper irrigation of lands is manifest."

§ 890. Measurement of water—The miner's inch as prescribed—In order to determine the definite quantity of water to which an appropriator is entitled, some method of measurement must be adopted by which the quantity of running water may be determined with some degree of accuracy. And, in order to do this, first and foremost, there must be adopted a standard of measurement. By the custom of the early miners of California, during the formative period of the Arid Region Doctrine of appropriation, the first standard of measurement was called the "miner's inch." The placer miners first employed this standard; and, in those sections where irrigation succeeded this form of mining, appropriators for this purpose generally adopted this standard or unit of measurement. At an early day, when water was plentiful for the uses for which it was claimed, in many respects it was satisfactory, especially for the smaller measurements of water. It is simpler than the computation by other standards, and easily understood by the farmers for the reason that they could tell at a glance the quantity of water that was being delivered. It is not suited, however, to the measurement of rivers or streams, or the regulation of the larger quantities of water as between the large canals, as the prescribed conditions necessary can not be produced on a large stream of water. Where

[3] Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322. For further discussion of this case, see Sec. 900.

For computations by formula, see Sec. 899.

[4] Farmers' etc. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

[5] Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

the water has become scarce, as compared to the demand, it is also subject to many other objections, which we will proceed to discuss.

This standard, with certain specifications as to pressure, is still retained in some of the Western States, although in the most it has been superseded by other standards of measurement such as the "second foot" or the "acre foot."[1] The terms "inch," "miner's inch," and "miner's measurement," as found in some of the early decisions, mean absolutely nothing in and of themselves without further specifications or evidence as to what the inch or miner's measurement consists of. As was said in a recent California case:[2] "To show the quantity in miner's inches there should have been either evidence as to a measurement according to some prescribed method, or evidence of facts upon which a definite calculation could be made."[3] Before any statutory enactments were made attempting to specify what a miner's inch should consist of it varied greatly even in different localities of the same State, and depended entirely upon the custom of that particular locality where the measurement was made.[4] In California, where this standard of measurement

[1] For second-foot, see Secs. 892, 893.

For acre-foot, see Sec. 894.

For history of doctrine of appropriation, see Secs. 595-626.

For a description of the miner's inch, see Exp. Stations Bulletin No. 86, U. S. Dept. of Agriculture, p. 19.

[2] Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989.

[3] "An examination discloses that a number of witnesses, when testifying and while expressing opinions as to the number of inches of water required to irrigate the land, had not very definite ideas as to the measurement of water; the Court was justified in attaching but little weight to such testimony." Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308.

As the words "inch of water" have not acquired any fixed technical meaning, which must control when used in a grant, evidence of the circumstances surrounding the making of the grant must be considered. Jackson M. Co. v. Chandos, 82 Wis. 437, 52 N. W. Rep. 759.

A decree that a party is entitled to "150 inches, statutory measurement," where it nowhere appears what statutory measurement is referred to, is void. *In re* Huntley, 85 Fed. Rep. 889, 29 C. C. A. 469.

See, also, Janesville Cotton Mills v. Ford, 82 Wis. 416, 52 N. W. Rep. 764; Collins v. Gray, 3 Cal. App. 723, 86 Pac. Rep. 983; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

[4] "It was admitted at the argument, that these latter terms have no fixed meaning, and that an inch of water according to 'miner's measurement' in one locality is sometimes a very different quantity from an inch according to 'miner's measurement'

originated, the term miner's inch is more or less indefinite in different localities of the State, for the reason that all do not use the same head above the center of the aperture.[5] It also varies in the different States according to the different heads either where it is used according to the custom of some locality or is prescribed by the statutes of the respective States.

From the above, as near as we can come to a general definition of the "miner's inch" as the unit of rate of discharge of water as used in the Western States, it is such an amount of water as will flow through an orifice one inch square in a vertical position and under a standard head fixed either by custom or law, and in the computation of which each square inch of the opening represents a miner's inch.[6] It will be noticed that this will not give the quantity of water in any recognized standard and only in miner's inches. The quantity of water in gallons or cubic feet will have to be determined by other measurements discussed in the following sections.[7] Then, again, the quantity will vary according to the standard head prescribed, which varies greatly in different localities, and also in accordance with the statutes of the different States still adhering to this unit of measurement.[8]

§ 890. Measurement of water—The miner's inch as prescribed by the statutes.—As we said in the previous section, the quantity of water measured by the miner's inch varies with the head of water prescribed. The "head of water," as used in this connection, is the

in another locality." Dougherty v. Haggin, 56 Cal. 522, 15 Morr. Min. Rep. 211; see, also, *Id.*, 61 Cal. 305.

5 See Kent's Mechanical Engineer's Pocketbook, p. 18.

Where it was found that the customary flow for the purpose of irrigation was 40 inches of water, the finding was not fatally defective for failure to specify the particular standard of measurement, since the finding would be construed according to the customary measurement of the locality. Collins v. Gray, 3 Cal. App. 723, 86 Pac. Rep. 983.

6 See Trautwine's Engineers' Pocketbook; Trautwine on Civil Engineering, p. 546; Kent's Mechanical Engineers' Pocketbook, p. 18; Newell's Practical Irrigation, p. 128; Merrman's Treatise on Hydraulics, 1904, pp. 122-124; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Collins v. Gray, 3 Cal. App. 723, 86 Pac. Rep. 983; Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989; Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388; Morgan v. Shaw, 47 Ore. 333, 83 Pac. Rep. 534; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546.

7 See Sec. 892.

8 See Sec. 890.

For the unit of measurement of the different States, see Part XIV.

pressure of water as it flows through the orifice or opening above the top of such opening. This head varies from three inches to nine inches.[1] In the different States, a different standard of head is prescribed for the miner's inch; and, as a different quantity of water will flow through the same orifice with a greater head than with a smaller one, it must necessarily follow that, as to the quantity of water, there is a variation in accordance with the head prescribed by the respective statutes.

In California the statute originally prescribed that the miner's inch should be measured under a four-inch pressure.[2] However, by the Act of 1901,[3] a different standard of head was adopted. That Act provides that the standard miner's inch shall be equivalent or equal to one and one-half cubic feet of water per minute measured through any aperture or orifice, and repealed all Acts or parts of Acts inconsistent therewith. By computation the head of water must be under a six-inch pressure.[4]

In Colorado the inch is defined by statute as follows: "Every inch shall be considered equal to an inch square orifice under a five-inch pressure, and a five-inch pressure shall be from the top of the orifice of the box put into the banks of the ditch, to the surface of the water."[5]

In Idaho the statute provides for the standard of a four-inch head,[6] although the duty of water is fixed at not more than one cubic foot per second for each fifty acres of land irrigated.[7]

In Oregon, the Court holds that, where the record is silent as

1 Trautwine's Engineers' Pocketbook.

2 See Cal. Civil Code, Sec. 1418; 2 Kerr's Cyc. Codes, p. 1159.

3 Cal. Stats. 1901, p. 600.

4 Kent's Mechanical Engineers' Pocketbook; Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

5 2 Mills' Ann. Stat., Sec. 4643; Rev. Stat. 1908, Sec. 7026; Colo. Stat. Ann., Sec. 7076.

"In Colorado an 'inch' is the volume which will pass through an orifice one inch square under a pressure of five inches, and varies somewhat with the number of inches sought to be measured; thirty-eight and four-tenths inches are the accepted equivalent of a cubic foot per second, however." U. S. Dept. of Agriculture, Experiment Stations Bulletin, No. 118, p. 73.

See, also, Mills' Irr. Manual, 1907, p. 133, for calculation by E. S. Nettleton, formerly State engineer of Colorado, to the same effect.

6 "The amount of water that will flow through an orifice one inch square with a four-inch pressure above the center of the orifice." Stat. Idaho, 1899, p. 380, Sec. 1.

7 Idaho Stat., 1905, p. 357.

See, also, Sec. 906.

to the quantity of water understood by the word "inch," it will be presumed that it is to be measured under a six-inch pressure.[8] And the term "inch," whenever referred to, is estimated on the basis of 40 inches to one "second foot."[9]

In many States, as we shall see in the following section, a new and better standard of measurement has been adopted, that of the "second foot" or "acre foot."[10] In these States, however, many rights had been acquired under the old standard of the miner's inch, before the statutes had been adopted. An equivalent was adopted in many of these States for the miner's inch in fractions of the second foot, or the reverse, a number of miner's inches were specified which should equal one second foot. As examples of the first, the North Dakota,[11] South Dakota,[12] and New Mexico[13] statutes declare that the miner's inch shall equal one-fiftieth of a second foot. As an example of the second foot, the statutes of Nebraska declare fifty miner's inches one second foot.[14] By the statutes of Arizona and Montana 100 miner's inches are declared to equal two and one-half cubic feet per second.[15] This is equal to forty inches to the cubic foot. The same equivalent is adopted by the California statute of 1901,[16] and also by the decisions of the Court in Oregon.[17] And in Colorado thirty-eight and four-tenths inches are declared to equal one second foot.

§ 891. Measurement of water—Miner's inch not a safe or accurate standard.—It will be noticed from the last section that the

For the cubic foot per second as the standard of measurement in Idaho, see Rev. Codes, 1908, Sec. 3241.

8 Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Morgan v. Shaw, 47 Ore. 333, 88 Pac. Rep. 534.

9 See cases cited *supra*.

Also see, Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

For second-foot, see Secs. 892, 893.

10 See Secs. 892, 893.

11 Rev. Codes North Dakota, Sec. 7650.

12 Stat. 1905, p. 201, Sec. 44. See Stat. 1907, Sec. 44.

13 Stat. New Mexico, 1905, p. 70, Sec. 3.

14 Comp. Stat. Neb., 1911, Sec. 6440.

15 Stat. Arizona. See Part XIV.

Stat. Montana, 1907, p. 489, Sec. 10.

For the statutes of the various States, see Part XIV.

16 *Supra*.

17 Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

ratio between the miner's inch and the second foot is not always the same. This is due largely to the different standards of head adopted in the various jurisdictions, the difference in the calculations, and the difference as to the understanding as to just what a miner's inch consists of. In the calculations even under the statutory definitions of a miner's inch, the amount of water can be varied greatly and still keep within the statute. In these definitions the question of velocity is not mentioned. Again, it is seldom specified as to the thickness of the plank in which the orifice is cut. An orifice of thin edges will discharge a greater quantity of water than one with thick edges. Then, the roughness or smoothness of approach is not considered. Then, again, the difference in the size of the orifice is not considered. A square orifice with sides two inches each, and therefore having an area of four square inches, will discharge more than four times the amount of water of an orifice one inch square or one-fourth its size, and that, too, with the same pressure of head. None of these subjects are mentioned in the statutes of the various States in defining the miner's inch. Yet all of these and more subjects, which we need not mention here, must be taken into consideration if we are to determine the exact quantity of water flowing in what is called the miner's inch.[1]

As shown in the last two sections, the miner's inch or the inch is such a variable quantity and has so many meanings that, in many States, it has been abolished as the standard for the measurement of running water, and the second foot or the acre foot adopted instead.[2] As was said in a recent Oregon case, when speaking of the term "inch": "This designation, however, is not sufficiently definite to be a safe guide at all times in ascertaining when the rights of a person awarded a given number of inches under six-inch pressure, etc., are being invaded."[3] And, in adopting an equivalent for the miner's inch, the Court said: "It is evident that the only reliable method by which any certain number of inches of water, when awarded under this method of measurement, can always be determined, is on the basis of what is termed by engineers as 'second feet,' or quantity of water flowing past a

1 As shown in the last two sections. See Secs. 889, 890.

2 For the second-foot, see Secs. 892, 893.

For the acre-foot, see Sec. 894.

3 Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Ulrich v. Pateros etc. Co., —— Wash. ——, 121 Pac. Rep. 818.

certain point in a given space of time." And the Court adopted the ratio recognized by the authorities that one inch of water under six-inch pressure equals one-fortieth of a second foot. But the question arises, instead of adopting an equivalent to the miner's inch expressed in the fraction of the second foot, why not adopt the second foot itself as the standard of measurement? The adoption of an equivalent of the miner's inch in the fraction of the second foot is but accomplishing the same end in a very roundabout manner, and one that still further complicates the subject.

The confusion in which a trial court may find itself in endeavoring to use these two standards of measurement is well illustrated in a late Oregon case:[4] "To show the quantity in miner's inches there should have been either evidence as to a measurement according to some prescribed method, or evidence of facts upon which a definite calculation could be made. Without evidence from which the quantity of water diverted could be ascertained the trial court was without evidence upon which it could base any conclusion as to the number of miner's inches which the Guichards were entitled to take on Logan's land, or could make any adjudication whatever of the extent of their rights. In the absence of a finding of the actual diversion of some definite quantity of water, sufficiently supported by evidence, the plea of prescriptive right to take water above their boundary must necessarily fail." In construing a contract where the miner's inch was provided for, but the pressure was not indicated, the Washington Court, in a recent case, said:[5] "The contract in this case does not define the pressure. The term 'miner's inch,' as used therein, is, no doubt, ambiguous. In such cases the rule is that oral evidence may be received to explain what the parties meant by the use of such terms. Such evidence was introduced in this case, and is clearly to the effect that at the time the contract was made and in that locality, it was commonly understood that the term 'miner's inch,' as applied to the measurement of water, meant a quantity of water which will flow through an orifice one inch square under a four-inch pressure; that a four-inch pressure means that the head of water stands four inches above the top of the orifice. There was no dispute whatever upon this defini-

[4] Logan v. Guichard, 159 Ore. 562, 114 Pac. Rep. 989.

[5] Ulrich v. Pateros Water Ditch Co., —— Wash. ——, 121 Pac. Rep. 818.

tion. Some of the witnesses stated: 'A miner's inch of water . . . is a body of water . . . taken . . . through an opening an inch square under a four-inch pressure, or six in that particular locality. Some understand six and some four.' But no witness put the pressure less than four inches." It was also held by the Court that the contract would be enforced in an action for specific performance for the miner's inch of water under a four-inch pressure.

§ 892. **Measurement of water—The second foot—Of what it consists.**—Contrary to the indefinite quantity of water as measured by the miner's inch, and discussed in our previous sections,[1] the unit or the "second foot" is a definite and exact method of measuring the volume of running water. The basis of this unit is the cubic foot of water, which consists of the quantity of water contained in a solid cube one foot in dimensions, containing 7.4805 gallons and weighing at 50 degrees Fahrenheit 62.408 pounds. The cubic foot per second, or the second foot as it is more commonly called, is the exact quantity of water contained in the cubic foot passing a certain given point in one second of time. Knowing the number of cubic feet passing a given point in a given period of time, it is a simple matter of computation to determine the exact volume or quantity of water which passed during that period either in second feet, in gallons, in acre feet, or in any other unit of measurement.[2] The volume of the flow is, of course, the number of cubic feet passing the given point during one second of time.

The more modern irrigation or water codes recently adopted in many of the States also provide to the effect that "The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second foot; and the standard unit of measurement of the volume of water shall be the acre foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet."[3]

§ 893. **Measurement of water—The second foot—Its use as a unit of flow.**—What is needed under the law of appropriation for the measurement of the flow of running water is some standard or

1 See Secs. 889-891.

2 For acre-feet, see Sec. 894.

3 Compiled Laws of Utah, 1907, Sec. 1288x19.

unit of measurement which will be uniform in all of the States, and from which there may be calculated the volume or quantity of the running water and approximately the correct results obtained under all conditions. The best standard or unit of measurement now known to science, in terms of which the flow of water running by a given point in a definite period of time may be given, is what is called the "second-foot" or the flow of one cubic foot of water by a given point in every second of time.

The second-foot is a definite and convenient unit of flow and has the double advantage of showing precisely what is meant and is further well adapted to the measurement of large as well as small volumes of flowing water. "It is the most satisfactory unit which can be employed in dividing rivers or in measurements where the flow is continuous."[1] Where the weir method is used for the measurement, with the standard tables which are always available,[2] it is as easily understood by the average farmer as is the miner's inch, and has the further advantage of being much more accurate and is the same under all conditions. For this reason it has been adopted by legislative enactment by the majority of the States of the arid and semi-arid West as the legal unit in the gauging and division of rivers, in measuring the discharge of ditches and canals, in defining the amounts of appropriations from the natural streams, and in fixing the volume in water right contracts between canal companies and the consumers obtaining their water from them. It is also the most common unit used in fixing the duty of water by the various statutes,[3] and also by the Government Reclamation Service, although in some cases the acre-foot is used for this purpose.[4] Even in those States which have not adopted the second-foot as the legal unit, equivalents to the miner's inch expressed in the fraction of the second-foot, or the reverse of the proposition, have been adopted either by statute or by Court decisions.[5]

1 Experiment Stations Bulletin, No. 86, U. S. Dept. of Agriculture, p. 20.

2 For the weir method, see Secs. 895, 896.

3 For the duty of water, see Secs. 902-908.

4 For the acre-foot, see Sec. 894.

See the annual reports of the Reclamation Service.

For the laws of the various States, see Part XIV.

5 See Sec. 891.

"It is evident that the only reliable method by which any certain number of inches of water, when awarded under this method of measurement, can always be determined, is on the basis of what is termed by

§ 894. Measurement of water—The acre foot—Of what it consists and its adoption as a unit of quantity.—There is another unit employed in the measurement of running water, which is also based upon the cubic foot of water,[1] which is as definite and accurate as the second-foot, and which, as we have seen, has been generally adopted as the unit of flow based on time. This is the acre-foot, which we may call the unit of quantity. This is a definite quantity of water, equal to one foot in depth and 43,560 feet square, or the amount of water which will cover one acre one foot in depth, and containing 325,851 gallons of water. The computation for this amount of water is generally made by the second-foot.[2] One second-foot of water flowing continually for twenty-four hours will amount to 86,400 cubic feet, or nearly two-acre-feet. It is a convenient and accurate unit for measuring the capacity of reservoirs, and for selling stored water. Also it is adopted by the statutes of some of the States as the unit for fixing the duty of water.[3] This unit has also been adopted by the Reclamation Service in certain cases.[4] Wherever the acre-foot has been adopted it has proven satisfactory to irrigators, and also to the canal companies, and has generally resulted in the economical use of the water.

§ 895. Measuring water—Devices for—The weir.—Just how it can be determined that a certain number of cubic feet of water

engineers as 'second-feet,' or quantity of water flowing past a certain point in a given space of time." Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

See, also, Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728; Morgan v. Shaw, 47 Ore. 333, 83 Pac. Rep. 534; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Seaweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598.

1 For cubic foot, see Sec. 892.

2 For second-foot, see Secs. 892, 893.

3 In Oklahoma, the second-foot and the acre foot are declared to be the units of time and flow respectively. Oklahoma Laws, 1905, p. 274, Chap. 21, Sec. 27.

In New Mexico, the second-foot and the acre-foot are declared to be the units for time and volume respectively. Laws New Mexico, 1905, p. 270, Chap. 102, Sec. 3.

In North Dakota the second-foot and the acre-foot are declared to be the standards of measurement for time and volume respectively. Stat. North Dakota. See Part XIV.

In Utah the standard unit of flow is the second-foot; of volume, the acre-foot. Comp. Laws of Utah, 1907, Sec. 1288x19.

4 See annual reports of Reclamation Service, Nos. 1-7.

flows by a given point in one second of time, or how it may be determined that a certain number of acre feet have been delivered to the irrigator during a season, are questions more within the province of the engineers than within that of the law book writer. We will, however, in most general terms, describe some of the methods and devices used in the measurement of running water, without going into any great details as to how results are obtained, and taking it for granted that the standard formulas and the tables, especially as related to the weir measurements, are approximately correct.

There are many devices used to assist in the measurement of running water, and foremost among these is the weir. The word weir may be used to describe any structure used to determine the volume of flow of water from measurements on a crest or sill of known length and form, and where the water has a considerable fall. The weir as applied to stream measurements is a special adaptation of the mill dam, to which the term weir, meaning a hindrance or obstruction, has been applied from early times. The French term "nappe," suggested by the curved surface of a cloth hanging over the edge of a table, is used to designate the overfalling sheet of water.

The theory of weir measurements is based upon the knowledge of a definite relation between the length and depth of the overflow and the quantity of the water, which has been scientifically determined by numerous experiments from the time of those made by Torricelli in 1643, down to the present time. In fact it is the theorem of Torricelli which forms the basis of this method of the measurement of running water and renders the weir, when properly constructed and with the tables of computation at hand, a comparatively simple, practical, and accurate method. This theorem of Torricelli is as follows: *"The velocity of a fluid passing through an orifice in the side of a reservoir is the same as that which would be acquired by a heavy body falling freely through the vertical height measured from the surface of the fluid in the reservoir to the center of the orifice."* The truth of this proposition was confirmed by the experiments of Mariotte, published in 1685. It can also be demonstrated from the law of dynamics and the principles of energy.[1]

1 See Wood, Elementary Mechanics, pp. 167, 291.

See, also, Weir Experiments, coefficients and formulas, by Horton, 1907, Water-Supply and Irr. Paper No. 200, pp. 10, 11.

Up to the present time the use of weirs for the measurement of running water has been confined to the smaller streams, owing to the fact that in the larger rivers and streams it is difficult to secure the proper conditions. But upon the smaller streams in the arid and semi-arid West the weir method of measurement is in common practice and gives universal satisfaction not only to engineers, but also to canal companies and the consumers. It is also a very common method of dividing the volume of flow of many streams in the West among the various ditches and canals entitled to the water.

There is one condition, however, even in the smaller streams, where the use of the weir has not always proven satisfactory, and that is when the streams are laden with heavy silt, and in these streams other devices for the measurement of the water are usually used.[2]

§ 896. Devices for measuring water—Different kinds of weirs used—The Cippoletti weir.—There are now two classes of weirs in general use throughout the West. First, "suppressed weirs," or weirs without end contractions, and whose channels of approach have a width identical with the length of the crest of the weir. Under this class is the rectangular weir, which is often the most convenient type for measuring the volume of large canals. Where the velocity of approach is not excessive and the grade of the canal will warrant it, this kind of weir is often installed in a flume or other structure. Often the section of the canal can not be reduced in width, and when this is the case, this kind of weir is the only one which can be readily installed. It is not considered as accurate as some of the weirs which we shall describe, but where it is properly set and the computations carefully made, approximately accurate results can be obtained.[1]

The weirs from which the most accurate results may be obtained are the second class, under our description, and are called the "con-

[2] For measurement by the flume method, see Sec. 897.

For measurement by the current meter, see Sec. 898.

[1] For description of these weirs, see Weir Experiments, co-efficients and formulas, by Horton, 1907, Water-Supply and Irr. Papers, No. 200, U. S. Geological Survey.

For tables for discharges in cubic feet per second of rectangular weirs from one to ten feet long, without end contractions, see Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture, pp. 55-66.

tracted weirs," or weirs whose crest have a length of less than the width of the channel of approach. In other words, the ends of these weirs are contracted. These weirs are thin edged and sharp crested, over which the "nappe" or overfalling sheet of water[2] touches only the smooth, sharp, up-stream corner or edge of the crest. The contractions may be of different shapes, but the most common type of this class of weirs is the famous trapezoidal weir of Cippoletti, an Italian engineer.[3] In the Cippoletti weir the actual length of the crest is the effective length, and no corrections are applied for end contractions as is the case of the rectangular weir, and the only corrections to be made when this weir is properly installed are for the velocity of approach. In this type of weir the sides have a slope of one-fourth horizontal to one vertical, and the slope automatically allows for the end contractions by increasing the discharge area with each corresponding increase in depth of the water.[4]

The Cippoletti weir is considered the most accurate and simple device known to science for the measuring of running water, where the conditions are such that it may be properly installed, and the streams are not too large and not too heavily laden with sediment. The fact that the only correction in the computation to be made when the weir is properly installed is for the velocity of approach greatly adds to its simplicity. Having once learned the depth flowing over the crest of the weir to which he is entitled, the irrigator can tell at a glance whether or not he is receiving the proper amount of water, and that, too, without any computation upon his part. But if he desires to make further computations, the weir tables for this purpose are readily had. Then by knowing the length of the crest of the weir and the depth of water flowing over the same he can readily ascertain the cubic feet of water flowing in his ditch down to the fraction of ten-thousandths of a cubic foot. As for the accuracy of the weir tables, it is not for the average irrigator or for us

2 See for "nappe," Sec. 895.

3 See Sec. 146.

4 For the description and formula for the Cippoletti weirs, see Weir Experiments, co-efficients and formulas, by Horton, *supra*, pp. 47-49.

Tables for the discharge in cubic feet per second may be secured in State engineer's reports, and from engineering works. Also see, for tables, Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture, pp. 49-54; also, for regulations of the Department of Agriculture for installing Cippoletti weirs, see pp. 29, 30.

to question or to compute, and this feature must be left to the engineers. It is sufficient for our purpose that they are generally considered accurate and have been adopted as the standard tables by the best engineers.

The Cippoletti weir is adopted by the United States as the standard device for measuring the flow of the smaller streams. It is also adopted by many of the State engineers for the same purpose.

§ 897. **Devices for measuring water—The flume.**—Some of the streams, especially in the southwestern portion of the country, carry a large percentage of silt or sediment. Where this is the case the weir can not be used to advantage for the reason that the sediment falling to the bottom fills the channel of approach oftentimes as high as the crest of the weir. Some of the canal companies which employ weirs operate in connection therewith a sluicing device which removes the accumulated sediment when occasion requires, which is at times as often as once a day. The objection to this is that the conditions are never stable, and it is impossible to tell for what length of time the weir tables agree with the actual discharge.

In cases where there is considerable sediment running in the stream, or the stream is of considerable size, the flume is most commonly used as the device for the measurement of the running water. The measuring flume, according to the regulations of the Agricultural Department, should be constructed with a bottom horizontal in both directions, with vertical sides. The length must be in no case less than twelve feet nor less than twice the width of the ditch or canal, and the width must be equal to the width of the ditch on the bottom. The upstream should have a submerged apron, extending two feet below the bottom, to prevent leakage. There are other conditions prescribed which are unnecessary to mention here. The principal difference between this kind of a flume and the weir is that there is no crest for the water to run over, and behind which sediment may lodge.[1]

The most serious objection to the use of the flume is that it requires an engineer to set it properly and to prepare the rating tables, on account of the constantly varying conditions as to the size, depth of water, and the velocity of approach. In determining

[1] For accurate description of flume and directions for setting, see Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture, pp. 30, 31.

the velocity of approach, a current meter is required, and this requires more skill to operate than is possessed by the average irrigator. There are no general rating tables which will give the volume in flow in cubic feet for all flume measurements, and a table has to be prepared for each case. However, with the flume properly constructed and set, and the table prepared by some competent engineer, the irrigator will have no difficulty in determining the amount of water flowing through by measuring its depth and making his computation in accordance with the table.[2]

§ 898. **Other devices for measuring water.**—There are other devices used in determining the volume of the flow of running water which we will not mention at all, and for which the standard works upon the subject of hydraulics and engineering are referred to.[1] There is one, however, which we will hastily mention, and that is the current meter. This is a mechanical device for measuring the velocity of a stream at all depths and at all parts of the stream, thereby acquiring a knowledge of the mean velocity from which and the size and depth of the stream the quantity of water which it discharges can be computed. It requires an engineer skilled in the use of a current meter to obtain satisfactory results. It is especially useful in the preparation of rating tables where the flume method of measurement is used.[2] The recent improvement in these instruments, by which their convenience and accuracy have both been increased, has made it a comparatively simple matter to prepare these rating tables of discharge in flumes or streams in which the flow is reasonably uniform. Under proper conditions and with the best instruments handled by a competent engineer results can be obtained of an accuracy within one per cent of the correct amount of water. The water meter is used in preliminary investigation, and where flumes or weirs have not been constructed, and in the measurement of large rivers and canals.

§ 899. **The velocity of approach—Formulas for computing.**—The methods of measuring and computing the volume and quantity

2 "Tables of this character have no value except with reference to the flume to which they relate." Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture, p. 70.

1 See books referred to under Secs. 896, 897, 899.

2 For flume method, see Sec. 897.

of a flow of running water would be comparatively an easy matter, if the velocity of all streams, or throughout all portions of the same stream, was the same. But as the velocity of different streams is always different, and is also continually changing in the same stream, the measurement and computation of the mean velocity of flow of the different natural streams and also of that in ditches and canals at different times, forms one of the most complex subjects connected with the science of the measurement of running water. This difference in velocity is due to the various differing conditions in the streams where the water is measured. Even in the same stream, where works have been constructed so as to bring about the most perfect conditions for the measurement of the velocity, where there are uniform grade, depth, and cross-section, the velocity is greater in the center than at the sides; it is also greater on the surface than at any depth below the surface, and is the least at the bottom.[1] This is due to the friction of the water on the sides and the bottom, and the more and greater the obstructions in the stream the greater will be the friction or retarding effect upon the velocity of the water. In small artificial channels of uniform cross-section and slope, these obstructions may be said to consist entirely of the comparatively minute roughness of the material of which the bed and sides of the channel may consist. But in rivers and earth canals, even where the general direction, slope, and cross-section are tolerably uniform, there are many considerable irregularities in the sides and bottom; and these exert a greater retarding effect upon the mean velocity than the mere roughness of material of the bed and sides. Much greater, then, are the variations in velocity where the current is obstructed by rocks, brush, sticks of wood, or other obstructions, as the water is retarded and cross eddies are formed. These obstructions in the channel of approach to the point where the measurement is taken is called the "coefficient of roughness," and corrections must always be made on account thereof in making the computations, in order to obtain anything like accurate results. With these corrections made, after

[1] For distribution of velocity in channel of approach, see Weir Experiments, coefficients, and formulas, by Horton, 1907, Water-Supply and Irr. Paper No. 200, U. S. Geological Survey, pp. 16-20.

See Ency. Britannica, Vol. 12, Sub. Hydromechanics; Trautwine's Engineers' Pocketbook, pp. 271-273; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

the fall in the channel of approach leading to the measuring device has been determined, the mean velocity of the stream may then be ascertained. But in these measurements and the computations for the same, it must always be considered that the fall in the channel of approach leading to the point of measurement is always greater than that required to produce the existing velocity, because some fall must be utilized in overcoming friction. There are a number of formulas based upon experiments used to determine the velocity of approach,[2] and for making the corrections for the "coefficient of roughness" in connection therewith. We will mention but one and that is what is known as "Kutter's Formula." This formula was based upon a vast number of experiments in which the coefficient of roughness is represented by the values of N which were obtained by averaging a large number of experiments made under very different circumstances. They therefore embrace all the disturbing effects to the velocity of the water arising from obstructions existing upon the bottom and sides of the channel of approach experimented upon. This formula is considered by engineers and scientists generally to be the "latest approved and most trustworthy test for ascertaining the carrying capacity of streams and canals."[3]

§ 900. **Evidence of the measurement of water before the courts.**—As will be seen from a study of the subject, the question of the measurement of water is a most complex one, and one which, as far as the practical side is concerned, is strictly within the special domain of the engineer and the scientist. The average lawyer, and, indeed, the average judge upon the bench, have to depend almost entirely upon the expert testimony of the engineer and scientist in order to acquire anywhere near a correct knowledge of the facts in any case where the question of the measurement of running water is involved. Streams, ditches, and canals have to be measured, computations have to be made upon these measurements, and in making

[2] For some of these formulas, see Weir Experiments, coefficients, and formulas, Horton, 1907, pp. 14-20, Water-Supply and Irr. Paper No. 200, U. S. Geological Survey.

See, also, Trautwine's Engineers' Pocketbook, 1896, pp. 236 *et seq.*

[3] Prof. Carpenter's testimony in Water Supply etc. Co. v. Larimer etc. Co., *supra.*

For Kutter's formula, see Trautwine, *supra*, pp. 271, 272.

See, also, Flow of Water, translated from Ganguillet and Kutter, by Rudolph Hering and John C. Trautwine, 1889.

these computations the recognized standard formulas have to be used.[1] Experiments upon this subject are still being made, and what, in one decade was considered a practically accurate formula, has been made to give way to one considered still more accurate. Hence, it follows that the question has not become what is known as an exact science, although it is exact enough for all practical purposes for the measurement of the streams and the division of their waters among the users entitled thereto. But to appreciate what the courts have to meet in this respect is well illustrated in a case which arose in Colorado, where this exact point was in question.[2] In that case on the 11th day of April, 1882, a decree was duly entered in the District Court of Larimer County, Colorado, adjudicating the priorities and the quantity of water to which each was entitled, of certain ditches and reservoirs in controversy, and all taking their water from a common source of supply, the Cache la Poudre River. Later, another action was brought for the express object of readjudicating the rights awarded by the Court and especially as to those awarded to a certain ditch of the appellees, upon the ground that under the latest approved formula for ascertaining the carrying capacity of water in ditches and canals, the computation, as originally made and awarded by the Court in the first decree in 1882 was erroneous, and that the specified quantity should be much less. From the testimony of that eminent scholar upon this subject, Professor L. G. Carpenter, it appeared that the latest approved and most trustworthy test for ascertaining the carrying capacity of streams and canals is by the formula of Ganguillet and Kutter, and by their formula a ditch of the theoretical dimensions of the one in question would not carry more than about 560 cubic feet of water per second of time, while under the early decree the ditch was awarded 720 cubic feet of water per second of time. Judgment was rendered for the defendant, and the plaintiff appealed to the Supreme Court. The Supreme Court affirmed the judgment, holding that the decree of 1882 was *res judicata,* and Mr. Justice Campbell, in delivering the opinion of the Court, said: "It is in evidence, however, that, in accordance with the formula that was in general use in this State at the time the decrees were rendered, the computation, as determined by the decree, was substantially correct;

1 For formulas, see Sec. 899.

2 See Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

and it further appears that no two computations are ever the same, even with the same formula. Hydraulics is said to be one of the most complex sciences. . . . If we should now correct the decree of 1882 for the reason urged, then, at the end of the next decade there may be evolved a new method of determining the carrying capacity of ditches giving even more accurate results than under the Kutter formula, and, in an action then brought to correct the mistake made by us now applying the Kutter test, the Court must set aside our decree and enter a new one, and so there would be no end to the litigation, provided new and more accurate tests are discovered."

In general it may be said that only expert testimony can be relied upon in the measurement of water, or at least the testimony of those who are familiar with the measuring of water under certain definite and specific conditions.[3]

§ 901. **Scientific investigations tending toward economical use.**—Since the first edition of this work was published in 1893, great progress has been made in the way of scientific investigations relative to stream measurements to ascertain the exact water supply of many sections of the arid and semi-arid West, and especially in those sections of the country which depend largely for their future development upon irrigation. These investigations have not been limited to the water supply but have also covered the subject as to how the available supply may be most economically used and still obtain the best results. These investigations have been carried on by two departments of the Government, the Department of the Interior and the Department of Agriculture. The results of the Interior Department have been published from time to time for distribution in what are known as the "Water Supply and Irrigation Papers." The results of the investigations of the Department of Agriculture have been published in bulletins and are also for distribution. In these papers or bulletins much valuable information is being spread throughout the country for the use of practical irrigators, engineers, and the courts. And, in addition to the investigations by the General Government, every State and Territory in the arid and semi-arid West has carried on investigations upon its own

3 Farmers' etc. Co. v. Riverside Irr. 481; Whited v. Cavin, 55 Ore. 98, 105 Dis., 16 Idaho 525, 102 Pac. Rep. Pac. Rep. 396.

behalf. Usually these investigations and experiments have been carried on by the agricultural colleges or by the State engineer's department of the respective States or Territories. And besides the subjects mentioned, these investigations have covered every question which has arisen relative to the scientific features of the subject of irrigation and all other uses of water. And, owing to the great scarcity of water in this Western country, no feature of the subject has been investigated more carefully, or with better results, than that phase of the question as to how to make a given quantity of water do the greatest service, and, at the same time to give the best results. The technical term given to this is the "duty of water," the investigations concerning which cover practically the whole field, especially as to the subject of irrigation.

Among the special subjects investigated by the Department of Agriculture of the Government and tending to solve the problem as to the proper duty of water under all conditions, are the following:

The quantity of water required by different crops;

The length of the irrigation period in different sections of the arid and semi-arid regions of the West;

The agreement or divergence between the quantity of water used in irrigation in the different months of the growing season and the rise and fall of streams during those months;

The benefits of reservoirs and the percentage of the total discharge of streams which must be stored in order to utilize the whole supply;

Losses in canals from seepage and evaporation;

Influence of different forms of water-right contracts in promoting economy or waste;

The returns from the use in irrigation of an acre foot of water.[1]

In the following sections we will discuss what effect these investigations have had upon the legal side of the question as to the economical use of water.

§ 902. Duty of Water—Definition.—In many portions of the arid and semi-arid West, either the General Government or the respective States, by means of the investigations referred

1 See Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture, p. 23.

to in our last section,[1] have determined, by careful scientific measurements covering a number of years, the quantity of water flowing at all seasons of the year in the different rivers, creeks, and other sources, which can be drawn upon to supply water for irrigation. Having determined the quantity of water available for irrigation, we would naturally be at a loss as to the number of acres such a quantity would irrigate when economically applied to the land unless we first had some idea of the quantity required to irrigate one acre. This ratio between the acreage to be irrigated and the quantity of water required to irrigate it is called the "duty of water."

Therefore, taking into consideration the economical use of water, the term "duty of water" may be defined, as far as the legal side of the question is concerned, as a definite quantity of water essential to successfully irrigate a definite tract of land, of a certain number of acres. The higher the duty, the larger the tract of land a definite amount of water will irrigate; the lower the duty the less land the same amount of water will irrigate. Or, to state the proposition in other language, the higher the duty, the less quantity of water necessary to successfully irrigate a definite tract of land of a certain number of acres; the lower the duty, the more water required for the same tract of land.[2] So, as it may be seen, the variable quantity may be either land or water. And, furthermore, the authorities, speaking of the subject sometimes from one basis and then from the other, at times, make it somewhat confusing.

§ 903. Duty of water—Too high, should not be required at expense of success.—In our definition of the duty of water,[1] it

1 See Sec. 901.

2 The "duty of water" is the quantity essential to the irrigation of any given tract of land. Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

"What evidence was given from actual tests shows a less quantity of water necessary per acre, and consequently a higher duty for the water." Farmers' etc. Co. v. Riverside Irr. Co., 16 Idaho 525, 102 Pac. Rep. 481.

As defined by Mr. Herbert M. Wilson, in his work on Irrigation in India, Water-Supply and Irrigation Paper No. 87, 2d Ed., 1903, p. 67, "The 'duty of water' is an expression which is used in India, as in the United States, to indicate the area of land which a fixed unit of water will irrigate, and, as in America, the unit adopted is one cubic foot per second of flow, or, as we express it, one 'second-foot.'"

1 See Sec. 902.

will be noticed that we used the expression "the quantity essential to successfully irrigate a definite tract of land." We mean by this that it is such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of the crops on the land. The economical use of the water might be carried to the extent that no crops could be raised, or at least very poor crops. This is illustrated in the many instances where there is not sufficient water for the proper irrigation of the land. But where an appropriator has a prior right to ample water to irrigate properly a certain tract of land, the successful raising of the crops thereon should not be made to give way by an award of a certain quantity of water which would require too great economy in its use. The object of these rules is to suppress, as far as possible, the waste of water,[2] and an award of this nature would be going to the other extreme and would require an economy in the use of the water at the expense of successful results. The water supply of the country should be conserved to the greatest possible extent consistent with its successful use for all beneficial purposes for which it may be appropriated. Further than this we should not go.

§ 904. Duty of water—How essential duty is determined.—In determining the duty of water, or the quantity essential to successfully irrigate a definite tract of land, many questions must be taken into consideration. Among these questions are the character of the soil, the climatic conditions, the location and altitude of the lands to be irrigated, the kind of crops to be raised, the time included in what is known as the "irrigation season," and the necessary manner of diverting the water from the source of supply, carrying it to the place of use and the final application to the land, as well as many other questions which constantly arise in connection with this subject. The "head" of water, or the quantity entering the intake of any canal or ditch, and the distance which the water has to be carried to the place of use, and the necessary loss in the carrying of the water, may also be considered, and also the question as to whether it is new land or land which has been irrigated for a number of years to which the water is to be applied.[1] Again, in determining

2 For the suppression of waste, see Secs. 911-916.

1 Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102

the duty of water, the fact as to whether or not the lands have been prepared and reduced to a reasonably good condition for their irrigation should be considered.[2] Water users should not be awarded an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water.

From the above it can be readily seen that no hard and fast rule can be made as to the duty of water which will apply to all cases. Therefore, the proper duty of water can only be determined from all the facts surrounding each particular case. What may be the proper quantity of water for one tract, might not be the proper quantity to be awarded to another tract adjoining. In some of the States by statute the minimum duty of water is fixed for the lands of the whole State.[3]

The required duty necessary to the successful raising of crops differs greatly with the varying conditions. As was well said by Mr. A. S. Dawson, Chief Engineer in charge of the Canadian Pacific Railway Company's irrigation projects in the Province of Alberta:[4] "World-wide experience in the use of water on cultivated lands under any kind of crops during long periods of years, shows that the duty varies with, (1) the nature of the soil; (2) the age of the soil; (3) the kind of crop; (4) the weather conditions; (5) the slope and condition of the conveying channels of supply; (6) the distance the water is carried in the ditches and channels to the fields, and (7) the experience and skill employed in irrigation."

§ 905. Duty of water—Power of Court to fix.—Especially during the later years, the courts have been and are now being called upon to fix by decrees the duty of water for certain tracts of land. In cases brought for the adjudication of water rights on certain

Pac. Rep. 728; United States v. Conrad Invest. Co., 156 Fed. Rep. 123, 130; Gerber v. Nampa etc. Irr. Dist., 19 Idaho 765, 116 Pac. Rep. 104; *Id.*, 16 Idaho 1, 100 Pac. Rep. 80.

As to expert testimony, see Evans Ditch Co. v. Lakeside D. Co., 15 Cal. 119, 108 Pac. Rep. 1027.

2 Farmers' Co-op. D. Co. v. Riverside D. Co., 16 Idaho 525, 102 Pac. Rep. 481.

See, also, Little Walla Irr. Union v. Finis Irr. Co., —— Ore. ——, 124 Pac. Rep. 666.

3 For duty fixed by statute, see Sec. 906.

See, for laws of the various States, Part XIV.

4 In an address before the Western Canada Irrigation Association, held at Calgary, Alberta, August 8-10, 1911.

streams as between the appropriators of the water thereof, it is always within the power of, and indeed it is the duty of the Court, where it is not limited by some statute arbitrarily fixing the duty of water, to award by decree the duty of water or the quantity to each piece, as under the evidence in the case it shall be found to be entitled. In fixing the duty of water for a certain tract of land, such an amount per acre should be awarded, within the lawful claim of the prior appropriator, as is essential or necessary for the proper irrigation of the land on which the water is used, and upon which the duty is being fixed; which water, when economically applied without waste, will result in the successful growing of crops on the land. Further than this, as far as the rights of the prior appropriator are concerned, the courts should not and can not lawfully go, where the result would be in cutting down the quantity of water to which the prior appropriator is entitled and reasonably needs for his purpose and the awarding of a certain amount of his water to subsequent appropriators.[1]

But, upon the other hand, where the Court finds that the claim of the prior appropriator is for an excessive amount of water for the land upon which it is being used, or is about to be used, there is no question as to the power of the Court to cut down the claim in its award to the proper duty for the land, as the evidence shall disclose, and award the surplus to the subsequent appropriators in the order of their respective priorities. It is always possible as the result of recent scientific investigations and the modern methods of measuring the water, to determine the proper duty of water for any given tract of land, and excessive quantities of water should never be awarded by the Court, even if, prior to the adjudication, there had been an attempt to use all of the water claimed.[2] This rule was well illustrated by a recent decision by the Supreme Court

1 For the rights of the prior appropriators, see Secs. 776-782.

For the rights of subsequent appropriators, see Secs. 783-786.

For decrees, see Chaps. 78, 79, Secs. 1557-1564, 1577, 1578.

2 "This feature, however, is similar in principle to that of the farmer who at first may have needed but 100 inches of water and yet constructed ditches carrying three times that quantity, using it in a wasteful manner, and which right he still insists upon by reason of the ditch, when first constructed, being of sufficient capacity to carry the excessive supply. It is well settled that such a claim can not be successfully maintained."

of Oregon,[3] where the trial court awarded seventeen inches of water under a six-inch pressure per acre as necessary for the irrigation of certain lands upon the testimony of certain witnesses, and the Supreme Court, in reviewing the judgment, said: "A flow of seventeen inches therefore would cover an area equal to one acre to a depth of twenty-five and one-half feet each month, or 102 feet in depth (102 acre feet) during an irrigation season of four months. The absurdity of such a quantity, being essential to the proper irrigation of lands, is manifest."[4]

The reason of this rule is apparent when we come to consider the fact that an appropriator, even if prior in time to all others, does not acquire any title to the waters while flowing in the natural stream.[5] He only acquires the right to the use of a certain quantity, reasonably sufficient for his purpose within the extent of his appropriation.[6] When he has this amount his right is satisfied, even though he attempted to claim more than he needed. When he has made an excessive appropriation the Court should cut his claim down to the proper duty of water for the land irrigated. The wasteful methods of diversion, in conducting the water, and its application to the land, so common with the early settlers, can, under the light most favorable to their use, be deemed only a privilege permitted merely because at that time it could be exercised without substantial injury to the rights of others, for the reason that the others were not then there. No vested right to continue these wasteful methods was acquired by the prior appropriator. Neither was there any vested right acquired to the surplus water over and above the proper duty of the water for the land irrigated. The surplus or excessive amount claimed the courts have the power to award to the subsequent appropriators in the order of their

Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

See, also, Seaweard v. Pacific L. Co., 49 Ore. 157, 88 Pac. Rep. 963.

3 Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

4 See, also, Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Porter v. Pettingill, 57 Ore. 247, 110 Pac. Rep. 393; Gerber v. Nampa Irr. Dis., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; United States v. Conrad Investment Co., 156 Fed. Rep. 123; Nevada Ditch Co. v. Canyon etc. Co., 58 Ore. 517, 114 Pac. Rep. 86; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

5 See Secs. 772.

6 For quantity of water limited to the amount needed, see Sec. 877.

respective priorities.[7] This is also the case in those States which by statute fix the maximum duty of water for all lands within their respective jurisdictions. In these States the Court in the face of the statute can not award a lower duty than that fixed by statute. But, if the evidence warrants it, it may award a higher duty. By this means it is practically left to the Court to determine from all the evidence in the case the proper duty of water for any given tract of land involved in the suit, and to make its award by decree therefor.[8]

§ 906. Duty of water—Minimum duty as fixed by statute.—In a number of the States of the West the minimum duty of water, or the maximum quantity allowed per acre, is fixed by statute, and ranges from the low duty of one cubic foot of water per second, or one second-foot, as it is commonly called, for every fifty acres of land irrigated in the State of Idaho,[1] to the higher minimum duty of one second-foot for each eighty acres of land irrigated in the

7 "The wasteful methods so common with the early settlers, can, under the light most favorable to their system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and no right to such method was acquired thereby." Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

"Whatever amount of water the defendant shows himself entitled to for the irrigation of the meadows or other lands as a prior right over the plaintiff, the judgment should be so decreed, but beyond this he can not go under any other pretext or claims for the natural condition of the stream. In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate ten times as much by proper application." Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752.

See, also, Anderson v. Bassman, 140 Fed. Rep. 14; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; United States v. Conrad Invest. Co., 156 Fed. Rep. 123; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Abbott v. Reedy, 9 Idaho 577, 75 Pac. Rep. 764.

"It is the policy of the laws of this State, and it has been so declared from time to time by this Court, to require the highest and greatest possible duty from the waters of the State in the interest of agriculture and other useful and beneficial purposes." Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

8 For the maximum duty as fixed by statute, see Sec. 906.

1 For Idaho Stat., see Part XIV, under Idaho.

For the measurement of water, see Secs. 888-900.

State of North Dakota.[2] In the State of Nevada a different basis of measurement is established by statute—that of the volume of the acre-foot instead of the measurement by flow of the cubic foot.[3] And in this State it is provided that the minimum duty may be three acre-feet per acre per year.[4] This is equivalent to about one second-foot for one hundred and sixty acres of land. Outside of the last-mentioned State it will be noticed that the minimum duty as prescribed by statute is very low, as compared with the actual duty of water in some localities. For example, the duty of water for the Greeley or Union Colony of Colorado, mentioned in a previous section, is one hundred and eighty acres of land irrigated for each second-foot of water. In Southern California, where water is very scarce, there is also a very much higher duty. In the Northwest Territories of Canada the minimum duty of water is fixed at one cubic foot of water per second, flowing continuously during the irrigating season, for each one hundred and fifty acres of land.[5] The Reclamation Service, under the Act of Congress of 1902, has established different duties of water, varying according to the soil, climate, and other physical features of the particular locality where the project is constructed or being constructed. Under the Minidoka project, in Idaho, the duty of water on an estimated average is four acre-feet per annum, measured at the point of diversion. For the Williston project, in North Dakota, it is fixed at two acre-feet per annum. For the North Platte project, in Nebraska and Wyoming, it is one and one-half second-feet per annum for each one hundred acres. For the Carlsbad project in New Mexico, it is three acre-feet per acre per annum. For the Cimarron project, in Oklahoma, it is two acre-feet per acre per annum. For the Belle Fourche project, in South Dakota, it is two acre-feet per acre per annum. For the Truckee-

2 For North Dakota Stat., see Part XIV, under North Dakota.

In Nebraska, New Mexico, Oklahoma, South Dakota, and Wyoming the minimum duty of water is fixed at one second-foot for each seventy acres of land irrigated. For the statutes of these States, see Part XIV.

3 For the measurement of water, see Secs. 888-900.

4 For the Nevada statutes, see Part XIV, under Nevada.

5 See, also, Irrigation in the Northwest Territories of Canada, 1902, published by authority of Hon. Clifford Sifton, Minister of the Interior, p. 30.

For Modern Irrigation in Canada, see Secs. 177-237.

Carson project, in Nevada, it is two and one-half acre-feet per annum. For the Strawberry Valley project, in Utah, it is one cubic foot per second at the head of the gate for every eighty acres. For the Yuma project, in California and Arizona, it is five and five-tenths acre-feet per annum for each acre. For the Uncompahgre Valley project, in Colorado, it is one cubic foot per second at the headgates for every eighty acres.[6]

It will be noticed that the duty established by the statutes of the various States is the minimum duty, or the largest amount of water which may be awarded for any given acreage. There is nothing in the statutes of any of these States which prevents the courts from awarding a higher duty, or making the same amount of water serve a larger acreage. In fact, where the conditions in any case warrant it, it is the tendency of the courts to do this, as, for instance in Idaho, where the minimum duty is but one second-foot for each fifty acres of land irrigated. In a very recent case the Court reaffirmed some of its previous decisions upon this point, and said: "It is the policy of the laws of this State, and it has been so declared from time to time by this Court, to require the highest and greatest possible duty from the waters of the State in the interest of agriculture and beneficial purposes."[7] As we view the matter, it is not only the right of the courts, but it is their duty, in all cases brought before them to adjudicate the water rights upon the streams to fix as high a duty as it is possible consistent with the successful use of the water. In many localities an increase of the water supply seems to be improbable, for apparently all the local sources have been developed. "A more economical use of the available supply is, then, the only way in which new orchards and new fields may be provided for without injury."[8]

[6] For the above and other duties established by the Reclamation Service, see 6th Annual Report, 1906-1907.

[7] Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

See, also, Abbott v. Reedy, 9 Idaho 577, 75 Pac. Rep. 764; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728; Seaweard v. Pacific L. Co., 49 Ore. 157, 88 Pac. Rep. 963; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; United States v. Conrad Invest. Co., 156 Fed. Rep. 123, 130; Anderson v. Bassman, 140 Fed. Rep. 14.

[8] R. H. Loughridge, in Distribution of Water in the Soil in Furrow Irrigation, U. S. Dept. of Agriculture, Experiment Stations Bulletin No. 203, 1908.

The legal duty in the Provinces of Alberta and Saskatchewan is fixed by the Irrigation Act as a continuous flow of one cubic foot per second of time for every one hundred and fifty acres of land, and for the period of fifty-three days between May 1 and September 30.[9] This, as will be noticed, is a much higher duty than is allowed by the statutes of any State in this country.

§ 907. Duty of water—Relation to—Of natural losses in transit.—In spite of the greatest precautions and the greatest care in the construction of the works to conduct the water, there is bound to be some loss of the water in transit between the point of diversion and the place of use. Water will evaporate; it will seep; and, at times, it will leak. These we will call the natural losses of the water in transit, and do not, except in the cases of leakages, constitute what is termed the wasting of water. As we have seen in a previous section, one of the subjects of investigation by the United States Department of Agriculture was the losses of canals from seepage and evaporation.[1] And from the beginning of the irrigation investigations of that department, many measurements of the losses from ditches and canals have been made in all sections of the arid and semi-arid West. The highest loss found was 64 per cent of the water entering the ditch in a single mile of ditch, while other canals having canals or irrigated land above them, show gains instead of loss. It is found that the average for the large canals is approximately one per cent per mile. And a commonly accepted estimate of the loss from large unlined canals is 30 per cent of the water taken in at the headgate, and from measurements given this seems to be a conservative estimate. It is probable that as much more is lost from the laterals and field ditches, so that it is well within the truth to say that not more than one-half of the water diverted by the average unlined earthen canals and ditches reaches the fields for which it is diverted.[2]

[9] For the legal duty of above Provinces, see Sec. 199.

[1] See Sec. 901.

See, also, Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture, pp. 23, 39.

For the wasting of water, see Secs. 911-916.

[2] See Losses of Irrigation Water and Their Prevention, by R. P. Teele, reprint from the Annual Report of the Office of Experiment Stations for year ending June 30, 1907, pp. 367-370.

See, also, Review of Ten Years of Irrigation Investigations, Annual Report of the Office of Experiment Sta-

There are, however, some necessary losses in the carrying of water from the point of diversion to the place of use which can not be counted as the waste of water. As was said in a recent Colorado case:[3] "We might be justified in indulging in the presumption this seepage occurs for a long distance along the line of the canal, and that it is no exception to the general rule of large ditches, where seepage usually exists from their headgate along down their line until the ditch gradually winds its way from the river upon the level lands. All irrigation canals must of necessity seep more or less along this portion of their lines, and will so continue until prevented by other means than ordinary diligence in their construction, and we do not think the time has yet been reached in this State when the owners of such enterprises can be held to such a high degree of diligence in their construction as to be compelled to prevent them from seeping at all, or be subject to successive suits for any injury which it is not practicable to remedy, and which logic would mean to prevent the construction of a large number of ditches and reservoirs, and thus retard the development of our State, as the result of such a rule would mean in most cases that the costs or means to prevent the seepage would be far in excess of the value of the property so damaged."[4] As will be readily seen, some of these losses are enormous, and merge into the waste of water.[5]

Upon the other hand, this water is not all lost to use, upon the old adage of "What is one man's loss is another man's gain." Much of the water which escapes from the canals finds its way to the surface below in the form of springs in spots which were ordinarily dry. Irrigators have used these waters, and in many cases have secured an ample supply of water for their use without having to pay the canal company which furnishes it anything for operating expenses. In those cases the question of the permanency of these rights arises, should the canal company line its canal and thereby prevent the loss.[6] This question we have treated and will treat in other portions of this work. But in a number of the States there are statutes providing for the acquisition of permanent rights in what

tions for the year ending June 30, 1908. Report of the Secretary of Agriculture for 1909.

3 Middelkamp v. Bessemer Irr. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

4 See, also, for damages upon the leakage of works, Chap. 83.

5 For the waste of water, see Secs. 911-916.

6 For the appropriation of waste water, see Sec. 661.

is known as seepage and spring water.[7] Again, where the water does not come to the surface in springs, the water lost from canals usually finds its way back into the streams, where it may be reappropriated by the irrigators lower down. The investigations of the Government have been of the greatest value to the owners of the ditches and canals which have been measured, since they locate the losses and make it possible to improve the sections of the canal which lose the most. And the object of the investigations was that existing conditions as to the natural losses might be improved so that as large a percentage of the water as was possible might be utilized, and thus greater areas might be brought under cultivation from the same amount of water diverted from the streams.

§ 908. **Duty of water—Point where water must be measured.**—As we have seen, in many jurisdictions the minimum duty of water is fixed by law,[1] and where this is the case the question has arisen as to whether the quantity of water claimed under an appropriation is to be measured at the head of the canal or at the margin of the irrigated field where it is to be used. It can be readily seen that where, for example, the duty allowed by statute or awarded by decision of the Court is the continuous flow of water of one cubic foot per second for each eighty acres of land to be irrigated, or is three acre-feet for the irrigation season, that a person having eighty acres of land lying at some distance from the headgate will not, on account of the natural losses of water, mentioned in the last section,[2] receive at the place of use the full quantity of the water if that exact quantity of water was measured at the headgate. But in cases of the shortage of water, the natural tendency would be and from experience is that the appropriator will take such steps as possible to stop all leakage, and to prevent, as far as possible, the excessive seepage and evaporation. Upon the other hand, if the water is measured at the margin of the irrigated field, or even at the head of the lateral leading to it, the tendency would be and is that the irrigator becomes careless as to the condition of the ditch or canal, permitting excessive loss, so long as he gets the full quantity of water, according to the duty fixed therefor, at the place of use. This has been a puzzling question for

7 For these statutes, see Part XIV. 2 See Sec. 907.
1 See Sec. 906.

irrigators, those in charge of the administration of the irrigation laws, such as water commissioners, and for the courts, and it can by no means be called settled at the present time. Water commissioners insist that it is practically impossible to measure the quantity of water covered by each appropriation at the head of the user's lateral.[3] Assuming that this statement is correct, and it probably is, there is another method of compensating for the natural loss of the water, and that is by making due allowance at the headgate for the necessary seepage and evaporation. Now the question arises, Should this allowance be made?

In the State of Idaho, where there is a low minimum duty of water of one second-foot for each fifty acres of irrigated land, the Court holds that the water must be measured at the point where the water is diverted from the natural channel of the stream from which the water is taken.[4] This was upon the theory that every act on the part of the appropriator that tends to waste water is to be discouraged rather than encouraged. "The necessity of measuring to each claimant, at the point of diversion from the natural stream, the waters appropriated and used by him is apparent." This is also the rule adopted in that State by the Reclamation Service.[5]

The rule adopted in Idaho may be all right for that State, owing to the fact of the exceedingly low minimum duty of water prescribed by the statute of one second-foot for each fifty acres of land irrigated, but, as said by Mr. Mead, "In order to plan for the just distribution of the volume entering the headgate, the losses in transit must be provided for."[6] In Nebraska, where the higher duty of water is fixed by statute of one second-foot for each seventy acres, the attorney-general holds to the same rule, and that the place of measurement must be at the head of the ditch, since allowing this quantity at the point of use would deprive the owners of later rights of the quantities lost from the ditch rather than the owners of the poorly constructed ditch. In other words, it would be placing a premium on poor construction, at least, giving no in-

[3] See Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture.

[4] Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. Rep. 189.

[5] See 6th Annual Report, 1906-1907, pp. 83, 91.

[6] Experiment Stations Bulletin No. 86, U. S. Dept. of Agriculture, p. 22; see, also, on subject, p. 39.

centive to good construction.[7] As a general rule, in the other States where the minimum duty of water is provided for by statute, no place is designated where the measurement of the water shall be made. Therefore, this question is left to the courts to determine. But unless the natural or necessary losses are provided for, the appropriator will not receive at the place of use the quantity of water to which he is entitled under his appropriation. The correct rule is to measure the water at the place where it is diverted from the stream. But the appropriator is entitled to have so much water diverted for his use as will yield at the place of use the quantity required and covered by his claim after the *necessary* loss by seepage and evaporation is allowed for. Any unnecessary loss either by seepage, evaporation, or leakage, on account of defective ditches, canals, or other works, may then be considered as wasted water, and treated accordingly. "The soundness of the doctrine is unquestioned."[8] As we view the question, no definite rule can apply generally to all cases, and it should be left to be determined from all the facts surrounding each particular case.

§ 909. Rotation as a matter of economy.—The question of rotation in the use of water between the consumers from the same stream or ditch as a matter of economy and enlarging the duty of water has, within the last few years, occupied the attention of irrigation experts and hydraulic engineers of this country, and more recently occupied the attention of the courts. This system has also been adopted in many communities as a matter of contract[1] between the consumers themselves or between consumers and ditch or canal companies, which contracts have invariably been upheld by the courts. The theory of rotation between users comes directly under the subject of suppression of waste and the question of

[7] Report of the Secretary of the State Board of Irrigation, 1901-1902, p. 218.

See, also, Losses of Irrigation Water and Their Prevention, annual report of the Office of Experiment Stations for year ending June 30, 1907, U. S. Dept. of Agriculture, p. 386.

[8] Natoma etc. Co. v. Hancock, 101 Cal. 42, 35 Pac. Rep. 334, reversing 31 Pac. Rep. 112.

See, also, Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504.

See, also, Little Walla Walla Irr. Union v. Finis Irr. Co., — Ore. —, 125 Pac. Rep. 270.

See, also, for wasting water, Secs. 911-916.

[1] For contracts for rotation of water, see Sec. 923.

natural losses in transit, described in other sections of this chapter.[2] But it stands to reason that where a greater proportion of what are called natural losses in transit can be saved and the duty of a certain quantity of water can be enlarged with better results to the users by a mere change in the method of conducting the water that this method should be adopted and enforced by the courts, whether based upon contract, statute, custom, or without any of these, but upon a mere fact of a saving of the water and a suppression of waste.

The situation is better illustrated by an actual case in which the writer was engaged, involving the rights of all parties using the water from Big Cottonwood Creek, Salt Lake County, Utah. The particular feature of the case was that of a small ditch having the right to seven-tenths of a second-foot of continuous flow when the entire stream equaled one hundred and twenty cubic feet per second. This amount awarded the ditch was proportionately cut down during the dry season. This ditch supplied six small farms with water for irrigation. It was found from actual experience that where the seven-tenths of a second-foot was divided up and conducted by various small ditches to the various farms and used simultaneously by the respective owners that there was much more water lost in transit than was applied to the land. Therefore, the owners of these interests got together and pooled their rights and a basis of one hundred and ninety-two hours, or eight days, was fixed for the division of the water. Each owner than took the whole flow of the ditch for the exact proportion of time of one hundred and ninety-two hours as the area of his tract of land bore to the total acreage of all. By this means each owner had a sufficient flow to give his land a good wetting every eight days. Again, during the extreme dry season of the year, when the flow of the water in all the ditches taken from the stream was cut down proportionately, the owners of this particular ditch pooled all of their interests with the interests of another ditch having similar rights, and this enabled the owners under each ditch to give their land a good wetting once in about every two weeks. If this method had not been followed the greater portion of the water would have been lost in transit by seepage or evaporation, for the reason that the

2 For the suppression of waste, see Secs. 911-916. For the loss of water in transit, see Secs. 907, 908.

stream would have been so divided that it would have practically all soaked away before it reached the land which it was intended to benefit. The Court in this case upheld the right of rotation.[3]

As was said before, irrigation experts and hydraulic engineers agree upon the proposition that rotation in the use of water, especially in cases where the supply is small, not only gives a higher duty to an available water supply, but it tends directly to suppress the actual waste of the water. As was said in a recent Idaho case:[4] "The use of water under the rotation system is approved by high engineering authorities." And the Court proceeds to quote from those great works by Robert B. Buckley and Sir Hanbury Brown, and we can do no better than to quote what these works say upon the subject: "The most wasteful system of irrigation possible is that under which all branch canals, distributaries, and village channels are in use continuously and the available supply is slowly dribbling into the fields. For not only is the actual loss of water greater, but under this system there is also this further disadvantage, that the velocities in all the distributaries and minor channels are reduced, and the silt in the water, which at these points of the system is nearly always advantageous to the fields, is largely deposited in the channels and not carried onto the cultivated ground. The system of irrigation by rotation or by tatils, as it is called in Upper India, is of great advantage, not only in checking the loss of water in the channel, but in teaching economical irrigation to the cultivators and in insuring an equitable division of the supply among the people."[5] "When the supply of water is not in excess of the demand, an economical and just distribution depends more on correct methods of administration than on the perfection and completeness of the regulating works. All countries that have practiced irrigation on a large scale have found it necessary to adopt some system of 'rotation' whereby water is alternately supplied and withheld for fixed periods. . . . The advantages of such a system are many: By concentrating the available supply in half, or

3 Progress Co. v. Salt Lake City and others, tried in the 3d District Court, Salt Lake County, State of Utah.

4 State v. Twin Falls Canal Co., — Idaho ——, 121 Pac. Rep. 1039.

5 Irrigation Works in India and Egypt, by Robert B. Buckley, 1893, E. N. F. Spon, London, New York, p. 282.

a third, or a less fraction of the canals, and giving the whole of it to the section whose turn it is to take the water, the irrigation is made easy in consequence of the higher water levels produced in the canals. At the same time, in other sections, which are not receiving water, the danger of the canals causing water-logging of the soil is removed, and they are either empty or flowing at a low level. The crops require water at certain intervals, and not continuously. It is better for them, as soon as they have received a watering, that the water supply should be shut off from their neighborhood, so that all excess of water over and above that used up or absorbed may be got rid of, and not be allowed to stagnate. Irrigation by rotation, moreover, is a system that conduces to economy of water, for the water is delivered just where and when it is wanted for irrigation, and is therefore not allowed to run to waste. The loss from evaporation and absorption is less, as the water is spread out over a less extent of canals." [6]

§ 910. Rotation as a matter of economy—The law as applied to the subject.—The system of rotation in the use of water as described in the previous section [1] has been adopted in many irrigation communities, and the law upon this subject must be recognized as one tending to enforce the more economical use of water and the suppression of waste.

Some of the States have enacted statutes upon the subject of rotation. For example, the statutes of Wyoming provide: "To bring about a more economical use of the available water supply, it shall be lawful for water-users owning lands to which are attached water rights to rotate in the use of the supply to which they may be collectively entitled; or a single water-user, having lands to which water rights of a different priority attach, may, in like manner, rotate in use, when such rotation can be made without injury to lands enjoying an earlier priority." [2]

As we have seen in previous sections, the courts will uphold valid contracts between users, and between users and ditch companies

[6] Irrigation, by Sir Hanbury Brown, p. 214, 217.

See, also, Irrigation Engineering, by Wilson, Sec. 67.

[1] See Sec. 911.

[2] Wyoming Comp. Stat. 1910, Sec. 806; Laws 1909, Chap. 108, Sec. 1.

See, also, for the statutes of other States, Part XIV.

upon the subject of rotation.[3] And upon the question of the application of the principle without contract or statute the courts are gradually falling in line, and are granting the right of rotation upon the theory that it tends to extend the duty of water and the suppression of waste. And although the cases are somewhat scarce upon this subject, the general tendency is to enforce rotation, where it can be done, without infringing upon the rights of others, even in cases of prior and subsequent appropriators upon the same stream on the ground that it tends toward a more economical use of a given quantity of water and the suppression of waste. As was said in a late Oregon case:[4] "We see no reason why, even in cases involving prior and subsequent appropriations of water, the courts can not require the appropriators to alternate in the use of the water. The time when water may be used recklessly or carelessly has passed in this State. With increasing settlement water has become too scarce and too precious to justify any but an economical use of it. An appropriator has only the right to use so much as his needs require, and at the time his needs require. And if these are satisfied by a use of the whole flow every other day, or every alternate week, he ought not to be heard to complain. . . . It must be conceded that there is a paucity of authority on the subject of requiring rotation in the use of water between appropriators. The remedy has frequently been applied in cases of dispute between riparian proprietors, and it is difficult to discern any difference in principle between the rights of a riparian proprietor and those of an appropriator in the beneficial use of water. The trend of the later decisions is to apply this method where practicable."[5]

In reversing a judgment of the lower court in a recent opinion handed down by the Supreme Court of California,[6] by way of suggestion to the trial court upon the question of rotation, it said: "If there is not water enough (and this appears to be the fact) to permit a diversion of the stream and a simultaneous use of part by both parties without injury, the Court may by its decree fix the times when, by rotation, the whole may be used by each at

[3] For contracts regulating rotation, see Sec. 923.

[4] McCoy v. Huntley, —— Ore. —, 119 Pac. Rep. 481.

[5] The rule laid down in the above case was reaffirmed in the more recent case of Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42.

[6] Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

different times in proportion to their respective rights. In doing so the Court should recognize the paramount and primary rights of the respondent to the first flow in a full ditch and the use of all of it, or a lesser quantity, for given periods during the irrigating season, as it may be required. If this can be done so that by giving respondent the first flow for a week, or every other week, or on certain days in the week, and the appellant the right thereto in the intervals, the wants of respondent are fully supplied, he obtains all he is entitled to, and has no ground of complaint. While this remedy of rotation and use of waters for irrigation purposes has been more generally applied as between riparian proprietors,[7] in principle there is no reason why it should not be made applicable as between claimants by appropriation."

Again, as was stated by the Washington Court:[8] "Respondents cite this case[9] to sustain the proposition that, it being shown that it was the custom throughout the Yakima Valley to deliver water in a continuous flow, we must hold this custom to have been within the contemplation of the parties when the contract was made. The answer to this is that a practice is shown to have existed, but the testimony does not show a custom. On the other hand, it shows a growing tendency to adopt an alternating system, which will give water in quantity at stated intervals. Nor does it show a necessity for a continuous flow." Again, the Idaho Court, in one of the first cases upon the subject, and also one of the last, holds to the same rule and adopts the following: "Rotation in irrigation undoubtedly tends to conserve the waters of the State and to increase and enlarge their duty and service, and is, consequently, a practice that deserves encouragement in so far as it may be done within legal bounds."[10]

The above language was adopted by the Idaho Court in a case decided very recently,[11] and in which the Court said: "The economical use of water in irrigation is of great importance to the

7 Citing Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725.

8 Shafford v. White Bluffs Land & Irr. Co., 63 Wash. 10, 114 Pac. Rep. 883.

9 Hewitt v. San Jacinto etc. Co., 124 Cal. 186, 56 Pac. Rep. 893.

10 Helphrey v. Perrault, 12 Idaho 451, 86 Pac. Rep. 417.

11 State v. Twin Falls Canal Co., — Idaho ——, 121 Pac. Rep. 1039.

State, and under the provisions of Section 3293, Revised Codes, the users of water are prohibited from using more than good husbandry requires for the crop or crops they cultivate. The duty of careful and economical use of water is one that by statute, as well as public policy, is imposed upon every water-user, and under the various Carey Act projects in this State provisions have been made for the conservation and best use of the water supply and to make it perform as high a duty as possible, and if the rotation system more nearly accomplishes that purpose, it should be adopted." [12].

Following the above cases, undoubtedly the courts of other States will adopt the same rule, as the general tendency in all jurisdictions is for a more economical use of the water and for a suppression of all unnecessary waste.

But whether there is a statute upon the subject or not, in the State where this right is claimed or exercised, the vested rights of all others who take water from the same stream and not parties to the rotation should be considered and protected. In Colorado under a statute the rotation of water is termed the "exchange" or "loaning" of water.[13] But whatever may be the terms, the principles covered by this statute are practically the same as those relative to the necessities and rules of rotation discussed in these sections. And upon the subject of the protection of vested rights of others the Colorado Court holds that if, as a matter of fact, these loans were made under the conditions and under the circumstances which permit of exchanges and loans of water, it is only right and proper that the burden of establishing the same be put upon the parties thereto. The Court upon this subject further said: "That this is the rule that should prevail seems only fair and just. . . . Such being the law of this State, when such exchanges or loans are made, or attempted to be made, they ought not to be permitted, if at all, until the parties seeking their benefits have clearly established that the alleged qualified right has been exercised in such a way, and at such times, and in such circumstances, that the vested rights of others are not injured." [14]

12 See, also, Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119.

13 For Colorado statutes upon the subject, see Chap. 87.

14 Fort Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37. The

§ 911. Wasting water—The need of suppression of.—We come now to that most important subject of the wasting of water and its suppression. Of course, the wasting of water is the converse of using it economically, and has in the previous sections been treated from that standpoint in our discussion in this chapter of the subject of the economical use of water.[1] We have also seen that there is a difference between the absolute wasting of water and the necessary losses of water in transit from seepage and evaporation.[2] But there are some questions upon the subject of wasting water which we will treat from that standpoint.

This subject of the wasting of water has occupied the attention of the courts, practical irrigators, the Government, and State authorities, and all persons interested in irrigation since, owing to the increased demand for water throughout the West, there has been a shortage of water, as compared to the amount which might be used if there were a plenty for all. And today one of the most important questions which comes before the courts and legislators is how a certain amount of water may be made to perform the greatest duty with success, and thus accomplish the greatest good to the greatest number. Those who are at all familiar with the conditions of the water supply of the West, and the ever-increasing demand made upon it, are well aware of the fact that, in many sections of the country, an increase of the water supply seems to be improbable, for apparently all of the available local sources have been developed. A more economical use of the available supply and an entire suppression of the wasting of water are, then, the only ways in which new fields and new orchards may be provided for; but this must be done without injury to the rights of those who are at present using the water.[3] But as an appropriator acquires no title to the *corpus*, or very body of the water,[4] and only acquires a right to the use of such a quantity of water within the extent of his appropriation as he can use economically and without waste, he can not lawfully acquire a right to an excessive amount of water

above was quoted and reaffirmed in Bowman v. Virdin, 40 Colo. 247, 90 Pac. Rep. 506.

See, also, King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906.

1 See Secs. 907, 908.

2 See Sec. 907.

3 See Distribution of Water in the Soil in Furrow Irrigation, by R. H. Loughridge, 1908, Experiment Stations Bulletin No. 203, U. S. Dept. of Agriculture.

4 See Sec. 772.

for the purpose for which he appropriates it, nor can be acquire a right to use the water in a wasteful manner and thereby deprive others from its use. A close study of the reports and bulletins issued by the Government shows a wide variation in the amount of water used for irrigation, and that, too, where the conditions are uniform. This goes to show that many farmers in nearly all parts of the country are still laying claim to and are using excessive quantities of water.[5] And since there is water enough for only a small part of the land suitable for irrigation, this wasteful use not only limits by so much the area which can be watered ultimately, but it is a positive injury to the lands of the farmer and to the lands of others below him. The water wasted has swamped large areas of land once fertile, or brought up so much alkali as to injure and destroy vegetation, requiring drainage or the abandonment of the land.[6] It has, therefore, on this account been found necessary to study methods for removing alkali and the drainage of the surplus water.[7] Then, again, some irrigators do not take into

5 Mr. R. P. Teele, in the annual report of the irrigation investigations for the year ending June 30, 1907, of the Agricultural Department of the Government, at page 382, in discussing the losses of water, says: "The measurements of losses summarized relate to the quantity of water which actually enters the soil. Much more is wasted by careless irrigation, the amount varying with the degree of carelessness. Summing up the whole subject of losses: Not more than one-half of the water diverted by the average earthen canal reaches the land for which it is diverted; of that which reaches the land fully one-fourth or one-eighth of the whole is lost by evaporation under ordinary practice, while still another fraction is lost by careless use. It is safe to estimate that not more than one-third of the water diverted actually enters into the growth of crops. The remaining two-thirds represents the field for expansion when the visible water supply is exhausted. Some of this loss is unavoidable, and some can be prevented only at a prohibitive expense, but a large part can be prevented by careful use and an adaptation of methods of applying water to soil conditions."

See, also, Experiment Stations Bulletin No. 86, pp. 15, 39, U. S. Dept. of Agriculture.

6 For injuries from seepage, see Chap. 83.

7 See Report of Irrigation Investigations for 1900, Experiment Stations Bulletin No. 104, p. v., U. S. Dept. of Agriculture; Losses of Irrigation Water and Their Prevention, Report of Irrigation Investigations for 1907, by R. P. Teele, pp. 369-386, U. S. Dept. of Agriculture; Drainage of Irrigated Lands, by Chas. F. Brown, 1909, Farmers' Bulletin No. 371, U. S. Dept. of Agriculture; Distribution of the Water in the Soil by Furrow Irrigation, 1908, by R. H. Loughridge, Experiment Stations Bulletin No. 203, U. S. Dept. of Agriculture.

consideration the fact that by the use of an excessive amount of water on their lands that not only is a great portion of the water wasted, but the results obtained are often of less value than would have been the case if a more economical use of the water had been made. By the use of too great a quantity of water upon a certain tract of land some of the most valuable species of grasses and other vegetation are drowned out, and swamp grasses, tules, and weeds take their places. Thus the employment of too much water by one man not only diminishes the water supply for other persons desiring its use, but it also injures the property of the user; and then, again, it is an illegal use of the water.

§ 912. Wasting water—What acts constitute—Excessive diversion.—There is no general definition which will apply to all cases as to just what acts upon the part of an appropriator will constitute the wasting of water. In every use of water for irrigation there is some loss of the water either by seepage or evaporation which is unavoidable. This necessary or natural loss of the water can not be counted as waste, and what might be a necessary loss in one case might be counted as an extreme case of waste in another. Therefore, as near as we can come to a definition of the wasting of water which will apply to all cases is that it is that amount of water which is lost to the appropriator which by a reasonable amount of labor or the expenditure of a reasonable amount of money upon his part might be saved for the use of growing crops; or it is that amount of water which an appropriator attempts to claim under an appropriation which he does not apply to some beneficial use or purpose, and which may be appropriated by others subsequent in time. But, as can be readily seen, at best, as to what constitutes the actual wasting of water depends upon the facts surrounding each particular case; and in determining as to just what constitutes waste the Court may examine all the facts bearing thereon relative to the proper duty of water for the land, the means of diverting the water and conducting the same to the place of use, whether the canals and ditches are in a reasonably good condition to convey the water without unnecessary loss thereof, the condition of the land to receive the water, and the methods of applying the water to the land, and any other facts in any particular case bearing upon the question.

If an amount of water is being conducted to a certain tract of land in excess of the fixed duty for the same, or if there is not a fixed duty of water in excess of the amount of water which the land when put in the proper condition to receive water will absorb for the actual production of the crops thereon, then there is a waste of the amount in excess of the quantity which is actually needed for that purpose. An excessive amount of water used upon the land is at times more injurious to the land itself than a scarcity, and where it is thus used others may successfully lay claim to the excessive amount.[1]

As was well said in a recent Colorado case: "If the defendants have no present or immediate need of the full quantity of water

1 For proper condition of land to receive the water, see Sec. 914.

For the duty of water, see Secs. 902-916.

That all the water appropriated must be applied to a beneficial use or purpose, see Sec. 727.

Water is too valuable to be wasted through an extravagant application to the purpose for which it was appropriated. Town of Sterling v. Pawnee D. Co., 12 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

See, also, Montrose Canal Co. v. Loutsenhizer, 23 Colo. 233, 48 Pac. Rep. 532; Courthouse etc. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463; Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Siever v. Frink, 7 Colo. 148, 2 Pac. Rep. 901.

An appropriator who permits part of the water to run to waste, or fails to use a certain portion of it for some beneficial purpose, is only entitled to that part of the water actually applied to a beneficial use. Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 Pac. Rep. 892.

See, also, Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Ft. Morgan Land & C. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 1067.

"Again, it has been so often demonstrated as to become a matter of common knowledge that lands after years of irrigation do not require the amount which, when first applied, was essential to the successful growing of crops. This law of nature, added to improved methods, greatly reduces the quantity required." Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

See, also, United States v. Conrad Invest. Co., 156 Fed. Rep. 123; Seaweard v. Pacific L. Co., 49 Ore. 157, 88 Pac. Rep. 963; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Anderson v. Bassman, 140 Fed. Rep. 14; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867.

which they may divert and use, they can not waste it, but it is their duty to allow such portion as they have no immediate need for to remain in the natural stream, or, if diverted, to return such surplus again into the same stream where, unless they then intend to recapture it, it becomes subject to diversion by the various ditches in accordance with their numerical priorities."[2]

As is the case with appropriators so is also the case with riparian proprietors. There must not be such a diversion of the waters of the stream to the extent that there is a wasting of the water.[3] It therefore follows that a lower riparian proprietor may enjoin an upper one from diverting the waters from a stream which the latter does not apply to some beneficial use, but allows to run to waste.[4]

§ 913. Wasting water—Defective appliances for conducting.—As was said in a preceding section, there is always some necessary loss by seepage and evaporation in conducting the water from the

2 Burkart v. Meinberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Abbott v. Reedy, 9 Idaho 577, 75 Pac. Rep. 764; Gerber v. Nampa & Meridan Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 972, 60 Am. St. Rep. 777; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280; X Y etc. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. Rep. 720; Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8; Daly v. Ruddell, 137 Cal. 671, 70 Pac. Rep. 784.

3 See rights of riparian proprietors to the use of the water of streams, Secs. 483-497.

Irrigation as a riparian right, Secs. 498-525.

See, also, Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889.

A riparian proprietor is not entitled to take water from a stream for use on land which is valueless for agricultural purposes. Montecito etc. Co. v. City of Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935; *Id.*, 144 Cal. 578, 77 Pac. Rep. 1113.

A riparian proprietor must not drain, collect, or divert waters for the sole purpose of wasting them. Stillwater W. Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541.

4 Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62, citing Kinney on Irr., 1st Ed., Secs. 165, 166.

point of diversion to the place of use and its application at that point. But any loss by means of defective appliances for conducting the water will not be treated as necessary loss, but as waste. So, also, where there is excessive seepage from the ditches and canals which might with a reasonable effort and expense be prevented.[1] Water is too valuable to be wasted, either through an extravagant application to the purpose for which it was appropriated, or, again, by waste resulting from the means employed to carry it to the place of use, which can be avoided by the exercise of a reasonable degree of care to prevent unnecessary loss. With water each year growing scarcer as compared with the need for it, as the law now stands in all jurisdictions it will not countenance a diversion of a volume or quantity of water from a stream which, by reason of the loss resulting from the defective appliances used to convey it, is many times that amount which actually reaches the point of use and is there consumed for the purpose for which it is appropriated.[2]

§ 914. **Wasting water—By application to land of extravagant amounts of water.**—There is another method of wasting the water, after it has been conducted to the place of use, and to which the courts have begun to pay attention. This is by the application of extravagant amounts of water to the land being irrigated. This is largely due to the habits of some of the farmers in every part of the West still clinging to their original claim to a certain amount of water, although it may be many times what they actually need for their purposes, and partially caused by ignorance as to the results of this method of irrigation.[1] Too many farmers throughout the whole West attempt to cultivate their lands with water by applying excessive quantities thereto. The result of this habit is not only injurious to their own lands and to the crops being raised thereon, but it is also injurious to the lands of others lying below theirs, and

1 Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867.

Parties may be compelled to keep their flumes and ditches in good repair so as to prevent any unnecessary waste. Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Little Walla Walla Irr. Union v. Finis Irr. Co., —— Ore. ——, 124 Pac. Rep. 666.

2 Town of Sterling v. Pawnee D. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Courthouse etc. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463.

1 See Secs. 875, 876.

it is a waste of water of the most extravagant kind. It is a well-known fact, which has long since passed the scientific stage of investigation, that a fair amount of labor expended in the cultivation of the soil not only keeps down weeds, but it also prevents the evaporation of the water from the soil. Upon the other hand, where excessive amounts of water are applied to the land when it is taken off it either runs into pools or low places or it stands upon the land and thereby under the hot sun excessive evaporation is caused, and the crust of the soil will be found in many cases to be baked hard. To let it remain in this condition until the next irrigation period it can be readily seen that the land will be in poor condition to receive the water, as the crust will prevent the percolation of the water into the soil. The same operation is then repeated. Between the irrigation periods, if the land is stirred up with the cultivator, the soil will be in much better condition to receive the water which, when a reasonable amount is applied, will sink below the surface and thereby its excessive evaporation is prevented; neither will it run off into pools or the low places. Of course, there are some crops which can not be cultivated, but orchards and everything planted in rows with room between them can be. Many times in these cases a greater amount of cultivation and a less amount of water will produce better results than the old method, and at the same time will not waste the water.[2]

There are not many cases where the courts have paid any attention to the waste of the water from the standpoint of the unfit condition of the land to receive the water, but it is the duty of the courts to consider this loss in connection with other losses from the wasting of water. The Supreme Court of Idaho, in a very late case, took this position, and, in our opinion, very correctly

2 "The tendency of farmers seems to be to use all the water that can be obtained, often to the injury of their crops and lands. Such farmers need to be shown the better results obtained by others who use the water economically." R. P. Teele, in Experiment Stations Bulletin No. 119, U. S. Dept. of Agriculture.

See, also, Experiment Stations Bulletins Nos. 86, 104, 303.

See, also, Preparing Land for Irrigation and Methods of Applying the Water, Experiment Stations Bulletin No. 145; Drainage of Irrigated Land, by Chas. F. Brown, Farmers' Bulletin No. 371, U. S. Dept. of Agriculture; Losses of Irrigation Water and Their Prevention, by R. P. Teele, from annual report of Office of Experiment Stations for year ending June 30, 1907.

decided that, in determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation, and that economy must be required and demanded in the use and the application of water. And the Court further held that water-users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. "One farmer, although he has a superior right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water."[3] The Colorado Court has taken the same position, and has recently held that water was too valuable to be wasted through an extravagant application of the water to the land.[4]

In a recent Oregon case, relative to the wasting of water by the application thereof, it was said: "Extravagant or wasteful application, even to a useful project, or an employment of water in a non-beneficial enterprise, is not included in the term 'use' as contemplated by the law of waters. Then, too, when even an appropriator is not using the water it is available for the use of others."[5]

We deem this position an important step in the right direction, strictly within the power of the Court to enforce, and one which will tend toward a greater suppression of wasting the water than in almost any other direction.

But, upon the other hand, so long as an appropriator uses the water without waste, and in accordance with his appropriation, no one has the right to complain, and under such circumstances the Court can not change his manner of use and require him to furrow the land before irrigating the same.[6]

[3] Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

[4] Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

See, also, Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532.

[5] Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731. The above doctrine was also adopted and reaffirmed in the still more recent case of Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42.

See, also, Doherty v. Pratt, —— Nev. ——, 124 Pac. Rep. 574.

[6] Nephi Irr. Co. v. Vickers, 29 Utah 315, 81 Pac. Rep. 144.

§ 915. Wasting water—Influence of statutes upon the waste of water.—The legislatures of many of the States of the arid and semi-arid West have enacted statutes prohibiting in general terms the wasting of water without prescribing what constitutes this waste in all cases. Criminal statutes are also enacted usually making it a misdemeanor to willfully waste any of the waters of any stream.[1] As we have also seen in previous sections,[2] tending toward this same end of the suppression of waste, statutes have also been enacted fixing the minimum duty of water, or the maximum amount which may be appropriated within the respective jurisdictions for the irrigation of a certain amount of land. These Acts in and of themselves have not tended to any great extent to accomplish the purpose for which they were enacted. Even the statutes fixing the maximum duty of water for a certain tract of land are pronounced failures, as far as the economical use of the water is concerned. Between absolute waste of water which can be detected and stopped by a public official and the economical use of the water there is a wide margin for saving which can be reached only by making it an object to the appropriators to economize. From this standpoint the civil statutes upon the subject fall into two classes: Those which allow the acquirement of rights to fixed quantities of water; and, second, those which allow rights for certain specified tracts of land. In the first case the appropriator must apply all of the water to some beneficial use or purpose, and if the appropriation is for irrigation, he will spread it over as great an area of land as possible, for he knows that if he does not use all the water he is liable to lose the excess. The owner of the right under the second class can use the water only on the designated tract, if he follows the statute,[3] and, as a general thing, he claims the maximum amount of water which he is entitled to within the statutory limit. Any saving upon his part remains in the stream for the use of some one else, without any advantage to the one who saved it,

1 "Any person or persons who shall willfully or wantonly waste any of the waters of any stream . . . or by allowing such water to waste by running into depressions or dry channels so that the same can not be used for irrigation, nor reach the original channel of the stream from which it has been diverted, is guilty of a misdemeanor." Idaho Stat. 1899, p. 336.

For other Acts of legislatures, see Part XIV.

2 See Secs. 901-908.

3 But see for water right as a fixed appurtenance, Secs. 1015, 1016.

and hence the tendency is in these cases to claim and use in some manner the maximum allowance, and although they do not use the water in an economical manner, they may not come within the rule of wasting the water as provided for by the statute. Mr. R. P. Teele, one of the Government experts, investigating this subject of the effect of the various statutes as influencing the economical use of the water, says: "The whole experience of the arid region shows that the former system leads to the more economical use of the water."[4]

As we view the question, it is impossible for the legislatures to prescribe any general rule as to the economical use of water which will apply to all cases any more than a definition can be given which will fit every case. Each individual case stands alone, and upon the questions of the economical use of the water or whether the water has been wasted, must be decided upon all the facts surrounding that particular case; hence this is left to the courts, the powers of which we will discuss in the following section.[5] Therefore, as far as the legislatures are concerned in this respect, as far as they can effectively go is to enact some general law providing that all the water must be used economically and prohibiting all waste, and leave the determination as to what constitutes the economical use of the water, or the wasting of it, to the courts to decide under the facts surrounding each particular case.[6]

Upon the question of the power of the legislature, it is clearly within the province of the legislature to enact such laws respecting the appropriation and distribution of water as will tend to prevent unnecessary loss and waste.[7]

[4] Annual report of the Office of Experiment Stations for year ending June 30, 1907, U. S. Dept. of Agriculture, pp. 385, 386. "Under the Northern Canal, in the Pecos Valley, New Mexico, water was delivered under both systems and those paying the acreage rate used 27 per cent more water than those paying the quantity rate." P. 385. Measurements made under the Ridenbaugh Canal in the Boise Valley, Idaho, showed that those paying the acreage rates used 40 per cent more water than those paying the quantity rate.

[5] See Sec. 916.

[6] As to the power of the courts, see Sec. 916.

[7] Nash v. Clark, 27 Utah 158, 75 Pac. Rep. 158, 101 Am. St. Rep. 953; affirmed, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Am. Cas. 1171, 49 L. Ed. 1085; Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. Rep. 189.

In a number of States what constitutes the wasting of water from artesian wells is defined by statute and penalties prescribed therefor.[8]

§ 916. **Wasting water—Duty of the courts to suppress.**—There is no question as to the power of the courts in all jurisdictions throughout the arid and semi-arid West, as the law now stands, in all cases properly brought before them, in which one of the issues is the amount of water necessary for any given purpose, to suppress all wasting of water, and even to go further and declare what shall constitute the economical use of the water, and to fix its proper duty by a decree awarding the use of a certain amount of water for that purpose. Not only have the courts the power, but it is their duty, to do this. Water is too precious an article in the arid region to be permitted to run to waste, and the great weight of modern authorities hold that where a person has diverted a certain portion of the waters of a stream and permits part of the water so diverted to run to waste, or fails to use a certain portion of the water for some beneficial use or purpose, he can only hold that part of the water diverted which has been actually applied to some beneficial use, and his priority only extends to the quantity so used. Also, the authorities hold that there was no appropriation as to the water not used, and which ran to waste, but that the same might be subsequently appropriated and held by other parties, provided they took all the proper steps and they themselves applied it to some beneficial use or purpose. The final test in all cases is whether *all* of the water diverted is actually applied to some useful or beneficial purpose.[1]

[8] For these statutes, see Part XIV.

See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

[1] Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62, citing Kinney on Irr., 1st Ed., Secs. 165, 166; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Anderson v. Bassman, 140 Fed. Rep. 27; Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728, all citing Kinney on Irr., 1st Ed., Sec. 30.

An excessive diversion of water can not be regarded as a diversion for a beneficial use. Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

"The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it after its diversion to run to waste, and prevent others from using it." Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

See, also, Fort Morgan etc. Co. v.

As was said in a recent case in Colorado, "No waste of water from natural streams should be countenanced by the court."[2] And, again, as was said in a recent Idaho case, "It is the policy of the law to prevent the waste of water."[3] In a recent case decided by the Supreme Court of California,[4] it was said: "The use of water in this State is of such great necessity as to preclude its being allowed to run to waste, and its full beneficial and economical use requires that when the wants of one appropriator are supplied another may be permitted to use the flow for his benefit."[5]

As to the second phase of the proposition, the power of the court of equity to determine what is an economical use of the water and to make a decree accordingly, we take the same view. As we have said, there is a wide margin between the absolute waste of the water and its economical use.[6] But the difference between the two questions is one of degree only. And even in those States which by statute fix a minimum duty of water or the maximum amount which may be appropriated to irrigate a given tract, the Court has the power to go fully into the question and determine the proper duty; and if it is found that the duty for any particular tract is too low, by decree to cut down the amount of water to the quantity necessary, even below the amount allowed by statute. And in these cases the Court must hear the evidence of persons who are competent to testify on the subject, and who can do so, not from guesswork or hearsay, but from actual measurements and tests and the actual application of the water to the lands irrigated. This is so held by the Supreme Court of Idaho, which State seems to be in the lead

South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Abbott v. Reedy, 9 Idaho 577, 75 Pac. Rep. 764; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

2 X Y etc. Co. v. Buffalo Cr. Irr. Co., 25 Colo. 529, 55 Pac. Rep. 720.

3 Gerber v. Nampa etc. Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104.

4 Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

5 See, also, State v. Twin Falls etc. Co., —— Idaho ——, 121 Pac. Rep. 1039.

6 See previous section, No. 915.

See, also, Losses of Irrigation Water and Their Prevention, by R. P. Teele, Annual Report of Office of Experiment Stations for year ending June 30, 1907, p. 385.

in applying this new rule to an old principle—that all of the water appropriated must be applied to some useful or beneficial purpose. The object of this new application of the rule, as can be readily seen, is to make a certain amount of water go as far as possible, and do the greatest good to the greatest number. As was said in a very recent case decided by the Idaho Court, "If it should be found that even a very slight increase in the duty of water per acre can be had, it will in the aggregate amount to several thousand additional acres of land that may be irrigated." [7]

In the determination of these questions by the Court an arbitrary standard which will apply to all cases can not be fixed, and no attempt should be made to accomplish the impossible. Each case must stand alone, and on the facts surrounding each case must the appropriate decree rest, governed, of course, by those general rules of the admissibility of competent evidence, weighing the evidence and applying legal principles common to all legal controversies.[8]

[7] Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

"The law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was therefore not what he had used, but how much was actually necessary." Abbott v. Reedy, 9 Idaho 577, 75 Pac. Rep. 764.

See, also, Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

[8] X Y Irr. D. Co. v. Buffalo Cr. Irr. Co., 25 Colo. 529, 55 Pac. Rep. 720; *Id.*, 9 Colo. App. 438, 49 Pac. Rep. 264.

A witness in order to be competent and qualified to testify as to the number of inches of water necessary for the successful irrigation of lands, must have had some observation or experience in the measurement of water. Farmers' etc. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

For the measurement of water, see Sec. 888-899.

In California it was held that where the evidence of the amount of the water claimed under a certain appropriation was admitted without objection, and a competent hydraulic engineer testified to the making of measurements and calculations, and he reached a conclusion as to the amount of water and there was no conflicting testimony, the court properly acted on the evidence and rendered judgment in accordance therewith. Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1026.

See, also, Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

CHAPTER 50.

CONTRACTS RELATING TO WATER RIGHTS.

§ 917. Scope of chapter.
§ 918. Contracts—In general.
§ 919. Construction of contracts.
§ 920. Void and voidable contracts—Duress.
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§ 922. Contracts settling disputes between appropriators.
§ 923. Contracts for the use of water as between appropriators—Rotation.
§ 924. Contracts settling disputes between riparian owners.
§ 925. Contracts for the use of ditches and canals of others.
§ 926. Contracts for the development of water.

§ 917. **Scope of chapter.**—Water rights, ditches, and canals being real property, all contracts relating to the sale or alienation thereof come within the statute of frauds, and must be in writing.[1] This subject will be treated in other chapters, and will not be further discussed here. Another principal subject of contract are the rights of consumers to the use of water furnished by irrigation and ditch companies. This subject will be discussed in a future portion of this work.[2] The question of contracts for water rates and the power of the legislatures to limit the same will also be discussed by itself.[3] Other questions upon the subject of contracts have been and will be discussed in connection with subjects where the contracts are incidental to the main subject. This chapter, therefore, will be necessarily brief, and will be confined to those questions of contracts which are not discussed in connection with some other question. We will also confine the discussion in this chapter to contracts between individuals, leaving the subjects of contracts between water companies and individuals to the chapter on water companies.[4]

§ 918. **Contracts—In general.**—It is our purpose to discuss the subject of contracts in this work only so far as they relate to the

1 For the sale and alienation of water rights and rights of way, see Secs. 994-1032.

2 For contracts with water companies, see Secs. 1509-1529.

3 For water rates, see Secs. 1368-1385.

4 For contracts with private water companies, see Chap. 77.

subject matter in hand. As a general rule, contracts relating to water rights, canals, and other works are governed and construed by the principles of law governing other contracts. A right to the use of water may be thus acquired either from a riparian owner or settled as between riparian owners.[1] It may be acquired from the owners of such rights, where the title to the same rests originally in a valid appropriation under the Arid Region Doctrine.[2] It may be acquired from a water company organized for the purpose of selling and distributing water to consumers.[3] It may be acquired from any person having such a right to dispose of. Rights to ditches, rights of way for ditches, and the right to the use of the ditches of others may also be acquired by contract. But as both water rights and the ditches, canals, and other works are real property, and governed by the law of the statute of frauds, in order to acquire a permanent right to any of these, such contracts should be in writing.[4] However, parol contracts affecting water rights and ditches as relating to real property are within the statute of frauds. Rights growing out of such contracts will be determined to be permanent rights, and will be enforced by a court of equity when there has been such a performance of the contracts as to take them out of the operation of the statute.[5]

Water rights may be represented by shares in corporations organized for the purpose of furnishing its stockholders with water. When this is the case the rights are treated as personal property, and the law of contracts relating to personal property and the transfer and sale of stock in corporations obtains.[6] Again, certificates issued by an unincorporated irrigating ditch association to its members, and treated by them as evidence of the right to control its property, and to appropriate water by means of a common ditch, are water right contracts, and a sale thereof by the holder is, in

1 For the settlement of rights between riparian owners, see Sec. 924.

2 For the Arid Region Doctrine, see Secs. 595-626.

3 For contracts with water companies, see Chap. 77.

4 See Secs. 978, 979.

See, also, Metropolitan etc. Co. v. Topeka etc. Co. (Kan.), 132 Fed. Rep. 702.

5 For parol executed contracts, see Secs. 997-1000.

6 For transfer of stock in mutual companies, see Chap. 75.

See, also, Fairbanks v. Rollins, 121 Cal. 17, 54 Pac. Rep. 79; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91.

effect, a conveyance of his water rights and his interests in the property.[7] Again, as we have seen, water severed from its natural source of supply and diverted into ditches, canals, or reservoirs, is personal property, and a contract concerning such water is a contract concerning personal property.[8]

Generally where there are joint obligees the contract is joint. Where, however, the contract requires the obligor to account to each of the obligees, respectively, or by the use of any words, imports a separate right of action, the contract is several, and each obligee may sue thereon. Therefore, a contract between a canal company and the members of an unincorporated joint stock association whereby the former, party of the first part, agrees to furnish to the "respective" parties of the second part, and the latter agree to rent their "respective" shares in the association to the first party, is a several contract, and any one of such members may maintain a suit for damages occurring to him thereunder, without joining the others.[9] Contracts may be made by agents, but where an agent makes a contract on behalf of his principal in excess of his authority he is personally liable thereon under an implied warranty of authority, even though he made no false representations.[10]

§ 919. Construction of contracts.—In the construction of contracts of this nature the intention of the parties must be ascertained in the first instance by reference to the language used by them, and the language used must be given its ordinary meaning, and where it is clear and unambiguous it must be interpreted by the Court to its full effect.[1] The rights of the respective parties under

[7] Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

For unincorporated water companies, see Chap. 73.

[8] That water severed from the natural stream is personal property, see Sec. 773.

See, also, People *ex rel.* Heyneman v. Blake, 19 Cal. 579; Spring Valley Water Co. v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Hesperia etc. Co. v. Gardner, 4 Cal. App. 357, 88 Pac. Rep. 286; Hagerman Irr. Co. v. McMurry, —— N. M. ——, 113 Pac. Rep. 823; Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88; on rehearing, 115 Pac. Rep. 343; King v. Chamberlin, —— Idaho ——, 118 Pac. Rep. 1099.

[9] Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

[10] Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

[1] Quirk v. Rich, 40 Mont. 552, 107 Pac. Rep. 821, where it is held that, in the interpretation of contracts the language employed must be given its ordinary meaning, in a case where the

such a contract are to be governed by the express terms thereof.[2] In such cases parol evidence is inadmissible to vary the terms thereof.[3] However, it was held in a recent case in Colorado that,

rights of persons to the use of water were based on a contract between themselves, and that neither was entitled to use more water after the date of the contract than he was actually, beneficially, and necessarily using at the time of making it.

A contract which recites that the second party agrees to supply the first party "with water for irrigation of his premises" is a contract to furnish water for the property mentioned only, the first party at the time of the execution of the contract owning but one tract on the creek. Ferrea v. Chabot, 121 Cal. 233, 53 Pac. Rep. 689; *Id.*, 63 Cal. 564.

Where a contract to furnish water for irrigation provided that the second party was to receive water annually "for the above described tract," and to pay therefor . . . annually "$2 per acre for the use of the water," it was held that he was to pay the $2 per acre only for the number of acres on which the water was used, and not for the entire tract. Purser v. Baker, 129 Cal. 607, 62 Pac. Rep. 109.

A clause in a contract for the delivery of water at the head of grantee's ditch, reserving the right to use it for mining purposes, confers no right to pollute it to any greater extent than that permitted by law. Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410.

Where a contract for the construction of a flume provided that the contractor waived all rights to mechanics' liens, it was held that it did not purport to waive sub-contractors' rights to liens for materials and labor. Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129.

Under a contract for the construction of an irrigation ditch, providing that the decision of the engineer shall be final as to the meaning, intent, and purport of the plans and specifications, the engineer has no power to vary the meaning of the plain terms used in the contract. Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301.

See, also, Welsh v. Bardshar, 137 Cal. 154, 69 Pac. Rep. 977; Sefton v. Prentice, 103 Cal. 670, 37 Pac. Rep. 641; Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323; Bonslett v. Butte etc. Co., —— Cal. App. ——, 122 Pac. Rep. 821.

"In the construction of a written contract, if there is room for doubt as to its true meaning, the facts and circumstances out of which such contract arose should be considered and the contract construed in the light of such facts and circumstances. It is the universal rule in the construction of contracts that the intention of the parties should be ascertained, if possible, and given effect." State v. Twin Falls etc. Co., —— Idaho ——, 121 Pac. Rep. 1039.

See, also, Gard v. Thompson, —— Idaho ——, 123 Pac. Rep. 497.

2 Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

See, also, as to the construction of contracts with corporations, Chap. 77.

3 A contract being perfectly clear in its terms, parol evidence of prior conversations between the parties, and of what was understood respecting the

although the word "assigns" means any person to whom property is transferred by any title, it was competent to show by oral evidence that the word as used was intended to be restricted to a certain investment company.[4]

Where, however, the terms of the contract are ambiguous and uncertain in its construction, it is proper for the Court to consider the subject matter, the situation of the parties at the time the contract was executed, and all the facts and circumstances surrounding each particular case, and tending to shed any light upon the true intent of the parties.[5] This is true regardless of what the construction would be under the literal interpretation of the terms of the instrument itself.[6] In order to ascertain the true intention

consideration, was properly rejected. Bryan v. Idaho etc. Co., 73 Cal. 249, 14 Pac. Rep. 859.

See, also, Babcock-Cornish Co. v. Urquhart, 53 Wash. 168, 101 Pac. Rep. 713.

4 Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063.

5 "As a guide to a correct interpretation, the law permits the subject-matter of a contract, the situation of the parties at the time of its execution, and all surrounding facts and circumstances to be taken into consideration." True v. Rocky Ford etc. Co., 36 Colo. 43, 85 Pac. Rep. 842.

See, also, Durkee v. Cota, 74 Cal. 313, 16 Pac. Rep. 5; Gagnon v. Molden, 15 Idaho 727, 99 Pac. Rep. 965; Booth v. Chapman, 59 Cal. 149; Blankenship v. Whaley, 142 Cal. 566, 76 Pac. Rep. 235; South Side Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107; Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Daly v. Ruddell, 137 Cal. 671, 70 Pac. Rep. 784; Alexander v. Winters, 23 Nev. 475, 49 Pac. Rep. 116; 24 Nev. 143, 50 Pac. Rep. 798; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. Rep. 570; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192; Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 25 Utah 441, 67 Pac. Rep. 672, 71 Pac. Rep. 1067, 61 L. R. A. 648; Brighton & North Point Irr. Co. v. Little, 14 Utah 42, 46 Pac. Rep. 268; Brixen v. Jorgensen, 33 Utah 97, 92 Pac. Rep. 1004, 28 Utah 290, 78 Pac. Rep. 674, 107 Am. St. Rep. 720; Los Angeles v. Los Angeles City W. Co., 124 Cal. 368, 57 Pac. Rep. 211, 571; Stone v. Harris, 146 Cal. 555, 80 Pac. Rep. 711, where it was held that a certain contract was not a lien; Gard v. Thompson, —— Idaho ——, 123 Pac. Rep. 497.

6 Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

Though a corporation may enter into a contract in a wrong name, it will be binding when it appears that such corporation was intended. North Point etc. Co. v. Utah etc. Co., 14 Utah 155, 52 Pac. Rep. 168, 824.

Where the parties to a contract radically disagree as to the meaning and insist on diametrically opposite constructions, it was held by the California Court in a recent case that

of the parties, local customs, when reasonable, uninterrupted, and uniform, in the locality or district, and not contrary to public policy, may be considered by the Court in the construction of contracts, and may affect their interpretation by raising the presumption that such contracts made in that locality were made with respect to such customs.[7] The construction given to the contract by the parties thereto may also be considered; but the construction placed upon a contract by the parties thereto is important only where the express language of the contract is doubtful or ambiguous.[8] An agreement between parties who have settled upon land near a stream as to the relative quantity of water which each shall be entitled to use, where such an agreement has been acted upon for a long time, will be enforced by a court of equity.[9]

§ 920.—Void and voidable contracts—Duress.—Contracts entered into in restraint of trade, or in restraint of compromises or settlement of litigation, are void as against public policy. Therefore, a contract by which owners of water rights on a stream make a written contract and agree under the penalty of $10,000 "agreed and liquidated damages" not to sell their individual rights to certain persons, and not to make any settlement or compromise with certain other persons claiming the rights without the consent of all the others, was held void as against public policy, being analagous to a contract in restraint of trade, and also imposing a restraint and condition upon compromises or settlements of litigation and disputes, which are favored by the law.[1] As is the case with all other contracts, these contracts must be freely and voluntarily entered into by the parties thereto. Therefore, contracts entered into under duress are void if not voidable.[2]

there is such an ambiguity as will justify parol testimony to aid in its construction. Bonslett v. Butte County Canal Co., —— Cal. App ——, 122 Pac. Rep. 821.

7 Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829.

See, also, Frith v. Barker, 2 Johns 327 (N. Y.).

8 Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323.

See, also, Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

9 Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661.

For the settlement of disputes between parties, see Secs. 923, 924.

1 Ford v. Gregson, 7 Mont. 89, 14 Pac. Rep. 659.

See, also, for rights of owners to settle disputes, Secs. 923, 924.

2 Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450.

§ 921. The performance—Breach—Enforcement and liabilities under.—There is nothing peculiar to contracts relative to water rights and other kindred rights in regard to their performance. The rules of law governing the performance of contracts in general also govern these contracts. They must be performed according to a reasonable construction of their terms, otherwise certain liabilities arise for their breach. Neither is there anything peculiar as to the performance or breach of these contracts as between individuals and as between water companies. But as the latter class of contracts occur more frequently than those between individuals, in these days of companies and corporations, and in order not to duplicate the discussion in this work upon certain definite subjects, we will discuss the performance of such contracts, the breach, enforcement, and liabilities thereunder in the chapter upon the subject of control by private water companies.[1]

§ 922. Contracts settling disputes between appropriators.—One of the most common sources of contracts relative to water and kindred rights is the settlement of disputes between appropriators, between riparian owners, or between appropriators and riparian owners. As a general rule, such contracts, involving real property as their subject matter, should be in writing.[1] However, as settlements of disputes and compromise of suits are favored in law,[2]

See, also, for contracts with water companies void as against the statute or public policy, Chap. 77, Sec. 1511.

1 See Chap. 77.

1 For the sale and transfer of water rights, see Secs. 994-1032.

See, also, Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494, where certificates issued by an unincorporated irrigating ditch company were held to be contracts fixing the right of the holders thereof and his right to participate in the affairs of the association and in the management and control of the general property of the association.

Where a contract providing for the distribution of the waters of a spring between plaintiff and defendant was entered into in good faith, for the purpose of adjusting and placing beyond dispute the rights and claims of the respective parties to the water, and the plaintiff's claim was at least doubtful, the settlement of the dispute constituted a sufficient consideration for the contract. Hutchinson v. Mt. Vernon etc. Co., 49 Wash. 469, 95 Pac. Rep. 1023.

See, also, Miller & Lux v. California etc. Co., 163 Fed. Rep. 462, 90 C. C. A. 8; Schilling v. Rominger, 4 Colo. 100; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223; Metropolitan etc. Co. v. Topeka etc. Co., 132 Fed. Rep. 702.

2 Ford v. Gregson, 7 Mont. 89, 14 Pac. Rep. 659.

where a parol agreement settling the rights of the parties and dividing the water is made, and where the parties have acted upon it, taken possession, and have acquiesced in its terms for a considerable time, such an agreement is not within the statute of frauds, and the courts will enforce the same regardless of the fact that the contract was not in writing.[3] "This doctrine is based on the common-sense proposition that when a dispute exists between two parties they may adjust their differences by mutual agreement, which, when executed by them, will be held binding as to each."[4] And where such a contract is entered into, the settlement of the dispute constitutes sufficient consideration for the same.[5] And afterward neither party to the contract is entitled to use more water than the terms of it provide.[6]

§ 923. **Contracts for the use of water as between appropriators —Rotation.**—The law of contracts also may be applied in cases of uses of the water between the various appropriators from the same stream or the same ditch, in cases where there is no dispute between them as to their legal rights. All such contracts which are entered into between such parties and are not in violation of public policy will be sustained by the courts. Again, contracts between consumers and ditch companies subject to the same restrictions as above will also be sustained.

The question of the rotation of the water between the various consumers from the same stream or the same ditch may also be

[3] Where the parties have entered into an oral agreement settling disputed water rights, which is carried into effect, and have acquiesced in it for a considerable time, such agreement is not within the statute of frauds. Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255.

See, also, Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661; Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193, 73 Pac. Rep. 548; Saunders v. Robison, 14 Idaho 770, 95 Pac. Rep. 1057; Churchill v. Russell, 148 Cal. 1, 82 Pac. Rep. 440; Flickenger v. Shaw, 87 Cal. 126, 25 Pac. Rep 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79; Coffman v. Robbins, 8 Ore. 278, 8 Morr. Min. Rep. 131; Weill v. Baldwin, 64 Cal. 476, 2 Pac. Rep. 249.

[4] Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255, holding that this rule is analogous to the rule of law settling boundary line disputes by parol agreement.

[5] Hutchinson v. Mt. Vernon etc. Co., 49 Wash. 469, 95 Pac. Rep. 1023.

[6] Quirk v. Rich, 40 Mont. 552, 107 Pac. Rep. 821.

provided for by contract, so also between the consumers and ditch companies. And these contracts, when legally made and not in violation of public policy or the direct law upon the subject, will be sustained by the Court. As was held by a recent case decided by the Supreme Court of Idaho,[1] that although there were no statutory provisions providing for rotation in the use of water, contracts providing for rotation will be enforced by the courts. And although the courts are somewhat late in deciding this question, the Idaho decision referred to above is the general rule upon the proposition as far as the same has been decided.[2]

§ 924. Contracts settling disputes between riparian owners.—As it is with the owners of water rights acquired by appropriation,[1] so it is with the owners of riparian rights. They may settle their disputes by a contract providing the extent to which each may use the waters of a stream running by their premises. And such a contract between the owners of adjacent lands as to the use and enjoyment by the respective parties of the waters of a stream to which they are severally entitled, made for the mutual benefit of themselves, their heirs, and grantees, runs with the land, and binds not only the contracting parties, but also their heirs and grantees, although in subsequent deeds of the respective premises no mention is made of such covenant or of the rights accruing therefrom.[2]

1 State v. Twin Falls Canal Co., — Idaho ——, 121 Pac. Rep. 1039.

2 See, also, Helphrey v. Perrault, 12 Idaho 451, 86 Pac. Rep. 417; Shafford v. White Bluffs Land & Irr. Co., 63 Wash. 10, 114 Pac. Rep. 883, in which the Court said: "Respondent cites this case to sustain the proposition that, it being shown that it was the custom throughout the Yakima Valley to deliver water in a continuous flow, we must hold this custom to have been within the contemplation of the parties when the contract was made. The answer to this is that a practice is shown to have existed, but the testimony does not show a custom. On the other hand, it shows a growing tendency to adopt the alternating system which will give water in quantity at stated intervals."

See, also, rotation as a matter of economy, Secs. 909, 910.

See, also, McCoy v. Huntley, —— Ore. ——, 119 Pac. Rep. 481.

For decrees providing for rotation, see Chaps. 78, 79.

For rotation as a matter of economy, see Secs. 909, 910.

1 See Sec. 923.

2 Horn v. Miller, 136 Pa. 640, 20 Atl. Rep. 706, 9 L. R. A. 810; Lawrence v. Whitney, 115 N. Y. 410, 22 N. E. Rep. 174, 5 L. R. A. 417; People's Ditch Co. v. Fresno etc. Co., 152 Cal. 87, 92 Pac. Rep. 77; Outhouse-Cottel v. Berry, 42 Ore. 593, 72 Pac.

Such a contract will be binding as between the parties to it, but as all the riparian owners upon a stream have equal rights to the use of the waters thereof, such a contract can not, of course, in any manner bind those not parties.[3]

A covenant in a partition deed that the owners of the entire property should continue to use the waters of the stream in equal shares, as theretofore, did not necessarily secure any riparian rights to subsequent grantees of land not contiguous to the stream.[4]

§ 925. Contracts for the use of ditches and canals of others.—As we have discussed in other portions of this work, rights of way for ditches, canals, and other works, or rights to the use of these works already constructed, by the enlargement thereof, may be acquired by deed,[1] prescription,[2] or by eminent domain.[3] These rights may also be acquired by contract, even where such contract does not attain the dignity of a deed or a technical conveyance. In fact, a very common subject of contract in this Western country is where the owner of a water right, in order to utilize it to the best advantage, agrees with the owner of works already constructed that, by the enlargement of such works, and keeping his proportion in repair, he may have the privilege of diverting and conducting his water through these works to a point nearest to his place of use. These contracts, relating to real property, like others of this nature, should be in writing.[4] And where in writing, if the terms are definite and certain, they will be construed according to the terms thereof.[5] But such is not always the case, and the authorities

Rep. 584; Alhambra etc. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101.

[3] Stockport W. W. v. Potter, 3 Hurl. & C. 300, 10 Jur. N. S. 1005, 10 L. T. N. S. 748; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717.

For grants and contracts of riparian rights, see Secs. 526-535.

[4] Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

[1] See Secs. 976-992.

[2] See Secs. 1033-1058.

[3] See Secs. 1059-1098.

[4] See Secs. 996, 1512.

See, also, Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 722; Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79; Flickenger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 11 L. R. A. 134, 2 Am. St. Rep. 234.

[5] For the construction of contracts, see Secs. 919, 1513.

See, also, Consolidated C. Co. v. Mesa C. Co., 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

Under a written contract between adjoining land owners for the enlargement of an irrigating ditch, and determining the rights of the parties

hold that such a contract or agreement, even if by parol, if acted upon and expense incurred is irrevocable, and will be enforced in equity.[6] Therefore, a parol agreement of a land owner that if an adjoining land owner will help him to enlarge an irrigation ditch on his lands, he will permit the latter to use the waters thereof, is, after performance by such adjoining land owner, enforceable in equity against the owner of the lands on which the ditch is located and those claiming under him with notice, although such agreement is within the statute of frauds.[7] "When such is the case, a court of equity, in accordance with familiar rules, considering that done which ought to be done, will protect the right obtained as readily and as fully as a legal title."[8] So, again, where one makes a parol agreement with the owner of certain lands that in consideration of a right of way through the same, such owner shall have an interest in such ditch to the extent of sufficient water therefrom to irrigate his lands, and such an agreement has been acted upon and the ditch

therein, and providing that the first party should at all times have the right to draw from the ditch five cubic feet of water, and that all water in excess of five feet should be the property of the second party, the second party was obligated to abstain from any willful act interfering with the first party's use of the first five feet of water. Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193; see, also, Mau v. Stoner, 15 Wyo 109, 87 Pac. Rep. 434.

See, also, Riverside Heights W. Co. v. Riverside Trust Co., 148 Cal. 457, 83 Pac. Rep. 1003; Brighton etc. Co. v. Little, 14 Utah 42, 46 Pac. Rep. 268; Gold Ridge M. Co. v. Tallmadge, 44 Ore. 34, 74 Pac. Rep. 325, 101 Am. St. Rep. 602; South Side Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107; Chicosa etc. Co. v. El Moro etc. Co., 10 Colo. App. 276, 50 Pac. Rep. 731; Patterson v. Nurnberg, 17 Colo. App. 223, 68 Pac. Rep. 134; Alhambra etc. Water Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101.

For the construction of an agreement of a tenant to keep ditch in repair, see Hayden v. Consolidated etc. Co., 3 Cal. App. 136, 84 Pac. Rep. 422.

[6] For parol executed contracts, see Sec. 998; see, also, Secs. 980-985.

[7] Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79; Flickenger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 11 L. R. A. 134, 2 Am. St. Rep. 234.

[8] Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; Maple etc. Co. v. Marshall, 27 Utah 215, 75 Pac. Rep. 369.

constructed, it is binding upon both the party making the agreement and those holding or claiming to hold under him.[9]

§ 926. **Contracts for the development of water.**—Owing to the recent discoveries of science relative to the movement of subterranean or underground waters, a great impetus has been given to the development of water by the sinking of wells or the tunneling into the sides of mountains and hills.[1] A contract may be made by one party for the development of water on the lands of another, either for a money consideration or for a division of the water so developed, and such a contract will be binding upon both parties to the same, their heirs and assigns.[2]

[9] Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192.

[1] For the development of waters, see Secs. 1205, 1206.

[2] Painter v. Pasadena etc. Co., 91 Cal. 74, 27 Pac. Rep. 539; Roberts v. Crafts, 141 Cal. 20, 74 Pac. Rep. 281; Chapea W. Co. v. Chapman, 144 Cal. 366, 77 Pac. Rep. 990; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68.

CHAPTER 51.

RIGHTS OF WAY OVER PUBLIC DOMAIN.

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§ 943. Text of amendatory Act of May 11, 1898, amending the Acts of March 3, 1891, and January 21, 1895.
§ 944. Construction of Acts of March 3, 1891, and January 21, 1895, as amended by Act of May 11, 1898—Scope of amendment.
§ 945. Procedure under Act of March 3, 1891, for acquisition of right.
§ 946. Act of March 3, 1891—Procedure where jurisdiction comes under two departments.
§ 947. Official acts under Act of March 3, 1891—Approval of application.
§ 948. Nature of title granted under Act of March 3, 1891, and amendments thereto.
§ 949. Effect of approval of application under Act of March 3, 1891.
§ 950. Secretary has no jurisdiction over water rights under Act of March 3, 1891.
§ 951. Segregated reservoir sites—Text of Act of October 2, 1888, and amendatory Acts of March 2, 1889, August 30, 1890, and Section 17 of the Act of March 3, 1891, and the Act of February 26, 1897.
§ 952. Segregated reservoir sites—Construction of Act of October 2, 1888, and amendatory Acts of March 2, 1889, August 30, 1890, and Section 17 of the Act of March 3, 1891.

§ 953. Segregated reservoir sites—Act of February 26, 1897, opening same up for use by private parties or States—Cause of its passage and construction.
§ 954. Rights of way over National Forests—Regulations and procedure under Act of March 3, 1891.
§ 955. Rights of way over National Forests—Act of February 1, 1905.
§ 956. Rights of way over National Forests—Construction of Act of February 1, 1905.
§ 957. Rights of way over National Forests—Regulations and procedure under Act of February 1, 1905.
§ 958. Rights of way over National Forests—Effect of Acts of March 3, 1891, and February 1, 1905, upon the Acts of 1866 and 1870.
§ 959. Over forest reserves and reservoir sites—Act of March 3, 1899—Construction of Act.
§ 960. Rights of way over National Forests—Applicants may take Department of Agriculture permits, under both Acts of March 3, 1891, and February 1, 1905.
§ 961. Rights of way over National Forests—Revocable permits issued by the Secretary of Agriculture.
§ 962. Rights of way over National Forests—Water power regulations.
§ 963. Permissive use of rights of way over reservations and public parks—Text of Act of February 15, 1901.
§ 964. Permissive use of rights of way over reservations and public parks—Construction of Act of February 15, 1901.
§ 965. Grants for fifty years upon public lands, National Forests, and reserves—Act of March 4, 1911, for the transmission and distribution of electrical power.
§ 966. Reservoirs for watering stock—Act of January 13, 1897.
§ 967. Over National Forests—Divided jurisdiction between secretaries of the Interior and Agriculture.
§ 968. General jurisdiction of the respective departments.
§ 969. Proceedings to forfeit right on account of non-performance of conditions—Under Act of March 3, 1891, and February 1, 1905.
§ 970. Rights to construct dams over navigable streams.
§ 971. Over State lands.

§ 927. Scope of chapter.—In this chapter we will confine our discussion to the rights of way granted under the various Acts of Congress over the public domain of the United States, and how and for what purposes they may be acquired. We will also discuss rights of way over State lands. Rights of way over private lands we will take up in a succeeding chapter.[1] Rights of way acquired

[1] See Chap. 52, Secs. 972-993.

by eminent domain [2] and prescription [3] will be discussed in succeeding chapters of this part.

§ 928. **Distinction as to property rights.**—As we have discussed in previous sections, the property in a water right and that in a ditch, canal, or other works by the means of which water is diverted, stored, and conducted to the place of use, is of entirely different character.[1] And even where these rights are used together, the ownership of the one may be in an entirely different party from the ownership of the other. They may, therefore, be acquired and disposed of separate and apart from each other, and the sale or other disposal of one does not necessarily include the other.[2] Again, there is a distinction between the property right in a ditch or canal, which is land and corporeal,[3] and the rights of way for a ditch or canal over the lands of others, which are generally considered easements, and are mere privileges which one person may have over the lands of others, and are intangible and incorporeal.[4]

§ 929. **Necessity for rights of way.**—If the appropriator could always take the water out on his own lands by dams, ditches, or canals constructed thereon, and use it on his lands without crossing those of others, there would be no necessity for rights of way, and a large portion of the law upon the Arid Region Doctrine of appropriation would be eliminated. But as under this law any lands may be irrigated, or the use of the water for other purposes need not be upon lands which are riparian to the stream from which the water is taken, "the law of necessity" was invoked at a very early day in the history of the doctrine,[1] and the appropriator was per-

2 For eminent domain, see Chap. 55, Secs. 1059-1098.

3 For rights acquired by prescription, see Chap. 54, Secs. 1033-1058.

1 For character of property in a water right, see Secs. 757-774.

For character of property in ditches and canals, see Secs. 833, 834.

2 For the sale of these separate rights, see Secs. 994-1032.

Possessory rights to right of way for irrigation ditches, and the right to the use of the water, may have an existence independent of each other. Ada County Farmers' Irr. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

3 See Secs. 833, 834.

4 That ditches, canals, etc., are not in themselves, see Secs. 833, 834.

1 See Secs. 598-605.

mitted to construct ditches and canals, sometimes many miles in length, in order to conduct the water to the place of use. This right to conduct the water to the place of use is as necessary as the right to the use of the water itself; and although they are different characters of property, and depend upon entirely different principles of law as to their origin, they must be used conjointly, as the right to one in this arid region would be worthless without the right to the other. Therefore, a great deal of the law of the doctrine of appropriation relates directly to the rights of way for the ditches, canals, reservoirs, and the other necessary works of the appropriator, also to the character of the works themselves, their location, construction, changes, and other subjects which attach directly to the works themselves, and are entirely exclusive of the right to the use of the water. In fact, it may be said that there are as many questions which relate directly to the different phases of the necessary works of the appropriator as there are which relate to his right to the use of the water. And if we may be permitted to judge as to the results of the future from the experience of the past, there are many of these questions which are by no means settled for all time. While all these laws are necessary under our Western system of water rights as matters now stand, we can but think that at an early day, when all of the lands and waters were upon the public domain, and when the United States had the absolute title to, as well as the sole sovereignty over them, instead of being so profuse in its gifts to the individual, had our Government evolved some uniform system for the acquisition of water rights and rights of way applicable to all parts of the Western country where irrigation is necessary, a much simpler and more uniform system would have been established. It might have been made so as to guard the rights of the individual, and at the same time the use of the available water supply would have had greater efficiency, and millions of dollars would have been saved in litigation in the past and millions more would be saved in the future. Other countries did this, notably the provinces of Canada.[2] It is true that they have profited largely by our mistakes, but the result of their system has been successful, uniform, efficient, and safe in the extreme, both to the Government and to the individual. As proof

[2] For the water laws of Canada, see Secs. 177-237. For those of Alberta and Saskatchewan, see Secs. 182-201.

of this, turn to the reports of their courts of last resort and see how few cases involving water rights have ever reached them for decision,[3] as compared to the thousands which have reached our appellate courts, and the thousands of others which have been tried in our *nisi prius* courts which have never been appealed. As compared to the water laws of some other countries, where the right to the use of the water may be acquired for the same purposes as they may be acquired in the arid and semi-arid West, our laws in general are not uniform, and are crude in the extreme. Again, there still are in the majority of cases no record of the rights themselves or of the amount of water used under each right, and many times the rights are not assured to present users, or to those contemplating the use of the water, for the reason that the appropriator does not know just what he owns, and therefore he gets all that he can and is eternally standing guard against the encroachment of others upon his rights. But, as we have said before, we must treat these subjects as we find them, and not as they might have been.

§ 930. **No title to early rights of way.**—In our chapter upon the history of the Arid Region Doctrine of appropriation [1] we discussed at some length the fact that for a period of eighteen years, from 1848 to 1866, although the Government was the sole owner of and had the absolute sovereignty over both the lands and waters, out of the very necessities of the case parties desiring the use of the waters of the natural streams upon the public domain went upon these lands without any authority of law and simply took what they needed for their various uses. The same may also be said as regards the land needed for their ditches and canals. They simply took possession of such land as might be necessary for the diversion of the water and its conveyance to the place of use. They had absolutely no title to the lands taken possession of for this purpose before any Act of Congress, and instead of having "rights of way" they were mere trespassers upon the public domain of the United

[3] As stated by Mr. F. H. Peters, Commissioner of Irrigation for the Provinces of Alberta and Saskatchewan, Canada, in a letter to the author under date of March 20, 1912: "I would also say that there has been practically no litigation arising over conflicting rights under the Irrigation Act, and to my knowledge the appellate courts have had no occasion to construe the provisions of the Act."

[1] For history of doctrine, see Secs. 595-626.

States. The only sanction to these acts was the forbearance of the General Government, and the local regulations and customs of the miners as enforced and moulded by the courts, and the legislation of the States and Territories wherein these customs prevailed. So when Congress came to take steps relative to the disposal of its public lands to the miners and settlers, it found many of them already in the possession of appropriators of water and in use for their ditches and canals for conducting the water. And although they were held by no legal title, Congress felt bound to and did recognize them. As held by the Supreme Court of the United States, by an opinion rendered by Mr. Justice Miller, they were rights which the Government had, by its conduct, recognized and encouraged, and was bound to protect before the passage of the Act of 1866.[2] This subject, however, has been fully discussed in a previous chapter of this work upon the subject of the history of the Arid Region Doctrine of appropriation.[3]

§ 931. **Act of Congress of 1866 the first Act granting rights of way.**—In 1866 Congress passed the first Act which recognized the rights of way for ditches and canals over the public domain of the United States, which had theretofore been held without title,[1] by providing that, in connection with the water rights therein granted,[2] "and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."[3]

2 Broder v. Natoma etc. Co., 101 U. S. 274, 25 L. Ed. 790, 50 Cal. 621.

See, also, Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

See, also, Secs. 611-619.

3 See Chap. 32, Secs. 595-626.

1 That there was no title to rights of way at first, see Sec. 930.

2 As to the water rights granted in the Act, see Secs. 611-619.

3 See 7 Fed. Stat. Ann., 1905, p. 1090; 2 U. S. Comp. Stat., 1901, p. 1437; Rev. Stat. U. S., Sec. 2339; Act of July 26, 1866, 14 Stat. L., Chap. 262, p. 253, Sec. 9.

See, also, Secs. 611-619.

This provision was inserted in the Act of Congress of that date, providing for the disposal of the mineral lands of the United States, and we have related in a previous portion of this work as to how it came to be passed.[4] This provision in and of itself was sufficient to give title to rights of way for all ditches and canals, the vested right to which had accrued at the time of the passage of the Act. In fact, the Supreme Court of the United States, in construing the provisions of the Act of 1866, before its amendment, held that this Act alone, as to all ditches in existence before or at the date of its passage, "was an unequivocal grant of the right of way, if it was no more."[5] And when the Government came to sell the lands through which the ditches and canals had been constructed, the grantees took the title subject to the rights of way which had vested and accrued prior to their inception of title to the land.[6] This was a consequence which naturally followed from the well-settled law of conveyancing; and although there was no reservation clause in the Government patents prior to those issued after the Act of 1870, wherever the title of the United States to any portion of the public domain was thus burdened the same burden would, on general principles, accompany the title, if transferred to any subsequent or private owner. Therefore, whoever succeeded to the title of the United States, through any mode of acquisition or conveyance, would acquire the title subject to the same servitude which before existed in favor of the owner of the ditch or canal.[7] But

[4] For history of the Arid Region Doctrine of appropriation, see Secs. 595-626.

[5] "As to the canal of the defendant: so far as it ran through the land of the United States, at the date of this Act it was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right commenced subsequent to this statute, as to the lands patented to him and his brother, he took the title subject to this right of way and can not now disturb it." Broder v. Natoma W. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621.

See, also, Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039; Childs v. Sharai, 8 Idaho 378, 69 Pac. Rep. 111.

One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by the Act of Congress of July 26, 1866. San Jose etc. Co. v. San Jose R. Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; affirming *Id.*, 129 Cal. 673, 62 Pac. Rep. 269.

[6] As to the inception of title to land acquired from the Government, see Sec. 445.

[7] Pomeroy on Riparian Rights, Secs. 16, 25; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Os-

owing to the fact of the difference of opinion of the courts in construing the Act as to whether it related only to the rights which had vested and accrued at the time of its passage or was prospective in its operation, a subject which has long since become obsolete as far as any extended discussion needed here is concerned,[8] Congress, as we shall see in the next section, afterward amended the Act.[9]

§ 932. **Act of 1870 amending Act of 1866.**—Four years after the Act of 1866 was passed, owing to the uncertainty stated in the previous section,[1] Congress, by the Act of July 9, 1870, amended, or rather supplemented, the first Act by providing: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."[2] This latter Act has been construed to be simply declaratory or explanatory of the terms of the provisions of the Act of 1866.[3] Our own opinion, however, is that this is not the proper construction of the Act. It not only explains the old Act of 1866, but it also adds considerably to it and to its scope. It provides that "all patents granted," etc., shall be subject to any vested and accrued water rights or rights of way, and not only those which had vested and accrued at the time the Act was passed, but also those which might vest and accrue in the future and prior to the granting of the patents, or rather, as has been construed by the courts prior to the

good v. El Dorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Copp's Mining Dec., 1873, 1874.

However, after the lands have been withdrawn from the public lands, such burden can not be added to or increased. Campbell v. Flannery, 32 Mont. 119, 79 Pac. Rep. 702, 80 Pac. Rep. 240.

8 See Secs. 813-815.

9 See Sec. 932.

1 See Sec. 931.

See, also, Secs. 611-619.

2 See 7 Fed. Stat. Ann., 1905, p. 1096; 2 U. S. Comp. Stat., 1901, p. 1437; Rev. Stat. U. S., 1878, Sec. 2340; Act of July 9, 1870, Chap. 235; 16 Stat. L. 218.

For full text of Secs. 2339, 2340, see Secs. 611, 615.

See, also, Secs. 611-620.

3 See Black's Pomeroy on Riparian Rights, 1893, Sec. 28.

See, also, Bouvier, Sub., "Declaratory." Something which explains or ascertains what was before uncertain or doubtful; as, a declaratory statute, which is one passed to put an end to a doubt as to what the law is, and which declares what it is and what it has been. 1 Bla. Com. 86.

inception of the right upon which a patent was afterward granted.[4] At least, this has been the construction of the Land Department and the courts since the supplemental Act of 1870 was passed, and all patents from the Government which have been issued since the Act of 1870 went into effect contain the following reservation clause: "Subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts." It will be noticed that this clause embodies the substance of both the ninth section of the Act of 1866 and that of 1870. And although the grant to the rights to the water and the rights of way would have been as absolute, and the patentee would have taken the title subject thereto, had the clause quoted not been inserted in the patents,[5] however, it was thought best by the Land Department that the clause be inserted to remove all misapprehensions between the owners of such rights and the patentees of the land. The interpretation given the Act of 1870 by the General Land Office is explained in the letter of Commissioner Drummond, dated March 21, 1872, a portion of which letter is quoted in our note.[6]

[4] For the inception of rights to patent, see Sec. 445.

For the doctrine of relation, see Secs. 742-756.

[5] This is the rule relative to patenting lands granted by a State, where the rights of way are allowed over State lands, or which had vested and accrued under the laws of the United States prior to the grant of the lands to the State. See Parkersville Drainage Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772.

[6] "Although from an examination of the ninth section of the mining Act of July 26, 1866, and the seventeenth section of the amendatory Act of July 9, 1870, I am satisfied that the rights to the use of the water for mining, manufacturing, agricultural, or other purposes, and rights for the construction of ditches and canals, used in connection with such water rights, *are fully protected by law;* yet, in order that all apprehensions that might exist between the holder or claimant of such right and such patentee might be set at rest, it was determined in all patents hereafter granted in mineral regions of the United States to insert an additional clause of condition, expressly protecting and reserving such water rights, and making the patent subject thereto, the same as before it was granted." See Copp's U. S. Mineral Lands, 2d Ed., p. 84.

§ 933. Construction of Acts of 1866 and 1870—Priority governs.—The Acts of Congress of 1866 and 1870, in addition to the granting rights to the use of water by appropriation,[1] constitute a continuing grant of rights of way for the ditches, canals, and reservoirs, or other works necessary, where the possession of the same is prior in time to the possession of the land through which they run. In other words, it was the intention of Congress, as indicated by these Acts, to give the owners of water rights the right of way over the public domain for the construction of the works necessary to make the water available for use. The grant of the right to use the water would have been worthless, had not the grant for the rights of way accompanied it.[2]

In a Colorado case it was held that Sections 2339, 2340, of the Revised Statutes of the United States are a recognition of the legality of water rights given by local customs and laws and the lands granted to the Pacific railroads under the Pacific Railway Acts are subject to such rights. And the Court said: "As to lands granted under the provisions of the Pacific Railroad Acts, which are precisely the same in the case at bar as in that case,[3] it was also held that under the reservation clause of the Act of July 2, 1864, the railway company took the lands therein granted subject to 'other lawful claims.' Under the Act of 1866 it was held that whenever the United States Government had, by its conduct, recognized and encouraged such rights to the use of water for agricultural purposes, and the right of way for the construction of ditches therefor, as were recognized and acknowledged by the local customs, laws, and the decisions of the courts, the Government was bound, even before the passage of the Act, to protect those persons in whom such rights became vested. Under the Pacific Railroad Acts it was held that when such lawful claims as the right of way for ditches for agricultural purposes had been so recognized by the Government, the grant to the railway company of lands under that Act was subject to such lawful claims, and that such lawful claims are

1 For the construction of the Acts as relating to water rights, see Secs. 611-620.

For the Acts themselves, see Secs. 611, 615.

2 Noteware v. Stearns, 1 Mont. 311, 4 Morr. Min. Rep. 650.

3 Broder v. Natoma Water Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621.

unaffected by the grant."[4] But in order to take advantage of the portion of the law granting rights of way for the purposes mentioned in the Acts, the appropriator must first have acquired a right to water which may be conveyed through his ditch or canal for which the right of way is claimed. As it is only the right to, or the right of way for, such ditches, canals, or reservoirs as are used in connection with a vested water right that the owner of the latter can successfully claim. Therefore, unless the claimant to the right of way first acquires a vested and accrued water right, he is not entitled to an easement over the public lands for his ditch, canal, or other works.[5] But with this condition complied with, the right of way over the public lands is given by the Act, and there is no need of condemnation proceedings.[6]

In this case, as in others involving the Arid Region Doctrine of appropriation, priority of the respective rights governs and gives the one who was first in time the superior right to the land covered by such right of way.[7]

4 Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

See, also, Childs v. Sharai, 8 Idaho 378, 69 Pac. Rep. 111, where it was held that, where a citizen settles upon a part of the unsurveyed lands of the United States, and has peaceable possession thereof, and constructs a ditch across the same, he secures the right of way therefor, although such land, when afterward surveyed, is found to be in the grant of a railway company.

See, also, Maffet v. Quine, 93 Fed. Rep. 347.

5 Nippel v. Forker, 26 Colo. 74, 56 Pac. Rep. 577, affirming *Id.*, 9 Colo. App. 106, 47 Pac. Rep. 766; Clear Cr. etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819, where it is said: "The inception of the water right of plaintiff, without which no right of way for the irrigation ditch to carry the water could exist, arose," etc.

6 Hobart v. Ford, 6 Nev. 77.

For rights of way by eminent domain, see Secs. 1059-1098.

Also that the proof of a water right is not necessary in condemnation proceedings, see Sec. 1074.

7 See doctrine of relation, Secs. 753-756.

For conflict of rights between appropriators and Congressional grantees, Chap. 43, Secs. 804-809.

For appropriation as against riparian rights, see Chap. 44, Secs. 810-823.

"In harmony with the above provisions, patents granted under the timber and stone law state that the grant is subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts." John H. Parker, 40 Land Dec. 431.

§ 934. Construction of Acts of 1866 and 1870—Effect of Acts.—By these two Acts Congress recognized, as far as the public lands were concerned, all those rights which had been acquired prior to their passage, and also provided for the acquisition of similar rights in the future, both as to water rights and also the rights of way over the public domain for the construction of ditches and canals or other works to make the water available for use.[1] Therefore, these two Acts of Congress have been construed as prospective in their operation, in the sense that they do not in any manner qualify or limit the effect to those patents issued before their passage, but relate to all rights of way over the public domain which were prior in time to the inception of any rights of settlers or others to title to the land in the future, after the passage of the Acts, as well as to all rights to rights of way which had vested and accrued prior to their passage.[2] And all parties whose inception to title to land afterward patented to them by the Government was or is subsequent to the actual construction of ditches, canals, or reservoirs, or the inception of the right to construct these works, take the title

1 "The Government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued which are recognized and acknowledged by the local customs, laws, and decisions of courts, such rights are acknowledged and confirmed." Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368; Telluride etc. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; dismissing *Id.*, 16 Utah 125, 51 Pac. Rep. 146; Same v. Same, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; dismissing *Id.*, 23 Utah 22, 63 Pac. Rep. 995; Noteware v. Stearns, 1 Mont. 311, 4 Morr. Min. Rep. 650; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039; Ada Co. etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Shoemaker v. Hatch, 13 Nev. 261; Childs v. Sharai, 8 Idaho 378, 69 Pac. Rep. 111; Miller v. Douglass, 7 Ariz. 41, 60 Pac. Rep 722.

For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the history of the doctrine, see Chap. 32, Secs. 595-626.

For the construction of the two Acts as relating to the appropriation of waters, see Secs. 611-620.

2 "The Act of Congress of July 26, 1866, is prospective in its operation." Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Broder v. Natoma M. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Beaver Brook Res. etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

to the land subject to the burden of such easements.[3] And the land is subject to the same servitude in the hands of a transferee that it was in the hands of the original patentee.[4] But the owner of an irrigation ditch constructed over public land never has the title in fee to it, but a conditional easement, which will be defeated by his failure to use it for the original purpose for which it was obtained.[5] Where an appropriator has become entitled to a right of way for his canal, he has a possessory right or interest in the land at the time of the inception of his right, which becomes absolute by the subsequent construction of the works, provided that the construction is prosecuted with all due and reasonable diligence to completion.[6] But there must be something more than the mere filing of a claim for or taking possession of land for a right of way and staking out the line of the canal to be constructed over the land. The works must be constructed with reasonable diligence.[7] Under these statutes no right or title to land, or the right of way over or through the same, vests as against the Government, in the party entering upon possession from the mere fact of such possession, unaccompanied by the performance of any labor thereon.[8]

[3] For the inception of title to lands, see Sec. 445.

For the doctrine of relation, see Secs. 742-756.

See, also, Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Broder v. Natoma W. Co., 101 U. S. 274, 25 L. Ed. 790; affirming 50 Cal. 621; San Jose etc. Co. v. San Jose R. Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; affirming *Id.*, 129 Cal. 673, 62 Pac. Rep. 269; Ada County etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Tuolumne Con. M. Co. v. Maier, 134 Cal. 583, 66 Pac. Rep. 863, 21 Morr. Min. Rep. 678; Shoemaker v. Hatch, 13 Nev. 261; Miller v. Douglass, 7 Ariz. 41, 60 Pac. Rep. 722; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Farmers' etc. Co. v. Moon, 22 Colo. 560, 45 Pac. Rep. 437.

[4] Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

[5] Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867.

[6] Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129.

The staking out of a line of canal, if the work is diligently prosecuted to completion, is the inception of a right of way. Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594.

[7] For reasonable diligence, see Secs. 733-741.

[8] Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. St. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368; Sullivan v. Northern Spy M. Co., 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186.

But, as is the case in all controversies involved in the Arid Region Doctrine of appropriation, priority of rights give the superior title in matters involving rights of way, as well as to the right to the use of the waters conveyed thereover. As was said in a recent Wyoming case:[9] "In the case before us the ditch, having been constructed and in actual use over and across the southeast quarter of the southeast quarter of Section eighteen, while it was unoccupied public land of the United States, and used continually thenceforth as a conduit, must, we think, be held to be a vested right within the provisions of Sections 2339 and 2340, *supra*, as against one who is not in a position to dispute the water right and deraigns title by grant from the Government thereafter. In Broder v. Natoma Water & M. Co.[10] it was held that the owners of a ditch located on public land and in actual use will be protected against subsequent entrymen. There are numerous decisions to the effect that if an appropriator is first in time with reference to possession and use as compared with the date of an entry made, the rights of the entryman are junior and inferior."[11] And if a settler is in possession under any of the laws for the acquisition of a title to the land, he has such a title as will enable him to recover damages for the construction of a ditch across his property before he obtains his patent.[12] This is also the case where the possession of a mining claim is held under the Federal laws, providing for such possession.[13] And in cases of this nature, in order to acquire a right of way over the land, it must be done in some method known to law for the acquisition of such rights over private lands, and discussed

[9] Chicago etc. R. Co. v. McPhillamey, —— Wyo. ——, 118 Pac. Rep. 682.

[10] 101 U. S. 274, 25 L. Ed. 790, affirming 50 Cal. 621.

[11] Citing Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Maffett v. Quine, 93 Fed. Rep. 347; *Id.*, 95 Fed. Rep. 199; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; South Yuba Water & Min. Co. v. Rosa, 80 Cal. 333, 22 Pac. Rep. 222; Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

[12] Culbertson etc. Co. v. Olander, 51 Neb. 539, 71 N. W. Rep. 298; Clear Creek Land & D. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081.

[13] Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Noteware v. Stearns, 1 Mont. 311, 4 Morr. Min. Rep. 650.

in a subsequent chapter.[14] But the right to acquire a right of way for a ditch across the public land can not be disputed by one who is merely in possession of the land across which the ditch runs, and who takes no steps to perfect his title to the land.[15]

Such being the rights of the owner of a right of way for ditches and canals over the public lands as against the Government, undoubtedly these rights as against third persons are acquired by priority of possession, and the Government will and does recognize such rights as between such parties,[16] as is also the case of the rights to the water by appropriation.[17] As was said by the Supreme Court: "But in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or at least disprove priority on the part of the plaintiff. The question, Who had acquired this priority of possession? was not a Federal question, but a pure question of fact, upon which the decision of the State Court was conclusive."[18] And, therefore, where the inception of the title to the land is prior to the inception of that of the right of way over the land, the absolute title to the land vests in the patentee and is subject to no burden or easement for the right of way.[19] And where there was a filing

[14] For the acquisition of rights of way over private lands, see Secs. 972-993.

For rights of appropriators as against those of settlers, see Secs. 810-823.

For rights of appropriators as against Congressional grantees, see Secs. 804-809.

[15] Knoth v. Barclay, 8 Colo. 300, 6 Pac. Rep. 924; Rivers v. Burbank, 13 Nev. 398; Hobart v. Ford, 6 Nev. 77.

[16] Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368; Sullivan v. Northern Spy M. Co., 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186.

[17] For rights of the prior appropriator, see Secs. 776-782.

[18] Telluride etc. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; dismissing *Id.*, 16 Utah 125, 51 Pac. Rep. 146.

See, also, Same v. Same, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178, dismissing *Id.*, 23 Utah 22, 63 Pac. Rep. 995.

[19] Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766; affirming *Id.*, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577; Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350; United States etc. Co. v. Gallagos, 89 Fed. Rep. 770, 32 C. C. A. 470, 61 U. S. App. 13; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Bybee v. Oregon etc. R. Co., 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641; affirming 26 Fed. Rep. 586; Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978.

upon the land for a pre-emption entry, which was afterwards abandoned, and an entry made for the same land under the homestead laws, there is no right to recover damages for the location of the ditch which was prior to the homestead entry.[20]

It is held by the Land Department that Sections 2339 and 2340 of the statutes were not repealed by the Act of March 3, 1891, and the priority of right in a right of way for a canal is protected by the provisions of said sections, although the right of way can not be approved under the terms of the Act of 1891.[21]

It has been contended that the rights of way under the Acts of 1866 and 1870 were repealed and superseded by the Act of 1891, but this contention can not be sustained. This subject, however, will be discussed in another section of this part.[22] In a recent decision by the Secretary of the Interior,[23] it was held that the right of way provision of the Act of 1866 never applied to the acquisition of rights of way for power purposes either upon the reserved or unreserved public domain, the opinion saying: "The law found in the Revised Statutes under Section 2339 constitutes merely a recognition by the United States of water rights acquired under usage, customs, and the laws of the State, and in addition thereto recognizes the rights of persons acquiring such rights to go across the public lands. It is too obvious for argument that in 1866, the date of the original Act constituting this law, Congress did not contemplate power companies, because they were not in existence at that time."

§ 935. Lands once entered and afterward forfeited.—The provisions for rights of way under the Acts of 1866 and 1870 [1] only apply to the unreserved public lands of the United States. They do not apply to the reserved lands included in Indian, forest, park,

20 Colorado etc. Co. v. Morris, 1 Colo. App. 401, 29 Pac. Rep. 302.

21 For rights of way under Act of 1891, see Secs. 937-945.

See, also, Cache Valley Co., 16 Land Dec. 192; Santa Fe Pac. R. Co., 29 Land Dec. 213.

See, also, Huerfaneo Val. etc. Co., 10 Land Dec. 171.

22 For the effect of Act of 1891 upon the Acts of 1866 and 1870, see Sec. 939.

23 Kern River Co., 38 Land Dec. 302.

1 For text of Acts, see Secs. 611, 615.

See, also, Secs. 611-620.

or other reserves,[2] nor do they apply to lands which have been once segregated from the public lands of the United States by private entries under some of the public land laws.

They do not apply to Indian reserves until the title of occupancy by the Indians has been extinguished[3] and the lands thrown open to settlement as a part of the public lands.[4]

After lands have once passed into private ownership, rights of way can only be acquired in accordance to the laws of the State relating to the acquisition of such rights over private lands, and discussed fully in a subsequent chapter.[5] But, upon the other hand, where lands have once been entered and either forfeited or abandoned, they again become public lands of the United States and subject to future entry the same as though no entry had ever been made thereon. And it is immaterial in cases of this nature whether the right of way was acquired prior or subsequent to the time the Government was reinvested with title and all subsequent entrymen or owners take the title subject to such rights of way over the same.[6]

§ 936. Reservations in patents of rights of way for ditches and canals constructed by the Government—Act of August 30, 1890.—The next law to be enacted by Congress upon the subject of rights of way over the public domain is to be found as Section 1 of the

2 For rights of way over reservations, see Secs. 954-967.

3 For Indian title of occupancy, see Secs. 405, 415.

4 Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Story v. Wolverton, 31 Mont. 346, 78 Pac. Rep. 589.

See, also, for the opening of Indian reservations, Sec. 415.

5 For rights of way over private lands by contract, see Chap. 52, Secs. 976-985.

For prescription, see Secs. 986, 1044, 1045.

For eminent domain, see Secs. 987, 1059-1086.

6 See San Jose Water Co. v. San Jose Land Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; affirming *Id.*, 129 Cal. 673, 62 Pac. Rep. 269; Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76; Maffett v. Quine, 93 Fed. 347; San Dimas etc. Co. v. San Jose etc. Co., 142 Cal. 583, 76 Pac. Rep. 1128; Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650; reversing on rehearing *Id.*, 83 Neb. 678, 120 N. W. Rep. 184.

Sundry Civil Appropriation Act of August 30, 1890,[1] which Act is as follows:

". . . That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this Act west of the one-hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."[2]

It will be noticed by the provisions of the Act that the expression is used that the rights of way are reserved "for ditches or canals constructed by the authority of the United States." Although no Act was passed for the construction of ditches, canals, or other works by the Government until twelve years afterward, when the National Reclamation Act was passed, it is evident that Congress, by the passage of the Act of 1890, was paving the way for National reclamation of lands by the reservation in all patents of rights of way for ditches and canals, which the Government might utilize in the future when such a reclamation Act should be passed. This law will be more thoroughly discussed when we come to the subject of rights of way for irrigation works for use by the Government under the National Reclamation Act of 1902.[3]

This Act is construed by the Secretary of the Interior in the regulations issued by him under date of May 31, 1910,[4] as follows: "All lands, however, taken up under any of the land laws of the United States subsequent to October 2, 1888, are subject to the right of way for ditches or canals constructed by the authority of the United States.[5] All entries made upon the lands referred to are subject to the following proviso of the Act cited:[6] "Should a homestead entry embrace land that is needed in whole or in part for purposes contemplated by said proviso, the land would be taken for

1 6 Fed. Stat. Ann., 1905, p. 508; 2 U. S. Comp. Stat., 1901, p. 1570; 26 Stat. L. 391.

2 For the construction of this Act, see rights of way for works constructed under the National Reclamation Act, Secs. 1263, 1264.

See, also, Instructions, 32 Land Dec. 147; Instructions, 36 Land Dec. 482; Green v. Wilhite, 160 Fed. Rep. 755; Green v. Wilhite, 14 Idaho 238, 93 Pac. Rep. 971; United States v. Minidoka etc. R. Co., 176 Fed. Rep. 762.

3 See Secs. 1235-1286.

4 38 Land Dec. 620.

5 Act of August 30, 1890, 26 Stat. 391; circular approved by department July 25, 1903.

6 Quoting Proviso, *supra*.

such purpose, and the entryman would have no claim against the United States for the same." It is also held that the Act applies to Indian allotments, and that all lands allotted after the Act of August 30, 1890, were subject to the reservation provided by that Act, to be expressed in the patent for right of way for ditches or canals constructed by the authority of the United States.[7]

It was held by the Idaho Supreme Court [8] that the Act in question in reserving to the Government an easement for ditches and canals over the lands therein named does not apply to railroad grants for rights of way acquired under the provisions of the Act of March 3, 1875. And the Court said: "When we come to consider the language of the Act itself, we find that all its terms have special reference to lands 'taken up' and lands on which 'entries' are made and for which 'patents' are issued. All these terms indicate a purpose to deal with lands to which the Government grants the absolute fee and which are conveyed in quantity or bulk by legal subdivisions, and indicate no purpose to refer to special and qualified estates or easements granted by Congress for definite and specific purposes." [9]

§ 937. Right of way through public lands and reservations to canal or ditch companies for irrigation—Act of March 3, 1891.—But Congress did not let the matter of rights of way for ditches and canals for the purpose of irrigation rest with the Acts of 1866 and 1870, which we have discussed in our previous sections.[1] By Sections 18 to 21 of the Act of March 3, 1891, "An Act to repeal the timber-culture laws, and for other purposes," [2] Congress provided as follows:

"Section 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly

[7] Clement Ironshields, 40 Land Dec. 28.

[8] Minidoka & S. W. R. Co. v. Weymouth, 19 Idaho 234, 113 Pac. Rep. 454.

[9] See, also, Green v. Wilhite, 14 Idaho 238, 93 Pac. Rep. 971; United States v. Minidoka etc. Co., 176 Fed. Rep. 762; United States v. Denver & Rio Grande R. Co., 150 U. S., 37 L. Ed. 975, 14 Sup. Ct. Rep. 11.

[1] See Secs. 611-620, 931-934.

[2] 6 Fed. Stat. Ann., 1905, p. 508; 2 U. S. Comp. Stat., 1901, p. 1570; 26 Stat. L. 1101, Secs. 18-21.

That this Act confirmed the doctrine of appropriation, see Secs. 622, 623.

organized under the laws of any State or Territory which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir, and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also, the right to take from the public lands adjacent to the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch; *provided,* that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of waters for irrigation and for other purposes under the authority of the respective States and Territories.

"Sec. 19. That any canal or ditch company desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 20. That the provisions of this Act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or associations of individuals, on the filing the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land

office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this Act from the date of their filing as though filed under it: Provided, that if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited, as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

"Sec. 21. That nothing in this Act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch."

§ 938. **Construction of Act of March 3, 1891.**—By the Act of March 3, 1891, quoted in the preceding section,[1] Congress granted rights of way upon and through the public lands and Government reservations for reservoir sites and rights of way for ditches and canals, to the extent of the land occupied by the water of a reservoir, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the ditch or canal material, earth, and stone necessary for the construction of such ditch or canal. By Section 18 of the Act the grant runs to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory upon complying with the conditions of the statute as to filing a copy of its articles of incorporation and proof of its organization, and also complying with the other conditions of the Act hereinafter discussed.[2] But by Section 20 the Act is made to apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether

1 See Sec. 937.

2 See Secs. 939-951.

Where the lands sought are within an Indian reservation they are within the scope of the Act, notwithstanding they may have been allotted to individual Indians. Fresno Water Right Canal, 35 Land Dec. 550.

See, also, United States v. Conrad Inv. Co., 156 Fed. Rep. 123.

However, the right is subject to the condition that the location and construction of the canal or ditch shall not interfere with the proper occupation of the reservation for Government purposes. Op. Atty. Gen., 33 Land Dec. 563.

constructed by corporation, individuals, or association of individuals, upon complying with the other conditions prescribed in the Act. And by the amendatory Act of February 26, 1897,[3] the scope of the Act was extended so as to include reservoir sites theretofore reserved by the Government, and also any State was authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation.[4]

Section 21 of the Act of 1891 also provides that nothing in the Act shall authorize the occupation for such right of way except for the purpose of the ditch and canal, which purpose is declared by Section 18 to be that for irrigation. It is further provided that if any section of the canal or ditch shall not be completed within five years after the location of said section, the rights granted in the Act shall be forfeited as to the uncompleted portion of the canal, ditch, or reservoir.[5] As the Act relates wholly to the public domain of the United States, the jurisdiction as to the execution of the Act is vested with the Secretary of the Interior, and it is further provided that where the right of way applied for is over any Government reservation, all maps of location shall be subject to the approval of the department of the Government having charge

See, also, Rio Verde Canal Co., 27 Land Dec. 421; overruling *Id.*, 26 Land Dec. 381, and Florida Mesa D. Co., 14 Land Dec. 265.

The provisions of the Act of March 3, 1891, do not contemplate the allowance of such rights over lands reserved by the Government for reservoir sites under the Act of October 2, 1888. Blue Water etc. Co., 23 Land Dec. 275.

For rights of way over segregated reservoir sites, see Secs. 951-953.

The provisions of the Act of March 3, 1891, are applicable to the Sequoia National Park Reservation, subject to the condition that the right of way, if granted, shall not interfere with the proper occupation of the reservation by the Government. H. V. Grueningen, 20 Land Dec. 253.

[3] 7 Fed. Stat. Ann., 1905, p. 1098; 2 U. S. Comp. Stat., 1901, p. 1556, Chap. 335; 29 Stat. L. 599.

For text of Act, see Sec. 951.

For right of way in segregated reservoir sites, see Secs. 951-953.

[4] See, also, Secs. 951-953.

[5] Where a reservoir right of way has been approved, but the reservoir was not constructed within the statutory period, a transferee of the reservoir company may be permitted to file a new map of location, to operate only upon such portions of the public lands as are free from any claims at the date of the approval of the new map of location. Franklin F. Noxon, 27 Land Dec. 585.

See for amended applications, Secs. 945-947.

of such reservation.[6] The original Act did not apply to forest reservations,[7] for mining or domestic purposes, or to Alaska.[8]

For the purpose of carrying out the provisions of the Reclamation Act of June 17, 1902, the Government may avail itself of the privileges conferred by the Act of March 3, 1891, to the same extent that individuals, corporations, or associations of individuals may exercise such privileges, and subject to the same conditions and limitations.[9]

The Act further provides that upon the approval of the maps and plats of the applicant for a right of way by the Secretary of the Interior the same shall be noted upon the plats in his office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way.[10]

The Act of March 3, 1891,[11] is not inconsistent with the Act of February 15, 1901, providing for the permissive rights of way over reservations and parks,[12] since the former Act applies to canals and ditches, the main purpose of which is irrigation, and for which an easement attaches which becomes permanent on the approval of the Secretary of the Interior after the land has been surveyed, while the Act of February 15, 1901, refers to the grant of a mere license, revocable at any time, of the right to construct, canals, etc., over the public land which may be used for parks and reserva-

6 Where the jurisdiction is under two departments, see Sec. 946.

7 Sierra D. & W. Co., 35 Land Dec. 154; Op. Atty. Gen., 28 Land Dec. 474.

For rights of way over forest reservations, see Secs. 954-967.

8 Miocene Ditch Co., 35 Land Dec. 297; John G. Brady, 26 Land Dec. 305.

9 Op. Atty. Gen., 33 Land Dec. 563; *Id.*, p. 415; *Id.*, p. 389.

For the Reclamation Act, see Secs. 1235-1286.

But a permanent easement attaching to public lands by the construction of a reservoir and canals upon a right of way acquired under the Act of March 3, 1891, does not, upon acquisition of such irrigation system by the United States for use in connection with a project under the Reclamation Act, become extinguished by merger in the estate of the Government in such reservoir lands; and entries allowed for lands within and below the flowage contour line of the reservoir are subject to the right of flowage by storage of waters in the reservoir. McMillan Res. Site, 37 Land Dec. 6.

10 Sec. 19 of the Act of March 3, 1891, *supra;* Homer E. Brayton, 31 Land Dec. 364.

See, also, Sec. 937.

11 For text of Act, see Sec. 937.

12 For Act of Feb. 15, 1901, and construction thereof, see Secs. 963-965.

tions.[13] The extent of the grant made by the Act of 1891 is defined by the statute, and the Secretary of the Interior is not authorized to accord a qualified approval of applications filed thereunder for the purpose of limiting the estate thereby granted.[14]

It is held by the Land Department that the Act of March 3, 1891, contemplates and requires that *prima facie* evidence of the right to waters to be conveyed in or to the canals or reservoirs covered by the right of way sought must be furnished by the applicant, "it not being contemplated that easements shall be granted where the applicant has no water to convey therein."[15] And it was further held that where the Government has filed notices of appropriation and asserted its claims to the unappropriated waters of a stream under the National Reclamation Act, applications for rights of way under the Act of March 3, 1891, in conflict with or detrimental to the Government project when such rights are based upon appropriations made or use attempted to be initiated subsequent to the assertion of the claims of the Government, should not be allowed.[16]

In the case of Francis W. Bosco,[17] which case involved international rights between this country and Mexico, as to the waters of the Rio Grande River, and where the granting of rights of way under the Act of March 3, 1891, would tend to embarrass the situation, it was held by the Secretary of the Interior that he could make withdrawals of land from the operation of the Act.

§ 939. Effect of Act of 1891 upon Acts of 1866 and 1870.—The Act of 1866 as amended by the Act of 1870 is still in full force and effect, both as to the water rights and as to the rights of way over the public lands of the United States.[1] As held by the Supreme Court of the United States, these Acts constitute "an unequivocal grant of the right of way."[2] While Section 20 of the

[13] United States v. Lee, 15 N. M. 382, 110 Pac. Rep. 607.

[14] Francis W. Bosco, 39 Land Dec. 104.

[15] Instructions by Secretary Ballinger, dated October 21, 1910, 39 Land Dec. 334.

See, also, Regulations, approved June 6, 1908, 36 Land Dec. 567.

[16] For the National Reclamation Act and Instructions and Regulations thereunder, see Chap. 65, Secs. 1235-1286.

[17] 39 Land Dec. 104.

[1] For rights of way under these Acts, see Secs. 931-936.

For water rights under Acts, see Secs. 611-620.

[2] Broder v. Natoma W. Co., 101 U. S. 274, 35 L. Ed. 790; affirming 50 Cal. 621.

Act of March 3, 1891,[3] provides "That the provisions of this Act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed," this clause simply extends the benefits of that Act to all canals, ditches, or reservoirs theretofore constructed upon the public domain, among which is the right to file in that behalf with the Land Department a map of such works for which the right of way is claimed under the Act of 1866 as amended, and secure the approval of the Secretary of the Interior therefor, yet the rights of claimants under the previous Act are in nowise dependent upon the later Act or upon an approval of such maps.

As was said by Secretary Hitchcock, of the Department of the Interior, in a case decided by him on February 23, 1904:[4] "But it is contended that while Section 2339 of the Revised Statutes did not require, preliminary to the acquirement of rights thereunder, that formal claims should be placed on record in the Land Department, yet the Act of March 3, 1891, *supra,* does require such record to be made, in that Section 20 thereof provides that the provisions of the Act shall apply to 'all canals, ditches, or reservoirs heretofore or hereafter constructed.' This contention is not sound. While the clause above quoted from Section 20 of the Act of March 3, 1891, extends the benefits of that Act to all canals, ditches, or reservoirs theretofore constructed upon the public domain, among which is the right to file in that behalf with the Land Department a map of such canals, ditches, and reservoirs, and secure the approval of the Secretary of the Interior thereof, yet the rights of claimants under Section 2339 of the Revised Statutes are in nowise dependent upon said act or upon an approval of such maps.[5] The

[3] For Act, see Sec. 937.

See, also, preceding sections, Nos. 937, 938.

[4] Lincoln Water Supply & Land Co. v. Big Sandy Reservoir Co., 32 Land Dec. 463.

[5] Citing Santa Fe Pacific R. R. Co., 29 Land Dec. 213.

Santa Fe Ry. Co., 29 Land Dec. 213; Silver Lake etc. Co. v. City of Los Angeles, 37 Land Dec. 152, where it is said: "For if the right has in fact been acquired under Sections 2339 and 2340 of the Revised Statutes no further steps are necessary to protect it, and the filing of maps and field notes and the approval of the application for a right of way will add nothing to the right."

See, also, Lincoln etc. Co. v. Big Sandy Reservoir Co., 32 Land Dec. 463; South Platte etc. Co., 20 Land Dec. 154; Cache Valley etc. Co., 16 Land Dec. 192; Pecos Irr. etc. Co., 15 Land Dec. 470, 575; Baldridge etc. Co. v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; United States v. Rickey, 164 Fed. Rep. 496;

purpose of the Act of March 3, 1891, in respect to this was primarily to extend to such claimants the right to place their claims of record with the Land Department for their better protection. It may be, too, that it enlarged the privileges conferred by Section 2339 of the Revised Statutes, in that it gave the right to the use of fifty feet of land on each side of the marginal limits on canals, ditches, and reservoirs—a privilege not carried by said section—but, however this may be, it surely did not operate to make the continued enjoyment of rights conferred by said section dependent upon the filing of the maps provided for in the Act."

The Act of 1891 also enlarged the privileges conferred by the earlier Acts in that it gave the right of way to the use of fifty feet of land on each side of the marginal limits of canals, ditches, and reservoirs, a right which was not given by the former Acts. The Act of 1891 also provided for the acquisition of rights of way over the reservations of the United States, which rights were not provided for in the Act of 1866. The Acts of 1866 and 1870 do not authorize the Secretary of the Interior to grant any right of way for ditches and canals, but simply to recognize such rights as may have accrued upon the public domain according to the local usages and customs.[6]

As we view the law, the Acts of 1866 and 1870 are in full force and effect, and rights of way may be acquired under them. These Acts were not repealed or altered by the Act of 1891, nor was it intended to take from the States and Territories the right to make local laws not inconsistent with the laws of Congress.[7] "The Act of Congress approved March 3, 1891, *supra,* extends to those in possession of public lands the benefit of that legislation, but in our opinion does not supersede the earlier statute."[8]

Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 101 Pac. Rep. 825; *Id.*. 104 Pac. Rep. 281; Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650; United States v. Lee, 15 N. M. 382, 110 Pac. Rep. 607; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766; *Id.*, 26 Colo. 74, 56 Pac. Rep. 577; United States v. Conrad Investment Co., 156 Fed. Rep. 123; Whitmore v. Pleasant Valley etc. Co., 27 Utah 284, 75 Pac. Rep. 748; McMillan Reservoir Site, 37 Land Dec. 6.

[6] Op. Atty. Gen., 28 Land Dec. 474.

[7] Pecos Irr. & Imp. Co., 15 Land Dec. 470.

The Acts of 1866 and 1870 are not repealed by the Act of March 3, 1891, and priority of possession on the part of canal owners is protected by the provisions of said Acts. Cache Val. Canal Co., 16 Land Dec. 192.

[8] Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650, where it was held that the failure of an irrigator to file a map in the land office and to secure the ap-

But in all cases where a large expenditure of money is called for in the construction of ditches, canals, and reservoirs, it is better for the applicant for rights of way to proceed under the provisions of the Act of 1891 and the regulations promulgated thereunder by the Secretary of the Interior. Under this Act greater privileges are allowed, and the applicant also has the benefit of a complete record of the rights acquired.[9]

§ 940. **Construction of Act of March 3, 1891—Purpose originally to aid irrigation only.**—The purpose of the Act of March 3, 1891,[1] was solely in the aid of irrigation, and any application for rights of way for ditches and canals, or for the construction of reservoirs, the object of which even included any other purpose than that of the sole purpose of irrigation, prior to the amendatory Acts hereinafter discussed[2] was refused by the Secretary of the Interior, who had the sole jurisdiction to determine as to whether or not the right of way should be granted.[3] As was held by Secre-

proval of the Secretary of the Interior in accordance with the Act of March 3, 1891, and the Acts supplementary thereto, does not destroy the privileges protected by Sections 2339, 2340 of the Revised Statutes of the United States.

See, also, Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

9 For the last regulations under the Act of 1891, see 26 Land Dec. 567.

See, also, the preceding sections, Nos. 937-939.

1 See previous section, No. 938.

For the text of the Act, see Sec. 937.

2 See Secs. 941-944.

3 The Act of March 3, 1891, grants a right of way through the public lands and reservations of the United States to any canal or ditch company "formed for the purpose of irrigation" only, and has no application to a company formed for other purposes. Denver etc. Co. v. Hydro-Electric Pr. Co., 32 Land Dec. 452.

Town of Delta, 32 Land Dec. 461, where the purpose was to convey water to a town for domestic and other purposes, the application was refused.

Opinion of Atty. Gen., 28 Land Dec. 474, to the effect that the right to construct a reservoir or ditch for use solely for mining or domestic purposes was not within the purport of the Act, even after the passage of the amendatory Act of May 11, 1898. For this Act, see Sec. 941.

H. H. Sinclair, 18 Land Dec. 573, where application was refused where the water was to be used for the generation of electricity.

Wm. Marr, 25 Land Dec. 344, application refused where the water was to be used for domestic and manufacturing purposes.

Chafee etc. Co., 21 Land Dec. 63, application refused where the water

tary Bliss upon this point, an application for a right of way under the Act could not be approved unless it was made to appear that the right of way was desired solely for the purpose of irrigation.[4] This rule, as may be readily seen, greatly hampered the appropriation of water for all beneficial purposes. Under the Arid Region Doctrine of appropriation water could be appropriated and a title to the use thereof could be acquired for any beneficial use or purpose.[5] In other words, the water flowing over these public lands might be appropriated for any useful purpose; but, upon the other hand, rights of way under the Act of 1891, for the purpose of conducting the very water so appropriated to the place of use, could only be acquired where the sole purpose was for irrigation. Worded as the Act was, the Secretary of the Interior was entirely without authority to approve applications even where the purpose for which the water was to be used included irrigation, together with some other use. And his rulings were correct upon the subject. This defect in the law led to certain amendatory Acts by Congress, which we will discuss before taking up the other provisions of the Act.[6]

§ 941. Text of Acts of January 21, 1895, May 14, 1896, and May 11, 1898, amendatory to the Act of March 3, 1891.—The scope of the rights conferred by the law as it stood after the passage of the Act of March 3, 1891, as to the right of companies or individuals to acquire rights of way over the public domain of the United States was very much enlarged by the later Acts of Congress, both as to the lands over which such rights of way might be acquired and also as to their purpose or use.

was to be used in mines, mills, and lands, and for floatage purposes.

South Platte etc. Co., 20 Land Dec. 154, application refused where it appeared that the principal use of the water would be for municipal purposes.

See, also, South Platte etc. Co., 20 Land Dec. 464; H. H. Sinclair, 18 Land Dec. 573; South Platte etc. Co., 20 Land Dec. 154.

For the amendatory Act of May 11, 1898, see Secs. 941, 942.

[4] Wm. Marr, 25 Land Dec. 344.

See, also, cases cited *supra*.

But see the amendatory Act of May 11, 1898, Sec. 941.

[5] For the purposes for which water can be appropriated, see Secs. 690-705.

For the doctrine of appropriation, see Chap. 31, Secs. 585-593.

[6] See Secs. 942-944.

The first of these Acts, which were, in fact, amendatory to the Act of March 3, 1891, was the Act of January 21, 1895, entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes."[1] This Act, in turn, has also been amended by later amendatory Acts, and, with these, is as follows:

"Section 1. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States not within the limits of any park, forest, military or Indian reservation for tramroads, canals, or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber."[2]

This Act was amended by the Act of May 11, 1898,[3] by adding a second paragraph to above Section 1, which is as follows: "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States not within the limits of any park, forest, military, or Indian reservations for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States *for the purpose of furnishing water for domestic, public, and other beneficial uses.*"[4]

However, prior to the amendment to Section 1, by adding the paragraph thereto, quoted above, the Act of January 21, 1895,[5]

1 6 Fed. Stat. Ann., 1905, p. 510; 2 U. S. Comp. Stat. 1901, p. 1572; 28 Stat. L. 635.

2 For the construction of this section, see Sec. 942.

This Act was also amended by the Act of May 11, 1898, 6 Fed. Stat. Ann., 1905, p. 512; 2 U. S. Comp. Stat., 1901, p. 1572; 30 Stat. L. 404, by adding another paragraph thereto.

3 6 Fed. Stat. Ann., 1905; 2 U. S. Comp. Laws, 1901, p. 1572; 30 Stat. L. 404.

4 For the construction of this amendment, see Sec. 942.

5 *Supra.*

was amended by the Act of May 14, 1896, by adding a second section thereto,[6] which section is as follows:

"Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reserves of the United States, by any citizen or association of citizens of the United States, for the purpose of generating, manufacturing, or distributing electric power."[7]

§ 942. **Construction of Acts of January 21, 1895, May 14, 1896, and May 11, 1898, amendatory to the Act of March 3, 1891.**—By the Act of January 21, 1895,[1] the Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him,[2] to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military, or Indian reservation for canals and reservoirs to the extent of the ground occupied by the water and fifty feet on each side of the marginal limits thereof, by any citizen or association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

By the amendatory Act of May 14, 1896,[3] Section 2 was added to the Act of January 21, 1895, *supra,* whereby the Secretary of the Interior was authorized and empowered, under general regulations to be fixed by him, to permit the right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purpose of generating, manufacturing, or

[6] 6 Fed. Stat. Ann., 1905, p. 510; 2 U. S. Comp. Stat., 1901, p. 1573; 28 Stat. L. 120.

[7] For the construction of this section, see Sec. 943.

[1] 6 Fed. Stat. Ann., 1905, p. 510; 2 U. S. Comp. Stat., 1901, p. 1572; Chap. 37, 28 Stat. L. 635.

For full text of Act, see Sec. 941.

See, also, Secs. 943, 944.

[2] For such regulations, see 20 Land Dec. 165, 23 Land Dec. 519, 27 Land Dec. 494.

[3] 6 Fed. Stat. Ann., 1905, p. 510; 2 U. S. Comp. Stat., 1901, p. 1573; Chap. 179, 29 Stat. L. 120.

For full text of the Act, see Sec. 941.

See, also, Secs. 943, 944.

distributing electric power.[4] It will be noticed that the right granted by Section 2 is but a permissive right.[5]

By the still further amendatory Act of May 11, 1898,[6] a second paragraph was added to Section 1 of the Act of January 21, 1895, *supra*, providing that over the same lands and by the same parties, as provided for in the original Act, permits to the use of rights of way might be given by the same methods, where the purpose of the use of the water was for "furnishing water for domestic, public, and other beneficial uses."[7] The Act of January 21, 1895, *supra*, was still further amended by adding another section thereto by the Act of May 11, 1898, but as the amendment was also amendatory to the Act of March 3, 1891, it will be discussed in our following sections.[8]

It is to be especially noted that all of these Acts differ from the other right of way Act of 1891[9] in that they merely authorize a permission to use instead of making a grant, and that they give no right whatever to take from the public lands adjacent to the right of way any material, earth, or stone for construction or for any other purpose.[10] It was therefore held by the Secretary that where permission to use the public lands under the Act of January 21, 1895, was given that the right terminated with the disposal of the lands; and any person receiving title from the United States takes the land free from any charge or burden thereon by reason of the right granted under the Act. In other words, the permission given

4 For regulations under the Act, see 23 Land Dec. 519, 27 Land Dec. 495.

The Act necessarily contemplates such destruction of timber along the line of such right of way as results from the use and maintenance of the right. Irrigators etc. v. Electric etc. Co., 32 Land Dec. 178.

5 The right of way Acts of March 3, 1891, and May 14, 1898, differ so widely in the character of the estate granted, as well as the uses to which the right of way may be devoted, and the extent thereof, that an application can not be properly allowed on the two Acts taken together; the permission must rest either upon one Act or the other. W. H. O'Melveny, 24 Land Dec. 560.

For Act of March 3, 1891, see Sec. 937.

6 6 Fed. Stat. Ann., 1905, p. 510; 2 U. S. Comp. Stat., p. 1572; Chap. 292, 30 Stat. L. 404, Sec. 1.

For full text of section, see Sec. 941.

See, also, Secs. 943, 944.

7 For regulations under the Act, see 27 Land Dec., p. 495.

8 See Sec. 943.

9 For Act of 1891, and construction thereof, see Secs. 937-941.

10 Regulations, 27 Land Dec. 495. See, also, Regulations cited *supra*.

by the Secretary did not in itself constitute an easement in the land, and the right to so use the land terminated upon the disposal of the land by the Government.[11] But an entirely different construction must be given as to the nature of the right after the passage of the amendatory Act of May 11, 1898.[12]

§ 943. Text of amendatory Act of May 11, 1898, amending the Acts of March 3, 1891, and January 21, 1895.—The Act of March 3, 1891,[1] and the Act of January 21, 1895,[2] were amended by the Act of May 11, 1898,[3] and their scope was very much enlarged by Section 2 of said Act, which is as follows:

"Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of Sections 18, 19, 20, and 22 of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891, may be used for purposes of a public nature, and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, and subsidiary to the main purpose of irrigation."[4]

§ 944. Construction of Acts of March 3, 1891, and January 21, 1895, as amended by Act of May 11, 1898—Scope of amendment.—The Act of May 11, 1898,[1] was not only amendatory of the Act of January 21, 1895, but it was also amendatory of the earlier Act of March 3, 1891,[2] by providing that the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the

11 Instructions, March 8, 1895, 20 Land Dec. 164; Regulations, 20 Land Dec. 165; Regulations, 27 Land Dec 495.

12 For which see the next section, No. 943.

1 For text of Act, see Sec. 937.
See, also, Secs. 938-942.

2 For text of Act, see Sec. 941.
See, also, Sec. 942.

3 6 Fed. Stat. Ann., 1905, p. 512; 2 U. S. Comp. Stat., 1901, p. 1575; 30 Stat. L. 404.

4 For the construction of the Acts of March 3, 1891, and January 21, 1895, as amended by Act of May 11, 1898, see next section, No. 944.

1 6 Fed. Stat. Ann., 1905, p. 512; 2 U. S. Comp. Stat., p. 1575; Chap. 292, 30 Stat. L. 404.
For the full text of the Act, see Sec. 941.
See, also, Secs. 942, 943.

2 6 Fed. Stat. Ann., 1905, pp. 508-510; 2 U. S. Comp. Stat., 1901, pp. 1570, 1571; 26 Stat. L., Chap. 561, p. 1101, Secs. 18-21.
For full text of Act, see Sec. 941.
See, also, Secs. 942, 943.

provisions of Sections 18 to 21 of the Act of March 3, 1891, may be used for "purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, and subsidiary to the main purpose of irrigation." The scope of the Act of 1891, which limited the purpose for which the right of way might be used to irrigation only, was extended so that it might, "as subsidiary to the main purpose of irrigation," be acquired for the other purposes named in the Act.[3] And, therefore, an application for a right of way under the Act of 1891, by a company formed for the purpose of irrigation, will be approved under the provisions of Sections 18 to 21 of the Act, and under those of the amendatory Act of May 11, 1898, notwithstanding the articles of incorporation may permit the company to engage in the business of furnishing and using water "for purposes of a public nature, and for the purposes of water transportation, domestic use, and development of power, as subsidiary to the main purpose of irrigation."[4] But the main purpose must be for irrigation, and the expression, "purposes of a public nature," as used in the amendatory Act of May 11, 1898, does not authorize the approval of an application under the Act of 1891, where the use of the right of way is not desired for irrigation.

As was held by the Secretary of the Interior that a right of way, under the Act of March 3, 1891, may be acquired only by a company formed for the purpose of irrigation; but a right of way secured under that Act may, under the Act of May 11, 1898, be used for purposes of a public nature, as subsidiary to the main purpose of irrigation, it was therefore held that a company organized chiefly for the purpose of generating and distributing power is not within

[3] For the regulations under the Act, see 30 Land Dec. 325, 31 Land Dec. 504, 36 Land Dec. 567.

See, also, circular, June 27, 1900, 30 Land Dec. 325.

Application for a railroad right of way through a narrow canyon in an Indian reservation, which is the most feasible site for a reservoir for irrigation of lands in the vicinity, was rejected by the Secretary of the Interior for the reason that construction of the road as contemplated would prevent use of the canyon for reservoir purposes, and that it was practicable to construct the railroad at a higher grade without interfering with the reservoir site. San Carlos Reservoir Site, 40 Land Dec. 470.

[4] Sierra D. etc. Co., 35 Land Dec. 154.

See, also, Allen v. Denver Power & Irr. Co., 36 Land Dec. 490; Sierra Ditch & Water Co., 38 Land Dec. 547.

the purview of the Act of March 31, 1891, and where application by such a company for right of way under that Act has been approved for lands then within a National Forest, the company may be permitted to relinquish all rights under such approval and amend its application to bring it within the Act of February 15, 1901, failing to do which action should be taken by the Land Department to the revocation of the approval.[5]

The nature of the grant for a right of way under the Act of 1891, as amended by the Act of 1898, *supra*, is not that in the nature of a grant of lands in fee, but is a base or qualified fee. The possession and right of use of the lands are given for the purposes contemplated by the Acts, but a reversionary interest remains in the United States, to be conveyed by it to the person to whom the land may be patented, but whose rights will be subject to those of the grantee of the right of way. Therefore, all persons settling upon a tract of public land, to part of which a right of way has attached for a canal, ditch, or reservoir, take the land subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deductions in such cases. If, however, a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to a reasonable measure of damages for right of way as may be determined upon by agreement or in the courts. This question, however, does not come within the jurisdiction of the Land Department, but is entirely within the jurisdiction of the courts of the State within which the land is situated.[6]

[5] Kern River Co., 38 Land Dec. 302; Town of Delta, 32 Land Dec. 461; Op. Atty. Gen., 28 Land Dec. 474, where it is held that "the controlling idea was still, as in the Act of 1891, irrigation." See, also, Op. Atty. Gen., 28 Land Dec. 476.

Inyo etc. Co., 37 Land Dec. 78, where it is also held that the department can not assume the burden of pointing out to applicants for right of way the particular facts necessary to establish the right asserted in each particular case; but the application will not be allowed except upon a satisfactory showing that the right of way is desired for the primary purpose of irrigation.

It is held that no company will hereafter be recognized as a beneficiary under the provisions of the Act of March 3, 1891, granting rights of way over the public lands and reservations to canal and ditch companies organized for the purpose of irrigation until the formal presentation of an application for a specific right of way. Pacific Gas & Electric Co., 40 Land Dec. 125.

[6] Regulations, June 6, 1908, 36 Land Dec. 568; Regulations, 34 Land Dec. 215, 31 Land Dec. 506; Homer E.

It is to be noted here that the courts hold, and correctly, that if the right of the settler has vested prior to the date of the approval of the application by the Secretary of the Interior, that his right is superior and entitled to protection.[7]

Section 21 of the Act of March 3, 1891, provides that the grant of a right of way for a canal, ditch, or reservoir, does not necessarily carry with it a right to the use of fifty feet on each side, but only such land may be used as is necessary for construction, maintenance, and care of the canal, ditch, or reservoir. But the size of reservoirs is not limited by the Act, and an application will be approved "to the extent of the ground occupied by the water of the reservoir" and fifty feet on each side of the marginal limits thereof.[8]

§ 945. **Procedure under Act of March 3, 1891, for acquisition of right.**—The administration of the provisions of the Act of March 3, 1891, comes under the jurisdiction of the Secretary of the Interior and under the General Land Office. Where, however, the land through which the right of way is sought is within a military or some other reservation under the direct charge and control of some department of the Government other than that of the Department of the Interior, all maps of location are also subject to the approval of the department of the Government having jurisdiction of such reservation.[1] Under his general power the Secretary has the authority to make all needed rules and regulations for the administration of the Act. This he has done from time to time as circumstances or amendment of the law required.

Brayton, 31 Land Dec. 364; Circular, 30 Land Dec. 325, 327.

[7] See for effect of approval, Sec. 949.

See, also, Nippel v. Forker, 26 Colo. 74, 56 Pac. Rep. 577, affirming same, 9 Colo. App. 106, 47 Pac. Rep. 766; Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; United States v. Conrad Inv. Co., 156 Fed. Rep. 123.

That the applicant to purchase the land will be required to pay for the entire area of the legal subdivision applied for regardless of rights of way, see John W. Wehn, 32 Land Dec. 33.

See, also, Regulations, 30 Land Dec. 325, 327.

[8] Irrigators etc. v. Electric etc. Co., 32 Land Dec. 178.

[1] For the approval of other departments, see Sec. 946.

For rights of way over National Forests, see Secs. 954-968.

The rules prescribed in the regulations must be followed accurately, as well as the forms prescribed by the Land Department, as no changes or additions are allowable in the substance thereof, except when the facts differ from those assumed therein.[2]

Where the applicant is an incorporated company, organized under the laws of any State or Territory, it must file with the register of the land office in which the right of way is sought, a copy of its articles of incorporation, duly certified to by the proper officers of the company under its corporate seal, or by the Secretary of the State or Territory where organized, a copy of the State or Territorial law under which the company was organized, with a certificate of the Governor or Secretary of the State or Territory, under seal, that the same was the law at the date of the incorporation, together with the proof that the articles were duly filed according to law with the proper officer, and that the corporation is authorized to do business in the State or Territory where the right of way is sought, by complying with its laws relative to foreign corporations, where its organization was under the laws of some other State or Territory. There must be also filed a true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs.[3] The company must also file a copy of its title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit of measurement used,[4] its equivalent in cubic feet per second must be stated. If the right to appropriate the water has been adjudicated, a certified copy of the decree should be filed; if it has not been adjudicated, a certified copy of the notice of appropriation will be sufficient. The notice of appropriation must also be accompanied with maps or plats sufficient to identify it with the canal or reservoir for which the right-of-way application is made, where the notice itself does not so identify it. If the water right claim has

2 For the last rules promulgated by the Secretary of the Interior, see 36 Land Dec. 567.

3 An application by a corporation should be accompanied by the certificate of the proper officer of the State that the articles of the incorporation have been filed in accordance with the local law. Farmers' Canal Co., 13 Land Dec. 166.

See, also, Long's Peak etc. Co., 27 Land Dec. 126; Regulations of June 6, 1906, 36 Land Dec. 570.

4 For measurement of water, see Secs. 888-900.

been transferred by other parties, an abstract of title must be filed. The papers must be accompanied also with a copy of the State or Territorial laws governing water rights and irrigation, with the certificate of the Governor or Secretary of the State or Territory that the same is the existing law. And in order to show that there is any water which may be appropriated by the company, there must be given the maximum, minimum, and average flow of water in the stream supplying the canal, ditch, or reservoir at the point of diversion or damming during the preceding year or years, and as far back as the records are available.

It is, therefore, invariably held that before a right of way will be granted by the Land Department the applicant must furnish sufficient proof to the effect that he is the owner of water rights which may be utilized by means of ditches and canals constructed over such right of way. As was said in the instructions under date of October 21, 1910:[5] "The Act of March 3, 1891, and the regulations thereunder approved June 6, 1908,[6] contemplate and require that *prima facie* evidence of the rights to waters to be conveyed in or to the canals and reservoirs covered by the right of way sought be furnished by the applicant, it not being contemplated that easements shall be granted where the applicant has no water to convey therein."

The company must, also, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office a location map of its canal, ditch, or reservoir, based upon accurate surveys of the same, together with the field notes of the same as prescribed by the regulations.[7] And written on the map

[5] 39 Land Dec. 334.

[6] 36 Land Dec. 567.

[7] See Sec. 19 of the Act.

Also see 36 Land Dec. 571, 572.

That maps and plats must be filed in duplicate, see Chas. E. Day, 13 Land Dec. 282; Kern Val. W. Co., 13 Land Dec. 707; H. B. Jones, 13 Land Dec. 357; Armstrong and Ogle, 14 Land Dec. 28; A. J. Bothwell, 14 Land Dec. 30.

For data necessary of survey, see A. J. Bothwell, 14 Land Dec. 30; Armstrong and Ogle, 14 Land Dec. 28; Pecos etc. Co., 15 Land Dec. 470; Rio Colorado Res., 14 Land Dec. 516; Long's Peak Res. etc. Co., 27 Land Dec. 126.

The dates of the survey and definite location of a reservoir are not essential, where the map is not filed until after construction. John B. Wilson, 27 Land Dec. 316.

The provision requiring a map of

in duplicate there must be the engineer's affidavit and applicant's certificate which must both designate by termini and length each canal, ditch, or lateral, and by initial point and area each reservoir shown on the map, for which right of way is asked. Applicants must also include in the certificate the statement: "And I further certify that the right of way herein described is desired for the main purpose of irrigation."[8]

Where the application is made by an individual or association of individuals for a right of way, the same proceedings must be followed, with the exception of the rules as to filing the articles of incorporation and the proof thereof. Associations of individuals must, however, in addition to the other papers necessary, file their articles of association; but if there be none, this fact must be stated over the signature of each member of the association.

In case it should be found that an amended location is desired, new maps and field notes in full, as in the regulations provided, changed to agree with the facts in the case, must be filed. The map must show clearly the portions amended or bear a statement describing them, and the location must be described in the forms as the amended survey and the amended definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended; said relinquishment to take effect when the map of the amended definite location is approved by the Secretary of the Interior. If the canal or reservoir has been constructed on the location originally approved, and is to be used until the canal or reservoir on the amended location is ready for use, the relinquishment may be made to take effect upon completion of the canal or reservoir on the amended location.[9]

location to be filed within twelve months after the location of the works, if upon surveyed lands, or within twelve months after survey, if upon unsurveyed lands, is directory, with respect to the time so fixed, and not mandatory. Battlement Res. Co., 29 Land Dec. 112.

[8] See Regulations, 36 Land Dec. 574.

[9] The Land Department has jurisdiction to approve an application for a right of way under the Act, covering, with other public land, a tract included in a prior approval, but it is not bound to do so; and where it appears that the enjoyment sought depends upon the destruction of the prior right, the granting of the later right may be withheld until the prior approval is set aside or the applicant is shown to be entitled to make use of the right sought. Allen v. Denver etc. Co., 36 Land Dec. 490.

§ 946. Act of March 3, 1891—Procedure where jurisdiction comes under two departments.—By the proviso in Section 18 of the Act of March 3, 1891,[1] no right of way will be granted over reservations so as to interfere with the proper occupation of the Government, and all maps shall be subject to the approval of the department of the Government having jurisdiction of such reservation.[2] Where, however, the land is partly within and partly without such reservation, the applicant need not go to the expense and trouble of making separate applications to each department, but may make it in regular form to the Department of the Interior, and if there found regular will be approved by that department, and then transmitted to the other department for its consideration and approval so far as it affects the reserve.[3] This mode of procedure must also be followed where the application is over lands entirely within the jurisdiction of some other department than that of the Department of the Interior. The application must be filed with the Department of the Interior, in accordance with the regulations, and it will then be submitted by it to the department having jurisdiction.[4]

§ 947. Official acts under Act of March 3, 1891—Approval of application.—When the maps and other papers are filed, the register of the land office must note the date of filing over his written signature. Notations must also be made on the records of the local land office as to each unpatented tract affected, that the application for the right of way is pending, giving the date of filing and the name of the applicant. The register must also certify on each map, over his written signature, that unpatented land is affected by the

See, also, Deseret Irr. Co., 33 Land Dec. 469.

The maps and papers pertaining to a right of way proceeding may be delivered to the receiver of an irrigation company, for purposes of amendment, on due showing that he is acting under judicial authority. Gila Bend etc. Co., 26 Land Dec. 154.

NOTE.—The above are in general the required regulations as last promulgated at the date of this writing. These regulations have been changed from time to time, and applicants should always send to the General Land Office for the last rules promulgated upon the subject, before filing the application, as the rules in force at the time of the application will be literally followed.

1 For Act, see Sec. 937.

See, also, preceding sections, Nos. 938-945.

2 For rights of way over National Forests, see Secs. 954-967.

3 Instructions, 34 Land Dec. 64.

4 Regulations, 36 Land Dec. 567; *Id.*, 34 Land Dec. 212.

proposed right of way. The maps and field notes in duplicate and all other papers filed in connection with the application must then be promptly transmitted to the General Land Office. If no unpatented land is involved in the application, the local officers will reject it.[1] And any valid right of settlers or others existing at the date of the filing of an application will not be affected by the filing or the approval thereof. Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of canals, ditches, or reservoirs as laid down upon the map. They will also note the approval in ink on the tract books, opposite each tract marked, as required above, and report to the General Land Office that the notations have been made, and that the applicant has been notified of the approval.[2]

§ 948. **Nature of title granted under Act of March 3, 1891, and amendments thereto.**—The nature of the title granted under the Act of March 3, 1891, as defined by the Secretary of the Interior in the regulations of June 6, 1908,[1] is as follows: "The right granted is not in the nature of a grant of lands, but is a base or qualified fee. The possession and right of use of the lands are given for the purposes contemplated by law, but a reversionary interest remains in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way. All persons set-

[1] The Secretary of the Interior has no jurisdiction to act upon an application for a right of way, under the Act of 1891, unless it affirmatively appears that some portion of the public domain is affected thereby. Mt. Nebo Res., 15 Land Dec. 345.

But an application may be approved, in so far as it affects unoccupied Government land, though the line for the greater part traverses lands that do not belong to the public domain. Kern Val. W. Co., 15 Land Dec. 577.

[2] Regulations, 36 Land Dec. 574.

As to the effect of the approval, see Sec. 949.

An application can not be approved until presented in conformity with the regulations of the department. Northern Pac. etc. Co., 13 Land Dec. 110.

A map showing the location of a canal will not be approved, where a portion of the line traverses unsurveyed land. Inyo Canal Co., 15 Land Dec. 245; Arrowhead Res. Co., 16 Land Dec. 148; Santa Cruz etc. Co., 13 Land Dec. 660; Cache Val. Canal Co., 16 Land Dec. 192.

[1] 36 Land Dec. 568.

tling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the land subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deductions in such cases."[2] As held by the courts, "The Act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions."[3] And one of the conditions of the grant is that the land must be continually occupied and used for the purpose for which it is granted, otherwise the right of way reverts to the United States or to the persons to whom the land, covered by such a right of way, has been acquired from the Government.[4]

§ 949. **Effect of approval of application under Act of March 3, 1891.**—Under Section 19 of the Act of March 3, 1891,[1] a canal, ditch, or reservoir is not definitely located in the sense that a right of way therefor over the public lands attaches, until the map and application for the same have been approved by the Secretary of the Interior. And the approval by the Secretary of the application, filed under the provisions of the Act, carries only the right of way over the public lands covered by such location as are vacant and

2 "The Act of March 3, 1891, under which the Denver company's application was filed and approved, is very similar to the Act of March 3, 1875 (18 Stat. 482), by which rights of way across the public lands are granted to railroad companies. Respecting this Act of 1875, the Supreme Court has decided that after an application has been approved by the Secretary of the Interior, a vested right is acquired which can not be disturbed by any subsequent action of the Department; that with the approval the title passes, and with the title passes all authority or control of the executive department over the land and over the title which it has conveyed." Allen v. Denver Power & Irr. Co., 36 Land Dec. 490.

See, also, Noble v. Union River etc. Co., 147 U. S. 165, 37 L. Ed. 123, 13 Sup. Ct. Rep. 271; T. A. Sullivan, 38 Land Dec. 493; McMillan Reservoir Site, 37 Land Dec. 6.

3 United States v. Whitney, 176 Fed. Rep. 593.

4 See, also, Whitmore v. Pleasant Valley etc. Co., 27 Utah, 284, 75 Pac. Rep. 748; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766; *Id.*, 26 Colo. 74, 56 Pac. Rep. 577; Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650; United States v. Lee, 15 N. M. 382, 110 Pac. Rep. 607; De Weese v. Henry Investment Co., 39 Land Dec. 27; Minidoka etc. Co. v. Weymouth, 19 Idaho 234, 113 Pac. Rep. 455.

1 For full copy of Act, see Sec. 937. See, also, preceding sections, Nos. 938-948.

unappropriated at the time of the approval, and in nowise affects other tracts. Hence it does not authorize one proceeding under its provisions to interfere with even the possessory right of *bona fide* settlers, though without title, where the inception of the settler's right was prior to the approval of the application of the right of way.[2]

It will be noticed that the Act prescribes that "upon approval" of the application, and not until then, by the Secretary, that "thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." The right does not relate back to the date of beginning the construction of the works.[3]

The section further prescribes that whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. This clause is an additional protection to the vested rights of settlers. This subject also comes wholly within the jurisdiction of the courts and not the Land Department.

By the Federal Court it was held that under the Act of March 3, 1891, upon the filing of a map thereof and its approval by the Secretary of the Interior, such approval is essential, and where it

2 Nippel v. Forker, 26 Colo. 74, 56 Pac. Rep. 577; affirming *Id.*, 9 Colo. App. 106, 47 Pac. Rep. 766. See same case before the Land Dept., *in re* protest of Tillie Gibson, 19 Land Dec. 304, where it was said: "As it appears, therefore, that the applicant (Nippel) has complied with the regulations prescribed under the Act of March 3, 1891, this department can not inquire into the merits of the protests, but must refer the parties to the courts for their proper remedies, if in anywise injured in their possession by the building and use of the proposed reservoir."

The mere fact of an outstanding approved right of way will not prevent the approval of a conflicting application for right of way, but in such case the conflict should be given proper weight in determining whether approvals should be given to the later application, especially where the previous right of way has been actually utilized. Deseret Irr. Co. v. Sevier River L. & W. Co., 40 Land Dec. 463; Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; United States v. Conrad Inv. Co., 156 Fed. Rep. 123; Whitmore v. Pleasant Valley Coal Co., 27 Utah, 284, 75 Pac. Rep. 748; O'Riley v. Noxson, 49 Colo. 362, 113 Pac. Rep. 486.

3 Nippel v. Forker, 26 Colo. 74, 56 Pac. Rep. 577, 9 Colo. App. 106, 47 Pac. Rep. 766; F. F. Noxon, 27 Land Dec. 585.

But see H. Pope, 28 Land Dec. 402.

was refused as to a reservoir, because the site had been previously withdrawn from sale or entry and reserved by the United States, the company acquired no right or easement by the filing of its maps.[4]

Section 21 of the Act forbids the occupancy of the right of way except for the purposes of the canal or ditch, and then only so far as may be necessary, and the acquirement of such a right of way gives the owner no right to use the land for any other purposes.[5]

Under Section 20 the canal or other works must be completed within five years or the rights are forfeited; also any section not completed within that time will be forfeited as to the uncompleted portion. A suit may be brought by the United States to declare such forfeiture,[6] or the rights may be held to be forfeited in a suit brought in the State courts by private parties without any special action to declare the forfeiture by the Government, especially where the claimant has lost his right to appropriate the water to conduct which the right of way was granted.[7]

§ 950. **Secretary has no jurisdiction over water rights under Act of March 3, 1891.**—The jurisdiction of the Secretary of the Interior, or the Land Department, under the Act only extends to the subject matter of the granting or rejecting the application for the rights of way over the public lands. The department is without jurisdiction to determine the question as to the right to the water, that being a matter solely within the province of the State courts.[1] Therefore, while the Act in question grants rights of way over the public lands necessary to the maintenance

4 United States v. Rickey Land & Cattle Co., 164 Fed. Rep. 496.

5 The right of way can not be used for the purpose of a saloon. Whitmore v. Pleasant Valley Coal Co., 27 Utah 284, 75 Pac. Rep. 748.

In approving an application for a right of way for a ditch, the department does not determine the marginal width necessary for the construction and maintenance of the ditch. Lewis J. Dawson, 16 Land Dec. 425.

6 Deseret Irr. Co., 33 Land Dec. 469.

For proceedings to declare a forfeiture of rights, see Sec. 969.

7 Baldridge etc. Co. v. Leon etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477.

1 Silver Lake etc. Co. v. City of Los Angeles, 37 Land Dec. 152; Kings River Pr. Co. v. Knight, 32 Land Dec. 144; Chicala W. Co. v. Lytle Cr. etc. Co., 26 Land Dec. 520; Surface Creek etc. Co., 22 Land Dec. 709; New Bear Valley Irr. Co. v. Roberts, Trustee, 30 Land Dec. 382;

and use of ditches, canals, and reservoirs, the control of the flow and use of the water is, so far as this Act is concerned, vested in the States, under the laws thereof, and the jurisdiction of the Department of the Interior is limited to the approval of the maps and the application for the bare right of way over the public lands necessary for the construction of the works through which the water may be conducted to the place of use.[2] However, in making the application the applicant must make at least *prima facie* proof that he has a valid water right to use with the right of way.[3] And it is invariably held that where the applicant does not furnish sufficient proof of a right to the use of water to be conveyed in or to the canals and reservoirs covered by the right of way sought that such right of way will not be granted.[4]

§ 951. **Segregated reservoir sites—Text of Act of October 2, 1888, and amendatory Acts of March 2, 1889, August 30, 1890, and Section 17, of the Act of March 3, 1891, and the Act of February 26, 1897.**—Evidently anticipating the construction of irrigation works by the Federal Government some time in the future, Congress provided for the segregation of reservoir sites for that purpose fourteen years before the National Reclamation Act was passed whereby these sites might be utilized.

In the Sundry Civil Appropriation Act of October 2, 1888,[1] Congress enacted the following:

" . . . For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of irrigable lands in such region, and for the selection of sites for reservoirs and other hydraulic works necessary

H. H. Sinclair, 18 Land Dec. 573; Tillie Gibson, 19 Land Dec. 304.

The Acts of Congress of March 3, 1891, and of July 26, 1866, and the Desert Land Act of March 3, 1877, permit the appropriation of water for irrigation and the reclamation of desert land. Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

2 Regulations, 36 Land Dec. 568, 34 Land Dec. 214, 31 Land Dec. 505.

For general jurisdiction of the Land Department, see Sec. 968.

3 See, also, Regulations, 36 Land Dec. 567.

4 Instructions dated October 21, 1910, 39 Land Dec. 334.

1 7 Fed. Stat. Ann., 1905, p. 1096; 2 U. S. Comp. Stat., 1901, p. 1552; 25 Stat. L. 526.

For the construction of this Act, see Sec. 952.

For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

for the storage and utilization of water for irrigation and the prevention of floods and overflows, . . . the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior. . . . And all lands which may hereafter be designated or selected by the United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this Act, to entry, settlement, or occupation until further provided by law: *Provided,* That the President may at any time in his discretion, by proclamation, open any portion or all of the lands reserved by this provision to settlement under the homestead laws."[2]

The above provision was amended by Section 1 of the Sundry Civil Appropriation Act of March 2, 1889,[3] which provides as follows:

"Sec. 1. . . . *Irrigation Survey.*—For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and for ascertaining the cost thereof, and the prevention of floods and overflows, and to make the necessary maps, . . . and the Director of the Geological Survey, under the supervision of the Secretary of the Interior, shall make a full report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this and future appropriation."

By Section 1 of the Sundry Civil Appropriation Act of August 30,

2 For the results of this Act, see the many Water-Supply Papers, issued by the Department of the Interior, U. S. Geological Survey, which contain much valuable information.

3 7 Fed. Stat. Ann., 1905, p. 1097; 2 U. S. Comp. Stat., 1901, p. 1553; 25 Stat. L. 960.

For the construction of this amendatory Act, see Sec. 952.

1890, the general withdrawal of lands provided for in the foregoing Acts, was repealed,[4] which repealing Act is as follows:

"Sec. 1. So much of the Act of October 2, 1888, entitled, 'An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1889, and for other purposes,' as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed, and all entries made for claims initiated in good faith and valid but for said Act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said Act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof."

By the amendatory Section 17 of the Act of March 3, 1891,[5] the above laws were again amended by the provision as follows: "Sec. 17. That reservoir sites located or selected and to be located and selected under the provisions of 'An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1889, and for other purposes,' and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding as far as practicable lands occupied by actual settlers at the date of the location of said reservoirs."

The above Acts were still further amended by the Act of February 26, 1897,[6] entitled, "An Act to provide for the use and occupation of reservoir sites reserved," by individuals, private corporations, or by any State, which Act provides:

"That all reservoir sites reserved or to be reserved shall be open to use and occupation under the Right of Way Act of March 3, 1891, and any State is hereby authorized to improve and occupy such

[4] 7 Fed. Stat. Ann., 1905, p. 1097; 2 U. S. Comp. Stat., 1901, p. 1553; 26 Stat. L. 391.

For construction of Act, see Sec. 952.

[5] 6 Fed. Stat. Ann., 1905, p. 1097; 2 U. S. Comp. Stat., 1901, p. 1554; 26 Stat. L. 1101.

For construction of the section, see Sec. 952.

[6] 7 Fed. Stat. Ann., 1905, p. 1098; 2 U. S. Comp. Stat., 1901, p. 1556; 29 Stat. L. 599.

For the construction of the Act, see Sec. 953.

reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or in part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or in part situated.'' [7]

§ 952. **Segregated reservoir sites—Construction of Act of October 2, 1888, and amendatory Acts of March 2, 1889, August 30, 1890, and Section 17 of the Act of March 3, 1891.**—By the Act of October 2, 1888,[1] Congress provided that all lands which might be thereafter designated or selected by the United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals, were from that time forward by the Act reserved from sale as the property of the United States, and should not after the passage of the Act be subject to entry, settlement, or occupation until further provided by law: *Provided,* That the President of the United States may at any time in his discretion, by proclamation, open any portion or all of the lands reserved by the provision of the Act to settlement under the homestead laws. The cause leading to the passage of this Act was the agitation throughout all of the arid West to induce Congress to take up the subject of irrigation as a National work and have the Government construct the reservoirs, ditches, and canals at its own expense, and then dispose of the lands under them to settlers. The work of selecting these sites was assigned by the Act to the Geological Survey under the direction of the Secretary of the Interior.[2] But a tract of land embraced

7 For the causes leading up to the enactment of this law, and the construction of the Act, see Sec. 952.

1 7 Fed. Stat. Ann., 1905, p. 1096, 2 U. S. Comp. Stat., 1901, p. 1552; Chap. 1069, 25 Stat. L. 526.

For full text of Act, see Sec. 951.

2 ''The object sought to be accomplished by the foregoing provision is unmistakable. The water sources and the arid lands that may be irrigated by the system of National irrigation are now reserved to be hereafter, when redeemed to agriculture, transferred to the people of the territories in which they are situated for homesteads.'' Circular of Land Commissioner, August 5, 1889, 9 Land Dec. 282.

The provisions of Sections 18-21 of the Act of March 3, 1891, conferring right of way privileges for irrigation purposes over the public domain and reservations of the United States, do

within a valid entry at the date of the passage of the Act is excepted by such entry from the operation of the general withdrawal declared by the Act for reservoir purposes.[3] This is so for the reason that when land is once appropriated for any purpose, it from that moment is severed from the mass of the public lands, and no subsequent law or proclamation will be considered to embrace it or operate upon it.[4] But an entry of land made after the passage of the Act of 1888, *supra*, and subsequently designated as a part of a reservoir site, is subject to selection by the Government, and the entryman takes the risk of his entry being canceled where the land is needed for that purpose.[5]

In the Sundry Civil Appropriation Act of March 2, 1889,[6] the Act of October 2, 1888, was confirmed, by providing that, for the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of the irrigable lands in such region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and for ascertaining the cost thereof, and to make the necessary maps, the Director of the Geological Survey, under the supervision of the Secretary of the Interior shall make full report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in locating sites for reservoirs, and an itemized account of the expenditures under this and any further appropriations.

Congress two years later, by the Act of August 30, 1890,[7] thereby

not contemplate the allowance of such rights over lands reserved by the Government for reservoir sites under the Act of October 2, 1888. Blue Water etc. Co., 23 Land Dec. 275.

[3] Austin v. Thompson, 18 Land Dec. 350; Forest Reservation, 12 Land Dec. 86; Margaret D. Gillis, 25 Land Dec. 221; Sjune Bondeson, 22 Land Dec. 520.

[4] Wilcox v. Jackson, 13 Peters 498, 10 L. Ed. 264.

See, also, Sec. 445.

[5] Owen Rogan, 22 Land Dec. 370; Amanda Cormack, 18 Land Dec. 352; Maria H. Williams, 23 Land Dec. 483; Mary E. Bisbing, 13 Land Dec. 45; Newton F. Austin, 18 Land Dec. 4; Colcomokas G. M. Co., 28 Land Dec. 172; John U. Gabathuler, 28 Land Dec. 418; Op. Atty. Gen., 11 Land Dec. 220.

[6] 7 Fed. Stat. Ann., 1905, p. 1097; 2 U. S. Comp. Stat., 1901, p. 1553; Chap. 411, 25 Stat. L. 960, Sec. 1.

For the full text of the section, see Sec. 951.

[7] 7 Fed. Stat. Ann., 1905, p. 1097; 2 U. S. Comp. Stat., 1901, p. 1553; Chap. 837, 26 Stat. L. 391.

repealed the Act of 1888, *supra,* however, with the exception of the reservoir sites theretofore located or selected under the provisions of the Act which should continue to remain segregated and reserved from entry or settlement, as provided by said Act, until otherwise provided by law; and reservoir sites thereafter located or selected on the public lands should in like manner be reserved from the date of the location or selection thereof.[8]

By Section 17 of the Act of March 3, 1891,[9] the previous Acts, cited *supra,* providing for the reservation of reservoir sites by the Government, were still further amended by the provision that all reservoir sites located or selected and to be located and selected, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.[10] And under Section 17 of the Act of March 3, 1891, the Secretary of the Interior has the authority to release from reservation any portion of the lands selected for reservoir purposes under the Act of October 2, 1888, and Acts amendatory thereof, if it is made to appear that such lands are not actually necessary for the purpose for which the reservation was made.[11]

For full text of the Act, see Sec. 951.

8 The Act of August 30, 1890, repealed the Act of October 2, 1888, in so far as said Act operated to create a general withdrawal of lands susceptible of irrigation. Marius Thorup, 26 Land Dec. 648; Emilio Torres, 17 Land Dec. 341; Newton F. Austin, 18 Land Dec. 4.

See, also, Regulations, 38 Land Dec. 629.

9 7 Fed. Stat. Ann., 1905, p. 1097; 2 U. S. Comp. Stat., 1901, p. 1554; Chap. 561, 26 Stat. L. 1101.

For full text of the section, see Sec. 951.

10 A withdrawal made for reservoir purposes, under the Act of October 2, 1888, will be revoked as to the lands that are finally found not to be actually required for the purposes of the reservation; and a pre-emption filing for land included in such reservation, and canceled for conflict therewith, may be then reinstated. Mary E. Leonard, 13 Land Dec. 92.

See, also, C. E. Tompkins, 21 Land Dec. 203; Marius Thorup, 26 Land Dec. 648; Emilio Torres, 17 Land Dec. 341; Sjune Bondeson, 22 Land Dec. 520; Newton F. Austin, 18 Land Dec. 4; Allen v. Denver Power & Irr. Co., 38 Land Dec. 207.

The protection provided for settlement claims by Sec. 17 of the Act of March 3, 1891, as against the location of reservoir sites extends only to lands occupied by actual settlers at the date of such location. Geo. A. Cram, 14 Land Dec. 514.

See, also, Chas. E. Tompkins, 21 Land Dec. 203.

11 Carls Hildt, 28 Land Dec. 194.

§ 953. Segregated reservoir sites—Act of February 26, 1897, opening same up for use by private parties or States—Cause of its passage and construction.—The Geological Survey, to which was assigned the duty of selecting reservoir sites under the Acts of 1888 and 1889, and amendatory Acts,[1] acted with great diligence in the matter and many valuable reservoir sites were selected, and a great deal of land under them was reserved and withdrawn from entry throughout the whole Western country. The matter ran along in this manner for nearly nine years, and the Government continued to select and reserve reservoir sites under the provisions of the Act of 1888, *supra*, and the amendments thereto, *supra*. In the meantime no Act was passed by Congress to utilize the sites so selected and reserved. The withdrawal of these lands from entry, without any attempt upon the part of Congress to provide for some reclamation law at the time, raised a perfect storm of protests from the West. Not only would Congress do nothing toward the utilization of the sites and again open the lands for entry and settlement, but by the absolute reservation of these lands from occupation, in many instances, private enterprise was hampered and prevented from utilizing and developing these advantageous sites.

When, owing to the protests against these withdrawals, and the demand of the people of the West that the lands so reserved be reopened for settlement and exploitation, Congress by the Act of February 26, 1897,[2] provided that all reservoir sites reserved or to be reserved shall be open to use and occupation under the Right of Way Act of March 3, 1891, discussed in the previous sections of this chapter.[3] And it was also further provided that any State was thereby authorized to improve such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe. And a proviso was added that the charges for water coming in whole or in part from reservoir sites used or occupied under the provisions

[1] For the text of Acts of October 2, 1888, and March 2, 1889, and construction thereof, see Sec. 951.

[2] 7 Fed. Stat. Ann., 1905, p. 1098; 2 U. S. Comp. Stat., 1901, p. 1556; Chap. 335, 29 Stat. L. 599.

For full text of the Act, see Sec. 951.

For the Act of October 2, 1888, and amendatory Acts, see previous section, No. 951.

[3] For the Act of March 3, 1891, Secs. 18-21, see Sec. 937.

See, also, construction of the Act in the preceding sections, Nos. 938-950.

of the Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or in part situated.[4]

§ 954. Rights of way over National Forests—Regulations and procedure under Act of March 3, 1891.—By Section 24 of the Act of March 3, 1891, the President was authorized by proclamation to declare the establishment of National forest reservations and the limits thereof.

Section 24 of the Act of March 3, 1891, reads as follows: "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall by public proclamation, declare the establishment of such reservations and the limits thereof." [1]

The provisions of the Act of March 3, 1891, known as the Right of Way Act, and discussed in the preceding sections of this chapter,[2] also include rights of way over the "reservations of the United States." Also the right was granted by the Act of February 1, 1905, as set forth in the next section.[3] It therefore follows that there are two Acts of Congress under which rights of way for reservoirs, ditches, and canals may be acquired over National forests. These are the Act of March 3, 1891,[4] and that of February 1, 1905,[5] And as the terms of these Acts are different and different rights

[4] For last regulations by the Secretary, see 36 Land Dec. 575, where it is provided that when an application is made under the Act, a reference to it should be made. In other respects, the application should be prepared according to the preceding regulations, and discussed in our previous sections. See Sec. 945.

[1] See 7 Fed. Stat. Ann., 1905, p. 310; 2 U. S. Comp. Stat., 1901, p. 1537; 26 Stat. L. 1103.

For Acts supplemental thereto, see 7 Fed. Stat. Ann., 1905, pp. 311-317; 2 U. S. Comp. Stat., 1901, pp. 1537-1545; 10 Fed. Stat. Ann., 1906, pp. 404-407; U. S. Comp. Stat. Supp., 1905, pp. 339-349; Supp. Fed. Stat. Ann., 1909, pp. 661-672.

[2] For the text of the Act, see Sec. 937.

For construction of the Act, see Secs. 938-950.

[3] See Sec. 955.

[4] For Act of March 3, 1891, and construction thereof, see Secs. 937-950.

[5] For the right as given under the Act of February 1, 1905, see Sec. 955.

are granted under the same it requires a different set of rules and regulations under each Act. These have been promulgated by the Secretary of the Interior to aid in the execution of the Acts.

Under the Act of March 3, 1891, whenever a right of way is applied for through a National forest, the applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of such National forest. No construction will be allowed in a National forest until an application for right of way has been regularly filed and approved by the Secretary of the Interior or unless permission for such construction work has been specifically given. The application must comply with the terms of the regulations as promulgated by the Secretary of the Interior relating to such rights and discussed in a previous section of this work.[6] And, in addition, it must comply with the following:

Under the regulations approved June 6, 1908,[7] if the right of way is through a *proposed* National forest, the applicant must file the following stipulations under seal:

"(a) That the proposed right of way is not so located as to interfere with the proper occupation and use of the reservation by the Government.

"(b) That the applicant will cut no timber from the reserve outside the right of way, and will remove no timber from the land within the right of way except such as is rendered necessary for the proper use and enjoyment of the privilege for which application is made.

"(c) That he will remove from the reservation, or destroy, under such safeguards as may be deemed necessary by the General Land Office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be required by the General Land Office to protect the forest from fire.

"(d) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business.

[6] For the rules and regulations under the Act of March 3, 1891, see Sec. 945.

See, also, Regulations, under date of June 6, 1908, 36 Land Dec. 567-575.

[7] 36 Land Dec. 569.

"(e) That should any portion of said right of way be included in a National forest, the applicant will build new roads, trails, and crossings, as required by the Forest Service, in case any roads or trails are destroyed or intercepted by construction work or flooding upon said right of way.

"The applicant will also be required to give bond, to be approved by the Commissioner of the General Land Office, stipulating that the United States will be compensated 'for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur.' A bond furnished by any surety company that has complied with the provisions of the Act of August 13, 1894,[8] will be accepted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed."

§ 955. Rights of way over National Forests—Act of February 1, 1905.—By the Act of February 1, 1905, entitled, "An Act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture," it was provided in Section 4 thereof that rights of way for the purposes named in the Act may also be acquired over the forest reservations, or "National Forests," established under the provisions of Section 24 of the Act of March 3, 1891,[1] and the Acts supplemental to and amendatory thereof. A copy of said Section 4 is as follows:

"Sec. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purpose of milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated."[2]

[8] 28 Stat. 279.

[1] See note, *supra*.

[2] 10 Fed. Stat. Ann., 1906, p. 405; U. S. Comp. Stat. Supp., 1905, p. 378; 33 Stat. L. 628.

For construction of Act, see Secs. 956-958.

§ 956. Rights of way over National Forests—Construction of Act of February 1, 1905.—By the Act of February 1, 1905, Section 4,[1] Congress made still further provisions for rights of way over the National forest reserves by providing that rights of way for the construction and maintenance of dams, reservoirs, water plants, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, were thereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated. The right granted under the Act is not in the nature of a grant of the lands in fee. However, it is a base or qualified fee giving the possession and the right of use of the land for the purposes contemplated by the Act, during the period of the beneficial use. When the use ceases, the right terminates, and thereupon proper steps will be taken by the Government to revoke the grant; and, when revoked, the land will revert to the Government free from the burden of the easement.[2] The Act also differs from

1 10 Fed. Stat. Ann., 1906, p. 405; Supp. U. S. Comp. Stat., 1905, p. 378; Chap. 288, 33 Stat. L. 628, Sec. 4.

For full text of Act, see Sec. 955.

See, also, Secs. 956-965.

2 See regulations, 36 Land Dec. 584, 585.

The rights of way granted by the Act of February 1, 1905, are limited to municipal and mining purposes, including milling and the reduction of ores, and an application under that Act should not be allowed where it appears that the chief purpose for which the right is desired is the generation of power for commercial use and that its utilization for mining operations is merely incidental to such purpose. Northern Cal. Pr. Co., 37 Land Dec. 80.

"The reservation in question is no bar to the approval of the right of way under the Act of March 3, 1891." Hamilton Irr. Co., 21 Land Dec. 330.

For the question of exercising due diligence in the prosecution of the construction of irrigation works, where the location for the same is upon National Forest reserves and a permit from the Government is required, see Wishon v. Globe Light & Power Co., 158 Cal. 137, 110 Pac. Rep. 290; Inyo Consol. Water Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 934.

Section 4 of the Act of February 1, 1905, granting rights of way for dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals within or across forest reserves of the United States applies to and is operative in forest reserves in the District of Alaska. Alaska Treadwell Gold Mining Co., 40 Land Dec. 426.

the terms of the Act of March 3, 1891, in that no right whatever is given to take any material, earth, or stone for the construction of the works or other purposes, nor is any right given to use any land outside of what is actually necessary for the construction and maintenance of the works. No construction will be allowed in National forests until an application for a right of way has been regularly filed in accordance with the regulations and has been approved by the Secretary of the Interior, or unless permission has been specifically given.

§ 957. **Rights of way over National Forests—Regulations and procedure under Act of February 1, 1905.**—The applicant must also set forth in his affidavit the purposes for which the right of way is desired with reference to the Act under which the application is made. The applications for rights of way under this Act must be made in the form of a map and field notes, in duplicate, based upon the accurate survey of the proposed works, and must be filed in the local land office for the district in which the land traversed by the proposed right of way is situated; if the land is in more than one district, duplicate maps and field notes need be filed in only one district and single sets in the others. Evidence of water rights acquired under the laws of the State in which the proposed right of way is situated must also be filed with the application, in accordance with the regulations as prescribed in other cases.[1]

An affidavit by the applicant that he is a citizen of the United States must accompany the application. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit of one of them. A copy of their articles of association must also be furnished, or if there be none, the fact must be stated over the signature of each member of the association. If the applicant is not a native-born citizen, he must file the usual proof of naturalization. If the applicant is a corporation, the articles of incorporation and the proofs of organization must be prepared in accordance with the prescribed forms, and in accordance with the regulations, discussed in a previous section of this chapter.[2] When the application

1 Regulations, 36 Land Dec. 570, 585.
See, also, Sec. 945.

2 See Sec. 945.
Regulations, June 6, 1908, 36 Land Dec. 585.

is made for a right of way for water plants, the location and extent of the ground proposed to be occupied by buildings or other structures necessary to be used in connection therewith, must be clearly designated on the map and described in the field notes. In addition to this the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to clearly show their dimensions and relative positions. The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures, and must show definitely that each is necessary to the proper enjoyment of the right of way granted by the Act.

The applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of the National forest. A stipulation on the part of the applicant that no timber will be taken from the land within the reservation outside of the reservoir, or right of way, or from the land not occupied by the waterway, is also required.[3]

All applications for rights of way over National Forests when received from the General Land Office at Washington will be referred to the Forester, and by him referred to the District Forester of the district in which the rights of way applied for are situated, in order that the District Forester may, before recommending the approval of the right of way, require the applicant to file such stipulations and bond, if any, as may be necessary to protect the National Forest interests.[4]

Upon the filing of an application under this Act, the register of the local land office will note the same in pencil on the tract books, opposite the tracts traversed, giving the date of the filing and the name of the applicant, and also indorse on each map, over his writ-

[3] Hamilton Irr. Co., 21 Land Dec. 330.

Whenever a right of way is located upon a forest or timber reserve, the applicant must enter into such a stipulation and execute such a bond as the Secretary of Agriculture may require for the protection of such reserves. Regulations, April 28, 1906, 34 Land Dec. 538.

See, also, for divided jurisdiction over National Forests under the Act of February 1, 1905, Sec. 967.

[4] For the procedure upon reference of an application to the Forest Service, see the National Forest Manual, Special Uses, 1911, pp. 23, 24.

See, also, for regulations issued by the Secretary of the Interior for procedure upon application for rights of way over National Forests, approved June 6, 1908, 36 Land Dec. 581.

ten signature, the name of the land office and the date of filing. If it appears that no portion of the public lands in a National Forest would be affected by the approval of such maps, they will be returned to the applicant with notice of the fact, by the register. If unpatented lands are affected by the proposed right of way, the register will so certify on the map and duplicate, over his signature, and will promptly transmit the same to the General Land Office, with the report that the required notations have been made. Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local land officers, who will then mark upon the township plat the lines of the right of way as laid down on the map. They will also note the approval in ink on the tract books, opposite each legal subdivision affected, with reference to the Act mentioned on the map.[5]

§ 958. Rights of way over National Forests—Effect of Acts of March 3, 1891, and February 1, 1905, upon the Acts of 1866 and 1870.—Although the term "public domain" is used in the Act of 1866,[1] it has been construed especially by the Land Department as not applying to forest or other reserves, but as applying to what are strictly known as the "public lands" of the United States,[2] especially since the Acts of March 3, 1891, and February 1, 1905, were passed. And it is practically held by the Land Department that as far as the public reserves, such as forest, Indian, and others are concerned, that the Acts of 1891 and 1905 repealed by implication the Act of 1866.[3] This, however, we deem to be a somewhat strained construction upon the part of the Land Department for the reason that the Act of 1866 applies to the "public domain" which, under the authorities, includes all lands owned by the Government,

5 The above is taken from the regulations of June 6, 1908, 36 Land Dec. 584. They are, however, subject to change, and the last rules promulgated should be followed.

1 For the Act of 1866, and construction thereof, see Sec. 611.

2 For distinction between "public domain" and "public lands," see Secs. 391, 392.

3 See the opinion of the Attorney General, 22 Op. 13, 26 Op. 421.

See, also, Kern River Co., 38 Land Dec. 302.

But see United States v. Conrad Investment Co., 156 Fed. Rep. 123, holding that the Act of 1866 was still in force in reserved land, so far as works which are so constructed as not to interfere with Government occupancy.

See, also, Denver Power & Irr. Co. v. Colorado Southern R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

including reserves. However, as the Department takes this position it is the law upon the subject, and applications for rights of way over forest and other reserves must be made under the Acts of March 3, 1891, and February 1, 1905. As far as the protection of the rights, both of the Government and the applicant, this is the better rule and should be followed in all cases.

§ 959. **Over forest reserves and reservoir sites—Act of March 3, 1899—Construction of Act.**—In the deficiencies appropriation Act of March 3, 1899,[1] Congress granted rights of way over forest reserves and reservoir sites for wagon roads, railroads, or highways, which Act is as follows:

"Sec. 1. That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."[2]

The grantee under this Act does not secure a full and complete title to the land on which the right of way is located. There is obtained only the right to use the land for the purposes for which it is granted and for no other purpose, and the grantee may hold such possession, if it is necessary for that use, as long and only as long as that use continues. When the Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, such patentee takes the fee, subject only to the right of way theretofore granted to the land.[3]

§ 960. **Rights of way over National Forests—Applicants may take Department of Agriculture permits under both Acts of March 3, 1891, and February 1, 1905.**—Although applications for permanent rights of way under the Acts of March 3, 1891,[1] and February 1, 1905,[2] must be filed in the proper local

[1] 6 Fed. Stat. Ann., 1905, p. 513; 2 U. S. Comp. Stat., 1901, p. 1584; 30 Stat. L. 1233.

[2] The Act of March 3, 1899, *supra*, is limited in the scope of its operation to reservations falling within the control or under the jurisdiction of the Secretary of the Interior. Brainard & Northern Min. R. Co., 29 Land Dec. 257.

[3] For regulations under the Act of March 3, 1899, see 27 Land Dec. 788.

[1] For which see Sec. 945.

[2] For which see Sec. 957.

land office of the Department of the Interior, it must be noted, however, that the Acts above mentioned granting rights of way amounting to easements for irrigation reservoirs and canals, and reservoirs, canals, and water plants for mining and municipal purposes, do not in any way prevent or interfere with the securing of permits for these purposes from the Department of Agriculture. And the issuance of a permit for any of the purposes above named will not in any way prevent the party acquiring the same from filing a map of location for approval and record with the Secretary of the Interior, under the Right of Way Acts above mentioned. The granting of an Interior Department right of way supersedes the permit issued by the Department of Agriculture, and vests in the grantee a permanent right of way, whereas, under the permit, he simply has a license to use the land for this purpose which is revocable by the Secretary at any time.[3]

§ 961. Rights of way over National Forests—Revocable permits issued by the Secretary of Agriculture.—As was stated in the preceding section, applicants could acquire permits from the Secretary of Agriculture for rights of way over National forests. By the Act of June 4, 1897,[1] the Forest Service was created and the control and management of all things necessary to the National forests was vested in the Secretary of the Interior. Afterward, as we have seen, the jurisdiction of the National Forests was divided between the Secretary of the Interior and the Secretary of Agriculture.[2] By the Act in question the Secretary of the Interior (now the Secretary of Agriculture) was empowered to "make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March 3, 1891, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." Under the

[3] See the National Forest Manual, Special Uses, 1911, pp. 22-24.

For special uses of National Forests under permits issued by the Secretary of Agriculture, see Secs. 963-965.

[1] 7 Fed. Stat. Ann., 1905, p. 311; 2 U. S. Comp. Stat., p. 1538; 30 Stat. L. 34.

[2] For divided jurisdiction of National Forests, see Sec. 967.

above provisions the Secretary of Agriculture, now having jurisdiction of the various uses of the forests, relative to which temporary permits may be issued, has promulgated certain regulations relative to such temporary use as follows:

Permits.

"Reg. 6. Permits are necessary for all occupancy, uses, operations, or enterprises of any kind within National Forests, whether begun before or after the National Forest was established, except: (a) Upon patented lands; (b) upon valid claims for purposes necessary to their actual development and consistent with their character; (c) upon rights of way amounting to easements for the purposes named in the grants; (d) prospecting for minerals, transient camping, hunting, fishing, and surveying for lawful projects.

"Reg. 7. Permits for the use of the National Forests, unless otherwise specifically fixed by regulation, may be granted by the Forester for any term consistent with National Forest interests. The Forester may also make a reasonable charge for any permit, right, or use.

"Reg. 8. Permits are not assignable, and abandonment in favor of another necessitates new application and permit. In case of abandonment and issuance of new permit, the original permittee may sell his improvements to the new permittee, and any payments made by him may apply on the new permit, in the discretion of the Forester.

"Reg. 9. Occupancy under permit secures no right or claim against the United States, either to the land or to any improvements upon it, beyond the uses conferred by the permit. Improvements made by the permittee, except fences, may not be removed except with the written consent of the supervisor.

"Reg. 10. The Forester and such officers as he may designate may issue, extend, or renew permits for special uses within National Forests with such conditions as to area, time, and requirements as they may deem best, and they may make reasonable charges for such permits. The Forester alone may revoke special-use permits."

Regulation 19 provides that the following acts within National Forests are forbidden: (a) Squatting upon land within a forest or making settlement, except in accordance with the Act of June 11, 1906; (b) the building among other things of ditches, dams, canals,

pipe lines, flumes, tunnels, or reservoirs without a permit or in violation of the terms of the permit except as otherwise allowed by law, and except upon patented land or upon a valid claim, when necessary for the actual development of such claim consistent with the purposes for which it was initiated; (c) the erecting or conducting among other things power lines, power plants, or other structures or "carrying on any kind of work except as allowed by law and the National Forest Regulations, and except upon patented lands or upon a valid claim."[3]

It is also provided under the regulations that "National Forest land should not be devoted to an inferior use so as to preclude a higher use. For instance, after the issuance of a pasture permit it may be found that the area covers the only available reservoir site for the water supply of the community. In such a case the District Forester should exercise his discretion and cancel the permit. Compensation should be made, if possible, by refunding unearned payments or by granting another area for pasture purposes. Wherever possible, this point should be determined during the field examination, and where it is evident that eventually a higher use can be made of the area than the one applied for, a clause should be inserted providing for the higher utilization, thus: This permit is issued subject to an application for the use of the area for . . . (a reservoir for municipal purposes, an irrigation ditch, school purposes, etc.) The welfare of the community or the number of people benefited should be the factor determining a higher use rather than the amount of money to be obtained for the use. If the supervisor rejects a special-use application, he will at once inform the applicant by letter, giving the reason for rejection and will forward all papers in the case to the District Forester for review. All papers will be returned to the supervisor for filing. The supervisor will not revoke special-use permits. When the necessity for revocation arises, the supervisor will report the case to the District Forester, who will take the necessary action in cases where the permits were issued by the supervisor. Permits issued by the District Forester may be revoked by the Forester or the Secretary of Agriculture. Notice of revocation of permit will be sent in duplicate to the super-

[3] See, also, the National Forest Manual, Special Uses, of March 18, 1911, and Schedule of Charges for Special Use Permits, pp. 6-8.

visor, the original for transmittal by registered mail to the permittee."

Relative to conduits and reservoirs for irrigation the regulations also provide: "No charge will be made for permits for irrigation projects.[4] As, under the Act of March 3, 1891, as amended by the Act of May 11, 1898, easements can be secured for irrigation projects on National forests, it is unlikely that supervisors will be called upon to issue permits for many large projects, although applications may be received pending the approval of application for easement to the Department of the Interior. For small projects the procedure will be the same as in other special-use cases. For large projects more accurate and detailed maps may be required, and also *prima facie* evidence of water appropriation and plans for dams and other structures, if the supervisor considers such requirements necessary. If in the opinion of the supervisor an examination should be made by the district engineer, he will make such a request to the District Forester, who, if he considers it advisable, will authorize the examination. The report of the forest officer should show, if possible, whether or not any development of water power for the generation of electric energy is contemplated."

The power granted by the Act to the Secretary to make regulations has been upheld by the Supreme Court of the United States in two very recent cases.[5]

§ 962. Rights of way over National Forests—Water power regulations.—As was said before, the Secretary of the Interior has jurisdiction over all matters relating to the patenting and official survey of lands in the National Forests and of grants of rights of way amounting to easements. By practice and regulations of the Department of the Interior, applications for rights of way in the National Forests are referred to the Secretary of Agriculture by the Secretary of the Interior, for his recommendation before final action thereon.[1] Upon the question of water power rights within the National Forests the Secretary of Agriculture promulgated certain

[4] Regulation L-32; see National Forest Manual, Special Uses, 1911.

[5] Light v. United States, 120 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485; Grimaud v. United States, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480; reversing *Id.*, 170 Fed. Rep. 205.

[1] For divided jurisdiction between the Secretary of the Interior and the Secretary of Agriculture, see Sec. 967.

rules under the date of December 28, 1910, relative to the use of National Forests for the purpose of generating and transmitting power.[2] An abstract of these regulations is as follows:

Reg. L-1. *Preliminary and final permits.*—Preliminary water-power permits will allow the applicant the occupancy of the lands of the United States within National Forests for the purpose of securing data for an application for a final permit and for such construction as may be necessary to preserve water appropriation during that period. Final water-power permits will allow the occupancy and use of such lands for the construction, maintenance, and operation thereon of works for the main purpose of the generation of electrical power.

Reg. L-2. *Definitions.*—"The term 'non-commercial water-power works' will be applied to water-power works owned and used solely by the permittees for one or more of the following purposes: In operation of their own mines or in the milling and reduction of ores therefrom; as auxiliary to irrigation works owned and operated by permittees; temporarily, in the construction of other works for which permission has already been granted the permittees; by municipalities for municipal purposes; or for such other miscellaneous uses not herein enumerated as may be determined by the Secretary of Agriculture to fall within this class. No charge will be made for the use and occupancy of lands for non-commercial water-power works. All other water-power works will be termed 'commercial.'"

Reg. L-3. *Priorities.*—Priority of application for a preliminary and final water-power permit shall be established by filing applications as prescribed. "Priority established under an application for final permit shall be lost if the permit is revoked. No other application for a like use, covering in whole or in part the same lands, shall be accepted from the permittee whose priority of application is lost, until the expiration of one year thereafter."

Reg. L-4. *Occupied Lands.*—No final water-power permit shall be issued if the works to be constructed thereunder will in any way physically interfere with the works operated or constructed or to be constructed under a final water-power permit. Nor will a final water-power permit be issued for the construction of works within an area covered by a prior preliminary permit until after the filing

2 See Use Book, Water Power, 1911, pp. 8-33.

of final application or the loss of priority by the prior preliminary permittee.[3]

Reg. L-5. *Privileges granted.*—"The occupancy and use of National Forest land is the sole privilege granted under a water-power permit. In the issuance of such permits no attempt will be made to adjudicate water rights, since water rights are acquired under State laws and adjudicated by the courts. Therefore, no protests against the granting of an application, if based upon alleged lack of water rights, will be considered; nor, in general, will any allegation that the time of beginning or completion of construction has been or is delayed by litigation over water rights be accepted as a sufficient reason for granting any extensions of time."

Reg. L-6. *Termination of permit.*—Unless sooner revoked by the Secretary of Agriculture a final water-power permit shall terminate at the expiration of fifty years from the date of the permit and may then be deemed to be an application by the permittee for a new permit to occupy and use such lands as are occupied and used under the original permit. The permittee must notify the Secretary of Agriculture that it desires such a new permit.

Reg. L-7. *Changes under permit.*—"The occupancy and use of lands of the United States within National Forests under a preliminary or final water-power permit, other than non-commercial, shall be conditioned upon the payment of an annual charge, based upon the value for power purposes of such lands, and the measure of said value shall be the net power capacity of the works, as defined in Regulation L-8, and the rates at which the charge shall be calculated shall be for each net electrical horsepower per annum, as follows: 'For the first year, 0.10; for the second year, 0.20; for the third year, 0.30; for the fourth year, 0.40; for the fifth year, 0.50; for the sixth year, 0.60; for the seventh year, 0.70; for the eighth year, 0.80; for the ninth year, 0.90; for the tenth and each succeeding year, 1.00. The above rates per net electrical horsepower per annum.'"

Sale or transfer.—"If the original permittee sells or transfers his improvements in accordance with Regulation L-15 and a new permit is issued to the vendee or transferee, the subsequent annual charges shall be at the rates that would have been required under the original permit, and any advance payments made by the original permittee

[3] As amended by Regulation of July 7, 1911.

may be applied *pro tanto* on the new permit. If all or any part of the amounts due for charges as required in the preliminary permit shall, after due notice has been given, be in arrears for sixty days, then and thereupon the preliminary permit shall terminate and be void. If all or any part of the amounts due for charges as required in the final permit shall, after due notice has been given, be in arrears for six months, then and thereupon the final permit shall terminate and be void."

Reg. L-8. *Definition.*—In this regulation the term "gross power capacity" is defined to mean the power capacity of the entire works to be constructed and the term "net power capacity" upon which the charges are based shall be determined by making certain deductions as therein prescribed.

Reg. L-9. *Applications.*—This regulation provides for the form and procedure in filing applications for preliminary permits.

Reg. L-10. *Applications.*—This regulation provides for the form and procedure in filing applications for final permits.

The regulations also provide that before a water permit for noncommercial or commercial works shall be issued that the permittee shall execute a stipulation as required by the regulations. During the progress of construction amendments to maps of location or plans of structures will be required from the permittee, if there is a physical interference with the use of lands granted by existing permits or pending application. An extension of the periods stipulated by the permittee for beginning construction may upon certain terms be extended.[4]

§ 963. Permissive use of rights of way over reservations and public parks—Text of Act of February 15, 1901.—By the Act of February 15, 1901, entitled, "An Act relating to rights of way through certain parks, reservations, and other public lands,"[1] *a permissive right* may be acquired to the use of rights of way through certain parks named in the Act, reservations, and other public lands for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other

[4] See, also, the instructions to the forest officers upon the granting of preliminary and permanent permits, the Use Book, Water Power, 1911, pp. 61-80.

[1] 6 Fed. Stat. Ann., 1905, p. 513; 2 U. S. Comp. Stat., 1901, p. 1584; 31 Stat. L. 790.

water conduits, and for water plants, dams, and reservoirs used to promote irrigation and other purposes. The full text of the Act is as follows:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying the water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits, or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successors in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." [2]

[2] For the construction of the Act of February 15, 1901, see Sec. 964.

§ 964. Permissive use of rights of way over reservations and public parks—Construction of Act of February 15, 1901.—By the Act of February 15, 1901,[1] it was provided that the Secretary of the Interior was authorized [2] and empowered, under general regulations to be fixed by him, *to permit the use of* rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for, among other purposes, electrical plants, poles, and lines for the generation and distribution of electrical power, and for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses, to the extent of the ground occupied by such canals, ditches, or other works, and not to exceed fifty feet on each side of the marginal limits thereof, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permit shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest:[3] *Provided, further,* That any permission by the Secretary of the Interior under the provisions

1 6 Fed. Stat. Ann., 1905, p. 513; 2 U. S. Comp. Stat., 1901, p. 1584; 31 Stat. L. 790.

For full text of Act, see Sec. 963. See, also, Sec. 965.

2 The jurisdiction under this Act was afterward transferred to the Secretary of Agriculture as to National Forest reservations, under the Act of Feb. 1, 1905; 10 Fed. Stat. Ann., 1905, p. 404; Supp. U. S. Comp. Stat., 1905, p. 343; 33 Stat. L. 628.

See previous section, No. 955.

3 The term "public interest" contemplates not merely the public interest in the Yosemite National Park for use as a park only, but the broader public interest which requires such reservoir sites to be utilized for the highest good to the greatest number of people. And under the provisions of the Act, the Secretary of the Interior is authorized to permit the utilization of reservoir sites in the park in connection with the municipal water supply system for the City of San Francisco. City of San Francisco, 36 Land Dec. 409.

But the right will not be permitted if incompatible with public interest. Op. Atty. Gen., 33 Land Dec. 389.

See, also, 33 Land Dec. 563; Inyo Consolidated W. Co., 37 Land Dec. 78; Northern Cal. Power Co., 37 Land

of the Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.[4]

As to the nature of the right, it is to be specially noted that this Act does not make a grant in the nature of permanent easement running with the land, as is the case under the Acts of 1891,[5] and Section 4 of the Act of February 1, 1905,[6] but it authorizes a mere permission in the nature of a license, revocable at any time, and it gives no right whatever to take from the public lands, reservations, or parks, adjacent to the right of way, any material for the purpose of construction.[7]

As to the rights granted under the Act, through the National forests only, by Section 1 of the Act of February 1, 1905,[8] discussed in our previous section,[9] the occupation or use under the Act being but temporary, and in no way affecting the fee or clouding the title of the United States, the absolute jurisdiction was transferred from that of the Secretary of the Interior to that of the Secretary of Agriculture. Therefore, when it is desired to obtain permission over lands wholly within a National forest reserve, an application should be prepared in accordance with the instructions issued by the Department of Agriculture, and the same filed with the officer in charge of such National forest.[10] In case the application involves rights and privileges upon public lands partly within and partly

Dec. 80; Kern River Co., 38 Land Dec. 302; Anderson v. Spencer, 38 Land Dec. 338.

4 The exclusive occupation or use of a canyon or defile will not be permitted under the approval of the department of a right of way under the Act; but the expense incident to any change or readjustment enabling use by a subsequent applicant must be borne by him, and the approval of the subsequent application will be so conditioned. Nevada etc. Co. v. Owens River etc. Co., 35 Land Dec. 637.

5 See Secs. 937-950.

See, also, Regulations, 36 Land Dec. 583.

6 See Secs. 955-958.

7 See United States v. Lee, 15 N. M. 382, 110 Pac. Rep. 607, where it is said: "The Act, while using the term 'public land,' applies it to lands subject to use for parks, reservations, and other purposes by the act of the United States necessitating the granting of a permit or license only for right of way purposes," and holding that the Act did not apply to other public lands.

8 10 Fed. Stat. Ann., 1906, p. 404; Supp. U. S. Comp. Stat., 1905, p. 343; Chap. 288, 33 Stat. L. 628, Sec. 1.

9 See Sec. 963.

10 See current Use Book of the Forest Service; Op. Atty. Gen., 33 Land Dec. 389, 33 Land Dec. 563.

See, also, for regulations, 36 Land Dec. 579-581.

without a National forest, separate applications must be prepared, and the one affecting the lands within the forest reserve filed with the forest officer in charge and the other filed in the local land office.

Where the application is for a right over lands outside of National forest reserves, it comes wholly within the jurisdiction of the Secretary of the Interior, and if it is over a National park, a military, Indian, or other reservation, it is subject to the approval of the chief officer of the department under whose supervision such park or reservation comes.

The application must be in the general form prescribed for applications under the Act of March 3, 1901, and discussed in previous sections. It must be accompanied with proof of citizenship of the applicant or applicants, and the applicant must set forth in an affidavit the purpose for which the right of way is to be used. Buildings proposed to be erected must be platted in the main drawing and in a separate drawing. Whenever a right of way is applied for through any of the National parks designated in the Act, the applicant must show to the satisfaction of the department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated, and will not result in damage or injury to the natural conditions of property or scenery existing therein.[11] The applicant must also make a *prima facie* showing of his right to appropriate water to be used in connection with the right of way; but it is not within the province of the department to determine the validity of such appropriation, but this is left to the laws of the respective States and for their courts to determine.[12]

Applications for right of way under this Act, all of which is located upon land within an Indian reservation, must be filed with the Commissioner of Indian Affairs. Applications for right of way affecting lands within and without Indian reservations must be filed with the local land office for forwarding to the Commissioner of the General Land Office. Before such applications are transmitted to the department they will be submitted by the Commissioner of the General Land Office to the Commissioner of Indian Affairs for such

11 Op. Atty. Gen., 33 Land Dec. 389; 33 Land Dec. 563.

But see City of San Francisco, 36 Land Dec. 409.

12 Kings River Pr. Co. v. Knight, 32 Land Dec. 144.

action and recommendation as that officer may deem proper. The notations upon the plats and the procedure in this respect are the same as those discussed under the Act of February 1, 1905.[13] All applications for permission to use rights of way for the purposes specified in the Act must be submitted under the regulations promulgated thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation, as contemplated by Sections 18 to 21 of the Act of March 3, 1891, and Section 2 of the Act of May 11, 1898,[14] the application must be submitted in accordance with the regulations issued under said Acts.[15] Application for permission to use the desired right of way, through the lands designated in the Act of February 15, 1901, must be filed and permission be granted, before any rights can be claimed thereunder.[16]

§ 965. Grants for fifty years upon public lands, National Forests, and reserves—Act of March 4, 1911, for the transmission and distribution of electrical power.—By the Act of March 4, 1911,[1] Congress provided as follows: "That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, National forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any National park, National forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation

13 See Secs. 955-957.

14 See Secs. 937-950; Regulations, 36 Land Dec. 580.

15 Regulations, 36 Land Dec. 567-575, 584-586. These are the regulations last issued by the department, but, as they are subject to change, the last issued should be consulted.

16 Op. Atty. Gen., 32 Land Dec. 597.

1 Public, No. 478. For a copy of the Act, see, also, 40 Land Dec. 30; 36 Stat. L. 1253.

falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for non-use for a period of two years or for abandonment.

"That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute." As construed by the Secretary of the Interior, on April 14, 1911,[2] the Act as closely as possible, in the accomplishment of its purpose, follows the language of the Act of February 15, 1901, discussed in the preceding sections,[3] which Act authorizes mere revocable permits or licenses for such lines and other purposes. It is held that the Act of March 4, 1911, merely authorizes additional or larger grants and does not modify or repeal the Act of February 15, 1901, and should be construed and applied in harmony with it. And the Secretary of the Interior also ordered that the regulations issued under the Act of February 15, 1901, in so far as they are applicable, shall control in the presentation, consideration, and the granting of applications for easements under the Act of March 4, 1911.[4]

§ 966. Reservoirs for watering stock—Act of January 13, 1897.—By the Act of January 13, 1897,[1] it was provided that any person, live-stock company, or transportation company engaged in the breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral, or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding 160 acres, so long as such reservoir is maintained for such purpose: *Provided,*

[2] 40 Land Dec. 30.

[3] See Secs. 963, 964.

[4] For the regulations under the Act of February 15, 1901, see Secs. 963, 964.

[1] 6 Fed. Stat. Ann., 1905, p. 511; 2 U. S. Comp. Stat., 1901, p. 1574; Chap. 11, 29 Stat. L. 484.

That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

Two years are allowed after the filing of the declaratory statement provided for in the Act to complete the reservoir, otherwise the statement will be subject to cancellation. If completed within the time specified, and it has been approved by the Secretary of the Interior, thereafter such land shall be reserved from sale so long as such reservoir is kept in repair and water kept therein. Although the title of the Act indicates that the lands are to be sold for reservoir sites, the Act itself does not provide for any sale of any lands, and therefore no lands can be sold under its provisions. The Act, however, directs the Secretary to reserve the lands from sale after the approval of the map showing the location of the reservoir.

When the applicant is a corporation there must be filed a copy of its articles of incorporation and proofs of its organization as required by the regulations.[2] The declaratory statement must be made under oath and also in accordance with the forms prescribed by the department.[3] The location of the reservoir must be described by the smallest legal subdivisions, its area in acres, its capacity in gallons, and the source from which the water is to be obtained for such reservoir, and whether there are any streams or springs within two miles of the land sought to be reserved; and if so, where. After the construction of the reservoir the applicant shall have the same accurately surveyed and mapped, and the map and field notes must be filed in the proper local land office, where the proper notations must be made by the local officers and the papers then forwarded by them to the General Land Office for approval. After the same have been approved, in order that the reservation be continued, it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir is required during the month of January of each year to file in the local land office an affidavit to the effect that the reservoir has been kept in repair during the preceding year, and that the provisions of the Act have been complied with. Upon failure to file such affidavit, steps will be taken to revoke the reservation.[4]

[2] Regulations, 36 Land Dec. 577.

[3] Regulations, *supra*.

[4] The above is abstracted from the last regulations, 36 Land Dec. 576. The applicant should always consult the last regulations issued.

The Act of June 13, 1897, providing for the use of public lands for

§ 967. Over National Forests—Divided jurisdiction between Secretaries of the Interior and Agriculture.—By the Act of February 1, 1905,[1] it was provided: "That the Secretary of the Department of Agriculture shall, from and after the passage of the Act, execute or cause to be executed all laws affecting the public lands hereafter reserved under the provisions" of the Act of March 3, 1891, as provided in Section 24,[2] "and Acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands." This Act has been construed by the Secretary of the Interior, the Secretary of Agriculture, and the Attorney General, that the Department of Agriculture is thereby invested with the jurisdiction to pass upon all applications for the granting of permission to occupy and use lands in a forest reserve which occupation or use is of a temporary character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserve be discontinued; but that the Department of the Interior retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land.[3] Therefore, as rights of way acquired under the Act of 1891, constitute easements running with the land, and settlers and others can only acquire a title to the land, subject thereto, the jurisdiction over this class of rights of way comes clearly within the powers of the Secretary of the Interior. However, whenever a right of way is granted through a National forest, the applicant must enter into such a stipulation and execute such a bond, as the Forest Service may require for the protection of such National Forest.[4]

construction of reservoirs for watering stock, contemplates the reservation of only so much land as may be necessary for the practical purposes for which the reservoir is established; and the Secretary of the Interior has the power at any time to reform the reservation and restore to settlement and entry all lands not necessary for the free use and enjoyment of the rights contemplated by the Act. Marsh v. Rambousek, 40 Land Dec. 559.

1 10 Fed. Stat. 1906, p. 404; U. S. Comp. Stat. Supp., 1905, p. 343; Chap. 288, 33 Stat. L. 628.

See, also, Secs. 954-965.

2 For text of Section 24 of the Act of March 3, 1891, relative to the reservation of forest lands, see Sec. 954.

3 For jurisdiction of rights of way over forest reserves, see 33 Land Dec. 609; Instructions, 34 Land Dec. 64.

4 Regulations, 36 Land Dec. 569; Regulations, 34 Land Dec. 583.

It therefore follows that, as the rights of way granted under the Act of March 3, 1891, discussed in our previous sections,[5] and those granted under the Act of February 1, 1905, also discussed,[6] constituting permanent easements running with the land, come under the sole jurisdiction of the Secretary of the Interior. And, upon the other hand, the Secretary of Agriculture is invested with the jurisdiction of all rights, which are merely permissive in character, under any law of the United States, to occupy and use lands in National forest reserves, where the occupation and use is temporary, and will in nowise affect the fee or cloud the title of the United States should the forest reserve be discontinued.[7]

As was said in a recent case decided by the Secretary of the Interior:[8] "The terms of this Act clearly contemplate that within forest reserves[9] those laws affecting the surveying, entering, and patenting of lands shall continue as theretofore to be executed by and under the supervision of the Interior Department; and also all such laws as affect prospecting, locating, and appropriating any such lands. Here is an express Congressional declaration reserving to the Land Department the execution and enforcement of those laws governing the latter class of Acts in the same terms and with no element of distinction as are employed with reference to the former, the departmental jurisdiction over which no one will question. The legislative announcement recognized the right, authority, power, and jurisdiction as already existent and vested, and declares that such power and authority shall remain where now seated, viz.: with the Interior Department."[10]

See, also, Use Book, Forest Service, 1907, pp. 53, 54.

5 See Secs. 937-950.

6 See Secs. 955-958.

7 See Regulations, 36 Land Dec. 569, 581, 34 Land Dec. 583, 33 Land Dec. 609, 34 Land Dec. 64.

8 H. H. Yard, 38 Land Dec. 59.

9 Now National Forests.

10 The approval of the Secretary of Agriculture of an application for a right of way under the Acts of March 3, 1891, and May 11, 1898, for a reservoir site within a forest reserve does not pass title to the land covered thereby, but is merely advisory to the Secretary of the Interior, and is subject to his paramount jurisdiction under said Acts. The exercise of jurisdiction of the Secretary of the Interior over applications for rights of way within reservations of the United States involves the exercise of more than mere legal discretion, and he should look beyond the mere technical sufficiency of the application and in broad view subserve the interests of the whole people. California-Nevada Canal, Water & Power Co., 40 Land Dec. 380.

§ 968. **General jurisdiction of the respective departments.**—The general jurisdiction of the Federal Land Department over the matters relating to the acquisition of rights of way over the public lands is almost absolute. The officers of the Land Department are specially designated by law to receive, consider, pass upon proofs presented, and to allow or to disallow the applications. The courts will not review the decisions of the Land Department on any question of evidence, nor as to the method of the officers thereof in arriving at their conclusions. The findings of such officers and conclusions as to matters of fact are conclusive, and if such officers err in that respect the remedy is by appeal from one officer to another to the head of the department or the Secretary of the Interior.[1] It is only when such officers err in the construction of the law applicable to the facts in any particular case or if their decision is brought about by fraud or collusion that their findings may be reviewed and annulled by the court having the jurisdiction in a proper case. As was said in a recent Colorado case:[2] "The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to the matters here involved. If they err in the construction of the law applicable to the facts of the case, or if their decision is brought about by fraud, their findings may be reviewed and annulled by the courts, in a proper case, but their findings and conclusions as to matters of fact are conclusive, and if they err in that respect, the remedy is by appeal from one officer to another of the department. . . . The courts will not review the decisions of the Land Department on questions of evidence, nor as to the method of the officers thereof in arriving at their conclusions. Unless the facts, and all the facts, together with the findings upon such facts, are disclosed, or enough undisputed facts are presented, which were proven before the Department to clearly establish that an error of law was committed, and that the party complaining was thereby deprived of his substantial rights, courts can not hold that the law was misconstrued by the officers of the department."[3] And the

1 Durango etc. Co. v. Evans, 80 Fed. Rep. 425, 25 C. C. A. 523; O'Reilly v. Noxon, 49 Colo. 362, 113 Pac. Rep. 486.

2 O'Reilly v. Noxon, 49 Colo. 362, 113 Pac. Rep. 486.

3 Citing Moore v. Robins, 96 U. S. 530, 24 L. Ed. 848; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; Durango etc. Co. v. Evans, 80 Fed Rep. 425, 25 C. C. A. 523.

approval of an application is held to have the following effect: "The approval of the company's application was, in effect, the sovereign, saying to all, such company has an apparent right to the premises described, which must be recognized and respected until the sovereign in some proper procedure inquires into its validity. It may be, when the inquiry is made, the apparent right becomes, in reality, no right at all, but, until such inquiry and determination, the apparent right must be respected."[4]

As to the jurisdiction over forest reserves by the Act of February 1, 1905, the Secretary of Agriculture was invested with the same as far as the granting of the right to occupy and use such National forests, which occupation and use is of a temporary character, and which if granted will in nowise affect the fee or cloud the title of the United States, should the National forest be discontinued. It, therefore, follows that the Secretary of Agriculture as to these uses of a temporary character has the power and authority to promulgate all rules and regulations controlling and regulating the use of such forest lands, both as respects special licenses for rights of way, grazing privileges, and the use of the timber growing thereon. In two recent cases decided by the Supreme Court of the United States[5] it was held that the Secretary of Agriculture under the provisions of the Forest Reserve Acts had full authority to make rules and regulations covering National Forests, and that the provisions of the Acts, making a violation of those rules and regulations a criminal offense, was not unconstitutional.[6] Although the decisions rendered relative to the authority of the Secretary of Agriculture to make rules cited regulating and controlling the various

[4] O'Reilly v. Noxon, 49 Colo. 362, 113 Pac. Rep. 486.

[5] United States v. Grimaud, 120 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480; and Light v. United States, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485.

[6] See, also, Dastervignes v. United States, 122 Fed. Rep. 30, 58 C. C. A. 346; affirming *Id.*, 118 Fed. Rep. 199; United States v. Shannon, 151 Fed. Rep. 863; *Id.*, 160 Fed. Rep. 870, 88 C. C. A. 52; United States v. Deguirra, 152 Fed. Rep. 568; United States v. Domingo, 152 Fed. Rep. 566; United States v. Bale, 156 Fed. Rep. 687; United States v. Rizzinelli, 182 Fed. Rep. 675.

It was only some of the lower courts that held such regulations by the Secretary of Agriculture to be invalid. United States v. Blasingame, 116 Fed. Rep. 654; United States v. Matthews, 146 Fed. Rep. 306; Dent v. United States, 8 Ariz. 138, 71 Pac. Rep. 920; reversing 8 Ariz. 413, 76 Pac. Rep. 455.

uses of the National Forests were relative to grazing privileges, by analogy, it may be said that the same power is vested in the Secretary to make rules and regulations relative to permissive rights of way and such rules and regulations must be strictly followed by the applicants, in order to acquire such permissive rights.[7]

§ 969. Proceedings to forfeit right on account of non-performance of conditions under Acts of March 3, 1891, and February 1, 1905.—Where there has been a failure to perform a condition subsequent by the owner of a right of way, which has attached by virtue of the approval of the Secretary, there are two methods of declaring a forfeiture, depending entirely upon the nature of the right granted. Where the right granted is simply permissive, there is no question but that the Secretary has the power to declare a forfeiture without there being any proceeding brought in court for that purpose.

But where the right granted is in the nature of a permanent easement running with the land, as is the case under the rights granted under the Act of March 3, 1891, and of February 1, 1905,[1] no authority exists in the Secretary, or the head of any other department of the Government, to work a forfeiture by a simple declaration of the same; but an action to adjudicate the question as to whether or not the right has been actually forfeited under the law must be brought, after such a decision by the department has been made, in the proper court having jurisdiction over the subject-matter and the parties thereto.

Section 20 of the Right of Way Act of March 3, 1891, among other things, provides that if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights therein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.[2] This requirement is in the nature of a condition subsequent, and the rule undoubtedly is that a failure to comply with such provisions does not operate *ipso facto* to devest the grantee of the title to the right of way for the canal, ditch, or reservoir, and reinvest the United

[7] See National Forest Manual, Special Uses, 1911, pp. 22-25.

[1] See Secs. 937-950, 955-958.

[2] For full text of Sec. 20 of Act of March 3, 1891, see Sec. 937.

States therewith; but that to be effectual, the default of the claimant must be followed with a declaration of forfeiture by some competent authority, and be followed by appropriate judicial proceedings.[3]

The proceedings of this nature as laid down by the regulations of the Department of the Interior are as follows: If upon examination proper grounds are shown for the institution and maintenance of such a suit to declare a forfeiture, the Commissioner of the General Land Office will call upon the grantee of the right of way or his successor in interest, as the same may be, to show cause within ninety days why the proper proceedings shall not be instituted to declare the right of way forfeited. If no satisfactory showing shall be made within the prescribed time, such action will be taken as the circumstances of the case seem to warrant.[4]

It is also held by the Secretary of the Interior that upon the approval by the department of an application for right of way under the Act of March 3, 1891, jurisdiction is lost and the department may not thereafter properly approve of another application which conflicts to a material extent with the approved application. And where an application for a right of way was inadvertently approved during the pendency and without consideration of a conflicting application, under which superior rights are claimed, the department may recommend the institution of a suit to cancel the approval and reacquire jurisdiction for the purpose of determin-

3 "This requirement being in the nature of a condition subsequent, the rule undoubtedly is that failure to comply therewith does not operate *ipso facto* to devest the grantee of the title and re-invest the grantor therewith, but that to be effectual, the default must be followed with a declaration of forfeiture by some competent authority, and, the grant here being of a public nature, such declaration can be made only by an Act of Congress, or by appropriate judicial proceedings." United States v. Whitney, 176 Fed. Rep. 593.

See, also, Kern River Co., 38 Land Dec. 302; Rio Grande etc. Co. v. United States, 215 U. S. 266, 54 L. Ed. 190, 30 Sup. Ct. Rep. 97; United States v. Rickey, 164 Fed. Rep. 496; Baldridge v. Leon Lake Co., 20 Colo. App. 518, 80 Pac. Rep. 477; O'Reilly v. Noxon, 49 Colo. 362, 113 Pac. Rep. 486; Schulenberg v. Harriman, 88 U. S. 21 Wall. 44, 22 L. Ed. 551.

See, also, Rio Grande Dam & Irr. Co. v. United States, 215 U. S. 266, 54 L. Ed. 190, 30 Sup. Ct. Rep. 97, where an injunction against the construction of a reservoir and dam was finally granted, upon the theory that the defendant had, by forfeiture, lost its right to construct the reservoir and dam.

4 Regulations, 34 Land Dec. 358.

See, also, Instructions, October 20, 1910, 39 Land Dec. 309.

ing to which of the rival applicants the right of way should be awarded.[5]

And, further, where the United States is not particularly interested in the matter of having a right of way declared forfeited, the department holds that there is no good reason why interested parties may not themselves institute and maintain such a suit in the name of the United States. It is, therefore, held that interested private parties, upon their proper application to the Department of the Interior and upon the execution of a good and sufficient bond to indemnify the United States against liability, and upon a further application to the Department of Justice for a commission to the applicant's attorney as special United States attorney, authorizing him to represent and defend the interests of the United States in such suit or suits as may be allowed, that actions may be so brought to declare forfeitures. The actions being so brought will then be tried upon their merits and a forfeiture declared of the right of way or not, as the evidence may warrant.[6]

But, as was held in a recent case in Colorado,[7] the approval of an application was in effect the sovereign saying to all, such applicant has an apparent right to the premises described which must be recognized and respected until the sovereign in some proper procedure inquires into its validity. "It may be, when the inquiry is made the apparent right becomes, in reality, no right at all, but, until such inquiry and determination, the apparent right must be respected."

§ 970. **Rights to construct dams over navigable streams.**—There is another subject which we have discussed in another portion of this work, and that is the right which may be acquired to construct dams or other works across and on the navigable streams of the

[5] T. A. Sullivan, 38 Land Dec. 493.

[6] See Regulations, 34 Land Dec. 358; Deseret Irr. Co., 33 Land Dec. 469.

Under the Act of Congress of March 3, 1891, Sec. 20, providing that, if a reservoir is not completed within five years after its location, the rights under the location shall be forfeited to the extent that the same is not completed, such a forfeiture may be declared by the State courts. Baldridge v. Leon Lake D. & R. Co., 20 Colo. App. 518, 80 Pac. Rep. 477.

See, also, Nippel v. Forker, 26 Colo. 74, 56 Pac. Rep. 577, 9 Colo. App. 106, 47 Pac. Rep. 766; *In re* protest of Tillie Gibson, 19 Land Dec. 304.

[7] O'Reilly v. Noxon, 49 Colo. 362, 113 Pac. Rep. 486.

United States and to which but a reference will be made here.[1] Under the Act of June 23, 1910, authority may be granted either by Congress or by an official or officials of the United States, to any person to construct and maintain a dam for water power or other purposes across or in any of the navigable rivers of the United States, but such dam is not to be built or commenced until the plans and specifications of the same and all accessory works, together with the drawing of the proposed construction and a map of the proposed location have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they have actually approved such plans and specifications, and the location of such dam and accessory works. The construction, control, and management of such dams are always under the direct supervision of the officers of the Government named in the Act and a full compliance with all questions of law as prescribed in the Act and the rules and regulations of the officers in charge must be made before any such right is granted. And, furthermore, any person who shall fail to comply with any lawful order of the Secretary of War and the Chief of Engineers made in accordance with provisions of the Act, shall be deemed guilty of a violation of the Act, and any person who shall be guilty of a violation of the Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding $5,000, and every month such person shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor. And the Secretary of War and Chief of Engineers may, upon the refusal of the persons owning or controlling any such dams and accessory works to comply with any lawful order issued by them in regard thereto, cause the removal of such works as obstructions to navigation at the expense of the persons owning or controlling such works.[2]

§ 971. **Over State lands.**—The rights of way for ditches, canals, reservoirs, or other works, to be used in connection with water rights acquired by appropriation of the water for beneficial uses, for the purpose of conducting the water to the place of use, or the

[1] For the protection of Navigation, the Dam Acts of Congress of March 3, 1899, and June 21, 1906, and June 23, 1908, see Secs. 351, 352.

For the Dam Act of Congress of June 23, 1910, see Chap. 360, p. 593, 2d Session, 61st Congress.

[2] See Sec. 351.

storage thereof, are not limited to the lands of the public domain of the United States, which subject we have discussed in the preceding sections of this chapter, but rights of way for these purposes may be acquired over State lands.[1] Of course, where rights of way were acquired over lands while those lands were a part of the public domain of the United States, and afterward the lands were granted to a State by the Government, the State as grantee of the Government takes the lands subject to all rights of way acquired over the lands prior to the date of the grant, or the selection of the land by the State, the same as would an individual.[2] It therefore follows that the subsequent grantee of the State will also take the land subject to the same burden. The statutes of the various States provide for the recognition of these rights, and also in all conveyances of State lands the statutes usually provide for the reservation of such vested rights of way.[3] And not only this, but also the statutes of the most of the Western States provide for the granting, over lands owned by the States, upon certain conditions, either with or without compensation, of rights of way for the purposes of ditches, canals, or reservoirs to be used in connection with the use of water appropriated for irrigation or for other beneficial and useful purposes.[4] And, also, where the right of way is acquired under State statutes, the land is subject to the same servitude in the hands of a transferee that it was in the hands of the original patentee, even if no reservation was made in the deed.[5]

1 For the various methods of acquiring such rights, see the statutes under the various States in Part XIV.

2 Shoemaker v. Hatch, 13 Nev. 261, where it was held that one constructing a ditch across public lands for irrigation and mining purposes under an Act of Congress authorizing the same is not liable for damages for the digging of such ditch to one coming into possession of the lands subsequently thereto, where, although an application by a State was made previous to the construction of the ditch, the land was not selected by the State until after its construction, and the grant to the State relates back only to the date of the selection.

See, also, Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130.

3 See the statutes of the various States, Part XIV.

4 See the statutes of the various states, Part XIV; Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101.

5 Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

In a recent case in Texas[6] it was held that the legislature, to facilitate the sale of school lands and to enhance their value, may grant an easement on the lands for dam and reservoir sites to impound water for irrigation, such power being inherent in the sovereign Government and growing out of necessities of the case.

The various States of the West have also passed statutes granting rights of way for ditches, canals, etc., over State lands, constructed by the authority of the United States, especially for those constructed under the authority of the National Reclamation Act.[7]

[6] Imperial Irr. Co. v. Jayne, —— Tex. ——, 138 S. W. Rep. 575.

[7] For National Reclamation Act, see Chap. 65, Secs. 1235-1286.

For the statutes of the various States, see Part XIV.

CHAPTER 52.

RIGHTS OF WAY OVER PRIVATE LANDS.

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§ 993. Ditches and canals—Duty to keep works in repair.

§ 972. Scope of chapter.—In this chapter we will discuss the rights of way over private lands and how they may be acquired by contract. Also the right to enjoy the easement so acquired and the construction and care of the works thereon. The right to acquire rights of way over private lands by adverse possession amounting to prescription will be discussed in a subsequent chapter.[1] We will also discuss the right to acquire rights of way under the power of eminent domain in a separate chapter relating to that subject.[2]

[1] For prescriptive rights, see Chap. 54, Secs. 1033-1058.

[2] For rights by eminent domain, see Chap. 55, Secs. 1059-1098.

§ 973. Right of way defined—Nature of right of way.—As well defined by the Oregon Court in a recent case:[1] "A right of way is an easement of perpetual use, a charge or burden upon the land of one for the benefit of another."

It has been frequently held by the Court that a right of way for a ditch or canal over the lands of another is an easement, and should be treated in all respects in accordance with the law of easements.[2] No fee to the land is granted unless it is particularly specified in the deed of conveyance.[3]

§ 974. Early cases upon the subject—Yunker v. Nichols.—As we have seen in our chapter upon the history of the Arid Region Doctrine of appropriation, the State of Colorado was one of the first to abrogate the common law of riparian rights. This State did this upon the ground of the absolute necessities of the case, and upon the further ground that the common law of riparian rights was not fitted for the physical conditions existing in the State of Colorado. And in this connection the early decisions of the Colorado Court went to a greater extreme than is allowed under present law and the constitutions of the various States, and that of the United States, in holding that in Colorado lands are held in subordination to the dominant rights of appropriators, who must necessarily pass over them to obtain a supply of water to irrigate their

1 Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584; rehearing denied, 110 Pac. Rep. 1092.

2 That the ditch or canal itself is not an easement, but land, see Sec. 833.

That a right of way for ditch or canal is an easement, see Sec. 834.

See, also, Shaw v. Profit, *supra;* Smith v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. Rep. 922; Mesnager v. Engelhardt, 108 Cal. 68, 41 Pac. Rep. 20; Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124; Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422; Dixon v. Schermier, 110 Cal. 582, 42 Pac. Rep. 1091; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Campbell v. West, 44 Cal. 646, 1 Morr. Min. Rep. 218; Quinlan v. Noble, 75 Cal. 250, 17 Pac. Rep. 69; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93; Anaheim v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. Rep. 69; North Fork etc. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39.

3 See Sec. 834.

own lands, and that such rights could be acquired without condemnation proceedings, and in this holding the case of Yunker v. Nichols,[1] was the leading case.[2] But the rule as laid down in this case was shortly after limited in its effect.[3] And after the adoption of the State constitution the rule was entirely changed, and it was then held that the acquiring of right of way over another man's property for ditches and canals could only be done by virtue of the right of eminent domain on condemnation proceedings.[4] And it may be now said that it is the general law upon the subject that no one can acquire a right of way over the lands of another for ditches and canals against his will, except it be by virtue of the right of eminent domain, prescription, or some other method known to law.[5] And it is well settled that such a right can not be acquired by mere trespass.[6]

§ 975. Right of the land owner to protection from trespass.—Rights of way for ditches, canals, or other works, to be used in connection with a water right appropriated for any beneficial purpose, may also be acquired over private lands. But when lands

1 1 Colo. 551, 8 Morr. Min. Rep. 64.

2 See, also, Schilling v. Rominger, 4 Colo. 100; Brannagan v. Dulaney, 8 Colo. 413, 8 Pac. Rep. 669.

3 See Chrisman v. Heiderer, 5 Colo. 589, in which it was said: "The appropriation of the water at the point named carried with it an implied authority to do all that should become necessary to secure the benefit of the appropriation; to this extent the appropriator acquired an easement in the adjoining lands; but the right thus acquired is one which is held to the narrowest limits compatible with the enjoyment of the principal easement, which is the right to the use of the water. The most reasonable mode of effecting the object must be adopted, and it must be done in such a manner as to occasion as little damage as possible to the owner of the adjoining premises. The necessity of obtaining water to run the mill did not justify the appellant in arbitrarily adopting a method which was calculated to greatly damage the property of others; it has been well said that the necessity of one man's business is not to be made the standard of another man's rights; the great maxim of the law, '*sic utero tuo ut alienum non laedas*,' applies with as much force to the enjoyment of water rights as to rights of any other description."

4 See Stewart v. Stevens, 10 Colo. 445, 15 Pac. Rep. 786.

See, also, United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Snyder v. Colorado etc. Co., 181 Fed. Rep. 62, 104 C. C. A. 136.

5 That the rights of the land owner are protected, see the next section.

6 See next section, No. 975.

have once passed into private ownership, no other person has the right to construct a ditch or canal across them without the owner's consent, unless the right is acquired under the power of eminent domain, or in some other way known to law.[1]

This rule also holds good even where the one in lawful possession of the land has no legal title to the same. He has a legal right to prevent an unlawful entry by any degree of force necessary short of taking human life.[2] Therefore, no easement can be acquired over the lands of others by a mere trespass,[3] unless the trespass

1 For eminent domain, see Secs. 1059-1098.

Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79, 76 Pac. Rep. 235, where it is held that such a right can only be enjoyed over the lands of others by procuring a right of way over them.

"The United States and the State of Montana have recognized the right of an individual to acquire the use of water by appropriation; but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings." Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081.

"Plaintiff in error also forgets that it is just as necessary to the creation and preservation of a water right to provide a means for the continual diversion of the water from its natural channel and for conducting it to the point where it is to be applied to the beneficial purpose. And he can not arbitrarily seize and use another's ditch, or interest in a ditch, for that purpose." McRae v. Small, 48 Ore. 139, 85 Pac. Rep. 503, and holding that where a ditch had been thus seized there was no valid appropriation of the water.

See, also, McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773.

One who has not acquired a right of way for an irrigation ditch while the lands were public lands of the United States, and where afterward such lands were entered as a homestead, must make arrangements for such right of way with the entrymen or take proper proceedings according to law to appropriate the land for that purpose. Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650.

For the works necessary for the appropriation of water, see Secs. 717, 718, 824-836.

2 Johnston v. Meagher, 14 Utah 426, 47 Pac. Rep. 861; Bishop, Criminal Law, Secs. 857, 861.

"Mere occupancy of land, however recent, gives the possessor a title against one who can not show a better claim, and is sufficient to enable him to maintain an action against a stranger." 2 Watson, Trespass, p. 246.

Look v. Norton, 55 Me. 103; Kilborn v. Rewee, 8 Gray (Mass.) 415.

A trespasser can not acquire the right. Smith v. Denniff, 24 Mont. 22, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

See, also, Alta Land Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

3 Crescent M. Co. v. Silver King M. Co., 17 Utah 144, 54 Pac. Rep. 244, 70

shall have continued for such a period that the right has been acquired by prescription.[4] A permit from the State engineer or from the Secretary of the Interior after the lands have passed into private hands gives no right as against the owner.[5]

It is, therefore, now held in all jurisdictions that rights of way can not be acquired by a mere trespass as against the rights of the owner of the land. As was said by the Supreme Court of the United States in a recent case:[6] "A final objection urged is that the plaintiff's land is taken without compensation. It would seem that this is merely technical in this case. There does not appear to have been any discussion of the point below, and it is probable that the water is the only thing that has substantial value or really is cared for. But the plaintiff is authorized to have his damages assessed, if he desires, by Chapter 55, Section 4,[7] as we have mentioned. We think that it would be unjust to disturb the decree on

Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; but where it was held that under the circumstances of the case, the remedy at law being complete, the plaintiff would be required to resort to such remedy for the recovery of damages for the alleged trespass, and that an injunction would not be granted under the circumstances.

See, also, Hoye v. Sweetman, 19 Nev. 376, 12 Pac. Rep. 504; Thorn v. Sweeney, 12 Nev. 251; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

See, also, cases cited *supra*.

The fact that a party has located a water right in accordance with law does not give him any right to build ditches and canals across the lands of others until he has acquired the easement and right of way therefor either by purchase or condemnation. Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. Rep. 612.

[4] For easements by prescription, see Sec. 1044.

[5] Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567, in which it was said: "It would be doing violence to the Act of 1907 to hold that the territorial engineer was empowered by it to authorize another applicant to go upon lands held in private ownership, construct ditches and appropriate seepage water or waters from snows, rain, or springs, not traceable to or forming a stream or water course, or from constructed works, as the limitations contained in Secs. 1 and 53, defining the waters over which the engineer has been given jurisdiction plainly indicate."

See, also, Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; Marshall v. Niagara Orch. Co., — Idaho —, 125 Pac. Rep. 208, decided June 8, 1912.

[6] Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; *Id.*, 11 Ariz. 128, 89 Pac. Rep. 504.

[7] Now Rev. Stat., Sec. 3202.

this ground, although in other circumstances the objection might be grave."[8]

Under this rule the inchoate rights of settlers to their lands either entered according to some law of Congress or settled upon and held in their lawful possession, are protected from trespass by others for the purpose of constructing ditches and canals over the lands.[9] Also under the same rule the right of miners to protect the lands covered by their valid locations is enforced.[10] Also when the lands have become the private property of a railway company, under a Congressional grant, or otherwise, it is entitled to the same protection from the encroachment of parties constructing ditches and canals over them without the consent of the railroad company.[11]

[8] See, also, Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79; Stewart v. Stevens, 10 Colo. 445, 15 Pac. Rep. 786; Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766; affirmed in 26 Colo. 74, 56 Pac. Rep. 577; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Baldridge v. Leon Lake etc. Co., 20 Colo. 518, 80 Pac. Rep. 477; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 405, 102 Pac. Rep. 168; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Prentice v. McKay, 38 Mont. 144, 98 Pac. Rep. 1081; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567; Castle Rock Irr. Co., v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690; Toyaho etc. Co. v. Hutchins, 21 Tex. App. 274, 52 S. W. Rep. 101; Willow Creek Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Wiedensteiner v. Malley, 55 Wash. 79, 104 Pac. Rep. 143; Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978; Rasmussen v. Blust, 83 Neb. 678, 120 N. W. Rep. 184; *Id.*, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650.

See, also, the cases cited throughout this chapter upon the various phases of this question.

[9] For the inception of rights of settlers, see Secs. 445, 755, 807.

[10] Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Noteware v. Stevens, 1 Mont. 311, 4 Morr. Min. Rep. 650; Oliver v. Agasse, 132 Cal. 297, 64 Pac. Rep. 401; Miocene etc. Co. v. Jacobson, 2 Alaska 573.

[11] Bybee v. Oregon etc. Co., 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641; affirming 26 Fed. Rep. 586.

But a purchaser of land from a railroad company, with notice that another had constructed an irrigation ditch thereon, supposing it to be on the public domain, and was claiming a right of way therefor over the land, it having been constructed before the land was surveyed and then found to belong to the railroad company, acquired no title to such ditch, and he takes the land subject to the right of way for the same. Childs v. Sharai, 8 Idaho 378, 69 Pac. Rep. 111.

A ditch and water right are, however, separate and distinct properties, and, therefore, the granting of a right of way for a ditch does not necessarily convey therewith a water right.[12] And, again, the ownership of a water right does not necessarily imply that the ownership of the ditch through which the water flows is vested in the same person. The ownership of the ditch and the ownership of the water right, to flow through such ditch, may exist in different parties.[13] Outside of the right of exercising the power of eminent domain there are two methods by which rights of way may be acquired over private lands, and these are: First, by grant or contract; and, second, by prescription, which, of course, presupposes a grant. In the following sections we will discuss these subjects in the order named.[14]

§ 976. Contracts not limited.—As in the case of contracts for the use of water,[1] it may be said that there is almost no limitation within the range of the law upon contracts which may not be taken advantage of in relation to rights of way for ditches and canals or other works over the lands of others. The general law of contracts also applies to this subject. Valid contracts may be made by a land owner and another granting rights of way by the first to

So, too, a patentee under the homestead laws of the United States of land included in a railroad grant, but which had been forfeited and had reverted to the Government, takes the land subject to a pre-existing right of way for a ditch or canal, although the ditch had been constructed before the title had reinvested in the Government. San Jose Land etc. Co. v. San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 487; affirming 129 Cal. 673, 62 Pac. Rep. 269.

That the servitude can not be increased to the injury of the patentee, see changes which may be made, Chap. 48, Secs. 856-873.

See, also, Oliver v. Agasse, 132 Cal. 297, 64 Pac. Rep. 401; Jatunn v. O'Brien, 89 Cal. 57, 26 Pac. Rep. 635.

12 Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623.

See, also, for the sale of ditches and canals, Secs. 1003, 1004, 1017.

That they are separate and distinct rights, see Secs. 764-767.

13 Swank v. Sweetwater Irr. & Pr. Co., 15 Idaho 583, 98 Pac. Rep. 297; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891; Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045; Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304.

See, also, Secs. 764-767.

14 For rights of way by contract, see Secs. 976-985.

For rights of way by prescription, see Secs. 1044-1046.

1 For contracts for the use of water, see Secs. 917-926.

the latter. Upon the other hand, the land owner may sell his land and reserve in the deed of conveyance a right of way over the same for a ditch or canal, or a right to run water appropriated by him through a ditch or canal already constructed upon the land. But in such a reservation the purpose should be specified for which the right of way is so reserved. It is held that a reservation of a "mere right of way" does not include the right to dig ditches or canals for the conducting of water over the land, since such appropriation contemplates only a right of ingress and egress to and from the land conveyed.[2]

A sale of a ditch may carry with it a water right as an appurtenance to the same, unless the water right should be specifically reserved.[3] Again, a ditch and a water right may be sold separate and apart from each other.[4] A ditch or canal may be mortgaged and the mortgage foreclosed;[5] it may be levied upon by and sold under an execution;[6] it is also subject to mechanics' liens, which may be foreclosed in accordance with the law and property sold thereunder.[7]

§ 977. When the granting of right of way by an entryman before patent is not in violation of the Federal statutes.—Section 2290 of the Revised Statutes of the United States, as amended by the Act of March 3, 1891,[1] provides that any entryman of land for homestead, pre-emption, etc., must make and file before the proper land office an affidavit that he or she "has not directly or indirectly made, and will not make, any agreement or contract in

[2] San Rafael Ranch Co. v. Ralph Rogers Co., 154 Cal. 76, 96 Pac. Rep. 1092.

[3] Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95; Zimmler v. San Luis etc. Co., 57 Cal. 221.

[4] Miller v. Vaughn, 8 Ore. 333.

[5] For mortgage and foreclosure of the same on ditches and canals, see Secs. 1019, 1020.

See, also, Mitchell v. Amador etc. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246.

[6] Gleason v. Hill, 65 Cal. 17, 2 Pac. Rep. 413.

[7] For foreclosure of mechanics' liens, see Secs. 1021, 1022.

See, also, Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; aff'g *Id.*, 9 Utah, 350, 34 Pac. Rep. 368; Creer v. Cache Valley etc. Co., 4 Idaho 280, 38 Pac. Rep. 653, 95 Am. St. Rep. 63; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6.

[1] 6 Fed. Stat. Ann. 1905, p. 290; 2 U. S. Comp. Stat. 1901, p. 1389; 26 Stat. L. 1098.

any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself or herself," etc.

The following section, 2291, as amended by the Act of March 3, 1877, also provides that the entryman, upon application for patent, must make an "affidavit that no part of such land has been alienated, except as provided in Section 2288."

Section 2288 of the Revised Statutes, as amended by Act of March 3, 1891,[2] provides as follows: "Any *bona fide* settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

By the last section above it is specifically provided that transfers may be made by a settler before patent for rights of way for canals, reservoirs, ditches for irrigation, or drainage across it, and such a transfer is an exception of the rule laid down in the previous section above cited.

It was held in a recent Washington case[3] that the granting of an easement by a homesteader before patent was not an alienation of the land contrary to the statutes of the United States. And the Court said: "In any event, the permission to cross respondent's lands without cost, other than the use of water, was in no sense an alienation of land, and hence not within the purview of Section 2288, Revised Statutes,[4] which furnishes the basis for the rule announced in the Railsback case, since the ownership of the ditch includes no ownership of the soil, nor of any fee in the land, but consists only of a right of way over the land."[5] In the Railsback case referred to in the above opinion, and decided by the same

2 6 Fed. Stat. Ann. 1905, p. 516; 2 U. S. Comp. Stat. 1901, p. 1385; 26 Stat. L. 1097.

3 Methow Cattle Co. v. Williams, 64 Wash. 457, 117 Pac. Rep. 239.

4 U. S. Comp. Stat. 1901, p. 1385.

5 See, also, Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826; Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; Lobdell v. Hall, 3 Nev. 507, where the court held that, although an Indian

Court in an earlier decision,[6] construing United States Revised Statutes, Sections 2290, 2291, providing that no homesteader, before final proof, shall alienate any interest in the land homesteaded in connection with Section 2288 of the Revised Statutes, as amended by the Act of March 3, 1891, which provides that a homesteader shall have the right to transfer any portion of his claim for a right of way for canals, reservoirs, or ditches for irrigation or drainage across it, it was held that a transfer by a homesteader before final proof of a right of way across his claim for a water flume to convey the waters of a river from the point of diversion to the place of intended use for power purposes for the generation of electricity was not within Section 2288, for the reason that "the words 'canals, reservoirs, or ditches' are qualified by the words 'for irrigation or drainage across it,' and it was not claimed or pretended that the ditch in question was for either of these purposes." It was, therefore, held that such an agreement was void and not subject to specific performance.

§ 978. Rights of way acquired by contract—Deeds—Statute of frauds.—Rights of way over private lands for the construction and use of ditches, canals, or other works, may be acquired by contract between the one seeking the right and the owner of the land, based, of course, upon the consent of the latter. The right of way being an easement over the land, the general law of contracts applies for securing rights of way for these purposes as applied to the acquisition of rights of way for other purposes.[1] To become a permanent easement the right of way must be acquired by a deed [2]

could not sell land, there was no objection to the sale of a water right owned by an Indian.

6 Cascade Public Service Corporation v. Railsback, 59 Wash. 376, 109 Pac. Rep. 1062.

1 That the right of way is an easement, see Secs. 834.

2 An instrument in the form of a deed, reciting that the grantors grant, bargain, sell, convey, and confirm unto the party of the second part, and to his heirs and assigns, a right of way for a pipe line over, upon, and across certain described lands, to have and to hold unto the party of the second part, his heirs and assigns forever, constitutes a grant of such right of way, and is not a mere license, terminable at will. Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617.

See, also, McCue v. Bellingham Bay W. Co., 5 Wash. 156, 31 Pac. Rep. 461; Spear v. Cook, 8 Ore. 380.

A deed conveying a right of way for a water ditch across certain described lands to carry water for irrigation from a canal through the tract, with

or as the result of an executed contract founded upon a good and sufficient consideration, to entitle the party seeking the right to a specific performance of the contract by the Court, or by operation of law by virtue of prescription.[3] As was held by a recent Oregon case, while ordinarily an easement in land can be created only by a writing under seal, it may be created by adverse user, by estoppel, or by part performance of a parol agreement.[4] A perpetual easement in land for ditches or canals can not be created by parol, with the above exceptions, any more than it can be so created for other purposes by the same method, for the reason that it would be contrary to the statute of frauds, which invalidates the conveyance of any interest in lands, other than agreements for leasing for a short period, without an instrument in writing.[5] This can now be con-

the right of ingress to and egress from the same to maintain and keep the ditch in repair, conveyed an easement only, and not the fee, in the land covered by the ditch. Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139; *Id.*, 104 Pac. Rep. 141.

But see Sweetland v. Grants Pass etc. Co., 46 Ore. 85, 79 Pac. Rep. 337; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349.

Where by condemnation a right of way was granted, it was held that it was merely an easement and not an absolute title. Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

3 "An easement is an interest in land that can not be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription." Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

For easements by prescription, see Secs. 1044, 1045.

For easements by eminent domain, see Secs. 1059-1086.

See, also, Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081.

4 Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584; rehearing denied, 110 Pac. Rep. 1092.

See, also, Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223.

5 The principle, which can not be disregarded, is that, where there is a parol license—for example, to lay a water main across the licensor's lots—a perpetual right can not be maintained, inasmuch as it can not be granted by parol without doing violence to the statute of frauds. Great Falls etc. Co. v. Great Northern R. Co., 21 Mont. 487, 54 Pac. Rep. 963.

See, also, Wood v. Leadbetter, 13 Mees & W. 838, 16 Eng. Ruling Cas. 49, 14 L. J. Exch., N. S., 161; Fabian v. Collins, 3 Mont. 215; New Iberia Rice Mill Co. v. Romero, 105 La. 439, 29 So. Rep. 876, where by a contract a company engaged in furnishing water to rice farmers for irrigation, whereby the right was acquired to conduct the water by means of a canal or ditch through one farm to another, it was held not to impose a real servitude on the land through which the water was conducted.

sidered the settled rule in all jurisdictions that the acquirement of a permanent right of way for ditches and canals over the lands of others by grant of contract comes within the statute of frauds, the same being an interest in real estate, and therefore should be in writing.[6] Such a conveyance, in writing, is binding upon the transferee of either party to the contract.[7] It is good between the parties to the grant and purchasers with notice even if the instrument was not acknowledged or recorded. As was said in a Washington case:[8] "The grant in this case was evidenced by writing, and this Court has held, in common with most courts, that an unacknowledged deed is good as between the parties thereto, and against subsequent purchasers with notice thereof.[9] The written instrument attached to the complaint as an exhibit in this action was, therefore, a valid grant as between the parties, and is equally valid against the respondents, if they purchased with notice of the prior grant to the appellants, as alleged in the complaint."

See, also, Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553.

The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly. Minneapolis W. R. Co. v. Minneapolis etc. Co., 58 Minn. 129, 59 N. W. Rep. 983.

See, also, Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. Rep. 73; Lawrence v. Springer, 49 N. J. Eq. 289, 24 Atl. Rep. 933, 31 Am. St. Rep. 702; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508.

A conversation, by which defendant claimed gave him permission to go on and construct a ditch across plaintiff's land, if conceded to have occurred, is not a legal grant of a right of way, and is not binding upon plaintiff as an estoppel. Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786.

All conveyances of any interest in, and all contracts creating any incumbrance on real estate, shall be by deed. Hathaway v. Yakima Water etc. Co., 14 Wash. 469, 44 Pac. Rep. 896, 53 Am. St. Rep. 874.

6 See cases *supra*.

However, in an early Colorado case, it was held that a right to convey water over the land of another for the purpose of irrigating one's land may be acquired under the then existing statute, and that such a grant did not need a grant from the owner of the servient estate to support it. Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64. But this case was practically overruled in a later case. See Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786.

For power of the legislature to enact statutes granting rights of way, see Sec. 1063.

7 O'Keiffe v. Cunningham, 9 Cal. 581; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508.

8 Little v. Gibb, 57 Wash. 92, 106 Pac. Rep. 491.

9 Citing Matson v. Johnson, 48 Wash. 256, 93 Pac. Rep. 324, 125 Am. St. Rep. 924, and cases cited.

§ 979. The terms of contracts relative to ditches and canals construed.—A deed is valid and grants a right of way, even where the exact boundaries are not described where the ditch or canal is to run; it is sufficient if it describes the tracts of land over which it is to run. As was said in a recent California case:[1] "It is settled law that where an unlocated right of way is granted or reserved, the owner of the servient estate may in the first instance designate a reasonable way, and if he fails to do so, the owner of the dominant estate may designate it."[2] Where the party to whom the right is granted goes upon the land described, selects a strip, and constructs his works over the same, the grant then becomes fixed and certain.[3] Where a location and duration of a right of way are not defined, they may be fixed by use and acquiescence of the parties.[4] But an indefinite easement can not be enlarged or changed, as its limits have been defined by practical construction in the absence of provisions in the grant providing for such change.[5]

1 Ballard v. Titus, 157 Cal. 673, 110 Pac. Rep. 118.

2 Citing Jones on Easements, Sec. 337; Kripp v. Curtis, 71 Cal. 62, 65, 11 Pac. Rep. 879; Blum v. Weston, 102 Cal. 362, 369, 36 Pac. Rep. 778, 41 Am. St. Rep. 188.

3 Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617; McCue v. Bellingham Bay W. Co., 5 Wash. 156, 31 Pac. Rep. 461, where the Court held that when the company went upon the land described in the deed, and cleared and prepared its right of way, its grant became fixed and certain. Kern Island etc. Co. v. City of Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052.

4 Washburn on Easements, Sec. 239; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396.

5 Winslow v. City of Vallejo, 148 Cal. 723, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851, in which it was said: "But we see nothing in the language of this grant, or in the conditions existing when it was executed, to indicate that it was intended to give the defendant the right to increase from time to time the number of pipes laid. The appellant's plea for such construction is based largely on the fact that the conveyance throughout uses the words 'pipes' and 'mains' in the plural number, and that, therefore, the parties could not have intended to limit the city to a single pipe. But while the city might, at the outset, have laid more than one pipe, the most that can be said regarding this language is that the grant is indefinite as to the number of pipes. The city, having elected to lay one, is bound by this election."

See, also, Graham v. Redlands Heights Water Co., 3 Cal. App. 732, 86 Pac. Rep. 989; Tarpey v. Lynch, 155 Cal. 407, 101 Pac. Rep. 10; Colegrove W. Co. v. City of Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13

Such a grant is held to include everything necessary for the full enjoyment of the easement. As was said in a recent Oregon case:[6] "The uses and purposes for which the way is granted included doing any work which may be necessary for maintaining, repairing, and operating the pipe line, which will include the maintenance of a telephone line, if the same is necessary or convenient for the proper or prompt repair, maintenance, or operation of the line, which necessity is very apparent."[7] In general, as was said by the Oregon Court:[8] "Whether a reservation or covenant in a deed shall be construed to create an easement in gross or one appurtenant to the land is a matter to be deduced (1) from the terms of the instrument itself, or (2), if that is ambiguous, then from a consideration of all the circumstances surrounding its execution, always bearing in mind the rule that the court should construe an instrument to convey an easement appurtenant rather than one in gross." And, again, as was said by the same Court:[9] "In determining whether a right granted is appurtenant or in gross, courts must consider the terms of the grant, the nature of the right, and the surrounding circumstances, giving effect, as far as possible, to the legally ascertained intention of the parties, but favoring always the construction of the grant as of an easement appurtenant rather than of a right in gross."

§ 980. Rights acquired by parol executed contract for a consideration.—A permanent easement for a right of way over the lands of others for ditches and canals may be acquired as the result of an executed parol contract, or where it is a written contract but not attaining to the dignity of a deed of conveyance, provided that

L. R. A., N. S., 904; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Rhoades v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93; McCue v. Bellingham Bay W. Co., 5 Wash. 156, 31 Pac. Rep. 461.

See, also, for changes which may be made, Secs. 856-873.

However, after an easement has become fixed and certain, in an action to prevent the interference therewith, the allegations in the complaint must describe and define the easement with sufficient definiteness. Carter v. Wakeman, 42 Ore. 147, 70 Pac. Rep. 393.

6 City of Portland v. Metzger, 58 Ore. 276, 114 Pac. Rep. 106.

7 See, also, for right of repairs, Secs. 992, 993.

8 Tone v. Tillamook City, 58 Ore. 382, 114 Pac. Rep. 938.

9 Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38.

the facts surrounding the contract are sufficient to entitle the party seeking the right to a specific performance of the contract.[1] Under this rule it is sufficient consideration for the contract that the ditch was constructed for the joint benefit of both the owner of the land and the party seeking the right of way, the former giving the use of the land for the right of way and the latter constructing the ditch.

1 "Since part performance of a parol contract respecting land will take it out of the statute of frauds, equity will enforce the rights thus acquired." Schilling v. Rominger, 4 Colo. 100.

See, also, Bloomstein v. Clees, 3 Tenn. Ch. 433, 6 Cent. Law Journal 50.

"The rule is well settled in this State that if a party has paid a consideration therefor, or has been encouraged by any participation in a common enterprise, or induced by definite oral agreement to expend money in making permanent valuable improvements, the parol license upon the faith of which he has acted in executing it can not be revoked to his prejudice." Ewing v. Rhea, 37 Ore. 538, 62 Pac. Rep. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783.

In determining whether a parol grant granting a right of way for a ditch was intended as an easement or a revocable license, the grantor's intent is held in Montana to be the controlling consideration. McDonnell v. Huffine, —— Mont. ——, 120 Pac. Rep. 792.

"When the owner of lands voluntarily consents to the construction of an irrigation ditch across or over the same, the right of the owner of such ditch to maintain and use the same as built is absolute against all persons." Arthur Irr. Co. v. Strayner, 50 Colo. 371, 115 Pac. Rep. 724.

See, also, Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

A parol sale of land and appurtenant water rights for a consideration, and a surrender of possession thereof to the purchaser, create an equitable estate, which a court of equity is bound to protect. Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

See, also, Sprague v. Jessup, 48 Ore. 211, 83 Pac. Rep. 145, 84 Pac. Rep. 802, 4 L. R. A., N. S., 410; Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Baldock v. Atwood, 21 Ore. 73, 26 Pac. Rep. 1058; Schilling v. Rominger, 4 Colo. 100; Hallock v. Suitor, 37 Ore. 9, 60 Pac. Rep. 384; De Graffenried v. Savage, 9 Colo. App. 131, 47 Pac. Rep. 902; Miser v. O'Shea, 37 Ore. 231, 62 Pac. Rep. 491; Chicosa Irr. D. Co. v. El Moro D. Co., 10 Colo. App. 276, 50 Pac. Rep. 731; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Coffman v. Robbins, 8 Ore. 278, 8 Morr. Min. Rep. 131; Huston v. Bybee, 17 Ore. 140, 20 Pac. Rep. 51, 2 L. R. A. 568; Curtis v. Le Grande W. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; McBroom v. Thompson, 25 Ore. 559, 37 Pac. Rep. 57, 42 Am. St. Rep. 806; Garrett v. Bishop, 27 Ore. 349, 41 Pac. Rep. 10; Miller & Lux v. Kern County L. Co., 154 Cal. 785, 99 Pac. Rep. 179; Vannest v. Fleming, 79 Iowa 638, 44 N. W. Rep. 906, 8 L. R. A. 277, 18 Am. St. Rep. 387.

And in cases of this kind the right of the latter can only be lost by abandonment.[2] For the Court to refuse specific performance in cases of this nature would be to sanction fraud, and allow a statute passed for the prevention of frauds to become the means of accomplishing fraud.[3] The equity to a deed is perfect; and when such is the case a court of equity, in accordance with the familiar rule considering that as done which ought to be done, will protect it as readily and as fully as a legal title.[4] A contract of this nature will also bind the successors in interest of the respective parties.[5] But,

2 Patterson v. Mills, 138 Cal. 276, 71 Pac. Rep. 177; Feeney v. Chester, 7 Idaho 342, 63 Pac. Rep. 192, where the Court held upon the subject that, the defendant having paid the consideration by giving the right of way for the ditch through his land, and having received and enjoyed, for some seven or eight years, the use of the ditch and water, it would be inequitable to permit the plaintiff to now deprive him thereof while retaining the benefit of the consideration given by defendant therefor.

See, also, Stowell v. Tucker, 7 Idaho 312, 62 Pac. Rep. 1033, where, in a similar case to the above, the Court said: "The predecessor in interest of the appellants received the full benefit that could accrue to it from the contract, even if said contract had been in writing, acknowledged, and recorded, and appellants now seek to evade the obligations of the contract by invoking an equitable remedy (injunction). The appellants ask equity but refuse to do equity." Held that the injunction did not lie.

See, also, Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Sprague v. Jessup, 48 Ore. 211, 83 Pac. Rep. 145, 84 Pac. Rep. 802, 4 L. R. A., N. S., 410, and note; Pomeroy, Spec. Perf. of Contracts, 2d Ed., Sec. 115; Waterman, Spec. Performance, Sec. 261; Wagonblast v. Whitney, 12 Ore. 83, 6 Pac. Rep. 339.

The certainty of such a contract must be established by evidence sufficient to satisfy a court of equity of the truth of the allegations of the complaint. Sprague v. Jessup, *supra*, and note, L. R. A.; Odell v. Morin, 5 Ore. 96; Coffman v. Robbins, 8 Ore. 278, 8 Morr. Min. Rep. 131; Plymale v. Comstock, 9 Ore. 318; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Le Fevre v. Le Fevre, 4 Serg. & R. 241 (Pa.), 8 Am. Dec. 696.

The evidence of it should be clear and convincing, and show a permission to do the particular act which has been accomplished or some participation in its execution by the owner of the easement. McBroom v. Thompson, 25 Ore. 559, 37 Pac. Rep. 57, 42 Am. St. Rep. 806.

3 Flickinger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234.

4 Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593; Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497; Pope v. Henry, 24 Vt. 560; Swartz v. Swartz, 4 Pa. 353, 45 Am. Dec. 697; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772.

5 See cases cited *supra*; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192.

upon the other hand, the fact that a party partly performed such an agreement can not avail, unless the facts in the case are sufficient to entitle him to a specific performance of the contract.[6]

§ 981. Rights acquired by parol contract—Licenses—In general.—There is another method by which a person can acquire a right of way over the lands of another, and that is by license. A license is a permission to do a certain act or series of acts upon another's land without acquiring any estate therein.[1] It may be given in writing or verbally, notwithstanding the statute of frauds.[2] A parol license, generally speaking, may be revoked at the will of the licensor, even though a consideration for it has been paid; and it terminates with the death of the licensor.[3] But, as we shall see in a subsequent section, by the act of the parties what was originally a mere license, and therefore revocable, may be merged into

6 Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Arguello v. Bours, 67 Cal. 447, 8 Pac. Rep. 49; Kentfield v. Hayes, 57 Cal. 409; Miller v. Fulton, 47 Cal. 146.

1 Bouvier's Law Dict.; Angell on Water Courses, Sec. 285; Gould on Waters, Sec. 322; 3 Kent Comm. 452; Miller v. Auburn etc. R. Co., 6 Hill (N. Y.) 61.

2 3 Kent, Comm. 452; Taylor v. Waters, 7 Taunt. 374, 2 Eng. C. L. Rep. 140; Wood v. Leadbetter, 13 M. & Welsb. 838, 16 Eng. Ruling Cas. 49, 14 L. J. Exch., N. S., 161; Whitmarsh v. Walker, 1 Metc. 313; Maxwell v. Bay City Bridge Co., 41 Mich. 453, 2 N. W. Rep. 639; Fentiman v. Smith, 4 East. 107, 7 Rev. Rep. 533; Cook v. Chicago etc. R. Co., 40 Iowa 451; Beaver v. Reed, 9 Q. B. (Can.) 152; Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497; Ricker v. Kelly, 1 Greenl. 117, 10 Am. Dec. 38; Chicago City R. Co. v. People, 73 Ill. 541.

See, also, Morrell v. Mackmen, 24 Mich. 279, where the Court held that a license is a permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it. It is founded on personal confidence, and is therefore not assignable. It may be in writing or by parol; it may be without consideration; it is subject to revocation and is not within the statute of frauds.

3 Biedelman v. Foulk, 5 Watts 308; Owen v. Field, 12 Allen 457; Hewlins v. Shippan, 5 B. & C. 22, 7 Dowl. & R. 783, 4 L. J. K. B. 241, 31 Rev. Rep. 757, 11 Eng. Com. L. 207, 108 Eng. Rep. F. R. 82; Bryant v. Whistler, 8 B. & C. 288, 15 Eng. C. L. Rep. 219; Totel v. Bonnefoy, 123 Ill. 653, 14 N. E. Rep. 687, 5 Am. St. Rep. 570; *Id.*, 23 Ill. App. 55; Bridges v. Purcell, 18 N. C. (1 Dev. & Bat.) 492; Gould on Waters, Sec. 324; Dark v. Johnson, 55 Pa. 164, 93 Am. Dec. 732, where it is held that, generally, a parol license is revocable at the will of the licensor, even though a consideration has been paid for it.

a right to a permanent easement.[4] If a licensee, under the authority of a parol license, *for a consideration*, makes large investments for the enjoyment of the privilege, the licensor is held to be estopped from making a revocation.[5]

The right to the use of water may also be acquired in excess of that which naturally belongs to a person, either by appropriation or by virtue of his riparian rights, by a license from the owner thereof. We will, however, discuss these rights in other sections.[6]

§ 982. Rights acquired by parol contract—Permissive right a revocable license.—A temporary right of way over the lands of others for ditches and canals may also be acquired by permission of the land owners, without any consideration and with no definite limitation as to time, in which case the right is a mere license, which may be revoked at any time.[1] Where the privilege granted is

4 See Secs. 983, 984.

See, also, for parol executed contracts for a consideration, Sec. 980.

5 For the doctrine of estoppel as applied to parol licenses, see Sec. 984.

See, also, Lane v. Miller, 27 Ind. 534; Hall v. Chaffee, 13 Vt. 150; Foot v. New Haven, 23 Conn. 214; Morse v. Copeland, 2 Gray 302; Rerick v. Kern, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; Raritan W. Co. v. Veghte, 21 N. J. Eq. 463, where it is held upon the subject of revocation that, if the consent was a fact, however obtained, and permanent works and improvements erected in pursuance thereof at great expense, equity will not, to the extent that the license is executed, disturb it or permit its revocation.

6 See Secs. 1025-1029.

See, also, Angell on Water Courses, Secs. 286-325; Gould on Waters, Secs. 322-325.

1 Yeager v. Woodruff, 17 Utah, 361, 53 Pac. Rep. 1045; Hathaway v. Yakima etc. Co., 14 Wash. 469, 44 Pac. Rep. 896, 53 Am. St. Rep. 874; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081; Crosdale v. Lanigan, 129 N. Y. 604, 29 N. E. Rep. 824, 26 Am. St. Rep. 551; Kirk v. Smith, 22 U. S. *ex dem. Penn.*, 9 Wheat. 241, 6 L. Ed. 81; Harvey v. Tyler, 69 U. S. 2 Wall. 328, 17 L. Ed. 871; Butler v. Bertrand, 97 Mich. 59, 56 N. W. Rep. 342; Hazelton v. Putnam, 3 Pin. (Wis.) 107, 3 Chand. 117, 54 Am. Dec. 158; Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786; Minneapolis etc. W. R. Co. v. Minneapolis etc. R. Co., 58 Minn. 129, 59 N. W. Rep. 983, where it is said: "The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly. It can not be established by intendment or presumption."

See, also, Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. Rep. 73; Lawrence v. Springer, 49 N. J. Err. & App. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702; Great Falls etc. Co. v. Great Northern R. Co., 21 Mont. 487, 54 Pac. Rep. 963; Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725; Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 Pac. Rep. 522; Jensen v. Hunter, 108

simply permissive, it may be revoked at any time, though money has been expended thereon by the licensee.[2] Such a licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor; and if he expends money in connection with his entry upon the land of the latter, he does so at his peril.[3] Such a license creates no interest in land. It is founded on personal confidence, and is not assignable, and its continuance depends on the will of the party giving it, and is revocable, unless the license is executed under such circumstances as would authorize the interference of equity to prevent fraud.[4] And it terminates at the death of the party conferring it.[5] A sale of the land by the owner instantly works its revocation, and in no sense is it property descendible to heirs.[6] The revocation of a license to

Cal. 17, 41 Pac. Rep. 14; Butz v. Richland Tp., — S. D. —, 134 N. W. Rep. 895.

A permissive right given to another to construct a ditch over one's land, amounting to a license, can be revoked at the will of the licensor. Weidensteiner v. Malley, 55 Wash. 79, 104 Pac. Rep. 143.

Rights to the use of water may be initiated through a ditch heading upon and tapping the source of water supply upon the lands of another, from whom no easement has been acquired, but which may by the owner of such lands be revocable. Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

2 Hathaway v. Yakima etc. Co., 14 Wash. 469, 44 Pac. Rep. 896, 53 Am. St. Rep. 874.

"A parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is, nevertheless, revocable at the option of the licensor; and this, although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license." Great Falls etc. Co. v. Great Northern R. Co., 21 Mont. 487, 54 Pac. Rep. 963.

For revocability of license to maintain a burden on land after the licensee has incurred expense in creating the burden, see note to Pifer v. Brown, 43 W. Va. 412, 27 S. E. Rep. 399, 49 L. R. A. 497.

3 Minneapolis Mill Co. v. Minneapolis etc. R. Co., 51 Minn. 304, 53 N. W. Rep. 639; Rhoades v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884; Hathaway v. Yakima W. Co., 14 Wash. 469, 44 Pac. Rep. 896, 53 Am. St. Rep. 874.

But see rights acquired by a parol executed contract, Sec. 980.

4 Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14.

It is founded in personal confidence, and is not assignable. 3 Kent Comm. 452; De Haro v. U. S., 72 U. S. 5 Wall. 599, 18 L. Ed. 681.

5 Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; Carter v. Page, 4 Ired L. 26 N. C. 424; De Haro v. U. S., 72 U. S. 5 Wall. 599, 18 L. Ed. 681.

6 See cases *supra*.

use a ditch does not terminate the licensee's water rights, provided that he has independent appropriation.[7]

§ 983. **Parol licenses—Irrevocable licenses.**—It has been oftentimes held, and we believe correctly, that what was originally but a mere parol revocable license [1] by the acts of the parties interested, the nature of the grant may be changed to that of a permanent easement, or to an irrevocable license. And in determining the question of the respective rights of the parties the doctrine of estoppel is oftentimes invoked. Although by no means unanimous, the great weight of authority now holds that where a parol license without consideration is granted by the owner of lands to another to construct ditches and canals over the same, and such owner not only assents, but aids and encourages the performance of the work, and the licensee expends money, or its equivalent in labor, in the construction of the same, the owner of the land is thereafter estopped from denying the right of the licensee, and such license then becomes irrevocable, and the nature of the grant for the right of way changes to that of a permanent easement over the land, or, at least, "the license will continue for so long a time as the nature of it calls for." [2] As was said in a California case: "The general rule, no doubt, is that one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce. But there are many cases where a mere parol license, which has been executed, and where investments have been made upon the faith of it, has been

[7] Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535.

[1] For parol revocable licenses, see Secs. 981, 982.

For revocable license to the use of water, see Secs. 1028.

[2] Where plaintiff granted defendant a parol license to construct an irrigation ditch over the plaintiff's land, and defendant entered under such license and expended over $7,000 in the construction of the ditch, the license became irrevocable, and it was held that the defendant was entitled to a permanent right of way over the plaintiff's land for the purpose of maintaining the ditch, and the rights of the ditch owner will continue for so long a time as the nature of it calls for. Stoner v. Zucker, 148 Cal. 516, 83 Pac. Rep. 808, 113 Am. St. Rep. 301, 7 Am. & Eng. Ann. Cas. 704.

See, also, Miller & Lux v. Kern County L. Co., 154 Cal. 785, 99 Pac. Rep. 179; Rerick v. Kern, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497.

held irrevocable."[3] The theory upon which this holding is made is that it would countenance a fraud upon the part of the licensor if he were allowed, after the expenditure of money by the licensee, upon the faith of the continuance of the license, to cut short by revocation the natural term of its continuance and existence, and that under the doctrine of estoppel the licensor will not be allowed to do this. And, therefore, the authorities hold that, in cases of this nature, the licensor will be held to have conveyed an easement commensurate in its extent and duration to the right to be enjoyed, and that, too, where the license was originally given with-

[3] Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022, citing Gould on Waters, Secs. 232, 324.

See, also, opinion of Mr. Justice Belford in Yunker v. Nichols, 1 Colo. 555.

To allow one to revoke a license when it is given to influence the conduct of another and cause him to make large investments, would operate as a fraud and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel. Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484.

Where it was shown by the evidence that the defendant knew of the building of the ditch at the place and of the size made by the plaintiff and that he made some suggestions in regard thereto, but interposed no objections, and where the defendant admitted that he broke the flume in two and hitched his horses thereto and pulled it off the premises into the public road, it was held that the evidence did not sustain the allegations of defendant's answer, nor did it justify the defendant in electing to treat the plaintiff as a trespasser and destroying the flume, the Court saying: "A parol license to do an act on licensee's land is not revocable in so far as it has been executed." Jones v. Bondurant, — Colo. App. —, 120 Pac. Rep. 1047.

See, also, Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039; Springer v. Young, 14 Ore. 285; Garrett v. Bishop, 27 Ore. 349, 41 Pac. Rep. 10; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; De Graffenried v. Savage, 9 Colo. App. 131, 47 Pac. Rep. 902; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Maple Orchard etc. Co. v. Marshall, 27 Utah 215, 75 Pac. Rep. 369; Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713; Sweetland v. Grants Pass etc. Co., 46 Ore. 85, 79 Pac. Rep. 337; Methow Cattle Co. v. Williams, 64 Wash. 457, 117 Pac. Rep. 239.

Rights in real estate may be obtained and irrevocably fixed by matter *in pais*. Rhodes v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884.

See, also, Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866; Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584; rehearing denied, 110 Pac. Rep. 1092; Arterburn v. Beard, 86 Neb. 733, 126 N. W. Rep. 379; Prentice v. McKay, 28 Mont. 114, 98 Pac. Rep. 1081; Great Falls etc. Co. v. Great Northern Ry. Co., 21 Mont. 437, 54 Pac. Rep. 963.

out a consideration passing from the licensee to the licensor.[4] A parol license to construct and maintain a flume over the lands of the defendant, in order to conduct water to the land of the plaintiff having been acted upon by the Court, and the flume having been constructed at the time when the statutes gave the plaintiff a right to condemn a right of way for the construction of such flume was held irrevocable in a recent case decided by the Wyoming Court.[5]

But the authorities are not all unanimous upon this proposition. Some very eminent authorities hold to the contrary, for example, Judge Cooley.[6] But the same eminent jurist, in a Michigan case, recognized the injustice and hardship which might follow the revocation of such a license, but held that it seems to be a reproach to the law that it should fail to provide some adequate protection against it.[7] And in this connection it may be said that the later authorities have modified the common law rule in this respect and have afforded adequate protection against the act of revocation in such cases by holding that, after the licensee has entered upon the land under a parol license and has made his improvements thereon, such a license is irrevocable. This is especially true in the arid West, where such licenses have been given to construct ditches and canals over the lands of others for the purpose of conducting water for irrigation or other useful purposes.[8] So, therefore, a parol

[4] Stoner v. Zucker, 148 Cal. 516, 83 Pac. Rep. 808, 113 Am. St. Rep. 301, 7 Am. & Eng. Ann. Cas. 704.

[5] Gustin v. Harting, — Wyo. —, 121 Pac. Rep. 522.

[6] Cooley on Torts, 2d Ed., 364; Rhoades v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884; Hathaway v. Yakima W. Co., 14 Wash. 496, 44 Pac. Rep. 896, 53 Am. St. Rep. 874; Minneapolis Mill. Co. v. Minneapolis etc. Co., 51 Minn. 304, 53 N. W. Rep. 639; Great Falls etc. Co. v. Great Northern R. Co., 21 Mont. 487, 54 Pac. Rep. 963; Pifer v. Brown, 43 W. Va. 412, 27 S. E. Rep. 399, 49 L. R. A. 497 and note.

[7] See Maxwell v. Bay City Bridge Co., 41 Mich. 453, 2 N. W. Rep. 639, where he said: "But the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements, is so serious that it seems a reproach to the law that it should fail to provide some adequate protection against it. Some of the courts have been disposed to enforce the license as a parol contract which has been performed on one side."

For parol executed contracts for a consideration, see Sec. 980.

[8] So, where the land owners knew of an extension of a canal that was being made over their lands, and they were interested in the improvement, both as stockholders of the canal company and as owners of land dependent upon it for water, and made no objection to the extension while it was being made, or ever afterward, but

license to enter the land of the owner to construct a ditch, canal, or other works, for the purpose of conducting water, operates as an irrevocable grant, after entry, and the construction of the works at considerable expense, and after commencing the use of the water; and the rights thus acquired under the grant will be protected in equity.[9] However, a license clearly expressed in terms to show

did, in selling their lands irrigable from the improved canal, transfer to their vendees shares of their stock with their incidental water rights, it was held that their vendees were estopped from objecting to the maintenance of the canal. Crescent C. Co. v. Montgomery, 143 Cal. 248, 76 Pac. Rep. 1032, 65 L. R. A. 940; Foster v. Bear Valley Irr. Co., 65 Fed. Rep. 836.

See, also, Ewing v. Rhea, 37 Ore. 583, 62 Pac. Rep. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783, but where it is held that mere silence is not sufficient; Flannery v. Campbell, 30 Mont. 172, 75 Pac. Rep. 1109.

9 Maple Orchard etc. Co. v. Marshall, 27 Utah 215, 75 Pac. Rep. 369, where it is held that a parol license to enter on the land of the owner to construct a pipe line to carry water for the purpose of irrigation operates as an irrevocable grant, after entry, and the construction of the pipe line at considerable expense, and after commencing the use of the water, and the rights acquired under the grant will be protected in equity.

"A license may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived." Rerick v. Kern, 14 Serg. & R. (Pa.) 16 Am. Dec. 497.

See, also, Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Garrett v. Bishop, 27 Ore. 349, 41 Pac. Rep. 10; Lee v. McLeod, 12 Nev. 280; Jackson v. Philadelphia etc. R. Co., 4 Del. Ch. 180.

"An executed license is treated like a parol agreement in equity. It will not allow the statute of frauds to be used for a cover for fraud." Curtis v. LeGrande Hydraulic W. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484.

Raritan etc. Co. v. Veghte, 21 N. J. Eq. 463; De Graffenried v. Savage, 9 Colo. App. 131, 47 Pac. Rep. 902, where the court held that the right of way for an irrigation ditch may be acquired by contract between the parties, by condemnation proceedings, or by the gratuitous license of the land owner. In either case, after entry and expenditure of money, the right is irrevocable. "After entry under license, and construction of the ditch, the license operates as an irrevocable grant."

McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713.

For right of way acquired by license, see Secs. 980-985.

See, also, for sale of ditches and canals, Secs. 1003, 1004.

the intent that it was to be temporary only is revocable even after it has been executed.[10]

§ 984. The doctrine of estoppel as applied to parol contracts and licenses.—The doctrine of estoppel is oftentimes invoked to sustain a right claimed by one person to an easement for ditches and canals over the lands of others. But as we shall discuss this subject more fully in another chapter, it need be discussed here only in a general way.

Of course, in order to successfully invoke the doctrine of equitable estoppel in cases of this nature, there must be present all of the essential elements recognized by the law as necessary.[1] There can be no estoppel as to a land owner where it does not appear that he did something or said something to mislead the one claiming the right of way.[2] Mere silence or passive acquiescence upon the part of the land owner is not sufficient.[3] To constitute such an estoppel

10 Lanham v. Wenatchee etc. Co., 48 Wash. 337, 93 Pac. Rep. 522; Wiedensteiner v. Malley, 55 Wash. 79, 104 Pac. Rep. 143; Hathaway v. Yakima Water Co., 14 Wash. 469, 44 Pac. Rep. 869, 53 Am. St. Rep. 874; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081; Lewis v. Patton, 42 Mont. 528, 113 Pac. Rep. 745; Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866; McIntyre v. Harty, 236 Ill. 629, 86 N. W. Rep. 581.

1 For these elements, see doctrine of estoppel as related to water right, Secs. 1121-1128.

Rhoades v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884.

2 Yeager v. Woodruff, 17 Utah, 361, 53 Pac. Rep. 1045; Turner v. Coffin, 12 Allen, 401.

See, also, Campbell v. Flannery, 32 Mont. 119, 79 Pac. Rep. 702, 80 Pac. Rep. 240, where it was held that the representations of part of the co-tenants of land did not bind the others.

2 Herman on Estop. & Res. Jud., Sec. 938.

3 Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786; Campbell v. Flannery, 32 Mont. 119, 79 Pac. Rep. 702, 80 Pac. Rep. 240; Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Madison v. Spokane etc. Co., 40 Wash. 414, 82 Pac. Rep. 718, 6 L. R. A., N. S., 257; Southside Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107; Mitchell v. Amador C. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246.

"We do not think that upon principle a mere naked license, which is predicated upon an invasion of another's right, and is, in effect, a trespass upon his property, so encourages a party to act upon the faith of the implied permission as to render it irrevocable, even when money has been expended in improving the property under the belief that the uninvited use relied upon will never be inter-

the person sought to be estopped must do some act or make some admission with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he afterward makes. The other party, too, must have acted upon the strength of such admission or conduct.[4] As was well said in a recent Colorado case:[5] "He that remains silent when conscience requires him to speak shall not be heard to speak when conscience requires him to remain silent. The defendant was silent when the circumstances should have impelled it to speak, if its rights were invaded. The policy of the law will not now permit it to appropriate unto itself an alleged additional right of way, which it might have possessed by exercising a proper diligence, when plaintiffs, acting in good faith, and believing that they, and not it, were the owners of, and entitled to its use, have expended large sums of money in placing permanent improvements thereon."

§ 985. **Rights acquired by parol contract—A prescriptive right can not be based on permission.**—That a prescriptive right can not be based upon a permission is one of the elementary principles of the law of real property. Neither can a prescriptive right be acquired under a parol license as long as the permission under that license continues. But in spite of this principle, it has often occurred that where permission under a parol license had been given by the owner of a certain tract of land, for the use of a strip of the land for a ditch or canal, that afterward the party so obtaining the permission, or his assignee, has claimed the right of way as a matter of right, either by prescription[1] or by an executed contract for a consideration.[2] Consequently the courts have often

rupted." Ewing v. Rhea, 37 Ore. 583, 62 Pac. Rep. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783, and overruling Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484, in so far as that decision is in conflict with the principle here announced.

4 Madison v. Spokane Val. etc. Co., 40 Wash. 414, 82 Pac. Rep. 718, 6 L. R. A., N. S., 257; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; New York Rubber Co. v. Rothery, 107 N. Y. 310, 14 N. E. Rep. 269, 1 Am. St. Rep. 822.

For a further discussion upon the subject of estoppel, see Secs. 1121-1128.

5 Arthur Irr. Co. v. Strayer, 50 Colo. 371, 115 Pac. Rep. 724.

1 For right of way by prescription, see Secs. 1044, 1045.

2 For rights of way by a parol executed contract, see Sec. 980.

been called upon to decide the rights of the parties in interest. Such a permission or license being revocable at the will of the licensor,[3] the correct rule in cases of this nature is that the permissive use of a ditch or canal by one party over the lands of another, no matter how long continued, can not give title by prescription to the party so using the land.[4] Under this state of circumstances, before there can be any adverse holding, it is necessary for the party claiming the easement for a right of way to have repudiated the license, or permission, and to have brought the knowledge of such repudiation home to the owner of the land giving such permission; and thereafter he must have continued to have held the right adversely for a time sufficient under the statute for the acquisition to an interest in the land by prescription.[5] The right can not be regarded as adverse, while the licensee acknowledges the right of the land owner and pays a compensation for the use of the land.[6]

[3] That a permissive right is a revocable license, see Sec. 982.

[4] The permissive use of the ditch across respondent's land, no matter how long continued, could not give title by prescription to the appellant. Weidensteiner v. Malley, 55 Wash. 79, 104 Pac. Rep. 143.

Under this rule, an adverse possession can not grow out of a permissive enjoyment; and so speak the decisions without a dissenting voice, including this court. Curtis v. La Grande W. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484.

Springer v. Young, 14 Ore. 280, 12 Pac. Rep. 400.

See, also, Hathaway v. Yakima W. Co., 14 Wash. 469, 44 Pac. Rep. 896, 53 Am. St. Rep. 874; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081; 22 Am. & Eng. Ency. Law, 2d Ed., 1196, 1198; Yeager v. Woodruff, 17 Utah, 361, 53 Pac. Rep. 1045; Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. Rep. 140; Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. Rep. 699, 9 L. R. A., N. S., 960; Anderson v. Bassman, 140 Fed. Rep. 14.

See, also, for the permissive right to use water, Secs. 981, 982.

[5] For rights of way by prescription, see Secs. 1033-1058.

Weidensteiner v. Malley, 55 Wash. 79, 104 Pac. Rep. 143; Yeager v. Woodruff, 17 Utah, 361, 53 Pac. Rep. 1045; Central Pacific R. Co. v. Mead, 63 Cal. 112; Pacific Mutual Ins. Co. v. Stroup, 63 Cal. 150; American Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; 22 Am. & Eng. Ency. Law, 2d Ed., 1198.

[6] Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288.

Title to a ditch can not be claimed by adverse possession by one who, after using the water for three years, acknowledged title by offering to pay for a grant thereof. Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14.

See, also, Lovell v. Frost, 44 Cal. 471; Cannon v. Stockman, 36 Cal. 535, 95 Am. Dec. 205.

§ 986. **Rights of way acquired by prescription.**—Rights of way may also be acquired over the private lands of another by adverse possession of the land for this purpose amounting to prescription. In general, in order to acquire a permanent right of way by this means for a ditch, canal, reservoir, or other works, over the lands of another, the party claiming the right must have had the peaceable, open, notorious, exclusive, uninterrupted, and adverse possession of the land in question for this purpose and use under a claim of right, and for the statutory period provided in the respective States for acquiring other interests in land by adverse possession amounting to prescription. But as this subject requires an extended discussion, and also rights to the use of water may be acquired by the same means, we will discuss the whole subject of the rights which may be acquired by prescription in a separate chapter.[1]

§ 987. **Rights of way may be acquired under the power of eminent domain.**—Rights of way or easements for ditches, canals, or other works may also be acquired by condemnation proceedings under the power of eminent domain. Again, the ditches, canals, or other works already constructed, together with the rights of way for the same, may be acquired by the same means. And, again, rights of way through ditches and canals for use in common with the original owners may also be acquired. As we shall see, the right to the use of water, under certain conditions, may also be acquired. As this subject requires an extensive treatment, we will treat all rights which may be acquired under the power of eminent domain in a separate chapter.[1]

§ 988. **Public canals—Right to the use of.**—Having discussed at considerable length the acquisition of rights of way over private lands by contract,[1] we will now turn our attention briefly to the subject of the right to use public canals, or those canals which are strictly public, as distinguished from those which are owned by quasi-public or public service corporations. The rights and duties of these companies we will discuss in a subsequent chapter of this

1 See Chap. 54, Secs. 1033-1058.
1 See Chap. 55, Secs. 1059-1098.
1 See Secs. 976-985.

work.[2] The necessity for irrigation in the Western part of this country, and for that purpose the conducting of waters from the natural streams to the place of use is so great that the construction of ditches or canals by a State or by some subdivision of the State authorized by the legislature is a matter of such a public nature by way of internal improvement that the taxing power of the State may be exercised for their accomplishment. When a ditch or a system of irrigation is so constructed it becomes the property of the public, and each person of the public, within the range of the operation of the ditch or irrigation system, and entitled to water, may demand the use of the ditch or system in conducting that water, as far as it can be done, toward his place of use. Such canals are recognized and treated as public property, in much the same way that a public road under our laws is regarded. Hence every land owner under such a canal, whether he uses the water or not, is required to contribute his quota in money or labor in the maintenance and preservation of the canal. The first legislation in this country upon the subject of public ditches is to be found in Arizona and New Mexico, and follow closely the old Spanish and Mexican laws upon the subject.[3] The community ditch, or "public acequia," as termed in the statutes, was at an early day the usual and ordinary means for the diversion of water. Each village or group of farmers constructed its own common ditch. The management and control of the ditch was regulated by law, and not by the agreements or contracts of the users of the water under it.[4]

Some of the States have provided by legislation for the construction of such ditches and canals as works of internal improvement, and authorized public aid to be extended in the construction of such works. This is the case in Nebraska, where the law provides that "canals and other works constructed for irrigation or water power

2 For the rights and duties of ditch and canal companies, see Chaps. 72-77.

See, also, for irrigation districts, Chap. 70, Secs. 1386 *et seq.*

3 For Spanish and Mexican laws, see Secs. 570-584.

For laws of Arizona, see Chap. 85.

For laws of New Mexico, see Chap. 94.

4 Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

In Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589, it was held that the right to have the original community ditch run through or near the lands of the plaintiff, upon its ancient course, was a property right in plaintiff, and that the majority interested in the ditch could not change the ditch from its ancient course against the consent of the owners to be injuriously affected by such change.

purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canal and irrigation works."[5] The constitutionality of these laws has been generally upheld.[6] But the general proposition must be conceded that a canal is not a work of public character if the chief purpose of its construction is to create a water power or other water right wholly for private gain, and in which the public is only incidentally or indirectly interested.[7] Hence it necessarily follows that the general public, taxed for the construction and maintenance of the works, having use for the water, must, under the proper restrictions, be allowed the right to use the works for the purpose of conducting the water to the place of use.

§ 989. Private canals—Right to use may be acquired by contract.—The right to the use of a private ditch or canal for the purpose of conducting water to the place of use may be acquired by contract. And a contract executed on a sufficient consideration can not be revoked at will of the party granting the right.[1] Again, one over whose land the ditch is constructed may, in consideration of the right of way, contract for a right to the use of the ditch for the conveying of water to his land, or he may be given the right to use a certain amount of water flowing in the ditch, and such an agreement, when executed, is not void because it is not in writing,

5 Comp. Stat. Neb. 1899, Sec. 5491.

6 That part of the statute authorizing counties and cities to extend aid in the construction of canals both for irrigation and power purposes was held, by the Federal Court, not to be invalid on the ground that such a use was not consistent with a work of public utility, and not a proper object with the exercise of the taxing power, but should be construed only to authorize such aid to the construction of such works devoted to public uses, and other incidental objects not prejudicial to the public interest. City of Kearney v. Woodruff, 115 Fed. Rep. 9, 53 C. C. A. 117.

See, also, Cummings v. Hyatt, 54 Neb. 35, 74 N. W. Rep. 411; Perkins County v. Graff, 114 Fed. Rep. 441, 52 C. C. A. 243.

7 City of Kearney v. Woodruff, 115 Fed. Rep. 90, 53 C. C. A. 117; Dodge v. Mission Tp., 107 Fed. Rep. 827, 46 C. C. A. 661, 54 L. R. A. 242.

1 See, also, rights acquired by executed contracts for a consideration, Sec. 980.

Chicosa etc. Co. v. El Moro D. Co., 10 Colo. App. 276, 50 Pac. Rep. 731; Bowman v. Ayers, 2 Idaho 465, 21 Pac. Rep. 405.

For right to condemn a way through existing canals, see Sec. 1085.

but will be specifically enforced.[2] And there are no limitations as to the rights of the respective parties to deal with this matter by contract. And there is no inconsistency in the right of the land owner in granting an easement over his lands for a ditch or canal, and either reserving or contracting for an easement through the ditch or canal to conduct his own water to the place of use, so long as such use is subordinate to the principal easement and does not restrict or limit its use.[3] Again, it is well settled as a general proposition that even without a specific contract the owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement. Thus in the case of a right of way, "he may himself use it as a way . . . unless the rights of the owner of the easement are exclusive."[4] As was said in a California case:[5] "The owner of property subject to an easement may use his property in any manner and for any purpose not inconsistent with the full and free enjoyment of the easement."[6] Again, the owner of an irrigation ditch can not rescind an agreement made by him to a third person, to the effect that he would have a right to water from the ditch, if he would do certain work thereon, after he had accepted the proposition and had performed part of the work and was ready and willing to perform the rest.[7] Again, the right to the use of a ditch may be reserved by the grantor in the sale of the same to another.[8] The right to the use of a ditch or canal may also be acquired by the agreement of several parties and by its construction at their joint expense, the specific rights of the users being agreed upon between

2 Stowell v. Tucker, 7 Idaho, 312, 62 Pac. Rep. 1033; Brighton etc. Co. v. Little, 14 Utah, 42, 46 Pac. Rep. 268; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95.

3 Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569.

4 14 Cyc. 1208, and cases cited.

See, also, Smith v. Hamshire, 4 Cal. App. 8, 87 Pac. Rep. 224; Colegrove W. Co. v. City of Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60.

5 Colegrove Water Co. v. Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904.

6 Citing Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569.

7 Bowman v. Ayers, 2 Idaho 465, 21 Pac. Rep. 405.

8 For sale and conveyance of ditches, see Sec. 1003.

See, also, Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95; Bryan v. Idaho Quartz M. Co., 73 Cal. 349, 14 Pac. Rep. 859.

them.[9] The contract may and often does provide that the expenses for the maintenance of the ditch are to be shared jointly between the parties using the same.[10] These cases come under the general law of contracts. And the rights of the respective parties to such an agreement, where for a good consideration one of the parties is to have the right to the use of the ditch or canal of the other for the purpose of conveying water of his own, are to be governed entirely by the terms of the contract.[11]

The right to the use of a ditch of another may also be acquired by prescription.[12] And, again, the use of a ditch on a right of way for the same acquired by prescription over the land of another may be made by the land owner, the prescriptive right of the owner of the right of way being limited to his use, measured by the quantity of water carried through the ditch by him, and should the ditch have a further capacity, it may be used by such owner.[13] The right to the use of a private ditch may also be acquired by the acts of the owner, amounting to an estoppel. So, an owner of an irrigation ditch upon the public land of the United States, who, without objection, saw others enlarge and repair his ditch, increase its capacity, take up lands in its vicinity which could only be irrigated through his ditch, and make improvements thereon on the faith of obtaining water through his ditch to the extent of its increased

9 See tenants in common in ditch, Secs. 1455-1458.

See, also, Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786; Patterson v. Nurnberg, 17 Colo. App. 223, 68 Pac. Rep. 134.

10 Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95; Smith v. Stearns Ranchos Co., 132 Cal. 178, 64 Pac. Rep. 261, 716.

11 Consolidated C. Co. v. Mesa C. Co., 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575, in which it is said in the opinion of the Supreme Court of the United States: "We need not stop to inquire what are the rights of separate appropriators of water in the absence of contract. We are dealing with those which grow out of this contract, bearing in mind that all rights are reserved to the appellee which are not in terms granted to the appellant."

12 For right of way acquired by prescription, see Secs. 1045, 1046.

See, also, Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553.

13 Smith v. Hamshire, 4 Cal. App. 8, 87 Pac. Rep. 224; Abbott v. Pond, 142 Cal. 393, 396, 76 Pac. Rep. 60.

"One may acquire a prescriptive right to use an irrigation ditch to convey a limited quantity of water to his land, while another retained the right to use the ditch for his own purposes to the extent of the remaining capacity." Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553.

capacity, is estopped to deny the right of such parties to so use such ditch.[14]

§ 990. Ditches and canals—Right to enjoy easement—Construction of works.—Where a permanent easement has once been acquired by the user of water over the lands of another, whether it was acquired by deed,[1] executed contract,[2] prescription,[3] or by the exercise of the power of eminent domain,[4] the owner thereof has the right to enter the premises and construct the ditch and canal, or other works, for which the easement was acquired, and for the purpose of keeping them in repair. This right to enter the lands of the owner for the purpose of construction and repair are incidental to the easement itself, and are called by some of the authorities "secondary easements."[5] In the construction of a ditch or canal the original route as planned need not be exactly followed out, if no further injury is done by the change.[6] But, upon the other hand, where there would be any material further injury to the land by a change from the original plans, either by a different location, width, or depth of the ditch or canal, a new easement or right of way must be acquired to conform to the new plans; or, if the owner of the original right goes ahead and so constructs the works according to the new plans, he will be liable in damages for the additional injuries to the land.[7] His right, in other words, in an easement is measured by the terms of his grant, or where the supposed original grant does not appear, by the prescriptive use.[8] And in the construction of the works, any radical changes from the original plans, either in the location or the size of the works, which add an increased burden upon the land over which

14 Lehi Irr. Co. v. Moyle, 4 Utah, 327, 9 Pac. Rep. 867.

1 See Secs. 975-979.

2 Sec. 980.

3 Secs. 1033-1058.

4 Secs. 1059-1098.

5 Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422.

6 Conger v. Weaver, 6 Cal. 548, 65 Am. Rep. 528, 1 Morr. Min. Rep. 594.

For changes which may be made, see Secs. 856-873.

7 For changes which may be made, see Secs. 856-873.

See, also, McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Welty v. Gibson, 42 Colo. 18, 93 Pac. Rep. 1093; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Weidensteiner v. Malley, 55 Wash. 79, 104 Pac. Rep. 143.

8 Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

the original right of way was acquired, will compel the acquisition of a new right of way according to law.[9] Where a ditch crosses another ditch, the later comer must so construct a crossing that it will not interfere with the prior ditch.[10] So, it is held that even the owner of the land across which an easement has been acquired for a right of way for a ditch has a right afterward, only in subordination to such easement, to cross it with a pipe line or flume to utilize on one side of the ditch constructed on the easement water developed on the other side.[11]

§ 991. **Easement for the flow of water in natural streams over private lands—Right to enjoy.**—An appropriator of the waters of a natural stream flowing through the public domain acquires an easement over the lands through which the stream flows for the flow of the water to his point of diversion, as it was wont to flow when he first made the appropriation.[1] This right is also acquired as against the subsequent purchasers of the lands from the United States and their grantees. It therefore follows that an appropriator has the implied authority to do all that is necessary to secure the enjoyment of such an easement. He therefore has the right to go upon the lands after they have become private and remove obstructions from the bed of the stream, so as to permit the water to continue its flow in its original channel to the head of his ditch.[2]

9 For changes which may be made, see Secs. 856-873.

Where, after defendant had acquired an easement over plaintiff's land for an irrigation ditch, they commenced the construction of another ditch some distance from the original one, it is immaterial to the plaintiff's right to restrain such acts that the land taken for such additional ditch had no appreciable value. Vestal v. Young, 147 Cal. 715, 721, 82 Pac. Rep. 283, 381.

See, also, Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396.

The owners of a right to maintain a dam have no right to rebuild and maintain a new dam in such a way as to place a greater servitude or burden on the property of the owners of the land than had been put upon it by the maintenance of the old dam. Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985.

10 Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Hotchkiss v. Young, 42 Ore. 446, 71 Pac. Rep. 324.

11 Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

1 See for right to the flow of water, Secs. 801-803.

2 Where one by the construction of his ditch, and the appropriation and user of the waters of a stream, acquires such an easement, he acquires, as against the subsequent purchasers

If, from natural causes, the stream becomes obstructed by deposits of gravel, fallen trees, or any other substance, so as to prevent the flow of the water to the head of the appropriator's ditch, the owner of the land of the servient tenement, is under no obligations to remove these obstructions, for the appropriator's enjoyment of his right to the water. Hence it follows that the duty of making such repairs and removing such obstructions essential to the appropriator's enjoyment of the easement devolves entirely upon the appropriator himself. However, in the exercise of this right to remove obstructions from the channel of the stream where it flows through the private lands of others, the appropriator must do so in as reasonable and proper manner as possible, and perform only such acts as are essential to his enjoyment of the water without injury to the land or damage to the owner of the land through which the stream flows. As held in one case, this right is to be held to the narrowest limits compatible with the enjoyment of the easement, which is the right to have the water flow as it was wont to his place of diversion.[3] As was said in a recent Idaho case:[4] "There can be no doubt of the right of appellants to employ such means as may be necessary and essential to keep this channel clear and in repair for the purpose of carrying and conveying the necessary body of water to meet the demands of their appropriation. This right, however, must be exercised with due diligence and with proper respect for the rights of other appropriators, and also of riparian proprietors as indicated in this opinion."[5] And the one attempting to remove an obstruc-

of the United States as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant. Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 476; Crisman v. Heiderer, 5 Colo. 589.

[3] Crisman v. Heiderer, 5 Colo. 589; Natoma etc. Co. v. Hancock, 101 Cal. 42, 35 Pac. Rep. 112, 35 Pac. Rep. 334, 101 Cal. 42, 31 Pac. Rep. 112.

[4] Hutchinson v. Watson Slough Ditch Co., 16 Idaho, 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

[5] See, also, City of Bellevue v. Daly, 14 Idaho, 545, 94 Pac. Rep. 1036, 125 Am. St. Rep. 179, 14 Am. & Eng. Ann. Cas. 1136, 15 L. R. A., N. S., 992.

"The appropriator took the water with the right to have the stream flow as it was wont to flow," at the time he made the appropriation. Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703.

One who owns an easement over the lands of another has a right to enter on the land to keep the easement in repair, but aside from this and analogous purposes, he has no right of entry. Pico v. Colimas, 32 Cal. 578.

tion must be careful not to exceed his rights, for, if he does so, he will be liable as a trespasser. This is the rule of the doctrine of appropriation, and also the common law of riparian rights.[6] However, if the obstructions are placed in the stream by the land owner, it is his duty to remove them,[7] or provide some other way to bring the water to the lands of the appropriator at such a point that he may have the full use thereof.[8]

§ 992. Ditches and canals—Right to enjoy easement—Right to make repairs.—Where a permanent easement has once been acquired over the lands of another, and the ditch or canal has once been constructed, the owner of the primary easement has the right, as a secondary easement, to go upon the lands and remove obstructions from the ditch, and to make other repairs necessary, consistent with the full enjoyment of the easement. Such a right or easement carries with it the right to the full enjoyment of the easement itself. "The express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment

6 Miner v. Gilmour, 12 Moore P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Strong v. Benedict, 5 Conn. 210; Greenslade v. Halliday, 6 Bing. 379, 4 Moore & P. 71, 8 L. J. C. P. 124, where one having a right to place in a stream an obstruction composed of stones and a board to aid in irrigating his land, fastened the board by stakes, thereby giving it a permanent character, whereupon the lower owner undertook to remove the obstruction, it was held that, while he might remove the stakes, he would be liable if he removed the board also.

See, also, Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. Rep. 433, 2 Am. St. Rep. 443; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 746; Darlington v. Painter, 7 Pa. 55; Hinkle v. Avery, 88 Iowa 47, 55 N. W. Rep. 77, 45 Am. St. Rep. 224; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. Rep. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905.

See, also, riparian rights, obstruction of stream, Sec. 545.

7 Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756.

See, also, for injuries from obstructions, Chap. 83.

8 Though a dam maintained by defendant interrupts the flow of the water to which the plaintiff is entitled, defendant need not remove it, where the water would then injure his land, so long as he adopts other means to bring the water to the plaintiff's lands. Harrington v. Demaris, 46 Ore. 111, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756, on rehearing, modifying *Id.*, *supra*.

See, also, Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483.

See, also, Secs. 801-803.

of the principal one."[1] As was defined by the Washington Court:[2] "The term 'secondary easement' is applied to the right to enter and repair and do those things necessary to the full enjoyment of an easement as existing."[3] The right to preserve the flow of water in the ditch also extends to the removal of obstructions from the natural stream from which the water is taken. This right we have discussed in a previous section.[4] But these secondary easements must be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement.[5] Such an easement does not give its owner the right to commit a trespass upon the servient tenement, or to exercise the use of the easement in any manner which happens to suit his pleasure.[6] The location of the ditch can not be changed,

1 Gale & Whatley on Easements, Am. Ed., 215, 231; Taylor v. Whitehead, 2 Doug. 745, 99 Eng. Reprint 475; Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. Rep. 27; Board etc. v. Hutchinson, 46 Ore. 57, 78 Pac. Rep. 1028; Spear v. Cook, 8 Ore. 380; Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922; Weidenmueller v. Stearns Ranchos Co., 128 Cal. 623, 61 Pac. Rep. 374; United States etc. Co. v. Gallegos, 89 Fed. Rep. 773, 32 C. C. A. 470, 61 U. S. App. 13; Flickenger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234.

2 White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 Pac. Rep. 497.

3 See, also, Sulloway v. Sulloway, 160 Cal. 508, 117 Pac. Rep. 522; Idaho Fruit Land Co. v. Great Western Beet Sugar Co., 18 Idaho, 1, 107 Pac. Rep. 989; Knowles v. New Sweden Irr. Dist., 16 Idaho, 217, 101 Pac. Rep. 81; Hard v. Boise City etc. Co., 9 Idaho, 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

But see O'Mara v. Jensma, 143 Iowa, 297, 121 N. W. Rep. 518, where it was held that if a ditch was constructed by agreement of persons and recognized as a water way, neither person would be compelled to clear it of rubbish, but either person might do so.

4 See Sec. 991.

The right to keep a ditch in repair also applies to drainage ditches. Roberts v. Roberts, 55 N. Y. 275.

5 Gale, Easements, p. 235; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

"This easement must be used by them in such a manner as to impose as little damage to the servient estate as possible." Board etc. v. Hutchinson, 46 Ore. 57, 78 Pac. Rep. 1028.

See, also, Arthur Irr. Co. v. Strayer, 50 Colo. 371, 115 Pac. Rep. 724; McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384.

See, also, Sec. 993, and cases cited.

6 In Pico v. Colimas, 32 Cal. 578, where the owner of an easement for a ditch entered upon the land of an-

neither can it be enlarged, if it will cause an additional burden upon the servient estate to its material injury.[7] But, in general, it may be said that the right of way for a ditch or canal for the purpose of conducting water over the land of another also includes the right to keep the ditch in such condition that it will perform the service for which it was constructed.[8] The owner of the easement can not be interfered with by the land owner as to this right to repair or clean out the ditch. If he is so interfered with, an injunction will lie.[9] Neither can the land owner destroy the lateral or subjacent support to the ditch to which the owner thereof is entitled.[10] But the mere right to maintain a ditch does not include the right to in any manner injure the servient estate. Therefore, it is held that the mere right to the easement and the right to maintain the ditch thereon does not include the right to use the soil adjoining it for the purpose of repairing the ditch.[11] Neither can the ditch owner so use his easement as to materially interfere with the ordinary use of the land by the land owner.[12] And should injury result from the ordinary use of the land by the land owner, either to the ditch or otherwise, it is the duty of the ditch owner to enter the land and

other and threw down a gate which the latter had placed in the ditch to divert water for his own use, the Court held that, as ancillary to the reasonable enjoyment of the plaintiff's easement he had a right to enter upon the upper proprietor's land for the purpose of keeping the ditch in repair and free it from obstructions prejudicial to the easement, but that if the enjoyment of the easement was not impaired by the gate there was no right to enter upon the land owner's premises to remove it.

See, also, Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542; Durfee v. Garvey, 78 Cal. 546, 21 Pac. Rep. 302.

7 For changes which may be made, see Secs. 856-873.

See, also, Mesnager v. Englehardt, 108 Cal. 68, 41 Pac. Rep. 20; Clear Cr. etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819; Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922, where it is held that repairs may be made on a ditch slightly changing its grade.

8 See cases, *supra*.

9 Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. Rep. 140.

10 Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54; McMenomy v. Baud, 87 Cal. 139, 26 Pac. Rep. 795.

Where in granting a right of way a later ditch crosses one constructed earlier, the latter claimant must adjust the crossings so as not to interfere with the prior ditch. Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

11 Thompson v. Uglow, 4 Ore. 369.

12 See duty of ditch owner to repair ditch, Sec. 993.

take such steps to protect the ditch or other works from such injury as are reasonably necessary.[13]

§ 993. Ditches and canals—Duty to keep works in repair.—As is the general rule of easements, not only has the owner of the right of way for a ditch or canal over the lands of others the right to enter upon those lands in order to remove obstructions to the flow of the water and to make repairs, but it is his duty to keep the ditch or canal in repair, both in order for himself to have the full enjoyment of the easement as well as to prevent injuries to the land owner.[1] As was held in a recent Idaho case, as a general principle of law, it is the duty of an individual, or the public, entitled to an easement or right of way over the lands of another to keep up, maintain, and protect such easement or right of way, and the presumption as to such duty and obligation arises as one of law; and where it is sought to maintain an action on the theory that such duty rests upon the owner of the fee, it is necessary for the plaintiff to plead and prove the facts from which such duty or obligation arises.[2] Therefore, as far as injuries to his own rights are concerned from his failure to receive the water to which he is entitled, or from injuries to his ditch caused by the ordinary use of the land by the land owner, it is the ditch owner's duty to repair such damages at his own expense, and also to take such precautions necessary against the repetition of such injuries as may be consistent with his right to the enjoyment of the easement, and also to the right of the

13 Keller v. Fink, 103 Cal. 17, 37 Pac. Rep. 411; City of Bellevue v. Daly, 14 Idaho, 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992.

See, for duty of ditch owner, Sec. 993.

1 For the right to enjoy the easement, see Secs. 990-992.

2 City of Bellevue v. Daily, 14 Idaho, 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992; Fraler v. Sears etc. Co., 12 Cal. 556, 77 Am. Dec. 562; Richardson v. Kier, 34 Cal. 63, 37 Cal. 263, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; Quinlan v. Noble, 75 Cal. 250, 17 Pac. Rep. 69; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39 where it is said: "The grantee or owner of an easement is bound to keep it in repair, and this applies as well to water ditches as to private ways."

The burden of keeping the ditch clear rests upon the owner of the easement. Durfee v. Garvey, 78 Cal. 546, 21 Pac. Rep. 302.

See, also, Goddard on Easements, 285; Gale & W. on Easements, 215; Prescott v. Williams, 5 Metc. 429, 39 Am. Dec. 688; Thomas v. Blainsell, 25 Nev. 223, 58 Pac. Rep. 903.

land owner to the ordinary enjoyment of his land. And in this connection it may be stated that, as a general proposition, every man has a right to the natural and ordinary use and enjoyment of his own property, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is "*damnum absque injuria,*" for the rightful use of one's own land may cause damage to the other without legal wrong.[3] This rule has been applied to cases where the cattle of the land owner injured the ditch; and it is held that the burden of keeping the ditch clear, where the sides are caved in by the tramping of cattle, rests upon the owner of the easement, and that he has the right to enter the land and protect the ditch or works from such injuries.[4] But in Oregon it was held that the owner of sheep can be held in damages for injuries to an unfenced ditch running across the public commons by reason of the sheep going onto the same, and in the absence of proof that they were purposely or negligently driven thereon.[5]

Upon the other branch of the subject, the ditch owner is in duty bound to keep the ditch or canal in such repair as will prevent unnecessary injury to the land of the owner or to others interested in the land, or in the distribution of the water from the ditch. And the rule, as stated above, that every man has the right to the natural and ordinary use and enjoyment of his own property, must also be taken in connection with another general rule that every person shall so use and enjoy his property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public.[6] This rule is especially true in the case of easements, where two or more

3 Beach on Injunctions, Sec. 1112, note 1.

See, also, Barnard v. Shirley, 135 Ind. 547, 34 N. E. Rep. 600, 35 N. E. Rep. 117, 24 L. R. A. 568, 41 Am. St. Rep. 454; *Id.*, 151 Ind. 160, 47 N. E. Rep. 671, 41 L. R. A. 737; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. Rep. 453, 57 Am. Rep. 445; Wolf v. St. Louis W. Co., 10 Cal. 541, 10 Morr. Min. Rep. 636.

4 Durfee v. Garvey, 78 Cal. 546, 21 Pac. Rep. 302; Keller v. Fink, 103 Cal. 17, 37 Pac. Rep. 411.

5 Bileu v. Paisley, 18 Ore. 47, 21 Pac. Rep. 934, 4 L. R. A. 840.

But see Swanson v. Groat, 12 Idaho, 148, 85 Pac. Rep. 384.

6 People v. Truckee Lum. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183.

are interested in the same property. But the general rule is the same, that, in order to prevent such injuries, it is the duty of the ditch owner to keep the ditch in repair, unless that duty, for any reason, contractual or otherwise, has shifted to the land owner, in which case the ditch owner must show such fact. Therefore, if through any fault or neglect of the owner of the ditch in not properly managing and keeping it in repair, the water overflows or breaks through the banks of the ditch and injures the lands or property of others, either by washing over the soil, covering the soil with sand, flooding crops, or doing any other injury to others, the law holds him responsible for his negligence.[7] And in this respect it makes no difference whether the ditch owner or the owner of the lands who was injured has the prior right of title. The ditch owner is bound in the construction and maintenance of his dam, ditches, and other works to so construct, maintain, and repair them as discreet and prudent men ordinarily do, or should do, in such cases, where their own interests are to be affected.[8]

The rule that the duty of making repairs is upon the owner of the ditch is even enforced where injuries result to the users of the

7 In Richardson v. Kier, 34 Cal. 63, 37 Cal. 263, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612, it is stated: "He is bound to keep it in good repair, so that the water will not break through or overflow its banks, and destroy or damage the lands of other parties."

See, also, Hoffman v. Tuolumne etc. Co., 10 Cal. 413; Wolf v. St. Louis etc. Co., 10 Cal. 541, 10 Morr. Min. Rep. 636; Turner v. Tuolumne W. Co., 25 Cal. 397, 1 Morr. Min. Rep. 107; Robinson v. Black Diamond Coal Co., 50 Cal. 460; Darst v. Bush, 14 Cal. 81; Campbell v. Bear River etc. Co., 35 Cal. 697; Mathews v. Kinsell, 41 Cal. 512; Jenkins v. Hooper Irr. Co., 13 Utah, 100, 44 Pac. Rep. 829; Rogers v. West Riverside, 350-Inch Water Co., — Cal. App. —, 124 Pac. Rep. 447.

"They can not negligently or carelessly permit the ditch to fill up and obstruct the flow of the water so as to cause it to flow back and injure the plaintiff, nor can they enlarge their ditch or increase the flow of the water therein to the plaintiff's damage, or in any manner so operate or use their ditch as to render it a nuisance, or unnecessarily damage the servient estate." Board etc. v. Hutchinson, 46 Ore. 57, 78 Pac. Rep. 1028.

8 Hoffman v. Tuolumne etc. Co., 10 Cal. 413; Wolf v. St. Louis etc. Co., 10 Cal. 541, 10 Morr. Min. Rep. 636.

The easement must be exercised in a reasonable and proper manner and without damage to the land owner. Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475.

See, also, Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

water of the ditch from impurities from the cattle of the land owner. Therefore, it was held in a recent Idaho case that the fact that a municipality uses the water, which runs through a ditch constructed over the lands of another, does not of itself entitle the municipality to maintain an action against the owner of the land for a perpetual injunction restraining him from allowing his cattle to feed and graze in the field along the banks of the ditch, and to cross over the same or wade through the waters thereof, but that in such case the primary duty of fencing or protecting the ditch and the waters therein from impurities rested upon the owner of the easement and not upon the owner of the land.[9] However, in Colorado it was held that where the ditch owner negligently allowed the ditch to enlarge so that the stock of one using the land for pasture, holding under a license from the land owner, was lost by miring therein, the ditch owner was not liable to the owner of the stock for such loss.[10]

[9] City of Bellevue v. Daly, 14 Idaho 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992, 125 Am. St. Rep. 179, 14 Am. & Eng. Ann. Cas. 1136.

See, also, for injury to ditches from cattle, Sec. 1678.

See, also, Durfee v. Garvey, 78 Cal. 546, 21 Pac. Rep. 302; Keller v. Fink, 103 Cal. 17, 37 Pac. Rep. 411; Bileu v. Paisley, 18 Ore. 47, 21 Pac. Rep. 934, 4 L. R. A. 840; Messenger v. Gorden, 15 Colo. App. 429, 62 Pac. Rep. 959.

[10] Messenger v. Gorden, 15 Colo. App. 429, 62 Pac. Rep. 959.

CHAPTER 53.

SALE AND ALIENATION OF WATER RIGHTS AND RIGHTS OF WAY.

§ 994. Scope of chapter.
§ 995. Sale or conveyance of water rights.
§ 996. Formalities necessary for the transfer of a water right—Must be by deed.
§ 997. Parol sale of water rights.
§ 998. Sale of a water right by parol executed contract for a consideration.
§ 999. Parol sale—Grantee takes as an appropriation by diversion.
§ 1000. Parol sale of water right with other improvements of settler upon relinquishment of claim.
§ 1001. Sale of water rights by transfer of stock in corporation—Pledge of stock.
§ 1002. Sale of land, reserving the water rights.
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§ 1005. Water rights—Appurtenances—In general.
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§ 1015. A water right is not an inseparable appurtenance to land.
§ 1016. A water right should not be an inseparable appurtenance to land.
§ 1017. Appurtenances—Ditches and canals when appurtenant to land.
§ 1018. Appurtenances—Water right appurtenant to ditch, or ditch to water right.
§ 1019. Mortgages—The alienation of water rights, ditches, and other works by means of.
§ 1020. Mortgages—After acquired water rights as affected by.
§ 1021. Mechanics' liens—To what property they attach.
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§ 1023. Vendors' liens—Liens for furnishing water supply.
§ 1024. Executions—Sale of water rights, ditches, and other works by means of.
§ 1025. Leasing water rights with land.
§ 1026. Leasing or renting water rights without land by consumers.
§ 1027. Sale of part of right—Surplus water can not be sold.
§ 1028. Licensing or loaning the use of water without land by consumers—"Doubling up"—Rotation.
§ 1029. Sale and transfer of riparian rights—As between the parties to the grant.
§ 1030. Sale of riparian rights—When grantee may transfer use to non-riparian lands.
§ 1031. Changes which the purchaser may make, where the right is by appropriation.
§ 1032. Sale of water after diversion.

§ 994. **Scope of chapter.**—In preceding chapters we treated the subject of the acquisition of the right to the use of water, or what are commonly called "water rights."[1] We also have treated the subject of the acquisition of rights of way, both over the public lands[2] and over private lands.[3]

In the present chapter we will treat the subject of the sale and alienation of water rights and rights of way after these rights have been once acquired. We will show that these property rights may be sold, conveyed, and transferred by the owners thereof, either together or separate and apart from each other, or with certain lands as appurtenances thereto.[4] We will show that the title to a right of way, together with the ditch or canal already constructed thereon, and the title to a water right may be acquired by adverse user amounting to prescription, as against the rights of the person who originally acquired the right of way, or the rights of the original appropriator of the water, or their grantees.[5]

Water rights and ditches and canals used in connection therewith may, under certain conditions, be acquired by the exercise of the power of eminent domain.[6] These rights may also be mortgaged

1 For the appropriation of water, see Chap. 38, Secs. 706-732.

2 For rights of way over public lands, see Secs. 927-971.

3 For rights of way over private lands, see Secs. 972-993.

4 For appurtenances, see Secs. 1005-1014.

5 For the acquisition of rights of way over private lands by prescription, see Secs. 1033-1058.

6 For the acquisition of a right of way over private lands by eminent domain, see Secs. 1059-1098.

and the mortgage foreclosed and the property sold, and thus title may be acquired in this manner.[7]

A mechanic's lien for labor, in certain instances, will attach to property rights of this nature, and the lien may also be foreclosed and the property sold under the decree of Court.[8] These rights are also subject to judgment liens, and are also subject to the levy and sale for money judgments acquired in the ordinary manner.

In fact, in this chapter we will endeavor to show that property of this nature is not exempt from any sale, conveyance, or alienation to which any other real property is subject, and that, generally speaking, the method pursued in these transactions is the same as that pursued in similar transactions for other real property. The sale of water rights by companies and corporations will be more thoroughly discussed when we come to that subject.[9]

§ 995. **Sale or conveyance of water rights.**—A water right, or the right to the use of a certain amount of water for a beneficial purpose, acquired under the Arid Region Doctrine of appropriation,[1] being a property right of the highest order,[2] is subject to the sale and transfer of the same as is any other species of property. Being an independent property right, based upon the prior appropriation of water, and consummated and perpetuated by the continuous application of the water to any beneficial use or purpose,[3] unless otherwise provided by statute,[4] it may be sold and transferred separate and apart from the land upon which it was intended to be used, and for the benefit of which the original appropriation was made; and, in fact, it may be sold independent of any land or interest in land. Even a sale or transfer of the whole or any part of the appropriation may then be made, either in connection with or separate and apart from the land, and the pur-

7 See Secs. 1019-1022.

8 See Secs. 1021, 1022.

9 For control by companies and corporations, see Chaps. 72-77.

1 For the definition of a water right, see Secs. 758, 759.

For Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

2 That a water right is a property right, see Secs. 768-771.

3 For the appropriation of water, see Secs. 706-732.

For the purposes for which water may be appropriated, see Secs. 690-705.

4 For the discussion of the recent codes upon the subject, see Secs. 1015, 1016.

chaser may use it for an entirely different and distinct purpose. As was recently held by the Federal Court: "Possessory rights on the public domain have always been recognized as transferable, and water rights can be transferred like other property."[5] Again, the water right may be sold separate and apart from the ditch or canal, by the means of which it was formerly utilized. The water right and the right of way and the ditch or canal constructed thereon may be sold separately, and the conveyance of the one does

[5] Thompson v. Pennebaker, 173 Fed. Rep. 849, 97 C. C. A. 591.

See, also, McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666.

A priority to the use of water is a property right, which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others. Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485.

The sale of a water right confers upon the purchaser all the rights and privileges acquired by his vendor through a prior appropriation thereof. Callahan v. Sullivan, 9 Land Dec. 6; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

See, also, Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Doyle v. San Diego etc. Co., 46 Fed. Rep. 709; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Gelswicks v. Todd, 24 Colo. 494, 52 Pac. Rep. 788; Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. Rep. 1074; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601.

A sale of a water right separate from the land, whereby the right is applied to other lands, may be made if the rights of others are not infringed. Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123, affirming 8 Colo. 237, 45 Pac. Rep. 525.

For the change of use by the purchaser, see Sec. 882.

See, also, Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986; Ada County Farmers' etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. Rep. 1094; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Hard v. Boise City etc. Co., 9 Idaho, 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Boise City etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. Rep. 25, 325; Turley v. Furman, —— N. M. ——, 114 Pac. Rep. 278.

not necessarily include the other. After the sale the right may be utilized by means of other works already constructed or which may be constructed.[6] In other words, the exclusive possessory right to divert and use the waters of a natural stream, acquired by the prior appropriation of the same, is an independent property right, and may be sold, conveyed, and transferred either by an independent conveyance, or together with the ditch or canal by the means of which the right is utilized,[7] and either with or without the land for the irrigation of which the water was appropriated, or the particular interest or business for which the water was originally used.[8]

As was said in a recent Wyoming case upon the subject of the right of the appropriator to sell his water right: "The water in the stream is not his property, but his right to use that water, based upon his prior appropriation, for beneficial purposes, is a property right, and as such is capable of transfer."[9]

6 Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875; Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397; Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95.

If the appropriator owns the channel of the stream, he may sell it without the water right and *vice versa*. Doyle v. San Diego etc. Co., 46 Fed. Rep. 709.

"We are of the opinion that possessory right to ditches and to the use of water may each have an existence independent of each other. A ditch may be conveyed, reserving the water right, or the water right may be conveyed, reserving the ditch." Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho, 793, 51 Pac. Rep. 990, 40 L. R. A. 485, citing Kinney on Irr., 1st Ed., Sec. 224.

7 For the sale of ditches and canals, see Sec. 1003.

8 For the right of the purchaser to change the place of use or the use, see Secs. 872, 1031.

9 Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

"The right to water acquired by priority is the subject of property, and may be sold and conveyed." Gould on Waters, Sec. 234.

"The exclusive right to divert and use the water of a stream, as well as the ditch or other structure through which the diversion is effected, may be transferred like other property, or rights analogous to property." Pom. Rip. Rights, Sec. 58.

See, also, Strickler v. Colorado Sprs., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Ortman v. Dixon, 13 Cal. 33; People's Ditch Co. v. Fresno Canal Co., 152 Cal. 87, 92 Pac. Rep. 77; Thompson etc. Co. v. Pennebaker, 173 Fed. Rep. 849, 97 C. C. A. 591; Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Fuller v. Swan River M. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Smith v. O'Hara, 43 Cal.

A co-owner of a water right can convey his own interest in and to the same, but his rights extend no further; he can not convey so as to injuriously affect his cotenants' rights.[10] Not only may a water right be sold after it has been finally perfected or consummated,[11] but after the inception of a right has been properly begun, the inchoate or unperfected right may be sold, and the purchaser will succeed to the right of priority and to all the other rights of the one who originally instituted the appropriation. It then devolves upon the purchaser to complete the appropriation in a reasonable time and to comply with all the other conditions imposed by the law of appropriation.[12] But in Colorado it is held that where one canal company purchases the rights from another canal company, it must succeed to the charter rights of the grantor and prosecute the enterprise under the same franchise, so that the continuation of the work will practically be the same enterprise.[13] And when a valid transfer is made of a water right acquired by

371, 1 Morr. Min. Rep. 671; McDonald v. Bear River etc. Co., 13 Cal. 220, 1 Morr. Min. Rep. 626; *Id.*, 15 Cal. 145; Dalton v. Bowker, 8 Nev. 190; Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Drake v. Earhart, 2 Idaho, 750, 23 Pac. Rep. 541; Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Rickey etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 574.

By the diversion and use for irrigation, a property right to the use of waters of the natural streams may be acquired. This priority is a property right, and, as such, is subject to sale and transfer. Ft. Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

10 Henderson v. Nichols, 67 Cal. 152, 7 Pac. Rep. 412; Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330.

See, also, for rights of tenants in common, Chap. 73.

11 For the consummation of an appropriation, see Secs. 725-728.

12 For reasonable time within which to complete the appropriation, see Secs. 733-741.

See Wood v. Lowney, 20 Mont. 273, 50 Pac. Rep. 794.

Where a person who initiated the appropriation, but has not completed it, transfers the possessory title to which the water right was appurtenant, his successor can complete the appropriation. Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

13 Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580.

appropriation, the priority of the original appropriation is preserved as against the rights of others.[14] But where the inception of a right has begun and afterward was abandoned or forfeited by the original appropriator, all rights revert to the public, and an attempted sale of the same passes nothing to the purchaser.[15] In other words, there must be something to sell. As was said in a recent Utah case:[16] "The mere making of a survey and posting of a notice neither conferred nor initiated any such rights. They therefore had no such 'rights, interest, or property' as were subject to sale, assignment, or transfer. All that they had to sell or assign, or make over, was their knowledge and information in respect of the canyon and the river, and of the feasibility of an appropriation and diversion of unappropriated waters of the river for power and irrigation purposes, and the field notes, maps, and drawings of their survey."

Not only may the sale of a consummated appropriation be made, but also one may be made where the right is inchoate or in an incomplete condition. And if the purchaser proceeds with the necessary work within a reasonable time to finally complete the appropriation, his rights will relate back to the inception of the title of his grantor. In other words, the priority of the grantor will be preserved.[17] But, upon the other hand, where the work was not diligently pursued by the grantor, as we have seen from the cases cited above, the grantor has nothing to convey, and the deed, as far as the conveyance of any rights to the water is concerned, is null and void.

Under the recent irrigation or water codes adopted by most of the Western States, a sale may be made of a permit by the State engineer or other officer authorized to issue the same upon certain

14 Jacobs v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671.

15 Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Davis v. Gale, 32 Cal. 26, 9 Am. Dec. 554, 4 Morr. Min. Rep. 604; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124; Stickney v. Hanrahan, 7 Idaho, 424, 63 Pac. Rep. 189.

For the abandonment of water rights, see Secs. 1099-1112.

For the forfeiture of water rights, see Secs. 1118-1120.

16 Coray v. Holbrook, —— Utah —, 121 Pac. Rep. 572.

17 Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. Rep. 867; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

conditions prescribed by the statute. The assignee of such permit may then proceed and complete the appropriation.[18]

§ 996. Formalities necessary for the transfer of a water right—Must be by deed.—As we have discussed in a preceding section, a water right is a species of real property.[1] It therefore follows that, being such property, sale or transfer of a water right should follow all the formalities required by the sale or transfer of any other real property. Therefore, it is the general rule of law respecting such transfers that they are within the statute of frauds, and where there is an independent sale of a water right, the transfer must be made by a deed, or an instrument in writing, which, together with the possession of the right, will be construed in effect to be a deed.[2] And any contract for the conveyance of a water right

18 Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

For statutes upon the subject, see Part XIV.

1 See Sec. 769.

2 Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223; Dalton v. Bowker, 8 Nev. 190; Union W. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

The sale is complete when the deed is delivered and possession given. Booth v. Chapman, 59 Cal. 149.

See Middle Creek etc. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054, where it was held that a contract for a valuable consideration transferring water rights was valid and binding between the parties, without being acknowledged or recorded, and, where accompanied by the possession of the right, was valid as to third persons.

"In this State it is regarded as an independent right, which may be the subject of sale and conveyance, but a technical transfer is essential to vest in the transferee a title to the water." Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601.

See, also, Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280, reversing 1 Colo. App. 480, 29 Pac. Rep. 906; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Daum v. Conley, 27 Colo. 64, 59 Pac. Rep. 753.

But see Bloom v. West, 3 Colo. App. 212, 32 Pac. Rep. 846.

See, also, Fudickar v. East Riverside

must be in writing, as the right is an interest in real estate, and, therefore, within the statute of frauds.[3] There are, however, certain exceptions to this general rule, which we will discuss in subsequent sections of this chapter.[4]

In most jurisdictions the necessity for a seal has been abolished by statute; but where the distinction between sealed and unsealed instruments still exists, the seal is necessary.[5] In accordance with the general rule governing the sale and transfer of real estate, the deed of conveyance must be acknowledged [6] in order to entitle it to record, and must be recorded.[7] But it was held in Montana that

Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024; Ada County etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; McGinness v. Stanfield, 6 Idaho, 372, 55 Pac. Rep. 1020.

A water right in Idaho is held to be real estate, and must be conveyed as real estate; and it can not be conveyed by the mere handing over of a permit to appropriate water to a would-be purchaser. Gard v. Thompson, —— Idaho, ——, 123 Pac. Rep. 497.

The interest conveyed by an irrigation company's deed of water rights is not transferred by an assignment of the deed. Blakeley v. Ft. Lyon C. Co., 31 Colo. 224, 73 Pac. Rep. 249.

[3] Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Johnson v. Sherman Imp. Co., 71 Neb. 452, 98 N. W. Rep. 1096; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Grisezn v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034, where it was held that a parol sale of a water right operates *ipso facto* as an abandonment thereof.

A transfer of a right to a certain amount of the waters of a stream for irrigation purposes is an agreement for the transfer of an estate in real property, within the statute of frauds. Churchill v. Russell, 148 Cal. 1, 82 Pac. Rep. 440.

[4] For the parol sale of water rights, see Secs. 997-1000.

[5] Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Ortman v. Dixon, 13 Cal. 33; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054.

[6] Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054.

[7] Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359, holding that the recording in a book entitled "Miscellaneous Records," in which it had been the custom to record water contracts and like agreements, is the proper book in which to record it, so as to give constructive notice thereof.

See, also, Lyles v. Perrin, 119 Cal. 264, 51 Pac. Rep. 332; Partridge v. McKinney, 10 Cal. 181, 1 Morr. Min. Rep. 185; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213, in which it was held that where a contract of conveyance was not acknowledged and a subsequent conveyance by proper deed was made to the same rights, that the lat-

where the statute providing that a conveyance of real estate not duly recorded shall be void as to the subsequent purchaser of such real estate, whose conveyance shall be first duly recorded, an appropriator of the water is not such a purchaser, within the terms of the statute, and a prior conveyance of a water right is valid as between the parties thereto, and is also valid as against the attempted subsequent appropriation of the water.[8] The sale of a water right or ditch is completed upon the delivery of the deed conveying the same and the possession of the property by the purchaser.[9]

In general it may be said that, owing to the loose methods by which water rights were sold and transferred, and the general lack of record of the claims of the appropriators of waters from the natural streams, especially as to the early rights, it is the tendency in all of the States by legislation to require that transfers of this nature should be executed in a more formal manner, and that the deeds of transfer be recorded. The statutes of many of the States also require that all claims to the use of water should be of record in some public office, usually the State engineer's office.[10] And where a water right is sold, should any question arise as to the title of the vendee, he must connect his right to the water with the rights of those who first made the appropriation. He must also give notice to the public that he succeeds to the rights of the original appropriator. This can only be done by deed and

ter conveyance would hold. And the Court said: "And as Purser had made a subsequent assignment of his rights under this very contract to a third person and it had been duly recorded, Leavitt's undoubted assignment became void." Citing Cal. Civ. Code, Sec. 1214.

8 Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054.

In Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995, it was held that an instrument, though not acknowledged or recorded, as required by law, was sufficient to pass title between the parties, and was also sufficient as against one who had filed a conflicting application with the State engineer, before the transfer was filed.

In Lyles v. Perrin, 119 Cal. 264, 51 Pac. Rep. 332, where the plaintiff made a second sale of a water right before the first deed was recorded, it was held that he was not liable to punitive damages.

A purchaser of land having springs of water thereon takes the land free from all claims of one to the use of the water under an unrecorded deed without notice. Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595.

9 Booth v. Chapman, 59 Cal. 149.

10 For State control, see Secs. 1337-1367.

For the adjudication of water rights, see Chaps. 78, 79.

the recording of the same, in which case the right of the grantee will relate back to the date of the inception of the original appropriator's title.[11] However, a recent case decided by the Supreme Court of Colorado, while holding to the rule that the use of water for irrigation is real estate, and that the proper method of conveying the title thereto is by deed, recognized the fact that since many of the early water rights acquired by appropriation have not passed by deed from the original appropriators, held that parol proof of the possession and use of a water right is *prima facie* evidence of title.[12] As to the amount of water intended to be conveyed by deed, the terms expressed therein must govern, in the absence of fraud or mistake, if by a reasonable construction thereof the intention of the grantor can be ascertained. If, however, the language used is ambiguous, the circumstances surrounding the making of the grant may be considered.[13] In the case of a mutual mistake or fraud, the rights of the respective parties may be determined in an action brought to establish prior rights to the water.[14]

§ 997. Parol sale of water rights.—A water right being an interest in real estate,[1] any sale or transfer of the same must be by deed

11 Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671.

Where, in a suit for unlawful diversion of the waters of a stream, plaintiff claimed by right of an earlier appropriation, and the evidence showed that although the water was used to irrigate plaintiff's land before defendant used it, but where plaintiff failed to connect himself in interest with those who first cultivated his land and appropriated and used the water thereon, it was held that the defendant's appropriation was the earlier one and that he will not be deprived of the water. Chiatovich v. Davis, 17 Nev. 133, 28 Pac. Rep. 239.

12 Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

"The open and notorious possession and user of water from an irrigation canal through lateral ditches is constructive notice to a purchaser of the rights of the parties so in possession and using the water." McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058.

See, also, Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406.

13 As the words "inch of water" have not acquired any fixed technical meaning, which must control when used in a grant, evidence of the circumstances surrounding the making of the grant must be considered. Jackson Mill Co. v. Chandos, 82 Wis. 437, 52 N. W. Rep. 759; Janesville Cotton Mills v. Ford, 82 Wis. 416, 52 N. W. Rep. 764, 17 L. R. A. 564; Emery v. Village of Three Rivers, 78 Mich. 438, 44 N. W. Rep. 401.

14 South Tule etc. Co. D. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032.

1 See Secs. 768-770.

or an instrument in writing, as being within the statute of frauds,[2] and with the exceptions hereafter mentioned, any attempt to transfer an independent water right by a mere parol or verbal contract [3] is void as against the rights of appropriators subsequent to the inception of the right attempted to be transferred and prior to the date of the attempted transfer, although such a sale, accompanied by the actual possession and use of the right, may be good as between the parties to the agreement. This has not always been the rule relative to parol transfers of water rights. In the early days, before the Act of 1866,[4] and during the period when the title to either water rights or mining claims was only that of possession, the mere possessory right to the use of water was sometimes held to be such a right that it was considered in the nature of personal property, and where so considered it was held that it might be sold and transferred by a mere parol agreement. It is even embodied in some of the early statutes that "such a right may be appurtenant to the land upon which such water is used, or it may be personal property, at the option of the rightful owner." [5] The same rule was held to be in force relative to the mere possessory title to mining claims, and that a written conveyance was unnecessary, where the actual possession was given.[6] During this period it was held that such transfers were not within the statute of frauds, and this loose method of making transfers of water rights was kept up for many years after these rights were acknowledged by Congress; and, in fact, it may be said that in practical working this custom is not

2 For transfer by deed, see Sec. 996.

3 For transfers of water rights with land, see Secs. 1005, 1006.

For appurtenances, see Secs. 1006-1014.

4 For the Act of 1866, and construction, see Secs. 611-619.

5 2 Comp. Laws of Utah, 1888, Sec. 2782.

The right to use power created by an accumulation of water above a dam may be granted by parol. Johnson v. Bowersock, 62 Kan. 148, 61 Pac. Rep. 740.

6 The right to mining ground, acquired by appropriation, rests upon possession only; and rights of this character, not amounting to an interest in land, are not within the statute of frauds, and no conveyance other than a transfer of possession is necessary to pass them. Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198, 9 Morr. Min. Rep. 457.

See, also, Gatewood v. McLaughlin, 23 Cal. 179; Antoine etc. Co. v. Ridge etc. Co., 23 Cal. 219; Black v. Elkhorn M. Co., 163 U. S. 445, 41 L. Ed. 221, 16 Sup. Ct. Rep. 1101, 18 Morr. Min. Rep. 375; Union etc. Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541, 5 Morr. Min. Rep. 323.

entirely obsolete, and parol transfers or attempted parol transfers have been made at a very late date. During the later years, however, owing to the great importance of the right and the necessity of a record of the same, "the possessory estate thus acquired has been elevated to the dignity of other interests in realty, being recognized as an express grant from the Government,"[7] and with the exceptions hereafter discussed, require a deed or instrument in writing for their transfer.[8]

In a recent case decided by the Supreme Court of Utah[9] it was held that one seeking to have rights declared and enforced founded upon a verbal or written agreement and involving or growing out of an alleged trust or confidential relation, is required, among other things, to show, with at least reasonable certainty, the terms of the agreement and the character and extent of the trust or confidential relation; that these things can not be left to loose or flexible language or to vague or indefinite terms. Therefore, the Court held that the evidence in the case was not sufficient to support a finding that a party agreed to make an appropriation of water for irrigation in trust for another or to secure for others an interest in a corporation formed to acquire water rights for irrigation.[10]

There are four principal exceptions to the rule above stated that a transfer of a water right must be in writing, viz.: First, where the transfer was made by a parol executed contract for a consideration;[11] second, where the transferee takes the right as an actual appropriation by diversion;[12] third, where the water right is considered as an improvement of a settler on the public lands, who relinquishes his claim before patent and sells his improvements;[13] and, fourth, where the right is sold with land as an appurtenance thereto, and without being specifically mentioned in the deed of transfer.[14] As the rights acquired by the grantee in each of these cases differ, as well as the rules of law governing them, we will discuss these subjects in the order named.

7 Wiel, Water Rights in the Western States, 2d Ed., p. 345.

8 See preceding section, No. 996.

9 Coray v. Holbrook, —— Utah —, 121 Pac. Rep. 572.

10 See, also, Duckworth v. Watsonville, 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338.

11 See Secs. 998, 999.

For the acquisition of a right of way by parol executed contract, see Secs. 980-984.

12 See Sec. 999.

For an appropriation by diversion, see Sec. 730.

13 See Sec. 1000.

14 See Secs. 1005-1018.

§ 998. Sale of a water right by parol executed contract for a consideration.—As is the case with the acquisition of rights of way[1] and other interests in land, rights to the use of water, or water rights, may be acquired without a formal deed of conveyance. One of the exceptions mentioned to the general rule in a previous section[2] is by a parol contract, for a good consideration, all or a portion of which contract has been executed, and of such a character that a court of equity will enforce a specific performance. An agreement of this nature takes the case out of the statute of frauds, and is valid as against the original grantor and as against all parties having notice thereof.[3] It was also held in a recent Oregon case that a parol sale of land and appurtenant water rights, for a consideration, and a surrender of possession thereof to the purchaser, created an equitable estate in the water rights which a court of equity was bound to protect.[4] Therefore, the grantor can not re-

1 For the acquisition of rights of way over private lands by parol executed contract, see Secs. 980-984.

2 See Sec. 997.

3 Churchill v. Russell, 148 Cal. 1, 82 Pac. Rep. 440.

An executed parol license to use the waters of a certain stream is irrevocable. Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022.

See, also, McBroon v. Thompson, 25 Ore. 559, 37 Pac. Rep. 57, 42 Am. St. Rep. 806; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; Stowell v. Tucker, 7 Idaho, 312, 62 Pac. Rep. 1033.

The parol agreement of a land owner that, if an adjoining land owner will help him to enlarge an irrigation ditch on his lands, he will permit the latter to use the waters thereof, is, after performance by such adjoining land owner, and his use of the waters thereunder, enforceable in equity as against the owner of the lands on which the ditch is located and those claiming under him with notice, though within the statute of frauds. Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79.

See, also, Flickeniger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058; Coffman v. Robbins, 8 Ore. 278, 8 Morr. Min. Rep. 131.

Part performance of an oral agreement concerning priorities and title to irrigation water rights will take the agreement out of the statute of frauds. Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406.

See, also, Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Bates v. Babcock, 95 Cal. 479, 30 Pac. Rep. 605, 16 L. R A. 745, 29 Am. St. Rep. 133; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Schilling v. Rominger, 4 Colo. 100; Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661.

4 Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

voke such a contract, after the grantee or licensee has expended money in making valuable improvements upon the strength of the contract, in order to conduct the water to the place of use.[5] So, under this principle, it is held that a parol agreement between parties who have settled upon lands near a certain stream as to the amount of water which each may take from the stream, if acted upon for a time by the parties, will be enforced in a court of equity.[6] But in order to successfully rely upon contracts of this nature it is held that it must be made for a consideration,[7] and must be either executed in full or partly executed, and the grantee must be able and willing to fully execute the contract upon his part.[8] But before a specific performance of such a parol contract is enforced, and where the legal title to the water right is in the grantor, and the grantee has but the mere equitable title, the grantee is not entitled to rely on the contract in a suit by a third party to restrain the diversion of such water in the absence of proof and a finding that the plaintiff purchased with notice, either actual or constructive, of the defendant's rights.[9] However, it is held in Colorado that open, continuous user of water from an irrigation canal by an owner of adjacent land, through lateral ditches, is possession, and gives constructive notice of his rights to a purchaser of the canal.[10] And, therefore, upon the other hand, water rights trans-

5 See cases cited *supra*.

See, also, for the same rule concerning rights of way, Sec. 980.

For license for right of way, see Secs. 983-985.

6 Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349.

Appropriators of water by means of a common ditch are entitled to agree among themselves as to the manner in which they may enjoy their several appropriations. Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

7 Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524, where it is held that one land owner will not be estopped from setting up his claim to a water right, by merely acquiescing in the use of it, and permitting the other to incur expense on the faith of his acquiescence, unless compensated.

8 Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216.

9 Churchill v. Russell, 148 Cal. 1, 82 Pac. Rep. 440; Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79; Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595; McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058.

10 McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058.

"His continued possession and occupancy is sufficient to convey to every one notice of his equitable rights in and to the estate." Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

ferred, in cases of parol executed contracts for a consideration, and coupled with the actual possession and use of the water for a considerable time, taken in connection with the improvements made upon the strength of the contract, as against all persons who have had actual notice of the grantee's claim, or whom the law deems to have had constructive notice, a court of equity will protect and enforce.[11] Furthermore, it was held by the Supreme Court of Montana, in a recent case,[12] that the rule, that the right to question the validity of a parol conveyance is available only to the parties or their privies, applies only to conveyances of water rights. And the Court said: "Appellant was a stranger to all of these conveyances; nor has he, by anything that has occurred since, been brought into privity with any of the parties to them. Being a stranger, he can not be heard to object to them. The right to question a contract on the ground stated is purely personal, and can not be asserted by one who is neither a party nor a privy to it."[13]

§ 999. Parol sale—Grantee takes as an appropriation by diversion.—An independent parol transfer of a water right may be good as between the parties to the agreement, provided the grantee enters into the possession and use of the water.[1] But should there not be sufficient water in the stream for all, as to third parties the transfer by parol may be void. This is especially true as to the rights of subsequent appropriators, the inception of whose rights

11 Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

Possession alone of land under a verbal contract, when delivered by the vendor to the vendee, is an act of part performance which will take the case out of the statute of frauds. Sprague v. Jessup, 48 Ore. 211, 83 Pac. Rep. 145, 84 Pac. Rep. 802, 4 L. R. A., N. S., 410.

12 Featherman v. Hennessy, 42 Mont. 535, 113 Pac. Rep. 751.

13 Citing McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648; Wood v. Lowney, 20 Mont. 273, 50 Pac. Rep. 794; Book v. Justice Mining Co., 58 Fed. Rep. 106; Murray Hill Co. v. Havenor, 24 Utah 73, 66 Pac. Rep. 762; Hill v. Groesbeck, 29 Colo. 161, 67 Pac. Rep. 167; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. Rep. 345, 37 N. E. Rep. 14, 23 L. R. A. 588; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; 20 Cyc. 306; Wood on Statute of Frauds, Sec. 538.

1 Middle Creek D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054, where it was held that such a sale was good as between the parties to a void deed.

See, also, McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

are subsequent to the inception of the right of the grantor in a parol transfer, and prior to the date of the transfer. The great weight of authority upon this subject throughout the Western States now holds that a parol or verbal sale of a water right, accompanied by actual possession and use for some beneficial purpose, is valid as between the parties to such an agreement. But in such a case it is further held that the grantee does not acquire the grantor's right to priority, but that he acquires a new right as an appropriator by actual diversion, dating only from the date of the transfer and such actual possession, which is, in effect, the same as though the grantee had upon that date consummated the appropriation himself. In other words, in such a transfer the doctrine of relation can not be invoked by the grantee back to the inception of his grantor's title to the right, as his right relates back only to the date of the parol transfer and his actual possession and use of the water.[2] In this case the priority of the grantor's appropriation is virtually abandoned, and the grantee takes the right simply as a subsequent appropriator by actual diversion in his regular order with the other subsequent appropriators of the waters of a certain stream, should there be any such subsequent appropriators; and, further, and most important, should there be any water remaining in the stream after the wants of the subsequent appropriators, who are prior to the date of the transfer, have been supplied. This right is the second exception to the general rule that the transfer to a water right must be by a deed or instrument in writing, mentioned in a preceding section.[3] It can be readily seen that such a right may or may not be of value, depending upon the size of the stream and the demands made upon its waters prior to the transfer.

One of the early leading cases upon this subject was decided by the Supreme Court of California,[4] where it was held that under a verbal or parol sale the grantee does not succeed to the rights of the seller so as to claim the seller's prior appropriation of the

[2] For doctrine of relation, see Secs. 742-756.

[3] See Sec. 997.

For right to appropriate by actual diversion, see Sec. 730.

For the doctrine of abandonment, see Secs. 1099-1117.

[4] Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671.

water, but must date his appropriation from the time he enters into possession.[5]

The grantee under a parol sale, even accompanied by possession, can not tack his own use onto that of his grantor and thus cut out the rights of appropriators who were subsequent to his grantor, but prior to himself.[6] Upon the question of a parol sale working an abandonment, where the grantee takes the water as an appropriation by diversion, it can not be said that the water right is abandoned, but that the priority which originated with the inception of the grantor's title is abandoned, and the grantee takes the right for what it is worth simply as a subsequent appropriation in his regular order with the other subsequent appropriators.[7]

§ 1000. Parol sale of water right with other improvements of settler upon relinquishment of claim.—The third class of cases, which are exceptions to the general rule, that the transfer of a water

[5] See, also, Davis v. Gale, 32 Cal. 26, 9 Am. Dec. 554, 4 Morr. Min. Rep. 604; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Barkeley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Fabian v. Collins, 3 Mont. 215; Dodge v. Marden, 7 Ore. 456; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032; Lobdell v. Hall, 3 Nev. 507; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Clark v. Willett, 35 Cal. 534; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034, citing Kinney on Irr., 1st Ed., Secs. 253, 255, 264; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678.

"If it be true that the respondent has failed to connect itself with the title of all the appropriators, except by verbal sale, its appropriation does not antedate its own possession." Salina Cr. Irr. Co. v. Salina S. Co., 7 Utah, 456, 27 Pac. Rep. 578.

See, also, Chiatovich v. Davis, 17 Nev. 133, 28 Pac. Rep. 239.

The abandonment of property destroys the title and also its relations. Gluckauf v. Reed, 22 Cal. 468; Dyson v. Bradshaw, 23 Cal. 528; Davis v. Butler, 6 Cal. 510; French v. Baintree M. Co., 23 Pick. 216; McGoon v. Ankeny, 11 Ill. 558; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633.

[6] Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Dodge v. Marden, 7 Ore. 456.

See, also, for tacking rights, Sec. 787.

[7] Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034, citing Kinney on Irr., 1st Ed., Secs. 253, 255, 264.

For rights of subsequent appropriators, see Secs. 783-786.

For the doctrine of abandonment, see Secs. 1099-1117.

See, also, for parol sale working an abandonment, Sec. 997.

right must be in writing, under our classification,[1] are those cases where a settler upon the public land of the United States has appropriated water or has taken some steps to make such an appropriation, and, having an imperfect or inchoate right to the land itself, relinquishes his right to the land. Under such a condition of affairs the settler is permitted to sell his improvements upon the land. The same is also true in the cases of mere squatters or settlers holding possessory rights to a portion of the public lands. And upon the theory that the possessory right to the use of the water is an improvement in the sense that buildings and fences are improvements, a parol sale or transfer of such improvements is held to be valid and to include water rights, and to vest in the transferee the grantor's priority to the appropriation.[2] As was held by the Montana Court,[3] a transfer by parol of a settler's right of entry of lands carries with it a water right appurtenant thereto, entitling the transferee to the benefits of the priority of the appropriation.

1 For the classification of these exceptions, see Sec. 997.

2 A mere claim of right to the land held by a squatter, if accompanied by a diversion and application of the water in the reclamation thereof, is sufficient to entitle him to convey to another his interest in the water right, together with such as he may have in the land to which the water may be appurtenant. "But a mere squatter upon public lands may, *even by parol*, transfer his claim and interest, whatever it may be in this respect, to another, and the rights of the subsequent purchaser and of his successors in interest, if asserted under the doctrine of prior appropriation, relate back to the date of the first appropriation with whom there may be a privity of estate." Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

A settler in possession of Government land for which he has appropriated a water right, may transfer such land and water right by oral assignment, so that the transferee becomes his successor in interest in the water right, even though the transfer was without consideration. Wood v. Lowney, 20 Mont. 273, 50 Pac. Rep. 794.

See, also, Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. Rep. 70; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Brown v. Newell, 12 Idaho 166, 85 Pac. Rep. 385; Featherman v. Hennessey, 42 Mont. 535, 113 Pac. Rep. 751; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Johnston v. Little Horse Creek etc. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

3 McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648.

It will be noticed in this case that the Court seems to hold that the water right was an appurtenance to the possessory right to the land, and passed with it as such.[4] And in all of the cases cited in our notes it must be also noticed that the right granted was not an independent water right as such, but the water right was granted with other property, and usually the possessory right to the land.

But the right of a person claiming an appropriation of water can not be tacked to that of a mere squatter upon public lands, who, while he may have irrigated the land, has abandoned it.[5]

§ 1001. Sale of water rights by transfer of stock in corporations—Pledge of stock.—Although a water right is real property,[1] both it and the ditches and canals used in conveying the water to the place of use may be represented by shares of stock in a corporation; and when so, the shares of stock are treated as personal property, and may be sold or pledged in the manner provided for the sale and transfer of such personal property.[2] A tenant in common in a mutual association of individuals together owning water rights and ditches may also sell his interest without joining with his co-tenants or in any way disturbing their rights.[3] Again, where water rights, and the ditches through which they are enjoyed, are owned by tenants in common, who form a corporation, which issues shares of stock representing both the water rights and the ditch, a transfer of its shares operates as a transfer of both water rights and the ditch.[4] The subject of the sale and transfer of water

4 For appurtenances, see Secs. 1005-1018.

5 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678.

For tacking water rights, see Sec. 787.

1 See, for the nature of a water right, Sec. 769.

2 For ditch and canal companies, see Chaps. 72-77.

3 For tenants in common, see Chap. 73.

4 Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123, affirming 8 Colo. App. 237, 45 Pac. Rep. 525; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Snyder v. Murdock, 20 Utah, 419, 59 Pac. Rep. 91; Wells v. Price, 6 Idaho, 490, 56 Pac. Rep. 266; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38; Brockman v. Grand Central C. Co., 8 Ariz. 451, 76 Pac. Rep. 602; George v. Robinson, 23 Utah, 79, 63 Pac. Rep. 819; Pederson v. North Yakima etc. Co., 63 Wash. 636, 116 Pac. Rep. 279.

rights where the same are represented by shares of stock will be more thoroughly discussed when we come to the question of the transfer of rights by means of the sale of stock in mutual water corporations.[5]

§ 1002. **Sale of land, reserving the water rights.**—As defined and distinguished by the California Court:[1] "The word 'reserved' in a strict technical sense is not synonymous with 'exception.' The former term is applied to a clause in a deed which creates some right or privilege for the benefit of the grantor in the land described as granted, and withholds it from the operation of the grant, so that the title to the thing passes to the grantee, and the right or privilege concerning it is the only thing retained by the grantor. The latter term applies to something which constitutes a part of the thing described as granted, and which would pass but for the excepting clause, the office of which is to exclude it from the thing described, and the title to the thing excepted remains in the grantor. The difference between the two terms is so slight and shadowy that in common parlance they are used interchangeably, 'and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used.'"[2]

If specified in the deed conveying a certain tract of land, the water right, although it may in fact be an appurtenance to the land, may be reserved by the grantor, who may then transfer the water claimed under the right to some other land, provided, of course, that the rights of others are not injured by the change.[3]

And a grantor conveying a water right without reservation has no right to use the water for any purpose.[4] And it was held in California[5] that a provision in a deed "reserving" to the grantor

[5] See Chap. 75.

[1] Van Slyke v. Arrowhead Res. & Pr. Co., 155 Cal. 675, 102 Pac. Rep. 816.

[2] Citing 13 Cyc. 674.

[3] For appurtenances, see Secs. 1005-1018.

For changes in the place of use, see Secs. 866-868, 871.

See, also, Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Wilson v. Higbee, 62 Fed. Rep. 723; Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617; McRae v. Small, 48 Ore. 139, 85 Pac. Rep. 503; Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469; Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42.

[4] Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762.

[5] Peterson v. McDonald, 13 Cal. App. 644, 110 Pac. Rep. 465.

a right to use water from a well upon payment of monthly rental constituted only a personal contract to sell the water, and that the same was not a reservation which ran with the land.[6] Where the General Government granted to the State of Montana one section of land of a former military reservation, to be selected "so as to embrace the buildings and improvements thereon," it was held that it did not grant the right to the use of the water of a stream from which the Government had taken water for its own use, but that the water was subject to appropriation.[7] So, also, a grant of a canal may be made and the water right used in connection therewith may be reserved.[8] Again, a tract of land may be granted and a portion of the water right reserved by the grantor.[9] But one who appropriates water for sale, rental, or distribution can not, when he sells the system, reserve any part of the waters for irrigation of his private lands, unless he had through the same canal and ditches made a private appropriation for use on such lands, in which case his reservation must be limited to such private appropriation.[10] The theory upon which this is not allowed is that the appropriation of the waters was made for distribution of the waters to members of the public, and the appropriator as the agent of such public use had no power whatsoever to reserve to himself for his private purposes any part of the water.

A parol reservation of a spring on land conveyed, as held by the California Court, will not be specifically enforced in an action for that purpose.[11] Again, as is the case of sales of water rights, there must be something to grant;[12] so, also, in cases of reserva-

6 See, also, upon the subject of reservations, Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Kelly v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785; German etc. Society v. McLellan, 154 Cal. 710, 99 Pac. Rep. 194; Peterson v. McDonald, 13 Cal. App. 644, 110 Pac. Rep. 465; Ballard v. Titus, 157 Cal. 673, 110 Pac. Rep. 118.

7 Story v. Woolverton, 31 Mont. 346, 78 Pac. Rep. 589.

8 Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95; Zimmler v. San Luis etc. Co., 57 Cal. 221; Miller v. Vaughn, 8 Ore. 333; Grand Val. Irr. Co. v. Lesher, 28 Colo. 237, 65 Pac. Rep. 44.

9 Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Peterson v. Cody, 14 Cal. App. 502, 112 Pac. Rep. 558.

10 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213.

11 German etc. Society v. McLellan, 154 Cal. 710, 99 Pac. Rep. 194.

12 See Sec. 995.

tions, in order to make a valid reservation there must be something to reserve. Hence, where the grantee's acceptance of a deed containing in terms a reservation to the grantor of a priority appropriation of water for a certain reservoir, when, in fact, no priority of appropriation had been secured, it was held by the Supreme Court of Colorado [13] that, there being nothing to reserve, the acceptance of the deed did not estop the grantee to claim an appropriation of its own for such reservoir.

§ 1003. Sale of ditches, or other works, and easements for the same.—We have discussed in previous chapters how rights of way may be originally acquired for ditches and canals and other works necessary for the utilization of the water under a water right, both over the public lands of the United States [1] and also over lands which have passed into private ownership.[2] When once acquired these easements, or rights of way, together with the ditches or other works constructed over the same, are property rights, and the subject of sale and transfer the same as any other species of real property, and under the same rules of law governing transfers of real property. It therefore follows that the ditch, canal, or other structure, by means of which the diversion of the water is effected, and the rights of way for the same, must be conveyed by a written instrument, as is the case of other real property.[3] A

13 Windsor Res. etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729.

1 See Chap. 51, Secs. 927-971.

2 See Secs. 972-993.

3 For the conveyance of water rights, see Secs. 995-1002.

An interest in a ditch used for mining purposes can not be transferred except by deed. Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632.

See, also, Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Dodge v. Marden, 7 Ore. 456; Spear v. Cook, 8 Ore. 380; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Clark v. Willett, 35 Cal. 534; Hart v. Plum, 14 Cal. 148; Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62; Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761, where the Court said: "The law recognizes but two ways of acquiring by purchase and ownership interest in such ditch. One by deed or prescription, which presupposes a grant, and the other by condemnation. An interest in such a ditch is an interest in realty. It can not pass by verbal sale."

See, also, Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Donnell v. Humphreys, 1 Mont. 518; Walley v. Platte etc. Co., 15 Colo. 579, 26 Pac. Rep. 129; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Fudicar v. East Riverside Irr. Dist., 109

ditch and easement over the land of another may be sold and transferred separate and apart from the land for the benefit of which the right of way was acquired and the ditch constructed. A ditch may also be conveyed reserving the water right, the waters under which right were formerly conveyed though the ditch; and the water right may also be conveyed, and at the same time the ditch and easement therefor may be reserved. It is a separate and distinct species of real property, and therefore may be sold and transferred separate from the water right or any other interest in land. The extent of the servitude is determined by the terms of the grant and the nature of the enjoyment by which it was acquired.[4]

"Whether a reservation or covenant in a deed shall be construed to create an easement in gross or one appurtenant to the land is a matter to be deducted (1) from the terms of the instrument itself; or (2), if that is ambiguous, then from a consideration of all the circumstances surrounding its execution, always bearing in mind the rule that the courts should construe an instrument to convey an easement appurtenant rather than one in gross."[5]

Cal. 29, 41 Pac. Rep. 1024; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Ada County etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Highland D. Co. v. Mumford, 5 Colo. 325; Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. Rep. 917; Bowen v. Webb, 37 Mont. 479, 97 Pac. Rep. 839; *Id*, 34 Mont. 61, 85 Pac. Rep. 739; McElravy v. Brooks, 48 Colo. 207, 109 Pac. Rep. 863.

For the sale of ditches as appurtenances, see Secs. 1017, 1018.

4 Los Robles W. Co. v. Stoneman, 146 Cal. 203, 79 Pac. Rep. 880; Salem etc. Co. v. Stayton etc. Co., 33 Fed. Rep. 146; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho, 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397; Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95; Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875; Parke v. Boulware, 7 Idaho, 490, 63 Pac. Rep. 1045; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Stocker v. Kirtley, 6 adIoh, 795, 59 Pac. Rep. 891; Zimmler v. San Luis etc. Co., 57 Cal. 221; Miller v. Vaughn, 8 Ore. 333; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38.

A grant of a right of way for a ditch does not necessarily include a conveyance of a right to take water from the stream from which the ditch was built. Zimmler v. San Luis etc. Co., 57 Cal. 221.

See, also, Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875.

5 Tone v. Tillamook City, 58 Ore. 382, 114 Pac. Rep. 938; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 39.

So distinct does the law deem these separate property rights that the courts hold that a water right, and the ditch including the right of way therefor, may be condemned separately;[6] that a decree as to the ditch right does not necessarily govern as to the water right, or the reverse;[7] that the abandonment of one right does not necessarily abandon the other;[8] that an injury to a water right can not be proved under a count for an injury to the ditch, or the reverse of the proposition.[9] It therefore follows, owing to the fact that these are separate and distinct property rights, that the grant of a ditch or canal together with the easement therefor does not necessarily include a water right formerly used through the same works.[10] However, the conditions may be such that the ditch, canal, or other works may be appurtenances to the land for the benefit of which they are used to conduct the water, and in that case will pass with the transfer of the land without special mention in the deed or the term "with appurtenances" being used.[11] Again, although as a physical fact there may be but one ditch, where a ditch is used in common for the conveyance of water for two appropriators, legally there are two—"two legal entities that had never merged or become identical," each of which may be sold and transferred separate from the other.[12] But the owner of an interest in an irrigation ditch can only sell rights in the same to the extent of his own interest.[13] Whether the interest in the

6 Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347.

For the acquisition of a right of way over private lands, see Secs. 972-993.

For the condemnation of a ditch or canal, see Sec. 1085.

7 Parke v. Boulware, 7 Idaho, 490, 63 Pac. Rep. 1045.

For judgment and decrees, see Chaps. 78, 79.

8 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

For abandonment, see Secs. 1099-1117.

9 Nevada D. Co. v. Kidd, 37 Cal. 282.

10 See cases cited *supra*.

11 For ditches and canals as appurtenances, see Secs. 1017, 1018.

For water rights as appurtenances, see Secs. 1005-1016.

For ditches appurtenant to water rights and the reverse, see Secs. 1017, 1018.

12 Patterson v. Brown etc. Co., 3 Colo. App. 511, 34 Pac. Rep. 769; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

See, also, Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101.

13 Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192; Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. Rep. 917.

For rights of tenants in common in ditches and water rights, see Secs. 1454-1458.

ditch is represented by shares of stock in a water company or upon a partnership interest, the courts agree with the rule that the rights to the ditch may be transferred separate from the land.[14]

It is held that the sale of a ditch will not pass title to laterals taken out from the main ditch and which are not expressly mentioned and are not in fact a part of the ditch sold.[15] The right to use water flowing in an irrigation ditch for the purpose of irrigation is an easement and an incorporeal hereditament, descendible by inheritance.[16]

§ 1004. Sale of the land subject to the easement for ditches and canals, where the purchaser had notice.—In case of the sale of the land over which there is a permanent easement for a ditch and canal constructed thereon, the grantee takes the land subject to such rights of way and their necessary use, and the open possession and use is sufficient notice to the purchaser.[1] As was said in a late Oregon case:[2] "Again, it is urged that, even though the license is irrevocable as to the licensor, it is not so as to his grantee. But the authorities that hold the license irrevocable also hold that it is binding upon the grantee of the licensor

14 McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Snyder v. Murdock, 20 Utah, 419, 59 Pac. Rep. 91; Hard v. Boise etc. Co., 9 Idaho, 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Brockman v. Grand Central C. Co., 8 Ariz. 451, 76 Pac. Rep. 602.

15 Carman v. Staudaher, 20 Mont. 364, 51 Pac. Rep. 738.

See, also, Donnell v. Humphreys, 1 Mont. 518.

For ditches as appurtenances, see Secs. 1017, 1018.

16 Gutheil Park Inv. Co. v. Town of Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Hall v. Blackman, 8 Idaho, 272, 68 Pac. Rep. 19.

1 One who purchases land over which an irrigation ditch is in operation takes subject to the rights of the owner of the ditch. Crescent C. Co. v. Montgomery, 143 Cal. 248, 76 Pac. Rep. 1032, 65 L. R. A. 940.

See, also, Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Quinlan v. Noble, 75 Cal. 250, 17 Pac. Rep. 69; McDougal v. Lame, 39 Ore. 212, 64 Pac. Rep. 864; Board of Regents etc. v. Hutchinson, 46 Ore. 57, 78 Pac. Rep. 1028, 93 Fed. Rep. 347; Baldock v. Atwood, 21 Ore. 73, 26 Pac. Rep. 1058; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 46, 92 Pac. Rep. 290; Fresno Canal Co. v. Rowell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112.

2 Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092.

who took with notice."[3] But it is held that a *bona fide* purchaser of land without knowledge, or actual or constructive notice, of the existence of an easement takes the title to the land, relieved of the burden of the easement.[4]

§ 1005. Water rights—Appurtenances—In general.—The fourth exception mentioned in a previous section,[1] to the general rule, that the transfer of a water right must be made by deed or an instrument in writing,[2] is the case where the title to a water right passes to the grantee with a sale of land as an appurtenance without being specifically mentioned in the deed of transfer. This subject we will now take up in our general discussion of the subject of water rights as appurtenances. Appurtenances are things belonging to another thing as principal, and which pass as incident to the principal thing.[3] It is that which belongs to another thing, but which did not belong to it immemorially.[4] Water rights

3 See, also, 3 Pomeroy Eq. Jur., Sec. 1295; 2 Pomeroy Eq., Sec. 613; McDougal v. Lame, 39 Ore. 212, 64 Pac. Rep. 864; German etc. Society v. Gordon, 54 Ore. 147, 102 Pac. Rep. 736; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185; Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092.

But see Rubio Canyon Water Assn. v. Everett, 154 Cal. 29, 96 Pac. Rep. 811, where it was said: "It is contended that the rule is that subsequent purchasers of land take it subject to all servitudes then laid upon it for the support of easements of the class called 'apparent,' and which are attached to other land. The principle is well established, but the question whether or not an easement of the character of this pipe line is an apparent easement is not so clear. Many authorities declare that the word 'apparent,' as applied to an easement in this connection, does not necessarily mean visible, but refers to easements used by means of some artificial permanent structure on the servient tenement, such as a pipe, a sewer, or a ditch, as distinguished from those which use the servient tenement in its natural state, and at intervals, in the meantime leaving no visible sign of their existence, such as a way or a right of fishery or pasture."

4 Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

1 See Sec. 997.

2 See Sec. 996.

3 Bouvier, Law Dict., Sub., Appurtenances.

4 Farmer v. Ukiah W. Co., 56 Cal. 11; 1 Ventris 407; Coke on Litt. 121b; New Ipswich etc. Factory v. Batchelder, 3 N. H. 190, 14 Am. Dec. 346.

"An appurtenance is that which belongs to another thing, but which has not belonged to it immemorially. Appurtenant denotes annexed or belonging to, but in law it denotes an annexation which is of convenience merely and not of necessity, and which may have had its origin at any time, in

may or may not be appurtenances to land. Therefore such rights may or may not pass with deeds conveying the land.[5] A water right, as we have seen in previous sections of this chapter, is a separate and distinct property right, and, except under recent water codes, may be sold and conveyed separate and apart from any land or interest in land.[6] The land may be sold together with the water right as an appurtenance thereto, without its being mentioned in the deed, or as described in the deed as a part and parcel of the land. Again, the land may be sold, and the appurtenant water right may be reserved from the transfer for use on other lands.[7] And, again, a tract of land may be sold, and with it there may also be conveyed a water right, which had formerly been used on other lands. In fact there is no end to the ramifications in the conveyancing of water rights which may be made. Therefore as to whether or not in the sale and transfer of land, the water right

both of which respects it is distinguished from appendant." Abb. Law Dict., title Appurtenance.

See, also, case of Crooker v. Benton, 93 Cal. 365, 28 Pac. Rep. 953, where the Court held that under Section 662 of the Civil Code, defining an appurtenance and providing that a "thing is deemed to be incidental or appurtenant to land when it is by right used with the land, etc.," the phrase "by right used with the land" does not refer to the owner's title to the incident, but has reference to the rightful *use* by which the incident has become an adjunct to the land, and remains such so long as it can be used therewith without lawful interference by third persons.

5 See Secs. 1005-1016.

See, also, Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Nevada Ditch etc. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Pogue v. Collins, 146 Cal. 435, 80 Pac. Rep. 623; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Pendola v. Ramm, 138 Cal. 517, 71 Pac. Rep. 624; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. Rep. 1091; Crooker v. Benton, 93 Cal. 365, 28 Pac. Rep. 953; McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178; Quirk v. Falk, 47 Cal. 453, 2 Morr. Min. Rep. 19; Reynolds v. Hosmer, 51 Cal. 305, 5 Morr. Min. Rep. 6; Hungarian etc. Co. v. Moses, 58 Cal. 168; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Lower King's River etc. Co. v. King's etc. Co., 60 Cal. 408; Standart etc. Co. v. Round Valley etc. Co., 77 Cal. 399, 19 Pac. Rep. 689; Mitchell v. Amador etc. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246.

6 See Sec. 995.

For a water right as an inseparable appurtenance, see Secs. 1015, 1016.

For the water codes of the various States regulating the sale of water rights, see Part XIV.

7 For the right to change the place of use, see Secs. 867, 868, 871.

For the right to change the use, see Secs. 869-872.

formerly used in connection therewith will pass as an appurtenance thereto is a question of fact, depending entirely upon the intention of the parties as indicated, first, by the terms of the deed itself; and, in case that is ambiguous, then by the other facts surrounding each particular case.[8]

In our discussion of the subject of water rights and ditches and canals as being appurtenant to land, under the Western rules, it will be noticed that in some of the cases cited the terms "appurtenances" or "with appurtenances" are used, in others the rights are referred to as "incidents" or "incidents to the land," while in still others they are referred to as "parts and parcels of the land," but all meaning the same thing. And, in some of the cases these terms are used indiscriminately. This is due to the confusion of the nature of the rights known under the common law as the riparian rights of riparian owners, which are parts and parcels of the soil,[9] with the rights of appropriators of the water under the Arid Region Doctrine of appropriation, the nature of whose rights are incorporeal hereditaments which may or may not be appurtenant to the land. Therefore, where the rights are acquired by appropriation, the correct expression to use is to refer to them as "appurtenances," or "with appurtenances." The Wyoming Court in the case of Frank v. Hicks makes the proper distinction.[10] As we have seen in a previous section, water may be appropriated by a trespasser upon the lands of others.[11] But where this is the case, the water right so appropriated does not become an appurtenance to the land; but upon the removal of the trespasser from the land he may sever the water right and use the water claimed thereunder upon other lands.[12] We will now take up the subject of the rights acquired by appropriation as appurtenances.

8 See Secs. 1007-1012.

9 For the nature of riparian rights, see Secs. 450-456.

10 Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

That the nature of a water right is an incorporeal hereditament, see Sec. 771.

11 See, for appropriation of water by trespassers, Sec. 688.

12 Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Seaweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963.

§ 1006. **Appurtenances—Sale of water rights with land when specifically mentioned.**—Although, as we have seen in a previous section, that water rights and land are separate and distinct property rights, and may be sold and transferred separate and apart from each other, no reason exists in law or otherwise why they may not be sold together. And, furthermore, whatever may be the rule governing the transfer of water rights with a tract of land that, under certain circumstances, the water right is appurtenant to the land conveyed,[1] it can have no application to a case where, by the terms of a valid deed itself, such a right is expressly granted or reserved. In such a case the express terms of the deed must govern, and, according to the tenor thereof, the title to the water right described therein either passes to the grantee or is reserved, in which case the title still remains in the grantor.[2] It was, therefore, held in a recent Colorado case[3] that where a deed to a certain tract of land also specifically described the water rights granted, the grantee did not take by implication any additional water rights.

Although a water right may be appurtenant to a certain tract of land, it is the subject of property, and may be transferred either with or without the land.[4] Again, a portion of the water right may be transferred with the land and a portion reserved in the grantor.[5] Where a land owner conveys a tract of land lying under his canal and susceptible of irrigation, and includes in the conveyance a grant of the "free and perpetual use of water" from the grantor's canal sufficient to irrigate the land conveyed, it was held that the grant of such free and perpetual water right did not obligate the grantor or his successors to perpetually bear and pay the expense and cost of maintaining and protecting the canal and water right and delivering the water to the consumer.[6]

1 See Secs. 1007-1015.

2 Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

3 Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323.

4 See Sec. 1015, 1016.

See, also, Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

"After a completed appropriation, the appropriator may sell and convey his lands in connection with which the appropriation was made, and the water rights acquired thereby will pass appurtenant to the land." Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

5 Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

6 Nampa etc. Dist. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993.

§ 1007. Water rights—Appurtenances—Intent of the parties as affecting sale of—Terms of deed.—As water rights, ditches, and canals and other works used in the diversion of the water and conducting it to the place of use are the subjects of independent property, and may be sold and transferred separate and apart from the land, or any interest in land,[1] as to whether in the sale of a certain tract of land the water rights, etc., pass to the grantee as appurtenances thereto depend largely upon the intent of the grantor that they should or should not so pass. This intention is a question of fact, which is to be ascertained, first, from the express terms of the deed transferring the land; or, second, when the deed is silent or ambiguous upon the question, from the presumption that arises from the circumstances and facts surrounding each particular case, including the question as to whether or not the water right claimed by the grantee as having passed by the deed was, at the date of the transfer, in fact an appurtenance to the land, and at that time owned by the grantor.[2] Relative to the first proposition, we will say that, owing to the law that a water right, although in fact appurtenant to a certain tract of land, may be sold and transferred with the land, or it may be specifically reserved in the deed conveying the land, where it is mentioned in the deed in sufficiently definite terms, so that the intent of the grantor as to whether it was to pass with the transfer of the land or not can, by a reasonable construction thereof, be ascertained, the terms expressed in the deed, in the absence of fraud or mistake must govern in the construction of the deed. The purchaser's intention, or his understanding as to what was conveyed in such a case, can in no way control.[3] It therefore follows, under the well-known rules of evidence, that in such cases

1 See Secs. 995, 1015, 1016.

"Although a water right may be appurtenant to the land, it is the subject of property, and may be transferred either with or without the land." Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91.

2 As to whether or not a water right is to be deemed an appurtenance in fact, see Secs. 1011-1013.

3 That the purchaser's intention can not control, see Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

See, also, Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107.

For the case of a mistake, where a right of way was sold and paid for and the deed included a water right and the mistake corrected in a suit to

the terms as expressed in the written instrument of conveyance can not be altered or varied by parol testimony.[4] But, however, owing to the fact that a water right and the ditches and other works used in connection therewith are of such an uncertain character, as far as their accurate description is concerned, the exact intent of the grantor, much more often than otherwise, in the sale and transfer of a water right, together with a certain tract of land, is not set forth by the terms of the deed itself with sufficient definiteness, so that by a reasonable construction of the language used it can be determined just exactly what the grantor intended to convey. It is self evident from the nature of a water right, or the right to the use of water, that it can not be described with the same degree of accuracy that the tract of land conveyed by the same instrument can be described—by the legal subdivisions of the Government survey, by lots and blocks, or by metes and bounds. And this is where the most of the trouble has arisen; and in deeds where there is no question as to the exact tract of land which was conveyed, the attempted descriptions of the water rights have been so vague and indefinite that the courts have oftentimes been called upon to determine as to just what was attempted to be conveyed in that respect. In construing deeds of this nature, the terms in the deeds themselves must be first considered, and if they are vague or indefinite as to the exact

determine priorities, see South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032.

In an action for deceit in the sale of land and appurtenant waters, oral evidence of what occurred before and when the deed was signed is admissible to show the situation and intention of the parties, in order to explain ambiguity in the deed. Wilson v. Higbee, 62 Fed. Rep. 723.

A grantee may not plead ignorance of the covenants of deed executed to him, if he has accepted and had it recorded, as a ground for dereating the course and effect of the covenants in the same, in the absence of any fraud, practiced by the grantor preventing the grantee from familiarizing himself with the deed. Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185.

See, also, Devlin on Deeds, Sec. 1002.

4 The vesting of title is determined by the legal effect of the terms of the grant, and can not be controlled or affected by subsequent statements or declarations of the vendor. Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568, where the Court said: "This is a fundamental principle of evidence that is too well established to require discussion."

See, also, Whitney v. Dewey, 10 Idaho 633, 80 Pac. Rep. 1117, 69 L. R. A. 572; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

water right or easement for a ditch, parol, or extrinsic testimony may be introduced, in order to explain away any ambiguity existing in the language used and to determine exactly what was intended to be conveyed.[5] So, where a deed purported to convey "one certain water ditch taken out of Montgomery Creek," and, also, "one certain water ditch taken from the tributary of Montgomery Creek, and taken out of said creek," etc., and it did not appear that the grantor owned any interest in any other ditch or ditches, and where the water right used in connection with the ditches was necessary for the irrigation of the land conveyed, it was held that a conveyance of the ditches was a conveyance of the right to the use of the water appropriated and conducted through the ditches.[6] Again, a deed conveying land and water rights in which the water rights were described as "And also one-half interest in a certain ditch," was construed by the Court as conveying a one-half interest in the ditch and the water rights, and also reserving a one-half interest in

[5] Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. Rep. 917, in which it is said: "The mortgage itself does not define the extent of the grantor's interest, nor the character of his title; and, from all that appears in that instrument, he might have been the sole owner. Upon extrinsic inquiry, however, it is learned that his right was limited to an undivided one-half interest," and holding that in construing conveyances of land and water rights, to ascertain what interest passed in the water rights and ditch, the instruments should be examined in the light of the facts regarding their use, both before and after their execution.

See, also, Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423, where it is said: "The right of the plaintiff must therefore depend upon the interpretation to be given to the deeds furnishing the chain of title. . . . What rights, therefore, does the plaintiff appear to have acquired in the water under the deed, in the light of the facts as they existed, and the behavior of the parties with reference to it down to the commencement of this action? This deed does not, nor does any of the others following it, describe any particular right."

A deed of general warranty of "quiet and peaceable possession" does not warrant water rights unless they are in fact appurtenant to the land. "If they were, the absence of any mention of them in the deed is immaterial, but if not, the warranty does not include them." George v. Robinson, 23 Utah 79, 63 Pac. Rep. 819.

See, also, Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

[6] Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405.

See, also, Allen v. Swadley, 46 Colo. 544, 105 Pac. Rep. 1097.

both, and that, too, whether the entire water before the conveyance was used upon the land sold thereby or not.[7]

The rule adopted by the Colorado courts is to the effect that, whether or not a deed to land conveys a water right formerly used thereon, depends upon the intention of the grantor, which is to be gathered, first, from the express terms of the deed; and, second, from the facts surrounding each particular case.[8] Also, in determining whether a right granted is appurtenant or in gross, it is the settled rule of law that the courts must consider the terms of the grant, the nature of the right and the surrounding circumstances giving effect, as far as possible, to the legally asserted intention of the parties, but always favoring the construction of the grant as of an easement appurtenant rather than a right in gross or as passing title to a certain parcel of land.[9]

§ 1008. **Water rights—Appurtenances—Intent of the parties as affecting the sale of—When the deed is silent.**—Where a tract of land is conveyed and at the time of the transfer the grantor was the owner of a water right, and ditches, canals, and a right of way for the same, used in connection with the land, and the deed is absolutely silent upon the question of the water rights, etc., the authorities also hold that it depends upon the intent of the grantor as to whether or not these rights were conveyed with the land. This intention is also a question of fact, and must be proven by the facts and

7 Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

8 See next section, No. 1008; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 177, 118 Am. St. Rep. 95; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. Rep. 1074; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601; Chamberlain v. Amter, 1 Colo. App. 13, 27 Pac. Rep. 87; King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906.

9 Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38.

See, also, Bank of British North America v. Miller, 6 Fed. Rep. 545, 7 Sawy. 163; Fudickar v. East Riverside etc. Co., 109 Cal. 29, 41 Pac. Rep. 1024; Washburn on Easements, 4th Ed., 45; Stovall v. Coggins Granite Co., 116 Ga. 376, 42 S. E. Rep. 723; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; Farmer v. Ukiah Water Co., 56 Cal. 11; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314.

circumstances which surround each particular case, including the acts of the parties, and such other facts as are admissible under the rules of evidence.[1] The burden of proof in such a case is upon the one claiming that these rights passed with the transfer of the land.[2] But the claimant need only prove, first, that the grantor at the time of the transfer was the owner of the rights claimed; and, second, that they were necessary to the full enjoyment of the land conveyed, or, in other words, that at the time of the transfer, they were in fact an appurtenance to that particular tract of land.[3] Having made this proof, under the rule that the conveyance of a particular tract of land conveys all rights which are in fact appurtenant thereto, a presumption arises in favor of the grantee, that such right was intended to pass and did pass with the conveyance of the land, and the burden then shifts to the grantor to prove that it was not intended that they should pass, and that they did not pass with the transfer of the land. And, in the absence of such evidence

[1] Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. Rep. 917; Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Sweetland v. Olson, 11 Mont. 27, 27 Pac. Rep. 339; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

"Whether an easement in a given case is appurtenant or in gross is determined mainly by the nature of the right and of the intention of the parties creating it." Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. Rep. 213.

When the deed is silent, the intent of the grantor must be gathered from the presumption arising from the circumstances. Bessemer etc. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

See, also, Colorado cases cited in preceding section.

Carman v. Staudaher, 20 Mont. 364, 51 Pac. Rep. 738, where it was held that parol evidence was admissible to show that certain lateral ditches claimed to be appurtenances were not so in fact.

[2] "One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator." Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

See, also, Hays v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; North American etc. Co. v. Adams, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65.

[3] As to when a water right is in fact an appurtenance to land, see Secs. 1011-1013.

of an intent to the contrary, it is well settled that the rights pass with the conveyance of the land as appurtenances thereto. This subject we will discuss more at length in connection with the particular features connected with these cases.[4] One of the circumstances in these cases, and upon which proof is competent and admissible, is the question of the actual consideration paid for the land. It is a well-known fact that in the arid portions of the West the land is practically worthless without a water right. If the price paid for the land was what might be considered a reasonable price for both the land and water, it is always competent that this fact be shown. As was said in a leading California case:[5] "The use of these waters to the extent at least to which they had been previously employed may have been, and it is fair to presume was, the chief, perhaps only, inducement to the purchase by plaintiffs and their grantors. To authorize judicially the diversion and material reduction of the waters would be a violation of the principle that they took with all apparent benefits and easements belonging to their purchase."

This question has been repeatedly passed upon by the courts of the States in the arid West as well as those of the Eastern States. Indeed, it is a rule in accordance with natural justice and reason that where one sells a house or a farm every right will pass to the purchaser which is necessary to the complete use and enjoyment of the property conveyed, unless expressly reserved in the instrument of conveyance itself. Take, for example, the case of a person in the arid region who owns a farm or an orange grove which is wholly dependent for water upon the right of the owner to divert a certain quantity from a neighboring stream, and perhaps also upon a right of way over the land of another person for his ditch to convey the water to the place at which it is needed; then, to carry our illustration still further, let us suppose that the water of a stream was all appropriated by the owner of the land and by others; then the owner sells the land, and leaves out the word "appurtenances"—perhaps designedly—from the deed conveying the land. The courts would hold under these circumstances that by the conveyance of the tract of land "every right will pass to the purchaser which is necessary to complete the use and enjoyment of the property conveyed unless

4 See Secs. 1009-1014, and cases cited.

5 Cave v. Crafts, 53 Cal. 135.

expressly reserved in the instrument of conveyance." If the law was otherwise the grantor could sell the naked land to one and the right to appropriate the water which was an absolute necessity to the enjoyment of the land to another, and thereby deprive the grantee of the land of any chance to get water with which to irrigate the crops or trees growing upon the same. Of course where the water right has been sold before the date of the conveyance of the land or is specially reserved in the deed the case is different.

§ 1009. Appurtenances—Sale of water rights when included in the word "appurtenances."—Where there is the sale of a certain tract of land by a valid deed and in which, after describing the land, there is the expression, "together with all and singular the appurtenances thereunto belonging and appertaining," or one of similar purport, using the word "appurtenances," unless there is a specific reservation of the water right, which is in fact an appurtenance to the land, the water right will pass with the transfer of the land the same as though it had been specifically mentioned in the deed. This follows the regular and well-settled rule of law as to the transfer of the land with "appurtenances," and the water right will pass with the land with the houses, barns, fences, and other appurtenances.[1] Under such a deed of conveyance, what water rights

1 "This conveyance would carry with it the water right appurtenant to the land at the time of the conveyance, unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed." Russell v. Irish, 20 Idaho 194, 118 Pac. Rep. 501; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Mitchell v. Amador etc. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246; Crooker v. Benton, 93 Cal. 365, 28 Pac. Rep. 953; Pendola v. Ramm, 138 Cal. 517, 71 Pac. Rep. 624; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Pogue v. Collins, 146 Cal. 435, 80 Pac. Rep. 623; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; North American Ex. Co. v. Adams, 104 Fed. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Cave v. Crafts, 53 Cal., 135; Donnell v. Humphreys, 1 Mont. 518; Bessemer Irr. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587.

Where the language used was, "together with all appurtenances thereto belonging," it was held that the uncontroverted evidence showed that the parties intended to convey the water

are to be considered as appurtenances is a question of fact, which must be determined from the express terms of the deed, and the circumstances surrounding each particular case. As the rule, as to what in fact are to be deemed appurtenances, is the same whether the term "with appurtenances" is used in the deed or not, this subject will be discussed in a subsequent section.[2]

Where a water right is conveyed with a certain tract of land, the law does not hold that such a water right is inseparably connected to that particular tract, and that the grantee may not thereafterward sell and transfer the right or a part of the right separate and apart from the land. As we have seen in a previous section, a water right is a separate and distinct species of real property and may be sold and transferred either with or without the land with which it was formerly used.[3] Therefore, a grantor selling a tract of land with a water right can not limit the right of his grantee to sell the water right separate and apart from the land by providing that the water rights, "shall be deemed and treated as appurtenant to and as a part and for the benefit of said lands."[4]

right. Gelswicks v. Todd, 24 Colo. 494, 52 Pac. Rep. 788.

The right to the use of a ditch and water appropriated for irrigation purposes essential to the land for which it was appropriated and without which it would be practically valueless passes by a deed of such land as "appurtenances." Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

A grant of land containing the clause, "including all right, title, and interest in and to the waters of Seaman's Creek and the irrigating ditches appurtenant thereto," carries with it all the water and water rights that were in fact appurtenant to the particular tract of land conveyed, and the determination of the amount of water and the extent of the water right so conveyed must depend wholly upon the extent of the appurtenant rights at the time of the conveyance. Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568.

See, also, Toyaho etc. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101; Kimpton v. Jubilee Placer M. Co., 16 Mont. 379, 41 Pac. Rep. 137, 42 Mont. 102.

A water right used in irrigating lands passes by a conveyance of the lands, under the term "appurtenances"; if the grantor so intends and where such is the intention, the grantee may maintain an action to quiet title to such right. King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906.

A conveyance of land, "with all appurtenances," conveys the grantor's water right necessary to its use and enjoyment. Sweetland v. Olsen, 11 Mont. 27, 27 Pac. Rep. 339.

See, also, Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508.

2 See Sec. 1010.

3 See Sec. 955.

4 Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. Rep. 1094.

See, also, that a water right is not

In States which have statutory provisions to the effect that a right to water appurtenant to land shall pass to the grantee of such land, unless especially reserved in the deed, it, of course, follows that such a right will pass whether the term "with appurtenances" is used in the deed or not.[5] Also, this is the case where under a general statute to the effect that "one who grants a thing is presumed to grant also whatever is essential to its use."[6] Again, the same rule would follow in States, where by statute the "statutory form" or the "short form" of deeds is provided for, with the provision that when such a deed shall be executed as required by law, it shall have the effect of a conveyance in fee simple to the grantee, etc., of the premises therein named, together with all appurtenances, rights, and privileges thereunto belonging.[7] A deed of the form provided by statute lawfully executed will pass the water rights owned by the grantor and appurtenant to the land conveyed, as though the water right was specifically mentioned or the term "with appurtenances" used in the deed.

§ 1010. Appurtenances—Sale of water rights when not described or included in word "appurtenances."—In the history of the transfers of water rights in this Western country together with land, it has often happened that, in the deeds of conveyance, no mention was made of the water rights, which in fact were connected with the respective tracts of land as parts or parcels thereof, and neither did the deeds contain the term "with appurtenances," or one of similar purport. The question now arises, as to when water rights under these conditions pass to the grantee with the land. The general rule upon this important subject is that, when a tract of land is transferred, and the grantor at the time of the transfer was the owner of a water right which had been used in connection with the land, and the deed is entirely silent upon the subject of the water rights, the title to these rights passes to the grantee, the same as though they had been expressly mentioned

an inseparable appurtenance, Secs. 1015, 1016.

[5] See Compiled Laws of Utah, 1907, Sec. 1288x32; Rev. Stat. Utah, Sec. 1281.

See, also, Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91.

[6] Cal. Civ. Code, Sec. 3522.

Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725.

[7] See Comp. Laws of Utah, 1907, Secs. 1981, 1982, 1983.

in the deed; provided, however, that to pass the title to a water right by a deed of the land, it must, in fact, have been made appurtenant to the land. And, this is the rule regardless of the use to which the water was put, whether it was for the irrigation of the land itself, the working of a mill, or mine, or for any other beneficial use or purpose. This rule is based upon the well-known principle of law that, when a person grants a thing, he by implication grants whatever is appurtenant and incident to it and necessary to its beneficial enjoyment. Or, as stated by the Supreme Court of Oregon: "The maxim of law is that whoever grants a thing is supposed, also, tacitly to grant that without which the grant would be of no avail." [1] Or, as stated by Mr. Justice Field, in somewhat different language, in rendering the opinion of the Supreme Court of the United States: "The true rule on the subject is this, that every thing essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance." [2]

"But the word 'appurtenances' is not necessary to the conveyance of the easement or water right in such cases. The general rule of law is that, when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing." [3] This rule of law is

1 Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

2 Sheets v. Selden, 69 U. S. 2 Wall. 177, 17 L. Ed. 822.

See, also, Andrews v. Donnelly, — Ore. ——, 116 Pac. Rep. 569; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Leonard v. Leonard, 7 Allen 280.

3 Angell on Water Courses, 7th Ed. Sec. 153a.

"Where a right of way attaches to and in favor of a certain house, farm, ranch, or plantation, or a certain right of drainage exists in favor of the farm, or the use of a certain ditch and water for the irrigating of a farm, it will pass by the deed, even without the use of the word 'appurtenances'; for the acquisition of the easement or servitude was intended for the benefit of the estate, and by destination is to be considered as incidental to the use of and as a part and parcel of the realty." Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571.

"The word 'appurtenances' is not necessary to the conveyance of the easement. The general rule of law is that, where a party grants a thing, he by implication grants whatever is incident to it, and necessary to its beneficial enjoyment. The incident goes with the principal thing." Cave v. Crafts, 53 Cal. 135.

See, also, Donnell v. Humphreys, 1 Mont. 518.

applied in cases where the water rights are the riparian rights of the riparian owner as known under the common law and where they are not considered as appurtenances to the land but as a part and parcel of it.[4] So, also, it is the rule of law that, where the water right is acquired under the Arid Region Doctrine of appropriation;[5] and, where, in fact, the water right is an appurtenance to the land, a deed conveying the land, without any reference to the water right, will pass to the grantee all of such water rights then owned by the grantor. In order for the water right, or any portion thereof, not to pass with the deed transferring the land, there must be some limitation or reservation specifically expressed in the deed.[6] And the courts of this Western country have uniformly adhered to this rule, with the exception of some of the Colorado courts.[7]

[4] For the common law of riparian rights, see Secs. 450-551.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

[5] For this doctrine, see Secs. 585-594.

[6] Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025, where it is held that a water right for irrigation will pass unless expressly reserved.

Though persons who divert waters part with their lands, yet, the use of the water having continued appurtenant thereto, the subsequent owners have the rights of their predecessors in the water. Oregon etc. Co. v. Allen etc. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701. Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393.

[7] Cave v. Crafts, 53 Cal. 135; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. Rep. 213; Corea v. Higuera, 153 Cal. 451, 95 Pac. Rep. 882, 17 L. R. A., N. S., 1018; Rubio Canyon Water Co. v. Everett, 154 Cal. 29, 96 Pac. Rep. 811; Standart v. Round Valley etc. Co., 77 Cal. 399, 19 Pac. Rep. 689; McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178; Quirk v. Falk, 47 Cal. 453, 2 Morr. Min. Rep. 19; Farmer v. Ukiah W. Co., 56 Cal. 11; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Crooker v. Benton, 93 Cal. 365, 28 Pac. Rep. 953; Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; Painter v. Pasadena W. Co., 91 Cal. 74, 27 Pac. Rep. 539; Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6; Hungarian etc. Co. v. Moses, 58 Cal. 168; Lower Kings River etc. Co. v. Kings etc. Co., 60 Cal. 408; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. St. Rep. 558; Rianda v. Watsonville etc. Co., 152 Cal. 523, 93 Pac. Rep. 79; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. Rep. 1091; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Beatty v. Mur-

In Colorado, the Supreme Court, in the case of Strickler v. Colorado Springs,[8] in deciding that a water right was a separate and distinct property right and might be sold and transferred separate and apart from the land upon which it was used, made use of the following expression: "It logically follows that the right to the use of water for irrigation is a right not so *inseparably* connected with the land that it may not be separated therefrom." The decision nowhere intimates that in the transfer of land a water right used in connection therewith might not pass with the land as an appurtenance thereto, in the sense that the word "appurtenances"

ray etc. Co., 15 Mont. 314, 39 Pac. Rep. 82; Smith v. Denniff, 23 Mont. 65, 57 Pac. Rep. 557, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648; Sweetland v. Olsen, 11 Mont. 27, 27 Pac. Rep. 339; Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713; Sloan v. Glancy, 19 Mont. 70, 47 Pac. Rep. 334; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334, where it is held that, where parties acquire certain land in separate parcels from the owners of a water right appurtenant to the land, they each become vested with an interest in the water, measured in the amount of the requirements of each.

See, also, Donnell v. Humphreys, 1 Mont. 518; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Rickey v. Miller etc. Co. (Nev.), 152 Fed. Rep. 11, 81 C. C. A. 207; Wilson v. Higbee (Nev.), 62 Fed. Rep. 723; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Bank of British N. A. v. Miller, 6 Fed. Rep. 545, 7 Sawy. 163; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632; Oregon etc. Co. v. Allen etc. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101; Straton v. West, 27 Tex. Civ. App. 525, 66 S. W. Rep. 444; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; George v. Robinson, 23 Utah 79, 63 Pac. Rep. 819; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Briggs v. Murray, 29 Wash. 245, 69 Pac. Rep. 765; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. Rep. 917; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See, also, that a water right can not be made an inseparable appurtenance to a definite tract of land. Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 108 Am. St. Rep. 986.

[8] 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

is used in connection with the sale and transfer of land, but it simply held that the water right was not an inseparable appurtenance.[9] But the Colorado Court of Appeals, evidently misconstruing the decision in the Strickler case,[10] in the case of Bloom v. West,[11] said, by way of *dictum* only, that: "It will be readily seen that it is utterly repugnant to the idea of water as 'appurtenant' under any circumstances." Yet, in the same case the Court held that where the owner of a tract of land, and of a water right used therewith, sells the land in two parcels to two different persons, and by common consent the water passes to them without any formal conveyance thereof, each vendee takes an interest in the water right proportioned to the amount of water previously used on the land bought by him.[12] In a later case,[13] the Court of Appeals also held that "a conveyance of land without mention of a water right can not be taken to transfer an interest in a ditch, although the water carried may have been used upon the land." Had the decisions in these cases prevailed in Colorado, in that jurisdiction, at least, the law upon the subject would have in effect been, that a water right could only have been transferred with land when such water right was specifically mentioned in the deed of transfer, and thus reversing the general rule that, unless specifically reserved, a transfer of the land will also pass to the grantee the water right which was in fact an appurtenance to the land. But the view of the Colorado Court of Appeals did not prevail even in that State. In the case of Gelwicks v. Todd,[14] the Supreme Court of the State, in effect, overruled the decisions of the Court of Appeals, and held that a water right may be appurtenant to land so as to pass by a conveyance of the land with its appurtenances, if incident and necessary to the beneficial enjoyment of the land without which its value would be greatly disproportionate to the consideration paid, which,

9 That a water right is not an inseparable appurtenance to land, see Secs. 1015, 1016.

10 See *supra*.

11 3 Colo. App. 212, 32 Pac. Rep. 846.

12 The Supreme Court of Wyoming, criticising the language used by the Colorado Court of Appeals in the above case, said: "It is only *dicta* of the latter case, tending to establish a doctrine dangerous, as we conceive, to great property interests heretofore considered secure." Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

13 Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601.

14 24 Colo. 494, 52 Pac. Rep. 788.

with other circumstances, indicates a clear intention of the parties to transfer the water right with the land. And the Supreme Court in other cases has also held that, since a water right is the subject of property, it may be transferred either with or without the land upon which it has been used, and that the question whether it will pass by a conveyance of the land depends upon the intention of the grantor, which must be gathered from the express terms of the deed, or, when that is silent, from the presumption that arises from the circumstances of each particular case.[15] These decisions make the rule in Colorado uniform with the rule in the other States.

§ 1011. Water rights—When in fact appurtenances to land—Where water is used for irrigation.—We have stated in the preceding sections that in the sale and transfer of specific tracts of land, where the term "with appurtenances," or one of similar purport, is used in the deeds,[1] or even in cases where that term is not used,[2] and no mention is made of a water right under certain circumstances the water rights will pass with the conveyance of the land. And, upon this question as to whether or not a water right will pass to the grantee of the land will largely depend the fact as to whether or not, at the time of the transfer, the water right claimed by the grantee as having so passed was in fact an actual appurtenance to the tract of land described in the deed and transferred by it. If therefore becomes necessary at this point to know when a water right, ditch, or other structure, used for diverting and conducting water to the place of use, is in fact an appurtenance to the land upon which the water is used, in order to pass with the transfer of the land to the grantee. This question as to whether a water right, ditch, or canal, is appurtenant to a certain

15 See, also, Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Bessemer Irr. D. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1054, 105 Am. St. Rep. 91; King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906; Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. Rep. 1074; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

See, also, Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025, criticising the decision in Bloom v. West, *supra*.

1 For the conveyance of water rights as "appurtenances," see Secs. 1008, 1010.

2 See Sec. 1010.

tract of land, a mine, a mill, or to any other real property, is one of fact, and depends entirely upon the circumstances surrounding each particular case.[3] However, in general, we will say that a water right, which secures to the owner of a tract of land water for the irrigation of the same, or for some other use or purpose, necessary to the beneficial enjoyment of the land, the title to which is also in the owner of the land, becomes appurtenant to such land, but not an inseparable appurtenance.[4] The doctrine is well settled in the States of the arid region, that a water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal, or other works necessary to conduct the water to the place of use, become appurtenances to the land, provided that they are all owned by the same parties. But they must be the property of the owner of the land to which it is claimed they are appurtenant, and not the property of another.[5] And the general rule of law in the case of

3 The mere fact that water was used upon a certain tract of land does not make it appurtenant to the land; as to whether or not the water right was or was not an appurtenance is a question of fact. Quirk v. Falk, 47 Cal. 453, 2 Morr. Min. Rep. 19.

In construing conveyances of land on which there is an irrigation ditch, to ascertain what interest in the ditch passed thereby, the instrument should be examined in the light of the facts regarding the use of the ditch before and after their execution. Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. Rep. 917.

The water right of one who appropriates water for the purpose of using it upon lands in his possession, but which he does not own, does not become appurtenant to such lands, without a conveyance in writing to the owner of the land. Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

The use of water by a trespasser upon the land of another does not make such water appurtenant to the land. Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Mitchell v. Amador etc. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246; Payne v. Cummings, 146 Cal. 426, 80 Pac. Rep. 620, 106 Am. St. Rep. 47.

One purchasing a tract of land and water rights after the owner had sold or relinquished certain water rights formerly appurtenant thereto by a duly recorded deed took no better title to the water rights than the owner at the date of the sale of the land. Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42.

4 That a water right is not an inseparable appurtenance to land, see Secs. 1015, 1016.

5 Ginocchio v. Amador etc. Co., 67 Cal. 493, 8 Pac. Rep. 29.

Where the rights of a community to the waters of a certain stream were appurtenant to the lands of the individuals composing the community, each individual had an appropriative right to his share of the water. Hil-

the sale or alienation of the land is that such water rights, unless specifically reserved in the deed, will pass to the grantee as appurtenances.[6] And the fact that the land upon which the water is used by the appropriator is unsurveyed public land of the United States, does not prevent the water from becoming appurtenant thereto.[7] So, the right to the water of a canal to the same extent as used by the mortgagor is appurtenant to the mortgaged tract, and passed

dreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395.

Water rights in an irrigation company, which are appurtenant to specific land, will be allowed against the receiver of the company. Atlantic Trust Co. v. Woodbridge, 86 Fed. Rep. 975, 79 Fed. Rep. 39; *Id.*, 79 Fed. Rep. 501.

6 "The disastrous results of separating the land and water are immensely greater here, and, from considerations strictly legal and technical, the water rights seem to be more thoroughly appurtenant to the land here than" at common law. Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

Water rights, ditches, etc., used appurtenant to homesteads are a part of them and exempt from execution. Payne v. Cummings, 146 Cal. 426, 80 Pac. Rep. 620, 106 Am. St. Rep. 47.

A transfer by parol of a settler's right of entry of lands carries with it a water right appurtenant thereto, entitling the transferee to the benefits of the priority of the appropriation. McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648; Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Sweetland v. Olsen, 11 Mont. 27, 27 Pac. Rep. 339; Crocker v. Benton, 93 Cal. 365, 28 Pac. Rep. 953; American Nat. Bk. v. Hoeffer, 18 Colo. 53, 70 Pac. Rep. 156.

See, also, Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Wilson v. Higbee, 62 Fed. Rep. 723; Rickey etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349, holding that when the land was divided the right was divided proportionately.

See, also, Hunstock v. Lumberger, —— Tex. Civ. App. ——, 115 S. W. Rep. 327; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632; Briggs v. Murray, 29 Wash. 245, 69 Pac. Rep. 765; Pendola v. Ramm, 38 Cal. 517, 71 Pac. Rep. 624; Tarpey v. Lynch, 155 Cal. 407, 101 Pac. Rep. 10.

See, also, cases cited in the preceding sections, Nos. 1005-1010.

Water appurtenant to land passes by conveyance of the land unless reserved; or such water rights may be treated as personal property and separately conveyed under Section 1281 Rev. Stat. of Utah, 1898. Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91.

The right to use water is a hereditament appurtenant to land. Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135.

See, also, Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520.

7 Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587; McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648; Wood v. Lowney, 20 Mont. 273, 50 Pac. Rep. 794.

with the land under the mortgage.[8] Again, a water right and the ditches used with the same are appurtenant only to such parts of a large tract of land as had been actually irrigated.[9] And, where the grantor had no right whatever in the water, the grantee, of course, takes no rights under the deed.[10] Again, the use of water upon land to which it is already appurtenant, by one who is a trespasser thereon, will give him no such right to the water that he may divert it from the land, or, upon being ejected therefrom, convey to a stranger a legal title in the water or in the use thereof.[11] By the statutes of some of the States, it is provided that the appropriation of water for irrigation must become appurtenant or fixed to some specific tract of land from which it can be separated only in the manner provided by the statute.[12] That a water right may become an appurtenance to a certain tract of land, under these statutes must be admitted, but that it must thereby become an inseparable appurtenance so that the owner thereof can not sell it separate and apart from the land, the same that he can sell any other property right, we deny. However, we will discuss this phase of the subject hereafter.[13] But, upon the other hand, where the facts surrounding any particular case show that the water right claimed was not in fact an appurtenance to a certain tract of land which has been conveyed, it will not pass with a conveyance of such land.[14] A water right can not always be deemed an appurtenance to a certain tract of land upon which it was formerly used as is the case where the land was sold before a canal on the land was completed and before any water therefrom had been used on the land. In such a case it was held by the Montana Court that the water right claimed by

8 Pendola v. Ramm, 138 Cal. 517, 71 Pac. Rep. 624.

For the acquisition of title to a water right by the foreclosure and sale of a mortgage, see Secs. 1020-1022.

9 Anaheim W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Cave v. Crafts, 53 Cal. 135.

10 Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423.

11 Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

12 See statutes of the various States, Part XIV.

13 See Secs. 1015, 1016.

14 Ginocchio v. Amador etc. Co., 67 Cal. 493, 8 Pac. Rep. 29; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Dodge v. Marden, 7 Ore. 456, 1 Morr. Min. Rep. 63; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223.

the grantee was not an appurtenance to the land.[15] As was said in a recent California case:[16] "It attached as an easement appurtenant only to such lands of the tract as had been actually irrigated from it."[17] Again, a water right does not become such an appurtenance to land taken up under a desert entry, or other land entry under the laws of the United States, so that upon the abandonment of the entry it also works an abandonment of the water right. But the water may be transferred by the appropriator thereof to other lands and used by him there.[18] Neither do water rights become appurtenant to land when used thereon by a trespasser, but the trespasser may change the use to other lands.[19] Again, it is held that where the water rights are represented by stock in a corporation they do not become appurtenant to the land in connection with which they were acquired and used; and, if the owner disposes of the stock in the company, he or his grantees have no further claim to such rights for irrigation.[20] Then, again, where a tract of land to which a water right is appurtenant is partly sold, or all sold in parts, the water right will pass to the grantees in parts,

15 Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713.

16 Anaheim Union Water Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613.

17 Citing Cal. Civ. Code, Sec. 1104; Cave v. Crafts, 53 Cal. 135.

Where the father of the grantor of the plaintiff merely permitted his son to use certain water rights for the irrigation of the land conveyed afterward to the plaintiff, such conveyance did not carry a grant to the plaintiff of the water right. Pew v. Johnson, 35 Mont. 173, 88 Pac. Rep. 770, 119 Am. St. Rep. 852.

18 Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423.

For the question of abandonment, see Secs. 1099-1117.

19 Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

For appropriation by trespassers, see Sec. 688.

But see Seaward v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963.

20 Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

See, also, Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Wells v. Price, 6 Idaho 490, 56 Pac. Rep. 266; Brockman v. Grand Canal Co., 8 Ariz. 451, 76 Pac. Rep. 602; Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123, affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525.

For ditch and canal companies, see Chaps. 72-77.

For sale of water rights by transfer of stock in corporations, see Chaps. 75, 76.

according to the specific amount that the water right was used on the respective tracts.[21]

But in order for a water right to be an appurtenance to land there must be some land, held by at least a possessory title to which it may become appurtenant. And a water right for the purposes of irrigation can no more exist, where there is no land to be irrigated, than can an easement for the passage of light to ancient windows exist where there have never been any windows. As we have seen, in order to acquire a water right by appropriation, and to continue the right, the application of the water must be made to some beneficial purpose.[22] "Where one thing depends upon another for its existence, it would seem entirely proper to call it an appurtenance to that thing upon which it so depends."[23]

§ 1012. Water rights—When in fact appurtenances—Water used for mining.—Water rights are deemed appurtenances to land in other cases than where the water is used for irrigation.[1] Oftentimes a water right is essential to the working of a mine, and, in such a case, where the water right is owned by the owner of the mine, it is deemed an appurtenance thereto so that the title will pass to the grantee in the sale and conveyance of the mine without mentioning the water right in the deed. As the transfer of a thing transfers all its incidents and appurtenances, unless specifically reserved,[2] in the transfer of mining property, one of the questions to be determined is, whether or not the water right and the ditches and other works used in conducting the water to the place of use are in fact incidents and appurtenances to the mine or mining ground. This is a question of fact to be determined from all the circumstances surrounding each particular case.[3] But, in general,

21 Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Bloom v. West, 3 Colo. App. 212, 32 Pac. Rep. 846.

22 For the appropriation of water, see Secs. 706-732.

For the consummation of the right, see Secs. 725-728.

23 Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

1 See Sec. 1011.

2 See Secs. 1005-1010.

3 The term "mining ground," as used in the California statute, includes a ditch and water right, by the means of which a mine is operated, as an appurtenance thereof. McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178.

See, also, Hungarian M. Co. v. Moses, 58 Cal. 168; Ginocchio v. Amador etc. Co., 67 Cal. 493, 8 Pac. Rep. 29; McDonald v. Bear River etc. M. Co., 13 Cal. 235; Beatty v. Murray Placer M. Co., 15 Mont. 314, 39 Pac. Rep. 82; Quirk v. Falk, 47 Cal. 453,

the relation of a mine to the water by which it is operated is analogous to the relation between an ordinary mill and the water upon which its use depends.[4] And it is held that, upon the one who asserts that a ditch and water right are appurtenant to a mine is cast the burden of proving that such is the fact.[5]

It was held in a recent case in Montana,[6] that water rights viewed as independent property were taxable as was other property but where they were appurtenant merely to lands they were not separately taxable from such lands.

§ 1013. Water rights—When in fact appurtenances—Water used by mills.—Upon the question of a water right being appurtenant to a mill, the authorities hold that if a mill be granted, reserved, or devised, either with or without the term "with appurtenances," that it includes all property which is in fact mere appurtenances and owned by the grantor at the time of the conveyance; these also include all water rights, ditches, or other works essential to the running of the mill. This has been the general rule under the common law of riparian ownership from a very early period,[1] as well as where the water right was originally acquired

2 Morr. Min. Rep. 19; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632.

4 McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178.

For rights appurtenant to mills, see Sec. 1013.

5 See Quirk v. Falk, 47 Cal. 453, 2 Morr. Min. Rep. 19, where it is held that the purchase of a water right and ditch by a mining company does not necessarily constitute said ditch and water rights appurtenant to a mining claim.

6 Hale v. Jefferson County, 39 Mont. 137, 101 Pac. Rep. 973.

1 In Touchstone it is laid down that, "by the grant of mills, the waters, flood gates, and the like, that are of necessary use to the mills, do pass." Shep. Touch. 89; Sheets v. Selden, 69 U. S. 2 Wall. 177, 17 L. Ed. 822; McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178.

"It is a well settled rule of law that the grant of a mill carries with it by necessary implication the right to the use of the water coming to the mill and furnishing power for working it, and also to the canal or raceway which carries the water from the mill, to the full extent of the grantor's right and power so to grant them." Richardson v. Biglow, 15 Gray 146, 154.

See, also, Blake v. Clark, 6 Greenl. 436; Maddox v. Goddard, 15 Me. 218; Baker v. Bessey, 73 Me. 472, 40 Am. Rep. 377; Miller v. Miller, 15 Pick. 57 (Mass.); Hapgood v. Brown, 102 Mass. 451; Frink v. Branch, 16 Conn. 260; Perrin v. Garfield, 37 Vt. 304; Morgan v. Mason, 20 Ohio 401, 55 Am. Dec. 464; Wickersham v. Bills, 8 Ind. 387; Neaderhouser v. State, 28 Ind. 257; Curtis v. Norton, 58 Mich. 411, 25 N. W. Rep. 327; Bank of

under the Arid Region Doctrine of appropriation.[2] And, in the Western States, it is well settled with reference to the ordinary mills, or plants for the generation of power, that the water rights essential to their operation, and the necessary ditches and other works used therewith, are appurtenant to the mill or plant when owned at the time of the sale and transfer by the same party, and will pass by a conveyance of the mill or plant either with or without the express mention of the term "with appurtenances," provided that they are not expressly reserved in the deed.[3] But whether the water right will so pass depends upon the question of fact as to whether or not the use is such that it will make it an appurtenance, and is also the property of the owner of the mill at the time of the transfer.[4]

North America v. Miller, 7 Sawy. 163, 170, 6 Fed. Rep. 545; Hadden v. Shutz, 15 Ill. 581; Cox v. Howell, 108 Tenn. 130, 65 S. W. Rep. 686, 58 L. R. A. 487, and note.

2 For the appropriation of water for mill purposes, see Sec. 695.

For appropriation for the generation of power, etc., see Sec. 695.

McDonald v. Bear River etc. Co., 13 Cal. 220, where it is held that, if the right to the use of the water was acquired by appropriation for the purpose of operating a mill, such right would pass by a transfer of the mill to the grantee as an appurtenance thereto.

3 McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178; Bruger v. Butler, 6 Ore. 459; Jackson v. Trullinger, 9 Ore. 393; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; North American etc. Co. v. Adams, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65, where it is said: "A deed of a mill site and mill upon which a right to divert water from a stream and to use it to operate the mill has been exercised conveys the water right as an appurtenance to the mill, in the absence of any reservation of it, of any conveyance of it to another, and of any other evidence that the grantor did not intend to convey it."

See, also, Bank of British N. A. v. Miller, 6 Fed. Rep. 545, 7 Sawy. 163.

Briggs v. Murray, 29 Wash. 245, 69 Pac. Rep. 765, where it was held that a water right and canal were appurtenant to a mill, and to pass by a sheriff's deed without special mention, the Court in the opinion saying: "It is next contended that the canal and water right are not appurtenant to the mill property. We think it is clearly appurtenant. It was constructed by the owners of the mill property, and has always been used, since its construction, for the benefit of the mill. The mill property, as the principal thing, is dependent on it, and, as a thing principal to the principal thing, the canal passes with it."

4 "The water supply of a mill will ordinarily pass with a conveyance of the mill, but, in order to do so, it must belong to the mill—must be the property of the owner thereof, and

§ 1014. Appurtenances—Rule where the land is subdivided.—Subject to the limitations as discussed in the preceding sections upon the subject of appurtenances,[1] upon the sale of a part of a tract to which a water right is appurtenant, and where the rights granted or reserved are not specifically set forth in a deed of conveyance, it is the settled law upon the subject that the grantee to such a part takes with his land such a proportion of the whole water right as the acreage of his tract bears to the entire tract, to which the whole of the water right was appurtenant.[2] Of course, if the rights conveyed are specifically defined in the deed instead of taking in proportion the grantee takes only the rights granted.[3]

§ 1015. A water right is not an inseparable appurtenance to land.—By the statutes of some of the States of this Western country, it is provided that a water right where the appropriation is made for irrigation must become appurtenant or fixed to some specific tract of land, from which it can be separated only in the manner provided by the statute. An attempt has been made by some of these statutes to make the water right an inseparable appurtenance to the land, so that it can not be sold or transferred therefrom. But, as we have seen in previous sections of this discussion, a water right is a separate and distinct property right, and, under the authorities, it may be sold and transferred separate from any land or any interest in land.[1] Again, there is nothing in the nature and character of a water right which makes it an inseparable appurtenance to any particular tract of land. It is true that, under certain conditions, already discussed, a water right may be an appurtenance to a tract of land, so that it will pass to the grantee in the transfer of the land, but it is also true that this "does not

not of another." Ginocchio v. Amador etc. Co., 67 Cal. 493, 8 Pac. Rep. 29.

1 See Secs. 1005-1013.

2 Booth v. Trager, 44 Colo. 409, 99 Pac. Rep. 60; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; Buhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38; Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223; Tarpey v. Lynch, 155 Cal. 407, 101 Pac. Rep. 10; Cave v. Crafts, 53 Cal. 135.

3 See, for rights specified in the deed, Secs. 1007, 1009.

See, also, Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323.

1 See Sec. 995.

mean, and never meant, inseparable,"[2] from the land, by sale or otherwise, at the will of the owner, provided there always continues the application of the water to some beneficial use or purpose, and that other vested rights are not injured by the change.[3] We are of the further opinion that, even by legislative enactment, a water right, constituting as it does a property right of the highest order, can not be made an inseparable appurtenance to the particular tract of land for which it was first appropriated, so that the owner thereof can not sell or dispose of the same, or use the water claimed under the right upon some other tract of land. And, to treat such a sale as an abandonment of the water right would be to disregard the rights of man under the bill of rights guaranteed under our constitutions to own and hold property and not to be deprived thereof except by due process of law and then upon just compensation. I make this statement with the full knowledge that several State legislatures have attempted to do this very thing, and to treat such a sale by the original appropriator as an abandonment of the water right and as vesting no title in the grantee to the same. I am also familiar as to just how these laws came to be enacted. They sprang from the theories of certain State engineers, capable in their way to run a level or a transit, to construct irrigation works, and to measure the exact amount of water which is required under certain conditions to successfully irrigate a crop of potatoes or alfalfa. But, when it comes to determining the questions involving the principles governing the fundamental rights of man under our constitutions and laws, these engineers are "not reliable." These State engineers having the control of the administering of the laws of their respec-

[2] Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

Where, in a certain deed conveying a definite tract of land and also a definite water right, there was evidently an intention upon the part of the grantor to make the water right an inseparable appurtenance to the land conveyed, it was held that the grantee might sell or dispose of any part of the water right, separate from the land. Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. Rep. 1094.

"Natural justice, therefore, is subserved by recognizing the right of a water right holder to change his appropriation, under such circumstances, to lands capable of profitable cultivation, or to sell his right to another, to be used by the latter for a beneficial use recognized by the statute." Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

[3] For the change of use of the water, see Secs. 869, 872.

That a water right is a property right, see Secs. 768-771.

tive States relative to irrigation and water rights, have gone before the legislatures of their States, with their theories, some of them most excellent, but others vague and impracticable; and, as the result, certain Acts have been passed which the courts have declared and are declaring unconstitutional and which it would have been better not to have enacted. Among these Acts are to be found those which attempt to provide that a water right shall be and always remain an inseparable appurtenance to any particular tract of land. And, in this respect, the Act of the legislature of Wyoming was framed with this exact end in view, and, following the theory of the then State engineer upon the subject attempted to provide in effect that any attempted sale of a water right by the owner thereof separate and apart from the land for which it was appropriated worked an abandonment of the water right and the grantee took no title to the same. When the question first reached the Supreme Court of Wyoming it was held against the Act and that a right to the use of water for the purposes of irrigation, together with the ditch or other conduit for the water may be conveyed separate from the land upon which the water is used.[4] This point was decided without any special stress being laid upon it, and it was not until 1904, in the case of Johnston v. Little Horse Creek Irrigating Co.,[5] where the question arose relative to the right of a corporation to sell one-half of its water right acquired under the Act in question to another company, that the question in all its phases was fully discussed. The judgment of the lower court upheld the right to sell. On appeal to the Supreme Court, it was strenuously urged by the plaintiffs in error that the sale of the water right was invalid and conferred no right or title upon the grantee, and that it amounted to an abandonment on the part of the selling company of one-half of the original appropriation. In the brief of counsel for the plaintiffs in error much was said with reference to the policy of the rule permitting a sale of a water right separate from the land; and to strengthen their case counsel submitted with such brief the views of a former State engineer of

[4] McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

In the first of above cases the water rights accrued after the Act in question, Rev. Stat. Wyo., 1899, Secs. 873, 917, 918, 924, and in the latter case they accrued before.

[5] 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

the State, "who worthily occupies an eminent position as an irrigation engineer, and whose ability is unquestioned (as an engineer) and for whose opinions the members of this court entertain a high regard." And what is novel in a court of law, it was argued that the views of the engineer should be taken in preference to the views of the Court for the reason of his practical knowledge, and the lack of knowledge of such matters upon the part of the Court. It was also strenuously asserted that the doctrine of the sale of a water right separate from the land was the doctrine of the courts and not of the irrigators and that it created a source of litigation. Mr. Justice Potter in rendering the opinion of the Court in affirming the judgment below, said: "We can not agree that the doctrine has resulted from ignorance concerning irrigation matters. Nor can we agree with the notion that men not necessarily or usually trained in the law are more competent than the courts to determine legal principles controlling the use of water by prior appropriation, notwithstanding that the judges may not, as a rule, be practical irrigators. . . . It may be accepted as true that the rule permitting the sale of a water right separate from the land has been the source of litigation. But that affords no sufficient reason for destroying property rights. We can not agree that, in order to discourage litigation or render it impossible, the courts should devest the citizen of his property. . . . To adopt the view contended for against the validity of the conveyance in question would, in our judgment, require us to deny the element of property in the water right itself. Nothing in the decisions on the subject or in the statute authorizes that.[6] Moreover, forfeitures have never been favored in law. But is it not a conclusive answer to the proposition for the new theory that there is no principle of law upon which it can be logically or reasonably based?"

But the Supreme Court of Wyoming is not the only court which has had this identical question before it. The legislature of the State of Idaho, in 1901,[7] attempted to make the water right an in-

[6] That a water right is a property right, see Secs. 768-771.

[7] See Sess. Laws of Idaho, 1901, p. 200, Sec. 9b. "All waters of the State, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, are declared to be the property of the State, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the rights to the use of any of the waters of the

separable appurtenance. The question of the construction of this statute first arose in the case of Hard v. Boise City Irrigation and Land Company,[8] and was decided against the statute, and that users of water from a ditch or canal acquire such a property right as they may transfer to other lands under such ditch and canal. It was also held that they may sell and transfer the right to use such waters, and the purchaser may transfer it to other lands under the ditch or canal, so long as the change of the place does not interfere with the rights of others, and that the canal companies do not acquire any greater rights, than are granted to the individual citizens of the State. And, Mr. Justice Alshie, in the concurring opinion, said: "If a thing really is property, the legislature, by saying it shall not be considered such, can not in fact deprive it of the character and quality which constitute it property. . . . I do not conceive of any well founded reason or principle of law that forbids the owner of a tract of land from separating and segregating an appurtenance therefrom, and disposing of it with the same freedom of sale or *jus disponendi* as he may enjoy with reference to any other property right. . . . It is a fundamental principle that every citizen has the inherent right to dispose of all his acquisitions."[9] He further held that the argument that under Section 4, Article 15,[10] of the State Constitution, the appurtenance can only attach to "the land so settled upon or improved," and that any attempt to separate the right from the specific piece of land to which it was originally applied works an immediate forfeiture or abandonment, is illogical and faulty. In a very recent case decided by the Supreme Court of Idaho,[11] it was held that a clause in the contract, which is as follows, "but in no case will water rights or shares be dedicated to any of the lands aforementioned," was valid;

State for useful or beneficial purposes are recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied shall not be considered *as being a property right in itself, but such right shall become the complement of*, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied," etc.

8 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

See, also, Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25.

9 Citing 1 Bl. Com. 138.

10 For Idaho State constitution, see Chap. 89.

11 State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039.

and the Court further held that it permitted the rotation of the water which tended towards the economical use of the same. In a still later case,[12] it was said: "This Court held that the owner of a water right, by purchase, or original appropriation, had a right to dispose of the same and sell the water separate and apart from the land. . . . If this be a correct statement of the law, then the trial court erred in its conclusion of law, to the effect that the water applied to the desert entry became appurtenant to the land and inseparable therefrom." [13]

Other States have passed Acts similar in nature to those of Wyoming and Idaho discussed above, attempting to make water rights within their respective jurisdictions inseparable appurtenances to the specific tracts of land to which the water was first applied. Some of these Acts provide that the water right can only be separated from this land after approval by the State engineer and publication of notice.[14]

We consider these statutes as faulty as those of Wyoming and Idaho discussed above, for the reason that there is nothing in the nature and character of a water right acquired under the Arid Region Doctrine of appropriation which makes it, upon any principle of law which can be conceived, an inseparable appurtenance to any particular tract of land, so that a sale or transfer of the right would work an abandonment, and vest no right in the grantee. Upon the other hand, the inherent rights guaranteed under our constitutions and laws to own, hold, and dispose of all or any portion of our property, either as a whole or in parts, permits the sale and transfer of a water right separate from the land. This principle was undoubtedly recognized by Congress in passing the National Reclamation Act,[15] where, in Section 8, it is provided that the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with the laws of the respective States

12 Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86.

13 Citing Johnston v. Little Horse Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986; Hard v. Boise City Irr. & Land Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

14 For the statutes of the various States upon the subject, see Part XIV.

15 See Act of June 17, 1902, Chap. 1093, 32 Stat. L., p. 390, Sec. 8; 7 Fed. Stat. Ann., 1905, p. 1100; Supp. U. S. Comp. Stat., 1905, p. 349.

For copy of Act, see Sec. 1214.

and Territories; and, in the same section is the proviso, "That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated," etc. As will be noticed the proviso does not state what "land irrigated," nor does it attempt to make the water an inseparable appurtenance to any land. It certainly can not be contended in the face of the whole of this section, that a person in either the States of Wyoming or Idaho, who had fully paid for a water right under the provisions of the Act, and where the laws of those States recognize the validity of a sale and transfer of a water right separate and apart from the land to which it was first applied, can not so sell his right, or transfer the water claimed thereunder to some other tract of land. The same may be said relative to the water rights acquired under the Act in other States under the principles stated above.[16]

We will now discuss some of the physical reasons why a water right should not be deemed an inseparable appurtenance to a particular tract of land.[17]

§ 1016. A water right should not be an inseparable appurtenance to land.—In the previous section we discussed from a legal standpoint that a water right is not an inseparable appurtenance to a particular tract of land.[1] In this section we will discuss why it should not be considered such an appurtenance from the physical standpoint; and as the law is based upon reason and common sense, the physical reason as to why the right should not be so considered, undoubtedly led to the rule of law that it is not so considered.

We will suppose, for example, that a settler upon the public land has taken up 180 acres and has lawfully appropriated two second feet of water for the irrigation of 80 acres; that this was accomplished after years of hard work in constructing his dam and ditches and in clearing the land and getting it ready for cultivation. His appropriation is entirely consummated and the title to the use of the two second feet of water is perfect in himself so long as he continues to apply the water for the irrigation of this particular tract of land. It has cost him a lot of money and is a property right. After using the water for the first 80 acres for a number of years, and in the meantime he has also broken up the

16 For the sale and transfer of water rights, see Secs. 955-1000.

17 See Sec. 1016.

1 See Sec. 1015.

other 80 acres of his claim and it is ready for cultivation, we will suppose that he desires the first 80 to rest for a few years, or, that he can put it to some use for which it needs no irrigation. But the second 80 requires the water, and, owing to other rights coming after his appropriation all of the waters of the stream are appropriated and he can secure no water for it except that claimed under his old appropriation. Is there any reason in law, common sense, or justice why the water right must remain a fixed and inseparable appurtenance to the first 80 acres, or that he can not apply the water claimed thereunder to the irrigation of the second 80 acres? Again, we will suppose that he for some reason does not wish to irrigate any of his land, is there any reason in law or otherwise why he may not sell all or a portion of his right to a neighbor who has the use for it and desires to purchase the right? We concede the rules that surplus waters can not be sold, and also that the failure to use the water for a certain period works an abandonment, and what we are speaking of are absolutely valid water rights.[2]

Again, it frequently happens, that through no fault of the owner of a water right, and by the operation of natural laws, land to which water rights have been attached becomes unsuitable for cultivation. In the mountainous regions, floods frequently wash away and destroy farming lands, or leave deposits of coarse gravel and boulders upon them; and other natural causes often render such lands not only unprofitable, but impossible of irrigation and cultivation. Other illustrations might be given, but they are unnecessary and space will not permit, where lands previously irrigated have been changed so that irrigation is not only impracticable but would further injure the lands to which the water had been formerly applied.[3]

There is, however, another reason why a water right should not be considered an inseparable appurtenance to a certain tract of land, and that is from the standpoint of the economical use and the suppression of the waste of the water, discussed in another chapter.[4]

Owing to the great scarcity of water throughout the arid West, a given supply should be made to go as far as it can successfully

2 That surplus water can not be sold, see Sec. 1027.

For abandonment, see Secs. 1099-1117.

3 For the injury to lands by the application of too much water, see Sec. 914.

4 See Chap. 49, Secs. 874-916.

go, when economically used and without waste. From investigations made by the United States Department of Agriculture, it has been determined that, where a water right is considered an inseparable appurtenance to a certain tract of land, and rights are allowed for such specified tracts with a maximum limit on the quantity of water which may be used, or a minimum duty of water,[5] a much larger percentage of water is used per acre, than where a certain quantity of water is allowed for the use on any lands that the owner may see fit. In the first case the owner will use as much water as possible for the given tract, and, in the latter, he will make a given amount of water irrigate as many acres as possible.[6]

There is also an important legal reason why a water right should not be considered an inseparable appurtenance to a certain tract of land. As we have seen, a water right is a property right of the highest character.[7] Therefore, the right of the alienation of a water right is one which is based upon the general rights of property, and arises oftentimes out of necessity, in order that injustice might not be done to the owner. The alienation of a water right should not work an abandonment or forfeiture of the right, which is a valid property right and oftentimes of great value, the loss of which would incur great financial loss to the owner. As was held in an Arizona case, natural justice, therefore, is subserved by recognizing the right of a water-right holder to change his appropriation to lands capable of profitable cultivation, or to sell his right to another, to be used by the latter for a beneficial use. To adopt a rule prohibiting the alienation of a water right would be to adopt a more stringent rule than that under the common law, as riparian rights to the use of the water may be sold or conveyed.[8]

Another physical reason why water should not be an inseparable appurtenance to a certain tract of land is upon the side of the question of economical use of the water and suppression of waste. If the use of water could not be transferred from one tract of land to another, it would do away with the question of the rotation of

[5] For duty of water, see Secs. 902-908.

[6] See, also, Losses of Irrigation Water and Their Prevention, by R. P. Teele, Annual Report of the Office of Experiment Stations for the year ending June 30, 1907, pp. 385, 386, U. S. Dept. of Agriculture.

[7] See Secs. 768-771.

[8] See Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

water, which as we have discussed in previous sections, tends toward its more economical use.[9]

§ 1017. Appurtenances—Ditches and canals when appurtenant to land.—Where a ditch, canal, or other works are used to divert and conduct the water appropriated to the place of use, and where they are constructed over a permanent easement, or right of way, acquired originally in some lawful manner,[1] a sale of the land where the water is used and for which the appropriation was made, will, in the absence of an express reservation to the contrary, pass to the grantee, under the principles discussed in the previous sections,[2] the title of the grantor in and to such ditch, or other works, at the time of the transfer; and that, too, regardless of the fact whether or not the term "with appurtenances" is used in the deed; provided, however, that the ditch, or other works, were in fact an appurtenance to the specific tract of land transferred. The rule of law in this respect is practically the same as the transfer of water rights as appurtenances discussed in previous sections.[3] There are, however, some points which need special mention. As is the case with water rights, where the term "with appurtenances" or one of similar purport is used in the deed, where the grantor possesses the right to conduct water to the land granted over the land of another, such right passes to the grantee under the *habendum* clause as an "appurtenance thereunto belonging," without specifically mentioning such right.[4] So also an easement over the lands of another, and the ditches constructed thereon, may pass as appurtenances to

9 For the rotation of water, see Secs. 909, 910.

See, also, State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039.

1 For the acquisition of rights of way over public land, see Secs. 927-971.

For same over private lands, see Secs. 972-993.

2 For water rights as appurtenances, see Secs. 1005-1016.

3 See Secs. 1005-1014.

4 Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Salem Capital Flour Mills Co. v. Stayton etc. Co., 33 Fed. Rep. 146; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Pogue v. Collins, 46 Cal. 435, 80 Pac. Rep. 623; Sloan v. Glancy, 19 Mont. 70, 47 Pac. Rep. 334; Crooker v. Benton, 93 Cal. 365, 28 Pac. Rep. 953; People *ex rel.* Standard v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; Grand Val. Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Peck v. Bailey, 8 Hawn. 658.

the dominant estate, without the word "appurtenances" being mentioned in the deed, conveying such estate, provided that it was the intention of the grantor that they should pass with the transfer of the land. This is upon the theory that "he who grants a thing is supposed to and does grant that without which the grant is worthless." The deed being silent, the intention of the grantor is to be gathered from the presumptions arising from the circumstances surrounding each particular transaction.[5] The perpetual right of a party and his heirs and assigns to have the water for his land carried through a certain ditch is an easement appurtenant to the land in whosesoever hands it might be.[6] However, the ditch or canal is an entirely distinct property right from the water right and may be conveyed separately from each other if the intention to do so is apparent in the deed.[7] It therefore follows that, where one of these rights has been disposed of before the sale of the land, or is reserved in the deed to the land, only the remaining right will pass to the grantee as an appurtenance. It is held that a water ditch can not be appurtenant to another ditch so as to pass as such under a grant of the latter. But an upper ditch which is a part of a system of ditches and necessary to furnish the water supply to the lower ditches, and without which they would be worthless, is covered by the words of a deed conveying the entire interest of the grantor in the system without specifying the different ditches, and therefore passes by the deed as a part and parcel of the system.[8]

Ditches and canals constructed for the irrigation of land occupied as a homestead, without which the land would be of little value, and the water flowing through them, are treated as appur-

[5] American Nat. Bank v. Hoeffer, 18 Colo. App. 53, 70 Pac. Rep. 156; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1052; Donnell v. Humphreys, 1 Mont. 518; Nelson v. Clerf, 4 Wash. 405, 30 Pac. Rep. 716; Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713.

[6] Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290.

See, also, Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

[7] Zimmler v. San Luis W. Co., 57 Cal. 221; Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875; Ada etc. Co. v. Farmers' etc. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

[8] Donnell v. Humphreys, 1 Mont. 518.

But see Carman v. Staudaher, 20 Mont. 364, 51 Pac. Rep. 738.

tenances to the land, as a part of the homestead and are exempt from execution for debts contracted prior to the issuing of the patent.[9]

§ 1018. **Appurtenances—Water right appurtenant to ditch, or ditch to water right.**—A water right, although a distinct property right from that in the ditch or canal, or other works, may under certain conditions be an appurtenance to a ditch, so where the ditch is sold that the water right will pass to the grantee, without special mention.[1] But this does not mean that the water right is an inseparable appurtenance to a certain ditch, as the water may be used through any ditch.[2]

In one California case,[3] it was held that, as the water right was the principal thing, and, if either is appurtenant to the other, the ditch is appurtenant to the water right.

There can be no right to the current of the stream as appurtenant to a diversion of the flowing water of the stream.[4]

§ 1019. **Mortgages—The alienation of water rights, ditches, and other works by means of.**—As we have seen in the preceding sections, the water rights acquired by appropriation, the ditches, and canals, and the land for the benefit of which the appropriation was made, are all separate and distinct property rights, and may be sold and transferred either together or separate and apart from each other.[1] Another method for the alienation by the owner of all

[9] Payne v. Cummings, 146 Cal. 426, 80 Pac. Rep. 620, 106 Am. St. Rep. 47; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836.

See, also, for the sale of rights under execution, Sec. 1024.

[1] Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024; Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6.

Where a water right has been acquired by means of a ditch used in carrying it, a conveyance of the ditch is a conveyance of the water right. Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405.

[2] Jacobs v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

[3] Jacobs v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

[4] Schodde v. Twin Falls etc. Co., 161 Fed. Rep. 45, 88 C. C. A. 207.

[1] See Secs. 995, 1015, 1016.

of these property rights, either separate and apart from each other, all together, or by a combination of any two or more, is by a mortgage or deed of trust. The mortgagor may pay off the mortgage debt and the property will then be released from the mortgage lien and will then revert to the mortgagor. But, as it often happens, the mortgage has to be foreclosed and the property sold under execution or has to be sold by the trustee under the power of sale. In these cases upon the execution and delivery of the sheriff's or the trustee's deed, the title to the property passes to the purchaser at the sale or to his assignee.[2]

In general, it may be said that the conveyance of water rights, or the works necessary for their utilization, by a mortgage or deed of trust is governed by the same rules of law as those which govern the mortgaging of other real property. Also, we will add, that the rules, as to what are or are not treated as appurtenances and pass to the mortgagee or to the purchaser at the foreclosure sale, are, in general, the same as the rules which govern the subject of appurtenances in the case of the ordinary sale and transfer of these rights and which we have fully discussed in preceding sections of this chapter.[3] In the transfer of land, as to what rights, other than the bare land itself, pass to the mortgagee, depend upon the terms expressed in the mortgage; and, when this is silent or ambiguous, from the presumption which arises from the facts and circumstances of each particular case.[4]

§ 1020. **Mortgages—After acquired water rights as affected by.**—There are, however, some questions relative to the alienation of property rights of this nature which require particular attention. One of these questions is, the status of water rights, ditches, and

2 See Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296; Farm Investment Co. v. Alta etc. Co., 28 Colo. 408, 65 Pac. Rep. 22; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 856, 15 L. R. A., N. S., 359; Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368; Schwab v. Smuggler Union etc. Co., 174 Fed. Rep. 305, 98 C. C. A. 160; Mitchell v. Amador etc. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246; Shurtleff v. Bracken, —— Cal. ——, 124 Pac. Rep. 724.

See, also, for preference rights of mechanics' liens over mortgages in certain cases, Sec. 1022.

3 See Secs. 1006-1014.

4 For rights passing under word "appurtenances," see Sec. 1009.

For rights passing without word "appurtenances," see Sec. 1010.

other works, as affected by a mortgage, where the same was acquired after its execution by the mortgagor and used for the benefit of the land covered. As can be readily seen, this question can seldom arise except in the case of foreclosure of the mortgage, or in case of a subsequent mechanic's lien claiming precedence.[1] The general rule upon this subject is that fixtures and improvements attached to the mortgaged land after the execution of the mortgage pass to the purchaser at foreclosure sale, although not mentioned or referred to in the mortgage.[2] Therefore, it is held that a water right, when so acquired by the mortgagor and when it becomes an appurtenance to the land, passes with the land, upon the foreclosure sale in the same manner as any other appurtenance or fixture passes with the title and possession of the land, and that, too, without any express mention and without any reference thereto, such as by the use of the word "appurtenances" or otherwise.[3]

A mortgage upon a flume or ditch not completed, but in process of construction, covers the whole work when completed, if apt terms expressing that intent are used in the instrument.[4] And in such cases where apt words are used in the mortgage, the question may be regarded as settled that property acquired subsequently to its execution may become subject to the lien thereof.[5] Therefore, in

[1] For subsequent liens taking precedence to mortgage, see Sec. 1022.

[2] 1 Jones on Mortgages, Secs. 147, 681; 2 *Id.*, Sec. 1657; 1 Am. & Eng. Encyc. of Law 255.

[3] Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359, where it is said: "We are unable to perceive any material difference in principle, in this respect, between fixtures and improvements attached to or erected upon land and a water right attached to land as an appurtenance, such as that here involved, and we hold that it is governed by the same rules."

[4] Union W. Co. v. Murphy's Flat etc. Co., 22 Cal. 621; Tibbetts v. Moore, 23 Cal. 208; Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62; Ferguson v. Miller, 6 Cal. 402; Soule v. Dawes, 7 Cal. 575; Sands v. Pfeiffer, 10 Cal. 258; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025, where it was held that the trust deed covered all property, both real and personal, then owned, or subsequently acquired.

[5] Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Farm Inv. Co. v. Alta etc. Co., 28 Colo. 408, 65 Pac. Rep. 22; Union W. Co. v. Murphy's Flat etc. Co., 22 Cal. 621.

See, also, Toledo etc. R. Co. v. Hamilton, 134 U. S. 296, 33 L. Ed. 905, 10 Sup. Ct. Rep. 546; Central Trust Co. v. Kneeland, 138 U. S. 414, 34 L. Ed. 1014, 11 Sup. Ct. Rep. 357; Galveston etc. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 459, 20 L. Ed. 199.

But an irrigating ditch, which was

construing a mortgage, and the sheriff's deed upon foreclosure, to ascertain what interest in a ditch passed thereby, it is held that the instruments should be examined in the light of the facts regarding the use of the ditch and water right before and after their execution.[6] It was held in Colorado that an irrigation ditch, which was not commenced at the time a deed of trust was executed, and not specifically mentioned in such deed, was not conveyed thereby, and that the purchaser under a foreclosure sale of the land acquired no title to such ditch.[7] It was therefore held by the Supreme Court of the United States that a clause in a mortgage which subjects subsequently acquired property to the lien thereof is a valid clause.[8] And where the Court said: "Such a mortgage, as against the mortgagor and subsequent incumbrancers, attaches itself to the after-acquired property as fast as it comes into existence, or as fast as the canal or railroad is built." But the property claimed as after-acquired property must be owned by the mortgagor, or he must have a legal or equitable interest therein.[9] Also, the land to which

not commenced at the time a deed of trust of land was executed, and was not specifically mentioned in such deed, is not conveyed thereby. Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. Rep. 1074.

But see Mitchell v. Amador etc. Co., 75 Cal. 464, 483, 17 Pac. Rep. 246, where it was held that a mortgage did not cover a new canal, where the description in the mortgage, *lis pendens*, decree of foreclosure, and deed described only the old canal and appurtenances.

6 Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 Pac. Rep. 917, where it was held that the mortgage and sheriff's deed passed so much only of the interest in the ditch as was used for and necessary to the irrigation of the land described therein.

See, also, Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. Rep. 1091; Pendola v. Ramm, 138 Cal. 517, 71 Pac. Rep. 624; Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; Cave v. Crafts, 53 Cal. 135; Hungarian M. Co. v. Moses, 58 Cal. 168; Bass v. Buker, 6 Mont. 442, 12 Pac. Rep. 922; Almeria etc. Co. v. Tzschuck, 67 Neb. 290, 93 N. W. Rep. 174; Johnson v. Sherman Co. etc. Co., 71 Neb. 452, 98 N. W. Rep. 1096.

7 Crippen v. Comstock, 17 Colo. App. 89, 66 Pac. Rep. 1074.

For after-acquired property as affected by a mortgage, see Sec. 1020.

For the question of mortgages on the property of irrigation districts, see Chap. 70.

8 Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 386.

9 Farm Inv. Co. v. Alta etc. Co., 28 Colo. 408, 65 Pac. Rep. 22, where it is said: "But no case has been cited to us which holds that property standing in the name of some person other

it is claimed that the after-acquired right is appurtenant must be owned by the mortgagor. Therefore, where one in possession of a tract of land, simply under a contract from the owner, appropriates and uses water upon the land, such a water right does not become appurtenant to such lands, without a conveyance in writing to the owner of the lands, there being no unity of title. Therefore, where a mortgage was given by the possessor of the land, which included the water right, it was held that the mortgage, although void as to the land because the mortgagor had no title, was good as to the ditches and water rights, and upon foreclosure and sale the purchaser was entitled to possession.[10]

Another subject requiring special mention, is the liability of a purchaser, under the foreclosure sale of a mortgage on the ditch system and water rights of an irrigation company, as to the contracts to furnish water to consumers by the mortgaging company. Upon this subject the courts generally hold that the purchaser of the mortgaged property is liable on and bound by such contracts. This subject, however, will be discussed in another part of this work.[11]

Another question is the precedence which may be given to a mechanic's lien, in certain instances, as against a mortgage prior in time. We will discuss this in a succeeding section in this chapter.[12]

§ 1021. **Mechanics' liens—To what property they attach.**—The title to a water right, the ditches, and canals, or other works, used in connection therewith, may be subject to mechanics' liens for the labor and the material furnished in the construction of the works; and if such liens are not released and satisfied in some other method they may be foreclosed and the property which they cover may be sold at sheriff's sale to satisfy such liens, and the purchaser

than the mortgagor becomes subject to the lien of the mortgage, unless the mortgagor has some legal or equitable interest therein."

10 Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 741, 81 Am. St. Rep. 408; reversing *Id.*, 23 Mont. 65, 57 Pac. Rep. 557.

11 For ditch and canal companies, see Chaps. 72-77.

See, also, Sammons v. Kearney etc. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; Stanislaus W. Co. v. Bachman, 152 Cal. 719, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Almeria etc. Co. v. Tzschuck, 67 Neb. 290, 93 N. W. Rep. 174.

12 See Sec. 1022.

at such sale will acquire title to all of the rights to the property so covered by the lien. In fact, this is the history of the present title to the works and water rights of one of the large irrigation enterprises of the country, as is set forth in the reports of the case as decided by the Supreme Court of Utah and also that of the United States.[1] And in case of the foreclosure and sale under a mechanic's lien, the water right for the benefit of which the ditch was constructed may be deemed an appurtenance to the ditch and pass with it at the sale to the purchaser.[2] Again, mechanics' liens may attach to the land for the irrigation of which the ditches, canals and other works are being constructed; and, upon a foreclosure of the lien and a sale of the property thereunder, the title to the land as well as that to the ditches, canals, and water rights will pass to the purchaser. As held by the Supreme Court of the United States, a lien for an irrigation ditch extends to the tract of land necessary to the convenient use of the improvement for the purposes contemplated in its construction and benefited thereby. And, in a case where the land benefited was a tract of 22,000 acres, the Court held that it attached to the whole tract, saying: "To limit the land upon which the lien was given to the strip of land 60 feet in width and 26 miles long, which was actually occupied by the ditch, and exclude the tract which the ditch was constructed to benefit by its continuous operation, would, it seems to us, be to

1 Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7, affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 386.

See, also, as to the enforcement of mechanics' liens covering property of this nature, Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39, 501, 86 Fed. Rep. 975; Nelson v. Clerf, 4 Wash. 405, 30 Pac. Rep. 716; Creer v. Cache Val. C. Co., —— Idaho ——, 38 Pac. Rep. 653; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Ada County etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

A special lien is one which the holder can enforce only as security for the performance of a particular act, and of such obligations as may be incidental thereto. Stone v. Harris, 146 Cal. 555, 80 Pac. Rep. 711.

2 Reynolds v. Hosmer, 51 Cal. 205, 5 Morr. Min. Rep. 6, where the ditch was built in two sections and were separately sold on foreclosure of a mechanic's lien; it was held that the water right passed as an appurtenance to the upper part, and that the owner of the lower part had no water right.

See, also, Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129.

unreasonably circumscribe the meaning of the statute."[3] But in order to entitle a judgment for the plaintiff in an action to foreclose a mechanic's lien against an irrigation ditch, for the construction thereof, he must show an ownership or an interest in defendant in the land over which the ditch was constructed; and the mere fact that the defendant owns the ditch and has possession of the land upon which it was constructed "without objection from the owners" is not sufficient.[4] However, it was held by the Supreme Court of the United States that a person for whom the work was done on land under a contract may be the "owner" within the Utah mechanic's lien law, although without any legal or equitable title until the work was done, as was the case where the canal was constructed on the public lands of the United States, if he became the owner when the work was completed by virtue of its performance.[5] In order to enforce a mechanic's lien, an action must be brought to foreclose the same; and where an ordinary action for debt is brought, the right to foreclose the lien is waived.[6]

§ 1022. **Precedence of mechanics' liens over mortgages.**—There is another subject which needs attention, relative to the subject of liens and mortgages, and that is when the rights acquired under these two clash and are hostile to each other. We have seen in a preceding section that a clause in a mortgage subjects subsequently acquired property of the mortgagor to the lien of the mortgage is

[3] Springer Land Assn. v. Ford, 168 U. S. 513, 42 L. Ed. 562, 18 Sup. Ct. Rep. 170, affirming 8 N. M. 37, 41 Pac. Rep. 541.

Where well drillers were allowed to drill a well and after they had informed the owners that they would not do the work upon the condition that drilling was not to be paid for unless water in sufficient quantity was obtained, it was held that there was no warranty that water would be obtained so as to preclude them from asserting their lien on the premises for drilling actually done. Behne v. Stapish, —— Wash. ——, 122 Pac. Rep. 1002.

[4] Nelson v. Clerf, 4 Wash. 405, 30 Pac. Rep. 716.

[5] Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7.

[6] Garland v. Bear Lake etc. Co., 9 Utah 350, 34 Pac. Rep. 368.

The same rule also applies to vendors' liens. Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198.

Also in the case of contracts, where a lien is given upon the land. Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275.

a valid clause.[1] And such a mortgage, as against the mortgagor and subsequent encumbrancers, ordinarily attaches itself to the after-acquired property as fast as it comes into existence.[2] There is, however, one exception to this rule, and that is that even under the after-acquired property clause in a mortgage, if the after-acquired property be burdened with a mechanic's lien at the very time of coming into possession or ownership of the mortgagor, such encumbrance remains prior and superior to the lien of the mortgage, although it is actually subsequent thereto in point of time.[3] This rule is especially true, where the mortgagee takes the mortgage with notice that a canal, or railway, or other works, was not constructed, and that it would be, when constructed, subject to mechanics' liens.[4] Therefore, in a case of this nature, where a canal was constructed largely over the public lands of the United States, and there could therefore be no title to a permanent right of way running with the land until it was completed and the appropriation finally consummated by its use in conducting the water,[5] and the canal and other works necessary to attain this end were finally completed only through the work and labor of the contractor, and, thereby, the property was not only brought into legal and physical existence, but was also brought under the mortgage as after-acquired prop-

1 See Sec. 1020.

2 Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7.

3 United States v. New Orleans Railroad, 79 U. S. 12 Wall. 362, 20 L. Ed. 434; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; 1 Jones on Mtgs., Sec. 158; Williamson v. New Jersey Southern R. Co., 28 N. J. Eq. 277, 29 N. J. Eq. 311; Hall v. Mill Co., 16 Mo. App. 454; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; San Diego etc. Co. v. City of National City, 74 Fed. Rep. 79.

The equitable rules governing priority to labor and supply claims arising within a limited time before the appointment of a receiver of a railroad in foreclosure proceedings are applicable by analogy to irrigation companies, which are also quasi-public corporations, subserving great public uses. Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39, 501; *Id.*, 86 Fed. Rep. 975, where it is held, however, in the later decision that only such claims where they are necessary for the operation and preservation of the property will be allowed the preference right over a mortgage.

See, also, California etc. Co. v. Yakima Inv. Co., 82 Fed. Rep. 542; Savings & Trust Co. v. Bear Valley etc. Co., 93 Fed. Rep. 339.

4 Brook v. Burlington etc. R. Co., 101 U. S. 443, 25 L. Ed. 1057; Paulsen v. Mauske, 126 Ill. 72, 9 Am. St. Rep. 532; Ellis v. Porter, 8 Utah 108, 29 Pac. Rep. 879.

5 For the consummation of an appropriation, see Secs. 725-728.

erty, it was held by the Supreme Court of the United States, that the mechanic's lien of the contractor was superior to that of a mortgage although prior in time to the mechanic's lien.[6] The Colorado Supreme Court followed the rule as laid down in the Bear Lake case and went one step further in holding that, even in the face of a provision in the contract where it was provided that the contractor waived all rights to mechanics' liens, that this provision did not bind the subcontractors where by law they were entitled to liens.[7]

§ 1023. Vendors' liens—Liens for furnishing water supply.—There are other classes of liens recognized in the Western States, whereby the title to both the lands and waters may be alienated. Among these are vendors' liens allowed in some of the States, where lands and waters are sold and transferred, the vendor taking a vendor's lien for part of the purchase price.[1] The laws of the Western States also recognize another class of liens upon land, not strictly connected with the subject-matter of this chapter. This class includes those liens allowed a ditch or canal company for furnishing water to the consumers, especially for irrigation. Statutes of the various States provide, in effect, that, where water is furnished by a ditch or canal company under a contract, the company may have a lien for the water furnished, and that such lien will run with the land, even where sold, provided the purchaser has notice of the lien.[2] We will discuss this subject more thoroughly when we come to the subject of contracts with ditch and canal companies.[3] But the remedy in both the case of a vendor's lien and one for furnishing water for land of consumers is by a fore-

[6] Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 368.

[7] Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129.

[1] Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Brixen v. Jorgensen, 33 Utah 97, 92 Pac. Rep. 1004; *Id.*, 28 Utah 290, 78 Pac. Rep. 674, 107 Am. St. Rep. 720.

[2] Fresno etc. Co. v. Rowell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112; Fresno etc. Co. v. Hart, 152 Cal. 450, 92 Pac. Rep. 1010.

See, also, Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 868; Hottell v. Farmers' etc. Assn., 25 Colo. 67, 53 Pac. Rep. 327, 71 Am. St. Rep. 109; Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Balfour v. Fresno Irr. Co., 109 Cal. 221, 41 Pac. Rep. 876.

[3] See Chap. 77.

closure of the lien and the sale of the property covered thereby and not by a direct action.[4]

§ 1024. **Executions—Sale of water rights, ditches, and other works by means of.**—Water rights, ditches, and other works used to utilize the same, may be sold either separate and apart from each other, or separate from the land for which they are used, or all together, on an execution issued under an ordinary money judgment against the owner.[1] But as such a sale is an involuntary one, where there is the sale of the land for which the water was used, in order for the sheriff's deed to pass title to the water right, there must be a direct levy upon such water right. So, it is held in Colorado that where a sheriff's deed did not purport to convey the water right, although he had the right to levy on the same, but did not do so, neither the sheriff's nor the purchaser's intention can control, and where there is no act of the judgment defendant from which an intention to convey can be inferred, the water right was not conveyed.[2] In this case the Court held that the water rights would not pass with the sheriff's deed as an appurtenance to the land sold. But in a Montana case, the Court intimates that it would so pass. But in the statement of that case it seems that the levy was made upon the lands "and property" described, and in the description of the property there were included the lands, mill, water rights, and canals.[3] But, as such a sale is always an involuntary one, and whether a water right passes even at a voluntary sale of land, as an appurtenance thereto, depends largely upon the intention of the grantor,[4] the better rule is, where property is sold upon execution, that the water rights, or the works by the means of which they are used, do not pass with the sheriff's deed unless direct levy and sale are made of them.

4 Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275.

1 Gleason v. Hill, 65 Cal. 17, 2 Pac. Rep. 413; *Id.*, 64 Cal. 18; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Briggs v. Murray, 29 Wash. 245, 69 Pac. Rep. 765; Pogue v. Collins, 46 Cal. 435, 80 Pac. Rep. 623; Struby-Esterbrook Mer. Co. v. Davis, 18 Colo. 93, 31 Pac. Rep. 495, 36 Am. St. Rep. 266.

2 Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

3 Briggs v. Murray, 29 Wash. 245, 69 Pac. Rep. 765.

4 For intention of the grantor, see Secs. 1007, 1009.

But water rights can not be levied upon and sold at sheriff's sale where they are exempt from execution. Therefore, where a certain tract of land owned by the judgment debtor is exempt from execution upon the ground that it is his homestead, the necessary water rights used for the irrigation of the land and the ditches and canals through which the water is conducted to the land, become a part and parcel of the homestead and are also exempt from execution.[5] But where the land is not exempt from execution the water right used therewith, although represented by shares of stock, may be levied upon and sold under an execution.[6]

§ 1025. **Leasing water rights with land.**—Under certain circumstances, water rights may be alienated other than by giving an absolute title to the same,[1] as for periods of time. Water rights used for the irrigation of a tract of land, the working of a mine, a mill, or an electrical plant, may be leased with these properties; and in that case, the lessee will have the same rights to the use of the water as would their owner. The lessee of land may also appropriate water for the irrigation of the land he has leased;[2] but a tenant can not, as against his landlord, acquire water rights by adverse use.[3] The leasing of a water right with the property from which it is used is of most common practice in the Western States. Land here can not be cultivated by the tenant without water any more than it can be cultivated by the landlord, and hence it follows that both are leased together.[4] And where the land and water

5 Payne v. Cummings, 146 Cal. 426, 80 Pac. Rep. 620, 106 Am. St. Rep. 47; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198.

But that a water right is not such an inseparable appurtenance to a homestead entry so that it can not be sold apart from the land, see Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826.

6 Struby-Esterbrook Mer. Co. v. Davis, 18 Colo. 93, 31 Pac. Rep. 495, 36 Am. St. Rep. 266.

1 For the sale of water rights, see Secs. 995-1002.

2 Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389.

As to who may appropriate water, see Secs. 678-689.

3 Gill v. Malan, 29 Utah 431, 82 Pac. Rep. 471; Talbott v. Butte etc. Co., 29 Mont. 17, 73 Pac. Rep. 1111; Hecla Ag. Co. v. Henry, 8 Hawn. 447.

For the acquisition of water rights by prescription, see Secs. 1033-1058.

4 See Seaweard v. Pacific etc. Co., 49 Ore. 157, 88 Pac. Rep. 963; Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Hayden v. Consolidated Min. & D. Co., 3 Cal. App. 136, 84 Pac. Rep. 422; Gill v. Malan, 29 Utah 431, 82 Pac. Rep. 471; Crook v. Hewitt, 4

rights are sold, upon which there is a valid existing lease, the sale can only be made subject to the lease.[5] Where a definite water right is leased with a tract of land and the lessee is dispossessed, as to the use of the water or a certain portion of the water, by third parties who have the title to the same, the lessee is entitled to damages for the loss.[6]

It was also so held where the lease was for the water right alone, no question being raised as to the validity of such a lease.[7] But where the lessor was not the owner of the water claimed by the lessee to have been leased to him with a tract of land upon the ground that the water was an appurtenance to the land, although the water was not mentioned in the lease, the maxim of *caveat emptor* applies, and the lessee, at his peril, must therefore ascertain the sufficiency of the lessor's title to the premises, including the appurtenances. And in such contracts property affected by the rights of appropriation will not only be governed by the terms of the contract itself but by the physical conditions of the property itself at the time the contract was entered into.[8] A limit may be made by the terms of the lease as to the amount of damages which may be assessed should the water supply fail.[9]

In a recent New Mexico case [10] where the evidence showed that

Wash. 749, 31 Pac. Rep. 28; Giddings v. Seventy-six Land & W. Co., 109 Cal. 116, 41 Pac. Rep. 788; Stockton v. Brown, —— Tex. Civ. App. ——, 106 S. W. Rep. 423; Un Wo Sang Co. v. Alo, 7 Hawn. 661, 739; Anna Long v. Wai Fong, 9 Hawn. 628; Cross v. Hawaiian Sugar Co., 12 Hawn. 415; Moore-Cortes C. Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S. W. Rep. 350; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561.

5 Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617.

6 Groome v. Ogden City, 10 Utah 54, 37 Pac. Rep. 90; Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

See, also, Cargill v. Thompson, 50 Minn. 211, 52 N. W. Rep. 644, where the water was leased for power purposes.

7 Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689, where it was held that, after the lease of water to plaintiff by defendant, a third person was decreed to be the owner of part of the leased water, so that plaintiff was deprived of such part, plaintiff was entitled to damages for the loss.

8 Groome v. Ogden City, 10 Utah 54, 37 Pac. Rep. 90.

See, also, Un Wo Sang Co. v. Alo, 7 Hawn. 661, 739.

9 Moore-Cortes C. Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S. W. Rep. 350.

10 Smith v. Hicks, 14 N. M. 560, 98 Pac. Rep. 138.

a lease had been given to a certain tract of land wherein the lessor bound himself to furnish sufficient water for irrigation of the same but where the situation was that to obtain the water the plaintiff must do an act of violence, such as breaking the lock to take the water, thereby incurring personal damage and possibly criminal prosecution or bring legal proceedings to obtain the use of the water he had a right to be peaceably furnished with by the defendant, it was held that it was such a breach of the covenant of lease that the plaintiff could recover damages.

§ 1026. **Leasing or renting water rights without land by consumers.**—The question has arisen as to whether or not one who has acquired a water right by appropriation or by some other method and is a consumer of the water claimed under such right, can lease his water right or a portion thereof to another separate and apart from the land, mine, mill, or other property, for which the water is used by him, and still retain his priority. It is uniformly held by the authorities that a water right is such a distinct species of property right that it may be sold separate and apart from the land for which it was used, or from any interest in land.[1] Therefore, the question naturally arises, if he can make a complete alienation of the title to the right by such a sale, why may he not alienate the use of the water for a period of time by leasing it? Take, for example, a farmer with 160 acres of land and all under cultivation, with a water right just sufficient for his needs, and all of the water he has used to irrigate his land. Let us further suppose that for a certain year he does not wish to cultivate and irrigate but 80 acres, letting the remaining 80 acres lie fallow. For that year he does not want to use the water for the 80 acres uncultivated. He can sell the water right for this 80 acres separate and apart from the land. But he does not wish to do this, as the following year he will want to use all of it. The only answer to this proposition is that he could lease the right if he was the owner of the *corpus* or body of the water, or had the same title to the water itself as he has to his land.[2] But, as under the law of appropriation, he does not own the very body of the water while it is flowing in the natural stream, and is only entitled to so much of the water that he claims

1 See Sec. 995.

2 That an appropriator does not own the water itself, see Sec. 772.

under his appropriation as he actually applies to some beneficial use or purpose,[3] he can not disregard the rights of subsequent appropriators by leasing the water for a period when he does not need it. The general rule under the Arid Region Doctrine of appropriation is that when an appropriator has no present need of the water which he claims under his prior appropriation, he must not divert it from the natural stream, but it is his duty to let it flow down the natural channel, to be enjoyed by the other appropriators as their numerical priorities entitle them. If a senior appropriator who has not such need of the water for his own land might disregard the general rule and pass over one or more appropriators who are junior to him, and confer upon others who either have no water right at all or whose rights are junior to the rights of those ignored, it would be subversive of the underlying principles of the doctrine of appropriation.[4]

As will be noticed from our note, the courts of Arizona, Colorado, Idaho, and Oregon sustain the above proposition. But a recent decision in the Supreme Court of California seems to intimate the converse of the rule as laid down by the other courts.[5] In that case the grantor of a water right attempted to limit the use of the

[3] See Sec. 877.

[4] For the relative rights of prior and subsequent appropriators, see Secs. 776-786.

See Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332, where the Court held that a consumer of water had the right to sell his water right, but not to lease it when he did not need it.

See, also, Ft. Lyon C. Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37, where it was held that an appropriator could not loan the water to another and thereby ignore the rights of subsequent appropriators.

Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154, where the Court said: "But some years ago—the time does not appear—they leased all their interests to Anderson for a term of 99 years, which was an abandonment of their irrigation rights."

Gerber v. Nampa etc. Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104, where it is held that, when prior appropriators are not using all of the water to which they are entitled, the canal company may supply such water to any other applicant therefor, but in so doing such applicant does not become vested with a right which can in any manner interfere with the rights of the prior appropriators.

But see Tilton v. Sterling Coal & C. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689, where no question was raised as to the right to lease certain water developed in a mine and the lessee recovered damages for the failure to furnish the full supply of water leased.

[5] Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. Rep. 1094.

water in the deed to the land of his grantee, and thereby make it an inseparable appurtenance thereto, and the Court held that this could not be done,[6] that the grantee could dispose of the water which he did not see fit to use on his own land to others. Thus far, upon the facts in the case, the ruling of the Court was correct. But in the opinion the Court used the language, "Having purchased the use of a given quantity, if he can not use it all himself we see no reason why he can not sell the right to a *temporary use* of it to his neighbors, as wanted, for a beneficial purpose." If this language was intended as a general ruling that an appropriator and user of water, when for any reason he does not wish to use all of the water himself, can lease or "license" the temporary use of the water to others and still retain his priority to the right, as against the subsequent appropriators from the same stream, we believe that the decision of the Court was decidedly wrong and against the great weight of authority, and the general principles of the law of appropriation governing the rights of the prior and subsequent appropriators of water from the same stream.[7] We believe, however, that the expression used by the Court and quoted above will be treated as *dictum* as regards the rights of subsequent appropriators, for the courts of California have always strenuously upheld their rights. Of course, the rule set forth above applies only to the appropriators who are the actual users and consumers of the water, and does not apply to ditch and canal companies, whose business it is to appropriate, sell, lease, or rent water to consumers. The rights of these companies will be treated in a subsequent portion of this work.[8]

§ 1027. **Sale of part of right—Surplus water can not be sold.**—As we have seen in previous sections, the owner of a water right does not own the water while it is flowing in the natural stream.[1] He only owns the right to the use of a certain amount of the water for some specific purpose, and the extent of his right is measured

[6] That a water right can not be made an inseparable appurtenance to a certain tract of land, see Secs. 1015, 1016.

[7] For the rights of prior and subsequent appropriators, see Secs. 776-786.

[8] For the rights of ditch and canal companies, see Chaps. 72-77.

For the right to appropriate water for sale, see Sec. 703.

[1] See Sec. 772.

by the amount necessary and actually applied to that or an equivalent purpose. "It is, unquestionably, the law that more than is required for such purpose can not be taken."[2] And it is the general rule of law that the owner of a water right may sell and convey, and give a good title to the purchaser by such a transfer, all of his valid right to the use of the water,[3] and that he may sell any portion of his valid right.[4] It may also be considered a settled rule of law that an appropriator can not sell or in any manner dispose of surplus water or water in excess of his needs and at the same time retain all the water that he needs for his own use.[5] The right to the use of the surplus water flowing in a natural stream over and above the necessities of the prior appropriator belongs to the subse-

2 Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541.

See, also, as to extent of rights, Secs. 877-879.

For change of purpose, see Secs. 870-872.

3 For right to sell, see Secs. 995, 996.

4 Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541, where it was held that one who had appropriated no more water than was necessary for the irrigation of his land may sell a portion of his right to use such water to a railroad company for supplying its needs; and that the mere fact of a sale by the plaintiffs of a part of the water claimed did not show that they attempted to appropriate more than was needed, where it appeared that all of the water of the stream was not sufficient to irrigate their land.

Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. Rep. 1094; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Frank v. Hicks, 4 Wyo. 502, 35 Pac. Rep. 475, 1025; Middle Creek D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Ft. Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

That a part of a water right may be sold, see Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Larimer etc. Co. v. Cache La Poudre etc. Co., 8 Colo. App. 237, 45 Pac. Rep. 525, 24 Colo. 144, 53 Pac. Rep. 318; Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905.

5 "As an appropriator of water obtains by his appropriation that only of which he makes a beneficial use, it necessarily follows that he can not sell surplus water which he does not need." Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

He can not sell the surplus because he has no right to it. Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Windsor Res. etc. Co. v. Hoffman Milling Co., 48 Colo. 82, 109 Pac. Rep. 422.

See, also, Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111.

quent appropriators in the order of their priorities. Therefore, the prior appropriator "can not give away or dispose of any surplus water to the injury of the subsequent appropriators."[6] As was said in a recent Wyoming case: "An individual appropriator of water for irrigation secures no surplus water, hence has no surplus which he can either sell or give to another as against subsequent appropriators."[7] To adhere to a rule to the contrary would be to permit speculation and fraud in that most inestimable benefit of Nature—the use of water in this arid region.[8] However, it must be understood that the mere fact of a sale of part of a water right does not of itself show that the beneficial use of the whole right had not been theretofore made or that the water covered by such right conveyed was surplus water.[9]

§ 1028. **Licensing or loaning the use of water without land by consumers—"Doubling up"—Rotation.**—What we have said in the preceding section [1] relative to leasing or renting the use of water by consumers applies with equal force to the licensing or loaning of the use of water without a consideration being paid for it. If the owner of a right to the use of a certain amount of water has no present need for the water which his right covers, and which in

6 Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111, citing Kinney on Irr., 1st Ed., Sec. 231; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

But see Bryan v. Idaho etc. Co., 73 Cal. 249, 14 Pac. Rep. 859.

"By such an appropriation the first appropriator does not acquire a pre-emption of the whole creek, so that he or his successors may, after enjoying the use of it for some beneficial purpose, convey the creek away, and cut off subsequent appropriators." Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 Pac. Rep. 459; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124.

But see Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. Rep. 1094, where the Court held that a person having purchased a definite quantity of water might sell the surplus to his neighbors.

7 Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

See, however, the right to appropriate water for sale, Sec. 703.

8 That water can not be appropriated for mere speculation, see Sec. 705.

9 Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. Rep. 1094.

1 See Sec. 1027.

order to hold must be applied by him to some beneficial use or purpose,[2] under the general law of appropriation he has no right to divert it from the natural stream and thereby ignore the rights of the subsequent appropriators, as it belongs to them in the numerical order of their respective priorities.[3]

There is, however, an exception to the rule as above stated, due to a custom which is in common practice in this Western country, and that is, in times of great scarcity of water and when there is danger of crops burning up for the lack of it, owners of definite water rights during the dry season of the year are permitted, under certain circumstances, to forbear their right to the use of their water for certain periods of time in order that the size of the irrigating stream to others in similar circumstances may be increased, and, in turn, that they may receive the increased flow of the water for a similar period for their own use. This custom grew out of the well-known physical fact that a large irrigating stream can be used more economically and with better results than a small stream, the most of which seeps away in the ditch oftentimes before it reaches the place of use. The custom is due to the great necessities of the case, and in some localities is termed the "loaning of water," in others, the "exchange of water," and in still others, the "doubling up of water." But the more generally accepted term is that of "rotation of water," discussed in previous sections.[4] But whatever it may be called, the right is allowed, provided always that the rights of others to the use of the water are in no way injured or impaired. In Colorado there is a statute upon the subject which in effect provides that it shall be lawful for the owners of ditches and water rights taking water from the same stream "to exchange with and loan to each other, for a limited time, the water to which each may be entitled for the purpose of saving crops or of using the water in a more economical manner." When the construction of the law came before the Supreme Court of the State, that Court seemed loth to uphold it; but, while holding the law constitutional, it held that the fact as to

2 That all the water must be so applied, see Secs. 727, 877.

3 Ft. Lyon C. Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

For the rights of prior and subsequent appropriators, see Secs. 776-786.

4 For the rotation of water, see Secs. 790, 909, 910.

whether these loans were made under conditions and circumstances which under the Act permitted the exchanges and loans of water, "it was only right and proper that the burden of establishing the same be put upon the parties thereto." And in the two cases where the question was before the Court, the right was denied because that fact had not been established.[5] The Court further held that these loans or exchanges could not be made where the vested rights of others were injured thereby, and that the burden of establishing the same was upon the parties to the transaction, and the Court further held that it must be proven "that the alleged qualified right has been exercised in such a way and at such times and in such circumstances that the vested rights of others are not injured."[6]

§ 1029. Sale and transfer of riparian rights—As between the parties to the grant.—As we have seen in previous sections of this work, the right of a riparian proprietor to the use of the waters of a stream which flows through or by his land under the common law of riparian rights is entirely different from the right of an appropriator to the use of the water.[1] The nature of the right is also different.[2] The right of a riparian proprietor to the flow of a stream undiminished in quantity and undeteriorated in quality over his lands is annexed to the soil and is considered as a part and parcel of it, or an incident thereto. Furthermore, the rights of all of the riparian proprietors upon the same stream are equal or correlative, and the use by one can not interfere with the equal or correlative use by all of the others.[3] However, it is held that riparian rights may be severed from the land to which they are a part by grant, condemnation, or by prescription.[4] Therefore a riparian proprietor can

[5] Ft. Lyon C. Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Bowman v. Virdin, 40 Colo. 247, 90 Pac. Rep. 506.

[6] See, also, Windsor etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 529.

[1] For the right to the use of water under the common law, see Secs. 483-497.

For irrigation as a riparian right, see Secs. 498-525.

See, also, for grants and contracts relating to riparian rights, Chap. 27, Secs. 526-535.

[2] For the nature and character of riparian rights, see Secs. 450-456.

For the nature of the right by appropriation, see Secs. 757-774.

[3] See Secs. 489-492, 511-513.

[4] For the condemnation of riparian rights, see Secs. 1090, 1091.

For the acquisition of riparian rights by prescription, see Secs. 1039-1041.

A riparian right is one which may

convey any portion of his estate, or any one or all of his riparian rights in and to the use of the waters of the stream flowing by or through his land, either together with the land or separate and apart from it, or from each other. In fact, as far as the different portions of his property are concerned, there is no part which can not be granted separate and apart from another, and such a grant is binding upon the parties to it.[5] Therefore, as between the parties to such a conveyance, a grant by a riparian owner to another for the use of the water on non-riparian land is binding.[6] But the right of

be segregated from the land "by grant or condemnation, or extinguished by prescription, but could not be defeated by simple appropriation." Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

See, also, Gould v. Stafford, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Alhambra W. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101.

See, also, Znamanacek v. Jelinck, 69 Neb. 110, 95 N. W. Rep. 28, 111 Am. St. Rep. 533; Angell on Water Courses, 7th Ed., Secs. 141, 146; Washb. on Easm., pp. 12, 385.

5 "Being the owners in fee of the land as well as the water, it was competent for them to grant all or any portion of either. 'A grantor of land through which a stream of water flows may reserve the water privilege, or he may convey the use of the water in whole or in part, leaving the fee of the land vested in the grantor.' Gould, Waters, Sec. 299. . . . The water in question was a part and parcel of the land over which it flowed, and when its owners granted the water they necessarily granted an interest in the land, which interest was assignable, descendible, and devisable." Doyle v. San Diego etc. Co., 46 Fed. Rep. 709.

See, also, Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; Rood v. Johnson, 26 Vt. 64; Miller v. Laphan, 44 Vt. 416; Soule v. Russell, 13 Metc. 436; Nichols v. New England etc. Co., 100 Mich. 230, 59 N. W. Rep. 155; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; Rianda v. Watsonville etc. Co., 152 Cal. 523, 93 Pac. Rep. 79; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. Rep. 98; Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905; Painter v. Pasadena etc. Co., 91 Cal. 74, 27 Pac. Rep. 539; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Outhouse v. Berry, 42 Ore. 593, 72 Pac. Rep. 584; City of Salem v. Salem etc. Co., 12 Ore. 374, 7 Pac. Rep. 497; Churchill v. Bauman, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43.

6 The right of a riparian proprietor to the flow of a stream of water over his land may be severed from the land by grant, and where such right has been conveyed without reservation the grantor can not maintain an action to enjoin a diversion of water from the stream. Gould v. Stafford, 91 Cal. 146, 27 Pac. Rep.

the purchaser to change the use of water owned as a riparian right to non-riparian lands as against the rights of the other riparian owners on the same stream and not parties to the transfer involves another proposition, which will be treated in our next section.[7]

Riparian owners may also, in a grant of riparian land, reserve a right to the use of all or a part of riparian water. And reservations of this character will be construed in favor of the grantor.[8] One riparian proprietor may also sell his riparian rights to another proprietor for use upon riparian lands for a period of time. But it was held in California that the relation of landlord and tenant could not be created between the parties, the Court holding that the riparian rights were incorporeal hereditaments, and that contracts with respect to incorporeal hereditaments may be good as contracts, but they do not create the relation of landlord and tenant.[9]

§ 1030. **Sale of riparian rights—When grantee may transfer use to non-riparian lands.**—We have seen in previous sections that the use of water by riparian proprietors as such is confined to riparian lands.[1] No greater right can be granted by a riparian proprietor of his use to the water than he himself has. It therefore follows, under the strict construction of the common law, that as against the rights of other riparian owners on a certain stream, one

543; *Id.*, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429.

See, also, Alhambra etc. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Doyle v. San Diego etc. Co., 46 Fed. Rep. 709.

7 See Sec. 1030. See, also, Secs. 534, 535.

8 Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282; Lawrence v. Whitney, 115 N. Y. 410, 22 N. E. Rep. 174, 5 L. R. A. 417; Allen v. Weber, 80 Wis. 531, 50 N. W. Rep. 514; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107; Hall v. Sterling Iron R. Co., 148 N. Y. 432, 42 N. E. Rep. 1056; Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944; Currier v. Howes, 103 Cal. 431, 37 Pac. Rep. 521; Lindeman v. Lindsay, 69 Pa. 93, 8 Am. Rep. 219; Wholey v. Caldwell, 108 Cal. 95, 41 Pac. Rep. 31, 30 L. R. A. 820, 46 Am. St. Rep. 64; Watkins L. Co. v. Clements, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

9 Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561.

1 For the use of water as a riparian right, see Secs. 498-525.

riparian proprietor can not grant his riparian rights to the use of the water, confined as it is to his lands abutting on the stream, to another for the use of the water on non-riparian lands. This is the English rule, and also the rule as laid down in most of the Eastern States upon the subject. In general, this rule is also followed in those Western States which still adhere to the common law of riparian rights.[2] Such a sale and transfer, although it may be valid as between the parties thereto,[3] is void as against others whose riparian rights are, or would be, injuriously affected by a diversion of the water to non-riparian lands by the purchaser.[4] In recent years, however, some

2 For these States, see Secs. 507, 621.

3 "There is nothing unlawful or improper in such an agreement." Alhambra etc. Co. v. Mayberry, 88 Cal. 68, 25 Pac. Rep. 1101.

See, also, Gould v. Stafford, 91 Cal. 146, 27 Pac. Rep. 543; *Id.*, 77 Cal. 66, 18 Pac. Rep. 879; *Id.*, 101 Cal. 32, 35 Pac. Rep. 429; Yocco v. Conroy, 104 Cal. 468, 38 Pac. Rep. 107.

See, also, grants and contracts relating to riparian rights, Chap. 27, Secs. 526-537.

4 A riparian proprietor can not confer upon another person the right to divert water from the stream to use on non-riparian lands to the injury of a lower proprietor, since the riparian owner himself has a right to divert waters to riparian lands only. "As against himself or his grantee, he may contract for the diversion of water to non-riparian lands. But the rights of the inferior proprietor will not be affected by such contract." Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

In a late case, the Supreme Court of California, in defining the right of a riparian proprietor to sell the use of the water, said: "Furthermore, his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose, upon land not riparian, nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not, by a transfer of his riparian rights, sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or non-riparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties." Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927.

A riparian owner can not sell water for the irrigation of non-riparian land. Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673.

See, also, Stockport etc. Co. v. Potter, 3 Hurlst. & C. 300; Ormerod v. Todmorden etc. Co., L. R. 11 Q. B. Div. 155, 52 L. J. Q. B., N. S., 445, 31 Week. Rep. 759, 47 J. P. 532; Swinton etc. Co. v. Proprietors of Wilts & B. etc. Co., L. R. 7 H. L. 697; Anaheim W. Co. v. Semi-Tropic etc. Co., 64 Cal. 185, 30 Pac. Rep. 623; Heilbron v. Fowler Switch C. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep.

of the American cases, Eastern as well as Western, have held that where the place of the use of the water was changed by the purchaser from riparian to non-riparian land, and no possible injury had or would accrue to the other riparian owners on the same stream, that such a change could be made. As we have seen in a previous portion of this work, especially in the Western portion of this country, and in the States where the common law of riparian rights and the Arid Region Doctrine of appropration are both in force, many modifications have been made in the common law rules of riparian rights as they were originally interpreted in England and in the Eastern States.[5] And the rule so often stated in the books that the riparian proprietor is entitled to the undiminished flow of the stream as it was wont to flow by Nature by or through his lands is held subject to the important limitation that an upper riparian proprietor may make such use of the waters of the stream as does not work "any actual, material, and substantial damage to the common right which each proprietor has."[6] It has therefore been held in a number of cases that the purchaser of riparian rights might change the place of the use of the water from riparian to non-riparian lands where the rights of the other owners on the stream were in no way injured thereby, and that such a use of the water was *damnum absque injuria* as to the technical rights of the other riparian owners.[7] The authorities upon this subject are, however, by no means harmonious. The better rule, in view

781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792.

Where a large tract of land had riparian rights, a subsequent conveyance of a part of the tract not abutting upon the stream cuts off such tract from riparian rights. Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, Anaheim etc. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

See, also, Sec. 464.

[5] For modifications in the common law, see Secs. 507-513.

For right to the undiminished flow, see Secs. 549.

[6] Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 360, 87 Am. St. Rep. 634.

[7] "We think it was properly left to the jury to find whether the defendants, claiming in the right of Clark (the grantor) had, by their diversion of the water for a valuable and highly beneficial use, caused any actual or perceptible damage, and, if not, to find for the defendants." Elliott v. Fitchburg etc. R. Co., 10 Cush. 191, 57 Am. Dec. 85.

See, also, Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac.

of the conditions in the arid West and the great need for the diversion of water for its application in irrigating lands both riparian and non-riparian is that where the rights of the riparian proprietors on a certain stream are in no way injured, or are slightly injured, the grantee of riparian rights should be permitted to change the use of the water to non-riparian lands. And in such cases a court of equity should not interfere by granting an injunction, but the question should be left to the law side of the Court to determine whether there was any injury to the rights of the riparian proprietor, and if so, to determine the amount of damages as the result.[8]

§ 1031. **Changes which the purchaser may make, where the right is by appropriation.**—We have treated in a separate chapter the changes which an owner of a water right acquired by appropriation may make.[1] Upon the sale of such a water right, the purchaser may make such changes as he sees fit, in the point of diversion, the place of use, the manner of use, the use itself, provided that the vested rights of others are not materially injured by the change. In fact, in general the purchaser of such a right may make the same changes which the original appropriator may make. Therefore, the purchaser may change the entire use of the water from one beneficial use to another.[2] But the amount of the water consumed must not be greater for the new use than for the old one, if the rights of others are injured thereby. A city may purchase for municipal purposes the rights of an appropriator for irrigation or some other right where an equivalent amount of the water is consumed.[3] But a sale of a water right where the new use by a city would injure the vested rights of the subsequent appropriators is invalid as against their rights.[4] Again, upon the sale and conveyance of such a right acquired by appropriation to the use of waters,

Rep. 1054; Gillis v. Chase, 67 N. H. 161, 31 Atl. Rep. 18, 68 Am. St. Rep. 645; Ulbricht v. Eufalia Water Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

See, also, actions by riparian proprietors for diversion of water, Secs. 1611-1615, 1663-1665.

8 For injunctions by riparian proprietors, see Chap. 81.

For damages to riparian proprietors for diversion, see Chap. 83.

1 See Chap. 48, Secs. 856-873.

2 For the right to the change of use, see Secs. 869-872.

3 Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; City of Springville v. Fulmer, 7 Utah 450, 27 Pac. Rep. 577.

4 Creek v. Bozeman Waterworks Co., 15 Mont. 121, 38 Pac. Rep. 459.

contrary to the rule at common law where the riparian rights of owners are involved, the purchaser may transfer the use of the water to other lands, even in the face of a statute attempting to prohibit it, so long as the change does not materially injure the rights of others.[5] In fact, it may be said that the right of a purchaser of a water right, which has been acquired as the result of an appropriation, is one of the incidents of ownership of that distinct property right,[6] and the only limitation upon it is that the rights of others shall not be injured.

§ 1032. **Sale of water after diversion.**—As we have seen in the preceding sections, the exclusive right to divert and use the water of a natural stream acquired by appropriation is the subject of property, and may be sold and transferred separate and apart from any land or interest in land by the original appropriator to other persons.[1] In fact, one of the objects of an appropriation may be for the sale of the right to use the water or for the sale of the water itself. There is a distinction, however, between the right to sell the use of the water or a water right and the right to sell the water itself after it has been appropriated and diverted from the natural stream and taken into the ditch, canal, or reservoir, as the case may be, of the appropriator.[2] Water, when it has been diverted from the natural stream into ditches, canals, pipes, or reservoirs, is personal property, and may be sold as other personal property.[3]

In an early California case Mr. Justice Field said: "Water, when collected in reservoirs or pipes and thus separated from the original source of supply, is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise. Engaging in the business of furnishing it to the in-

[5] That a water right acquired by appropriation can not be made an inseparable appurtenance to a particular tract of land, see Secs. 1015, 1016.

See, also, Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986; Hard v. Boise City etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325.

[6] That a water right is a distinct species of real property and may be conveyed separate from any interest in land, see Sec. 995.

[1] See Secs. 995, 1015, 1016.

[2] For the appropriation of water for sale, see Sec. 703.

That water collected in artificial works is personal property, see Secs. 773, 774.

[3] See Sec. 774.

habitants of a city for equivalent considerations to be received is engaging in 'a species of trade or commerce.' . . . Ice companies organized to furnish the inhabitants of a city with ice, and gas companies organized to furnish them with gas, and the company in question organized to supply them with water, all stand upon the same footing."[4]

The subject of the sale of water and water rights will be more thoroughly discussed when we come to the chapter of the rights and duties of canal and water companies.[5]

[4] Heyneman v. Blake, 19 Cal. 579. Water in pipes of a distributing system is personal property. The ownership is in the water itself. Bear Lake etc. Co. v. Ogden, 8 Utah 494, 33 Pac. Rep. 135; Dunsmuir v. Port Angeles etc. Co., 24 Wash. 104, 63 Pac. Rep. 1095; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780; Parks Canal Co. v. Hoyt, 57 Cal. 44; Riverside etc. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Fallon v. O'Brien, 11 Q. B. D. 21; Spring Val. Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Hesperia etc. Co. v. Gardner, 4 Cal. App. 357, 88 Pac. Rep. 286.

[5] See Chaps. 75, 76.

See, also, for water rates, Secs. 1368-1385.

CHAPTER 54.

RIGHTS ACQUIRED BY PRESCRIPTION.

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§ 1053. Elements necessary—The adverse user must be continuous—Interruption of user.
§ 1054. Elements necessary—The taxes must be paid by adverse claimant.
§ 1055. Pleading and proof to establish a claim by prescription.
§ 1056. Extent of right acquired where prescriptive right is complete.
§ 1057. Effect of adverse user amounting to prescription.
§ 1058. The question of priority.

§ 1033. Scope of chapter.—Where the title to water rights, rights of way, ditches, and canals already constructed, together with their rights of way, has once vested in any person or corporation, they may all, or any one may be acquired by another person as against the rights of the owner, by the adverse user of the right, or

rights amounting to prescription. It therefore must follow that where such right is acquired by one person as against another, the latter person loses the right.

In this chapter we will take up the subject of all rights which may be acquired by adverse user amounting to prescription with some exceptions here stated. The subject of actions basing their right upon prescription will be discussed in another chapter.[1] The question of prescription involving percolating and subterranean waters will also be treated in another part of this work.[2]

§ 1034. **Prescription—In general.**—It is laid down by the earlier English authorities that all incorporeal hereditaments might be acquired by the immemorial or long-continued enjoyment of the same by a person other than the original owner thereof. It follows, therefore, that one originally owning these rights may lose them by the same method. This method of the acquisition of this character of property was designated by the common law writers as "prescription." And a fiction was indulged in by the authorities in this, that every right by prescription presupposes a grant.[1] Under the early rule of the common law an enjoyment to confer a title by prescription must have continued, in legal phrase, "during the time whereof the memory of man runneth not to the contrary." But the modern common law rule, both in England and in this country, has been limited, without statute, to the period of twenty years, because of the extreme difficulty of giving proof of the enjoyment for so long a period as that laid down by the early English law writers.[2] In all of the Western States the time for the acquirement of a right by prescription is governed by a continuance of the right during the period fixed by the statute of the jurisdiction wherein the right is claimed for the recovery of real property. As

1 See Chap. 78.

2 See Secs. 1182, 1209.

1 1 Blackstone Comm. 75; 2 *Id.*, 263; Gould on Waters, Chap. 11; Angell on Water Courses, Chap. 6.

That prescription always presupposes a grant, see Hammond v. Zehner, 23 Barb. (N. Y.) 473; affirmed in 21 N. Y. 118; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

2 "By our laws, upon principles of public convenience, the term of twenty years' exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right." Judge Story in Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312.

was said in a recent Oregon case:[3] "The acquirement of a prescriptive right has come to be measured by the statute of limitations for the recovery of real property, and such is the rule in this State."

In the subsequent sections of this chapter we will see that rights to the use of water may be acquired by adverse possession and use for the same period as is prescribed by the statutes for the acquisition of title to land.[4]

So, also, may easements be acquired by this method over the lands of others for the purpose of ditches and canals to be used in conducting the water to the place of use.[5]

§ 1035. Prescription in the arid West—Statute of limitations.—We have seen in a previous portion of this work that the principles of riparian rights in those Western States which still adhere to the common law of riparian rights have been greatly modified by statutory enactments and decisions of the courts from the strict construction of those principles by the authorities of England and the Eastern States, so as to be more in harmony with the great necessities of this Western country.[1] The same can be said upon the subject of acquiring a right to the use of water, or a water right, by adverse user amounting to prescription. This old common law principle has also been modified to meet the needs of this Western country. The principal modification is in the period of time during which the adverse possession and user must run in order to acquire title by this means. As we have seen in the previous section, the modern common law rule was twenty years during which the adverse possession must run. By still the more modern statutes of the various States, especially in the West, the period of time has been still further reduced; but it greatly varies in these jurisdictions. In general, the period of adverse possession must be continuous for the period of time prescribed by the respective statutes of limitations governing actions for the recovery of real property. This period varies in the respective States from

3 Oregon Construction Co. v. Allen Ditch Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701, citing Kinney on Irrigation, 1st Ed., Sec. 295.

4 See Sec. 1052.

5 See Sec. 1045.

1 For the modification of the common law of riparian rights, see Secs. 508-513.

that of three years in Arizona, five years in California, fifteen years in Kansas, to twenty years in South Dakota.[2]

The statute of limitations, after which the respective statutes of the States have been based, has been in existence for nearly three centuries. "Experience has demonstrated the necessity of placing a limit upon the time within which certain specified actions could be brought. The peace and good order of society, the opportunities for the commission of frauds, and the difficulty of defending against actions which had accrued many years before they were brought, prompted a policy which resulted in the enactment of a statute of limitations which is now universally held to be one of repose, prescribing a limit of time within which actions must be brought; otherwise they can not be maintained against parties who see fit to avail themselves of the privilege of the statute."[3]

§ 1036. **Water rights by prescription.**—In general, it may be said that a permanent right to the use of water, or a water right, may be acquired in the Western States by one who has complied with the essential elements, for the statutory period, which constitute the adverse user of the water amounting to prescription.[1] This right may be acquired as against one who formerly claimed the water by virtue of a prior appropriation,[2] as a riparian owner,[3] as a purchaser, or as against one who originally claimed the right to the water by prescription itself,[4] or as against one who had acquired the right to the water by any other method. The law is so generally settled upon this proposition that there is no need to cite all of the authorities here, therefore, under this section, we will cite but a few of the leading cases, reserving the rest for the various phases of the question discussed in the succeeding sections.[5] The

2 For the statutes of the various States, see Part XIV.

3 Patterson v. Ft. Lyon etc. Co., 36 Colo. 175, 84 Pac. Rep. 807.

1 For the elements constituting adverse user, see Secs. 1048-1054.

2 For prescription as against an appropriator, see Sec. 1038.

3 For prescription as against a riparian owner, see Secs. 1039, 1040.

4 See Sec. 1042.

5 Union M. & M. Co. v. Dangberg (Nev.), 81 Fed. Rep. 73, 116; Anderson v. Bassman (Cal.), 140 Fed. Rep. 14, both citing Kinney on Irr., 1st Ed., Secs. 293, 294, 297; Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 709; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 594, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Union Water Co. v. Crary, 25 Cal. 504, 85

converse of the proposition is that the right to the use of the water which is acquired by prescription by one party as against another is correspondingly lost by the latter.[6] A water right may be acquired by or against a corporation by this means.[7] In certain jurisdictions the adverse right will run against a State.[8] Two or more may acquire separate rights by prescription at the same time against a common owner.[9] Not only may a right to the use of water be

Am. Dec. 145, 1 Morr. Min. Rep. 196; Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781; Smith v. Logan, 18 Nev. 140, 1 Pac. Rep. 678; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Center Cr. etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312; Baker v. Brown, 55 Tex. 377; Mud Cr. Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

The use must continue for the full time prescribed by the statute. Moss v. Rose, 27 Ore. 595, 41 Pac Rep. 666, 50 Am. St. Rep. 743; Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Gallagher v. Montecito etc. Co., 101 Cal. 242, 35 Pac. Rep. 770; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Higuera v. Del Ponte, 4 Cal. App. 13, 88 Pac. Rep. 808.

6 The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another." State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 499.

One who has acquired rights by appropriation may lose them through the adverse user of another. Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604.

The right may be extinguished by prescription. Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

See, also, Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732.

7 "In this State a corporation's title to water either by appropriation or prescription has been recognized and upheld from the very earliest day." Montecito etc. Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935.

For rights of corporations to acquire water rights, see Sec. 684; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726.

It may be acquired against a railroad company. Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200; Gallagher v. Montecito etc. Co., 101 Cal. 245, 35 Pac. Rep. 770.

8 State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 499; Wattier v. Miller, 11 Ore. 329, 8 Pac. Rep. 354; Topping v. Cohn, 71 Neb. 559, 99 N. W. Rep. 372.

9 Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60; Collins v. Gray, 3 Cal. App. 723, 86 Pac. Rep. 983.

In a recent case decided by the Supreme Court of Oregon, it was held that to entitle the parties or privies to an agreement relinquishing and apportioning water rights, to afterwards

acquired by prescription, but under certain circumstances and to a certain extent it is held that the right to pollute the waters of a stream may be so acquired. This subject, however, we will discuss in another portion of this work.[10]

A water right and ditch right are independent rights, and may be acquired separate and apart from each other. Therefore, it is held that even if the one claiming the prescriptive right to a ditch does not own a water right, his claim may be maintained.[11]

§ 1037. Distinction between acquisition of rights by prescription and by appropriation—Can be no prescription against United States.—There is a decided distinction between the acquisition of rights to the use of water and rights of way for ditches and canals for the utilization of the same by appropriation under the Arid Region Doctrine and the acquisition of the same rights by prescription. In the first place, a prescriptive right can not be acquired against the United States, no matter how long the possession and user,[1] while, upon the other hand, a right by appropriation may be acquired against the United States.[2] Hence, if the title to the water, or to other property claimed, was in the Government any part of the period of time prescribed by the statute of limitations of the State wherein the rights are claimed, no prescriptive right can be acquired.[3] It therefore follows that before

claim such rights by adverse user, each "must show some affirmative act on his part under claim of right, open, notorious, and exclusive in its character, amounting to such an invasion of the other's title as would furnish a cause of action in favor of the latter." Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42.

10 For the pollution of waters, see Secs. 1129-1147.

11 McDonnell v. Huffine, —— Mont. ——, 120 Pac. Rep. 792.

1 Morris v. U. S., 174 U. S. 196, 43 L. Ed. 946, 19 Sup. Ct. Rep. 649; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Wattier v. Miller, 11 Ore. 329, 8 Pac. Rep. 354; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Mathews v. Ferrea, 45 Cal. 51; Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200; Wilkins v. McCue, 46 Cal. 656.

2 For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

3 "Prescription or adverse user will not mature into a title as against the United States, and that it will not avail as a defense unless the user has been adverse for the requisite period after the title has passed from the United States." Mathews v. Ferrea, 45 Cal. 51.

See, also, Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200; Smith v. Haw-

such a right can be acquired by prescription, and even before the statute of limitations can begin to run against the right, the title to the property thus claimed must have previously passed from the United States, and have vested in some individual, or corporation, or in some State,[4] county, or municipality. Again, in order to finally consummate a right by appropriation, no specific time is required. After the first steps have been legally taken, what is known as a reasonable time is allowed for the final consummation of the right. What is a reasonable time is dependent upon the particular circumstances of each case. It may be a month, a year, or, in some cases, a number of years, depending upon the magnitude of the enterprise and the difficulties encountered.[5] Upon the other hand, the adverse possession and use of a right acquired by prescription must be at least for the period of time prescribed by the statute within which actions may be commenced for the recovery of real property in the jurisdiction where the right is claimed.[6] Where,

kins, 110 Cal. 122, 42 Pac. Rep. 453; Wilkins v. McCue, 46 Cal. 656; State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Wattier v. Miller, 11 Ore. 329, 8 Pac. Rep. 354, where it was held that the owner of a mill dam could not acquire a right by prescription to overflow adjoining lands while they belong to the United States.

Where lands and waters are owned by the Government in trust for public purposes, and are withheld from sale by the Land Department, without any renunciation of, or failure to exercise, jurisdiction or control over them, an adverse possession, however long continued, will not create title. Morris v. United States, 174 U. S. 196, 43 L. Ed. 946, 19 Sup. Ct. Rep. 649.

4 That a right by prescription may be acquired against a State, see State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

5 For the consummation of a water right by appropriation, see Secs. 725-728.

As to what constitutes a reasonable time for the consummation, see Secs. 735-741.

6 As stated by the Supreme Court of California: "The differences are twofold. A prescriptive right could not be acquired against the United States, and can be acquired only by one claimant against another private individual. Again, such an appropriation does not necessitate use for any given length of time, while time and adverse use are essential elements to the perfection of a prescriptive right. One who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for a period of at least five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right." Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453.

however, the legal title to the land is granted by Act of Congress, the title of the land is as effectively divested as it would be by the issuance of patent therefor by the executive department, under authority of law, and such land then becomes subject to the limitation laws of the State in which it is situate, and adverse possession thereof after the date of such grant for the requisite period will ripen into a legal title in favor of the adverse claimant, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor in pursuance of such Act of Congress.[7]

The theory of this rule is that the title to the land in question has passed from the United States to the grantee, although the patent for the same had not been issued. The same rule should also be applied to the lands of settlers who have fully complied with the law, as far as their entries are concerned, and their title is ready for patent, but which has not been issued.

§ 1038. Water rights—Prescription as against rights of appropriators.—By the law of prescription there may be acquired a permanent water right as against the rights of an appropriator who originally acquired the same by an appropriation under the Arid Region Doctrine of appropriation.[1] It consequently follows that the rights of an appropriator may be lost in whole, or in part, by the adverse possession and the user of the water by another amounting to prescription.[2] And when such a person has complied with all of the essentials necessary, and has had the continued, open, notorious, exclusive, uninterrupted, and adverse use and enjoyment of the waters, and under a claim of right, for at least the period of time prescribed by the statute of the State where the right is claimed for the commencement of actions for the re-

"We think the Attorney General overlooks the fact that there is a distinction between the acquisition of a water right by appropriation and the acquisition of such right by prescription." State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

7 Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; Langdeau v. Haines, 88 U. S. 21 Wall. 521, 22 L. Ed. 606; Longlois v. Crawford, 59 Mo. 456; Peting v. De Loire, 71 Mo. 1.

1 For the Arid Region Doctrine, see Secs. 585-594.

For the appropriation of water, see Secs. 706-732.

2 For the essential requisites to acquire a right by prescription, see Secs. 1048-1054.

covery of real property, the law will presume a grant of the right so held and enjoyed by him.[3] And so far as the right by prescription

[3] Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 92; Anderson v. Bassman, 140 Fed. Rep. 14; Wimer v. Simons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Carson v. Hayes, 39 Ore. 79, 65 Pac. Rep. 814; all citing Kinney on Irrigation, 1st Ed., Sec. 294.

The rights of the locators of a ditch for irrigation to the use of water after supplying prior appropriators are lost by permitting the exclusive possession, management, and beneficial use of the waste-water ditch to be enjoyed during the season of irrigation for more than the statutory period of limitation as a part of the older system, without any use of water therefrom by such locators except what is distributed to them by virtue of their ownership of shares in the older ditch. Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 29 U. S. App. 155, 30 L. R. A. 265; *Id.*, 51 Fed. Rep. 101.

The open, notorious, exclusive, and adverse use of water from a stream for a period of five years establishes title in the user. Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022.

The adverse user must continue for the full period prescribed by the statute. Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743.

See, also, Higuera v. Del Ponte, 4 Cal. App. 13, 88 Pac. Rep. 808; Union W. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Evans v. Ross, 67 Cal. 19, 8 Pac. Rep. 88; Dodge v. Marden, 7 Ore. 456; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693; Cave v. Crafts, 53 Cal. 135; Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Huston v. Bybee, 17 Ore. 140, 20 Pac. Rep. 51, 2 L. R. A. 568; Los Angeles v. Baldwin, 53 Cal. 469; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Gallagher v. Montecito etc. Co., 101 Cal. 245, 35 Pac. Rep. 770; State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Trambly v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312; Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Gurnsey v. Antelope Cr. etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Hubbs etc. Co. v. Pioneer W. Co., 148 Cal. 407, 83 Pac. Rep. 253; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588, citing Kinney on Irr., 1st Ed., Sec. 256; Palolo Imp. Co. v. Wong Quai, 15 Hawn. 555; Chessman v. Hale, 31 Mont. 577, 79

to the use of water is concerned, it is immaterial whether the party claiming the right took the steps necessary to acquire the right under the general law of appropriation or in accordance with the provisions of the statute, as the right runs against the party who has already appropriated the water, or has acquired the right to its use in some other manner. The actual adverse user for the prescribed time is sufficient to acquire the right, regardless of the steps taken by the claimant.[4] However, the claim of the rights to the use of water acquired by prior appropriation and adverse possession are not inconsistent.[5] During the period necessary for the statute to run the water must be applied to some beneficial use or purpose by the one claiming the adverse title. Otherwise there is no right to it which can become the basis of an adverse claim.[6] The right to the use of subterranean waters may also be acquired by prescription.

Pac. Rep. 254, 68 L. R. A. 410; City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197; Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200; Talbott v. Butte City W. Co., 29 Mont. 17, 73 Pac. Rep. 1111; Brosard v. Morgan, 7 Idaho 215, 61 Pac. Rep. 1031; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. Rep. 570; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 981, 133 Am. St. Rep. 587; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396; McRae v. Small, 48 Ore. 139, 85 Pac. Rep. 503; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162; Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Rhodes v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884.

[4] "So far as the defenses founded upon the statute of limitations and equitable estoppel are concerned, it is immaterial whether defendant or his grantors made an appropriation of the waters of Clear Creek in compliance with the code requirements as to posting notices, etc., or not." Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099.

"Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire a right by prescription this advantage, that it gives to prior claimants notice that his user is adverse, and under a claim of right, and sets the statute in motion against such prior claimant." Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

[5] Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Gardner v. Wright, 49 Ore. 609, 632, 91 Pac. Rep. 286; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

For the distinction between the acquisition of a water right by appropriation and prescription, see Sec. 1037.

[6] Where one relies on adverse user as the basis of a right to use water for irrigation, the burden is on him to show conclusively beneficial use for the required period. Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524.

So, where a party sunk several wells in the bed of a stream and continued to use the water adversely for more than the statutory period, it was recently held that he acquired a permanent right, although the water from the wells caused a decrease in the flow of the surface stream below and of the waters formerly used by appropriators below.[7] This, however, is under the new rule as to percolating waters first adopted in the case of Katz v. Walkinshaw,[8] and fully discussed in another chapter of this work.[9] Under the old rule no prescriptive right could be acquired to subterranean waters where they flowed in undefined and unknown channels.[10] But where they flow in defined and known channels, a prescriptive right may be acquired to subterranean waters under exactly the same rules as it may be acquired to the waters of surface streams.

§ 1039. Water rights—Prescription as against riparian rights.—In those States which adhere to the common law of riparian rights to the use of the waters of the natural streams, by the owners of riparian lands,[1] such rights can not be lost by simply the failure to use the water;[2] neither can they be lost by the mere appropriation of the water by another.[3] However, the right to the use of the water, either on riparian or non-riparian lands, may be acquired by one person, and to the same extent the riparian rights of others may

7 Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

For the rights in subterranean waters, see Chaps. 59-62, Secs. 1148-1211.

8 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

9 For subterranean waters, see Chaps. 59-62, Secs. 1148-1211.

10 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Crescent etc. Co. v. Silver King M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810, 14 Utah 57, 45 Pac. Rep. 1093.

1 For the States adhering to the common law, see Sec. 507.

For the common law right to the use of waters of streams, see Secs. 483-497.

For irrigation as a riparian right, see Secs. 498-525.

2 None of the rights of a riparian proprietor to put water of a stream flowing through or along his land to a legitimate use is lost by mere non-user. Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Heilbron v. 76 etc. Co., 80 Cal. 189, 22 Pac. Rep. 62; Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Whitney v. Wheeler, 121 Mass. 396, 24 N. E. Rep. 774, 7 L. R. A. 613.

3 For appropriation as against riparian rights, see Secs. 810-823.

be extinguished by adverse user amounting to prescription.[4] The rules of law governing the acquisition of a right by prescription, and the elements essential, in cases of this nature, are similar to those governing prescriptive rights as against prior appropriators.[5]

[4] As against riparian owners, one who diverts water may acquire title by prescription in the same time necessary to acquire title to land by adverse possession. Oregon Cons. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; citing Kinney on Irr., 1st ed., Sec. 295.

"Actual and uninterrupted use, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under a claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of a riparian proprietor." Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

"It is the settled law of this State that the right to take water from a stream, as against riparian owners, may be acquired by prescription." Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874.

See, also, Gallagher v. Montecito etc. Co., 101 Cal. 245, 35 Pac. Rep. 770; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Hall v. Carter, 33 Tex. Civ. App. 230, 77 S. W. Rep. 19; Dunn v. Thomas, 69 Neb. 683, 96 N. W. Rep. 142; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; Farwell v. Brisson, —— Wash. ——, 119 Pac. Rep. 814; Mason v. Yearwood, 58 Wash. 276, 108 Pac. Rep. 608, 30 L. R. A., N. S., 1158; Alhambra etc. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Baker v. Brown, 55 Tex. 377; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588, citing Kinney on Irr., 1st Ed., Sec. 295; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Thompson v. Felton, 54 Cal. 547; Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Rice v. Meiners, 136 Cal. 292, 68 Pac. Rep. 817; Mud Cr. etc. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078, where it is held that the right can only be enforced against riparian proprietors on the stream below.

See, also, Jordan v. Long, 22 S. C. 159; Messenger's Appeal, 109 Pa. St. 285, 4 Atl. Rep. 162; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783, where it is held that, where a dam across a stream has been maintained for 15 years—the period of limitations for actions to determine an interest in real property—the right to its continued maintenance can not ordinarily be assailed by upper riparian land owners.

[5] See previous section, No. 1038.

See, also, Oregon Const. Co. v. Allen

The riparian proprietor against whom adverse possession is held must have had knowledge, or means of knowledge, of such occupation and claim of right. The appropriator must have proof of possession for the statutory period with proof of an adverse claim against the proprietors, or his plea will not avail.[6] And in order to establish a right by prescription the acts by which it is sought to establish it must operate as an invasion of the rights of all of the riparian proprietors upon the stream having an interest in the natural flow of the water. As we have seen in previous sections,[7] the rights of all of the riparian proprietors upon a stream to the use of the water flowing therein are equal or correlative. Therefore, it necessarily follows that the invasion of the rights of one proprietor will not suffice where others are equally interested in the flow of the water. The enjoyment of the water relied upon by the claimant must afford ground for an action by each proprietor against whom the right is sought.[8] The appropriation of considerable quantities of water in seasons when that may be done, without sensible injury to the lower owners, does not give a prescriptive right to divert the whole stream in dry seasons.[9] If it was doubtful whether the use

D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701, citing Kinney on Irr., 1st Ed., Sec. 295.

For the elements essential to enter into a prescriptive right, see Secs. 1048-1054.

6 Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588, quoting from Kinney on Irr., 1st Ed., Sec. 295; Greer v. Tripp, 56 Cal. 209; Osborne v. Clark, 60 Cal. 622; Sheils v. Haley, 61 Cal. 157; Farris v. Merritt, 63 Cal. 119; Union W. Co. v. Creary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190.

7 See Secs. 483-497, 513.

8 For the equal rights of riparian proprietors to the use of the water, see Secs. 483-497; Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 80 Cal. 181, 30 Pac. Rep. 623; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Grigsby v. Clear Lake W. Co., 40 Cal. 396.

9 Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

A lower riparian owner who is not injured by the diversion of flood waters above his land can not restrain such diversion as there is no invasion of his rights. Fifield v. Spring Valley W. Co., 130 Cal. 552, 62 Pac. Rep. 1054; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Heilbron v. 76 Land & W. Co., 80 Cal. 189, 22 Pac. Rep. 62; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; North Powder Mill Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647, hold-

was adverse, or not known to the owner, or interrupted, the claim of prescription can not avail.[10]

§ 1040. **Water rights—Special rights acquired by one proprietor as against the others.**—By the means of adverse user of the waters of a stream by one riparian proprietor thereon, he may acquire as against all the other proprietors upon the same stream special rights to the use of the water other and greater than the law confers upon him simply as such riparian owner. The law may be considered as settled that the right to the use of water in a particular manner and in excess of his natural common law rights may be acquired by one owner as against all the other owners whose rights are infringed upon thereby by prescription. But as every riparian owner has an equal right to the use of the water as it flows by or through his property,[1] and as no rights to use an excess amount of the water is gained by the mere appropriation or prior use of the water as against the other riparian owners upon the same stream, in order to acquire the right by prescription all the elements must enter into the right necessary and essential for the acquisition of other classes of property by the same title.[2] As was said

ing: "Where it appears that defendant's use of the water of a stream for irrigation purposes was not so extensive as to render the water supply of plaintiff, a lower riparian owner, insufficient, such a use by defendant is not so adverse to plaintiff's right as to form a basis for a claim of title by adverse user."

In a recent case in California, the Court, in reaffirming the doctrine of riparian rights in that State, held that, in an action to enjoin the diversion of water from a stream from which plaintiffs irrigate, a finding that plaintiffs' land had been irrigated from the stream for 25 years was immaterial, since plaintiffs are entitled to have the stream continue in its customary flow, subject to the reasonable use by other riparian owners. Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

10 American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Huston v. Bybee, 17 Ore. 140, 20 Pac. Rep. 51, 2 L. R. A. 568.

1 For rights of riparian owners to use the water, see Secs. 483-525.

2 Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504; Baker v. Brown, 55 Tex. 377; Mitchell v. Parks, 26 Ind. 363; Hazard v. Robinson, 3 Mason 272, Fed. Cas. No. 6,281; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Watkins L. Co. v. Clements, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; Hall v. Carter, 33 Tex. Civ. App. 230, 77 S. W. Rep. 19.

in a recent Nebraska case:[3] A riparian proprietor "may, by prescription, acquire a right beyond that which the common law would give him, but he gets this right only by adverse user."[4] This was true also under the Mexican and Spanish law, and a private right to the exclusive use of the waters of a stream could be acquired by prescription or by the compliance with established conditions.[5] And, in general, it may be said that one riparian proprietor may acquire such rights by remaining in the peaceable, continuous, uninterrupted, actual, open, notorious, and exclusive use of the water for the period required by the statutes as against the rights of all the other riparian owners whose rights are injuriously affected by such use, even to the extent of acquiring the right to consume the entire waters of the stream. And where such rights have once been acquired by prescription, the riparian owners along such stream, who have improved their property with reference to the change in conditions, acquire a reciprocal right to have the artificial conditions remain undisturbed.[6]

The effect of the acquisition of title by prescription against riparian rights is an extinguishment of the riparian rights.[7]

§ 1041. Riparian rights—Right to receive the flow of the stream.—A prescriptive right may be acquired against lower riparian owners by complying with the requisite essentials for acquiring such rights.[1] Upon the other hand, owing to the equal rights of

[3] Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

[4] "The use of water in a stream in a particular way for a period of 40 years is evidence of the right to continue such use perpetually, unless it can be shown that such right in its creation related only to temporary use or was to endure for a limited time." *In Re* Water Commissioners, 4 Edw., Chap. 545.

[5] For the Mexican and Spanish laws, see Secs. 570-584.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[6] Kray v. Muggli, 77 Minn. 321, 79 N. W. Rep. 964, 45 L. R. A. 218; *Id.*, 84 Minn. 90, 86 N. W. Rep. 882, 54 L. R. A. 473; Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. Rep. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859.

[7] Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

[1] Montecito Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935; Heilbron v. Last Chance Water Co., 75 Cal. 117, 17 Pac. Rep. 65; Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

riparian owners to the use of the waters of a certain stream,[2] and that under the common law their rights are not lost by the non-use of the water, it is held that a lower riparian owner can not acquire by prescription the right to receive the water of the stream for some extraordinary use of the water in excess of his natural rights as against the upper riparian owners, since a lower use in no way interferes with the natural flow above, and, therefore, there is no invasion of the rights above. In other words, it is held that there is no such thing as a prescriptive right of a lower riparian proprietor to receive the waters of the stream as against the upper owners.[3] The theory upon which the authorities hold to this rule

2 See Secs. 483-497, 513.

3 There is no such thing as a prescriptive right of a lower riparian owner to receive water as against upper owners. Receiving the full flow of a stream for more than 10 years does not give a prescriptive right that will prevent reasonable use of its waters by an upper owner. Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

Where a lower riparian proprietor takes water out of the stream at a point on his own land, and uses such water only as the upper riparian proprietor permits to pass down, he can acquire no right to the water by prescription, as such use is not adverse in the sense required to give a right by prescription. Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

No use of water by a riparian owner can give him rights by adverse user as against an upper owner. Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Mud Cr. etc. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Dunn v. Thomas, 69 Neb. 683, 96 N. W. Rep. 142; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282.

"And in case the party against whom such adverse user is asserted is an upper riparian owner, it is difficult to conceive of a case where the use of the water by a lower diversion can be adverse." Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; affirming 2 Hurlst. & N. 168; Stockport Waterworks v. Potter, 3 Hurlst. & C. 600, 10 Jur. N. S. 1005, 10 L. T. N. S. 748; affirmed in 7 Hurlst. & N. 106, 31 L. J. Exch. N. S. 9, 7 Jur. N. S. 880; Hoy v. Steritt, 2 Watts 327, 27 Am. Dec. 313; Pollitt v. Long, 58 Barb. 20; Thurber v. Martin, 2 Gray 394, 61 Am. Dec. 468; Hinckley v. Nickerson, 117 Mass. 213; Gould v. Boston Duck Co., 13 Gray 442.

is that if a riparian owner diverts water which otherwise would flow down to a still lower owner, that use is adverse. But, upon the other hand, the water which comes to him would come in any case, and there is nothing adverse to any one in merely receiving it that could be said to give a prescriptive right enabling him to prevent the reasonable use of the water by an upper owner.[4] In other words, if no wrong is done, no prescriptive right can be acquired.[5]

But we have seen in previous sections a riparian proprietor may also acquire a right to the use of water by appropriation under the Arid Region Doctrine.[6] An appropriator may also acquire a right by prescription, and the rights to the use of water acquired by prior appropriation and by prescription are not inconsistent.[7] It is also settled in the Western States and Territories that the right to the use of water may be acquired by a subsequent appropriator as against the rights of the prior appropriator of the waters of the same stream, and that, too, whether or not he diverted the water from the stream either above or below the points where the prior appropriator took out his water. In other words, all water which is not appropriated and used for some beneficial use or purpose by prior appropriators is subject to appropriation by later comers.[8] We have also seen in another portion of this work that the common law rules of riparian rights, as the same are strictly construed in England and the Eastern States, have been modified in the Western States in many particulars, owing to the peculiar arid conditions existing in these States which have both rules of law governing waters—the common law of riparian rights and the Arid Region Doctrine of appropriation.[9] These modifications have been

[4] Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

[5] See, also, Smith v. Duff, 39 Mont. 381, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

[6] See Sec. 519.

[7] Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728, where the Court said: "Rights to the use of water acquired by prior appropriation and adverse possession are not inconsistent."

See, also, Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

[8] For the rights of subsequent appropriators, see Secs. 783-786.

[9] For these States, see Secs. 507, 621.

For the modifications of the com-

made with the view of making the small amount of water which we have here go as far as possible, and doing the greatest good to the greatest number. Now, then, while fully conceding that the Western authorities in the States which have both rules governing waters hold to the proposition that no prescriptive right to the use of water can be gained by a lower riparian owner as against the rights of an upper owner, even if the upper owner does not use the water, or can not use it, except incidentally by letting it flow by his lands, we believe the law to be wrong, especially as against appropriators of the water below, or as against riparian owners who are also appropriators. Yet the California cases have even gone to this extent.[10]

These cases illustrate in a vivid manner the everlasting and irrepressible conflict between the common law rules and those of the Arid Region Doctrine of appropriation in those States which have both rules governing the subject of waters. In the States where they have only the doctrine of appropriation, the question does not arise. There, where a person has made a valid prior appropriation of a definite amount of water for any beneficial use or purpose, he can hold his right as against all later comers, either above or below him upon the stream who attempt to infringe upon it. If he has continued the user of the water adversely as against the rights of others upon the stream for the period of time prescribed by the statute of limitations, he may also claim the right as against the appropriators above him, by prescription, and whether or not their lands happen to touch upon the stream itself, and that, too, without

mon law of riparian rights, see Secs. 509-517.

For irrigation as a riparian right, see Secs. 498-525.

10 In the case of Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158, the lower riparian owner was also an appropriator, and had filed his notice of appropriation before the full prescriptive period had run, it was held that a prescriptive right was not acquired.

In Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282, it is said: "It is impossible for the Court to see how, any acts of appropriation by appellant's predecessors at a lower point upon the stream can defeat respondent's riparian rights, for respondent's rights have not been invaded by any act of the lower appropriator. As riparian owner, he is not bound to use the water, or, in case of non-user, lose his right to its use.'"

See, also, Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18; 30 L. R. A. 390; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107.

some ancient saurian lying upon the bank of the stream invoking the rule of the common law that, "as a riparian owner, he is not bound to use the water, or, in case of non-user, lose his right to its use." [11]

§ 1042. **Rights acquired by prescription may be lost by prescription—Extinguishment of rights.**—It makes no difference how the rights were originally acquired by the owner, they may be lost by prescription. Therefore, rights originally acquired by prescription to the use of waters, as well as rights of way for ditches and canals, or the use of such property, may also be lost by prescription. And, therefore, the same rule which operates in favor of an adverse claim for a water right, or right of way for a ditch or canal, will also operate to the destruction of the right. So where adverse possession of the right of way is maintained by the owner of the land, with a denial of the right in the ditch owner, the right to maintain the ditch may be lost.[1]

An easement for a right of way for a ditch or canal may also be extinguished by a conveyance back from the owner thereof to the owner of the land through which the ditch runs.[2] Again, it may be extinguished by a purchase and conveyance of the land through which the right of way runs by the owner of the easement. The vesting of the right to the servitude and to the servient tenement in the same person extinguishes the servitude, as the two estates are

11 Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282.

"Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors." Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

1 Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205; School Dist. etc. v. Benson, 31 Me. 381, 52 Am. Dec. 618.

See, also, Secs. 1048-1054.

But where a person had acquired a prescriptive right to maintain a flume across an irrigation ditch so as to obstruct the flow of water of the ditch, a promise by him to change the construction of the flume so as not to obstruct the flow of the water does not destroy his right, and make him a mere licensee. Centerville etc. Co. v. Sanger Lum. Co., 140 Cal. 385, 73 Pac. Rep. 1079.

2 For the sale of easements, see Secs. 1003, 1004.

then merged in the same person.[3] Again, it may be lost by foreclosure and sale under a mortgage.[4]

§ 1043. Water rights—Prescription as against any other right.—It makes no difference as to how the right to water was originally acquired, or in what capacity it was originally held, rights to all or a part of the water may be acquired by prescription. Hence it follows that a right acquired by prescription may be lost by prescription.[1] It is also important to note in this connection that a water course, although artificial, may have been so long used as to become a natural water course prescriptively.[2] But when an artificial water course is made solely for drainage, from mines or otherwise, the flow of the water through that channel is, from the nature of the case, of a

3 Drake v. Russian River Land Co., 10 Cal. 654, 103 Pac. Rep. 167; Heilbron v. Last Chance etc. Co., 75 Cal. 117, 17 Pac. Rep. 65.

"No easement exists so long as the unity of possession remains." Lampman v. Milks, 21 N. Y. 505.

4 Wyker v. City of Caldwell, 71 Kan. 459, 80 Pac. Rep. 941.

1 Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286, where it is said: "After the title by such possession has become complete, no interruptions were of any avail to plaintiffs, unless actual, open, exclusive, continuous, and adverse, under claim of ownership for the statutory period." Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. Rep. 69.

But see Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Bowers v. Hill, 1 Hodges 334, 2 Scott 535, 5 L. J. C. P., N. S. 77, 1 Bing. N. C. 339; Johnston v. Hyde, 33 N. J. Eq. 632; Curtis v. Jackson, 13 Mass. 507; Hurd v. Curtis, 7 Metc. 94; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Day v. Walden, 46 Mich. 575, 10 N. W. Rep. 26; Corning v. Gould, 16 Wend. 531 (N. Y.); Warren v. Syme, 7 W. V. 474; Dyer v. Depui, 5 Wharton (Pa.) 584; Bowen v. Team, 6 Rich. (S. C.) 298, 90 Am. Dec. 127.

2 Sutcliffe v. Booth, 32 L. J. Q. B., N. S., 136; Nuttal v. Bracewell, L. R. 2 Ex. 1; Miner v. Gilmour, 12 Moor. P. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Freeman v. Weeks, 45 Mich. 335, 7 N. W. Rep. 904.

See, also, Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Cottel v. Berry, 42 Ore. 593, 72 Pac. Rep. 584; Murchie v. Gates, 78 Me. 300, 4 Atl. Rep. 698; Reading v. Althouse, 93 Pa. St. 400; Adams v. Maning, 48 Conn. 477, 51 Conn. 5; Peter v. Caswell, 38 Ohio St. 518; Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. Rep. 697; Arkwright v. Gell, 5 Mees. & W. 2031, 2 Horn. & H. 17, 8 L. J. Exch. N. S. 201.

But see Green v. Carrota, 72 Cal. 267, 13 Pac. Rep. 685.

temporary character, and a use of the water by others, although it may be adverse for the statutory period, affords no presumption of a grant of any right to the water in perpetuity; and, therefore, a prescriptive right to have the water continue its flow can not be successfully claimed.[3]

No prescriptive right can be acquired as against mere waste water.[4] In fact, no right can be acquired to have the discharge of waste water continued either by appropriation,[5] prescription, or estoppel, regardless of the time that such waste water has been used by those claiming the right.

A prescriptive right may be had by one person to flood the lands of another.[6] This subject, however, will be discussed when we come to the discussion of injuries to lands.[7] But while no right can thus be acquired by prescription against the originator of an artificial stream of a temporary character, yet so long as he continues to use the canal for the purpose of drainage, a prescriptive right may be acquired against others, including those through whose lands the canal runs.[8] So, also, the right to the use of water flowing through an aqueduct or pipes for domestic purposes may be acquired by prescription.[9]

3 "It makes no material difference if such a state of things were kept up for a long number of years. In such case time would raise no presumption of a grant, and A. could at any time stop the production of such artificial and temporary stream; and he could at any time, if he continued the production of such stream, put the waters thereof to his own use." Cardelli v. Comstock Tun. Co., 26 Nev. 284, 66 Pac. Rep. 950, citing Kinney on Irr., 1st Ed., Sec. 297.

See, also, Crescent etc. Co. v. Silver King etc. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725; Arkwright v. Gell, 5 Mees. & W. 2031, 2 Horn. & H. 17, 8 L. J. Exch. N. S. 201; Gaved v. Martyn, 19 C. B. N. S. 732.

See, also, for the appropriation of developed waters, Secs. 658, 1205, 1206.

4 For waste water, see Sec. 661.

See, also, Cardelli v. Comstock Tunnel Co., 26 Nev. 284, 66 Pac. Rep. 950, 21 Morr. Min. Rep. 699.

See, also, Crescent etc. Co. v. Silver King etc. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; Fair Play etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725.

5 See Sec. 661.

6 See Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. Rep. 174.

7 See Chap. 83.

8 Greatrex v. Hayward, 8 Exch. 291, 22 L. J. Exch. 137.

9 Dority v. Dunning, 78 Me. 381, 6 Atl. Rep. 6.

No prescriptive right can be acquired to be negligent; and although an easement may be acquired over the lands of others for ditches and canals by prescription,[10] the ditch owner can acquire no right by prescription to injure the servient estate through negligence.[11]

But injuries to land from water seeping from an irrigation ditch, which was properly and carefully constructed, and is intended to be permanent, constitutes a single cause of action and as affected by the statute of limitations accrues at the beginning of the injury and from that time the statute begins to run.[12] Again, the right to maintain a public nuisance can not be maintained under a claim of prescription.[13] As was said in a recent California case:[14] "It is not claimed, nor can it be, that the plaintiff has acquired by prescription any right to divert from her land water which would naturally flow there, and to discharge it upon the public road. Indeed, no such right can be acquired in property set apart for public use."[15]

Rights of way, or easements, for ditches and canals over the lands of others may be acquired by prescription, which will give a permanent right; also ditches and canals, after construction, may be so acquired together with their rights of way; again, rights of way through ditches and canals of others may be so acquired for the purpose of conducting water. In the succeeding sections of this chapter we will discuss these rights.[16]

10 See for rights of way by prescription, Secs. 986, 1044, 1045.

11 "If the defendants, during the time alleged in the complaint, had injured and damaged plaintiff's property by the negligent use and operation of their canal, the fact that they had negligently used and operated it in the same negligent way and manner for a period of seven years, or any number of years, furnished no defense to plaintiff's claim." Jenkins v. Hooper etc. Co., 13 Utah 100, 44 Pac. Rep. 829.

12 Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

13 Woodruff v. North Bloomfield etc. Co., 18 Fed. Rep. 753, 9 Sawy. 441; Hill v. Standard etc. Co., 12 Idaho 223, 85 Pac. Rep. 907; Kern etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052.

See, also, for the pollution of water, Secs. 1129-1147.

14 Shaw v. Town of Sebastopol, 159 Cal. 623, 115 Pac. Rep. 213.

15 See, also, People v. Kerber, 152 Cal. 751, 93 Pac. Rep. 878, 125 Am. St. Rep. 93; Visalia v. Jacob, 65 Cal. 434, 4 Pac. Rep. 433, 52 Am. St. Rep. 303; Cloverdale v. Smith, 128 Cal. 230, 60 Pac. Rep. 851; Southern Pacific Co. v. Hyatt, 132 Cal. 240, 46 Pac. Rep. 272, 54 L. R. A. 522.

16 See Secs. 1044, 1045.

§ 1044. **Easements—Rights acquired to, by prescription.**—The doctrine that easements of every sort may be acquired by an adverse user for the period of time prescribed by the statute of limitations of the respective State where the right is claimed, is a most commonly accepted doctrine, and has been adopted and very frequently applied by the Supreme Court of the United States. In order to acquire title by prescription, the enjoyment and exercise of the use must be continuous,[1] notorious, and under a claim of right[2] with knowledge of the owner[3] and adverse, for the whole statutory period, in the exact sense that the possession of land must be so as to warrant the application of the statute of limitations in an action of ejectment.[4] Where the wording of the statute is not such that it covers easements, the period that the adverse possession must run is the old common law period of twenty years.[5] But without discussing any further the subject of prescription in general, we will proceed to discuss the subject as directly applicable to the subject in hand.[6]

§ 1045. **Rights of way for ditches and canals.**—As we have seen in previous sections, rights of way for ditches, canals, or other works may be acquired over private lands by grant from the owner thereof.[1] So, also, such a right of way may be acquired over the private lands of another by adverse possession amounting to prescription, from which a grant, of course, is presumed. Also ditches

1 Boliver Mfg. Co. v. Neponset Mfg. Co., 16 Pick. 241 (Mass.); Cowell v. Thayer, 5 Metc. 253 (Mass.); Davis v. Bringham, 29 Me. 391; Kent v. Waite, 10 Pick. 138; Branch v. Doane, 17 Conn. 402; *Id.*, 18 Conn. 233; Durgin v. Leighton, 10 Mass. 56.

2 Gilford v. Winnipisseogee Lake Co., 52 N. H. 262; Solomon v. Vintner's Co., 4 H. & N. 585; O'Neil v. Blodgett, 53 Vt. 213; Emery v. Raleigh R. Co., 102 N. C. 209, 9 S. E. Rep. 139, 11 Am. St. Rep. 727.

3 Livett v. Wilson, 3 Bing. 115; Flora v. Corbeau, 38 N. Y. 111; Smith v. Miller, 11 Gray 145.

4 Colvin v. Burnet, 17 Wend. 562; Hart v. Vose, 19 Wend. 365; Dyer v. Depui, 5 Whart. (Pa.) 584.

5 Harkness v. Woodmansee, 7 Utah 227, 26 Pac. Rep. 291; Clawson v. Wallace, 16 Utah 300, 52 Pac. Rep. 9; Funk v. Anderson, 22 Utah 238, 61 Pac. Rep. 1006; North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Coleman v. Hines, 24 Utah 360, 67 Pac. Rep. 1122.

6 For rights of way acquired by prescription, see Secs. 986, 1045.

For the right to the use of water acquired by prescription, see Secs. 1038-1043.

1 For sale of rights of way, see Secs. 1003, 1004.

and canals after their construction, together with their rights of way, may be acquired by prescription.[2] Again, rights of way through ditches and canals of others may be so acquired for the purpose of conducting water to the place of use.[3] These subjects will be treated together.

As has been said before, as far as acquiring title is concerned, water rights and ditch rights are entirely independent. It therefore follows that a prescriptive right to one does not necessarily involve a right to the other. As was said in a recent Montana case:[4] "If these ditches were actually used for the prescribed period, and the use was characterized by all the attendant circumstances which constituted it adverse, open, exclusive, and under claim or right, title by prescription resulted even though the claimants to the easements never owned water rights, but had to depend for their use of the ditches upon water leased or otherwise acquired from year to year."[5] Such a right of way being a permanent

2 McEwen v. Preece, 45 Wash. 612, 88 Pac. Rep. 1031.

3 One may acquire a prescriptive right to use an irrigation ditch to convey a limited quantity of water to his land, while another retains the right also to use the ditch for his own purposes to the extent of the remaining capacity. Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. Rep. 224; Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60.

4 McDonnell v. Huffine, —— Mont. ——, 120 Pac. Rep. 792.

5 Open, visible, continuous, and unmolested use of a way for more than 30 years is sufficient to raise a presumption that the use was under an adverse claim of right. Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908.

See, also, Franz v. Mendonca, 131 Cal. 205, 63 Pac. Rep. 362, where it was held that, where a land owner claimed a right of way over the lands of another, the fact that the lessee of the dominant estate was at the same time the lessee of the servient estate did not interrupt the running of the statute of limitations in favor of the dominant estate.

"If there has been the use of an easement for 20 years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." Washb. on Easements, 4th Ed., p. 156.

See, also, Malstrom v. People's Drain Ditch, 32 Nev. 246, 107 Pac. Rep. 98; Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783; McEwen v. Preece, 45 Wash. 612, 88 Pac. Rep. 1031; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396; Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Hesperia etc. Co. v. Rogers, 83 Cal. 10, 23 Pac. Rep.

interest in land, the requisite character of the possession and the duration of the same for the acquisition of such a prescriptive right is provided for in the most of the respective States by statute.[6] And in order to acquire a right by this means to a permanent easement for a ditch, canal, reservoir, or other works, over the lands of another, the party claiming the right must have had the peaceable, open, notorious, exclusive, and uninterrupted adverse possession of the land in question for this purpose and use under a claim of right for the whole statutory period of limitations provided in the respective States for acquiring other interests in land by adverse possession amounting to prescription.[7] Or if there is no statute which in direct terms or by analogy applies to easements, the period for the acquisition of such a right is the common law one of twenty years.[8]

196, 17 Am. St. Rep. 209; Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; Kripp v. Curtis, 71 Cal. 66, 11 Pac. Rep. 879; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. Rep. 224; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Anaheim W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Centerville etc. Co. v. Sanger Lum. Co., 140 Cal. 385, 73 Pac. Rep. 1079.

See Brattain v. Conn, 50 Ore. 156, 91 Pac. Rep. 458, where it was held that a prescriptive right to maintain a dam might be acquired, notwithstanding defendants clandestinely and without complainant's knowledge at various times forcibly destroyed the works so maintained.

"A title so acquired is as effectual and complete as one obtained by a conveyance." Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

[6] For the statutes of the States, see Part XIV.

"No principle of law is better established than that, when title is once acquired by adverse possession for the statutory period, such title remains in the person so acquiring it as completely as if conveyed to him by deed from the owner." Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Joy v. Stump, 14 Ore. 361, 12 Pac. Rep. 929.

[7] See, also, for the prescriptive right to the use of water, Secs. 1038-1044.

One who seeks to acquire an easement, maintaining a ditch over another's land, by adverse user, must maintain it without material change of location for the whole statutory period; and that he may have had a ditch somewhere on the land for 10 years does not give him a right to maintain it in a new location or to use an extension thereof made within the period. Dunn v. Thomas, 69 Neb. 683, 96 N. W. Rep. 142.

[8] See Harkness v. Woodmansee, 7 Utah 227, 26 Pac. Rep. 291; Clawson v. Wallace, 16 Utah 300, 52 Pac. Rep. 9; Funk v. Anderson, 22 Utah 238, 61 Pac. Rep. 1006; North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Coleman v. Hines, 24 Utah 360, 67 Pac. Rep. 1122.

The right may have had its inception by permission or license, but in order to constitute adverse possession of a right to use a ditch or canal across the land of another, originally given by permission or license, the licensee must have repudiated the license and have brought the knowledge of the repudiation home to the owner of the land, and thereafterward must have held adversely for the statutory period. The statute of limitations, however, does not begin to run until notice of such repudiation.[9] The statute of limitations does not begin to run as against the land over which the right of way is claimed until the issuance of patent therefor.[10]

In an action to establish a right of way by adverse possession, and where the whole theory of plaintiff's complaint was that his rights were acquired by adverse use of a ditch or canal, the recovery must be had on that theory, and the findings and a decree which expressly state that the use of the ditch by the plaintiff was had with the consent of the owners thereof, and under an oral license or agreement therefor, will be reversed upon appeal.[11]

§ 1046. Prescriptive rights as between landlord and tenant.—A tenant can not, as against his landlord, acquire water rights by prescription. This proposition is so elementary that it is hardly necessary to cite authorities. The use in this case being permis-

[9] That an adverse right can not be based on permission, see Secs. 985, 1050-1053.

See, also, Weidensteiner v. Mally, 55 Wash. 79, 104 Pac. Rep. 143; 22 Am. & Eng. Encyc. Law 1196.

"If the right so given was and remained merely permissive so as to be revocable at any time by the landowner, it would not ripen into a title by prescription, no matter how long continued, for then the possession or use would not be hostile or adverse. But if the parol consent was given to use the land as if legally conveyed, the use would then be as of right, which, if continued for the requisite period, might develop into a prescriptive right." Gustin v. Harting, —— Wyo. ——, 121 Pac. Rep. 522.

[10] Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726, where it is said: "The statute of limitations can only have application to acts of the appropriator performed after the plaintiff's title was acquired, whether from the State or the United States." Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200.

[11] Schirmer v. Drexler, 134 Cal. 134, 66 Pac. Rep. 180, where judgment was reversed and a new trial granted with leave to amend pleadings.

See, also, remedies and procedure, Chaps. 78-83.

For the discussion of the right to the use of water acquired by adverse possession, see Secs. 1036-1043.

sive, and when so it can not be adverse, in the sense that a right by prescription can be acquired.[1] So, also, where the statute is already running in favor of an adverse claimant against the rights of another, and where there are all of the essential elements necessary to acquire the right by prescription,[2] except that of time, where the claimant offers to lease the right, there is a recognition of the rights of the original owner, and it stops the running of the statute.[3] But it was held in California that where the lease provided for the use of one-half of the water right owned by the landlord, and the tenant used all of it, the second half adversely, it left him free to claim this half adversely.[4] Again, after the tenant delivers up the possession of the leased property, he can acquire title to the water right formerly used by him under the lease by adverse user, for the prescriptive period.[5] A water right may be acquired by prescription against the owner of the right where he had leased it to a tenant who had failed to protect the right. In this case the right runs against both the landlord and the tenant.[6]

But in order to constitute a title by prescription it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim is made.[7]

1 "The rule is elementary that a tenant can not acquire title to property occupied by him as such tenant by adverse possession. This doctrine is so well settled that we deem it unnecessary to cite authorities in support of it." Butler v. Lamson, 29 Utah 439, 82 Pac. Rep. 473.

"A tenant may have from his landlord an undisputed right to use water belonging to the latter, and may do so by his license, in an undisputed manner for 10 years, but this possession of the use is not necessarily adverse, because undisputed." Heintzen v. Binniger, 79 Cal. 5, 21 Pac. Rep. 377; Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617.

2 For the elements necessary, see Secs. 1048-1054.

3 Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 17.

4 Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788.

5 Talbott v. Butte City W. Co., 29 Mont. 17, 73 Pac. Rep. 1111.

6 Heilbron v. Last Chance etc. Co., 75 Cal. 117, 17 Pac. Rep. 65.

7 Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410, 3 Am. & Eng. Ann. Cas. 1038; Anderson v. Bassman, 140 Fed. Rep. 10; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; North Powder etc. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642.

§ 1047. Prescriptive rights as between tenants in common.—Water rights, ditches, canals, and other works may be owned by different parties as tenants in common. Where this is the case the possession of one tenant in common is generally deemed the possession of all.[1] However, under certain conditions one tenant in common may acquire by prescription the rights formerly owned by the others. But in order to do this there must be some actual notice given by the adverse claimant against the owner of such adverse holding, which will operate as an ouster, and set the statute of limitations running. So where two tenants in common are the owners of certain rights, the mere possession and user of one cotenant can not be considered adverse as against the rights of the other where there is no evidence of an actual ouster or some equivalent act showing an intent to exclude him.[2] It therefore follows that constructive notice by the adverse use of the rights will not be sufficient, even if all of the other elements necessary in other cases are fully complied with for the full prescriptive period.[3] And not only this, but the burden of proving an ouster of a tenant in common and proving adverse possession for the full period of the statute of limitations, devolves upon the cotenant who asserts it.[4]

§ 1048. Elements essential to adverse user amounting to prescription.—We have discussed in the preceding sections of this chapter what rights might be acquired by prescription and against whom they might be so acquired.[1] But the terms "adverse possession" or "adverse user," amounting to prescription, as used in legal phraseology, are general terms and need further discussion.

1 For rights of tenants in common, see Chap. 73.

2 An adverse holding will not operate as an ouster, and set the statute of limitations running, until the tenant out of possession has some notice of such adverse holding. Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632; Unger v. Mooney, 63 Cal. 586, 49 Am. St. Rep. 100; Colman v. Clements, 23 Cal. 245; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Moss v. Rose, 27 Ore. ——, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223; Freeman on Co-Ten., Secs. 221, 222.

3 For elements necessary, see Secs. 1048-1054.

4 Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717.

For burden of proof in adverse possession, see Sec. 1055.

1 See Secs. 1036-1044.

There are certain essential elements which enter into their composition, and which must be present before a right can be acquired by prescription. And as a prescriptive right, acquired by one person, is a corresponding loss or forfeiture of right by another, and, further, as the law does not favor forfeitures, it is absolutely essential that all the elements prescribed by law as necessary to constitute a permanent valid claim by adverse possession amounting to prescriptive right should be present.

There are five principal elements necessary for the acquisition of a permanent title by prescription, namely: First, the possession must be actual occupation or use, open and notorious, and exclusive;[2] second, it must be hostile against the rights of the party against whom the right is claimed;[3] third, it must be held under a claim of right, as the property of the claimant;[4] fourth, it must be continuous and uninterrupted for the full period prescribed by the statute of limitations;[5] fifth, during all of this period taxes, if any, are assessed against the property claimed, and must be paid by the claimant.[6]

"There are five elements required to make out an adverse possession sufficient to constitute a defense under the statute of limitations: (1) The possession must be actual occupation, open and notorious, not clandestine. (2) It must be hostile to the plaintiff's title. (3) It must be held under a claim of title, exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the action, not, however, necessarily next before the commencement of the action. (5) Since the passage of the proviso to Section 325 of the Code of Civil Procedure in 1878, payment of taxes."[7]

2 See Sec. 1049.

3 See Sec. 1050.

4 See Sec. 1051.

5 See Secs. 1052, 1053.

6 See Sec. 1054.

7 Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; quoted with approval in Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Montecito W. Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 96 Pac. Rep. 935.

"An adverse possession that will bar a legal title must be (1) hostile, under a claim of right; (2) actual; (3) open and notorious; (4) continuous." Yeager v. Woodruff, 17 Utah 361, 53 Pac. Rep. 1045; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. Rep. 952; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1027; Malmstron v. People's Ditch Co., 32 Nev. 246, 107 Pac. Rep. 98; Davis v. Angelo, 8 Cal. App. 305,

We will now take these elements up and discuss them in the order named.[8]

§ 1049. Elements necessary—The possession must be actual, open, notorious, and exclusive.—In order to successfully claim a right by prescription against the rights of another the adverse claimant must have actual possession or occupation of the property claimed. If it is a water right so claimed, he must have had the actual use of the water under the right, and have applied the water to some beneficial use or purpose during the full period prescribed by the statute of limitations.[1] Otherwise there is no right to the water which can become the basis of an adverse claim. If the right claimed is a right of way for a ditch or canal over the lands of another, or the ditch or canal itself with its right of way, or the right through a ditch or canal of another for the conducting of water, there must be also actual possession, occupation, and use of the property claimed for the required period.[2] The mere construction of ditches without the actual use thereof is not sufficient to set the statute in motion.[3]

96 Pac. Rep. 909; Tosini v. Cascade etc. Co., 22 S. D. 337, 117 N. W. Rep. 1037.

8 See Secs. 1049-1054.

1 For the necessary period, see Sec. 1052.

See, also, Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524, where on rehearing it was said: "Defendant having alleged an adverse user, the burden was upon him to show when the water was applied to a beneficial use, and, he having failed in this respect, the petition is denied."

See, also, Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

The possession must be actual. Yeager v. Woodruff, 17 Utah 361, 53 Pac. Rep. 1045.

"There must have been an actual occupation by the diversion and use of the water." Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 92, citing Kinney on Irr., 1st Ed., Secs. 293, 294, 297; Oregon etc. Co. v. Allen etc. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935.

2 Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908, where it was shown that for 27 years the ditch was kept in repair by the adverse claimant.

"A presumption that the use was under a claim of right arises from the undisputed use of the easement." Franz v. Mendonca, 131 Cal. 205, 63 Pac. Rep. 362.

See, also, Kripp v. Curtis, 71 Cal. 66, 11 Pac. Rep. 879.

3 Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454.

"If there has been the use of an

In order that the actual user shall ripen into adverse title amounting to a prescriptive right, it must be open and notorious, and with the knowledge of the one against whom the right is claimed; or the use must have been of such a character that it will be presumed that the original owner had such knowledge.[4] But the terms "open" and "notorious" do not mean that the general public must have knowledge of the use, or that any person must have knowledge of such use other than the one against whom the right is claimed. If he has knowledge that the use is being made of his property, under a claim of right, it is sufficient to bring the case within the rule, and the right by prescription may be acquired without the knowledge of others not interested in the right.[5] The words "open" and "notorious," used in this connection, mean the same thing, and all that they mean to imply in this connection is that the use was with the knowledge of the original owner of the right, and not secret, clandestine, or hidden, or concealed from him.[6]

easement for 20 years, unexplained, it will be presumed to be under a claim of right." Washb. on Easements, 4th Ed., p. 156; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524.

See, also, for rights of way for ditches and canals, Secs. 972-993.

[4] Bell v. Sausalito etc. Co., 98 Cal. 17, 33 Pac. Rep. 449; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Irving v. Media, 194 Pa. 648, 45 Atl. Rep. 482.

That knowledge will be presumed under certain circumstances, see Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935; Montgomery v. Keppel, 75 Cal. 128, 19 Pac. Rep. 178, 7 Am. St. Rep. 125; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100.

[5] "But as all that is necessary to make a use adverse is a claim of right in the party using it, and knowledge of the claim in the adverse party, the use of the water might be adverse without being open or notorious." Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. Rep. 570.

See, also, Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588, citing Kinney on Irr., 1st Ed., Sec. 295, holding that the party against whom the right is claimed must have had notice, or means of knowledge of the adverse claim.

See, also, Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Britt v. Reed, 42 Ore. 76, 70 Pac. Rep. 1029, where it was held that, though the defendant had used the water for more than 10 years, such use had not come to the knowledge of plaintiffs, or interfered with their prior rights, until a year before the suit was begun, and hence defendant had acquired no right by prescription.

[6] Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60; Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep.

As was said in a late Montana case:[7] "While the authorities use both the words 'open' and 'notorious,' the use of either would seem to be sufficient, as they are practically synonymous when used in this connection, as inspection of the dictionaries will show." In other words, the user, to be adverse, must be attended by actual notice or by such circumstances of notoriety as would reasonably impart notice to the person to be affected.[8]

The use must not be secret, clandestine, hidden, or concealed from the owner.[9] And when the use is not secret or clandestine, but open and visible, the presumption of knowledge of the original owner follows.[10] Again, as a corporation can only have knowledge through

808, 25 Pac. Rep. 378, 10 L. R. A. 484; Hume v. Rogue River etc. Co., 51 Ore. 237, 92 Pac. Rep. 1065, 83 Pac. Rep. 391, 92 Pac. Rep. 1072, 96 Pac. Rep. 865, 131 Am. St. Rep. 732; Anaheim Union W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613, where the Court said that "it was not necessary to declare such right any further than their conduct indicated it."

"The possession must be actual occupation, open and notorious, and not clandestine." Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935.

7 Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

8 See Salem Flouring M. Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832, where the water was pumped, and the means of supplying the pumps were totally concealed from ordinary observation; held, that no prescriptive right was acquired.

See, also, Gray v. Cambridge, 189 Mass. 405, 76 N. E. Rep. 195, 2 L. R. A., N. S., 976.

As to the value of evidence of posting a notice of appropriation of the water, see Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

See, also, Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297; Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Clark v. Ashley, 34 Colo. 285, 85 Pac. Rep. 588; Wiedensteiner v. Mally, 55 Wash. 79, 104 Pac. Rep. 143; Britt v. Reed, 42 Ore. 76, 70 Pac. Rep. 1029.

9 Salem Flouring M. Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832; Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60; Anaheim Water Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; Hume v. Rogue River etc. Co., 51 Ore. 237, 83 Pac. Rep. 391, 92 Pac. Rep. 1072, 96 Pac. Rep. 865, 131 Am. St. Rep. 732, 92 Pac. Rep. 1065; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1027; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. Rep. 952.

10 "It is next urged by the appellant that the possession of defendants was clandestine, and not brought to its knowledge. . . . The work was openly carried on during this time, and it could not be reasonably urged that

the information of its officers and agents, the knowledge of such officers, within the scope of their duties and employment, becomes the knowledge of the corporation.[11] In the case of tenants in common, the possession of one tenant being the possession of all his cotenants, there can be no element of hostility in such possession. And it therefore follows that an adverse holding will not operate as an ouster, and set the statute of limitations running until the tenant out of possession has had some actual notice of such adverse holding. "Such possession can not be considered adverse until there has been an actual ouster or some equivalent act showing the intent or act of exclusive." [12]

The use and occupation must be exclusive in the sense that it must not at any time while the statute is running have been shared with the former owner, against whom the adverse possession ran. In other words, the user must be uninterrupted, and will be discussed when we come to that feature.[13]

§ 1050. Elements necessary—The use must be hostile to the owner and there must be an invasion of his rights.—The mere use of water, a right of way, or a ditch, or canal, in any particular

such work—running a tunnel for 600 feet in the side of a canyon, at a point only 500 feet distant from the plaintiff's place of diversion—could be carried on clandestinely. From the moment when the tunnel began to take water, it would seem that plaintiff was charged with notice. The means of knowledge was certainly open to it." Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

"When the use is not secret or clandestine, but open, visible, and notorious, the presumption of knowledge follows:" Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Evans Ditch Co. v. Lakeside D. Co., 15 Cal. App. 119, 108 Pac. Rep. 1027.

See, also, Thompson v. Pioche, 44 Cal. 508; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Barnes v. Light, 116 N. Y. 34, 22 N. E. Rep. 441; Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. Rep. 952.

See, also, for burden of proof, Sec. 1055.

11 Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Balfour v. Fresno etc. Co., 123 Cal. 395, 55 Pac. Rep. 1062; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

12 Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Coleman v. Clements, 23 Cal. 245; Unger v. Mooney, 63 Cal. 586, 49 Am. St. Rep. 100; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632.

13 See Secs. 1052, 1053.

manner for however long a period of time, will not ripen prescriptively into a permanent right.[1] There must be something more. The use during the full period of time necessary to acquire the right[2] must have been hostile to the owner. Without a hostile holding against the owner, both in the inception and the continuance of a claimed right, no prescriptive right can be acquired.[3] It therefore follows that no prescriptive right can be acquired where the use is by permission, sufferance, or license from the owner, who continues to exercise ownership and dominion over the right claimed, and that, too, regardless of the length of time that the use continued.[4] As was held in a recent California case,[5] that one could not base a prescriptive right upon a permissive use where the same extended for a period of fifty years.[6]

1 Winter v. Winter, 8 Nev. 129; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Dec. 100; affirming *Id.*, 50 Barb. 316.

2 For the period of time necessary, see Sec. 1952.

3 Without a hostile holding, both in the inception and the continuance of a claimed right to water, there would be no prescription. Rhodes v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884.

At no time did plaintiffs assert a user hostile to the corporation, therefore no prescriptive right was acquired to take water from a certain ditch. Fuller v. Azusa Irr. Co., 138 Cal. 204, 71 Pac. Rep. 98.

An adverse possession that will bar a legal title must be hostile under a claim of right. Yeager v. Woodruff, 17 Utah 361, 53 Pac. Rep. 1045; Francoeur v. Newhouse, 43 Fed. Rep. 236, 14 Sawy. 600; Hayes v. Martin, 45 Cal. 559.

See, also, Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; McManus v. O'Sullivan, 48 Cal. 7; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Oneto v. Restano, 78 Cal. 347, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Manning v. Smith, 6 Conn. 289; Odiorne v. Lyford, 9 N. H. 502, 32 Am. Dec. 387; Parker v. Foote, 19 Wend. 309.

4 That a license can not be the basis of a prescriptive right, see Sec. 985.

User of water for irrigation purposes, by permission, whenever not needed in the operation of a mill, gives no prescriptive right to have the use continue. Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780.

The permissive use of a ditch across the land of another or the water therein, no matter how long continued, could not give title by prescription. Weidensteiner v. Mally, 55 Wash. 79, 104 Pac. Rep. 143.

5 Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866.

6 See, also, Anderson v. Bassman, 140 Fed. Rep. 10; Rhodes v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884; Edson & Foulke Co. v. Winsell, 160 Cal. 783, 118 Pac. Rep. 243; Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep.

And not only must the user be hostile against the rights of the owner, but, in order to establish a right by prescription, the acts by which such right is sought to be established must for the full period of time operate as an actual, substantial invasion of the property rights of the party against whom the right is claimed. The enjoyment relied upon by the claimant must be of such a character as to afford a ground for action by the other party.[7]

"To acquire a right by prescription in the lands of another upon the presumption of a grant, the possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner of the land upon which the easement is claimed. If its inception is permissive or under a license from the owner, it can not avail to work an ouster. To effect that result the possession taken must be open, hostile, and continuous—'he must unfurl his flag on the land and must keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains and planted the standard of conquest.'"[8]

396; Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; Yeager v. Woodruff, 17 Utah 361, 53 Pac. Rep. 1045; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. Rep. 699, 9 L. R. A., N. S., 960; Hunter v. Emerson, 75 Vt. 173, 53 Atl. Rep. 1070; Coalter v. Hunter, 4 Rand. (Va.) 58, 15 Am. Dec. 726; Polly v. McCall, 37 Ala. 20; Gray's Case, 5 Coke 79.

7 "No adverse user can be initiated until the persons possessing the superior use are deprived of its benefit in such a substantial manner as to notify them that their rights are being invaded." Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546.

"The law is well established that no right to the use of water can be acquired by prescription unless there has been such an invasion of the rights of the parties against whom it is asserted as would have given them a cause of action therefor." Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814, citing Kinney on Irr., 1st Ed., Sec. 294.

No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator unless such use deprives the prior appropriator of it when he has actual need of it. Talbott v. Butte City W. Co., 29 Mont. 17, 73 Pac. Rep. 1111.

8 Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484, citing Springer v. Young, 14 Ore. 285, 12 Pac. Rep. 400.

See, also, Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Grigsby v. Clear Lake W. Co., 40 Cal. 396; Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623; Dick v. Bird, 14 Nev. 161; Dick v. Caldwell, 14 Nev. 167; Boynton v.

Therefore, where there is sufficient water in the stream for all parties, its use by one can not be an invasion of the rights of another so as to start the statute of limitations running. It is only when the water becomes so scarce that all the parties can not be supplied, and when one appropriator takes water which by priority belongs to another then there is an adverse use.[9] Again, the appropriation of considerable quantities of water in seasons of high

Clear Lake etc. Co., 40 Cal. 396; Union M. & M. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; *Id.*, 81 Fed. Rep. 73; The Mining Debris Cases, 9 Sawy. 441, 18 Fed. Rep. 753 (Woodruff v. North Bloomfield etc. Co.); Cave v. Crafts, 53 Cal. 135; Winter v. Winter, 8 Nev. 129; Ledu v. Jim Yet Wa, 67 Cal. 346, 7 Pac. Rep. 731; Huston v. Bybee, 17 Ore. 140, 20 Pac. Rep. 51, 2 L. R. A. 568; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Wimer v. Simons, 27 Ore. 1, 29 Pac. Rep. 6, 50 Am. St. Rep. 685; North Powder etc. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Boyce v. Cupper, 35 Ore. 256, 61 Pac. Rep. 642; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Weidensteiner v. Mally, 55 Wash. 79, 104 Pac. Rep. 143; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334.

"In the absence of a finding of the actual diversion of some definite quantity of water, sufficiently supported by evidence, the plea of prescriptive right to take water above their boundary must necessarily fail." Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989, citing Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. Rep. 704; Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563.

[9] Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. Rep. 699, 9 L. R. A., N. S., 966; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Bowman v. Bowman, 35 Ore. 279,

water, when it may be done without sensible injury to the prior claimants or to the lower owners on the stream, does not give a prescriptive right to divert the whole stream in dry seasons, and at a time when the rights would be injuriously affected.[10] Nor at any time is the use of a surplus, over and above the rights of the prior appropriators, adverse to them, since there is no invasion of their rights so long as they get all the water claimed by them.[11]

Under the later, and, we will add, better considered, decisions, it is held that in order for a prescriptive right to be acquired, there must be actual damage to the use of the owner. As was said in a recent Montana case:[12] "But use of water does not begin to be adverse as against a prior appropriator unless it results in a deprivation to such appropriator, or amounts to such an invasion of his rights as will enable him at any time during the statutory period to maintain an action against the adverse user."[13]

We have also seen in a previous section that there can be no pre-

57 Pac. Rep. 546; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

10 Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

11 Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Fifield v. Spring Valley etc. Works, 130 Cal. 552, 62 Pac. Rep. 1054; Talbott v. Butte etc. Co., 29 Mont. 17, 73 Pac. Rep. 1111; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883.

12 Featherman v. Hennessy, 42 Mont. 535, 113 Pac. Rep. 751.

13 See, also, Smith v. Duff, 39 Mont. 382, 202 Pac. Rep. 984, 133 Am. St. Rep. 587; Talbott v. Butte City Water Co., 29 Mont. 17, 73 Pac. Rep. 1111; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Anaheim Water Co. v. Semi-Tropic etc. Co., 64 Cal. 185, 30 Pac. Rep. 623; Last Chance etc. Co. v. Heilbron, 86 Cal. 10, 26 Pac. Rep. 523; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. Rep. 699, 9 L. R. A., N. S., 960; Morris v. Bean, 146 Fed. Rep. 432; affirmed 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

But see Moore v. Clear Lake W. Works, 68 Cal. 146, 147, 8 Pac. Rep. 816, where it is said: "The interposition of a court of equity was required to prevent defendant's wrongful acts from ripening into a right, and on that ground alone the interference of a court of equity was properly asked and granted."

See, also, Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Mott v. Ewing, 90 Cal. 231, 27 Pac. Rep. 194; Conklin Imp. Co. v. Pac. etc. Co., 87 Cal. 296, 25 Pac. Rep. 399; Creighton v.

scriptive right acquired by a user below of the water as against the rights of those above on the stream.[14]

As to the extent of the invasion of the right necessary before the adverse claimant can acquire a title by prescription, we have seen above that the enjoyment by the claimant of the right must be sufficient to afford a ground for action against him by the owner.[15]

§ 1051. Elements necessary—The use must be under a claim of right or color of title.—The third essential element under our classification,[1] in order to acquire a title to a water right by prescription, is that the user must be held under a claim of right as the property of the claimant, or, as it is sometimes termed, under color of title.[2] The same is true where the right claimed is a right of

Evans, 53 Cal. 55; Heilbron v. Fowler etc. Canal Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968.

As to when a right of action for an injunction will lie, see Chap. 81.

14 For prescriptive right to receive the flow of a stream, see Sec. 1041.

15 Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814, citing Kinney on Irr., 1st Ed., Sec. 294; Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935.

See, however, Alhambra etc. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. Rep. 570.

That a suit interrupts the continuity of use, see Sec. 1053.

1 See Sec. 1048.

2 A right to the use and possession of the water of a stream may be acquired by prescription only when accompanied by claim of title. Brossard v. Morgan, 7 Idaho 215, 61 Pac. Rep. 1031.

It must have been asserted under claim of title, exclusive of any other right. Center Cr. etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

See, also, Smith v. North Canyon etc. Co., 16 Utah 194, 52 Pac. Rep. 283; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Davies v. Angel, 8 Cal. App. 305, 96 Pac. Rep. 909; Heintzen v. Binninger, 79 Cal. 5, 21 Pac. Rep. 377; Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Postlethwaite v. Payne, 8 Ind. 104; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935; Yeager v. Woodruff, 17 Utah 361, 53 Pac. Rep. 1045; Winter v. Winter, 8 Nev. 129.

The use of squatters of a part of the waters of a stream, without any claim of right to divert and use it elsewhere, is not adverse to the owners of the tract. Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

way for a ditch or canal over the land of another, or the right to conduct water through the ditch or canal of another. But where there has been an open, visible, continuous, and unmolested use of a right of way for more than the time required by the statute of limitations, it is sufficient to raise a presumption that it was under a claim of right.[3]

The claim of right may be made in a number of ways. It may be made by the continued assertion verbally of the right in such a manner that it is brought home to the owner of the right, and, therefore, notice to him.[4] It may be made by the posting and recording of a notice of appropriation, and the continued use of the water, although this is not necessary, except as evidence of the claim.[5] But, assuming that there is no express declaration of right, or any posting of notice declaring the same, where there is satisfactory proof of a continuous, open, notorious, and uninterrupted use of the waters on the lands of the claimant for the statutory period, and of such a character as to unquestionably indicate that the use was being exercised in hostility to the right of any person to interfere with its exercise, there is sufficient proof that it was made under a claim of right.[6] And in this connection it may be said that when the

[3] Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908.

"If there has been the use of an easement for 20 years, unexplained, it will be presumed to be under a claim of right, and adverse." Washb. on Easements, 4th Ed., p. 156.

[4] The claim may be made, by the use, openly, notoriously, and peaceably, and adversely to the defendant and to the whole world, claiming all the time to be the owner. Gurnsey v. Antelope Cr. etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

See, also, Anaheim Union W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613.

[5] Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Frederick v. Dickey, 91 Cal. 360, 27 Pac. Rep. 742, where it is held that a notice of location of a water right made 15 years before the commencement of the action was admissible in evidence of an adverse claim.

See, also, Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Oregon etc. Co. v. Allen, 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524.

[6] Anaheim Union W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613.

"Such claim may be made out by visible acts, without any assertions by word of mouth." Gurnsey v. Antelope Cr. etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

See, also, Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396; Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Royall v. Lisle, 15 Ga. 545, 60 Am. Dec. 712; Langworthy v. Myers,

use is not secret or clandestine, but open, visible, and notorious, the presumption of knowledge of the owner follows, and that the claim is made under a claim of right of ownership.[7]

A prescriptive right once properly begun may be terminated by the recognition of the title of the owner. Therefore, where the adverse claimant offers to purchase or rent the property from the owner, it amounts to a waiver of his own claim of right and an unequivocal recognition of the right of the party against whom the adverse right was formerly running.[8] So, also, will any act upon the part of the claimant which changes the nature of the claim from one being adverse to one based upon permission.[9]

§ 1052. Elements necessary—The adverse user must be continuous for the full prescriptive period.—Under our classification [1] the fourth element necessary is that the use must be continuous and uninterrupted for the full prescriptive period required by the statute of the State where the right is claimed.[2] And since adverse user is necessary, the time prescribed by the statute does not begin to run until the one against whom the right is claimed

4 Iowa 18; Barnes v. Light, 116 N. Y. 34, 22 N. E. Rep. 441; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Southern California etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Frederick v. Dickey, 91 Cal. 360, 27 Pac. Rep. 742; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. Rep. 1027.

7 Gurnsey v. Antelope Cr. etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908; Thompson v. Pioche, 44 Cal. 508; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Montecito Val. etc. Co. v. Santa Barbara, 144 Cal. 597, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905; Anaheim Water Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1027.

8 Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Lovell v. Frost, 44 Cal. 471.

9 Conceding that a diversion of water from a dam initiated a prescriptive right thereto, it is disturbed by obtaining permission to lay pipes across the land in question, and take from the dam at a point 300 feet from the first diversion. Rhoades v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884.

That a prescriptive right can not be based on permission of license, see Sec. 985.

1 See Sec. 1048.

2 For the statute of limitations, see Part XIV.

has had notice, either actual or constructive. In other words, the notice may be actual or it may be attended by such circumstances of notoriety as will reasonably impart notice to the person affected that the user is being made under a claim of right.[3] As against a water right the statute will begin to run at the time the unlawful diversion of the water is made by the claimant, and not at the time the works are begun with which it is intended to use the water.[4] As against a right of way for a ditch, canal, or other works across the lands of others, the statute will begin to run from the time of the actual adverse possession of the land in question.[5]

From the exact date of the actual notice of the party against whom the right is claimed, or from the date when such notice to him may be reasonably presumed, the claimant must have used the water, or the ditch, canal, or other works continuously and uninterruptedly for at least the full prescriptive period required by the statute.[6] And in this connection it is held that the word

[3] See previous sections, Nos. 1049-1053.

See, also, Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Hughesville W. Co. v. Person, 182 Pa. 450, 38 Atl. Rep. 584.

[4] Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252.

Prescription begins to run from the time one diverts the water, although there is not then an actual use thereof, there being actual and exclusive possession and control with the intent to use it, and actual use, within a reasonable time. Oregon etc. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701.

See, also, Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524.

[5] See for rights of way by prescription, Secs. 1044, 1045.

[6] For the prescriptive periods of the various States, see Part XIV.

If the plaintiffs' possession was adverse, it did not continue for a sufficient time to entitle them to any rights against defendant by prescription. Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743.

"Adverse possession to realty may have its inception in trespass, and naked possession under a claim of right, actual, hostile, and continuous for a period of 10 years, will, in this State, ripen into a perfect title." Oregon etc. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701.

"The right of the defendant in the water would become fixed only after seven years' continuous, uninterrupted, hostile, notorious, adverse enjoyment." Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283.

See, also, Richard v. Hupp, —— Cal. ——, 37 Pac. Rep. 920, where it was held that the adverse use of a flume for less than the statutory period failed to establish a prescriptive right.

"It is not contended that the statute of limitations will not run against the State." State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

See, also, Hough v. Porter, 51 Ore.

"uninterrupted" comprehends a continuous use to the extent required.[7] The word "exclusive" also comprehends a continuous use by the claimant, and is synonymous in this connection with the word "uninterrupted." It is also held that the word "uninterrupted" is synonymous with the word "peaceable," so far as the right acquired by adverse possession is concerned.[8] The use must be uninterrupted, and, therefore, it must be continuous for the statutory period.[9] And, also, it is held that the words "prescrip-

318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396; Campbell v. Shivers, 1 Ariz. 161, 25 Pac. Rep. 540; Dalton v. Rentaria, 2 Ariz. 275, 15 Pac. Rep. 37; Center Cr. Irr. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Heintzen v. Binninger, 79 Cal. 5, 21 Pac. Rep. 377; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Ball v. Kehl, 95 Pac. Rep. 606, 30 Pac. Rep. 780; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Natoma W. Co. v. Hancock, 101 Cal. 42, 31 Pac. Rep. 112, 35 Pac. Rep. 334; Baker v. Brown, 55 Tex. 377; Higuera v. Del Ponte, 4 Cal. App. 13, 88 Pac. Rep. 808; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

7 Collins v. Gray, 3 Cal. App. 723, 86 Pac. Rep. 983, where it is said: "In addition, the Court finds that for more than five years the use by the plaintiff was uninterrupted, which of itself comprehends a continuous use to the extent required."

8 "It is true that in Cave v. Crafts, 53 Cal. 135, it is said that the adverse use must be peaceable. But that means no more, as the opinion itself explains, quoting Wood on Nuisances, than that it must be uninterrupted." Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

9 Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Bree v. Wheeler, 129 Cal. 145, 61 Pac. Rep. 782; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Cave v. Crafts, 53 Pac. Rep. 135; Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205; Authers v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439; Mason v. Yearwood, 58 Wash. 276, 108 Pac. Rep. 608; Gallagher v. Montecito Valley Water Co., 101 Cal. 245, 35 Pac. Rep. 770; Rice v. Meiners, 136 Cal. 292, 68 Pac. Rep. 817; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. Rep. 952; Guttierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; *Id.*, 151 Cal. 587, 91 Pac. Rep. 395; Boyntan v. Longley, 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781; Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Center Creek v. Lindsay, 21 Utah 192, 60 Pac.

tion" and "limitation" are convertible terms, and therefore a plea of the proper statute of limitations is a good plea of a prescriptive right.[10]

As to what constitutes a continuity of user of a water right, ditch, or canal, or other works depends upon the nature and character of the right claimed. The adverse user only during the season when the water is needed constitutes a sufficient continuous user of either the water or the easement used in connection therewith, as the omission to use the water when it is not needed by the claimant does not break the continuity of the user as far as acquiring a right by prescription is concerned. Water for irrigation, for example, is not needed at all seasons of the year; and, again, it may not be needed every day of the irrigating season. In general, it may be said that the right to its use may be acquired adversely, as it may be acquired by appropriation by periods of time.[11] If whenever the claimant needs the water from time to time, he makes use of it, whether the use be every day, or once every week, or twice a month, or whenever his needs require it, this is a continuous use.[12] But where the interruption in the continuity of the use

Rep. 559; Crawford etc. Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Talbott v. Butte City etc. Co., 29 Mont. 17, 73 Pac. Rep. 1111; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Lara v. Sandall, 52 Wash. 53, 100 Pac. Rep. 166; Haas v. Chussard, 17 Tex. 588; Evans v. Scott, 37 Tex. Civ. App. 373, 83 S. W. Rep. 874.

10 Alhambra etc. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Campbell v. West, 44 Cal. 646; Frederick v. Dickey, 91 Cal. 360, 27 Pac. Rep. 742.

11 For appropriation by periods of time, see Sec. 786.

12 "The correct rule as to continuity of user to give a presumptive right to an easement, and what shall constitute such a continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because the water does not flow in it every day in the year. The party claimant does not need the ditch every day in the year, and the law does not require him, to constitute continuity of use, to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as continuous use." Hesperia etc. Co. v. Rogers, 83 Cal. 10, 23 Pac. Rep. 196, 17 Am. St. Rep. 209, citing Bodfish v. Bodfish, 105 Mass. 317.

In California, a finding that for more than five years plaintiff and others used a pipe line as often as required by them for irrigating pur-

is caused by the acts of the party against whom the adverse user is running, and not from the claimant's own free will, no right can be acquired by prescription.[13] Again, a mere "scrambling possession" of the water first by one claimant and then by another gives no right by prescription to any party, for the reason that the continuity of the use is broken.[14]

§ 1053. Elements necessary—The adverse user must be continuous—Interruption of user.—An interruption of an adverse user by the owner of the right may be made in several ways, and thus prevent a permanent right from being acquired by prescription. It may be made by the shutting off of the water at the time the claimant needs it.[1] This is true even though the claimant immediately thereafter turned the water back into his own ditch.[2]

poses, constituted a sufficient finding of continuity of user. Collins v. Gray, 3 Cal. App. 723, 86 Pac. Rep. 983.

See, also, Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60; McDougal v. Lame, 39 Ore. 212, 64 Pac. Rep. 864; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Jordan v. Lang, 22 S. C. 159; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678.

13 Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255; Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205.

14 "A mere scrambling possession of the water, or the obtaining of it by force or fraud, gives no prescriptive right." Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 91.

See, also, Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836, where the water was used first by one claimant and then by the other, "but the possession of none of the claimants was continuous, or of such a character as to constitute adverse possession against the others."

See, also, cases cited in the following notes.

1 No title to water rights accrued by adverse possession, where the plaintiff annually interrupted defendant's use. Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255; Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205; Cave v. Crafts, 53 Cal. 135; Baker v. Brown, 55 Tex. 377; Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523.

2 Authers v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439.

"Among the defenses set up in the several answers were pleas of the statute of limitations and rights by prescription. Under such pleadings any evidence which tended to show an interruption of possession was proper and competent." Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

But the authorities hold that there must be some open act of the owner to prevent the statute from running, and that the mere verbal disputing of the right of the claimant by the owner is not sufficient.[3] In a recent action in Oregon, where the owner clandestinely and without the knowledge of the adverse claimant forcibly destroyed the works conducting the water, it was held not to break the continuity of the user.[4] Of course, an action brought by the owner against the adverse claimant, seeking to enjoin him from diverting the water, or in ejectment, or seeking to adjudicate the rights of the parties to the water or other property in question, is such an interruption that it will prevent the running of the statute. This may be regarded as the safest and best proceeding for the protection of his rights.[5] But a suit by a stranger against the adverse claimant does not affect or interrupt his adverse use of the water or other property as against the real owner not a party to the suit.[6]

Of course, any acknowledgment of the owner's superior right by the adverse claimant during the statutory period breaks the continuity of the adverse possession, as far as acquiring a right by prescription is concerned.[7]

3 Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Higuera v. Del Ponte, 4 Cal. App. 13, 88 Pac. Rep. 808; McGeorge v. Hoffman, 133 Pa. 381, 19 Atl. Rep. 413.

Continuity of holding by persons who divert water is not interrupted by objection being made thereto, no attention being paid to the objection. Oregon etc. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701, where the Court said: "The objection amounted to nothing more than the mere denial of the defendant's right, and this was insufficient."

4 Brattain v. Conn, 50 Ore. 156, 91 Pac. Rep. 458, where the Court said: "It was a clandestine and secret invasion of their rights, and we do not understand that an entry by stealth and without the knowledge of the party in possession is sufficient to break the continuity necessary to constitute or establish a right by prescription."

5 "Just before the expiration of the five years the use was 'interrupted' by the bringing of the action in ejectment, and this interruption, though it did not break the continuity of use until final judgment and writ of possession, stopped the running of the statute." Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

6 Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

See, also, actions for the protection of the right, Secs. 1596-1659.

7 Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; Ledu v. Jim Yet Wa, 67 Cal. 346, 7 Pac. Rep. 731; Rhodes

§ 1054. Elements necessary—The taxes must be paid by adverse claimant.—The fifth and last essential necessary, under our classification, to acquire the rights under discussion by prescription is that during all of the prescriptive period, if any taxes are assessed against the property claimed by adverse user, they must have been paid by the adverse claimant. This rule applies to water rights as well as to ditches, canals, or other works used in utilizing the water, and of which there has been an adverse possession for the prescriptive period with all of the other essentials discussed in the preceding sections.[1] So where the water rights are assessed separate and apart from the lands upon which the water is applied, in order to acquire title by prescription the taxes must be paid by the claimant.[2] But it has been the policy in a number of the States and Territories not to assess water rights or the works used in connection therewith, in certain cases, for the reason that the use of the water when used upon the land so materially increases its value that the land only is assessed. Therefore in jurisdictions where this is the case, water rights and the works necessary therefor the element of the payment of taxes may be considered as eliminated from the essentials necessary to acquire title by prescription. But in jurisdictions where they may be assessed, the payment of taxes by the adverse claimant is an essential to the acquisition of the right in this manner. Where, however, the water rights and works are not assessed, the payment of taxes need not be shown,

v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884.

See, also, that adverse possession can not be based upon permission or license, Sec. 985.

1 See Secs. 1048-1053.

In California it is held that since the passage of the proviso to Section 325 of the Code of Civil Procedure in 1878, the payment of taxes must be made. "Section 325 of the same code makes the additional requirement of the payment of all levied and assessed taxes." Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

See, also, Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; McNoble v. Justiniano, 70 Cal. 395, 11 Pac. Rep. 742; Lux v. Haggin, 69 Cal. 255, 451, 4 Pac. Rep. 919, 10 Pac. Rep. 674; St. Helena W. Co. v. Forbes, 62 Cal. 182, 45 Am. Dec. 659.

2 Swank v. Sweetwater Irr. Co., 15 Idaho 583, 98 Pac. Rep. 297; Frederick v. Dickey, 91 Cal. 360, 27 Pac Rep. 742.

and may be considered as eliminated from the special cases of this nature as an essential element.[3]

The acquisition of a right of way for a ditch or canal by prescription is not defeated by the failure of the claimant to pay taxes assessed against the land, if no taxes were separately assessed against the right of way.[4] And, again, where there is no separate assessment of these property rights, but they are assessed with the land which they benefit, and whose value is enhanced by the use of the water, the payment of the taxes during the prescriptive period of the land benefited is sufficient to answer the requirement.[5]

§ 1055. Pleading and proof to establish a claim by prescription.—Upon the question of pleading in cases where one of the parties to a suit relies upon adverse possession amounting to prescription, the authorities are almost unanimous to the effect that it must be specially pleaded by a defendant;[1] but it is held that a general allegation of ownership is sufficient as far as the pleading of the plaintiff is concerned.[2] This question, however, will be more thoroughly discussed in another portion of this work when we come to the question of pleadings.[3]

In the chapter upon the subject of the adjudication of water rights we will discuss the question of the proof necessary to establish a claim by prescription.[4] Suffice it to say here that where one claims a water right or an easement by adverse possession and user amounting to prescription, he has the burden of proving that there

[3] Heilbron v. Last Chance W. Co., 75 Cal. 117, 17 Pac. Rep. 65; Hesperia etc. Co. v. Rogers, 83 Cal. 10, 23 Pac. Rep. 196, 17 Am. St. Rep. 202; Onete v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; *Id.*, 89 Cal. 63, 26 Pac. Rep. 788; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Lucas v. Provines, 130 Cal. 270, 62 Pac. Rep. 509.

[4] Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Heilbron v. Last Chance W. Co., 75 Cal. 117, 17 Pac. Rep. 65; Ross v. Evans, 65 Cal. 439, 4 Pac. Rep. 443; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. Rep. 952; Frederick v. Dickey, 91 Cal. 360, 27 Pac. Rep. 742; Cavanaugh v. Jackson, 99 Cal. 672, 34 Pac. Rep. 509.

[5] Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Frederick v. Dickey, 91 Cal. 360, 27 Pac. Rep. 742.

[1] State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; American etc. Co. v. Bradford, 27 Cal. 361, 15 Morr. Min. Rep. 190.

[2] Montecito W. Co. v. Santa Barbara, 144 Cal. 494, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

[3] See Chap 78.

[4] See Chap. 78.

has been present all of the essential elements for the full period of time required by the law of the State or Territory where the claim is made,[5] including the proof of its hostile character, and his evidence must be clear and convincing.

§ 1056. **Extent of right acquired where prescriptive right is complete.**—The right acquired by prescription is only commensurate to the rights enjoyed during the full prescriptive period; and the extent of enjoyment measures the permanent right. The rule declared by the authorities is that the rights of the party who has acquired a prescriptive title, either to a water right or to an easement for the same over the lands of others, "and the rights of the one against whom the title is acquired are mutual, and each is entitled to demand that the prescriptive right be exercised in the same manner that it was exercised while it was being acquired."[1] The claimant can not, on the one hand, gain a right which is in excess of his actual possession and user during the period of time that the statute was running. Therefore, a right acquired for watering stock or for domestic purposes must be confined to the

[5] For the essentials of a prescriptive right, see Secs. 1048-1054.

[1] Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

See, also, Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396; Drake v. Russian River L. Co., 10 Cal. App. 654, 103 Pac. Rep. 167; Mason v. Yearwood, 58 Wash. 276, 108 Pac. Rep. 608; Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922; Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989; Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 434, 3 Am. St. Rep. 781; Kern Island etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052; Hall v. Carter, 33 Tex Civ. App. 230, 77 S. W. Rep. 19; Collins v. Gray, 3 Cal. App. 723, 86 Pac. Rep. 983; North Fork etc. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69; Colegrove W. Co. v. Hollywood, 151 Cal. 425, 90 Pac. Rep. 1153, 13 L. R. A., N. S., 904; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. Rep. 224; McDougal v. Lame, 39 Ore. 212, 64 Pac. Rep. 864; Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Hoyt v. Hart, 149 Cal 722, 87 Pac. Rep. 569; Oliver v Agasse, 132 Cal. 297, 64 Pac. Rep. 410; Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; Hayes v. Silver Cr. etc. Co., 113 Cal. 142, 45 Pac. Rep. 191; Centerville etc. Co. v. Sanger Lum. Co., 140 Cal. 385, 73 Pac. Rep. 1079; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Gregory v. Nelson, 41 Cal. 278; Miller v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

amount of water actually consumed during the prescriptive period, and will not confer any right to use any additional water for any other purpose.[2]

Again, the mere right acquired to the use of an easement over the lands of another does not entitle the claimant to the use of water as against the rights of the owner; but there must also be a right to the use of the water acquired by the adverse possession and user.[3] But so long as the claimant keeps within the limits of the right which he has acquired, or is acquiring he may make such changes in the purpose or manner of his use as he sees fit.[4] But any further invasion of the rights of the former owner may be enjoined by him; or, if continued for the statutory period, accompanied with all the essential elements necessary, will of itself ripen into an independent prescriptive right.

Upon the other hand, the former owner can not restrict the right to the use acquired by the adverse claimant.[5] Therefore, when a prescriptive right has been once acquired, the former owner can not impose some condition to its future use in the manner and to the extent of the right acquired.

It is well settled that in the case of the acquisition of the right to easements by prescription, the owner of the servient estate may use his property in any manner which will not conflict with the enjoyment of the easement. As was said in a late California case:[6] "It is well settled, as a general proposition, that the owner of the servient estate may use his property in any manner

[2] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Cooper v. Great Falls etc. Co., 94 Tenn. 588, 30 S. W. Rep. 353; Mastenbrook v. Alger, 110 Mich. 414, 68 N. W. Rep. 213; Bashore v. Mooney, 4 Cal. 276, 87 Pac. Rep. 553; Swank v. Sweetwater Irr. Co., 15 Idaho 583, 98 Pac. Rep. 297; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136; Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

[3] Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

[4] Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504.

[5] Bliss v. Rice, 17 Pick. 23 (Mass.); Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162; Oliver v. Agasse, 132 Cal. 297, 64 Pac. Rep. 401; Gregory v. Nelson, 41 Cal. 278.

[6] Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569.

and for any purpose consistent with the enjoyment of the easement."[7]

§ 1057. **Effect of adverse user amounting to prescription.**—The effect of a right acquired by prescription is to vest in the claimant the title to the same as completely as if conveyed to him by deed from the original owner. And, as stated in a previous section, there is a fiction of law indulged in that he acquired his title in this manner.[1] In other words, there is a presumption that the original owner granted the right to the claimant.[2] As laid down in a California case,[3] the adverse possession for a period of time prescribed by the statute of limitations not only bars the remedy of the former owner, but extinguishes his title and vests a perfect title in the adverse user.

One effect of acquiring a title either to a water right or an easement for the same is that the adverse claimant will be as fully

[7] See, also, Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223.

[1] For prescription, in general, see Sec. 1034.

[2] "No principle of law is better established than that, when title is once acquired by adverse possession for the statutory period, such title remains in the person so acquiring it as completely as if conveyed to him by deed from the owner." Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Joy v. Stump, 14 Ore. 361, 12 Pac. Rep. 929.

The rule that adverse possession of land for a period of time prescribed by the statute of limitations not only bars the remedy, but extinguishes the right of the person holding the true written title and vests a perfect title in the adverse holder, applies to the prescriptive right to divert water. Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

See, also, Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022; Pearson v. Dryden, 28 Ore. 350, 43 Pac. Rep. 166; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Woodward v. Brown, 109 Cal. 12; Yankee Jim's etc. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Alhambra etc. W. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Evans v. Ross, 67 Cal. 19, 8 Pac. Rep. 88; Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Woodward v. Farris, 109 Cal. 12, 41 Pac. Rep. 781; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

[3] Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

protected in his right as though his title to the same was acquired in some other manner. This is both the English and American rule.[4]

An action may be brought to quiet title by the claimant [5] or any other action will lie in his behalf necessary to protect his right.[6] Upon the other hand, no right of action for the continued user by the adverse claimant exists in favor of the original owner after the statute has run for the full prescriptive period, his right of action being then barred.[7]

After a right by prescription has once been acquired, the continuance of the use is held to be no longer a cause of action as a continuing trespass; but the title having once vested is as complete as any other.[8]

§ 1058. **The question of priority.**—There are very few decisions upon the question of the priority of rights which have been acquired by prescription. However, the following are our views upon the subject:

The title acquired by one by adverse user amounting to prescription is based upon the presumption of a grant of the right so acquired. As was said in a late Oregon case:[1] "No principle of law is better established than that, when title is once acquired by adverse possession for the statutory period, such title remains in the person so acquiring it as completely as if conveyed to him by deed from the owner."[2] Therefore, upon the question of the right ac-

4 Holker v. Porritt, L. R. 10 Exch. 59, 44 L. J. Exch. N. S. 52, 33 L. T. N. S. 125, 23 Week. Rep. 400; affirming *Id.*, L. R. 8 Exch. 107, 42 L. J. Exch. N. S. 85, 21 Week. Rep. 414.

5 Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553.

6 For remedies, See Chaps. 78-83.

7 Wutchumna etc. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

After the statute has once run, the continuance of the use is no longer a cause of action as a continuing trespass. Patterson v. Ft. Lyon etc. Co., 36 Colo. 175, 84 Pac. Rep. 807.

But see the case of Henshaw v. Salt River Valley C. Co., 9 Ariz. 418, 84 Pac. Rep. 908, holding to the contrary, and also contrary to all authority upon the subject.

8 See Patterson v. Fort Lyon etc. Co., 36 Colo. 175, 84 Pac. Rep. 807.

See, also, Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985.

But see Henshaw v. Salt River etc. Co., 9 Ariz. 418, 84 Pac. Rep. 908.

1 Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

2 See, also, Joy v. Stump, 14 Ore. 361, 12 Pac. Rep. 929.

quired, it depends upon what the original owner had to grant. If he claimed as a riparian proprietor, there was no priority of right, for the reason that the common law recognizes no priority of rights as between riparian proprietors.[3] In such a case, therefore, the claimant by prescription can take only what the riparian owner had to grant; that is to say, the right to the use of the water regardless of any priority. The rule in such a case, as correctly laid down by the Oregon Court, is to the effect that the priority begins with the time when the claimant begins to divert the water, as is the case of an appropriator by actual diversion.[4] In other words, there is an extinguishment of the old riparian right and a substitution of the new prescriptive right, the priority of which begins at the time of the actual diversion.[5] Upon the other hand, if the original owner acquired his right by appropriation, having a certain fixed date of priority, and he grants to another by proper deed a portion of his rights, the grantee will take the right with the original priority.[6] So in the case of prescriptive right against the rights of an appropriator which prescriptive right vests in the grantee the title "as completely as if conveyed to him by deed from the owner,"[7] it must logically follow that the prescriptive owner takes all the title that the original owner had, including his priority of right, and in any future adjudication of such right the decree should award the original priority of right to the prescriptive owner. Such we believe to be the only logical and common-sense view of this subject.

[3] See Sec. 518.

[4] For appropriation by actual diversion, see Sec. 730.

See, also, Oregon Const. etc. Co. v. Allen etc. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524.

[5] Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

[6] See Sec. 995.

[7] Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

CHAPTER 55.

RIGHTS ACQUIRED BY EMINENT DOMAIN.

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§ 1096. Actions for condemnation—Verdict—Judgment.
§ 1097. Actions for condemnation—Appeal and review of the judgment.
§ 1098. Nature of title acquired.

§ 1059. Scope of chapter.—As the right of acquiring property for public purposes has been more frequently exercised for the acquisition of rights of way for ditches, canals, and other works over the lands of others, we will divide this chapter into three parts: First, a short discussion of the general right to exercise the power of eminent domain; second, the acquisition of rights of way; and, third, the acquisition of water rights.

The right of eminent domain relative to the subterranean or underground waters, and also to underground reservoirs, will be discussed in a separate chapter.[1]

§ 1060. Power of the United States to exercise the right of eminent domain.—Eminent domain is the right which the Government retains over the estates of individuals to appropriate them to the public use. It is the superior right of property subsisting in the sovereignty, by which private property may, in certain cases, be taken, or its use controlled for the public benefit, without regard to the consent of the owner, and even against his wishes.[1] The right of eminent domain is an incident of sovereignty and requires no constitutional recognition.[2] This right of the State is univer-

1 For subterranean waters, see Chaps. 59-62, Secs. 1148-1211.

1 Bouvier, Law Dict., Sub., Eminent Domain; Angell on Water Courses, Sec. 457.

2 United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015, 3 Sup. Ct. Rep. 346, where the Supreme Court held that: The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution and in the Constitution of the several States for just compensa-

sally acknowledged, and to this power "men have impliedly yielded, though it has not been expressly reserved."[3] But it is a rule founded in equity and laid down by jurists, as also an acknowledged principle of universal law, that no estate can be condemned for this purpose without due process of law and just compensation to the owner thereof. And for the protection of the individual in his property rights the Fifth Article of the Amendments to the Constitution of the United States was added, which provides: "Nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."[4] "Due process of law" in the first clause refers to the law of the land, which derives its authority from the legislative power conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.[5]

The clause that private property shall not be taken for public use without just compensation contains an implied recognition of the right of eminent domain beyond what may justly be implied from the express grants of power. This amendment admits the principle that private property may be taken for public use if just compensation be made.[6] The clause is also a limitation upon the

tion for the property taken is merely a limitation upon the use of the power.

See, also, 1 Blackstone Comm. 139; Mississippi etc. Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Varick v. Smith, 9 Paige 547; Spring v. Russell, 7 Me. 273; Day v. Stetson, 8 Me. 365; Gould on Waters, Chap. 8; Vattel, Chap. 20, Sec. 244.

[3] Vattel, Chap. 20, Sec. 34.

[4] This amendment applies only to the powers of the United States through its Acts of Congress. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

[5] Hurtado v. People of California, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111.

See, also, for further discussion on the subject of due process of law, Secs. 1076-1078.

[6] The right of eminent domain exists in the Federal Government, and may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449.

See, also, Chesapeake etc. Co. v. Key, 3 Cranch 599, 5 Fed. Cas. No. 2,649; Bonaparte v. Camden R. Co., Baldw. 205, 3 Fed. Cas. No. 1,617; 8 Op. Atty. Gen. 333; Smith v. United States, 32 Ct. Cl. 307; *In re* Rugheimer, 36 Fed. Rep. 369; Shoemaker v. United States, 147 U. S. 282, 37 L. Ed. 170, 13 Sup. Ct. Rep. 361.

That this amendment applies only

use of the power.[7] Such, in brief, are the rights of the United States to exercise the power of eminent domain. The right of the respective States to exercise the same power will be discussed in the following sections.[8]

§ 1061. Power of the States to exercise the right of eminent domain.—The respective States of the Union have the same general powers to exercise the right of eminent domain as have the United States.[1] That private property may be taken by a State under the powers of eminent domain, under due process of law, and with just compensation, is beyond all question. The exercise by the State of its sovereign right of eminent domain can not be interfered with by the United States.[2] But not only are the rights of the individual protected under the provisions of the Fifth Amendment of the Constitution of the United States, discussed in the previous section,[3] but Section 1 of the Fourteenth Amendment of the Constitution of the United States also adds a further protection by providing: "Nor shall any State deprive any person of life, liberty, or property without due process of law." This clause operates to extend to the citizens and residents of the several States the same protection against arbitrary legislation by the State affecting life, liberty, and property, as is offered by the Fifth Amendment against similar legislation by Congress.[4] However, the right

to Acts of Congress, see Fallbrook Irr. Co. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

7 United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015, 3 Sup. Ct. Rep. 346; High Bridge Lum. Co. v. United States, 69 Fed. Rep. 320, 16 C. C. A. 460; *In re* Montgomery, 48 Fed. Rep. 896; Smith v. United States, 32 Ct. Cl. 307; Meriam v. United States, 29 Ct. Cl. 257.

8 See Secs. 1061-1063.

1 For powers of the United States, see Sec. 1060.

And even the Territories were given this power under the authority of their organic Acts.

The Territory of Arizona, though not possessing sovereignty, was clothed with authority to provide for the exercise of the power of eminent domain by the clause in the organic Act which says: "The legislative power of this Territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Oury v. Goodwin, 3 Ariz. 255, 26 Pac. Rep. 376.

See, also, Guttierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

2 Mississippi etc. Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

3 See Sec. 1060.

4 Hibben v. Smith, 191 U. S. 310, 48 L. Ed. 195, 24 Sup. Ct. Rep. 88.

of eminent domain, that is, the right to take private property for public uses, appertains to every independent government, whether that government be the United States or one of the States of the Union. It requires no constitutional recognition; it is an attribute of sovereignty.[5] But, upon the other hand, for a State legislature to authorize the taking of private property, against the consent of the owner, either for a right of way for ditches and canals or for any other purpose, in no way public, and without due process of law, and without just compensation to the owner thereof, would be unconstitutional, as being contrary to the provisions of both the Fifth and the Fourteenth Amendments of the Constitution of the United States.[6]

In Texas it is held that the Act of the legislature of 1895,[7] authorizing the organization of irrigation corporations and giving them power of eminent domain, and providing that the Act shall apply to those portions of the State in which, by reason of insufficient or irregular rainfall, irrigation is beneficial for agricultural purposes, does not render the Act void for indefiniteness as to the territory to which it applies.[8]

§ 1062. Protection under State constitutions.—But the protection to the property rights of the individual in this respect does not rest solely with the Constitution of the United States. The declaration of rights in the constitutions of the respective States have provisions similar to those of the Fifth and Fourteenth Amendments of the Constitution of the United States.[1] For example, the

French v. Barber Asphalt Pav. Co., 181 U. S. 324, 45 L. Ed. 879, 21 Sup. Ct. Rep. 625.

[5] Mississippi etc. Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

[6] Fallbrook Irr. Dist. v. Bradley, *supra;* Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. Rep. 773, 8 L. R. A., N. S., 567; *Id.*, 37 Mont. 60, 94 Pac. Rep. 631, 10 Am. Cas. 1055; Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 41 L. Ed. 489, 17 Sup. Ct. Rep. 130; *In re* Tuthill, 163 N. Y. 133, 57 N. E. Rep. 303, 49 L. R. A. 781.

As to what constitutes a public use, see Secs. 1065-1074.

For due process of law, see Secs. 1076-1078.

For just compensation, see Secs. 1079-1083.

[7] Laws 1895, p. 21, Chap. 21; Rev. Stat. 1895, Tit. 60, Chap. 2.

[8] Borden v. Trespalacios etc. Co., 98 Tex. 494, 82 S. W. Rep. 461, 86 S. W. Rep. 11, 107 Am. St. Rep. 640.

[1] See preceding sections, Nos. 1060, 1061.

Utah Constitution, Article I, Section 7, provides: "No person shall be deprived of life, liberty, or property without due process of law." And Section 22 of the same article provides: "Private property shall not be taken or damaged for public use without just compensation." In the California constitution, Article I, Section 13, is to be found the following: "No person shall be," etc., "nor be deprived of life, liberty, or property without due process of law."[2]

These constitutional provisions of the United States,[3] supplemented and reinforced by the provisions in the State constitutions, afford full and ample protection to the property rights of the individual in any jurisdiction; and should these rights be attacked in any manner against the constitutional provisions, relief may always be had by recourse to the courts. We will now discuss the elements which must necessarily be present in order to take private property for public use, having special reference to the subject in hand, the acquisition of rights of way amounting to a permanent easement by the power of eminent domain over the private lands of another and against his consent for ditches and canals for the purpose of conducting water to the place of use.[4]

§ 1063. Rights of way—Public use—Effect of State statutes defining a use to be public.—We come now to the important question as to what constitutes a public use for which private property, especially rights of way over the lands of another for ditches and canals, under the power of eminent domain, may be taken against the consent of the owner of the lands. And, incidentally, we will say in passing that the same principles as to the public use apply where the property is taken by some other means than that of eminent domain, such as by taxation, assessment, or other burden upon property.[1] In the statutes of all the States are to be found detailed

[2] These provisions of the various constitutions will be set out in Part XIV, the constitution and laws of the various States.

[3] See Sec. 1060.

[4] For the right to the use of water acquired by eminent domain, see Secs. 1087, 1088.

[1] Fallbrook Irr. Co. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948, where the question was the assessments levied under the Wright Act in support of an irrigation district.

The Fourteenth Amendment of the Federal Constitution protects the citizen against the taking of his property for any other than a public use,

provisions as to when and for what public uses the power of eminent domain may be exercised. And only such uses as are enumerated by the statute are public uses for which an action for condemnation will lie.[2] The procedure or method of exercising the right is also prescribed in detail.[3]

A State statute defining a certain use to be a public one, and, therefore, within the constitutional limitations,[4] is by no means conclusive upon the subject. We may also say the same thing respecting a State statute which has been construed by the Supreme Court of the State as being within the constitutional limitations as to the use defined to be a public one. The matter involving such a grave constitutional question may be taken to the Supreme Court of the United States, and its decision alone can be regarded as conclusive as to whether a certain use defined by a State statute as a public one, for which the right of eminent domain may be exercised, is in fact such a use. But in deciding this question the Supreme Court of the United States itself holds that the declaration of the people and the legislature of a State, in their constitutions and statutes, that a certain use is a public one, especially when so decided by the highest courts of the States that it is so, are to be treated with very great respect by the Supreme Court of the United States, but that they are not absolutely binding upon that Court as to what constitutes in fact a public use, but that it is for that Court to determine finally what use constitutes a public use within the constitutional limitations. The question in these cases also arises as to whether the Federal Constitution has been violated, and thus it is for the Supreme Court of the United States to

either under the guise of taxation, or by the assumption of the right of eminent domain. *In re* Tuthill, 163 N. Y. 133, 57 N. E. Rep. 303, 49 L. R. A. 781.

For the taking of the right to the use of water by the power of eminent domain, see Secs. 1087, 1088, 1098.

2 Hercules W. Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. Rep. 401.

An Act authorizing the organization of irrigation corporations, and giving them the power of eminent domain, and providing that the Act shall apply to those portions of the State in which, by reason of insufficient or irregular rainfall irrigation is a necessity, does not render the Act void for indefiniteness as to the territory to which it applies. Borden v. Trespalacios etc. Co., 98 Tex. 494, 82 S. W. Rep. 461, 86 S. W. Rep. 11, 107 Am. St. Rep. 640.

3 For actions for condemnation, see Secs. 1092-1097.

4 For the constitutional limitations, see Sec. 1062.

make the final and conclusive decision in accordance with its views of constitutional law.[5] And, therefore, if the Act of a State legislature, as construed by its highest court, conflicts with the Federal Constitution, it is the duty of the Circuit Court and the Supreme Court of the United States to so decide, and thus enforce the provisions of the Federal Constitution.[6] Therefore, if an Act violates any provision, expressed or properly implied, of the Federal Constitution, it is the duty of the Supreme Court of the United States to so declare it; but if it does not there is no justification for the Federal Courts to run counter to the decisions of the highest court of the State upon questions involving the construction of the State statutes or constitution on any alleged ground that such decisions are in conflict with the sound principles of general constitutional law. And in exercising that jurisdiction by the Federal Courts it is their duty to be guided by the decisions of the highest State court upon the construction of the statute as to whether it was or was not in violation of the Federal Constitution, and also upon the question whether as construed the statute violated any provision of the State constitution.[7]

[5] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

Under the Montana constitution, Article 3, Section 15, the flooding of land by a dam erected for the purpose of supplying electric power to mines and smelters and to the public generally, and for supplying water for irrigation purposes, is for a public use, authorizing condemnation of such land. And it is there held that every reasonable intendment is in favor of the constitutionality of a law, and before it can be pronounced invalid the invalidity must be made manifest beyond a reasonable doubt. Spratt v. Helena etc. Co., 37 Mont. 60, 94 Pac. Rep. 631; see, also, for same case, 35 Mont. 108, 88 Pac. Rep. 773, 8 L. R. A., N. S., 567, 10 Am. & Eng. Ann. Cas. 1055.

[6] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Shelby v. Guy, 24 U. S. 11 Wheat. 361, 6 L. Ed. 495; Nesmith v. Sheldon, 48 U. S. 7 How. 812, 12 L. Ed. 945; Van Rensselaer v. Kearney, 52 U. S. 11 How. 297, 13 L. Ed. 703; Webster v. Cooper, 55 U. S. 14 How. 488, 14 L. Ed. 510; Leffingwell v. Warren, 67 U. S. 2 Black 599, 17 L. Ed. 261; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945; Detroit v. Osborne, 135 U. S. 492, 34 L. Ed. 260, 10 Sup. Ct. Rep. 1012.

[7] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Cal. 948.

"We are always, where it can be fairly done, strongly inclined to hold with the State Courts, when they uphold a statute providing for such condemnation." Clark v. Nash, 198 U.

§ 1064. Private property can not be taken for strictly private use.—The authorities are unanimous upon the proposition that private property of another can not be taken by a person under the power of eminent domain for a strictly private use by that person and without any benefit either to the general public at large or to a portion thereof, although full compensation may be made or tendered.[1]

The Fourteenth Amendment of the Federal Constitution, in prohibiting a State from depriving any person of life, liberty, or property without due process of law, protects the citizen against the taking of his property for any other than a public use, even for full compensation, by the assumption of the right of eminent domain.[2] Hence it must necessarily follow that a right of way for a ditch or canal can not be acquired in this manner over the lands

S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

"The construction by a State Court of law of the State as authorizing the Court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court on writ of error to that Court." Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; State *ex rel.* Manhattan Const. Co. v. Barnes, 22 Okla. 191, 97 Pac. Rep. 1000.

1 "The sovereign power is incapable of conferring any right to interfere with private property, except it be needed for public objects. To take land for any other than a public use; to take it from one citizen and to transfer it to another, even for full compensation, would be to violate the contract by which the land was originally granted by the Government." *In re* Tuthill, 163 N. Y. 135, 57 N. E. Rep. 303, 49 L. R. A. 781, and note.

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Flemming v. Hull, 73 Iowa 598, 35 N. W. Rep. 673; Embury v. Connor, 3 N. Y. 511, 53 Am. Dec. 325; State v. Driggs Drainage Co., 45 N. J. L. 91; *In re* Niagara Falls R. Co., 108 N. Y. 375; Beekman v. Saratoga etc. R. Co., 3 Paige 45 (N. Y.), 22 Am. Dec. 679; Bloodgood v. Mohawk etc. R. Co., 18 Wend. 9, 31 Am. Dec. 313; Bankhead v. Brown, 25 Iowa 540; Liskeard Union v. Liskeard W. Co., 7 Q. B. 505; *In re* Albany Street, 11 Wend. 149, 25 Am. Dec. 618; People *ex rel.* Herrick v. Smith, 21 N. Y. 598.

2 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; *In re* Tuthill, 163 N. Y. 133, 57 N. E. Rep. 303, 49 L. R. A. 781.

For the powers of the State to exercise the right of eminent domain, see Secs. 1061, 1063.

of another where the use to which the water is put is purely private, and in which no portion of the public is interested or benefited thereby. It is upon this theory that some of the courts hold, under their constitutions, that the right of eminent domain can not be exercised to condemn lands for ditches and canals where the object is to use the water in working the mining claims of those seeking the right of way, and that, too, even although incidentally water is to be sold for general mining and irrigation purposes.[3] As held by a late case in California, the business of mining for the benefit of the mine owner is a private enterprise, and the right of eminent domain can not be invoked in the aid of it.[4]

§ 1065. What is a public use—Classification—Authorities.—Upon the question as to what constitutes a public use for which the power of eminent domain, within the constitutional limitations,[1] for the purpose of acquiring rights of way over the lands of others, the authorities, even in the arid States, are by no means harmonious. Again, there is no fixed rule of law by which this question can be determined. In other words, what is a public use can not always be determined by the application of purely legal principles. Upon an examination of the authorities upon this subject it will be found that there is a great diversity of opinion upon this most important question as to what constitutes a public use for which private property may be taken, either by the power of eminent domain or by taxation or assessments for some particular purpose. It is therefore impossible to reconcile these authorities and make them consistent with any definition of the term "public use," and no attempt will be made to do so. And neither does an appeal to the Supreme Court of the United States tend to reconcile the au-

3 Lorenz v. Jacobs, 65 Cal. 20, 3 Pac. Rep. 654; Consolidated etc. Co. v. Central Pac. R. Co., 51 Cal. 269; Dower v. Richards, 73 Cal. 477, 15 Pac. Rep. 105; Amador etc. Co. v. Dewitt, 73 Cal. 482, 15 Pac. Rep. 74.

4 Sutter County v. Nichols, 152 Cal. 688, 93 Pac. Rep. 872, 15 L. R. A., N. S., 616.

But a canal, if constructed for the sale and distribution of water for the general development of mining and agricultural interests along the line thereof, and not for the purpose merely of developing the mineral lands of the owners of such canal, is held to be a public use for which land may be condemned. Cummings v. Peters, 56 Cal. 593.

See, also, Spratt v. Helena etc. Co., 37 Mont. 60, 94 Pac. Rep. 631.

1 See Secs. 1067-1074.

thorities upon the subject as that Court, where there is no direct violation of the Constitution, as announced by it many times, will usually hold with the highest Court of the State as to whether a statute of the same as to what constitutes a public use for which the right of eminent domain may be exercised, is constitutional.[2] And it will be found upon examination that the decisions of the Supreme Court of the United States upon the subject as to what constitutes a "public use" are as irreconcilable with each other and any rule which may be formulated as are the decisions of the State courts which it follows.

But, although the authorities can not be reconciled upon the subject, they may be classified. And for this purpose they may be divided into three classes: First, those which hold that the use must be for all the public;[3] second, those which hold that the use is public when it promotes the interests of a certain portion of the community, although it may not directly benefit the public at large;[4] third, those which hold that a certain use by a private individual or corporation for his or its own private enterprise, when it indirectly benefits the public at large, constitutes such a use that it is a public use.[5]

§ 1066. What is a public use—Influence of locality.—It will also be noticed that in the decision of this question the courts have been largely influenced by the local conditions and necessities. And, therefore, what is deemed a public use in one State has been held by the courts of another State not to be such a use. As was said in a late Washington case:[1] "In determining the question of public use courts have always been influenced to a greater or

2 "Where the right of eminent domain is asserted under a State statute, we are always, where it can be fairly done, strongly inclined to hold with the State courts, when they uphold a statute providing for condemnation." Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

3 See Sec. 1067.

4 See Sec. 1068.

5 See Sec. 1069.

1 State *ex rel.* Tacoma Industrial Co. v. White River Power Co., 39 Wash. 648, 82 Pac. Rep. 150, 2 L. R. A., N. S., 842, 4 Am. & Eng. Ann. Cas. 987.

less extent by legislative declarations and local customs and conditions and local necessities."[2]

In the East and the South the drainage of lands is one of the paramount questions, and thereby establishing the health of the community indirectly, while at the same time the lands drained are made productive and thereby directly benefiting the owners. The "Mill Acts" of this portion of the country have also been considered, and in the main upheld, and thereby great manufacturing enterprises were permitted to take private property for what was deemed by the courts to be a public use by the general upbuilding of that portion of the country through the establishment of these manufacturing enterprises. In the Western States the reclamation of lands has been declared a public use, in the aid of which the right of eminent domain may be exercised, upon the theory that, although it may benefit the individual directly, the indirect benefit to the general public is greater by permitting the upbuilding and settlement of the country. Therefore, in the main, as to what constitutes a public use is a question of the necessities of any particular region of the country and the general benefit to the public either directly or indirectly, and regardless of the fact that some particular individual or group of individuals are more directly benefited than the general public.[3]

§ 1067. Public use—Authorities holding that the use must be for the entire public.—Under our classification, as stated in a previous section,[1] there is a long line of authorities, which hold that the power of eminent domain can not be exercised for any use which does not appertain to the general public; that is, the public

2 See, also, New Central Coal Co. v. George's Creek etc. Co., 37 Md. 537; Potlatch etc. Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, 118 Am. St. Rep. 233.

"The case of Strickley v. Highland Boy Mining Co., 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; affirming *Id.*, 28 Utah 215, 78 Pac. Rep. 296, 1 L. R. A., N. S., 976, 107 Am. St. Rep. 711, like the one it cites (Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 671, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 731, 1 L. R. A., N. S., 208), is based upon exceptional conditions, and is without application here." Shasta Pr. Co. v. Walker, 149 Fed. Rep. 568.

3 In the following sections, we will discuss the authorities under the above classification and in the order named.

See Secs. 1067-1069.

1 See Sec. 1065.

in general must have the right to the actual use in some way of the property appropriated. And it is also held that it is the right of individuals as a part of the public to use the property when the occasion requires. But it is not necessary that all of the public should have occasion for the use. These authorities also hold that the taking must be by the official representatives of the public, or by some one standing in the position of a public agent. In other words, this line of authorities holds that property is devoted to a public use when, and only when, the use is one which the public, in its organized capacity, to wit, the State, or some subordinate public or municipal organization, has the right to create and maintain, and therefore one which all the public has the right to demand and share in.[2] Hence, under this line of authorities it is held that the generation of electricity by a private corporation under no obligations to serve the public, and not organized to meet a public demand, is not a public use for which the power of eminent domain may be exercised, although the corporation is organized with the right to sell the generated power to the public.[3]

[2] Budd v. New York, 143 U. S. 517, 36 L. Ed. 247, 12 Sup. Ct. Rep. 468, 4 Inters. Com. Rep. 45; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. Rep. 1001, 66 L. R. A. 387; Borden v. Trespalacios etc. Co., 98 Tex. Civ. App. 494, 107 Am. St. Rep. 640, 82 S. W. Rep. 461, 86 S. W. Rep. 11; Board of Health v. Van Hoesen, 87 Mich. 533, 49 N. W. Rep. 894, 14 L. R. A. 114; Berrien Sprs. W. Co. v. Berrien Circuit Judge, 133 Mich. 48, 94 N. W. Rep. 397, 103 Am. St. Rep. 438; Varner v. Martin, 21 W. Va. 534; Pittsburg etc. R. Co. v. Benwood Iron Wks., 31 W. Va. 710, 8 S. E. Rep. 453, 2 L. R. A. 680; Southwest Mo. L. Co. v. Scheurich, 174 Mo. 235, 73 S. W. Rep. 496; *In re* Rhode Island etc. R. Co., 22 R. I. 457, 48 Atl. Rep. 591, 52 L. R. A. 879.

[3] The legislature can not make a private use public by calling it so, so as to justify an exercise of the power of eminent domain in its behalf; and neither a mere public convenience, nor the mere public welfare, will justify the exercise of the right. The mere creation and distribution of power for manufacturing enterprises are not a public use which will justify an exercise of the power of eminent domain. Brown v. Gerald, 100 Me. 351, 61 Atl. Rep. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526.

See, also, State *ex rel.* Harris v. Superior Court Thurston Co., 42 Wash. 660, 85 Pac. Rep. 666, 5 L. R. A., N. S., 554, where the Court held that, however much public policy demands it, or whatever the public benefit therefrom may be, it must be a use by the public or by some agency that is *quasi* public.

See, also, Healy Lum. Co. v. Morris, 33 Wash. 490, 74 Pac. Rep. 681, 99 Am. St. Rep. 684, 63 L. R. A. 820; State *ex rel.* Tacoma etc. Co. v. White River Pr. Co., 39 Wash. 648,

As will be noticed by the authorities cited, and many more which are cited in the cases referred to in our notes, this view might be termed the strict construction of the term "public use" for which the power of eminent domain may be exercised. Under this construction of the term the use must be for all of the public or any members of the public who wish to avail themselves of it and are in a position to do so. The use must also be brought into being by the State or some public agency. It will also be noticed that there is a close analogy between the reclamation of land by irrigation and its reclamation by drainage, and under this rule it is held that the State has no power to authorize the construction of a drainage ditch under the power of eminent domain over the private land of another, except when it be for the betterment of the public health or welfare.[4]

Under this theory a corporation or company may represent the general public. But "whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumed and pays for) every individual of the community or communities, farming neighborhood, or farming neighborhoods, to which he conducts it."[5]

82 Pac. Rep. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987; Avery v. Vermont Elec. Co., 75 Vt. 235, 54 Atl. Rep. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818; *In re* Barre W. Co., 72 Vt. 413, 48 Atl. Rep. 653; Fallsburg Pr. Mfg. Co. v. Alexander, 101 Va. 98, 43 S. E. Rep. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855, where it is held that the mere fact that its charter recognizes it as an "internal improvement company" is immaterial.

[4] The drainage of agricultural lands by "necessary drains, ditches, and dikes upon the lands of others, under proper restrictions, and upon just compensation," for which provision may be made by the general laws, under the New York constitution, 1894, is a taking of private property for private use in violation of the Fourteenth Amendment of the Constitution of the United States. *In re* Tuthill, 163 N. Y. 133, 57 N. E. Rep. 303, 49 L. R. A. 781, and note.

See, also, Coster v. Tide W. Co., 18 N. J. Eq. 54, where it is said that the taking of the property of one man and giving it to another is not making a law or rule of action; it is not legislation, it is simply robbery.

See, also, McQuillen v. Hatton, 42 Ohio St. 202; State *ex rel.* Utick v. Polk County, 87 Minn. 325, 92 N. W. Rep. 216, 60 L. R. A. 161, and note.

[5] Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

See, also, State *ex rel.* Wilson v. Superior Court, 47 Wash. 39, 92 Pac. Rep. 269; Borden v. Trespalacios etc. Co., 98 Tex. 494, 82 S. W. Rep. 461, 86 S. W. Rep. 11, 107 Am. St. Rep. 640; Colorado etc. Co. v. McFarland, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435; Hildreth v. Montecito Water Co., 139 Cal. 22, 72

§ 1068. Public use—Authorities holding that the use need not be for the entire public.—As stated in our classification of the authorities,[1] there is another long line of cases which hold that a use is a public one when it promotes the interests of a certain portion of the community. This rule can not be considered a modern one, but some of the early authorities hold to the effect that the use is a public one when it promotes the interest of a considerable portion of the community, although it might not benefit the public at large.[2] The later cases along this line hold that the power

Pac. Rep. 395; Crow v. San Joaquin Water Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213; Price v. Riverside etc. Co., 56 Cal. 433; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264.

1 See Sec. 1065.

2 Wyland v. Middlesex, 4 Gray 500; Boston Water Pr. Co. v. Boston R. Co., 16 Pick. 512 (Mass.); Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; Graff v. Baltimore, 10 Md. 544; Foster v. Park Commrs., 133 Mass. 321; Wurts v. Hoagland, 114 U. S. 606, 29 L. Ed. 229, 5 Sup. Ct. Rep. 1086; Hager v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945; Todd v. Austin, 34 Conn. 78; Aldridge v. Tuscumbia etc. R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 207; Hand Gold M. Co. v. Parker, 59 Ga. 419; Bradley v. New York etc. Co., 21 Conn. 294; Great Falls Mfg. Co. v. Fernald, 47 N. H. 444; Talbot v. Hudson, 16 Gray (Mass.) 417; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221; Boston & Roxbury Mill. Co. v. Newman, 12 Pick. 467, 23 Am. Dec. 622; Scudder v. Trenton etc. Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

"The use is public when it promotes a considerable portion of the community, although it may not benefit the community at large." Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585, citing Kinney on Irr., 1st Ed., Sec. 94.

"The term 'public use' implies 'the use by many' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be common and not for a particular individual." Pocantico Water Works Co. v. Bird, 130 N. Y. 259, 29 N. E. Rep. 246.

A public use must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; writ of error dismissed, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. Ed. 487, 63 L. R. A. 471; Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. Rep. 37; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. Rep. 376; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106, 5 Am. R. R. & Corp. Rep. 288; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

of eminent domain may exist even if no considerable portion of a community where the right is sought to be exercised should directly enjoy or participate in the improvement. As was said by Mr. Justice Peckham in rendering the opinion in the case of Fallbrook Irrigation District v. Bradley,[3] which case involved the same principle as to what constituted a public use for which private property might be taken either by eminent domain or by a tax or assessment, although in this case it involved the validity of an assessment under the Wright Irrigation District Act: "The fact that the use of the water is limited to the land owner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. . . . It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water." And the Court further held that all the lands lying within the limits of the district were subject to the assessments for the objects for which the district was organized, even if the owner of the lands could not or would not use the water for their irrigation. In laying down this rule the Court followed the rule as laid down by the State Supreme Court, holding, in effect, that these decisions were to be treated with great respect by the Court; and where there was no direct violation of the Constitution the decisions of the highest State courts were to be followed as to what constituted a public use in any jurisdiction. And in the case of Tregea v. Modesto Irrigation District[4] the Supreme Court of the United States, by dismissing the appeal in that case, affirmed the decision of the Supreme Court of California,[5] wherein it was held that even small town lots covered by buildings

That the use of property sought to be condemned may bring about private profit, does not prevent the use from being a public one. Spratt v. Helena etc. Co., 37 Mont. 60, 94 Pac. Rep. 631.

The test of public use in acquiring water rights and rights of way for irrigation ditches and canals is not necessarily the service the owners may be compelled to render the public in connection therewith. State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

[3] 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

[4] 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

[5] 88 Cal. 324, 26 Pac. Rep. 237.

might be included in the assessments for the organization and maintenance of the irrigation district, upon the theory "that their value for other purposes may have been greatly enhanced.[6] And not only have the courts under this rule upheld the taking of land for rights of way by irrigation districts, but it has also upheld the taking under statutory provision allowing the taking for supplying water to "farming neighborhoods."[7]

§ 1069. Public use—Exercise of right for irrigation by private parties, when a public use.—Under our classification of the different lines of authorities as to what constitutes a public use[1] there is another line which holds to the effect that a private individual or corporation may exercise the right of eminent domain and condemn rights of way over the lands of others for ditches and canals, and that, too, where the sole use of the water is by the individual or corporation, and that the actual use by the public, or by any community or class thereof, is not necessary. This is upon the theory that the physical and climatic conditions of the State are such that the promotion of any great industry, such as irrigation, mining,[2] manufacturing,[3] the development of electrical energy,[4] or other great industries,[5] is of sufficient importance in the upbuilding of the country and the developing of its natural resources, that such a use is a public benefit to the community at

[6] See, also, Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; *In re* Bonds Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106, where it was held that land not at all benefited by the public improvement of an irrigation district in which it is included does not have on that account a constitutional exemption from assessment; Rialto Irr. Co. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484.

See, also, for irrigation districts, Chap. 70, Secs. 1386 *et seq.*

[7] Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802, where it was held as to what constituted a farming neighborhood was a question of fact for the trial Court, and its findings thereon are conclusive.

See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Fallbrook Irr. Co. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Aliso etc. Co. v. Baker, 95 Cal. 268, 30 Pac. Rep. 537, where, however, the averments of the public that the condemnation of a water right to supply a "farming neighborhood" was for the use of the public.

[1] See Sec. 1065.

[2] See Sec. 1070.

[3] See Sec. 1071.

[4] See Sec. 1072.

[5] See Sec. 1073.

large, and, therefore, it is a public use, even if the more direct benefit is to a private individual or corporation. Under this line of authorities, upon the subject that the use of the water for the irrigation of one farm is of such a benefit to the general public that the right of eminent domain may be exercised by the farmer to acquire a right of way over the lands of his neighbor for his ditch or canal, the case of Nash v. Clark, which arose in the State of Utah, is the leading case.[6] This was an action where the plaintiff sought to condemn a right of way through the ditch of the defendant and over another short strip of land in order to conduct the water to his own farm. The Supreme Court, in affirming the judgment of the Court below granting the right, held to the effect that in that State the reclamation of land by irrigation is such a public use that the legislature may rightfully authorize the condemnation of rights of way over the private lands of others, or through the ditches of private individuals, to convey water for that purpose onto land belonging to a private individual.[7]

Upon the subject of what constituted a public use in cases of this nature Mr. Justice McCartey, in rendering the opinion of the Utah Court, said: "In view of the physical and climatic conditions in this State, and in the light of the history of the arid West, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and pros-

[6] Nash v. Clark, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953, 4 Ann. Cas. 1171; affirmed in Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676.

[7] The Compiled Laws of Utah of 1907 provide as follows: "1288x22. When any person, corporation, or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation, or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; provided, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch." Rev. Stat. 1898, Sec. 1278; Laws 1903, p. 103; Laws 1905, p. 160.

perity of the State, would be giving to the term 'public use' altogether too strict and narrow interpretation, and one we do not think is contemplated by the constitution."

The case was then appealed by the defendant below to the Supreme Court of the United States, and jurisdiction in that Court had upon the ground that the use for which this condemnation was allowed was not a public use within the meaning of the Fourteenth Amendment of the Constitution of the United States.[8] And in the appeal to the Supreme Court of the United States, as will be seen from the record, the plaintiff in error was represented by very able counsel and a brief filed; while, on the other hand, the defendant in error relied only upon his constitutional right to represent himself in his own case, "no counsel for defendant in error" appearing and no brief being filed in his behalf, and yet that Court affirmed the decision of the State Court in the following language: "We are of the opinion, having reference to the above peculiarities which exist in the State of Utah, that the statute permitting the defendant in error, upon the facts appearing in this record, to enlarge the ditch and obtain water for his own land was within the legislative power of the State, *and the judgment of the State Court affirming the validity of the statute is therefore affirmed.*"

It is said of the decision in the case of Nash v. Clark that it "pushes the doctrine of the right to exercise the power of eminent domain for the benefit of a private individual further than it has ever before been pushed for the purpose of draining or irrigating private property."[9] But that the case settles the law as to this right as far as the State of Utah is concerned, and in any other State which has adopted or will adopt a similar statute to the one in question in that State there can be no doubt. We believe this to be the correct rule as far, at least, as the States of this Western part of the country are concerned, and where they have adopted similar statutes.[10] But the case, under our classification, representing a third class as to the public uses for which the power of eminent

[8] For the discussion of the Fourteenth Amendment, see Sec. 1060.

[9] See case note 1 L. R. A., N. S., 208.

[10] See, also, State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893; Portneuf Irr. Co. v. Budge, Judge, 16 Idaho 116, 100 Pac. Rep. 1046; Portneuf-Marsh Valley Irr. Co. v. Portneuf Irr. Co., 19 Idaho 48, 114 Pac. Rep. 19; Rasmussen v. Blust, 83 Neb. 678, 120 N. W. Rep. 184.

domain may be exercised, does not stand alone as to the particular use of the water for irrigation, or as to the principle involved where the use of the water is for other purposes.[11] Before the decision in the Nash v. Clark case the Supreme Court of Arizona in an elaborate and exhaustive opinion, in a case in which the facts were similar, held to the same rule.[12]

By the Act of the legislature approved February 19, 1877, irrigation corporations were given the power to acquire rights of way and to condemn property necessary to the construction of such canals in the same manner as railroad corporations might acquire property and right of way for railroad purposes; and the law applicable to an exercise of the right of eminent domain by rail-

11 For other uses, see the following sections, Nos. 1070-1073.

12 Oury v. Goodwin, 3 Ariz. 255, 26 Pac. Rep. 376, where the Court held that, to determine what is a public use authorizing the power of eminent domain, cases and principles, rather than definitions, must be consulted.

See, also, Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; San Luis etc. Co. v. Kenilworth C. Co., 3 Colo. App. 244, 32 Pac. Rep. 860; Schilling v. Rominger, 4 Colo. 100; De Graffenried v. Savage, 9 Colo. App. 131, 47 Pac. Rep. 902; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347; Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36; *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 755, 27 Am. St. Rep. 106; Paxton & H. etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Emigrant D. Co. v. Webber, 108 Cal. 88, 40 Pac. Rep. 1061; Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Cummings v. Peters, 56 Cal. 593; Wilmington etc. Co. v. Dominguez, 50 Cal. 505; Merrill v. Southside Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Lake Keon etc. Co. v. Klein, 63 Kan. 884, 65 Pac. Rep. 684, where it is held that irrigation is a public use for which a private person may be authorized to exercise eminent domain; Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766; Patterson v. Brown etc. Co., 3 Colo. App. 511, 34 Pac. Rep. 769; Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

"The value of the land is enhanced by the use of water, and the public interests benefited, and it may be said that almost the unbroken current authority supports this view." Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635.

"The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the State as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit." Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. Rep. 757.

road companies was made to apply to such irrigation companies. "The development of a system of irrigation and the appropriation and application of the waters of the streams of the State for the purpose, is obviously a work of internal improvement." And, citing the statutes, "Under these comprehensive provisions the legislature could have intended nothing less than that in the construction and operation of irrigation enterprises private property reasonably necessary for the conduct of the business could be taken and appropriated on due compensation by the exercise of the power and right of eminent domain." [13]

It will therefore be seen that the necessity for irrigation in the development of the agricultural resources of the States within the arid region of the country caused the broadening and enlarging of the power of eminent domain in those States to the extent that even a private individual or corporation might exercise the right and

[13] Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. Rep. 411; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Potlatch etc. Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, 118 Am. St. Rep. 233; Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798; *Id.*, 27 Mont. 135, 69 Pac. Rep. 709; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Albuquerque etc. Co. v. Gutierres, 10 N. M. 171, 61 Pac. Rep. 357; affirming 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

Corporations organized to construct reservoirs and ditches to supply water for irrigation of arid lands, are organized for the performance of a public duty. 4 Thomp. Corp., Sec. 5375, p. 4085.

See, also, State *ex rel.* Bradford v. Western Irr. C. Co., 40 Kan. 96, 19 Pac. Rep. 349, 10 Am. St. Rep. 166; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

A corporation organized for the purpose of irrigation, milling, navigation, and stock raising, has power to condemn private land for a right of way for its works. Borden v. Trespalacios etc. Co., 98 Tex. 494, 82 S. W. Rep. 461, 86 S. W. Rep. 11, 107 Am. St. Rep. 640; Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429, 172 Fed. Rep. 615; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081; Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Mundy v. Hart, —— Tex. Civ. App. ——, 111 S. W. Rep. 236; Kaschke v. Camfield, 46 Colo. 60, 102 Pac. Rep. 1061; Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

thus acquire rights of way over the lands of others, even where the water was used solely for individual or corporate use.[14]

§ 1070. Public use—Exercise of right for mining by private parties, when a public use.—The rule discussed in the previous section,[1] that even the actual private use by an individual or corporation, in the promotion of a private enterprise, where that enterprise tends to the prosperity and industry of the State, and therefore in this sense constitutes a public use, whereby the right of eminent domain may be exercised, has also been applied to mining in some of the Western States and Territories, although the California rule is different.[2] One of the first cases holding to this

14 But see Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989, where the facts were that one land owner permitted defendant to construct a ditch across his land because he believed that the defendant could condemn a right of way over his land, but where it was held that such an act did not prevent defendant from subsequently acquiring the right to maintain the ditch over such land by prescription. The Court said: "We do not see how this mistaken view could in any way operate to preclude the subsequent acquirement of the right by prescription."

It is held in a recent case in California that water pumped from wells, from a subterranean catchment basin extending under adjacent lands, to fulfill private contractual obligations to deliver water to lands sold with a water right, is not taken for a public use, but is taken for a private use, and hence the right of eminent domain does not exist, the Court saying: "The water taken by the defendants to supply the needs of the interveners is not taken for public use. It is not offered to the public generally, or to all who may want it within a certain territory. It is taken solely to fulfill the private contractual obligations of the defendants to deliver water to certain lots which it has sold with a water right. This is a private use." Burr v. Maclay, 160 Cal. 268, 116 Pac. Rep. 715.

See, also, Hildreth v. Montecito, 139 Cal. 22, 72 Pac. Rep. 395; Barton v. Riverside, 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331; Gilmer v. Lime Point, 18 Cal. 229.

1 See Sec. 1069.

2 "The business of mining for the benefit of the mine owner is as much a private affair as that of the farm or factory, and the right of eminent domain can not be invoked in aid of it." Sutter County v. Nichols, 152 Cal. 688, 93 Pac. Rep. 872, 15 L. R. A., N. S., 616, 14 Am. & Eng. Ann. Cas. 900.

See, also, Consolidated etc. Co. v. Central Pac. R. Co., 51 Cal. 269, 5 Morr. Min. Rep. 438; Lorenz v. Jacob, 63 Cal. 20, 3 Pac. Rep. 654; Amador etc. Co. v. DeWitt, 73 Cal. 482, 15 Pac. Rep. 74; Dower v. Richards, 73 Cal. 477, 15 Pac. Rep. 105; Cummings v. Peters, 56 Cal. 593.

view, and one often cited, arose in Nevada [3] as early as 1876, where the Court, through Mr. Chief Justice Hawley rendering the opinion, held that a statute of the State was constitutional where it declared that mining, milling, smelting, or other reduction of ores, even by a private company, was a public use; and it was further held that any appropriation of private property for rights of way under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community, was the taking of such property for a public use.[4]

The Federal Court also holds that under the Alaska Code,[5] under the peculiar local conditions in Alaska, private mining is a use for which a right of way for a ditch to aid in the operations of a mining claim might be condemned.[6] The principle laid down in the case of Nash v. Clark [7] was also reaffirmed by the Supreme Court of the United States in another case which also arose in the State of Utah,[8] where it was held that the condemnation of a right of way across a placer mining claim for the aerial bucket line of a mining corporation can not be said to be taking private property for a

[3] Dayton etc. M. Co. v. Seawell, 11 Nev. 394.

[4] See, also, Overman S. M. Co. v. Corcoran, 15 Nev. 147; Miocene Ditch Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106; Hand G. M. Co. v. Parker, 59 Ga. 419; Douglass v. Byrnes, 59 Fed. Rep. 29; Ahern v. Dubuque etc. M. Co., 48 Iowa 140, where it was held to be a public use to construct drains and levels for the purpose of draining mineral lands so they would be available for mining purposes.

[5] 1 Fed. Stat. Ann., 1905, p. 269; 31 Stat. L. 522, Chap. 22, Sec. 204.

[6] Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106.

See, also, Byrnes v. Douglass, 83 Fed. Rep. 45, 27 C. C. A. 399, 48 U. S. App. 526; *Id.*, 59 Fed. Rep. 29; Butte etc. R. Co. v. Montana etc. R. Co., 16 Mont. 405, 41 Pac. Rep. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508, where it is held that the exercise of the right of eminent domain to acquire land by a railroad company is not precluded by the facts that the road is built by a private corporation for the benefit of private mines and ore houses; and that the connection of mines and ore houses is a public use, which will authorize such a railroad company to acquire a right of way by that means for that purpose.

See, also, Kansas etc. Co. v. Northwestern Coal & M. Co., 161 Mo. 288, 61 S. W. Rep. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717; Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. Rep. 757; 10 Am. & Eng. Ency. Law, 2d Ed., pp. 1086, 1087.

[7] See Sec. 1069.

[8] Strickley v. Highland Boy G. M. Co., 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301, 4 Am. & Eng. Ann. Cas. 1174; affirming *Id.*, 28 Utah 215, 78 Pac. Rep. 296, 1 L. R. A., N. S., 976, 107 Am. St. Rep. 711.

private use contrary to the Fourteenth Amendment of the Constitution of the United States, if authorized by the construction by the State Court to the provisions of State legislation for the exercise of the right of eminent domain in behalf of certain uses declared to be public.[9]

§ 1071. **Public use—Exercise of right for manufacturing by private parties, when a public use.**—But the broader doctrine of the right of a private individual or corporation to exercise the power of eminent domain and to acquire private property reasonably necessary for the conduct of his or its enterprise upon the theory that the general public will be indirectly benefited therefrom, is not a doctrine peculiar to the Western States, neither is it a new doctrine, which has been evolved in the course of their development and progress. As a matter of fact, the doctrine was taken from some of the older Eastern States, especially those of New England, involving the constitutionality of the so-called General Mill Acts. As was said in a recent Montana case:[1] "The courts of the Western States have, as a rule, adopted a liberal view of the term 'public use,' and in the main have largely followed the so-called 'Mill Cases' of New England." And in the opinion in the early Nevada case,[2] Mr. Justice Hawley, in sustaining the decision of the Court, cites a number of these mill cases, and said: "But the cases more directly in point, where the decisions are solely based upon this ground, are to be found in the States where a construction is given to what are known as the 'mill-dam' or 'flowage' Acts."[3] In fact, it was held at an early day, in many cases of very high authority, that the power conferred by the General Mill Acts upon any owner of land upon a stream to erect and maintain a mill on his own land and to flow the land of others for manufacturing purposes, has been considered as resting on the

[9] See, also, Spratt v. Helena etc. Co., 37 Mont. 60, 94 Pac. Rep. 631.

[1] Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. Rep. 773, 8 L. R. A., N. S., 567, 10 Am. & Eng. Ann. Cas. 1055; *Id.*, 37 Mont. 60, 94 Pac. Rep. 631.

[2] Dayton etc. M. Co. v. Seawell, 11 Nev. 394, 5 Morr. Min. Rep. 424.

[3] Citing Boston etc. M. Corporation v. Newman, 12 Pick. 480, 23 Am. Dec. 622; Hazen v. Essex Co., 12 Cush. 475; Talbot v. Hudson, 16 Gray (Mass.) 417; Newcomb v. Smith, 2 Pin. (Wis.) 131; Fisher v. Horicon etc. Co., 10 Wis. 351.

right of eminent domain, by reason of the advantages and benefits inuring to the public from the improvement of the water power and the promotion of manufactures.[4] But, as we have said before, there are other States which hold directly to the contrary, as to what constitutes a public use both for this particular purpose and other purposes, and the authorities upon the proposition are entirely irreconcilable.[5] In Colorado it is held that, under their constitution and laws, the authority to condemn land for agricultural and milling purposes is sufficient to cover its condemnation for power, manufacturing, and "other beneficial and useful purposes."[6]

§ 1072. **Public use—Exercise of rights for development of electrical energy by private parties, when a public use.**—The development, transmission, and use of electrical energy throughout the whole country for the purpose of heat, light, and power, is becoming of the utmost importance. As to whether such an industry is a public use so that the power of eminent domain may be exercised in aid thereof by private individuals and corporations is a question for the respective States to decide through their legislatures and the construction of their Acts by their highest courts. And upon this subject the States are in hopeless conflict; and even those in the Western portion of the country are in direct conflict with each other. This is not a subject peculiar to the Western portion of the country, but is common to all of the States of the Union. In the West, on account of the lack of railroad facilities

[4] Head v. Amoskeag Mfg. Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441, 28 L. Ed. 889; Scudder v. Trenton etc. Co., 1 Saxt. (N. J. Eq.) 694, 728, 23 Am. Dec. 756; Hankins v. Lawrence, 8 Blackf. 266 (Ind.); Great Falls Mfg. Co. v. Fernald, 47 N. H. 444; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221.

[5] See Sec. 1067, and cases cited.

[6] Denver Pr. etc. Co. v. Colorado etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

See, also, Lamborn v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241, where the word "milling," as used in the constitution, was held as synonymous with the word "manufacturing."

It was held by the Supreme Court of Washington that the furnishing of water by a water company, authorized to exercise the right of eminent domain, to private persons and corporations to be used in boilers to generate steam for saw and shingle mills was a private and not a public use. State *ex rel.* Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. Rep. 3.

and other means of transportation the necessity for the development of this industry may be greater than in the Eastern States. As we have seen in another section of this work, the generation for electrical energy is such a beneficial purpose that water may be appropriated therefor under the Arid Region Doctrine of appropriation.[1] As an incident thereto rights of way over the lands of others must be acquired in order to conduct the water to the place of use and to distribute wires. And, upon principle, provided that in the State where the right is sought, the statute is broad enough, there are no constitutional reasons why the right of eminent domain should not be granted, even to a private individual or corporation, upon the same theory as was held in the case of Nash v. Clark,[2] that such a use is a benefit to the public at large, therefore it is a public use. And the highest courts of many of the States have held to that effect.[3] But there are other very

1 See Sec. 695.

See, also, Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 456, 71 Pac. Rep. 1069, 61 L. R. A. 648.

2 27 Utah 158, 75 Pac. Rep. 158, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953, 4 Ann. Cas. 1171; affirmed, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676.

3 The right of way to carry water to operate an electric light plant may be acquired by eminent domain under the constitution of Colorado. Bell v. Lamborn, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241.

The collection, storing, and distribution of electricity for the use of all who may have need of it upon equal and reasonable terms is a public use, so as to justify an exercise of the power of eminent domain by a private corporation, for the acquisition of a right of way for the distributing wires. Rockingham County etc. Co. v. Hobbs, 72 N. H. 531, 58 Atl. Rep. 46, 66 L. R. A. 581.

The right to use an existing canal for the conveyance of water for the purpose of generating electricity may be appropriated under the right of eminent domain. Salt Lake City v. Salt Lake City etc. Co., *supra*.

The flooding of land by a dam erected for the purposes of supplying electric power to mines and smelters, and to the public generally, is a public use authorizing the condemnation of such land. Helena v. Spratt, 35 Mont. 108, 88 Pac. Rep. 773, 8 L. R. A., N. S., 567, 10 Am. & Eng. Ann. Cas. 1055; *Id.*, 37 Mont. 60, 94 Pac. Rep. 631.

See, also, 1 Lewis on Eminent Domain, Secs. 172, 173; *Re* Municipal Fuel Plants, 182 Mass. 605, 66 N. E. Rep. 25, 60 L. R. A. 592, however, by a municipal corporation; Minnesota etc. Co. v. Koochiching etc. Co., 97 Minn. 444, 107 N. W. Rep. 410, 5 L. R. A., N. S., 638, 7 Am. & Eng. Ann. Cas. 1182; Brown v. Weaver, 140 N. C. 333, 52 S. E. Rep. 954, 3 L. R. A., N. S., 912; Hollister v. State, 9 Idaho 651, 71 Pac. Rep. 541, 77 Pac. Rep. 339; Denver Pr. etc. Co. v. Colorado etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383; Tuolumne etc.

eminent authorities which hold to the exact contrary to the above rule, and that mere public welfare, or public convenience, will not justify the exercise of the right of eminent domain by private individuals or corporations.[4] This class of cases draws, it seems to the writer, too sharp a distinction between public use and public benefit, and guards the private rights of property against the assertion of the power of eminent domain for a public benefit as distinguished from public use. The other class of cases, of which the case of Nash v. Clark may be considered as the leading case, the doctrine of the Utah Court having been affirmed by the United States Supreme Court, takes a broader view of the subject, and holds that the general welfare and benefit of the public should prevail over the private property rights, and that the power of eminent domain may be exercised, even though the use for which it is asserted is not in a strict sense a public one.

Co. v. Frederick, 13 Cal. App. 498, 110 Pac. Rep. 134; Walker v. Shasta Power Co., 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725; Northern California etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896.

It was held in California, however, that the case of Nash v. Clark did not apply to uses for power purposes for the reason that the constitution only declares the use of water "for sale, rental, or distribution" to be for public use. Shasta Power Co. v. Walker, 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725; affirming *Id.*, 149 Fed. Rep. 568.

See, also, Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989.

[4] See Brown v. Gerald, 100 Me. 351, 61 Atl. Rep. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526, where it is said: "We can not find any ground for sustaining the defendant's contention, except that of 'public benefit,' or general utility, and we think that is not sufficient."

See, also, Avery v. Vermont Elec. Co., 75 Vt. 235, 54 Atl. Rep. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818; Southwest Missouri L. Co. v. Scheurich, 174 Mo. 235, 73 S. W. Rep. 496.

The generation of electrical power by a private corporation under no obligations to serve the public, and not organized to meet a public demand, is not a public use for which the power of eminent domain may be exercised, although the corporation has announced the intention to sell the generated power to the public. State of Washington *ex rel.* Tacoma Industrial Co. v. White River Pr. Co., 39 Wash. 648, 82 Pac. Rep. 150, 2 L. R. A., N. S., 842.

See, also, State *ex rel.* Harris v. Superior Court of Thurston Co., 42 Wash. 660, 85 Pac. Rep. 666, 5 L. R. A., N. S., 672; Shasta Pr. Co. v. Walker, 149 Fed. Rep. 568; affirmed, 160 Fed. Rep. 856, 87 C. C. A. 660.

§ 1073. Public use—Exercise of right for other industries by private parties, when a public use.—There are also other uses which are held to be of such a public benefit that they are declared by Acts of the legislatures of the respective States to be a public use, and are so construed by their highest courts, so that individuals and corporations are permitted the power of eminent domain in their aid. These cases follow the rule in the Nash v. Clark case [1] that, owing to the peculiar conditions of the country, there must be a pressing and universal demand by the general public for the exercise of the right, although the individual is more directly benefited by the use. In Idaho the right to exercise the power of eminent domain under the constitution of that State is held not to depend upon the narrow and restricted meaning of the phrase "public use" as defined by the courts of last resort of some of the States, but the general welfare and benefit of the public is taken into consideration, and if the taking is necessary to the complete development of the material resources of the State, such taking is for a public use. Therefore, the construction of a dam which causes the overflow of certain lands, but which tended to improve the navigability of a river used for the purpose of floating logs to a private mill, was decided to be a public use, under a statute providing for such improvements for navigation.[2] This was upon the theory that logging and the transporting of timber to market was of such great benefit to the public at large that the right of eminent domain might be exercised in its behalf.[3] The Supreme Court of Washington also held to the same rule and for a similar purpose in behalf of a private corporation, although, in the opinion, the Court indulged in a violent presumption that because there was such a large amount of timber up a certain river, in the absence of testimony affirmatively showing that such a large body of timber is all owned by one owner, it should not be presumed that it was so owned; and, that therefore, the driving company seeking the right must do so as a public servant.[4] The Court, in its opinion, neglected to distinguish or to cite a previous case, which was based

1 See Sec. 1069.

2 Potlatch Lum. Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, —— Am. St. Rep. 233.

3 See, also, Powell v. Springston Lum. Co., 12 Idaho 723, 88 Pac. Rep. 97.

4 State *ex rel.* Wilson v. Superior Court of Chehalis County, 47 Wash. 397, 92 Pac. Rep. 269.

upon a similar state of facts, eliminating the presumption, and wherein the same Court held exactly to the contrary view.[5]

The question of the drainage of lands has, by some courts, been held of such universal importance and benefit to the community at large that, under the proper constitutions or statutes, the right of eminent domain might be exercised by private parties to drain their own lands,[6] although some of the cases uphold private drainage laws upon the ground that they are a proper exercise of the police power of the State.[7] But for this purpose, as we view the subject, there is no more difference in principle in the exercise of the right for the reclamation of either small or large tracts of land by drainage, than there is in its exercise for the reclamation of such lands by irrigation. The benefit accruing to the general public is probably as great, where a single tract is drained and reclaimed from too much moisture, as where such a tract is reclaimed from too great aridity. But, as to whether such a use is a public use within the constitutional limitations, for which the power of eminent domain may be exercised, the authorities as in the case for other uses are in hopeless conflict. And, strange as it may seem, in that part of the country, where there are more lands which need drainage for their reclamation, the great weight of authority holds that the right can not be exercised unless it involves such a benefit to the

5 Healy Lum. Co. v. Morris, 33 Wash. 490, 74 Pac. Rep. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964, which case held to the effect that the acquisition of an easement over the land of another for the transportation of logs of a private owner to market was not a public use justifying the right of the exercise of eminent domain.

6 "It is not necessary that the public at large shall be benefited, but only that part of the public affected by the want of proper drainage or by the improvement to be made." Lewis County v. Gordon, 20 Wash. 80, 54 Pac. Rep. 779.

See, also, Sherman v. Tobey, 3 Allen 7; Coomes v. Burt, 22 Pick. 422 (Mass.); Ahern v. Dubuque etc. M. Co., 48 Iowa 140; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; State *ex rel.* Gordon v. McNay, 90 Wis. 104, 62 N. W. Rep. 917; Donnelly v. Decker, 58 Wis. 461, 17 N. W. Rep. 389, 46 Am. Rep. 637; Cribbs v. Benedict, 64 Ark. 555, 44 S. W. Rep. 707; State *ex rel.* Baltzell v. Stewart, 74 Wis. 620, 43 N. W. Rep. 497, 6 L. R. A. 394.

The mere fact that one or more individuals may derive from it pecuniary and particular benefits and advantages does not destroy the validity of an Act of the legislature. Winslow v. Winslow, 95 N. C. 24.

7 See last cases cited, *supra*.

general public that it comes within the strict construction of the term as to what is a "public use."[8]

The purpose of taking land by eminent domain by a railroad company has also been upheld where the taking was chiefly for the advantage of a private enterprise.[9]

In a well reasoned Oklahoma case it was held that even a convention hall to be owned, controlled, and used exclusively by a city to accommodate public gatherings of the people of the city and for such other public uses as might be designated by the Mayor and City Council, is a "public utility," and might be taken under the power of eminent domain.[10] There are many other uses declared by the legislatures of the various States to be such public uses that the right of eminent domain may be exercised relative thereto. In this work, however, further discussion is unnecessary.

§ 1074. Public use—The necessity for the taking must exist in order to acquire the right.—In order to acquire a right of way over the lands of others for ditches and canals, or through the ditches and canals of others, by the power of eminent domain, the necessity for the taking must always be shown to exist. And when the law says that private property may be taken for public use it

[8] Mr. Farnham, in his work on Waters and Water Rights, page 1066, after referring to some of the irrigation cases, where the right was allowed, says: "Similar reasoning would permit the exercise of the right of eminent domain to obtain a right of way over one farm for the drainage of an adjoining farm, which, by all the authorities, can not be done. The mere increase of the revenues of the State by increasing the value of a single farm is not within any of the accepted principles for which the State may exercise its governmental functions."

See, also, *In re* Tuthill, 163 N. Y. 133 57 N. E. Rep. 303, 49 L. R. A. 781; McQuillen v. Hatton, 42 Ohio St. 202.

[9] Chicago etc. R. Co. v. Morehouse, 112 Wis. 1, 87 N. W. Rep. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918; Stockdale v. Rio Grande W. R. Co., 28 Utah 201, 77 Pac. Rep. 849; Morrison v. Thistle Coal Co., 119 Iowa 705, 94 N. W. Rep. 507; Butte etc. Co. v. Montana Union R. Co., 16 Mont. 504, 41 Pac. Rep. 232, 31 L. R. A., 298, 50 Am. St. Rep. 508; Kansas etc. R. Co. v. Northwestern etc. Co., 161 Mo. 288, 61 S. W. Rep. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717; Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461, 43 N. W. Rep. 469, 6 L. R. A. 111; State *ex rel.* Ami Co. v. Superior Court of Pierce Co., 42 Wash. 675, 85 Pac. Rep. 669.

[10] State *ex rel.* Manhattan Const. Co. v. Barnes, 22 Okla. 191, 97 Pac. Rep. 1000.

means it may be so taken only when it is necessary for such use; it means a reasonable, and not an absolute necessity.[1] And as to what constitutes such a reasonable necessity is a question of fact to be determined by the Court or jury from all the facts surrounding each particular case, and the burden of proving the necessity is on the plaintiff in an action to condemn.[2] A large discretion is given to those who are vested with the power, in determining what property and how much is necessary. As was said in a Utah case: "It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith, or is guilty of oppression, its discretion in the selection of land will not be interfered with."[3] Again, in determining the necessity for the taking of the land sought to be condemned, it can not be considered whether the contemplated scheme is feasible or practicable, for such matters rest wholly in the discretion of the promoters.[4] As was said by the Federal Court in a recent case:[5] "The record discloses no circumstances or conditions taking the case out of the general rule that, in the absence of bad faith that the judgment of the party exercising the right of eminent domain as to what and how much land shall be taken is conclusive." But as to the extent

1 Spring Val. W. W. v. San Mateo W. W., 64 Cal. 123, 28 Pac. Rep. 447; Samish River Boom Co. v. Union River Boom Co., 32 Wash. 586, 73 Pac. Rep. 670; Portneuf Irr. Co. v. Budge, Judge, 16 Idaho 116, 100 Pac. Rep. 1046; necessity must be determined before damages are assessed; Northern Light & Power Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896.

2 Whether the land is reasonably required is a question of fact to be determined by the Court or jury, and the burden of proof is on the plaintiff. Spring Val. W. W. v. Drinkhouse, 92 Cal. 528, 28 Pac. Rep. 681; Sanford v. City of Tucson, 8 Ariz. 247, 71 Pac. Rep. 903; Santa Ana v. Gildmacher, 133 Cal. 395, 65 Pac. Rep. 883; Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879, where it was held that a law requiring that commissioners shall determine the necessity for the taking of the lands was held constitutional.

Where the statute provides that, before property can be taken for a public use, it must appear that the taking is necessary for such use, and the question as to the necessity is submitted to a jury, the Court can not disregard their verdict and find differently. Wilmington C. & R. Co. v. Dominguez, 50 Cal. 505.

3 Postal etc. Co. v. Oregon etc. R. Co., 23 Utah 474, 65 Pac. Rep. 735, 90 Am. St. Rep. 705.

4 Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879; Warner v. Town of Gunnison, 2 Colo. 430, 31 Pac. Rep. 238.

5 United States v. Burley, 172 Fed. Rep. 615; affirmed, 179 Fed. Rep. 1, 102 C. C. A. 429.

of the land which may be taken, many of the legislatures have limited the extent to the amount necessary for the purpose in question.[6]

But even where the statute is silent upon the subject as to the extent of the taking, under the constitutional limitations, the power to take is limited to such and so much property as is necessary for the use in question.

There are also statutes providing where there is already one ditch through a certain tract of land that, without the owner's written consent, the land shall not be subject to the burden of two or more irrigation or other ditches through it to lands beyond, when all the water necessary can be conveyed in one ditch.[7]

The right of condemnation for a right of way will not be denied from the fact that the water might be put upon the land by pumps.[8] Neither will the right of condemnation be denied upon the ground of want of necessity where it is shown that the land which it is proposed to irrigate is of some value without water rights.[9]

But in that line of decisions which hold that a public benefit is such a public use that the right of eminent domain may be exercised in its behalf, even by an individual or corporation, more directly benefited thereby, the question of the necessity of the taking enters into the subject in a much larger and broader sense. As was held by the Supreme Court of the United States in the leading case upon this particular subject,[10] where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use, must be founded upon or be the result of

6 See statutes of various States, Part XIV.

7 See statutes, Part XIV.

See, also, Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766, where it was held that even then a right of way could not be condemned through another's ditch, where there are other practical routes, and especially where such a ditch is not of a uniform grade, and its enlargement would greatly diminish its usefulness.

8 "It is clear that the constitution and this law both contemplate irrigation by gravity; and we do not think the right to condemn was intended to be withheld simply because water might be put upon the land by pumping." State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

9 State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

10 Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

See, also, for further discussion of this case, Sec. 1069.

some peculiar condition of the soil or climate, or other peculiarity of the State, where the right is sought to be exercised. And the Court expressly disclaimed approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. The Court simply held in that particular case, having reference to the conditions above stated, that the use was a public one, although the taking of the right of way was for the purpose simply of thereby obtaining the water for an individual where it was *absolutely necessary* to enable him to make any use whatever of his land, and which would be valuable and fertile if the water was obtained. So, the Federal Court, in a case arising in California, referring to the Clark v. Nash case, held that it was based upon exceptional conditions, and without application in the case at bar.[11]

§ 1075. **Rights of way—Necessity for the taking—The existence of a water right.**—As to whether or not in order to authorize one to exercise the right of eminent domain for a right of way for a ditch or canal over the lands of others and to successfully prosecute an action in condemnation therefor, he must have had, at the time of bringing the action, a water right which he proposes to use in connection with the ditch or canal, the authorities disagree. As a general rule, if there is no necessity for the taking, the right will not be allowed; but the amount necessary for the use is left to the party seeking the right. But in this Western country, to hold that a right of way for a ditch or canal could not be acquired, until the party seeking the right had a vested right to the use of a certain amount of water, would, in many instances, be equivalent to holding that an easement for such purpose could not be acquired at all. And, not only this, but such a rule would prevent the appropriation of water, now running to waste in the natural streams. The right to the use of water can not become vested until it has been lawfully appropriated.[1] Under the general rule, the appropriation is not finally consummated, until the water has been ap-

11 Shasta Pr. Co. v. Walker, 149 Fed. Rep. 568; affirmed, 160 Fed. Rep. 856, 87 C. C. A. 660.

1 For the appropriation of water, see Secs. 706-731.

plied to a beneficial use.[2] Under the California rule, it is not complete until the works are finished and the water conducted to the place of use.[3] Under either rule, the procuring of the right of way and the construction of the ditch must necessarily precede the final consummation of the appropriation. Hence it is held by one line of authorities that in a proceeding to condemn land for a ditch or canal, the fact that the plaintiff has no vested right to the use of water, which the ditch is intended to carry, is no defense to the action. And as no land can be taken for this purpose, unless the land owner be paid just compensation, this seems to us to be the only correct rule, especially where the right to the use of the water is acquired by appropriation.[4] However, the contrary rule has been held to be the law in some jurisdictions.[5] In Oregon it is provided by statute,[6] that when a corporation shall have acquired the right to appropriate water in the manner provided it may proceed to condemn lands and premises necessary for right of way for its ditch or canal.[7] And in this connection we will state that the latter is the rule where one seeks to acquire a right of way over the public lands of the United States under the provisions of the Acts of Congress of 1866 and 1870. It is held that in order to acquire such a right of way, the person claiming the right must first secure the right to the use of the water.[8]

2 For Colorado rule, see Secs. 726, 728, 729.

For the consummation of a right by appropriation, see Secs. 725-729.

3 For California rule, see Sec. 726.

4 Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347; State *ex rel.* Kettle Falls Pr. & Irr. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; Appeal of Edgwood R. Co., 79 Pa. 257.

"Nor is it pertinent to inquire what petitioner may be able to accomplish in the way of obtaining water which can be utilized through his proposed ditch." Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879.

See, also, Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635, where it was held that it was not necessary to show that a company had acquired a right to take water from a stream, from which it proposed to get its supply, from the riparian owners, as a prerequisite to its right to condemn land for a right of way.

5 Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690; Wisconsin W. Co. v. Winans, 85 Wis. 26, 54 N. W. Rep. 1003, 20 L. R. A. 662, 39 Am. St. Rep. 813.

6 B. & C. Comp. Code, 1902, Sec. 5028.

7 Grande Ronde Elect. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031.

8 See for rights of way over the public domain, Secs. 927-971.

See, also, for Acts of Congress of 1866 and 1870, Secs. 611-618, 931-

§ 1076. Due process of law—In general.—Where the question of "public use" is settled for which private property may be taken for rights of way for ditches and canals, there is another essential element which must enter into the taking, and that is that the property must be taken by due process of law, which right is guaranteed by the Fifth Amendment of the Constitution of the United States,[1] and, also, by the constitutions of the various States.[2] As far as the "due process of law" clause is concerned, as found in the Constitution of the United States, it is held that this only applies to the taking by the Government through its Acts of Congress.[3] "Due process of law" in this clause refers to the law of the land, which derives its authority from the legislative power conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.[4] The same, or similar clauses, found in the constitutions of the various States, refer to the law of the State, which derives its authority from the legislative power conferred upon the legislature of a State by its constitution, and exercised within the limits prescribed therein.[5]

Therefore, by "the due process of law" is meant one, which, following the forms of the law either of the United States, or of a State, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity

934; Nippel v. Forker, 26 Colo. 74, 56 Pac. Rep. 577; affirming *Id.*, 9 Colo. App. 106, 47 Pac. Rep. 766; Clear Cr. etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819.

1 For the Fifth Amendment, see Sec. 1060.

2 See Secs. 1061, 1062.

3 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

4 Hurtado v. People of California, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111.

5 "Due process of law in each particular case means such an exercise of the powers of the Government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley on Const. Lim., 6th Ed., p. 434.

See, also, Murray v. Hoboken etc. Co., 59 U. S. 18 How. 276, 15 L. Ed. 372; Bank of Columbia v. Okely, 17 U. S. 4 Wheat. 235, 4 L. Ed. 559; Burton v. Platter, 53 Fed. Rep. 904, 4 C. C. A. 95; *Ex Parte* McCluskey, 40 Fed. Rep. 71; Jaeger v. U. S., 27 Ct. Cl. 278, 285.

to be heard respecting the justice of the judgment to be sought.[6] An approved definition of "due process of law" is "law in its regular course of administration through the courts of justice."[7] It need not be a legal proceeding according to the course of the common law; neither must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of the action brought against him, and an opportunity is afforded to defend.[8]

Therefore, whenever by the laws of a State, or by State authority, any burden is imposed upon property for a public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate and just to the nature of the case, any judgment rendered in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.[9]

§ 1077. Due process of law—Rights of way can not be acquired without.—As against the will of the land owner, rights of way over his lands for ditches and canals can not be acquired without due process of law.[1] In an early Colorado case [2] it was there held, upon the ground of necessity, that, in that Territory, lands were held in subordination to the dominant rights of others, who must necessarily pass over them to obtain a water supply to irrigate their own lands. And in a later Colorado case the same doctrine

6 Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Sweeney v. Montana Cent. R. Co., 25 Mont. 543, 65 Pac. Rep. 912, where it was held that where a railroad company took possession of land under a void *ex parte* order that it was a trespasser.

7 Happy v. Moser, 48 N. Y. 313.

8 Fallbrook Irr. Dist. v. Bradley, *supra;* Davidson v. New Orleans, *supra;* Weimer v. Bunbury, 30 Mich. 201.

9 Fallbrook Irr. Dist. v. Bradley, *supra;* Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

1 For due process of law, in general, see Secs. 1076, 1078.

2 Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64.

was reaffirmed;[3] Mr. Chief Justice Thatcher, in the concurring opinion, said: "Primarily, where the climatic conditions are such as exist in Colorado, the right to convey water for irrigation purposes over land owned by another is founded on the imperious laws of Nature, with reference to which it must be presumed the Government parts with its title. . . . This right passes with the estate in the land as a necessary incident." But the rule as laid down in the Yunker v. Nichols case did not remain the rule in Colorado, for the reason as given in a later case that, since the first case was decided a constitution had been adopted, which prohibited the taking of private property for public use, without due process of law and upon just compensation;[4] and that the legislature had provided the proceedings by which private property might be subjected to such use.[5]

It may now be regarded as settled in all jurisdictions as the universal rule, even in the States whose constitutions or laws in terms grant such rights of way for ditches and canals, that such rights of way can only be acquired against the will of the land owner, by due process of law, and under the mode of procedure provided for by the respective statutes of the States. The constitutions and statutes do not, in and of themselves, grant the right of way, nor confer the power to enter upon the lands of another until the right to the use is ascertained [6] and established by the proper procedure in condemnation, and then only upon just compensation.[7] As was said by

[3] Schilling v. Rominger, 4 Colo. 100. But see Crisman v. Heiderer, 5 Colo. 589, where the doctrine was questioned, and it was held that the rule should be confined "to the narrowest limits."

[4] For compensation in cases of eminent domain, see Secs. 1079-1083.

[5] Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786; Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; United States v. Gallegos, 89 Fed. Rep. 770, 32 C. C. A. 470; Blake v. Boye, 33 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577; Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766; Denver Pr. & Irr. Co. v. Denver etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

After title to land has passed from the Government, the land can be burdened with a right of way for a ditch only by consent of the owner or by legal proceedings provided by the statute. Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. Rep. 612.

[6] For the public uses for which the right of eminent domain may be exercised, see Secs. 1067-1073.

[7] For procedure in eminent domain, see Secs. 1092-1097.

For compensation for the exercise of the right, see Secs. 1079-1083.

For Colorado cases, see last note.

the Montana Court, after referring to the statute of that State, which conferred upon any person, corporation, or company owning or holding lands without available water facilities, an absolute right of way over the lands of others, for the purpose of constructing ditches to conduct the water to the place of use:[8] "Giving full force to said section, it can not be seriously contended that, by the mere force of said statute, one person could go upon the lands of another without his consent and dig a ditch. Before such right could have been exercised, it should have been definitely ascertained by proper proceeding in eminent domain."[9]

§ 1078. Due process of law—Statutory provisions.—The statutes of the various States of the arid and semi-arid West all provide for the acquisition of rights of way over the lands of others for ditches and canals to be used for the purpose of conducting the water to the place of use.[1] These statutes also provide for the procedure by which the right must be acquired in the respective jurisdictions, in condemnation cases for this purpose. This latter question we will discuss in another chapter.[2] In general, where the right to condemn is ascertained, there must be some notice to the land owners, and a hearing had before some body, either judicial or otherwise, at which the damages or compensation to the owners must be assessed,[3] which damages must be paid by the one seeking the right before the right to the easement is finally acquired.

Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Noteware v. Stearns, 1 Mont. 311, 4 Morr. Min. Rep. 650; Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408, 23 Mont. 65, 57 Pac. Rep. 557; Steritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994; Toyaho etc. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101; McGhee Irr. D. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398; reversing 22 S. W. Rep. 967.

[8] See Rev. Stat. Mont., 1879, Sec. 732; Comp. Stat. Mont., Div. 5, Sec. 1240.

[9] Emerson v. Eldorado D. Co., 18 Mont. 247, 44 Pac. Rep. 696.

See, also, Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101.

One can not arbitrarily seize and use another's ditch for that purpose. McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773.

For the procedure in condemnation cases, see Secs. 1092-1097.

[1] For statutes, see Part XIV.

[2] For procedure in condemnation, see Secs. 1092-1097.

[3] For just compensation, see Secs. 1079-1083.

The procedure designated by the statute authorizing the acquisition of the right of way in the State where the right is sought, must be strictly followed in acquiring the easement.[4] But the fact that a person constructed an irrigation ditch across the lands of another without first acquiring the right of way, through ignorance that it was necessary, will not preclude him from afterward condemning the right of way under the statutory proceedings.[5] It is not necessary to show that there is no other way than the one selected by which the water could be conducted to the place of use.[6] The legislature may provide for the appointment of a commission to ascertain the necessity for taking the land sought to be condemned.[7] But where a party is vested with the authority to exercise the power of eminent domain, he may exercise his discretion in determining what lands are necessary for his purposes, and this discretion can not be controlled by the courts.[8] It is solely within the province of the party seeking the right to determine whether the enterprise is practicable and can be made a success financially. "Courts can not say that a party shall not carry out an enterprise because it can not succeed. Such matters must be left entirely to the discretion and judgment of the promoters."[9]

The question of jurisdiction as to what constitutes due process of law is for the highest court of the State where the statute is in force and the right sought. And a decision of the highest court of the State in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby.[10]

§ 1079. **Compensation and damages—Right to.**—One of the constitutional guaranties, found both in the Fifth Amendment of the Constitution of the United States, and in the constitutions of all of the States, is that private property shall not be taken without just

4 Dalton v. Water Comrs., 49 Cal. 222; Castle Rock Irr. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690.

5 Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. Rep. 757.

6 Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484.

7 Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879.

8 Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879; Warner v. Town of Gunnison, 2 Colo. 430, 31 Pac. Rep. 238.

9 Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879.

10 Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471.

compensation; or, as is provided in some of the constitutions, it shall not "be taken or damaged" without just compensation.[1] It seems to be considered a settled principle of law, that the right to compensation is an incident to the exercise of the power of eminent domain; "that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle."[2] But the constitutions of all the States, as now construed, settle the right as to compensation, or damages, by requiring that just compensation shall be made whenever private property is taken for a public use. The statutes enacted by the legislatures of the respective States, in providing for the right to exercise the power of eminent domain, must also provide for just compensation and as to how it may be assessed. And statutes which provide for the condemnation of private property, and fail to provide for the compensation therefor, would be unconstitutional as far as the right to condemn was concerned.[3]

The question of the just compensation is for the State court to decide, where no Federal question is involved. And a decision of the State court is not reviewable in the Supreme Court of the United States on the theory that property was taken without just compensation, where there is nothing in the record which adequately shows that the State Court was led to suppose that any claim was made under the Constitution of the United States.[4]

But, where the defendant has no title to the right for which he claims damages, no damages can be assessed. So, where a riparian owner claimed special damages by reason of the destruction of a natural reservoir site, in which the waters flowing in a river could

1 For the Fifth Amendment, Constitution of the United States, see Sec. 1060.

For the constitutions of the various States, see Part XIV.

For procedure in condemnation suits, see Secs. 1093-1097.

2 Sinnickson v. Johnson, 17 N. J. L. 129, 145, 34 Am. Dec. 184.

"Just compensation," as used in the constitutions, means full compensation, and the taking of private property for public use for anything less is an invasion of constitutional rights, irrespective of the extent of the infringement. Spring Valley Waterworks v. City and County of San Francisco, 124 Fed. Rep. 574.

3 Cribbs v. Benedict, 64 Ark. 555, 44 S. W. Rep. 707; Lewis on Em. Domain, 3d Ed., Sec. 673; Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766, 26 Colo. 74, 56 Pac. Rep. 577.

4 Hooker v. City of Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471.

be impounded, and thereby increase the power capacity of the river, an instruction that the owner, before impounding the waters, must obtain the consent of the lower riparian proprietors, or acquire their rights, before he could recover damages, was proper.[5]

§ 1080. Compensation and damages—By what body may be assessed.—Congress and the respective legislatures of the States have the right to provide for the exercise of the power of eminent domain, and to declare, within the constitutional provisions, the purposes for which the right may be exercised.[1] But the question as to the measure of compensation or damages is judicial, not legislative.[2] Therefore, the legislature can not fix the compensation or prescribe the rules for its computation.[3] And a statute in so far as it undertakes to direct the compensation to be paid for the property is unconstitutional and void.[4] So, also, is a statute unconstitutional when there is no express provision therein for notice to the land owner of the time and place when he may be heard as to the amount of his damages, although he is required to be notified of the appointment of appraisers.[5] However, the compensation to be made may be ascertained by any appropriate tribunal capable of estimating the value of the property. This tribunal may be created either by Acts of Congress or by the legislatures of the States for this purpose. The assessment of the damages is not required to be made by a jury.[6] As held by a recent case in Idaho, it has been the uniform ruling of the American courts that the right of trial by jury in a proceeding for the condemnation of property does not exist as a constitutional right unless the constitution itself contains a specific grant and guaranty of such right.[7] Therefore, the legisla-

[5] Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. Rep. 1091.

[1] See previous sections, Nos. 1060-1063.

[2] Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463, 13 Sup. Ct. Rep. 622.

[3] Lewis, Em. Domain, 3d Ed., Sec. 683.

[4] Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695.

[5] Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994.

[6] High Bridge Lum. Co. v. United States, 69 Fed. Rep. 320, 16 C. C. A. 46; Bauman v. Ross, 167 U. S. 548, 42 L. Ed. 270, 17 Sup. Ct. Rep. 966; Great Falls Mfg. Co. v. Garland, 124 U. S. 581, 31 L. Ed. 527, 8 Sup. Ct. Rep. 631.

[7] Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 Pac. Rep. 1046.

tures of the respective States have provided how the just compensation and damages in the special proceedings for condemnation shall be assessed, and the provisions of the statute where the right is sought must be strictly complied with in this respect.[8] In Colorado and some of the other States, the compensation must be determined by a jury or a board of commissioners.[9] And in that State the county court has concurrent jurisdiction with the district court in condemnation proceedings for the acquisition of a right of way, where the amount of the damages and the value of the land taken are within the money limit fixed for its jurisdiction.[10]

§ 1081. Just compensation—Measure of.—The just compensation, required by the clause in the constitutions, to be made to the land owner, is to be measured by the loss occasioned to him by the appropriation. Where the element of other damages to his property does not enter into the case, he is entitled to receive the value of the property he has been deprived of and no more.[1] But the market value of the land for its most important use may be considered.[2] However, the enhancement in the value of the lands, by the reason of having irrigation facilities afforded by the construction of works for that purpose by the condemner, can not be considered in deter-

See, also, Heyneman v. Blake, 19 Cal. 579; Mills on Eminent Domain, Sec. 91.

8 For the statutes of the States, see Part XIV.

9 Trippe v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Knoth v. Barclay, 8 Colo. 300, 6 Pac. Rep. 924; Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742; Siedler v. Seeley, 8 Colo. App. 499, 46 Pac. Rep. 848, where it is held that, after one demands a jury and enters on the trial of the case, he waives his right to the appointment of commissioners.

See, also, Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

10 Sievers v. Garfield County Court, 11 Colo. App. 147, 52 Pac. Rep. 634; Southwestern L. Co. v. Hickory Jackson D. Co., 18 Colo. 489, 33 Pac. Rep. 275; Otero C. Co. v. Fosdick, 20 Colo. 522, 39 Pac. Rep. 332.

1 Bauman v. Ross, 167 U. S. 548, 42 L. Ed. 270, 17 Sup. Ct. Rep. 966; Nahant v. U. S., 136 Fed. Rep. 273, 70 C. C. A. 641, 69 L. R. A. 723; Gallatin C. Co. v. Lay, 10 Mont. 528, 26 Pac. Rep. 1001; Siedler v. Seeley, 8 Colo. App. 499, 46 Pac. Rep. 848.

2 The value of the land as a reservoir site may be shown in proceedings to condemn it for reservoir purposes. San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372, 3 L. R. A. 83, 88 Cal. 50, 25 Pac. Rep. 977, 11 L. R. A. 604; Brown v. Weaver Pr. Co., 140 N. C. 333, 52 S. E. Rep. 954, 3 L. R. A., N. S., 912; Otero C. Co. v. Fosdick, 20 Colo. 522, 39 Pac. Rep. 332; Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

mining the amount of compensation to an owner of land taken for those purposes.[3] Where a settler upon the public lands, without taking any steps to procure title to the lands, places improvements thereon, and another desires to construct his irrigation ditch over or across such land, if, by proper proceeding, full compensation is determined and is paid for all damages or injury to the improvements, caused by the construction of the ditch, the constitutional and statutory requirements are complied with.[4] And no compensation can be had where the ditch was completed before the inception of the settler's title.[5]

§ 1082. **Damages to other lands—Measure of.**—Where the right to exercise the power of eminent domain is determined, not only must just compensation be paid for the land actually taken,[1] but the party seeking the right is also liable for the resultant damages from any cause, to the remaining land of the owner. These damages are usually provided for by the statutes.[2] But in assessing damages taken by eminent domain for the construction of a ditch, canal, or reservoir, all damages present and prospective, that are the natural, necessary, or reasonable incidents of the improvement, must be assessed in the condemnation proceedings; and no subse-

3 San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372, 3 L. R. A. 83, 88 Cal. 50, 25 Pac. Rep. 977, 11 L. R. A. 604.

4 Knoth v. Barclay, 8 Colo. 300, 6 Pac. Rep. 924; Colorado Con. etc. Co. v. Morris, 1 Colo. App. 401, 29 Pac. Rep. 302.

5 Farmers' High Line etc. Co. v. Moon, 22 Colo. 560, 45 Pac. Rep. 437.

1 For just compensation, see Secs. 1079-1083.

2 Siedler v. Seeley, 8 Colo. App. 499, 46 Pac. Rep. 848; Gallatin C. Co. v. Lay, 10 Mont. 528, 26 Pac. Rep. 1001; Lile v. Gibson, 91 Mo. App. 480; Denver etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; San Luis etc. Co. v. Kenilworth etc. Co., 3 Colo. App. 244, 32 Pac. Rep. 860.

Damages may be allowed for seepage. Clear Cr. etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819; Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

See, also, Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36, where it was held that the word "damages," as used in the statute, includes damages to the whole tract, in addition to the land actually taken.

In condemnation proceedings by a town the admission in evidence of the valuation as made by the assessor was held not to be prejudicial error, where the assessor testified that the valuation was not made as to what the land was actually worth. Benninghoff v. Town of Palisade, 48 Colo. 64, 108 Pac. Rep. 983.

quent recovery for such injuries will be allowed, unless the injuries are due to negligence, the unskillful construction of the works, or the subsequent negligent use of such right of way.[3] In other words, there can be but a single recovery for the whole damage resulting from the act.[4] It is therefore held that damages from the permanent injury to land from future seepage may be recovered in a single action.[5]

§ 1083. **Compensation and damages to land offset by benefits.**—Upon the question as to whether or not the benefits arising from the proposed improvement, for which the right of way is sought, may be charged against the land owner, or, in other words, whether the just compensation or damages to be paid to the owner for the right of way may be reduced by the actual benefits which will accrue to the land of the owner by the construction of the ditch, canal, or other works, the authorities do not agree. Upon principle, we do not think that they should be so charged against him. At best, it is but a forced benefit. The very object of an action in condemnation is to secure a right of way against the will of the owner of the land. As was said in a leading Tennessee case upon the subject: "He can not be paid off in benefits and advantages, which are forced upon him against his consent. He may be compelled to submit to the encroachment upon his private rights, when they come thus in conflict with the public interest, but with the charter of his liberties in his hand, he can say to the powers that be, 'Thus far shalt thou come and no farther.'"[1] But in Montana, where there are no constitutional or statutory restrictions upon the subject, it seems to be

[3] Denver etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; writ of error dismissed, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. Ed. 487, 63 L. R. A. 471; Benninghoff v. Town of Palisade, 48 Colo. 64, 108 Pac. Rep. 983.

[4] City of Denver v. Bayer, 7 Colo. 113, 2 Pac. Rep. 6; Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S. 795.

[5] Middlekamp v. Bessemer etc. Co., *supra*.

[1] Woodfolk v. Nashville etc. R. Co. (2 Swan's Rep.), 32 Tenn. 422, 434. It can be readily seen that, if the owner was compelled to receive his compensation in benefits, he might often, when carried to the extreme but logical conclusion, be compelled to pay those seeking the right of way for the privilege of going through his land, for the reason that the benefits

the rule to charge the land owner with the benefits from the proposed improvements.[2] In Missouri, the rule is the same; and an instruction that no damages shall be assessed if it appears that the benefits accruing to the land by reason of the construction of an irrigation ditch through it equal the damages sustained thereby can not be complained of when such an instruction is supplemented by another allowing the jury to consider every conceivable element of damage in such case.[3]

§ 1084. Multiplicity of ditches—Limitations to the right of condemnation.—While in all of the Western States the absolute right to condemn land, for the purpose of securing a right of way for ditches and canals over the lands of others is given, the right must be exercised with due regard to the rights of the owners of the land thus burdened with the easement. And in a number of the States are to be found statutory enactments for the protection of the land owner, against the placing of unwarranted burdens upon his land in this respect, and especially against the construction of a number of ditches through the land where one will answer all purposes, and requiring the ones seeking the right to traverse the shortest possible route. In Colorado, it is provided that no tract of improved or occupied land shall, without the written

to the land exceeded the just compensation for and damages to the same. Therefore, in some of the States, the consideration of benefits to the land is prohibited by the constitution, and in others by statute.

California.—Payment must be made in money, "irrespective of any benefit from any improvement." Art. 1, Sec. 14.

Iowa.—Compensation to be assessed by a jury, "who shall not take into consideration any advantage that may result to said owner on account of the improvement for which it is taken." Art. 1, Sec. 18.

Kansas.—Payment must be made in money, "irrespective of any benefit from any improvement proposed." Art. 12, Sec. 4.

For the constitutions of the various States, see Part XIV.

See, also, for a full discussion upon the subject of benefits as a set-off for compensation and damages, Lewis on Em. Domain, 3d Ed., Secs. 687 *et seq.*

It has been a question with many courts whether the benefit arising from the proposed improvement is to be charged against the owner. San Francisco etc. R. Co. v. Caldwell, 31 Cal. 368.

2 "As a matter of course, evidence as to damages is competent, and evidence as to all benefits is competent." Gallatin C. Co. v. Lay, 10 Mont. 528, 26 Pac. Rep. 1001.

3 Lile v. Gibson, 91 Mo. App. 480.

consent of the owner, be burdened with two or more irrigating ditches, for the conveyance of water to other lands, where all the water necessary to be conveyed through such property can be conveyed in a single ditch.[1] In a number of the other States are to be found similar provisions,[2] and in all of the statutes upon the subject, provisions will be found to the effect that the right must be exercised so as not to unnecessarily injure any public or private property. Where there are constitutional provisions permitting such rights of way to be acquired by eminent domain, it is held that these statutory enactments do not conflict with the constitutional provisions granting the right of way for the construction of ditches; but, while recognizing the privilege, they simply undertake to regulate the exercise thereof so as to inflict the least possible inconvenience upon the owner of the servient estate.[3] The object of these provisions is to avoid the multiplicity of ditches and canals through any tract of land where one will answer all purposes.[4] It has been held in Colorado that the statute is for the protection of the land owner only, and that it does not apply to a canal company, which is seeking to prevent the taking of land for, and the construction of, another irrigating canal by a rival company through the same land already occupied by the former company.[5] As can be readily seen, where the law forbids the granting of rights of way for a multiplicity of ditches through any tract of land, where one will answer all purposes, that, where a tract of land is already burdened with a right of way for an existing ditch, a later comer desiring a right of way

1 1 Mills' Ann. Stat., Secs. 2261, 2262.

2 For the statutes of the States, see Part XIV.

3 Trippe v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695.

4 Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766; Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

The provision of Section 3, Article 1 of the irrigation law of 1889, viz.: "No tract of land shall be crossed by more than one ditch," etc., held in Nebraska to include lands owned by corporations as well as natural persons. Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585.

"Under the statute, two or more outside parties can not burden the servient estate with two or more ditches and two or more easements without the owner's consent, when it is practicable to accomplish the same object by imposing but one burden." Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766.

5 San Luis etc. Co. v. Kenilworth C. Co., 3 Colo. App. 244, 32 Pac. Rep. 860.

over the same tract may be compelled to condemn a right of way through the ditch already existing. And, as will be noticed in the States thus regulating the right of eminent domain by statute, the right is also given to acquire a right of way through the ditch of another. However, we will more thoroughly discuss this subject in the following section.[6]

§ 1085. Acquisition of right of way through existing ditches.— In some of the States of the West are to be found statutes providing for the condemnation of rights of way through existing ditches and for the enlargement of the same where found necessary.[1] In the States where the right of eminent domain is regulated by forbidding the burdening of a tract of land with more than one ditch, where the one will answer all purposes, a later comer is often compelled to condemn a right of way through an existing ditch.[2] But, whether this specific right is provided for by statute or not, it is generally recognized that the right exists, under the general law of eminent domain, even in cases where the right of way for the existing ditch was originally acquired by condemnation proceedings. And, therefore, it may be laid down as the general rule that, where the right to exercise the power of eminent domain exists at all for any use deemed by the statute a public use,[3] the right also exists to condemn a right of way through an existing ditch, where there are no other obstacles in the way than the mere question of the right of eminent domain. The leading case, where the right was allowed by statute, is that of Nash v. Clark,[4] where the extreme right was allowed to a single person to condemn a right of way over the land and through the ditch of another for the purpose of conducting water to a small tract of his own land to be there used for irrigation. And it was held by the Supreme Court

6 See Sec. 1085.

For the statutes upon the subject, see Part XIV.

1 See Comp. Laws of Utah, 1907, Sec. 1288x22; Mills' Ann. Stat. Colo., Secs. 2261, 2263.

See, also, for statutes of various States, Part XIV.

2 See previous section, No. 1084.

3 For public uses for which actions for condemnation will lie, see Secs. 1065-1073.

4 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953; affirmed, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171.

See, also, for further discussion of this case, Sec. 1069.

of the United States that the legislatures may provide for the condemnation of such a right.[5] The proprietor of a ditch constructed for the conducting of water to be used for any purpose, whether upon his own premises or upon those of another, has a property ownership, both in the ditch and the right of way therefor,[6] and the using and enlarging of such a ditch without the owner's consent is as much the taking or damaging of private property, within the meaning of the constitutions, as would be the appropriating the right of way therefor in the first instance; and such a taking or damaging against the will of the owner will not be tolerated for any purpose except for what may be deemed a public use,[7] by due process of law,[8] and only then upon just compensation both to the land owner, through whose land the ditch is enlarged, and to the owner of the ditch or canal and the easement over which it runs.[9] Therefore it follows that for the acquisition

5 See, also, Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 Pac. Rep. 1046; Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742, where it was held that a private ditch may be enlarged and used in common by different parties, and the mere fact that the ditch was owned by a corporation does not entitle the ditch to exemption from the operation of the statute.

See, also, Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766; Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347; San Luis etc. Co. v. Kenilworth etc. Co., 3 Colo. App. 244, 32 Pac. Rep. 860; Patterson v. Brown etc. Co., 3 Colo. App. 511, 34 Pac. Rep. 769; Portneuf-Marsh Valley Irr. Co. v. Portneuf Irr. Co., 19 Idaho 48, 114 Pac. Rep. 19; Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147; Tanner v. Provo Bench etc. Co., —— Utah ——, 121 Pac. Rep. 584; Salt Lake City v. East Jordan Irr. Co., —— Utah ——, 121 Pac. Rep. 529.

A right to use a canal owned by a city may be appropriated by an electric power company under the right of eminent domain for the purpose of conducting the water of the power company. Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

6 For the nature of title to ditches and canals, see Secs. 833, 834.

7 For public use, see Secs. 1066-1074.

8 For due process of law, see Secs. 1076-1078.

9 Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695, where it was held that a statute which limits or directs the compensation to be paid for the property, instead of leaving this to be determined as provided by the State constitution was unconstitutional in this respect.

See, also, Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742; Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1,171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

The right to construct a ditch across the land of another does not include

of such a right under the power of eminent domain, the statute of the State where the right is sought must be strictly followed as to the procedure provided for condemnation cases.[10] The question, however, arising in these cases, as to the nature of the right to be condemned, is not that of actually condemning a ditch or canal, but to condemn such of its right of way as is not being actually used for carrying water, so that the plaintiff may also use that right of way, by the construction of a larger canal, if necessary, through which he may conduct the water appropriated by him by mingling it with the water of the owner of the canal, and afterward taking out the proper amount.[11] Where the right of way is acquired through the ditch of another, and it is necessary that the ditch be enlarged in order to carry the additional water, the original owner of the ditch can not be required to perform any work or make any expenditures for the purpose of enlarging his ditch so that it may be used by another;[12] but it is held that the keeping of the headgate and the ditch to its original terminus in repair devolves upon both sets of owners, the expense to be adjusted upon an equitable basis.[13] However, where an irrigation company uses a ditch already in operation, and extends a new ditch beyond the terminus of the old one, the owners of the old ditch are not liable for the cost of maintaining the new portion.[14]

In the State of Idaho, where there is no specific statute authorizing the condemnation of a right of way through the ditch of another, in a recent case the right was upheld; and it was there held that where the necessity for the taking is shown, one canal company will be allowed to condemn a part of the right of way of another canal company for the purpose of enlarging the old canal to a sufficient capacity to carry such an additional volume of water as may be needed for the use of the latter company.[15] But in Colorado,

the right to subsequently enlarge the ditch, without the consent of the owner. Clear Cr. etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819.

See, also, for changes which may be made, Secs. 856-873.

10 For procedure for condemnation, see Secs. 1092-1097.

11 For mingled waters, see Secs. 798-800.

See, also, Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 Pac. Rep. 1046.

12 Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

13 Patterson v. Brown etc., 3 Colo. App. 511, 34 Pac. Rep. 769.

14 Patterson v. Brown etc. Co., 3 Colo. App. 511, 34 Pac. Rep. 769.

See, also, Secs. 992, 993.

15 Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 Pac. Rep. 1046.

where there is a statute which provides that no person having constructed a private irrigation ditch through the land of another shall prevent another person from enlarging or using such ditch in common with him on paying a reasonable compensation, it was held that the statute did not give a city the right to enlarge and use the ditch of a water company.[16] We consider this ruling an entirely too strict a construction of the statute, and entirely disregarding the power of a municipal corporation to exercise the right of the power of eminent domain. Where the purpose for which the right is attempted to be exercised is deemed a public use, as the right to the use of water under the Colorado constitution and statutes must be deemed, upon principle there is no difference whether the right sought to be condemned is for a way over the land of another for a ditch, or through an existing ditch or canal of another.

§ 1086. **Acquisition of rights over lands of municipalities or public service corporations.**—Rights of way may also be acquired by eminent domain over lands and other rights of way owned by municipal or public service corporations. The general rule, and one usually provided by the statutes, is, however, that the right sought must be for a more necessary public use. Therefore, it is held that land of a private person subject to an easement of a public highway may be taken by a water company for a dam and reservoir.[1] The rights of irrigators may be condemned for the more public use of furnishing to a city a water supply.[2] The bank or levee of a public reclamation district may be condemned for a railroad roadbed.[3] A right to use a canal owned by a city may be acquired by eminent domain for the conveyance of water by an electrical power company. But this is upon the theory that where two public uses can stand together without material impairment or impediment of one by the other, they must so stand.[4] Under the constitution and statutes of

16 Junction Creek etc. Co. v. City of Durango, 21 Colo. 194, 40 Pac. Rep. 356.

1 Marin County W. Co. v. Marin County, 145 Cal. 586, 79 Pac. Rep. 282.

2 City of Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798, 27 Mont. 135, 69 Pac. Rep. 709.

3 Reclamation Dist. No. 551 v. Superior Court of Sacramento, 151 Cal. 263, 90 Pac. Rep. 545.

4 Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

See, also, Postal Tel. C. Co. v. Oregon Short Line R. Co., 23 Utah 474,

the State of Idaho, the use of land for irrigation canals is declared to be for a public use; and in that State where it is sought by condemnation proceedings to take property that is already devoted to a public use, it is held that the necessity will not be measured by the extent to which the use is actually applied, but rather to the public nature and character of the use to which it had been previously applied, and a right of way through the canal of a canal company was allowed to another canal company.[5]

It is held in the State of Washington that as between two rival public service corporations the one which first started may condemn the water rights of the later one in the case where only one is possible.[6]

§ 1087. Water rights—Power to acquire.—A permanent right to the use of water, or a vested water right, may, under certain conditions, be acquired under the power of eminent domain. But, as we have seen in preceding sections, a water right is a property right of the highest order;[1] and, therefore, under the constitutional guaranties, discussed in previous sections of this chapter, and the general authorities upon the subject of the right to exercise the power of eminent domain,[2] the same general conditions attach in order to acquire a water right in this manner as there discussed relative to the acquisition of rights of way over the lands of others. The taking can be made only for a public use; and, upon the question as to what constitutes a public use, for which water rights may be taken, the authorities are as much at variance as they are as to what constitutes a public use for which lands may be taken for rights of way, heretofore discussed in this chapter.[3] But it is generally

65 Pac. Rep. 735, 90 Am. St. Rep. 705; Oregon Short Line R. Co. v. Postal Tel. C. Co., 111 Fed. Rep. 842, 49 C. C. A. 663; Boston etc. Co. v. Boston & W. R. Corp., 23 Pick. 360 (Mass.).

5 Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 Pac. Rep. 1046.

See, also, Sand Cr. etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742; San Luis etc. Co. v. Kenilworth etc. Co., 3 Colo. App. 244, 32 Pac. Rep. 860.

But see Junction Creek v. Durango, 21 Colo. 194, 40 Pac. Rep. 356.

6 State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; State *ex rel.* Cascade Public Service Corporation v. Superior Court, 53 Wash. 321, 101 Pac. Rep. 1094; Nicomen Boom etc. Co. v. North Shore Boom etc. Co., 40 Wash. 315, 82 Pac. Rep. 412; Mills on Eminent Domain, Sec. 4.

1 See Secs. 768, 769.

2 See Secs. 1060-1063.

3 See Secs. 1065-1074.

conceded in the Western States, that the irrigation of arid lands unproductive in their natural state constitutes such a public use, by way of public improvement, that the legislatures of these States may authorize the exercise of the power of eminent domain to secure the water necessary to carry out such improvement.[4] But water rights can only be condemned, if under the statute they can be condemned at all, by those corporations, either public or private, or others who will supply the water so acquired to the general public, or at least to some portion of the public. They can not be taken for the private use of a person or of a corporation, but the public must benefit by the taking. But it is held that the taking of water rights for the supplying of water for "farming neighborhoods" is a proper exercise of the power of eminent domain where it is so provided by the legislature.[5] And, upon the subject as to what constitutes a public use for which a water right may be condemned, we can conceive of no case where the taking of the water right of one person by another person for his own use would be justifiable under the statute of any State. In this respect, a distinction must be drawn between what constitutes a public use for which a right of way for a ditch or canal over the lands of another, or through a ditch or canal of another, may be condemned for the private use of one individual, as laid

[4] Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; McGhee Irr. D. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398; *Id.*, 22 S. W. Rep. 967; Lake Koen etc. Co. v. Klein, 63 Kan. 484, 65 Pac. Rep. 684; Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Fallbrook Irr. Co. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Albuquerque etc. Co. v. Gutierres, 10 N. M. 177, 61 Pac. Rep. 357; affirmed, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

[5] "It must always be borne in mind that under the codes no man, or set of men, can take another's property for his own exclusive use. Whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumes and pays for) every individual of the community or communities, farming neighborhood or farming neighborhoods, to which he conducts it." Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674.

See, also, Aliso W. Co. v. Baker, 95 Cal. 268, 30 Pac. Rep. 537; Lindsay etc. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; St. Helena etc. Co. v. Forbes, 62 Cal. 182, 45 Am. Dec. 659; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197; Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. Rep. 37.

down by the Supreme Court of the United States in the leading case upon the subject,[6] and the condemnation of a water right of one person for the exclusive use of another. In the right of way cases the taking is justified upon the ground that the right to take the water which the condemner already owned over the lands of others to his own lands where it was there to be used for the irrigation of his own lands, was such a general benefit to the public at large that the use was deemed a public one. While the transferring of a water right from one person to another would not be any additional public benefit, it would be the taking of private property for a private use and, therefore, strictly within the constitutional prohibition. However, it is held that a private person may condemn a water right of another for a public use, but that he must respond to all reasonable regulations in the matter of the administration of such public use as the legislature of the State may prescribe.[7] Under the Washington statute, it was held that the water rights of one public service corporation might be condemned by an earlier corporation organized for the same purpose, where only one was possible.[8] But in California it was held that after one corporation makes a *bona fide* effort to acquire the rights to the water of a stream, it obtains an equity which the court will protect against rivals.[9]

The right can only be acquired upon due process of law [10] and upon just compensation.[11]

6 Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

7 Lake Keon etc. Co. v. Klein, 63 Kan. 884, 65 Pac. Rep. 684.

8 State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; Mills on Eminent Domain, 2d Ed., Sec. 47; State *ex rel.* Cascade Public Service Corp. v. Superior Court, 53 Wash. 321, 101 Pac. Rep. 1094.

9 San Francisco etc. Co. v. Alameda W. Co., 36 Cal. 639.

10 For due process of law, see Secs. 1076, 1077.

See, also, Bensley v. Mountain Lake W. Co., 13 Cal. 306, 73 Am. Dec. 575.

Any destruction, interruption, or deprivation of the usual and ordinary use of property amounts to a taking of the same both without compensation and without due process of law. Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

11 For just compensation, see Secs. 1079-1083.

Lux v. Haggin, 69 Cal. 256, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758; McGhee Irr. D. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398; *Id.*, 22 S. W. Rep. 967.

See the case of Los Angeles v.

Whatever right exists to acquire water rights by the exercise of the power of eminent domain must be specially conferred by the statute of the State where the right is sought, or by an Act of Congress of the United States.[12] It therefore follows that, where the general right is given, any provisions fixing any limitation or restriction within which the right may be exercised are conclusive, and will be followed by the courts.[13] And, if the right to condemn water rights is granted, it can only be upon due process of law and just compensation. So, in Idaho, where a preference right is given by the constitution for domestic uses, as superior to appropriations for other uses, it is held that the water having been once appropriated for other uses, it can not arbitrarily and without compensation be taken for domestic purposes.[14] Under the same condition, they may be condemned for the use of cities and towns for domestic and municipal purposes.[15] The National Reclamation Act of June 17,

Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; writ of error dismissed, 188 U. S. 314, 23 Sup. Ct. Rep. 395, 47 L. Ed. 487, 63 L. R. A. 471, where it was held that the value of percolating water could not be taken into consideration in estimating the value of property taken under the power of eminent domain. But on this subject, under what may be called the new theory of rights in percolating waters, see Secs. 1185-1211.

12 For the Acts of the various States permitting the condemnation of water rights, see Part XIV.

13 In Washington, the rights of riparian owners may be condemned with the exception of the right to the use of water for irrigation where in actual use. State *ex rel.* Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968.

See, also, for the condemnation of riparian rights, Secs. 1088-1091.

See, also, Albuquerque etc. Co. v. Gutierres, 10 N. M. 177, 61 Pac. Rep. 357; affirmed, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338, where it was erroneously held that surplus water was subject to appropriation only. The title to surplus water is in the United States in the Territory of New Mexico. It is subject to appropriation, not to condemnation; and that was the extent of the statute being construed that corporations had the right to appropriate the surplus water, or water which had not already been appropriated.

14 Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650, holding that as between two rival corporations, the one prior in time may condemn the water rights of a later one, where only one is possible.

15 A city, though not authorized by its charter so to do, may condemn the waters of a creek for the use of its inhabitants. Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197.

See, also, Strickler v. Colorado Sprs., 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; New Whatcom v. Fairhaven etc. Co., 24 Wash.

1902,[16] Section 7, provides for the condemnation of water rights or other property, where, in carrying out the provisions of the Act, it becomes necessary to acquire them. Water rights may also be condemned by irrigation districts where necessary and permitted by the statute of the State.[17]

§ 1088. **Water rights—The condemnation of riparian rights.**—A number of the States of the Western part of the country adhere to the doctrine of riparian rights as one of its systems of laws governing waters within their respective jurisdictions.[1] And in the majority of these States there are provisions of the statute which authorize the taking of the water rights of riparian proprietors, as such, under the power of eminent domain. As the right to the use of water, under the common law of riparian rights, heretofore discussed, is a property right,[2] it can not be taken, injured, or destroyed, except for a public purpose, upon due process of law, and for just compensation, and only then when specially authorized by the statute of the jurisdiction where the taking is sought to be had. And, we will say in passing that one of the redeeming features of the laws of these States which adhere to the dual and inconsistent systems of water laws, are the broad provisions of the most of their statutes permitting the condemnation of riparian rights especially when the purpose for which the right is sought is that of irrigation, which, as we have seen in previous sections,[3] is considered a public use of

493, 64 Pac. Rep. 735, 54 L. R. A. 190; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; Hercules W. Co. v. Fernandes, 5 Cal. App. 726, 91 Pac. Rep. 401; Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; Benninghoff v. Town of Palisade, 48 Colo. 64, 108 Pac. Rep. 983; State *ex rel.* Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. Rep. 3, where it was held that although the supplying of pure water by a corporation to the inhabitants of a city or town was a public use, within the law of eminent domain, the corporation must show before condemnation would lie that they have obtained from the city the privilege of supplying it with water.

[16] 7 Fed. Stat. Ann., 1905, p. 1098; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388.

For full text of Act, see Sec. 1244.

[17] Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

For irrigation districts, see Secs. 1386 *et seq.*

[1] For the Western States adhering to the doctrine of riparian rights, see Sec. 507.

[2] That riparian rights are property rights, see Secs. 450-456.

[3] See Secs. 1068, 1069.

a very high order.[4] Were this not so, the development and cultivation of the arid lands in these States would be greatly retarded. It is therefore provided by the statutes of a number of these States, which are upheld by their courts, that the rights of riparian owners in the waters of a stream may be taken under the power of eminent domain by others for agricultural and other public uses.[5] As said by the Washington Court: "If such rights may be conveyed, we see no reason why they may not, under the right of eminent domain, be condemned when necessary for public use, without the appropriation of the land itself."[6]

[4] For the statutes of the various States providing for the condemnation of water rights, see Part XIV.

[5] In Nebraska it was held in the leading case upon the subject that corporations organized under the district irrigation law were expressly authorized to condemn "the riparian proprietor's right to the use of the water" of a natural stream, when found necessary, for irrigation purposes, the development of a system of irrigation being a work of internal improvement. Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. The Court said: "Water for irrigation canals contemplated by the Act is absolutely indispensable for the successful prosecution of the enterprise. In fact, water to flow in the ditches to be constructed for the purpose of irrigating the soil for the production of crops was the overshadowing and all controlling factor, without which the law, so far as promoting the public welfare, would be but a hollow mockery, suggestive of a highly absurd situation—an anomalous condition of affairs."

See, also, Paxton etc. Irr. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. Rep. 37; McGhee Irr. D. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398; *Id.*, 28 S. W. Rep. 967; St. Helena W. Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659; Hercules W. Co. v. Fernandes, 5 Cal. App. 726, 91 Pac. Rep. 401; McCook etc. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Cline v. Stock, 71 Neb. 70, 102 N. W. Rep. 265, 98 N. W. Rep. 454; Long Island etc. Co. v. City of Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718; Northern Light & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Grande Ronde etc. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031; City of New Whatcom v. Fairhaven etc. Co., 24 Wash. 493, 64 Pac. Rep. 735, 34 L. R. A. 190; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Bingham v. Port Arthur etc. Co., 100 Tex. 192, 97 S. W. Rep. 686, 13 L. R. A., N. S., 656; Spokane etc. Co. v. Arthur Jones Co., 53 Wash. 37, 101 Pac. Rep. 515.

[6] State *ex rel.* Burrows v. Superior Court, 48 Wash. 277, 93 Pac. Rep. 423, 17 L. R. A., N. S., 1005, 125 Am. St. Rep. 927.

As the power to exercise the right of eminent domain for the condemnation of riparian owners' right to the use of the water flowing by or through their lands is one granted by statute only, any limitation or restriction to the exercise of the right fixed by the legislature is conclusive and must be followed. This may be illustrated by the statute upon the subject in the State of Washington,[7] wherein it is provided that the right to condemn the use of water shall not extend further than to the riparian rights of persons to the natural flow of water through lands on streams, and is not intended to allow the taking of water from any person that is used by the person himself or that is needed for that purpose. It was held by the Court that the word "needed" as so used meant water necessary to irrigate his land which he has under cultivation at the time his rights are sought to be condemned, or which he intends to and will place under irrigation within a reasonable time and that as to such water no condemnation could be had.[8]

The riparian owner's right to the use of the water itself can be condemned separate and apart from any land, although an action for the condemnation of the water may be joined with an action to condemn land for a right of way.[9]

§ 1089. Riparian rights—Parties defendant—Difficulties encountered in condemnation suits.—The condemnation of a water right acquired by appropriation, where a certain appropriator has

See, also, Northern Light etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Clear Creek W. Co. v. Gladeville Imp. Co., 107 Va. 278, 58 S. W. Rep. 586; Watauga W. Co. v. Scott, 111 Tenn. 321, 76 S. W. Rep. 888; Hatch v. Tacoma etc. R. Co., 6 Wash. 1, 32 Pac. Rep. 1063; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; State *ex rel.* Smith v. Superior Court, 26 Wash. 278, 66 Pac. Rep. 385; Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. Rep. 90; State *ex rel.* Smith v. Superior Court, 30 Wash. 219, 70 Pac. Rep. 484; Lewis on Eminent Domain, 2d Ed., Sec. 56.

7 Ball. Ann. Codes, Sec. 4156.

8 State *ex rel.* Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968.

See, also, State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031.

9 For the condemnation of land for rights of way, see Secs. 1065-1085.

See, also, Bigelow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570; St. Helena W. Co. v. Forbes, 62 Cal. 182, 45 Am. St. Rep. 659.

acquired the right to the use of a certain amount of the water of a stream, is a simple matter as far as the parties defendant are concerned, as compared with the condemnation of riparian rights. There the suit may be brought against the defendant, or defendants, who are the owners of definite water rights, which are sought to be acquired by the proceedings.[1] But, upon the other hand, as the rights of all the riparian proprietors upon a certain stream are equal or correlative,[2] and one riparian owner has only the right to the use of a reasonable amount of water naturally flowing in the stream for riparian lands, and then only when it does not materially injure the rights of the other proprietors, the question of parties defendant, in condemnation proceedings of riparian rights, becomes an important subject in this discussion. Under the common law rule, riparian rights are as much property rights as the soil adjoining the river, or other body of water, on which the rights are claimed.[3] Therefore, being property rights they can not be acquired against the will of their owners, under the constitutional guaranties heretofore discussed, except for a public use upon due process of law, and only then when just compensation is paid. Upon the smaller streams, which flow entirely within a certain jurisdiction, the matter is not a difficult one, as all the riparian owners upon the stream may be joined as parties defendant, and be served with process or other legal notice provided by the statute of the State wherein the suit is brought, and thus be all brought into court or the other tribunal provided for, their rights determined, and the damages for the tak-

1 For the procedure in eminent domain, see Secs. 1092-1097.

2 See Secs. 483-497.

3 "These riparian rights, founded on the common law, are property, and are valuable, and while they must be enjoyed in the due subjection to the rights of the public, they can not be abridged or capriciously destroyed or impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for a public use, upon due compensation." Baltimore etc. R. Co. v. Chase, 43 Md. 23.

See, also, Gardner v. Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526, where Chancellor Kent said: "A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which no man can be disseized but by a lawful judgment of his peers, or by due process of law."

See, also, Diedrick v. Northwestern etc. R. Co., 42 Wis. 248, 24 Am. Rep. 329; *Id.*, 47 Wis. 662, 3 N. W. Rep. 749; Kingsland v. New York, 35 Hun, 458.

See, also, for riparian rights, Chaps. 21-28, Secs. 450-551.

ing assessed. But, where the stream is large and the riparian proprietors are many and the stream flows through different jurisdictions, the question is, by no means, an easy one, as to how all those having property rights in the natural flow of the stream are to be brought into court and have their rights adjudicated, and the taking of the rights permitted, without a violation of the constitutional provisions. And, besides, if this can be done, it is a vastly expensive proceeding. As a general rule, all persons who have any proprietary interest in the property taken, or proposed to be taken, should be made parties defendant to the proceedings and also all other persons, if any, who are required to be made parties by statute. And by proprietary interest is meant any interest which is recognized as property by the laws of the State, where the taking is sought.[4] And not only must the owners of the record title to the property in question be made parties defendant, but, in some jurisdictions, the husband and wife must be made parties, also mortgagees, judgment creditors, and other lien holders, life tenants, lessees, and reversioners, tenants in common, and joint tenants, towns, cities, and other municipal corporations; infants should be brought in by their legally appointed guardians, or a guardian *ad litem* should be appointed by the Court; in fact, any person or corporation having a property interest in the rights sought to be condemned must be made parties defendant in the proceedings; and, not only this, they must be served by legal notice of the proceedings in accordance with the provisions of the statute. Otherwise there would be a taking of property without due process of law and in violation of the constitutional guaranties. All these questions which are liable to arise in actions to condemn riparian rights, on large streams with numerous riparian owners, by large enterprises, where the rights of the riparian owners would be materially injured by the taking, are practically prohibitive against the bringing of such actions, although the abstract right to condemn such property may be given by the statute.[5]

4 Lewis on Em. Domain, 3d Ed., Sec. 516.

5 "It would seem, however, that in instances where the stream system is of considerable size and the number of riparian proprietors who will be affected by diversion of water is large, the proceedings to condemn their respective rights and compensate each for his injury or loss would be of such magnitude and so expensive as to practically bar the appropriator from attempting it." Mills' Irr. Manual, 1907, p. 276.

Upon the question of jurisdiction referred to above, the constitution and statutes must be followed as to where the action may be brought.[6] But where the right sought to be acquired is in two or more counties of the same State, the rule generally is that the action may be brought in either county.[7] Where the works producing the injury are in one State, and the property damaged in another, it is held that an action for redress may be brought in either State.[8] But the courts of one State have no jurisdiction to try the rights of or to condemn property situated in another State.[9]

§ 1090. Riparian rights—Modern tendencies—Due process of law and just compensation in other than condemnation suits.—In the arid States of the West, adhering to the common law,[1] there is

See, also, Wiel on Water Rights in the Western States, 2d Ed., Sec. 339.

To secure the condemnation of all the riparian rights upon a certain stream, all riparian owners upon such stream must be made parties to the action, and not merely those above or below the point of diversion. *In re* Board of Water Supply, 58 Misc. Rep. 581, 109 N. Y. Supp. 1036.

6 For jurisdiction of courts, see Chaps. 78-83.

7 City of Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798, 27 Mont. 135, 69 Pac. Rep. 709; Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628; Postal Tel. Cable Co. v. Oregon etc. R. Co., 23 Utah 474, 65 Pac. Rep. 735, 90 Am. St. Rep. 705.

In California, under the Code of Civil Procedure, Section 392, subdivision 1, requiring actions for injuries to real property to be tried in the county where the real estate is situated, the suit may be brought in any county, although the property injured is situated in another county. The Court thus acquired jurisdiction to try the cause unless the defendant applied for its transfer for trial to the county where the real property is situated. Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

Again it is held in California that a ditch company incorporated in one county can not maintain an action to condemn lands in another county in connection with water rights claimed therein, where the ownership of such property is the issue in the case, without first filing a copy of its articles of incorporation in such county. Emigrant D. Co. v. Webber, 108 Cal. 88, 40 Pac. Rep. 1061.

8 Little v. Chicago etc. R. Co., 65 Minn. 48, 67 N. W. Rep. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421; Howell v. Johnson, 89 Fed. Rep. 556; West v. Octoraro W. Co., 159 Fed. Rep. 528; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665.

See, also, for interstate waters, Secs. 1221-1234.

9 Octoraro W. Co., 5 Pa. Dist. Ct. 767; Conant v. Deep Cr. Irr. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721; Carpenter v. Strange, 141 U. S. 87, 35 L. Ed. 640, 11 Sup. Ct. Rep. 960.

1 For these States, see Sec. 507.

a commendable modern tendency upon the part of the legislatures, and the courts as far as possible, owing to the peculiar arid conditions of this part of the country, to still further modify the old common law rule governing waters.[2] This is especially true as to the granting of rights for the irrigation of lands as against what may be called the "unused" rights of riparian proprietors, by not compelling those seeking the right to submit to the difficulties attendant upon an action to condemn riparian rights, by permitting the taking of the waters and then allowing those riparian proprietors whose rights are materially injured to rely upon their actions for damages, or if there has been "a more substantial injury," to maintain actions for injunction. In a previous portion of this work, we discussed the modern rule as to the rights of the riparian proprietors to the "undiminished flow," where a large portion of the waters of the natural streams was unused by the riparian proprietors, except as it might incidentally benefit their lands by flowing past them.[3]

We will still further discuss the question when we come to the subject of the granting of injunctions upon behalf of riparian proprietors as against the appropriators of the water for beneficial purposes.[4] Although, under the constitutional guaranties, private property can not be taken except for a public use upon due process of law and upon the payment of just compensation; and, as the right of riparian proprietors to the natural flow of the stream is a property right of which he can not be devested except under these conditions, still there are other methods by which this property of another may be taken, and these conditions met, than by the special proceedings in condemnation. That the taking of riparian rights to the natural flow of the water of a stream by persons or corporations for the irrigation of land, which otherwise would be barren, is a public use of the highest order, is unquestioned; therefore, that

2 For modifications of the common law, see Secs. 508-513.

For irrigation as a riparian right, see Secs. 498-525.

3 For undiminished flow, see Sec. 549.

4 For injunctions as against appropriators, see Chap. 81.

See Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

See, also, the exceedingly well reasoned opinion by King, J., in the case of Hough v. Porter, 51 Ore. 318, 98 Pac. Rep. 1083, 95 Pac. Rep. 732, 102 Pac. Rep. 728.

subject need not be further discussed here.[5] But the taking for this purpose may be by the actual diversion of the water of the stream, originating in trespass, if you will, and still the riparian owners whose rights were injured would be entitled to their remedies at law for damages, or in equity for an injunction, should the facts in any case warrant either remedy, and thus the other constitutional conditions would be complied with, both as to just compensation and due process of law. And so the courts of some of these common law States hold, especially in Nebraska and California, with Oregon leaning in that direction. In a leading case in Nebraska [6] it was held that, where an appropriator had acquired a valid right to the use of water, not theretofore actually used by the riparian proprietors, under the laws governing the taking and use of water for purposes of irrigation, equity will restrain an upper riparian owner from subsequently diverting water, without requiring the appropriator to institute proceedings to condemn the rights under the common law of all riparian owners to the reasonable use of water flowing in the stream. And, in a still earlier case,[7] it was held that where the appropriation was made in accordance with the statute, a riparian proprietor whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action instituted for that purpose.[8]

The Supreme Court of California, in the more recent cases holds practically to the same rule that in order to acquire property rights of riparian owners to the natural flow of a stream, it is not necessary to bring condemnation proceedings, but that where the rights of the public are involved in a suit to enjoin the abstraction of the waters of a stream, or subterranean waters, for a beneficial use at a distance, the court can arrive in terms of money at the loss which the

5 See Secs. 1068, 1069.

6 McCook Irr. etc. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249.

7 Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

8 See, also, Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

In a former hearing of the case of McCook Irr. Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996, it was held that the plaintiff appropriator could properly bring an action in equity to determine the rights of all the claimants to the use of the water of the stream, and to quiet its title thereto, and in which damages to riparian rights might be ascertained, and due compensation awarded.

proprietors sustained, and an absolute injunction should not be granted, but the proceedings will be regarded as one to secure compensation to the land owners for their injury; but that an injunction might be granted conditional merely upon the failure of the defendant to make good the damage thus allowed. "Such an action, if successful, should be regarded in its nature as the reverse of an action in condemnation. The defendant in effect would be held to be damaging private property without just compensation first made to the owner, and, failing to make such compensation, should be enjoined from further damage."[9] The rights of those who had taken the water as against the rights of riparian proprietors were decided upon different principles of law in the cases referred to in Nebraska and the cases in California. In the Nebraska cases, it was held that the appropriator had acquired the right to the use of the water by complying with the statutory provisions, while in California it was held that they had acquired the right as against the owners by estoppel.[10] But the only point which we wish to make here, is that the rights between the different parties, where water is taken and claimed by riparian proprietors, may be adjudicated, and the damages assessed therefor, in suits other than by the special proceedings in condemnation. But in cases of this nature, it falls upon the party claiming to be injured to bring the action, but the ultimate results are the same as though the action had been brought by the party seeking to secure the right. As against the "unused" portion of the waters flowing by the lands of a riparian owner, that is to say, the portion of the water of a stream, which is not in fact at the time the claim is made being actually put to some beneficial use by the riparian owners, other than merely being permitted to flow in

9 Newport v. Temescal etc. Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098.

See, also, Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, the case of Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391, where the Court, referring to the ruling in the above cases cited, said: "The principle contended for and sustained by the cases cited and others is unquestionably correct." But the Court held that the facts in the case at bar did not warrant their application.

See, also, Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Miocene etc. Co. v. Jacobsen, 146 Fed. Rep. 680, 77 C. C. A. 106.

10 For the doctrine of estoppel, see Secs. 1121-1128.

the natural channel by their lands, where the constitution or statute of a State does not prohibit this mode of procedure, it is much more equitable to have these matters adjudicated in actions brought by those claiming to be injured by the diversion, than to compel the party seeking the right to bring an action to condemn the right against all those riparian owners who may have an interest by virtue of their common law rights to the flow of the waters of a stream, whether those waters were put to any beneficial use or not.

§ 1091. Riparian rights—Just compensation—Measure of damages.—If there is a taking of a riparian right to the natural flow of a stream, in those States where it is recognized by the authorities as a property right, just compensation must be paid therefor; otherwise there would be a violation of the constitutional guaranties. Therefore, no matter what the mode of procedure in acquiring the riparian rights of another by virtue of the power of eminent domain, whether it be by direct action in special condemnation proceedings against the riparian owners upon a certain stream, or, whether it be an action brought by the riparian owner against the party diverting the water for damages, or for any injunction protecting his right, and it should be decided by the Court that the condemner would be entitled to the water which was the property of another, upon the payment of just compensation, the damages for the taking must be assessed and the payment made by the claimant.[1]

The measure of the damages which should be allowed, where riparian rights are sought to be condemned, is the depreciation in the value of the whole riparian tract by reason of the taking. The estimate should be based upon the value of the property immediately before the taking and what it would be worth after the taking had been made. The difference, if any, is the loss actually sustained,

1 See previous section, No. 1090.

In making appropriations of water as contemplated by the Irrigation Act of 1895, a riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained to be recovered in a suitable action or proceedings instituted for that purpose. McCook Irr. etc. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; *Id.*, 70 Neb. 109, 96 N. W. Rep. 996.

See, also, Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 647.

and therefore the proper measure of damages.[2] As a riparian right is a property right, whether it is used or not, the courts of the various jurisdictions differ somewhat as to the assessment of damages where the water is not being put to actual use by the riparian proprietors. The rule in California seems to be that the right to the future use of the water should be considered,[3] while in Nebraska, where the riparian proprietors were possessed of the naked right to a reasonable use of the waters of a stream, yet where such right was not coupled with an actual diversion or application of such waters to some beneficial use, the measure of damages for future use, defeated by the taking, can not be considered. And, also, in a recent case it was held that the riparian owner could not be permitted to enhance his damages and be entitled to greater compensation by reason of his added expenditures in the construction of ditches for irrigation of his riparian lands subsequently to the time of the taking.[4]

In view of the great need for water in this arid country none of

2 Lee v. Springfield W. Co., 176 Pa. 223, 35 Atl. Rep. 184; City of Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. Rep. 354.

The measure of damages for condemnation of a riparian owner's water rights is the depreciation in the value of the whole tract of land adjacent to the stream, depending as well on the depth of the land as its frontage on the stream. Hercules W. Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. Rep. 401.

3 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

4 McCook Irr. etc. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249, where the Court said: "The defendants (the riparian owners) in the case at bar constructed their ditches with the full knowledge of the plaintiff's superior rights as an appropriator, and, in equity and good conscience, ought not to be permitted to add this increased expense to the compensation to which they might be found entitled, as riparian owners, for damages to their riparian estate. If this were a case where the riparian owner had actually diverted water to irrigate riparian lands before the rights of the appropriator had attached, the case presented would be entirely different; and it could hardly be doubted that the appropriator would, in equity, be compelled to make due compensation before a Court would restrain the further diversion and use of such water by such riparian owner."

In a previous hearing of the same case, 70 Neb. 109, 96 N. W. Rep. 996, the Court held that under the circumstances of the case the injury of the riparian owners by reason of the taking of the water by an irrigation enterprise "is nominal only."

See, also, Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

it should be permitted to run to waste by riparian proprietors or others. Therefore, where a riparian proprietor claims his right to maintain the undiminished flow of the water of a natural stream, without other use, others should be permitted to acquire the right to the use of the water in order that the greatest good might be done to the greatest number. And in those States which adhere to the common law of riparian rights, it is true that in all jurisdictions these rights should be condemned for public uses, and the measure of damages should be based upon the present use that is being made by a riparian proprietor, and not upon some vague, uncertain scheme for the use of the water in the future.[5]

§ 1092. Actions for condemnation—General procedure and practice.—The form of procedure in actions to condemn rights discussed in the previous sections of this chapter differs in the various States, the same being largely regulated by statute. In the most of the States a special procedure for actions of this nature is provided, and the general code of civil procedure does not apply.[1] In most jurisdictions there are provisions that, after the complaint has been filed, the court or judge may, upon a proper showing that the necessity exists for the condemnation, upon motion, grant an order that the plaintiff take possession of the premises, upon filing a bond conditioned to pay the adjudged value of the premises and all damages in case the property is condemned and to pay all damages arising from the occupation before judgment, in case the property is not condemned, and all costs adjudged to the defendant in the action. The court or judge may also, pending the action, restrain the defendant from hindering or interfering with the occupation

5 For rights of riparian proprietors to the undiminished flow of the water, under the modified Western rule, see Sec. 549.

For when injunctions will be granted upon behalf of riparian proprietors, see Chap. 81.

1 "Proceedings of this nature are *sui generis;* they are purely statutory, and in many important particulars are wholly unlike our ordinary civil actions under the code." Knoth v. Barclay, 8 Colo. 300, 6 Pac. Rep. 924; Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994, wherein it is said: "The proceeding to condemn property under the right of eminent domain is not a civil action, nor is it necessary that it should be considered in the ordinary course of legal proceedings."

For condemnation proceedings in California, see Chap. 86.

of the premises and the doing thereon of the work required.[2] In Nebraska, water companies are given the power to acquire rights of way, and to condemn property necessary for the construction of their canals, in the same manner as railroads may acquire property and rights of way for railroad purposes; and the procedure applicable to the exercise of the right of eminent domain by railroad companies is made to apply to such water companies.[3] In Washington it is provided by the Act of 1899 [4] that the money damages assessed must be paid to the clerk of the court before the work of construction can be commenced.[5]

In some States, before an action for condemnation will lie, there must have been a demand upon the part of the plaintiff for the land and an attempt upon its part to secure the property sought by contract or agreement.[6] But, in most jurisdictions, it is only necessary to show that the use to which the property is to be applied is authorized by law and that the taking is necessary to such use.

§ 1093. Actions for condemnation—Parties.—In actions for condemnation, the parties plaintiff must be a corporation, associa-

2 The right of the plaintiff to enter into possession of property in condemnation proceedings, upon filing sufficient bond, upheld by the Utah Court, and the provisions of the statute relative thereto declared not in conflict with Article 1, Section 22, of the Utah constitution. Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 67 Pac. Rep. 672, 61 L. R. A. 648, 25 Utah 441, 71 Pac. Rep. 1069.

See, also, Spratt v. Helena etc. Co., 37 Mont. 60, 94 Pac. Rep. 631.

3 Crawford v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

4 Laws Wash., 1899, p. 262, Sec. 6.

5 It was held that any informality in the decree not exactly conforming to the statute, requiring that the decree provide that the money be paid to the clerk of the court before work upon the ditch be commenced, was cured by a supplemental transcript on appeal showing that the money had been actually paid to the clerk for the benefit of the owners of the land condemned. Fulton v. Methow Trading Co., 45 Wash. 136, 88 Pac. Rep. 117.

6 Fulton v. Methow Trading Co., 45 Wash. 136, 88 Pac. Rep. 117; Grande etc. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031; Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36.

In Colorado, in such an action the condemner offered to prove that the parties were unable to agree, but the proof was excluded upon objection of the attorneys for the defendant, and it was held that all the parties were bound by the action of the attorneys conducting the trial, and, upon appeal, they could not complain. Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. Rep. 238.

tion, or person in charge of the public use for which the property is sought, or some other party designated by the statute of the State wherein the action is brought. Under the more modern statutes the right is given to foreign as well as domestic corporations. Therefore, it is generally held that a corporation, organized under the laws of any State that has complied with the laws of the State relative to the filing of its articles, accepting its constitution and laws, etc., has the power as party plaintiff to condemn lands and rights for the purposes prescribed in the statutes of the State where the action is brought, as well as domestic corporations.[1] And in jurisdictions where the statute does not permit this right, the tendency is for the legislatures to amend the statutes so that it will give the right. This is illustrated by a case in Montana, where the Supreme Court upon the first hearing of a case held that a foreign corporation authorized by the laws of its domicile to construct a dam and electric power plant on a river in Montana did not have the power of eminent domain, and reversed the judgment of the lower court granting the right.[2] But shortly afterward the statute was amended,[3] and the Supreme Court in a second action between the same parties upheld the amended statute extending the power to foreign corporations.[4] In Alaska it has been held that a foreign corporation can not exercise the power of eminent domain.[5]

The United States is given the power as party plaintiff to exercise the right of eminent domain for the Reclamation Service, but this must be done in accordance with the local laws of the State wherein the action is brought.[6]

The powers of a corporation are usually determined by the terms of its articles or charter.[7] Therefore, a corporation whose articles show that it is essentially a private corporation, and in no sense obligated to furnish the public with water, can not exercise the power of eminent domain.[8] Upon the other hand, when the cor-

1 Gilmer v. Lime Point, 18 Cal. 229.

2 Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. Rep. 733, 8 L. R. A., N. S., 567; *Id.*, 37 Mont. 60, 94 Pac. Rep. 631.

3 Laws Mont., 1907, p. 38, Chap. 23.

4 Spratt v. Helena etc. Co., 37 Mont. 60, 94 Pac. Rep. 631.

5 Miocene D. Co. v. Lyng, 2 Alaska 265, 138 Fed. Rep. 544, 70 C. C. A. 458.

6 United States v. Burley, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

7 See Chap. 74.

8 State *ex rel.* Tolt Power etc. Co. v. Superior Court, 50 Wash. 13, 96 Pac. Rep. 519.

poration articles show that primarily it was organized for the purpose of public service, it is given the right of condemnation. However, it is held in the State of Washington that this does not carry any sanction of private use, and such may be prevented in subsequent proceedings.[9]

As to parties defendant in such actions, all persons, or corporations having an interest in the property sought to be acquired should be made parties defendant, served with summons according to law, and their rights tried and their damages assessed.[10] Again, as in other cases, where persons other than those who are made parties defendant have an interest in the property sought to be condemned, they may intervene in the action.[11] But the rights of persons who are not made parties to the suit, but are strangers thereto, can not be considered in the trial of the action.[12] In order to have the rights of strangers to a suit determined, they must be

9 See State *ex rel.* Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. Rep. 3; Walker v. Shasta Power Co., 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

10 Denver etc. Co. v. Denver etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383; Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36; Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994.

See, also, for the condemnation of riparian rights—parties defendant, Sec. 1089.

But, on appeal in such an action, where the transcript showed no service on certain defaulting defendants, objections to the trial Court's findings that they were duly served and their default entered, and to the act of the trial Court in not calling for a jury to determine damages as to them, were held to be immaterial, where such defaulting defendants did not appeal. Fulton v. Methow Trading Co., 45 Wash. 136, 88 Pac. Rep. 117.

11 One intervening is not entitled to a judgment of dismissal as to himself on a finding by the trial Court that he was not the owner in his own right of any of the lands sought, since he came into the action of his own initiative, and was not forced into Court by the plaintiff. Fulton v. Methow Trading Co., 45 Wash. 136, 88 Pac. Rep. 117.

But in a proceeding instituted by a power company to condemn a railroad right of way for a reservoir, the people, through the attorney general, have no right to intervene to determine whether the railroad company has forfeited its franchise to such right of way. Denver etc. Co. v. Denver etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

12 Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347; Denver etc. Co. v. Denver etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

made parties to the action or must of their own accord intervene therein.[13]

§ 1094. **Actions for condemnation—Pleadings.**—The complaint or petition in actions to condemn rights must, in the first instance, set forth the statutory requirements, and then may include such other allegations as may be necessary. It must particularly describe the right sought to be condemned. If a right of way is sought, the complaint must show the location, general route, and termini, and, in some instances, must be accompanied with a map thereof, so far as the same is involved in the action.[1] If a tract of land is sought to be taken, each piece must be definitely described, and a statement as to whether the entire piece or only a portion thereof; if it is only the latter, the part sought must be definitely described.[2] Where the action is brought to condemn water rights, these rights must also be particularly described. If they are ri-

13 Denver Power & Irr. Co. v. Denver & R. G. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383; Walker v. Shasta Power Co., 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725.

1 A complaint which describes the definite route and the dimensions of a ditch, sufficiently describes the quantity of land, within the requirements of the statute, requiring the complaint to state the quantity of land required. Fulton v. Methow Trading Co., 45 Wash. 136, 88 Pac. Rep. 117.

See, also, Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. Rep. 757; State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; Shasta Power Co. v. Walker, 149 Fed. Rep. 568; Walker v. Shasta Power Co., 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725.

A complaint to condemn property must show that the use for which it is to be taken is a use declared by the legislature to be a public use. Northern Light etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896.

2 A complaint by a city showed that the property sought was all the estate and interest of defendants in certain land definitely described, and alleged that the interest of the defendants was in fee, subject only to the city's ownership of the exclusive right to the use of all the water flowing through it; it was held on demurrer that the complaint sufficiently described the property sought to be condemned. Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585. Appeal dismissed under name of Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471.

Ordinarily, one seeking to condemn land should describe in his petition the property sought, but where an anticipated claim for damages is interposed the petitioner may lessen or obviate the claim by stipulation or waiver, whereby the damages claimed may be avoided and the rights of the owner fully protected. Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. Rep. 1091.

parian rights, the complaint should set forth a definite description of the defendants' lands which are riparian to the stream, a description of the stream itself, and the nature and character of the riparian rights connected with the land and sought to be condemned.[3]

If the property sought is a water right acquired by appropriation, the nature and extent of the right must be fully described, the stream from which the water is taken, and the beneficial use or purpose to which the water is being applied, and any further statements that are necessary to fully describe the right. But, in either case, the plaintiff must fully state the use or purpose to which he intends to apply the water, and for which he is seeking the right by condemnation, in such terms that the complaint will show upon its face that that use is a public one. And in this respect only the uses designated by the statute are deemed public uses for the purpose of condemnation. Therefore, it is not sufficient for the complaint to allege that the use for which the property is to be taken is a public use, but it must show specifically that the use is one of those enumerated by the statute, and the trial court can not obviate this requirement by finding the use to be a public use.[4] It is held that the facts showing the necessity for taking the property by condemnation must be proved, but that they need not be specifically pleaded.[5]

Where the absolute right is given by the statute for condemnation of property rights, and for the public use or purpose for which an action is brought, the defenses to such an action are few. In Washington it has been held that no answer is contemplated or

3 Northern Light & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Hercules W. Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. Rep. 401; State *ex rel.* Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968.

4 Therefore, a complaint to condemn water rights to supply specified towns "and other places" "with water for domestic and other necessary purposes" is bad on demurrer, as the purpose for which the condemnation is sought would include other uses not public uses. Hercules W. Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. Rep. 401.

See, also, Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Northern Light & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Shasta Pr. Co. v. Walker, 149 Fed. Rep. 568; *Id.*, 160 Fed. Rep. 858, 87 C. C. A. 660, 19 L. R. A., N. S., 725.

5 Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Northern Light & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879.

required in proceedings of this nature, and that it is not error to strike such an answer from the files.[6] About all that a defendant can do in such an action is to see that the proceedings are conducted in accordance with the law, and to put in evidence the full facts as to the amount that he will be damaged by the taking of his property. The necessity of the taking may, in certain instances, be a good defense, as where the condemner has ample water besides the rights sought for the public use to which he applies the water, or ample facilities to conduct the water to the place of use. But where in an action to condemn a right of way for a ditch and the riparian rights to the waters, it was held to be no defense that the water company appropriated and was capable of using a large supply of water through another source, where there was the actual necessity for the additional water for the public use to which the plaintiff intended to apply the water rights condemned.[7] Neither is it a defense, in an action to condemn land for a reservoir site, that the site is within the limits of a forest reserve of the United States, and that the Government's consent has not been obtained.[8] Nor is it a defense that the rights sought may conflict with rights of others who are not parties to the action.[9] Again, it is not a good defense, where the answer alleged that the property was sought for other and ulterior purposes, where the Court determined that the public interests required the taking.[10]

§ 1095. Actions for condemnation—The hearing.—In the matter of the hearing in actions for condemnation, the statute of the States where the action is brought must be strictly followed.[1] The

6 Seattle etc. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. Rep. 720; State *ex rel.* Ami Co. v. Superior Court of Pierce Co., 42 Wash. 675, 85 Pac. Rep. 669.

See, also, Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. Rep. 1091.

7 State *ex rel.* Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968; State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 Pac. Rep. 1046.

8 Denver etc. Co. v. Denver etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

9 Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347.

10 Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. Rep. 1091; Fort St. Union Depot Co. v. Bacus, 92 Mich. 33, 52 N. W. Rep. 790.

1 Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

question of the necessity for the taking of the property for a public use, when the same is denied in the answer, is usually left to the Court alone to decide. But in Colorado, in all proceedings under the eminent domain Act, the question of necessity, or when the proceedings are to condemn a right of way for a ditch, the question of the feasibility and practicability of the undertaking must be tried, if at all, by a board of commissioners appointed by the Court.[2] But by demanding a jury and voluntarily trying the question of damages, the defendant is held to have waived his right to have the preliminary necessity for the taking submitted to a commission.[3] And where this question is not waived, the question as to the necessity of the taking should be determined, either by the Court or by the commission appointed for such purpose *in limine*, before the question of the damages is tried either by the jury or by the commission selected for this purpose.[4]

Upon the hearing of the question of damages, not only must the statute provide for such a hearing, but also it must provide for notice to the person whose property is sought in an action for condemnation of such hearing for fixing the damages.[5] The defendant must be given the opportunity to be heard, otherwise there is not due process of law in taking the property, in violation of the Federal and State Constitutions.[6]

In those jurisdictions where it is provided that the damages may be assessed by a jury after the evidence in the case is all in, the

2 Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742; Thompson v. De Weese-Dye etc. Co., 25 Colo. 243, 53 Pac. Rep. 507. —

"The jury determines only the question of damages." Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36.

3 Thompson v. De Weese-Dye etc. Co., 25 Colo. 243, 53 Pac. Rep. 507.

4 Portneuf Irr. Co. v. Budge, 16 Idaho 116, 100 Pac. Rep. 1046; Thompson v. De Weese-Dye etc. Co., 25 Colo. 243, 53 Pac. Rep. 507; Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742.

Facts showing the necessity for taking property by eminent domain must be proven. Northern Light etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

5 Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994; Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36.

6 For due process of law, see Secs. 1076, 1078.

Court must instruct the jury upon the law as to the proper measure of damages.[7]

§ 1096. **Actions for condemnation—Verdict—Judgment.**—The verdict of the jury or the finding of the commission before whom the question of damages was tried having been adopted by the Court, the Court must then enter judgment in the case, in accordance with the statute, both as to the amount of damages to be paid the defendant for the taking of his property, and the nature and extent of the right to take the same. These judgments usually provide that the amount assessed as damages for the taking must be paid to the defendant within a certain time, as specified by the statute, and upon the payment of which the final order is made of condemnation. The judgment of final condemnation must describe the property condemned with great particularity and the purpose of such condemnation. And upon the rendition of such judgment, and usually filing the same in the office of the county recorder, thereupon the property described therein vests in the plaintiff for the purpose therein specified.[1]

Upon the question of costs, the statutes of the respective States specify how they shall be assessed. In some States costs may

7 An instruction "that the measure of damages of the defendant would be the amount in dollars and cents, if any, saved to the plaintiff in the construction or enlargement of the proposed canal by reason of the existence of the ditch of the defendant, as constructed at the time of the issuance of the summons, bearing in mind said defendant's continued future use of the proposed enlarged canal in common with that of the plaintiff corporation," was held not to correctly state the rule for estimating and fixing damages, and in direct conflict with the further instruction that: "The jury are instructed that they are not to measure the value of the right sought to be condemned from the defendant, by the necessity the plaintiff is under of obtaining that right, or the value it may be to the plaintiff alone, under the peculiar circumstances of the particular case. The reasonable market value of the property sought to be taken is the true measure of damages for the amount so taken." The latter instruction correctly states the law, and was a proper instruction for the jury. Portneuf-Marsh Valley Irr. Co. v. Portneuf Irr. Co., 19 Idaho 483, 114 Pac. Rep. 19.

1 Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742; San Luis etc. Co. v. Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. Rep. 860; Otero Canal Co. v. Fosdick, 20 Colo. 522, 39 Pac. Rep. 332; Denver etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; Fulton v. Methow etc. Co., 45 Wash. 136,

be allowed or not, in the discretion of the Court, and if allowed, may be apportioned between the parties on the same or adverse sides. In other States the costs must be assessed against the plaintiff, under the theory that the owner should receive his just compensation for the property taken, clear of any expense of the proceedings.[2] However, it was held in an action in eminent domain, where reversible error was committed in connection with the trial of a separate and independent cause of action injected into the case by the defendant, the appellee, he will be taxed with the costs in the Supreme Court of an appeal of a judgment reversed for such error.[3]

The effect of a judgment for a water company in condemnation proceedings is to estop it, in an action against it for failure to deliver water on demand to one over whose land a strip for a right of way for its canal was condemned.[4]

§ 1097. Actions for condemnation—Appeal and review of the judgment.—As in other actions, the right of appeal is given from final judgments in condemnation cases, and the Appellate Court has the power to affirm, reverse, or modify the judgment of the trial court. An erroneous instruction to the jury, if the exception to the same is taken in time and duly embodied in the abstract on appeal, may be ground for the reversal of the judgment.[1] But where instructions when all read together may be harmonized and reconciled, the Appellate Court will not reverse a judgment because some particular isolated instruction, when read alone, might be misleading or give the jury an improper understanding as to the law of the case. However, where the instructions are irreconcilable and conflict on a decisive or controlling question to be determined by the jury, they can not be construed together, and where no one can

88 Pac. Rep. 117; Portneuf Irr. Co. v. Budge, Judge, 16 Idaho 116, 100 Pac. Rep. 1046.

See, also, Grande Ronde etc. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031.

See, also, measure of damages, Secs. 1079-1083.

2 Lewis on Eminent Domain, 2d Ed., Sec. 562; Portneuf-Marsh Valley Irr. Co. v. Portneuf Irr. Co., 19 Idaho 483, 114 Pac. Rep. 19.

3 Farmers' etc. Co. v. Moon, 22 Colo. 560, 45 Pac. Rep. 437.

4 Lowe v. Yolo County etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 379.

1 Thompson v. De Weese-Dye etc. Co., 25 Colo. 243, 53 Pac. Rep. 507.

tell which instruction the jury followed, a reversal of the judgment must necessarily follow.[2]

Again, where it is claimed that the trial court has exceeded its jurisdiction, or that the procedure was not in accordance with the course provided by law, and there is no plain, speedy, or adequate remedy, the judgment of the trial court in condemnation cases may be reviewed by a Superior Court in an action for *certiorari*, and the proceedings of the trial court either quashed or affirmed.[3] Again, when it is claimed that the trial court has no jurisdiction, or in an action in which the Court has jurisdiction, the trial court attempts to proceed with the prosecution of an action for condemnation by rules differing from those which ought to be observed, an action in a superior court in prohibition will lie against the judge of the trial court, and the trial court may be prohibited from proceeding with the action, or the writ may be denied and the trial court permitted to proceed.[4] And, again, the entire question, including the constitutionality of the condemnation Act, may be reviewed by an appellate court in an action brought by the defendant in the condemnation proceedings seeking to enjoin the plaintiff from entering upon and taking possession of the property attempted to be condemned by the trial court.[5]

§ 1098. Nature of title acquired.—Where a strip of land has been condemned for a right of way for ditches and canals under

2 Portneuf-Marsh Valley Irr. Co. v. Portneuf Irr. Co., 19 Idaho 48, 114 Pac. Rep. 19.

3 For actions for *certiorari* or review, see Sec. 47.

See, also, State *ex rel.* Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968; State *ex rel.* Wilson v. Superior Court, 47 Wash. 397, 92 Pac. Rep. 269; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893; State *ex rel.* Tacoma Industrial Co. v. White River Power Co., 39 Wash. 648, 82 Pac. Rep. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987; State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; Sievers v. Garfield County Court, 11 Colo. App. 147, 52 Pac. Rep. 634; State *ex rel.* Burrows v. Superior Court, 48 Wash. 277, 93 Pac. Rep. 423; *Id.*, 48 Wash. 286, 93 Pac. Rep. 426, 17 L. R. A., N. S., 1005, 125 Am. St. Rep. 927.

4 Portneuf Irr. Co. v. Budge, Judge, 16 Idaho 116, 100 Pac. Rep. 1046.

For actions for writ of prohibition, see Chap. 82.

5 Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994; Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

the power of eminent domain, the party who has acquired the right acquires merely an easement, and not an absolute fee to the land. The courts hold that this is the correct rule, even where the statutes in terms provide that the condemner "shall be seized in fee" of the land condemned, or language of similar purport.[1]

It therefore follows that no greater title passes to the owner of the right of way than the needs require, so that the residue remains in the former owner, and he can make such use of it as is not incompatible with the easement.[2]

1 Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148, where it was held that an easement, and not a fee, is acquired by a ditch company by a rule of court in compliance with its petition for a right of way under a statute providing that, upon the entry of such rule, the company shall become seized in fee, or shall have the exclusive right, title, and possession of such lands described in the rule as required to be taken.

See, also, Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; Butchers' Slaughtering & Melting Assn. v. Com., 169 Mass. 103, 47 N. E. Rep. 599.

2 Wilson v. Scranton, 141 Pa. 621, 21 Atl. Rep. 779; Clark v. Worcester, 125 Mass. 226.

See, also, as to right to enjoy an easement, Secs. 992, 993.

CHAPTER 56.

ABANDONMENT AND FORFEITURE.

§ 1099. Scope of chapter.
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§ 1102. Abandonment of rights—Inchoate rights.
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§ 1113. The abandonment of water—Distinctions to be drawn.
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§ 1118. Forfeiture defined—Distinguished from abandonment.
§ 1119. Forfeiture by failure to comply with statute.
§ 1120. Construction of statutes providing for the forfeiture of rights.

§ 1099. Scope of chapter.—We have discussed in the preceding chapters how the right to the use of waters owned by one individual may be lost by him by the adverse user of another amounting to prescription.[1] We have also discussed how these rights may be taken away from him by virtue of the power of eminent domain, upon the payment of just compensation.[2] There are also other ways by which a person may lose a water right, or the right to the use of water. He may lose it by abandonment [3] or by forfeiture in failing to comply with some provision of the statute of the jurisdiction

1 For rights acquired by prescription, see Secs. 1033-1058.

2 For rights acquired by eminent domain, see Secs. 1059-1098.

3 See Secs. 1100-1117.

where the right originated.[4] In this chapter we will discuss these subjects in the order named.

§ 1100. **Abandonment—Doctrine of—In general.**—Although a water right has attained to the dignity of real property, it can not be said that it has attained to the dignity of an estate in fee or a freehold estate. It is still a possessory right, even after its consummation, and dependent on the continuous use of the water, and a failure to comply with this condition subjects the right to loss by abandonment or forfeiture.[1]

The prior or exclusive right to the use of water, or a water right, acquired under the Arid Region Doctrine of appropriation, may be lost by abandonment. An easement for a right of way for a ditch, canal, or other works, or the works themselves, may also be lost by abandonment.[2] As the whole theory of the doctrine of appropriation is based upon possession and the application of all of the water claimed to some beneficial use or purpose,[3] after the original acquisition of the right, in order to have the title to the right remain in the appropriator, there must be a continued possession and application of all of the water claimed to either the original or to some equivalent purpose;[4] and any failure upon the part of the appropriator to do this for an unreasonable time may work an abandonment of all or a part of the right originally claimed. And in this connection it must be noted that there is a decided distinction between the tenure of such right acquired by appropriation and the right to the use of the water flowing in the natural streams by riparian owners, under the common law. As we have stated in previous portions of this work, the right of a riparian proprietor to the use of the water of a stream flowing by or through his land is in no way dependent upon user, it being considered a part and parcel of the land itself, and, therefore, it can not be lost by nonuser or abandonment.[5] Upon the other hand, the continuance of the right acquired by appropriation depends upon the continuous user of the right, and the relinquishment of possession or

4 See Secs. 1118-1120.

1 See Merritt v. Judd, 14 Cal. 64, 6 Morr. Min. Rep. 62.

2 For abandonment of ditches, canals, etc., see Sec. 1108.

3 For the doctrine of appropriation, see Chap. 31, Secs. 585-594.

4 For the right to change the use or purpose, see Secs. 869-873.

5 See Secs. 452-456.

non-user with intent to abandon, constitutes an abandonment of the right. The doctrine of abandonment will also apply where the rights of the parties have been adjudicated and a certain amount of the water of a stream awarded by decree to the party charged with abandoning the right or any portion of the same. However, it will only apply to the acts of the party subsequent to the decree awarding the right. As to all acts of the party prior thereto, the decree is *res judicata*, and none of the acts of the claimant upon which the award was made can thereafter be inquired into in a collateral proceeding.[6]

Again, an inchoate right, or a right not fully consummated, may be abandoned before its final consummation and before a perfect title has vested in the appropriator.[7]

In the most of the arid and semi-arid States there are statutes which define what constitutes an abandonment of a right, and specify the period of time during which the non-use may continue before it works an abandonment.[8]

§ 1101. **Abandonment Defined—Intent.**—The word "abandon" is held, in this connection, to mean "to desert or forsake."[1] It is the relinquishment of a right by the owner thereof without regard to any future possession by himself, or by any other person, but with the intention to forsake or desert the right.[2] Such being the

[6] The volume of the priority awarded an irrigation ditch in adjudication proceedings is *res judicata*, and the decree can not be disturbed in subsequent litigation on the question of abandonment of the priority, but evidence of abandonment in such a proceeding must be limited to acts of the owner subsequent to the decree. O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945.

See, also, Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Boulder etc. Co. v. Leggett, 36 Colo. 455, 86 Pac. Rep. 101; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540, 60 Pac. Rep. 484.

[7] For abandonment of inchoate rights, see Sec. 1102.

[8] For the statutes upon the subject of abandonment and forfeiture, see Part XIV.

See, also, the question of the forfeiture of rights, Secs. 1118-1120.

[1] Dodge v. Marden, 7 Ore. 456.

[2] That a right can not be abandoned in favor of another, see Sec. 1117.

"Abandonment, as applied to the doctrine of appropriation of water to a beneficial use, may be defined to be an intentional relinquishment of a known right." Oviatt v. Big Four M. Co., 39 Ore. 118, 65 Pac. Rep. 811.

definition of the word "abandon," and as the intent of the party is a necessary element therein, it necessarily follows that there can be no abandonment of a right without some action of the will and an intent to abandon. Now, then, coming down to the subject under discussion, there can be no abandonment of a water right, right of way, ditch, or other works, unless there is a concurrence of the acts of the party charged, with his intent to desert, forsake, or to abandon the right.[3] But it is not necessary, as we shall see in the section upon the subject of proof of abandonment,[4] to rely solely upon the direct statements of one charged with having abandoned a right, that he did so abandon it. Such intention may be inferred from the other declarations, and especially by the acts of the party. It is oftentimes by such declarations only, taken in connection with the acts of the persons charged, that their true intention can be proven. However, the concurrence of the acts with the intent will work an abandonment. But the authorities are practically unanimous upon the proposition that, in order to work an abandonment, the element of the intent to abandon must be present and coupled with the yielding up of the possession or a cessation of the user. It therefore follows that abandonment is always a question of fact for the Court or jury to decide.[5] It will also be

See, also, Mallett v. Uncle Sam M. Co., 1 Nev. 188, 90 Am. Dec. 484, 1 Morr. Min. Rep. 17.

3 Dodge v. Marden, 7 Ore. 456, where it was held that there could be no abandonment without some action of the will and an intent to abandon.

"There was no attempt made by him to relinquish any appropriation appurtenant to the land, nor does it appear that he ever had any such intention while in the ownership, without which 'there can be no abandonment.'" Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972, citing Wimer v. Simons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685.

See, also, Watts v. Spencer, 51 Ore. 262, 85 Pac. Rep. 39.

4 See Secs. 1103, 1116.

5 "Abandonment must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing, and, further, it must be made without any desire that any other person shall acquire the same." Mr. Justice Field, concurring in Stephens v. Mansfield, 11 Cal. 363.

Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807, where the Court said: "To constitute such abandonment, there must be a concurrence of act and intent, viz.: the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. . . . The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will non-

seen from the authorities cited that the courts are very loth to declare an abandonment of a right by a party where the title to

user alone, without an intention to abandon, be held to amount to an abandonment." Oviatt v. Big Four M. Co., 39 Ore. 118, 65 Pac. Rep. 811.

See, also, Gould v. Maricopa C. Co., 8 Ariz. 429, 76 Pac. Rep. 598, where it is held that abandonment of a right to appropriate water for irrigation is a matter of intent, evidenced by the declarations of the appropriator or by his acts. Brockman v. Grand C. Co., 8 Ariz. 451, 76 Pac. Rep. 602; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Marlar v. Maricopa etc. Co., —— Ariz. ——, 76 Pac. Rep. 1125; Wood v. Etiwanda W. Co., 147 Cal. 233, 81 Pac. Rep. 512, where it is held that the mere intention to abandon the right to divert and use water, if not coupled with an actual yielding up of the possession or cessation of the user, does not constitute an abandonment.

See, also, Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Land v. Johnston, 156 Cal. 449, 104 Pac. Rep. 449; Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101; Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Partridge v. McKinney, 10 Cal. 181, 1 Morr. Min. Rep. 185; Hoffman v. Stone, 7 Cal. 47; Waring v. Crow, 11 Cal. 369; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Cate v. Sanford, 54 Cal. 24; Keane v. Cannovan, 21 Cal. 293; Myers v. Spooner, 55 Cal. 257; St. John v. Kidd, 26 Cal. 272; Judson v. Malloy, 40 Cal. 299; Moon v. Rollins, 26 Cal. 337; Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Bell v. Red Rock etc. Co., 36 Cal. 214; Davis v. Perley, 30 Cal. 630; Moon v. Rollins, 39 Cal. 333, 95 Am. Dec. 181; St. John v. Kidd, 26 Cal. 264, 4 Morr. Min. Rep. 454; Richardson v. McNulty, 24 Cal. 339; Wilson v. Cleveland, 30 Cal. 192.

"An abandonment is a matter of intention; it is peculiarly within the province of the trial Court to determine from all the facts and circumstances of each particular case whether abandonment has or has not taken place." Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

See, also, Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. Rep. 101; Central Trust Co. v. Culver, 35 Colo. 93, 83 Pac. Rep. 1064; Lower Latham D. Co. v. Louden Irr. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Platte Valley etc. Co. v. Central T. Co., 32 Colo. 102, 75 Pac. Rep. 391; Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. Rep. 70; North Amr. Exp. Co. v. Adams, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. Rep. 205; Butterfield v. O'Neill, 19 Colo. App. 7, 72 Pac. Rep. 807; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945; Alamosa etc. Co. v.

the same has once vested and accrued in him, and where he still lays claim to the right; but in certain cases this is done. The right can not be retained by a mere assertion of an intention not to abandon, if the acts of the party charged are such that an abandonment in fact has been made. The mere declarations of parties who have acquired rights to the use of water are insufficient to preserve those rights without any act or deed in vindication or maintenance of them.[6] But in general it may be said that an abandonment of the rights of one who has appropriated water will not be decreed for trivial matters, or upon insufficient evidence. So long as the appropriator in good faith intends to retain his rights, and manifests that intention by the use of the water, or by his prepara-

Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Hawaiian etc. Co. v. Wailuku Sugar Co., 14 Hawn. 50, 15 Hawn. 675; Last Chance etc. Co. v. Bunker Hill etc. Co. (Idaho), 49 Fed. Rep. 430; Ada County etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Welch v. Garrett, 5 Idaho 639, 51 Pac. Rep. 405, 19 Morr. Min. Rep. 193; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Smith v. Hope M. Co., 18 Mont. 432, 45 Pac. Rep. 632; Goon v. Proctor, 27 Mont. 526, 71 Pac. Rep. 1003; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Norman v. Corbly, 32 Mont. 195, 79 Pac. Rep. 1059; Featherman v. Hennessey, 42 Mont. 535, 113 Pac. Rep. 751; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Lobdell v. Hall, 3 Nev. 507; Schulz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Valcalda v. Silver etc. Co., 86 Fed. Rep. 90, 29 C. C. A. 591, 19 Morr. Min. Rep. 233; Edgemont Imp. Co. v. Tubbs Sheep Co., 22 S. D. 142, 115 N. W. Rep. 1130; Dodge v. Marden, 7 Ore. 456, 1 Morr. Min. Rep. 63; Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Stallin v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686; Holman v. Pleasant Grove, 8 Utah 78, 30 Pac. Rep. 72; Promontory Ranch Co. v. Argile, 28 Utah 398, 79 Pac. Rep. 47; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

[6] Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101.

tions to use it, his rights will remain unimpaired. But he will not be permitted to retain a right which he neither uses nor intends to use, merely for the purpose of preventing others from using it. As was said in a recent Washington case:[7] "But abandonment, like appropriation, is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region." So, as was held in a recent California case,[8] so long as an appropriator was being conveniently supplied with the water to which he was entitled, he had no right to demand that it should come from one or another source of supply. And the Court said: "And as they could not have insisted upon this, so their failure to insist can not be construed as any waiver or abandonment of their right to a supply from another source covered by their grant should the source used for them prove inadequate."

§ 1102. Abandonment of rights—Inchoate rights.—An inchoate right, or a right which has been properly instituted but not finally consummated,[1] may be abandoned before its final consummation and before a perfect title to the same has vested in the party instituting it. So, where an appropriation is properly instituted, and the enterprise is given up and its owners desert it, with the intention of not resuming the work to complete the appropriation, it works an immediate and express abandonment of the incipient right.[2] It is true that the Supreme Court of Colorado, in a recent case, held that the term "abandonment," as applied to waters, is applicable only to completed appropriations of water, and not to a case where the claimant never acquired a fixed right because of

7 Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

8 Smith v. Cucamonga Water Co., 160 Cal. 611, 117 Pac. Rep. 764.

1 For the consummation of rights, see Secs. 725-729.

2 Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580, where the Court said: "It is unnecessary to determine in this case what a reasonable time for the construction of the contemplated canal would have been, as construction was absolutely abandoned without any evinced or declared intention of resuming. Hence, the incipient right lapsed, and reverted to the State," etc.

his failure to apply the appropriation to a beneficial use within a reasonable time.[3] The decision in the case upon the facts was undoubtedly correct, but the Court unhappily made use of an expression which might be implied to mean that no inchoate right could be abandoned, by stating that "abandonment, as that term when employed in our irrigation law applies only to completed appropriations, and there can be no abandonment of that which never existed." Now, under the law of all jurisdictions, including that of the United States, inchoate rights, properly instituted, either to lands or to water rights, will merge into a perfect title, provided that the settler or appropriator faithfully complies with all of the conditions of the law within the time allowed, or within a "reasonable time."[4] And if all of the necessary conditions are fully complied with, either within the statutory or a reasonable time, by the doctrine of relation, his title to the whole of the right actually consummated relates back as of the date when the claim was instituted.[5] But, upon the other hand, if the settler or appropriator absolutely deserts or gives up his claim or his incomplete right to appropriate before his title to the same is finally consummated, there is as much an abandonment of the inchoate right as though the title was perfect.

Where, however, the consummation of the right depends upon the question of "reasonable diligence," either in the construction of the works[6] or the actual application of the water to some beneficial use or purpose,[7] and upon the facts in any particular case it is found that an unreasonable time was consumed in its final consummation, the right is lost to the appropriator, and some of the authorities treat it as abandoned, and others as forfeited, or, as stated in the case of Conley v. Dyer,[8] "the inchoate right terminates, and the water goes to junior claimants who have complied with all the requirements of the law." The better rule, as it seems to us, is

[3] Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

[4] For a reasonable time to complete an appropriation, see Secs. 735-740.

For inchoate rights to lands, see Secs. 445, 755.

[5] For the doctrine of relation, as applied to water rights, see Secs. 742-756.

For the doctrine of relation as applied to lands, see Secs. 752-756.

[6] For reasonable diligence in construction of works, see Secs. 733-741.

[7] See Secs. 727, 877.

For the appropriation for future needs, see Sec. 740.

[8] *Supra.*

to treat such an inchoate right as abandoned where there has been an unreasonable time in the final consummation of the right, after the rights of others have intervened,[9] unless there should be a failure to comply with some specific statute upon the subject, in which case the right should be treated as forfeited.[10] It is true that if the works are finally completed, although it took an unreasonable time to complete them, before the rights of others intervene, the appropriator will take his right as by actual diversion and use and as of the same date.[11]

§ 1103. Abandonment of rights — Express abandonment.— Probably the more numerous cases of abandonment are those which may be termed express abandonment. That is to say, cases where there is an express intent upon the part of the owner of the right to desert or forsake the right, coupled with the acts deserting and forsaking the same, and no further claim being made by him, or one claiming under him, of the right. The former rights of the party abandoning the same may then be taken by others, as we will discuss when we come to the subject of the effect of an abandonment.[1] But, upon the other hand, it can be easily seen that fewer of the cases of this nature get into court, and especially into the appellate court, where a record is made of the decision, for the very reason that there is seldom, after an actual abandonment, any claim made for the right by the former owner. It is usually only when

9 Low v. Rizor, 25 Ore. 551, 37 Pac. Rep. 82, where it is held that a failure for 13 years to enlarge the acreage first put under cultivation, worked an abandonment of the right claimed for the portion of the land which was not reduced to cultivation, the Court saying: "We think Kitchen, during that time, should have enlarged the cultivated tract, and, failing to do so, he abandoned the right to increase the appropriation."

See, also, Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685, citing Kinney on Irr., 1st Ed., Sec. 253; Keeney v. Carillo, 2 N. M. 480; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111.

The case of Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583, holds that a mere suspension of work in construction of a ditch for a reasonable time would not necessarily be an abandonment of the appropriator's inchoate right.

10 For forfeiture of a right, see Secs. 1118-1120.

For the distinction between abandonment and forfeiture, see Sec. 1118.

11 See for reasonable time, Secs. 733-741.

1 For the effect of an abandonment, see Sec. 1117.

the party who is charged with abandoning the right, or one claiming under him, makes some future claim to the right that there is such a case that it gets into the courts. Therefore, where a settler or miner gives up his claim, and goes away with the intention of not returning or of repossessing it, an abandonment takes place instanter of the water right used in connection with the land. And in such a case the moment the intention to abandon and the relinquishment of the possession unite, the abandonment is complete, and time is not an essential element of such an abandonment.[2] The most common cases of express abandonment are the cases where the water was used to work mining claims, especially in placer mining. After the claims have been worked out they are usually abandoned, and if the water rights used in connection therewith are not otherwise disposed of, they are oftentimes abandoned and deserted with the mining claims. And even in those States where the statutes provide that for non-user alone an abandonment will not be declared unless the period of the non-user was for the time prescribed by the statute of limitations, it is held that non-user continued for a considerable time, coupled with other acts showing an intention to abandon on the part of the owner not to repossess himself of the right whose use he has relinquished, will,

2 "Abandonment is a matter of intention, and operates instanter." Derry v. Ross, 5 Colo. 295.

"The abandonment may be express and immediate, as by the intentional act of the owner and possessor of the right, or it may be implied from his neglect, failure of application to the purpose designed within a reasonable time, non-user, and the like." Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685, citing Kinney on Irr., 1st Ed., Sec. 253.

See, also Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. Rep. 70; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693; Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Goon v. Proctor, 27 Mont. 526, 71 Pac. Rep. 1003; Ison v. Nelson M. Co., 47 Fed. Rep. 199; Noland v. Coon, 1 Alaska 36; Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399; Ophir M. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640.

"An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself, and careless of what may thereafter become of it. A single act may be of such character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it." Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Black. Pomeroy on Water Rights, Secs. 96, 97.

in certain cases, constitute an abandonment.[3] However, the temporary shut-down of a mine with no intent on the part of the owners to abandon any rights does not work an abandonment.[4]

It is also held that the abandonment of agricultural land for which water is appropriated, without any further disposition of the right, works an abandonment of the water right.[5] So, again, where a company bored wells in the search for oil, and after producing two artesian wells of water, deserted them, it was held that an immediate and express abandonment was worked when the company ceased its operations, and as against the appropriation of the water by others a deed to the wells and water passed no title.[6] So, also, the fact that a municipal appropriator of water for the purpose of sale to outside owners for extra municipal purposes is subsequently restricted by the legislature to the use of water for municipal purposes only, amounts to the abandonment by it of the appropriation.[7]

3 Alamosa Cr. C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112, where the Court held that abandonment as applied to property rights consists of non-user and intention.

See, also, Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Land v. Johnson, 156 Cal. 449, 104 Pac. Rep. 499.

4 Smith v. Hope etc. Co., 18 Mont. 432, 45 Pac. Rep. 632; Featherman v. Hennessy, 42 Mont. 535, 113 Pac. Rep. 751.

Where an appropriator of water from a stream for use in the development of mining claims owned by him at once commenced work necessary to take out and utilize the water, which works he continued for four years, and until he sold his property and rights to the defendant corporation, and during the next four years the defendant continued the work in good faith, expending upwards of $500,000 in developing the mine and completing the works by which the water was utilized to run the mill and supply the works, it was held that there was not at any time such an abandonment of the water right as would authorize an adverse appropriation of the water by another at the end of that time under the rules of the mining district which required a diligent and continuous prosecution of the work to completion. Thorndyke v. Alaska Perseverance Min. Co., 164 Fed. Rep. 657, 90 C. C. A. 473.

5 Rutherford v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. Rep. 445.

See, also, Brockman v. Grand C. Co., 8 Ariz. 451, 76 Pac. Rep. 602; Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. Rep. 70.

6 De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001, the Court saying: "Its rights, if it had any, to the land, wells, or water flowing therefrom, terminated when it ceased work thereon and abandoned its efforts to discover oil."

7 Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

§ 1104. Abandonment of rights—When an abandonment will be implied.—Although, as we have seen in a previous section, the intent of the party charged with abandoning a water right, ditch, or other works, is a necessary element to work an actual abandonment upon his part,[1] the intent to abandon will be implied, and an actual abandonment decreed by the Court from the acts of the appropriator or owner, or from his failure to act; and that, too, in the absence of any direct statement by him that he has abandoned the right. Even in the face of declarations of the party charged, that he still owns the right and has not abandoned it, without any act of possession or user of the right by him, the Court will declare the right to be abandoned, should the facts and circumstances in the case show that there was an actual abandonment.[2] The whole theory of the continuation of a right acquired by appropriation is that it must be in the continual possession and user of the claimant; and if it is not so possessed and used, it may be treated as abandoned, and others may successfully lay claim to the right.[3] Therefore, if the acts of the party charged with abandoning a right are sufficient in and of themselves to show that he had actually abandoned and deserted a right, for a sufficient period of time, the intent to abandon will be implied from such acts, and the courts will presume that an actual abandonment of the right had been made by him, and that, too, regardless of the verbal claims of the party to the effect that he did not abandon the right, or the subsequent attempt to use or sell the right, especially in the face of the

1 See Sec. 1101.

2 Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101, where Judge Story said: "Such declarations by word of mouth, unaccompanied by any act or deed in vindication and maintenance of them within the period prescribed by the statute of limitations, are wholly insufficient to keep alive the rights they had previously acquired."

Water is not abandoned by the execution of a mortgage thereof by the owner in connection with one upon the land upon which the water was used, although the mortgage was void as to the land because the mortgagor had no title to it. Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.

3 "The continuance of the right depends upon the continuous user of the water, and hence may be abandoned by non-user." Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

adverse claims of others.[4] In other words, where there is a failure to use the right for an unreasonable period, it creates a presumption to abandon it; but this presumption is not conclusive, but may be overcome by other sufficient evidence.[5] However, it must be stated that there is a material difference in one respect in cases of implied abandonment and cases of express abandonment, discussed in the previous section.[6] In cases of express abandonment time is not an essential element, and, therefore, whenever the intent and the act of the party charged concur, it may work an immediate abandonment of the right.[7] Upon the other hand, where the abandonment may be implied from neglect, failure of application to the purpose designed, non-user, and the like, time is an element, and the relinquishment of possession and the failure to use the right must continue for an unreasonable time; and usually for the period of time provided by the statute as a bar to an action for the recovery of real property, or to the length of time when title to the right by adverse possession amounting to prescription may be acquired.[8]

4 For rights acquired by prescription, see Chap. 54, Secs. 1033-1058.

See, also, Rutherford v. Lucerne Canal etc. Co., 12 Wyo. 299, 75 Pac. Rep. 445; Brockman v. Grand Canal Co., 8 Ariz. 451, 76 Pac. Rep. 602; Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022; Platte Water Co. v. Northern Colorado etc. Co., 12 Colo. 525, 21 Pac. Rep. 711; Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. Rep. 70; Oviatt v. Big Four etc. Co., 39 Ore. 118, 65 Pac. Rep. 811; Lamborne v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241; Ophir Min. Co. v. Carpenter, 6 Nev. 534, 97 Am. Dec. 550, 4 Morr. Min. Rep. 640; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693.

5 "A failure to use for a time is competent evidence on the question of abandonment; and, if such non-user continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs." Sieber v. Frink, 7 Colo. 79, 2 Pac. Rep. 901.

The abandonment of an appropriation of water for irrigation is a question of intention to be evidenced by overt acts; but when such overt acts appear the right to appropriate water ceases and can not be resumed as against the intervening rights of others. Anderson etc. Co. v. McConnell, 133 Fed. Rep. 581.

6 For express abandonment, see Sec. 1103.

7 Derry v. Ross, 5 Colo. 295; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685.

8 For the time fixed by the statute for non-user which will work an abandonment, see the statutes of the States, Part XIV.

For time when a right by prescription may be acquired, see Secs. 1052, 1053.

§ 1105. Abandonment of rights—Implied abandonment—For non-user.—The mere non-user of the water, unless it continues for an unreasonable time, is not of itself sufficient to work an abandonment of the right to use. An appropriator having senior water rights by the non-use of all the water at first that he is entitled to, where he has no intention to waive any right, in and of itself will not work an abandonment; but, while he is not using the water, he may sell a portion of it to another and allow the purchaser to divert it to other lands.[1] This rule is applied to cases where there is an appropriation of a certain amount of water for present and for future needs. The appropriator, although he may not use all of the water claimed by him, is given a reasonable time within which to put his land in cultivation and in shape to use all of the water claimed; and so long as he does not continue the non-user for what is deemed an unreasonable time, he may still hold the full right, although he may not at first have used it all.[2] So, again, the mere non-user of the water lawfully appropriated, or the works constructed to utilize the same, for short periods of time, even where there is a manifest intent not to make use of them during these periods, while it may be an abandonment of the unused water during these periods,[3] will not work an abandonment of the right, and the owner will have the right to resume the use of the water at any time.[4] But the length of time during which this non-use may continue is a question of fact dependent upon all the circumstances

1 Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525.

2 For the appropriation for future needs, see Sec. 740.

3 For the abandonment of water, see Secs. 1113-1115.

4 A right is not abandoned by the mere non-user of the water for one irrigating season; nor is it abandoned during the administration of a decedent owner's estate. Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972.

Mere temporary non-use of the water during one year, some time subsequent to the appropriation, without any intent to abandon the right, is not sufficient to establish an abandonment of the acquired right. Land v. Johnston, 156 Cal. 253, 104 Pac. Rep. 449; Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400.

"It is well settled that lapse of time does not itself constitute an abandonment, and that it is only a circumstance for the jury to consider in determining whether there has been an abandonment. In other words, the question is one of intent." Valcalda etc. Co. v. Silver etc. Co., 86 Fed. Rep. 90, 29 C. C. A. 591, 19 Morr. Min. Rep. 233.

surrounding each particular case; and where the time is not fixed by the statutes, the question depends as to whether those circumstances show that the non-user was for a reasonable or unreasonable time. And where it is shown that the non-user was for a reasonable time, and the owner still lays claim to the right, no intent to abandon will be presumed, and, therefore, no abandonment will be implied.[5]

[5] See cases cited under Sec. 1101, Abandonment Defined—Intent.

"Non-user of an appropriation of water is not of itself sufficient to establish abandonment. The intention to abandon must also be present." White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329.

See, also, New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989.

The failure to use the water for the purpose for which it was appropriated will not constitute an abandonment if during the years in which it was not used there was not a sufficient quantity to supply the requisite amount for that purpose. McCauley v. McKeig, 8 Mont. 389, 21 Pac. Rep. 22, 16 Morr. Min. Rep. 1.

See, also, Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. Rep. 151; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Wood v. Etiwanda W. Co., 147 Cal. 233, 81 Pac. Rep. 512; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; North American etc. Co. v. Adams, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Smith v. Hope M. Co., 18 Mont. 432, 45 Pac. Rep. 632; Dodge v. Marden, 7 Ore. 456, 1 Morr. Min. Rep. 63; Partridge v. McKinney, 10 Cal. 181, 1 Morr. Min. Rep. 185; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Lobdell v. Hall, 3 Nev. 507; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Sloan v. Glancy, 19 Mont. 70, 47 Pac. Rep. 334; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693; People v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Gill v. Malan, 29 Utah 431, 82 Pac. Rep. 471; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400; Ada County etc. Co. v. Farmers' etc. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Welch v. Garrett, 5 Idaho 639, 51 Pac. Rep. 405, 19 Morr. Min. Rep. 196; Lowden v. Frey, 67 Cal. 474, 8 Pac. Rep. 31; People v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678; Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. Rep. 205; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Promontory

But, upon the other hand, it is held that a failure to use the water is evidence of an intention to abandon; and if the non-use is continued for an unreasonable period, it creates a presumption that the owner intended to abandon the right, and from which an actual abandonment will be implied. And if this presumption is not overcome by other sufficient proof to the contrary, it will be permitted to stand, and the Court will declare the right abandoned.[6] "The right thus obtained may be lost by abandonment or non-user for an unreasonable time."[7] Therefore, a corporation having the exclusive right to all the waters of a stream, and the exclusive privilege of using and controlling the same, can not allow such right to remain in abeyance for a long series of years, and thereafter assert the right to the same to the exclusion of those who have, in the meantime, acquired rights to the use of the waters of the stream by actual appropriation and use.[8]

Non-user continued for a considerable time, coupled with other acts showing an intention on the part of the owner not to repossess himself of the right whose use he has relinquished, may constitute an abandonment.[9] Even where the rights of the parties have been settled by judicial decree, if they are not used for an unreasonable period, they will be treated as abandoned.[10] But the adjudication

etc. Co. v. Argile, 28 Utah 398, 79 Pac. Rep. 47; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290; Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476; Edgemont etc. Co. v. Tubbs etc. Co., 22 S. D. 142, 115 N. W. Rep. 1130; North American etc. Co. v. Adams, 104 Fed. Rep. 404, 25 C. C. A. 185, 21 Morr. Min. Rep. 65; Thorndyke v. Alaska etc. Co., 164 Fed. Rep. 657, 90 C. C. A. 473.

6 Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Hewitt v. Story, 51 Fed. Rep. 101; *Id.*, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Oviatt v. Big Four M. Co., 39 Ore. 118, 65 Pac. Rep. 811; Jackson v. Indian Creek etc. Co., 18 Idaho 513, 110 Pac. Rep. 251; *Id.*, 16 Idaho 430, 101 Pac. Rep. 814.

7 Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

8 Platte W. Co. v. Northern Colorado Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711, holding that there can be an appropriation of water under the laws of Colorado only when the water is actually applied to some beneficial use or purpose.

9 Alamosa Cr. C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124; Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686.

10 New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989;

proceedings awarding priorities to water are *res judicata* of the volume awarded to the parties, so that the question of abandonment thereof is limited, in subsequent litigation, to the acts subsequently done.[11] The period of time during which non-user of the water will constitute an abandonment of the right in the majority of the States is prescribed by statute. In some of the States special statutes are enacted, while in others it is held that the period of time sufficient to bar a right of action for the possession of real property is the proper limitation—the period for obtaining prescriptive title or losing a right by non-user.[12]

§ 1106. Abandonment of rights—Implied abandonment—For non-user by tenants in common.—Water rights, ditches, canals, and other works may be owned by tenants in common. Where this is the case, without an express abandonment,[1] the mere fact that

Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. Rep. 101; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1121; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748.

11 Platte Valley etc. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945.

12 For the statutes, see Part XIV.

See, also, Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453, where the Court said: "Upon this point the legislature has made no specific declaration, but, by analogy, we hold that a continuous non-user for five years will forfeit the right."

A perpetual right to have carried in a ditch sufficient water to irrigate lands can not be lost by non-user short of the period of limitations of actions to recover realty. People *ex rel.* Standart v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543.

See, also, Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Dodge v. Marden, 7 Ore. 456; McCauley v. McKeig, 8 Mont. 389, 21 Pac. Rep. 22, 16 Morr. Min. Rep. 1; Sloan v. Glancy, 19 Mont. 70, 47 Pac. Rep. 334; Gassert v. Noyes, 18 Mont. 216, 44 Pac. Rep. 959; Ison v. Nelson (Ore.), 47 Fed. Rep. 199; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972; Oviatt v. Big Four M. Co., 39 Ore. 118, 65 Pac. Rep. 811; North American Exp. Co. v. Adams (Colo.), 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

1 For express abandonment, see Sec. 1103.

one tenant in common does not use his full share of the water can not imply an abandonment of his right or any portion thereof.[2] Where the water of one tenant in common is used by his cotenants, it preserves the common right for the benefit of all.[3] This is under the rule of law governing tenancy in common that "the possession of one tenant in common is the possession of all his cotenants."[4]

§ 1107. Abandonment of rights—Effect of changes by the owner.—As we have discussed in a previous portion of this work, an appropriator may make any changes in the point of diversion, the location of his works, the place of use, or even the use itself, and so long as he does not materially impair the vested rights of others, his own rights will in no way be impaired by the change.[1] In general it may be said that no abandonment of the water right is worked by any attempted change in the ditch, or other works, or in the place, manner, or the use of the water itself.[2] The ditch may be abandoned without abandoning the water right, where the use of the water is continuous through some other ditch.[3] Again, no abandonment is worked by the mere change of use of the water.[4]

2 For rights of tenants in common, see Chaps. 73, 75.

For prescription as between tenants in common, see Sec. 1047.

3 Where the owner of a water right did not use the full quantity of water to which he was entitled, but his cotenants and lessees did, it was held that there was no abandonment of his rights. Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525.

See, also, Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743.

4 Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283.

1 See Chap. 48, Secs. 856-873, for changes which may be made.

2 The abandonment of one ditch does not work an abandonment of the water right, so long as the water continues to be diverted through another ditch. Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652.

See, also, Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. Rep. 205; Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131.

3 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

For abandonment of ditch and other works, see Sec. 1108.

4 Schwab v. Beam, 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279.

So, a tenant in common in certain water rights used for a certain purpose, may, when the original use is abandoned, and the flow of the water turned into the stream, recapture and use his proportion of the water for some other purpose.[5]

The posting of a second notice of appropriation, while diligently prosecuting the work to complete the appropriation under the first notice, does not work an abandonment of the first claim.[6] However, the assertion of inconsistent rights will work an abandonment. Therefore, a party can not claim as an original appropriator where he has turned in his right to a corporation and has taken stock for his interest and has sold the stock to others.[7]

In Colorado it is held that the question of abandonment can not be determined in the statutory action to change the point of diversion.[8]

§ 1108. Abandonment of rights—Ditches, canals, and other works and easements for the same.—The ditches, canals, and other works used to utilize a water right, and the easements over the lands of others upon which these works are constructed, may be abandoned. This abandonment may be immediate as where the intent of the owner is express and is coupled with his acts in yielding up the possession and ceasing to use the works.[1] But, as is the case with the abandonment of a water right, the intent of the owner must govern.[2] However, the intent may be implied from the acts themselves of the owner, and from these acts an abandonment of the right to use the works will be presumed; and if the works are not used for an unreasonable time, connected with other acts showing that the owner has no intention to use the works in the future, an abandonment of them will be presumed.[3]

5 Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451.

6 Osgood v. El Dorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

7 Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

See, also, Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 29 U. S. App. 155, 30 L. R. A. 265; *Id.*, 51 Fed. Rep. 101.

8 Wadsworth Ditch Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Lower Latham etc. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. Rep. 483.

1 For express abandonment, see Sec. 1103.

2 For the intent to abandon, see Secs. 1101, 1116.

3 The fact that a quartz mill has gone to decay so that it can not be

The most common cases of express abandonment of ditches, canals, and other works, are where the owner, in order to better or more economically use the water, constructs new works or combines with others in the construction of new works, after which the old works are abandoned. It is the history of the use of water acquired by appropriation that, in the early days the ditches and canals were oftentimes poorly constructed and many times not in the right locality to obtain the best results. Then, again, the waste from small, individual ditches poorly constructed is much greater in proportion to that from the larger and better constructed ditches. So the tendency in the West has been by a combination of the water users, either by way of a corporation, or otherwise, to construct larger and better ditches and thereby to make a great saving of the water, after which the old ditches were abandoned. An abandonment of this nature, the intent being in conjunction with the acts yielding up the possession and use of the old ditches, will work an immediate and express abandonment. But the authorities upon this question are few, for the reason that such an abandonment is seldom questioned. However, there are a few cases of this nature, where a claim was afterward made to the old ditch.[4] In cases of this nature, however, there is no abandonment of the water right.[5]

As is the case with the right to the use of the water, so it is the case with the right to use ditches and canals over the lands of others, and the statutes of many of the States provide that a failure to use for a specified time will work an abandonment. And where there are not express statutes upon the subject, by analogy it is

operated may be shown as evidence tending to prove an abandonment of a flume and easement for the same. Richard v. Hupp, 104 Cal. 18, 37 Pac. Rep. 920.

See Conley v. Deyer, 43 Colo. 22, 95 Pac. Rep. 304, where it is held that the term "abandonment" applies only to completed appropriations.

4 Where defendant claimed an easement in a ditch crossing the lands of another, but declared his intention of not using the ditch, whereupon the owner of the land filled the ditch, and sowed it over with grass, with the knowledge of the defendant, who made no objection, it was held that there was an express abandonment. Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686.

See, also, Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693.

A member of a corporation has no right to assert rights which have been abandoned by the corporation. Stewart v. Stevens, 10 Colo. 440, 15 Pac. Rep. 786.

5 Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193, 73 Pac. Rep. 548.

held that a failure to use during the period prescribed by the statute as a bar for the recovery of real property will work the abandonment.[6] As the ditch and the easement over which it is constructed is real property, in the absence of a statute specifically limiting the right, we consider this the proper rule. But, as is also the case with the water right, the mere failure to use the ditch for a period of time which can not under the circumstances of the case be considered unreasonable, will not work an abandonment of the right to resume the use.[7] And, therefore, the mere fact that a land owner having an easement in a ditch which entitled him to be supplied with water therefrom, uses some other method of conveying the water for a time, and where adverse possession has not continued for the prescriptive period, does not constitute an abandonment thereof, or of the easement over which it ran.[8] In certain

6 For the statutes of the various States upon the subject, see Part XIV.

Where a ditch was filled up by a landslide, and it was not used for over nine years thereafter, it was held to destroy all claim of the owner thereto, under a statute of the State providing that, when a ditch is abandoned, and thereafter the owner shall cease to exercise acts of ownership over the same for one year, he shall be deemed to have lost all rights thereto. Ison v. Nelson M. Co. (Ore.), 47 Fed. Rep. 199; Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686; People *ex rel.* Standart v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; reversing 8 Colo. App. 246, 45 Pac. Rep. 543; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Cate v. Sanford, 54 Cal. 24.

An easement for a ditch and dam is lost and extinguished, under California Civil Code, Section 811, subdivision 4, by complete disuse for the period prescribed for acquiring title by enjoyment. Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. Rep. 69.

7 For the abandonment of a water right by the failure to use, see Secs. 1105, 1106.

The owner of a ditch on the public lands of the United States does not forfeit the same by merely non-user. Ada County etc. Co. v. Farmers' C. Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

See, also, Welch v. Garrett, 5 Idaho 639, 51 Pac. Rep. 405, 19 Morr. Min. Rep. 193; Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. Rep. 140; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

The failure to contribute for the maintenance of a ditch, or to contribute expenses in a suit to determine the rights therein, held not to work an abandonment. Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056.

See, also, Butterfield v. O'Neil, 19 Colo. App. 7, 72 Pac. Rep. 807.

8 Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290, where it is said: "But no showing is made, nor is there any effort to show, that he ever deeded or in any manner conveyed this easement, nor that the same was acquired by

cases the same acts of the owner will work an abandonment of both the ditch and the water right utilized thereby. This is the case where the entire purpose is given up and the enterprise deserted, without any attempt of the owners to use either for any other purpose, or at any other place. So, after a ditch by which water was diverted for mining purposes has fallen into disuse and has been abandoned, the water right, if not otherwise disposed of at the time, and not used for many years, is also held to be abandoned and destroyed.[9] However, owing to the fact that a water right and the ditch, canal, or other works are separate and distinct species of property,[10] and are not inseparably connected with each other, it does not necessarily follow that the abandonment of the works is an abandonment of the water right. Therefore, old ditches may be abandoned and new ditches substituted therefor for the utilization of the same water right, and so long as the owner continues the use of the water through other ditches, he does not lose his right.[11] But the right to a ditch is not lost if the use of the same is stopped under an agreement, so long as the agreement continues

adverse possession for the prescriptive period, nor does any intention to abandon appear by the record. He had the right to use as many ditches or methods of conveying his water to his lands as he might see fit, so far as the question of abandonment is concerned."

9 Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Goon v. Proctor, 27 Mont. 526, 71 Pac. Rep. 1003; Ison v. Nelson M. Co., 47 Fed. Rep. 199; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693.

Two years' delay in constructing a ditch and the fact that the water is not at present needed for irrigation show a virtual abandonment of the right to the water. Lamborn v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241.

10 See Secs. 764, 768-771.

11 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278, where it is held that a person may abandon an irrigating ditch without abandoning his water rights.

See, also, McGuire v. Brown, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; Salt River etc. Co. v. Slosser, 9 Ariz. 102, 76 Pac. Rep. 1125; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Marlar v. Maricopa etc. Co., 76 Pac. Rep. 1125; Salt River etc. Co. v. Van Fossen, 76 Pac. Rep. 1126.

The abandonment of an old or dilapidated flume is not an abandonment of the right to divert and use the water conveyed through the flume. Wood v. Etiwanda W. Co., 147 Cal. 233, 81 Pac. Rep. 512.

in force.[12] As held in California: "An easement acquired by deed is not lost by mere non-user." [13] So, again, the non-user of a ditch, brought about by circumstances over which the owner has no control, does not work an abandonment of a ditch, as the intent to abandon is lacking.[14] An injunction was granted restraining the majority owners in a community ditch from abandoning its ancient location and thereby injuring the property right of the minority owners.[15] It is held by the authorities that old and abandoned ditches may be used in making new appropriations.[16] But it is further held that where one made such use of an abandoned ditch his right does not succeed to the old water right used in connection with such ditch, but stands alone upon the merits of its own individual appropriation.[17] In other words, the right of the later appropriator can not be tacked to the rights of the earlier.[18]

§ 1109. Abandonment of rights—By parol sale or defective deed.—In our discussion of the sale and transfer of water rights, ditches, canals, and other works, we discussed the effect of attempted sale by parol, and by defective deeds.[1] Very little upon that subject need be added in discussing the subject of abandonment. The great weight of authority holds that an attempted parol sale of a water right is an abandonment of the priority of the right, and that the grantee, when he takes possession under such a sale or attempted transfer, takes the right on the date of such transfer and possession as by an appropriation by actual diversion.[2] This, as can be readily seen, in the face of the rights of claimants having valid appropriations subsequent to the date of the appropriation in question, being an abandonment of the original priority, is, in effect, an abandonment of the right. The purchaser,

12 Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. Rep. 140.

13 Smith v. Worn, 93 Cal. 206, 28 Pac. Rep. 944; quoted with approval in Walker v. Lillingston, 137 Cal. 401, 70 Pac. Rep. 282.

See, also, Currier v. Howes, 103 Cal. 431, 37 Pac. Rep. 521.

14 Welch v. Garrett, 5 Idaho 639, 51 Pac. Rep. 405, 19 Morr. Min. Rep. 193.

15 Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589.

16 Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

17 Tubbs v. Roberts, 40 Colo. 498, 92 Pac. Rep. 220.

18 For tacking of rights, see Sec. 787.

1 See Chap. 53, Secs. 997-1000.

2 For an appropriation by diversion, see Sec. 730.

taking as he does by actual diversion, takes by virtue of the institution of a new right. In other words, the priority being thus lost, the whole original right is treated as abandoned, and the grantee takes his place as the last of the subsequent appropriators upon the date of his actual possession and use of the right.[3] However, in a recent case in Oregon,[4] contrary to the general rule, as announced above, the Court held that a parol sale of land and an appurtenant water right for a consideration, and a surrender of the possession thereof to the purchaser, create an equitable estate in the water rights, which a court of equity is bound to protect. This decision, however, was upon the theory that it was an executed parol contract, sufficient to enable the purchaser to enforce specific performance against the grantor and "all who claim title under him with notice of the plaintiff's rights."[5] And the Court made no distinction between the land and ditch, and the water right, saying: "But it may be contended that it does not apply to the use and possession of the water; but we can not make such distinction. The right to the use of the water goes with the right to the land." Also, in the more recent decisions in Montana, the Court criticises the early decision in the case of Barkley v. Tieleke,[6] in which an attempt to transfer a water right by an imperfect conveyance was held to operate as an abandonment of the right, and that the right of the purchaser related only to the date of his taking possession, as though it was an original appropriation made by him, the Court in one case

3 A verbal sale and transfer of the water rights of a prior appropriator operates *ipso facto* as an abandonment thereof. Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Lower Kings River etc. Co. v. Kings River etc. Co., 60 Cal. 408; Dodge v. Marden, 7 Ore. 456; Clark v. Willett, 35 Cal. 534; Lobdell v. Hall, 3 Nev. 507; Chiatovich v. Davis, 17 Nev. 133, 28 Pac. Rep. 239; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 2 Sawyer 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678.

"If it be true that the respondent has failed to connect itself with the title of all the appropriators, except by verbal sale, its appropriation does not antedate its own possession," etc. Salina Cr. Irr. Co. v. Salina Stock Co., 7 Utah 456, 27 Pac. Rep. 578.

4 Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

See, also, Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13.

5 Citing Sprague v. Jessup, 48 Ore. 211, 83 Pac. Rep. 145, 84 Pac. Rep. 802, 4 L. R. A., N. S., 410.

6 2 Mont. 59, 4 Morr. Min. Rep. 666.

saying: "We can not comprehend the logic of the language in Barkley v. Tieleke, etc. But a mere failure to execute a deed in nowise justifies the inference that he intends to throw away his honest buyer's rights as well as his own."[7] It will be noticed in both the Oregon and Montana cases that with the attempted transfer of the water right there was also a transfer of land, and the question of the water being an appurtenance to the land so transferred had its influence with the Court.

Our own view as to the correct rule is that, owing to the fact that during the more recent years a water right has attained to the dignity of real property, and by the courts is so considered,[8] and the necessity of a record of at least the claims of those owning these rights, a sale and transfer should be consummated with all the formalities necessary for the transfer of other real property. And, therefore, an attempted parol sale of an independent water right should be treated as an abandonment of the priority of the right, and the purchaser taking such right subject to all rights which have vested subsequently to the date of the inception of this particular right so sold, and prior to the actual possession and use by the purchaser.

§ 1110. **Abandonment of rights—By lease.**—The attempt to lease a water right independent of land is held to be an abandonment of the right.[1] As was said in an Arizona case: "To recognize the right of a prior appropriator to lease his water right independent of his land would, as we conceive, be subversive of the underlying principles of our water right law."[2] So, where the owners of a mining ditch took water therefrom for irrigation, by leasing their right for a term of 99 years, it was held by the Court that they had abandoned their irrigation rights in the ditch.[3]

7 McDonald v. Lannan, 19 Mont. 78, 47 Pac. Rep. 648.

See, also, Wood v. Lowney, 20 Mont. 273, 50 Pac. Rep. 794.

The grant of a ditch and a water right to an alien is not an abandonment by the owner, but the alien may hold the same until forfeited by "office found," and, in the absence of any such forfeiture, may convey title. Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741.

8 That a water right is real property, see Secs. 768-771.

1 For the leasing of water rights, see Secs. 1025, 1026.

2 Slosser v. Salt River Valley C. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

3 Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

§ 1111. Abandonment of rights—By wasting water.—As the basis of the continuance of the right to the use of water claimed under a valid appropriation is the continuous application of all of the water appropriated to some beneficial use or purpose without any unnecessary waste,[1] no title can be retained to that portion of a right the water of which is unnecessarily wasted. Therefore, where an appropriator continually permits a certain amount of water claimed by him to be wasted, there is an abandonment of so much of his right as is represented by the wasted water, which others may lawfully claim.[2] And, although no valid appropriation can be made of discharged waste as such, where the water simply flows from one field to another,[3] it is the duty of all appropriators, if they have no present or immediate need of the full quantity of water included within their claim, to allow such portion not needed to remain in the stream, so that it may be used by others.[4] However, the writer of this has found, from a somewhat extended experience in practical irrigation matters, and also the trial of irrigation cases, that this is one of the hardest things to get the farmers to do. Many, like "the dog in the manger,"[5] would rather raise tules and other swamp grasses upon their own lands, to the great

For the sale and alienation of water rights, see Secs. 994-1032.

1 For the economical use and prevention of waste, see Chap. 49, Secs. 874-916.

That all of the water appropriated must be used for a beneficial purpose, see Secs. 727, 877.

2 Where the appropriation was for domestic purposes, and the appropriator permitted the excess to incidentally flow over his land without any intent to utilize it for a beneficial purpose, it was held that there was an abandonment of the excess water. Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32, the Court saying: "A man may divert more water than is necessary for domestic and culinary purposes, and permit the excess to flow down on his lands; but if he has no intention of using such excess to irrigate the land upon which the excess so runs, and his purpose is not to raise a crop or run machinery, or to mine, or to otherwise apply it to a useful purpose, he acquires no valid right to such excess by the mere fact of a diffusion of waste water upon the grounds, even though they be susceptible of cultivation."

See, also, Doherty v. Pratt, —— Nev. ——, 124 Pac. Rep. 574.

3 For abandonment of water, discharged waste, see Secs. 1113-1115.

4 Burkart v. Meiberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 91 Am. St. Rep. 279; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644.

5 Nevada etc. Co. v. Kidd, 37 Cal. 282; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113.

injury of both the crops and the land itself, than to permit any of the water claimed by them to flow to the lands of others, or to leave the portion actually wasted by them in the stream to be appropriated by others. But, as has been said, "water is too precious in this arid climate to permit its being unnecessarily wasted"; and, therefore, where an upper subsequent appropriator appropriated and diverted only so much of the water as a lower and prior appropriator actually wasted, it was held that the prior appropriator could not recover damages for the diversion.[6] Also, a lower subsequent appropriator may acquire a right to the water wasted by an upper prior appropriator, and through the courts compel him to leave the water abandoned by waste to remain in the stream for his use. Their rights may be determined by an action to enjoin the upper appropriators from diverting from the stream the excess quantity of water, or in an action to determine the rights of the parties, and by proper decree or orders these rights may be enforced.[7]

Also, in those jurisdictions which adhere to the common law of riparian rights, a lower riparian owner may enjoin an appropriator from diverting water from a stream which the latter does not apply to some beneficial use, but allows to run to waste.[8] As we deem

[6] Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867.

[7] Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396, where it is said: "A flow of 17 inches therefore would cover an area, equal to one acre, to a depth of 25½ feet each month, or 102 feet (102 acre feet), during the irrigation period of three months. The absurdity of such a quantity, being essential to the proper irrigation of lands, is manifest. Four hundred inches of constant flow would cover an area equal to 440 acres, during a like period, 5½ feet in depth. The quantity allowed by the Government for an irrigation season in similar localities and altitudes, with like soil, is usually about 1½ acre feet. In Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728, the quantity allowed under the evidence was from one-third to two-thirds inches per acre, which is less than here allowed. It is clear, therefore, that 10 second feet, or 400 inches, are ample for the irrigation of plaintiff's lands under the ditch, and it is probable that this is not required at all times during the irrigation seasons. When not so required, however, it becomes subject to use by others on the stream, in the order of their rights." Citing Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Williams v. Altnow, 51 Ore. 275, 303, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

[8] Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62, citing Kinney on Irr., 1st Ed., Secs. 165, 166; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; McClintock v. Hudson, 141 Cal. 275, 174 Pac. Rep. 849; Nielson v. Sponer,

the law upon the subject, the correct rule should be and is that where an appropriator continually permits a certain amount of the water which he claims under his appropriation to unnecessarily run to waste, there is an abandonment of so much of his right to use the water as is represented by the amount of the water so wasted, and the right so abandoned may be taken by the subsequent appropriators in the order of their priorities.[9]

§ 1112. Abandonment of rights—By the acquiescence in the adverse user of another.—In a preceding chapter we have treated at considerable length how permanent rights to the use of water may be acquired by one person and correspondingly lost by another by adverse possession and user amounting to prescription.[1] And, as we there discussed, one of the elements essential to the acquisition of title to a water right by this method is that a use of the water is not adverse until it becomes hostile to another's rights and interferes with such rights so as to give the person injured a right of action for the interference.[2] While, as we will show in another section, a water right can not be abandoned in favor of any particular person,[3] it may be abandoned and thereby lost by the acquiescence of the appropriator, or owner, in the adverse user thereof by another, continued uninterruptedly and notoriously for the statutory period. This, however, does not apply to any portion of the water which the prior appropriator, within said period, resumed the use and retained the possession thereof.[4] An adverse user of

46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128.

9 See effect of abandonment, Sec. 1117.

1 See Chap. 54, Secs. 1033-1058.

2 See Sec. 1050; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283.

3 See Sec. 1117.

4 Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588, citing Kinney on Irr., 1st Ed., Sec. 256; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283, citing *Id.*

A party may acquire a prescriptive right to the waters of a stream by adverse user, and an acquiescence in such user may cause the grantee of adjoining lands to lose the right of appropriation previously acquired by his grantors. Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678.

See, also, Alhambra etc. Co. v. Richardson, 72 Cal. 593, 14 Pac. Rep. 379; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Woolman v. Garringer, 1 Mont. 535, 1 Morr.

the property and rights of another may be hostile to the latter's rights, and give him a right of action against such interference, and still he may not take advantage of his right of action, and may even passively acquiesce to the use by the adverse claimant, and by such a use the statute of limitations will run against the rights of the owner. But such an acquiescence does not work an immediate abandonment, but both the use and the acquiescence must run at least the full time prescribed by the statute of limitations as a bar to an action for the recovery of real property.[5] A distinction, however, must be made between the abandonment of a right by acquiescence and the right to the use of the water granted by contract or license, which subjects have already been discussed.[6]

§ 1113. The abandonment of water—Distinctions to be drawn.—Water, after it has been diverted from the natural stream into the ditches, canals, or other works of the appropriator, becomes personal property,[1] while the water right, or the right to divert and use the water, is real property.[2] Therefore, a distinction must be made between the abandonment of a water right, as treated in the preceding sections,[3] and the abandonment of the water itself, or the very body or *corpus* of the water. Water, after it has been used for the purpose for which it was appropriated, may be allowed to escape from under the control of the appropriator, without any intent upon his part to recapture it. In the first instance it is the abandonment of real property, and in the other it is the abandonment of personal property. Again, water developed incidental to some other enterprise, such as mining, while ordinarily it belongs to the party developing the same, may also be discharged without any use having been made by him of it, and this is, in effect, an abandonment of water and not a water right.[4] There is another distinction between the abandonment of a water right and the aban-

Min. Rep. 675; Los Angeles v. Baldwin, 53 Cal. 469; Cave v. Crafts, 53 Cal. 135.

5 A water right is not barred by acquiescence in an impairment thereof for less time than is required by adverse user. Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68.

See, also, Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217.

6 See Secs. 994-1032.

1 See Sec. 773.

2 See Secs. 768-771.

3 See Secs. 1100-1112.

4 For rights to developed water, see Secs. 1205, 1206.

donment of water in the property rights which may be acquired to their use by others. We will discuss this in the following sections.[5] Again, a distinction must be made in the abandonment of the water itself, especially as to whether or not the abandoned water increases below the point of discharge, the flow of a natural stream, or whether it is simply discharged waste. This subject will also be discussed hereafter.[6]

§ 1114. Abandonment of water—Water discharged into a natural stream.—Where, after use by a prior appropriator, water is discharged into a stream for the purpose of drainage or as a convenient method of disposing of it, and without any intent upon the part of the owner of the right to reserve or recapture it, it works an abandonment of such water,[1] and the water thus discharged becomes a part of the natural stream, and is subject to reappropriation and to the same rights as the water naturally flowing therein, and can not afterward be taken out by the original appropriator to the injury of other rights which have attached and vested to it. The authorities hold that in all cases where water formerly appropriated, or which has been under the control of any person, is permitted to flow down the natural channel of a stream below the point of diversion of the appropriator, without any intent upon his part, it works an immediate and express abandonment of all the water permitted so to escape; and subsequent appropriators can not be deprived of their rights in and to this water appropriated by them by an attempt upon the part of the first appropriator to shut off their supply by enlarging the amount diverted by him, or by any changes in the place or manner of use,[2] which would injure the rights of such subsequent appropriators to the continuous flow of the stream as it was at the time that they made their appropria-

5 See Secs. 1114, 1115.

6 See Sec. 1115.

1 Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888.

Where water was discharged from a mining tunnel and passed into a lake, and all control was lost over it, it is held that there is an abandonment. Crescent M. Co. v. Silver King M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810, 14 Utah 57, 45 Pac. Rep. 1093.

2 For changes which may be made, see Secs. 856-873.

tions.[3] However, the right of the prior appropriator to take out of the stream the amount of water originally appropriated by him is not defeated by his letting, at certain times, a portion of it go back to the stream after use, which is appropriated by a subsequent appropriator, although the latter may not be able to get at all times the full amount which he obtained at the time of his first appropriation.[4] In those States of the West which adhere also to the common law of riparian rights,[5] the same rule holds to the effect that where water has been discharged into a natural stream as a matter of convenience, and abandoned, it can not be diverted from its natural

3 Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Cache La Poudre Res. Co. v. Water Supply Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131, citing Kinney on Irr., 1st Ed., Secs. 234, 253, 254, 259.

The fact that waters find their source in springs on land owned by a party is immaterial, his property rights therein being lost after the water has passed into the water course. Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589.

"After waste waters reach the stream, unless there is an intention of the owner to reclaim them, they become a part of its volume, and inure to the benefit of its waters, to be enjoyed in accordance with their numerical priorities." La Jara Creamery etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644, citing Kinney on Irr., 1st Ed., Secs. 183, 259.

See, also, Maeris v. Bicknell, 7 Cal. 262, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Thomas v. Guiraud, 6 Colo. 530; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Ortman v. Dixon, 13 Cal. 33; Last Chance M. Co. v. Butter Hill etc. Co., 49 Fed. Rep. 430; Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155; *Id.*, 51 Fed. Rep. 101; Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 352; Farmers' Union D. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580.

4 Brown v. Mullin, 65 Cal. 89, 3 Pac. Rep. 99.

Where water from a tunnel is discharged into a stream previously appropriated, it would be inequitable to deprive the first appropriator of his original rights, by allowing the diversion of water which would naturally flow into the stream, but which, on account of the tunnel, is discharged into the stream at a point different from the natural flow. Herriman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930.

5 For these States, see Sec. 507.

channel so as to prevent a lower riparian owner from enjoying its use.[6]

But, as has been seen in a previous portion of this work, a natural channel of a stream may be used as a part of the ditch system of an appropriator, and water turned into the same by the appropriator, with no intent to abandon the same, but, upon the contrary, with the express purpose of conducting it to some point below and of recapturing it at that point.[7] Therefore, where water from an artificial ditch is turned into a natural water course and mingled with the natural waters of the stream for the purpose of conducting it to a point where it is to be used, it is not thereby abandoned, but may be "recaptured," or rather an equivalent amount taken out of the stream, by the person so conducting it, provided that in so doing he does not diminish the quantity of the natural flow of the stream to the injury of those who have previously appropriated it.[8] As we have shown in a previous section, the question of

6 Willcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Schultz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 255, 3 Am. St. Rep. 888.

A riparian owner may restrain the diversion of any water from the stream by one who has conducted water into it from a foreign source, unless the latter shows that he is not taking from the stream more water than he turned into it. Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 742; Adams v. Slater, 8 Ill. App. 72.

7 For the use of the natural channel as a ditch or canal, see Sec. 832.

For the right to recapture water turned into a natural channel, see Secs. 798-800.

8 Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Burnett v. Whitesides, 15 Cal. 35; Hoffman v. Stone, 7 Cal. 46; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; Weaver v. Eureka etc. Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Platte Valley etc. Co. v. Buckers, 25 Colo. 77, 53 Pac. Rep. 334; Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045; Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727; Fuller v. Sharpe, 33 Utah 431, 94 Pac. Rep. 817; Spring Valley W. Co. v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.

One who by his own efforts increases the flow of a stream is entitled to the benefit of it to the extent of the increase. Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719, holding that the mere turning water into

abandonment of a water right or of the water itself is a question of the intent of the parties. Therefore, it follows that where the water is turned into a stream for the convenience in conducting it to the place of use, with the express intention of recapturing it, there can be no intention to abandon the water.[9] But the intent to recapture the water must be present at the time it is discharged into the stream.[10] Water which is developed in mining operations may be discharged into a natural stream, and where the intent to recapture was present at the time of such discharge, it may be taken out by the party developing the same at some point below and used for any beneficial purpose. The date of such an appropriation relates back to the time when the party sought to utilize the water.[11]

§ 1115. **Abandonment of water—Discharged waste.**—In the preceding sections we have discussed the effect of an abandonment of water rights,[1] and of the water itself,[2] where the water either remains in the natural stream or is discharged into it and thereby augments its natural flow, and the rights which may be acquired to this water by others. To this water so abandoned permanent rights may be acquired, where, in fact, there has been an actual

a natural stream is not an abandonment of it.

See, also, Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881, holding that the appropriator can not successfully claim any excess of water over the amount to which he is entitled, regardless as to how it was produced.

See, also, Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. St. Rep. 769, 4 Morr. Min. Rep. 532; Creighton v. Kaweah Irr. Co., 67 Cal. 221, 7 Pac. Rep. 658; Merriman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

Also, for right of recapture, see Secs. 799, 800.

In Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767, the right to recapture seepage as against the rights of a riparian owner was denied.

9 For intent to abandon, see Sec. 1101.

10 Schulz v. Sweeney, 19 Nev. 359, 11 Pac. Rep. 253, 3 Am. St. Rep. 888; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Farmers' Union D. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042.

See, also, cases cited *supra*.

11 Ripley v. Park etc. Co., 40 Colo. 129, 90 Pac. Rep. 75; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719.

1 For effect of abandonment of a water right, see Sec. 1117.

2 For the abandonment of water, see Secs. 1113-1115.

abandonment either of the right or of the water which has been discharged into a natural stream.

There is another method whereby the water is lost, which although it may work an abandonment upon the part of the appropriator, must be distinguished from the abandonment of the other rights discussed, and that is the question of the necessary discharged waste. This is where the water is lost from the ditches, canals, or other works, of the appropriator by seepage, leakage, or, after use by him, flows from the ends of his ditches, canals, or laterals to the lower lands, without immediately finding its way into a natural stream. The loss of this water is a matter of necessity, and not merely the question of a convenient method of disposing of it or drainage. In a previous chapter upon the subject of the economic use and the suppression of waste [3] we endeavored to show that in all enterprises for the use of water there is more or less of the water lost to the appropriators from what is called necessary waste. This is the water which escapes from the ditches, canals, or other works, and which can not be avoided by the ordinary precautions commonly used in the construction of the works. And while it is the duty of the appropriator to use ordinary methods to prevent this waste, he is not compelled under the law to use extraordinary methods. However, as "water is a movable, wandering thing," [4] under the best methods known to man, some of the water will escape. To this necessarily lost water, while a temporary use may be made of it by any one who may capture it, no permanent right can be acquired so as to compel the continuance of the discharge or loss.[5]

[3] See Chap. 49, Secs. 874-916.

[4] 2 Black. Comm. 18.

[5] In the now famous case upon the subject of the right to intercept percolating waters of Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, Mr. Justice Shaw, in reviewing the cases cited, said: "In Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299, . . . McCue's predecessor had made a ditch leading from a spring on his land, across a tract of land belonging to Hanson's predecessor, and terminating upon another tract, also owned by McCue's predecessor, through which he conducted water from the spring across the Hanson tract to his other land. This ditch, in its course over Hanson's land, leaked water in such quantities that it collected in a stream, which Hanson used for irrigation. This was the only foundation for the right which Hanson had or claimed to the water. The Court properly held that he had no right to the waste water, and that McCue was not bound to continue to maintain the artificial stream for Han-

The authorities hold upon this subject to the effect that, where water has been once lawfully appropriated, a use by another of the water necessarily lost from the works of the appropriator, or owner, can not give rise to a permanent right by appropriation,[6] prescription, or estoppel so as to compel the loss of such water permanently kept up, even though the parties claiming and using it constructed expensive works for the utilization of such water. Therefore, the owner of a water right for irrigation purposes, by permitting the water to flow onto adjoining property, does not lose the right to use all of the water under his right by the fact that the owner of the adjoining land collected it into a ditch for many years and applied it to the irrigation of his land. But he may at any time use all of the water under his lawful claim so that all waste is cut off.[7]

So, when the owner of the right for temporary periods does not wish to use the water, there is no abandonment of any right, and there can be no valid appropriation of the water by the mere passive acceptance of it as it flows into the ditch of another.[8] So, again, where the appropriator uses the water for mining purposes, the

son's benefit, but could, by any means he chose, change the use of the spring and the course of the ditch."

6 For the appropriation of waste water, see Sec. 661.

7 Burkhart v. Meinberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 91 Am. St. Rep. 279, where it is held that no valid appropriation can be made by gathering surplus water as it flows over the surface from adjoining property upon which it has been spread for irrigation purposes, so as to entitle the user to contest the right of the owner of the water right, after he has sold the land on which the water was used, to gather this surplus for use on other property belonging to him.

8 Smith Canal etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Stockman v. Riverside etc. Co., 64 Cal. 57, 28 Pac. Rep. 116; Anaheim W. Co. v. Semi Tropic etc. Co., 64 Cal. 185, 30 Pac. Rep. 623; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac Rep. 76; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780; Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108.

The overflow or waste, after use on defendants' land, of waters which they appropriated and brought there, was not abandoned, so as to be subject to the use of others, unless there was a concurrence of intent to abandon and an actual relinquishment. Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Mabee v. Platte L. Co., 17 Colo. App. 476, 68 Pac. Rep. 1058.

mere fact that he abandons the water and tailings from his flume for a portion of the time does not render it obligatory upon him to continue to do so, but he may sell the water to third persons or divert it in another direction, though the persons who have been accustomed to use them will thereby be deprived of its use.[9]

§ 1116. **Proof of abandonment.**—As to whether or not a water right, the water itself, the ditch, canal, or other works have actually been abandoned or not, depends upon the facts and circumstances surrounding each particular case, tending to prove the essential elements of an abandonment, namely, the intent and the acts of the party charged with abandoning such a right. In other words, it is a question of fact, to be determined by the jury, or by the Court, sitting as such.[1] Abandonment is most usually proved by evidence of the failure of the party charged to use the right, or the water,[2] or to keep the works necessary for the utilization of the water in repair; and if such non-usage or neglect is continued for an unreasonable period, it may fairly create the presumption of the intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory evidence introduced by the party charged to rebut the presumption.[3] And where the preponderance

[9] Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Correa v. Frietas, 42 Cal. 339; Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725; Cardelli v. Comstock Tunnel Co., 26 Nev. 284, 66 Pac. Rep. 950; Crescent etc. Co. v. Silver King etc. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; see *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675.

[1] "Abandonment is a question of fact to be determined by a jury or the Court sitting as such. Yielding up possession and non-user is evidence of abandonment, and, under many circumstances, sufficient to warrant the deduction of the ultimate fact of abandonment." Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

"As abandonment is a matter of intention, it is peculiarly within the province of the trial Court to determine from all the facts and circumstances of each particular case whether abandonment has or has not taken place." Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

See, also, authorities cited under the section abandonment defined—intent, Sec. 1101.

[2] For abandonment of water, see Secs. 1113-1115.

[3] Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283, where it is said:

of all the evidence introduced in any particular case shows that the appropriator continued in the use of his rights, without any unreasonable voluntary cessation or neglect, no abandonment will be decreed against him by the Court.[4] The evidence in any particular case where an abandonment is decreed by the Court must be clear and satisfactory that such, in fact, was the case. The old rule that forfeitures are not favored in law applies with especial force in cases of this nature; and an appropriator, or owner, will not be held lightly by the Court to have abandoned his rights, and only when the preponderance of the evidence in the case shows that there was actually such a desertion of the right, or such actual neglect and failure to use the right for an unreasonable time as to warrant the presumption, from all the evidence in the case, that the party charged intended to abandon the right.[5]

"These acts of ownership and use not only preclude the presumption of any abandonment of the water on the part of the plaintiff, but also preclude the statutory bar of his rights," etc.

There must be a manifest intention upon the part of the party charged to abandon his right; this intention to be determined from his declarations and acts in relation thereto. Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Low v. Schaffer, 24 Ore. 239, 33 Pac. Rep. 678.

The failure to repair and use a ditch destroyed by a landslide for over nine years is an abandonment of the ditch. Ison v. Nelson, 47 Fed. Rep. 199; Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686.

However, evidence that parties did not, when water was scarce, enforce their right to all the water they might justly claim, and that, if more water had been used, better and larger crops could have been raised, is insufficient to raise the presumption that they intended to abandon their rights in whole or in part. Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047.

See, also, American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Cave v. Crafts, 53 Cal. 135.

4 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047.

5 "The intention of the party who made the appropriation must govern in determining whether he has abandoned his rights, such intention to be ascertained from his conduct and declarations in respect thereto." Oviatt v. Big Four M. Co., 39 Ore. 118, 65 Pac. Rep. 811.

"A single act may be of such character, and done in such manner, and under such circumstances, that an intention to abandon may be inferred from it." Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056.

"Abandonment is a question of intention, and forfeitures are not favored, and must be clearly established." Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

See, also, Rominger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac.

The burden of proving that an abandonment of a right of this nature actually took place is upon the party asserting it, and it must be proven by a preponderance of all the evidence admitted in the case.[6] Any evidence, however, which is admissible under the ordinary rules of evidence, is admissible to prove or disprove the allegation that a right was or was not abandoned. So, also, the declarations of the party charged with abandoning a right is admissible as tending to prove his intentions.[7] The party charged with abandonment may also testify as to what his intentions were, since the question rests largely upon that of intention.[8] Therefore, while mere non-user will not prove an abandonment, it is competent evidence upon the question of abandonment. The failure to use the right for an unreasonable time is evidence of the intention to abandon it. In other words, where the non-user is, under all the facts and circumstances of the case, for an unreasonable time, it is an abandonment of the right; if, upon the other hand, under the evidence in the case, it appears that but a reasonable time elapsed there is not an abandonment.[9] In other words, what is or is not a reasonable or unreasonable time which will or will not work an abandonment is a question of fact for the jury or for the Court to determine from all the facts and circumstances surround-

Rep. 1047; Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Wood v. Etiwanda W. Co., 147 Cal. 233, 81 Pac. Rep. 512; *Id.*, 122 Cal. 152, 54 Pac. Rep. 726; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Valcalda v. Silver etc. Co., 86 Fed. Rep. 90, 29 C. C. A. 591, 19 Morr. Min. Rep. 233.

6 O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; McFarland v. Alaska etc. Co., 3 Alaska 308; White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329.

7 Central Trust Co. v. Culver, 35 Colo. 93, 83 Pac. Rep. 1064; Dodge v. Marden, 7 Ore. 456, 1 Morr. Min. Rep. 63; Boulder etc. Co. v. Leggett, 36 Colo. 455, 86 Pac. Rep. 101.

An administrator, however, is without power or authority to relinquish or abandon a water right appurtenant to the estate, by a simple disclaimer of title. Turner v. Cole, 31 Ore. 154, 49 Pac. Rep. 972.

8 Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. Rep. 101.

9 See implied abandonment for non-user, Secs. 1105, 1106.

ing any particular case.[10] The non-user of the water for a period of seven years and a failure during that time to keep in repair the ditch is held in Utah to be an abandonment.[11] And since the intent of the party charged is the principal issue in the case, he himself may testify as to what his intentions were in respect to abandoning the right.[12] The abandonment of a right may be proven by statements of the party charged asserting inconsistent rights.[13] A sale of land, and in the deed ignoring a water right which was used on the land, is evidence of the abandonment of the right, but it is not conclusive. The water right may have passed to the grantee as an appurtenance,[14] or it may have been retained by the grantor for use on other lands.[15] Again, the posting of a second notice of appropriation is evidence which may be introduced as tending to prove the abandonment of the rights claimed under a first notice. But this evidence is not conclusive and may be rebutted.[16] Evidence that certain wells were sunk for oil, but the owners failing in striking oil struck a flow of water, after which they pulled up and deserted the wells, was held to work an immediate abandonment.[17] But the evidence of the abandonment of worked out mining claims is not necessarily proof of the abandonment of the water rights used in connection therewith. There is an absolutely inde-

10 Gross v. Jones, 85 Neb. 77, 127 N. W. Rep. 681.

11 Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686.

See, also, Jackson v. Indian Creek etc. Co., 18 Idaho 513, 110 Pac. Rep. 251; Rutherford etc. Co. v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. Rep. 445.

12 "The Court, over the objection of the plaintiff, permitted one of the owners of the Leggett ditch to answer the question: 'Did you ever have any intention or purpose of abandoning that decree or any part of it?' . . . The Court, we think, did not commit error. Abandonment is a matter of intention, and therefore the intent with which the acts claimed to operate as an abandonment were done is material." Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. Rep. 101, citing Greenleaf on Ev., Sec. 329n; Wharton's Crim. Ev., Sec. 431; Fiedler v. Darrin, 50 N. Y. 437.

13 Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 29 U. S. App. 155, 30 L. R. A. 265; *Id.*, 51 Fed. Rep. 101; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

14 For appurtenances, see Secs. 1005-1018.

15 For the reservation of water rights, see Sec. 1002.

See, also, Dodge v. Marden, 7 Ore. 456.

16 Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047.

See, also, Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059.

17 De Wolfskill v. Smith. 5 Cal. App. 175, 89 Pac. Rep. 1001.

pendent property right in a water right separate and apart from the land upon which it is used.[18] Therefore, the mining claims may be abandoned, but the water right may be either sold to others for their use or transferred to other lands for use there by the original owners of the mining claims.[19]

There are other questions of evidence tending to prove or disprove the charge of abandonment which have been discussed under the substantive law upon the subject in the preceding sections. But, in general, any evidence which is admissible under the general rules of evidence as tending to prove or disprove the allegation that a right was abandoned, is admissible in evidence for what it is worth.

§ 1117. The effect of abandonment.—The effect of the abandonment of water rights, water itself, ditches, canals, or other works, or easements or rights of way for the same depends largely upon the nature of the right abandoned. In the case of the abandonment of water rights, and water discharged into a natural stream for the purpose of drainage, or as a matter of convenience, without any intent to recapture it,[1] the effect is the same: First, the former appropriator, or owner, loses absolutely all title to the water right, or the portion thereof abandoned, and all right to the use of the water so discharged into a natural stream;[2] and, second, the water formerly claimed under the right becomes a part of the volume of the stream and *publici juris*, and, therefore, subject to the appropriation of the first comers;[3] or, if there are already subsequent appro-

18 See Secs. 766-771.

19 For the sale and transfer of water rights, see Secs. 994-1032.

For the change of the place of use of water rights, see Secs. 856-873.

See, also, Lowden v. Frey, 67 Cal. 474, 8 Pac. Rep. 31.

1 For the abandonment of water, see Secs. 1113-1115.

2 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408.

3 "After it had been used and answered the purpose of the first appropriator without any intention of recapture, and thereby became *publici juris* and subject to appropriation by any one." Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Dodge v. Marden, 7 Ore. 546; Platte W. Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; McCauley v. Mc-

priators upon the stream, the water inures to the benefit of such subsequent appropriators, to be enjoyed by them in the order of their respective priorities.[4]

An abandonment need not necessarily be the whole of a right claimed by a party. A portion only of that right may be abandoned.[5] As was well said in a late Washington case:[6] "Upon the principle that the law of appropriation as applied to the arid regions will not tolerate a waste of water, it has been held that water that is allowed to run to waste after use on the land of the appro-

Keig, 8 Mont. 389, 21 Pac. Rep. 22, 16 Morr. Min. Rep. 1; Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022.

When water leaves the possession of a party, without any intention upon his part to recapture it, all his right and interest in it is gone, and the water becomes a part of the stream and is subject to appropriation by another. Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408.

4 "The plaintiff, though junior to the milling company, in so far as the use of the water for power purposes is concerned, is a senior appropriator to the milling company as to the water which the former appropriated after it left the mill race. That right was as valid as was the prior right of the milling company for power purposes, and each becomes a vested right." Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131, citing Kinney on Irr., 1st Ed., Secs. 234, 253, 254, 259; see, also, *Id.*, 27 Colo. 532, 62 Pac. Rep. 420.

"A party who locates on a stream and diverts and applies the water has title so long as he continues to use it, either for the purpose for which it was originally diverted, or for any legitimate purpose. Yet no one would dispute the proposition that if the appropriator abandons the use, whether it be the original or any subsequent one, he would thereby lose all right, and the right to the water would revert to the people, and belong to whomsoever might thereafter appropriate it, and would likewise inure to the benefit of any subsequent locator on the stream who by reason of the abandonment might become both prior in time and prior in right. This demonstrates very conclusively that the title is not absolute, and that the appropriator's rights are relative." Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828.

See, also, Water Supply etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386; reversing 7 Colo. App. 225, 42 Pac. Rep. 1020, citing Kinney on Irr., 1st Ed., Secs. 159, 183; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644, citing Kinney on Irr., 1st Ed., 159, 183; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; McClellan v. Hurdle, 2 Colo. App. 434, 33 Pac. Rep. 280; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430.

5 Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

6 Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065.

priator is abandoned, and that lower appropriators are entitled to the surplus."[7] Therefore, one can not, after he has abandoned all or a certain portion of his water right by any of the methods discussed in the previous sections,[8] reassert his original right to the same extent as against subsequent claimants who, in the meantime, have taken the proper and legal steps to effect an appropriation of the water covered by the original right so abandoned.[9] Again, if several persons have their respective priorities from the same stream and water is abandoned by one having early rights, and if the ones subsequent have not the full quantity of water covered by their claim, the water thus abandoned inures to the benefit of the subsequent appropriators in the order of their respective priorities—the first taking the abandoned water to the full extent of his original appropriation, the next to the extent of his, and so on until all of such water is appropriated.[10] The benefit accrues to those who have already legally made subsequent appropriations, and whose claims are not fully supplied, in preference to any other person attempting to claim the water abandoned by the prior appropriator. But the right inures to the subsequent appropriators already upon the stream, "to be enjoyed in accordance with their numerical priorities."[11] Again, as abandonment is a matter of intention and consists in the giving up of the right absolutely without reference to any particular person or purpose, as was said in a late Oregon case:[12] "There is no such thing as an abandonment to particular persons or for a consideration."[13] Again, one who has abandoned

7 Citing Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811.

8 See Secs. 1100-1112.

9 See cases cited *supra*.

See, also, rights of subsequent appropriators, Secs. 783-786.

10 See cases cited *supra*.

11 Cache La Poudre etc. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131.

"It becomes subject to diversion by the various ditches in accordance with their numerical priorities." Burkart v. Meiberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644.

12 Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

13 Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep 1054; Wood v. Lowney, 20 Mont. 273, 50 Pac. Rep. 794; McLeran v. Benton, 43 Cal. 467; Richardson v. McNulty, 24 Cal. 339, 1 Morr. Min. Rep. 11; Stephens v. Mansfield, 11

his prior right to the use of water can not, by afterward making a sale of the same, revive his abandoned right in favor of his grantee, even if the sale is made in good faith. Such a sale passes no title.[14]

If, however, there has been no subsequent appropriation of the rights or the water itself thus abandoned by some other party, the original appropriator may regain his former right; but this can only be done by instituting and consummating a new appropriation and taking all the requisite steps which were required of him in the first instance. He is in exactly the same situation as though he had hitherto made no attempt to appropriate the waters at all.[15] However, if the rights of others have intervened, the prior appropriator having abandoned his original right, must take his chances as the last of the subsequent appropriators.[16]

Again, as there may be an abandonment of a part or all of the water right for a part of the time,[17] another may appropriate the water for the period that it is permitted to run down the natural channel, and acquire a good title to its use for the period of time that the first was not accustomed to use it.[18] There is, however,

Cal. 363; Last Chance etc. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430; Cache La Poudre etc. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Rominger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Lower Kings etc. Co. v. Lower Kings etc. Co., 60 Cal. 408; Dodge v. Marden, 7 Ore. 456.

14 Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761.

15 Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

16 Rutherford etc. Co. v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. Rep. 445.

17 See Sec. 1100.

18 For appropriations by periods of time, see Sec. 786.

See, also, Hesperia Land Co. v. Rogers, 83 Cal. 10, 23 Pac. Rep. 196, 17 Am. St. Rep. 202; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1113.

in this case no abandonment of the right for the periods of time that it was used by the prior appropriator.

The effect of the abandonment of discharged waste from leakage or seepage is that, while the water is lost to the party abandoning the same, and while it may be captured and used by any person who may be in a position to use the same, as discussed in a previous section, no permanent rights can be acquired in such waters so as to compel the party losing it to keep up the discharge.[19] The effect of an abandonment of a ditch, canal, or other works over the lands of others, or easements for the same is that all rights of the former owner, upon abandonment, revert to the owner of the fee to the land over which they pass.[20]

§ 1118. Forfeiture defined—Distinguished from abandonment. —Water rights, ditches, and canals, and other works, together with the easements over the lands of others for the same, may be lost by forfeiture. Although the terms "abandonment" and "forfeiture" are oftentimes used interchangeably, even by the courts, upon the subject of the loss of water rights, and other rights used in connection therewith, there is a decided distinction in their legal significance, and one which, in view of the forfeiture clauses enacted by recent legislation, should be observed. While, upon the one hand, abandonment is the relinquishment of the right by the owner with the intention to forsake and desert it,[1] forfeiture, upon the other hand, is the involuntary or forced loss of the right, caused by the failure of the appropriator or owner to do or perform some act required by the statute. Forfeiture is a "punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interests therein."[2]

The element of intent, therefore, so necessary in the case of an abandonment,[3] is not a necessary element in the case of forfeiture. In fact, a forfeiture may be worked directly against the intent of the owner of the right to continue in the possession and the use

19 For right to discharged waste, see Secs. 661, 1115.

20 Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686.

For rights to easements for ditches and canals, etc., see Secs. 990-993.

1 For abandonment defined, see Sec. 1101.

2 Bouvier, Law Dict., Sub., Forfeiture.

3 For intent to abandon, see Secs. 1101, 1116.

of the right. Therefore forfeiture as applied to water rights and other rights in this connection is the penalty fixed by statute for the failure to do, or the unnecessary delay in doing, certain acts tending toward the consummation of a right within a specified time; or, after the consummation of the right, the failure to use the same for the period specified by the statute. In a California case there was recognized the distinction between abandonment, which is a matter of intention, and forfeiture by non-user, which is a matter of the failure to use the right for the period of time prescribed by the statute.[4]

Although the general rule is that forfeitures are not favored in law, and even in cases of abandonment, the evidence must be clear and convincing that it was the intent of the owner to abandon the right before the Court will decree that the right was actually abandoned,[5] it has been the policy of the legislatures of the various States and Territories to pass enactments providing for the forfeiture of these rights for the failure or neglect to use them for a beneficial purpose. The very life of this arid country depends largely upon the use of all of the available water supply. Therefore, by the forfeiture of the rights which are claimed by certain parties, but who fail to use them, the ends of justice are met, and the water is made to do the greatest good to the greatest number. This is upon the correct theory that the continuance of the title to a water right is based only upon continuous user; and where a person claims a certain right which he does not use for a certain period of time, the statute declares that the right to the unused portion is forfeited

[4] Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; *Id.*, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243.

[5] For intent to abandon, see Sec. 1101.

For evidence of abandonment, see Sec. 1116.

"Abandonment is a question of intention, and forfeitures are not favored, and must be clearly established." Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

See, also, Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Rominger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213; Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Pool v. Utah Light etc. Co., 36 Utah 508, 105 Pac. Rep. 289.

"A Court of equity will not lend its aid to enforce, but, in a proper case, will often relieve against a forfeiture." Farmers' Pawnee C. Co. v. Pawnee etc. Co., 47 Colo. 239, 107 Pac. Rep. 286.

and available for the appropriation of others. Where these provisions are enforced, it practically disposes of the "dog in the manger" or the "water hog."[6]

§ 1119. Forfeiture by failure to comply with statute.—As stated in a previous section,[1] in many of the States of the arid and semi-arid West, and especially in those jurisdictions which have passed recent irrigation codes, providing for the State control[2] of the waters within their respective jurisdictions, are to be found provisions declaring to the effect that a failure to comply with the specific provisions of the Acts in question within the times specified works a forfeiture of all rights of the claimant to the uncompleted portions, or to the unused water claimed.[3] Under these provisions a forfeiture of the rights of the claimant is worked by the failure to commence the work of construction, for the failure to prosecute the work with reasonable diligence, for the failure to finally complete the works, and, finally, for the failure to apply all of the water claimed to some beneficial use or purpose, within the time specified by the statute. Also, after the works have been finally completed and the appropriation finally consummated by the application of all of the water claimed thereunder to some useful purpose, the failure thereafter to use all of the water so claimed for a specified time provided by the statute works a forfeiture either to all of the rights or to the portion so unused, and that, too, regardless of the intent not to abandon. The State of Wyoming led off with these laws of State control, and in 1888 it was provided by statute that "The failure to use the water for a period of two years should be deemed an abandonment."[4] This law was in effect until 1905, when the time was extended to five years.[5] In Idaho the period is also five years.[6] It is four years in New Mexico,[7] three

[6] See Union M. & M. Co. v. Dangberg, 2 Sawy. 450, 81 Fed. Rep. 73, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113.

For the statutes of the various States, see Part XIV.

[1] See Sec. 1118.

[2] For the subject of State control, see Chap. 68, Secs. 1337-1367.

[3] For the statutes upon the forfeiture of rights, see Part XIV.

[4] Laws Wyoming, 1888, Chap. 55, Sec. 14; see, also, Chap. 104 herein.

[5] Laws Wyoming, 1905, Chap. 49, p. 36; see, also, Chap. 104.

[6] Laws Idaho, 1905, p. 27; see, also, Chap. 89, providing, however, that the section shall not apply to appropriations for "future needs."

[7] Laws New Mexico, 1905, p. 270; see, also, Chap. 94.

years in North Dakota [8] and South Dakota,[9] and two years in Oklahoma.[10] In Utah the statute provides, upon the question of non-user, that where the owner ceases to use the water for a period of seven years the right ceases; but mingling the question of abandonment with that of forfeiture, the statute further provides: "But questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact." [11] But a recent statute of Utah provides that all the necessary works must be constructed within the period of time to be fixed by the State engineer, who may extend the time to the maximum period of five years, should the facts warrant it. But the construction of the works must be diligently prosecuted to completion, and if one-fifth of the work is not completed within one-half the period allowed, or the whole construction not completed within five years from the date of the approval of the application, the right to the use of the water shall be forfeited. Nine years are also given for the beneficial use of the water after the date of the approval of the application.[12]

Also, in some of the States which have not adopted the law of State control, as that term is understood,[13] are to be found provisions of the statutes to the effect that the rights are forfeited if the conditions of the law relative to the appropriation of the right and to the use are not complied with. This is true in California, the statute of which State, after providing how an appropriation shall be made, in Section 1419 of the Civil Code provides as follows: "*Forfeiture.* A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subse-

8 Rev. Codes North Dakota, 1905, Sec. 7605; see, also, Chap. 95.

Prior to this Act, the period was four years.

9 Laws South Dakota, 1907, p. 373, Sec. 46; see, also, Chap. 100.

This was changed from two years.

10 Laws Oklahoma, 1905, Chap. 21, p. 274, Sec. 28.

11 Comp. Laws of Utah, 1907, Sec. 1288x23.

See, also, Promontory Ranch Co. v. Argile, 28 Utah 398, 79 Pac. Rep. 47, where it was held that no forfeiture was worked for the reason that the non-user was for less than the period of seven years, and that there was no abandonment, as there was no intention to abandon.

See, also, Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 Pac. Rep. 892; Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686; Gill v. Malan, 29 Utah 431, 82 Pac. Rep. 471.

12 Laws Utah, 1909, Chap. 62, p. 86, Sec. 1288x13.

13 For State control, see Chap. 68, Secs. 1337-1367.

quent claimant who complies therewith."[14] This section is held to apply only to the acts of the appropriator in the steps taken in the acquisition of his right, and not to a completed appropriation, and not to the non-user of the right after it has been finally consummated.[15]

Upon the question of the non-user of the water right after the same has been once lawfully acquired, Section 1411 of the Civil Code provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases."[16] This section has been construed to work a forfeiture of the right where the non-user was continuous for five years, the period of time fixed by the statute as a bar for the recovery of real property, and this, too, regardless of the intent of the owner to use the right, the Court holding that such a case was not one of abandonment, but of forfeiture for non-user during that period.[17]

In other States are to be found similar provisions, and although the term "abandonment" may be used in some cases, it means involuntary abandonment, or "statutory abandonment," or a forfeiture of the right for the failure to comply with the statute as to the use of the right for the time prescribed. An early Oregon statute provided that "whenever the owner of any 'ditch, flume, or water right' shall abandon the same, and who shall for one year thereafter cease to exercise ownership" over the same, "shall be deemed to have lost all title, claim, or interest therein."[18] This Act was construed to mean that in order to work a forfeiture there must have first been an abandonment, and thereafter one year of non-user, or the failure to exercise any acts of ownership over it.[19]

[14] 2 Kerr's Cyc. Code, p. 1161.

[15] Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198.

[16] 2 Kerr's Cyc. Code, p. 1149.

[17] Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; *Id.*, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243, where it is said: "That section, as has been said, makes a cessation of use by the appropriator work a forfeiture of his right." Farmers' etc. Co. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Ladd v. Johnston, 156 Cal. 253, 104 Pac. Rep. 449; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213.

[18] Oregon Comp. Stat., 1887, p. 1639.

[19] Dodge v. Marden, 7 Ore. 486, 1 Morr. Min. Rep. 63.

But see Noland v. Coon, 1 Alaska

Under the rule in Colorado that an appropriation is not complete or finally consummated until the water is applied to a beneficial purpose,[20] the courts hold that where there is a failure upon the part of the appropriator to apply the water within a reasonable time to such a use or purpose, there is in effect a forfeiture of the inchoate right. "Unless such beneficial use follows, the interest thus acquired does not ripen into an appropriation, the inchoate right terminates, and the water goes to the junior claimants who have complied with all of the requirements of the law."[21] The Court held in effect that no valid appropriation had been made for the reason that the inchoate rights, for failure to comply with the conditions of the law governing appropriations, had terminated or had been forfeited.[22] There is no statute in Colorado providing that for the continuous non-user for a prescribed period it works a forfeiture to a vested or perfected right. The courts hold that non-user alone, at least short of the statutory period, is not sufficient to prove an abandonment, and, therefore, the courts rely upon the law of abandonment, discussed in previous sections,[23] rather than upon any law of forfeiture for perfected rights.

36, and Ison v. Nelson (Ore.), 47 Fed. Rep. 199, where it was held that the intent to abandon was shown to co-exist with the acts of non-user, and, therefore, the rights were forfeited under the statute.

In a late case, however, it was held that the right to the use of water by non-user alone can not be deemed forfeited short of the period prescribed by the statute of limitations for actions for the recovery of real estate. Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

20 "No principle in connection with the law of water rights in this State is more firmly established than that the application of water to a beneficial use is essential to a completed appropriation." Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

21 Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

22 See, also, Farmers' Pawnee C. Co. v. Pawnee etc. Co., 47 Colo. 239, 107 Pac. Rep. 286, where the Court held that under a contract whereby defendant granted water rights, such rights to be forfeited upon the failure of the plaintiff to complete certain work within five years, where such work was not completed within the time, it was held that the rights were forfeited.

The mere failure of the owner of a water right to pay a company each season for carrying his water, is not a forfeiture of the right. Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

23 See Secs. 1100-1117.

See Alamosa Cr. C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

§ 1120. **Construction of statutes providing for the forfeiture of rights.**—The fixing of a definite time to declare a forfeiture for the failure to comply with some condition imposed by the law is usually for the legislature and not for the courts. It is the duty of the courts to construe the Acts of the legislature as they are enacted.[1] But it is not beyond the power of the courts to fix such a limitation, as was in the case of Missouri v. Illinois,[2] where Mr. Justice Holmes, in rendering the opinion of the Court, said: "The courts did fix a time in the rule against perpetuities, but the usual course, as in the instances of statutes of limitation, the duration of patents, the age of majority, etc., is to depend upon the lawmaking power." In the case of Smith v. Hawkins,[3] the leading case in California upon the question of forfeiture for the non-user of a right, the Court unquestionably exercised legislative power, from the fact that there was no specific statute in that State fixing the time for the forfeiture of a water right for non-user, and the Court, by analogy, fixed the time at five years, that being the period of time "fixed by law for the ripening of an adverse possession into prescriptive title." Yet the Court had the power to do this, and this decision will undoubtedly stand as a precedent upon the subject.

These statutes fixing the maximum time limit for the non-user of a water right, where free from ambiguity, should be strictly construed by the courts. Such an act should be strictly construed, and a case clearly made out before any relief should be extended to the delinquent thereunder. "When a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the Act should be strictly construed; and the validity of all acts done under the authority of such an Act will depend upon the compliance with its terms. In respect to such Acts, the steps pointed out for the acquisition, preservation, and enforcement of the remedies provided should be construed as mandatory, rather than optional."[4] So, also, in construing a particular section of an Act, all the provisions of the Act, as

1 Missouri v. Illinois, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268; *Id.*, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331.

2 *Supra.*

3 110 Cal. 122, 42 Pac. Rep. 453, 19 Morr. Min. Rep. 243; *Id.*, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243.

4 Campbellsville Lumber Co. v. Hubbert, 112 Fed. Rep. 718, 50 C. C. A. 435.

well as its object, must be considered, but if the language is unambiguous, it must ordinarily be given full force and effect. But, as stated by Mr. Justice Frick, in a very recent case decided by the Utah Supreme Court,[5] "When, therefore, a forfeiture of a preexisting right is claimed by reason that a particular clause or section of an entire Act has not been literally complied with, and when the statute does not in terms or by unavoidable implication declare that a failure of a strict compliance shall work a forfeiture, the courts may well pause before declaring a forfeiture by reason that all the provisions of the Act have not been literally complied with." And the Court held that in the acquisition of a water right, where application for an appropriation of water was made to the State engineer, under the provisions of the statute,[6] which statute gave him large discretionary powers with authority to extend the time that he had fixed to completing the works required to perfect the appropriation, and the work was commenced within the statutory time and prosecuted in good faith and with due diligence, he might extend the time, if not beyond the final limit fixed by the statute, although the application therefor was made after the time first fixed by him had expired. But the opinion adds: "We do not wish to be understood as holding that the State engineer may arbitrarily extend the time limits fixed by him at any time and under all circumstances. It may well be that, if an applicant had ceased work, so that it may be deemed a virtual abandonment, the engineer may not in effect reinstate the application after a second applicant's rights under his application have attached, and in that way defeat the rights of the second applicant."

[5] Pool v. Utah Light & Pr. Co., 36 Utah 508, 105 Pac. Rep. 289.

[6] Laws Utah, 1903, pp. 88-100, Chap. 100, Secs. 1-42.

CHAPTER 57.

THE DOCTRINE OF ESTOPPEL.

§ 1121. Scope of chapter.
§ 1122. Estoppel defined.
§ 1123. Estoppel by deed.
§ 1124. Estoppel by matter of record.
§ 1125. Estoppel by matter in pais—Definition and essentials.
§ 1126. Estoppel by matter in pais as applied to water rights.
§ 1127. Estoppel by matter in pais—Silence not amounting to consent, will not work as estoppel.
§ 1128. Estoppel by matter in pais—Riparian owners estopped when.

§ 1121. **Scope of chapter.**—The owners of water rights acquired by appropriation, and other rights kindred thereto, such as their necessary ditches, canals, or other works,[1] and the owners of riparian rights,[2] may lose such rights by their conduct, amounting to an estoppel. Any representations or conduct upon the part of the owner of such a right, which will lead others to change their position and act upon the faith thereof, will, under the doctrine of estoppel, prevent him from thereafter asserting rights inconsistent with such representations.[3] And, correspondingly, the right lost in this manner by one party may be gained by others with its respective priority.

In this chapter we will discuss the various phases of estoppel as applied to the subject in hand.

§ 1122. **Estoppel defined.**—Estoppel has been defined as the preclusion of a person from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he can not be allowed to call in question.[1] Upon the question of water rights, and the rights kindred thereto, here under discussion, estoppel may

[1] For the loss of appropriators by estoppel, see Secs. 1125-1127.

For loss of ditches, canals, etc., by estoppel, see Sec. 1126.

[2] For the loss of riparian owners by estoppel, see Sec. 1128.

[3] See authorities cited in the following sections.

[1] Bouvier, Law Dict., Sub., Estoppel.

"The doctrine of estoppel is intended to preclude fraud, and to that

be subdivided under the usual heads, that is to say: By deed,[2] by matter of record,[3] and by matter *in pais*.[4] We will discuss the subject in the order of the subdivisions named in the following sections.

§ 1123. **Estoppel by deed.**—Estoppel by deed is such as arises from the provisions of a deed. It is a general rule that a party is estopped to deny anything stated therein which has operated upon the other party as the inducement to accept and act under the deed.[1] Where, therefore, there is a direct grant of a water right, or other right, in definite and unambiguous language, and the deed has been accepted by the grantee, and possession taken of the property granted, the grantor is estopped from thereafterwards denying the rights of the grantee to the property definitely and particularly described in the deed.[2] But it is only as to the particular and definite recitals in the deed that such an estoppel is worked. The courts are not permitted to indulge in suppositions, or to draw inferences from ambiguous language employed in such deeds.[3] So,

end imposes silence on a party, when in conscience and honesty he should not be allowed to speak." Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

See, also, Van Rensselaer v. Kearney, 52 U. S. 11 How. 297, 13 L. Ed. 703.

2 See Sec. 1123.

3 See Sec. 1124.

4 See Secs. 1125-1128.

1 1 Washburn, Real Property, 464.

2 In a late case in Washington, an owner of land conveyed one acre thereof with a specific water right, and subsequently conveyed the remainder of the tract subject to the grant of the water right described in the former deed, but described a greater water right. By mesne conveyances plaintiff acquired title to the one tract and the defendant to the remainder of the tract without knowledge of other conveyances relating to the extent of the water right appurtenant to the one-acre tract. It was held by the Court that both parties were estopped by the recitals in the respective deeds constituting their respective chain of title and their rights must be adjusted without regard to any estoppel, the Court saying: "Thus, if both parties claim under the same person, and one is estopped by one deed and the other is estopped by another deed, both made by that person, one estoppel offsets the other, and the rights of the parties are to be adjusted without regard to any estoppel." Schmidt v. Olympia Light & Pr. Co., 46 Wash. 360, 90 Pac. Rep. 212.

3 Zimmler v. San Luis W. Co., 57 Cal. 221, citing Kepp v. Wiggett, 10 Com. Bench 35, 70 Eng. Cas. L. 34, and saying: "That case is cited as an illustration of the strict adherence of the courts to the rule that an estoppel must be certain to every intent," and holding as to the case at bar that, although in a deed there was a plain and positive grant to

again, an after-acquired title to water rights by the grantor will not inure to the benefit of the grantee, and neither is the grantor estopped from claiming the same, where the grantee knew at the time of the transfer that the grantor had no title and did not expect him to procure one, or where the title purported to be conveyed is an inchoate interest, the completion or forfeiture of which depends upon some acts to be performed, or diligence to be exercised by the grantee.[4]

Upon the other hand, the grantee is not estopped by his acceptance of a deed containing a reservation to the grantor of a priority of appropriation of water for a certain reservoir, when, in fact, the priority of appropriation had been secured from afterward making an appropriation of his own for such reservoir.[5] A party to a contract for water rights, by making claim of the rights under the contract, is estopped from denying the execution and delivery of the same.[6]

§ 1124. **Estoppel by matter of record.**—Estoppel by matter of record is such as arises from the adjudication of a case by a court of record having jurisdiction of the same. Parties who have partici-

convey water over the land, beyond that all was a matter of conjecture, and that the language of the deed did not estop the grantor from denying the right of the grantee to the water formerly conveyed in the ditch or the right to divert water from the creek.

See, also, as to the general recitals not estopping the grantors from disputing statements made in them: Independent School District v. Stone, 106 U. S. 183, 27 L. Ed. 90, 1 Sup. Ct. Rep. 84; Farrer v. Cooper, 34 Me. 394; Noble v. Cope, 50 Pa. St. 17; Muhlenburg v. Druckenmiller, 103 Pa. St. 631; Calkins v. Copley, 29 Minn. 471, 13 N. W. Rep. 904; Lucas v. Beebe, 88 Ill. 427.

An irrigation company is held to be estopped by the covenants of its deed from showing that there was not sufficient water to supply it to those to whom conveyances had been made since the sellers themselves had exercised the functions of the corporation and caused it to make such conveyances. Lombard v. Schlotfeldt, — Wash. ——, 123 Pac. Rep. 787.

4 "To hold their grantors estopped to assert after-acquired title, under such conditions, would be to make estoppel a weapon of injustice, rather than a shield to protect the wronged." Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

See, also, Rianda v. Watsonville etc. Co., 152 Cal. 523, 93 Pac. Rep. 79.

5 Windsor Res. etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

6 Fresno etc. Co. v. Hart, 152 Cal. 450, 92 Pac. Rep. 1010.

pated in the benefits of a decree and have claimed and enjoyed the rights under the same by accepting its provisions and using the waters decreed to them, are estopped from assailing its validity, and are bound by the same.[1] But, in order to work an estoppel by matter of record, in cases of this nature, the decisions of the courts establish the rule that the same degree of certainty must be attained as in the case of estoppel by deed discussed in the previous section. The judgment and decree of the Court must fix the extent of the right, the quantity of the water allowed, and all other matters adjudicated by the Court in the case with certainty and definiteness, otherwise the judgment fails to attain the certainty necessary to work an estoppel.[2] Vague and uncertain judgments do not consti-

1 One who recognizes a decree by participating in its benefits is estopped from denying its validity. Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540.

A party accepting and retaining the fruits of a void judgment is estopped from assailing the judgment itself. And, as to him, such a judgment has the same force and effect as a valid judgment. Denver City etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30.

See, also, Town v. Town of Yellowhead, 80 Ill. 208; Town v. Town of Blackbury, 29 Ill. 137; Duff v. Wynkoop, 74 Pa. St. 300; Felch v. Gilman, 22 Vt. 39; Arthur v. Israel, 15 Colo. 147, 25 Pac. Rep. 81, 10 L. R. A. 693, 22 Am. St. Rep. 381; Embury v. Connor, 3 N. Y. 511, 53 Am. Dec. 325; Sabin v. Vermont C. R. Co., 25 Vt. 363; Freeman on Judgments, Sec. 249.

A party to a decree settling priorities of water rights is estopped from assailing its validity after the lapse of several years, where he stood by while third parties expended money in the acquisition of valuable rights upon the strength of the decree. Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792.

See, also, Last Chance D. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Lowe v. Yolo County etc. Co., 157 Cal. 503, 108 Pac. Rep. 297, 8 Cal. App. 167, 96 Pac. Rep. 379.

Where plaintiff relied in the trial Court on an estoppel arising from defendant's admission in his answer in a previous suit, she could not change her position on appeal, and claim that the judgment was conclusive as to the facts on which the estoppel was based. Flannery v. Campbell, 30 Mont. 172, 75 Pac. Rep. 1109.

"And, even if the water decree of 1897 were void, plaintiff in error would be now estopped from repudiating or assailing the same." Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 112.

2 See for judgments and decrees, Secs. 1557-1564.

"The decisions of this Court establish that in cases like the present the findings and judgment must fix the

tute a complete determination of the rights of either party, and can not, therefore, be pleaded as an estoppel.[3] So, again, a prior appropriator of water is not estopped from asserting against another his superior rights to the water of a stream in times of scarcity, because he had, without objection upon his part, permitted the water commissioner to distribute such water between the parties claiming the same on the basis of an erroneous construction of a decree settling the rights.[4]

But an estoppel need not rest alone upon a judgment or decree. It may rest upon other matters of record. Estoppel by record may be worked by the pleadings made by the party sought to be estopped or by some other record made or assented to by him in the course of the trial of the case.[5]

§ 1125. **Estoppel by matter in pais—Definition and essentials.**—The third kind of estoppel under our classification [1] is estoppel by matter *in pais*, or, as it is sometimes called, equitable estoppel, or estoppel by conduct. Estoppels of this character are the most common in connection with the subject of the rights under discussion. Estoppel by matter *in pais*, or equitable estoppel, is such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself. It is said to have its foundation in fraud in its most general sense.[2] To

extent of the superior right, viz., the quantity of water to be allowed to the party whose claim is paramount; otherwise the judgment fails to attain the certainty necessary to an estoppel upon the main subject of the litigation." Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560, citing Dougherty v. Haggin, 56 Cal. 522; *Id.*, 61 Cal. 305; Alhambra W. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Lakeside D. Co. v. Crane, 80 Cal. 182, 22 Pac. Rep. 76; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108.

3 Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107.

Condemnation proceedings brought by plaintiff to secure a right of way for an enlarged pipe line will not estop him from asserting a prescriptive right to the land upon which the original line was maintained, since the proceedings were not to acquire the right then in use, but to enlarge it. Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396.

4 Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505.

5 See Hackett v. Larimer & Weld Res. Co., 48 Colo. 178, 109 Pac. Rep. 965; Shaw v. Profitt, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092.

1 See Sec. 1122.

2 For a leading case upon this subject, see Pickard v. Sears, 6 Ad. & El. 469.

constitute such an estoppel, the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he afterward makes. The other party, too, must have acted upon the strength of such admission or conduct.[3]

Mr. Bispham, in his work on Equity, upon this subject, says: "Equitable estoppel, or estoppel by conduct, has its foundation in fraud considered in its most general sense; because a man can not be prevented by his conduct from asserting a previous right, unless the assertion would be tantamount to a fraud upon a person who had subsequently acquired the right."[4]

Therefore, there must be some actual misrepresentation or some degree of turpitude upon the part of the party sought to be estopped before a Court will estop him from the assertion of his title—the effect of the estoppel being to forfeit his property and transfer it to another.[5] "In all this class of cases," says Mr. Justice Story, speaking of equitable estoppels, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which, in effect, implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief."[6]

As laid down by the Supreme Court of Utah, in order to create an equitable estoppel, the essential elements are that the party

[3] New York Rubber Co. v. Rothery, 107 N. Y. 310, 14 N. E. Rep. 269, 1 Am. St. Rep. 822; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Madison v. Spokane Valley etc. Co., 40 Wash. 714, 82 Pac. Rep. 718, 6 L. R. A., N. S., 257.

[4] Bispham on Equity, Sec. 282.

[5] Biddle Boggs v. Merced M. Co., 14 Cal. 279, 10 Morr. Min. Rep. 334; Anaheim etc. Co. v. Semi-Tropic etc. Co., 64 Cal. 185, 30 Pac. Rep. 623; Stockman v. Riverside etc. Co., 64 Cal. 57, 28 Pac. Rep. 116; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

"A party who claims that another, seeking to enforce his rights, shall not be permitted to allege and show the truth, must establish that he has been induced, by his faith in or reliance upon the assertions or acts of such party to the contrary, to do some act, or incur some liability, which would make it injurious to, or a fraud upon him to allow the truth to be shown." Herman on Estoppel, Sec. 1304.

[6] Story on Equity, Sec. 391.

See, also, cases cited in the next sections, Nos. 1126-1128.

estopped should have: "First, falsely represented or concealed a material fact; second, the false representation or concealment must have been knowingly made; third, the party pleading the estoppel must have been ignorant of the fact; fourth, the representation must have been made with the intention that it should be acted upon; fifth, the party pleading it must have been misled thereby to his injury in some substantial particular."[7] The long receipt of mere waste water does not give a permanent right to have the discharge continued, either by appropriation, prescription, or estoppel. This matter has been discussed in another portion of this work,[8] and further discussion here is unnecessary.

§ 1126. Estoppel by matter in pais as applied to water rights.—In an early California case it was held to the effect that, where one had the prior right to the use of water and merely "stood by and saw" others take steps to appropriate the water at a great expenditure of money, the prior appropriator was estopped from setting up his prior right.[1] But from the weight of authority we do not think that the above ruling is or was the law upon the subject of equitable estoppel as applied, the effect of such an estoppel being to forfeit the property of a prior appropriator and transfer it to a later comer.[2] The early California case of Parke v. Kilham was, in effect, a few years after its decision overruled by the Court, and the rule adopted that, in order to constitute an equitable estoppel, there must be some degree of turpitude in the conduct of the party sought to be estopped before a court of equity will estop him from the assertion of his title.[3] In the case of Lux v. Haggin, it is said of the Parke v. Kilham decision:[4] "In the light of subsequent

7 Brigham Young Trust Co. v. Wagener, 12 Utah 1, 40 Pac. Rep. 764; Centennial Eureka M. Co. v. Juab County, 22 Utah 395, 62 Pac. Rep. 1024.

See, also, Biglow on Estoppel, Sec. 487.

8 See Sec. 661, and cases cited.

1 Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522.

For estoppel by silence, see Sec. 1127.

2 For the definition and essentials of equitable estoppel, see previous section, No. 1125.

See, also, for executed parol contracts, Secs. 980, 985.

Executed parol licenses, Sec. 983.

3 Biddle Boggs v. Merced M. Co., 14 Cal. 368, 10 Morr. Min. Rep. 334; Stockman v. Riverside etc. Co., 64 Cal. 57, 28 Pac. Rep. 116; Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623.

4 *Supra.*

decisions it can scarcely be claimed that the facts recited in the instruction constituted an equitable estoppel which could be relied on as a defense at law."[5] And the Court in the later case said: "To constitute such an estoppel it must also be shown that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declaration; that the party so influenced will be prejudiced by allowing the truth of the admissions to be disproved." This, in view of the definition and essentials of equitable estoppel, as given in the preceding section,[6] is the correct rule upon the subject.[7] So the mere fact that the subsequent appropriator employed the prior

[5] Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[6] See Sec. 1125.

[7] "There must be some degree of turpitude in the conduct of a party, before a Court of equity will estop him from the assertion of his title, when the effect of the estoppel is to forfeit his property, and transfer its enjoyment to another." Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80.

See, also, Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 395; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Wimer v. Simmons, 27 Ore. 1, 39 Pac. Rep. 6, 50 Am. St. Rep. 685; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 300; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Riverside Heights W. Co. v. Riverside Trust Co., 148 Cal. 457, 83 Pac. Rep. 1003; Madison v. Spokane etc. Co., 40 Wash. 414, 82 Pac. Rep. 718, 6 L. R. A., N. S., 257; Gustin v. Harting, —— Wyo. ——, 121 Pac. Rep. 522; Yeager v. Woodruff, 17 Utah 361, 53 Pac. Rep. 1045, where the Court held that there could be no estoppel as to the defendants, where it did not appear that they said or did anything to mislead the plaintiff.

A water company is not estopped from contesting the constitutionality of a city ordinance fixing its water rates at a rate in violation of a provision in a contract between the city and the grantors of the company, merely because for 15 years it had collected the rates established by similarly objectionable ordinances, where it had annually protested against the city's conduct. City of Los Angeles v. Los Angeles etc. Co., 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736; affirming 88 Fed. Rep. 720.

appropriator in the construction of his works does not estop the prior appropriator from afterward asserting his rights.[8] To work such an estoppel, the evidence must conclusively show that the money had been expended or labor performed pursuant to an agreement of the parties.[9] The safer way, where one sees works being constructed for the appropriation of waters which are liable to interfere with the rights of an owner, is to serve a notice of his claim upon the parties constructing the works. This will prevent any estoppel in favor of the parties so served by reason of any subsequent expenditures made by them.[10]

Upon the other hand, any conduct upon the part of the owner of a right, ditch, or canal, or other works [11] which will lead others to change their position on the faith of representations made by him, will estop the owner of such rights from asserting rights inconsistent with his representations.[12] Rights to real estate may be obtained

[8] Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361; Churchill v. Bauman, 104 Cal. 369, 36 Pac. Rep. 93, 28 Pac. Rep. 43.

But see Orient M. Co. v. Freckleton, 27 Utah 125, 74 Pac. Rep. 652.

[9] Garrett v. Bishop, 27 Ore. 349, 41 Pac. Rep. 10; North Powder etc. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713; Orient M. Co. v. Freckleton, 27 Utah 125, 74 Pac. Rep. 652.

[10] Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Burr v. Maclay etc. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715.

[11] For estoppel as to rights in ditches and canals, see Sec. 984.

[12] Where the appellant abandoned the possession of an unsurveyed tract of land, and stated to the respondent's grantor that he no longer had any interest in it; and whereupon the latter took actual possession of the land, at considerable expense, and used the water in dispute upon it, without objections from the appellant, such party was estopped from claiming the water right against the respondent. Morrison v. Winn, 18 Utah 15, 54 Pac. Rep. 761.

Where the evidence shows that the owner consented to the diversion in derogation of his prior rights, he is estopped from afterwards claiming them. Churchill v. Bauman, 95 Cal. 541, 30 Pac. Rep. 770; *Id.*, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43.

Where parties have settled differences by an agreement, each will thereafter be estopped from denying the right of the other to divert and use the water in accordance with such agreement. Saunders v. Robinson, 14 Idaho 770, 95 Pac. Rep. 1057.

See, also, Natoma W. Co. v. Hancock, 101 Cal. 42, 35 Pac. Rep. 334, reversing 101 Cal. 42, 31 Pac. Rep. 112; Huston v. Bybee, 17 Ore. 140, 20 Pac. Rep. 51, 2 L. R. A. 568; Parker v. City of Atchison, 58 Kan. 29, 48 Pac. Rep. 631; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac.

and irrevocably fixed and determined by estoppel by matter *in pais*.[13]

The question of estoppel as to questions relating to ditches and canals and rights of way for the same has been discussed in a previous portion of this work.[14] But, in general, we will say here that where one enters the enclosure of another and constructs a ditch, canal, or other works thereover at large expense, and the owner of the land acquiesces and permits them to remain there for a long period of time, such owner is estopped from denying the appropriator's right on the ground that he is a trespasser.[15] Again, where the owner of an irrigation ditch constructed on public lands induces subsequent settlers to take up lands that can only be irrigated by the ditch, and to labor upon and increase its capacity with the understanding that they were to use the water and the ditch as the other settlers, he is estopped to deny their right so acquired.[16]

§ 1127. Estoppel by matter in pais—Silence not amounting to consent will not work an estoppel.—Upon the question of silence operating as an estoppel, the authorities are not quite harmonious. The true rule as we view the subject is that unless the silence upon the part of the owner can be construed as a consent or at least an acquiescence, an estoppel will not be worked. Of course, if the silence is continued for the full period of the statute of limitations as a bar to an action for the recovery of real property, by the laches of the owner, and the adverse possession and user of the one seeking the right, a prescriptive right may be acquired. But where one party invades the right of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to

Rep. 1001; Fabian v. Collins, 3 Mont. 215.

But see Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978.

13 Rhodes v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884.

14 See Sec. 984.

15 Miller v. Douglas, 7 Ariz. 41, 60 Pac. Rep. 722; Scott v. Toomey, 8 S. D. 639, 67 N. W. Rep. 838; Sweetland v. Grants Pass etc. Co., 46 Ore. 85, 79 Pac. Rep. 337; Foster v. Bear Valley Irr. Co., 65 Fed. Rep. 836; Campbell v. Shivers, 1 Ariz. 161, 25 Pac. Rep. 540.

But see South Side Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107.

16 Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Brown v. Evans, 18 Nev. 141, 1 Pac. Rep. 673.

bring the case within the purview of the statute of limitations.[1] Therefore, silence in and of itself does not imply consent or acquiescence unless that silence should continue for such a period that the owner would be guilty of laches in not speaking when the law says he should have spoken in order to protect his rights. And, generally speaking, the statute of limitations governs in cases of this nature. Therefore, that a ditch, canal, or other works were constructed at a great cost and were maintained and they and the water right used with the knowledge of the prior appropriator or owner, without any objection or opposition upon his part, is not by the mere silence upon his part sufficient to operate as an immediate estoppel against his afterward asserting his claim to his rights.[2]

1 Wood on Limitations, Sec. 62.

For the acquisition of rights by prescription, see Chap. 54, Secs. 1033-1058.

2 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, where it is said: "But, whatever the facts, we can not assent to the proposition—apparently recognized by the Court—that the mere silence of plaintiff's grantors, disconnected from other circumstances in evidence, created an estoppel at law."

"The evidence shows that the plaintiff was employed by the defendant about its mill; that he knew that it was being constructed to reduce ores, and made no objection to the erection thereof. Such tacit acquiescence, however, is not sufficient to create an equitable estoppel." Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361.

A corporation is not estopped from challenging the validity of a contract made on behalf of its directors, interested therein adversely to the corporation, by laches on the part of such directors in not causing the contract to be set aside, but allowing the other party to expend money on the strength of the contract. Goodell v. Verdugo etc. Co., 138 Cal. 308, 71 Pac. Rep. 354.

"The mere fact that the defendants expended money in sinking wells and putting in pumps each upon his own lands, with the knowledge of the plaintiffs and without objection by them, creates no estoppel." Verdugo Canon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

In Wyoming, where the defendant acquired a water right before the adoption of the constitution, the fact that he failed to present his claim of priority to the board of control, after notice of proceedings to establish his claim, does not estop him from asserting his right in the District Court. Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

See, also, Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; Hallock v. Suitor, 37 Ore. 9, 60 Pac. Rep. 384; Ewing v. Rhea, 37 Ore. 583, 62 Pac. Rep. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783; Bolter v. Garrett, 44 Ore. 304, 75 Pac. Rep. 142; Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Madison v. Spokane Valley etc. Co., 40

The silence without objection upon the part of the owner is a mere license, and may be treated as such.[3] So, as held by the Oregon court, the mere passive acquiescence on the part of the owners of land in the expenditure of a considerable sum of money for the construction of an irrigating ditch across their property does not estop them, or their grantees, from destroying the ditch within the period of limitations, since the right to maintain it is a mere license, and revocable at pleasure.[4] And where the word "acquiescence" is used it must mean more than a passive acquiescence or a failure to object. "A mere passive acquiescence where one is under no duty to speak does not raise an estoppel."[5]

Wash. 414, 82 Pac. Rep. 718, 6 L. R. A., N. S., 257; Farmers' Pawnee C. Co. v. Pawnee etc. Co., 47 Colo. 239, 107 Pac. Rep. 286; Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; Kelly v. Taylor, 23 Cal. 11; Maye v. Yappen, 23 Cal. 308, 10 Morr. Min. Rep. 101; Stockman v. Riverside etc. Co., 64 Cal. 57, 28 Pac. Rep. 116; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Orient etc. Co. v. Freckletson, 27 Utah 125, 74 Pac. Rep. 652; Durga v. Lincoln Cr. Lum. Co., 47 Wash. 477, 92 Pac. Rep. 343; McCann v. Wallace, 117 Fed. Rep. 936; Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312; Anaheim etc. Co. v. Semi-Tropic etc. Co., 64 Cal. 185, 194, 30 Pac. Rep. 623; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Miller & Lux v. Madera etc. Co., 155 Cal. 61, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814, 817; Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866; Walker v. Elmore County, 16 Idaho 696, 102 Pac. Rep. 389; Rasmussen v. Blust, 83 Neb. 678, 120 N. W. Rep. 184; Garrett v. Bishop, 27 Ore. 349, 41 Pac. Rep. 10; North Powder etc. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713; Rhodes v. Barnes, 54 Wash. 145, 102 Pac. Rep. 884; McKinney v. Big Horn etc. Co., 167 Fed. Rep. 770, 93 C. C. A. 258; McCann v. Wallace, 117 Fed. Rep. 936; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; *Id.*, 121 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. Rep. 1123, 120 Am. St. Rep. 978.

[3] For rights by license, see Sec. 982.

[4] Ewing v. Rhea, 37 Ore. 583, 62 Pac. Rep. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783; Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484.

[5] Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

But, upon the other hand, the circumstances may be such that it is the duty of one, where he sees his rights about to be invaded by another to speak out and lay claim to the same; otherwise he will be estopped from afterward setting them up and claiming them. Such was held to be the case where one who had a prior right by prior appropriation to the use of water of a certain stream stood by and allowed another wrongfully claiming to own the right to sell it to a third party, without asserting and making known his claim. By reason of his failing to speak when he should have spoken, he was estopped from thereafterward asserting or claiming the right.[6] "It is elementary that he who fails to assert his alleged rights, when in good faith he should have done so, is estopped from afterward asserting the same."[7] As was said in a recent Colorado case:[8] "He that remains silent when conscience requires him to speak shall not be heard to speak when conscience requires him to remain silent."

Again, where the evidence is conclusive that the owner, knowing that his rights were about to be invaded by another, stood by and permitted the other parties to construct expensive works, use, and enjoy the rights, and by his actions assented and invited such works and use, although he did not do so in terms, but by his very silence, he induces them to believe that such rights might be acquired, that thereafterward to deprive them of such rights would work an injustice and fraud upon them, such owner will be held to be estopped from setting up or claiming such rights.[9] It must be noticed here, however, that some of the authorities go to the extent that such a case works an estoppel only as to injunctive relief, and that the owner may have his action at law for damages. We will discuss these subjects in a subsequent portion of this work.[10]

[6] Fabian v. Collins, 3 Mont. 215.

[7] Orient M. Co. v. Freckleton, 27 Utah 125, 74 Pac. Rep. 652.

[8] Arthur Irr. Co. v. Strayner, 50 Colo. 371, 115 Pac. Rep. 724.

[9] Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; Schettler v. Lynch, 23 Utah 305, 64 Pac. Rep. 955; Crescent C. Co. v. Montgomery, 143 Cal. 248, 76 Pac. Rep. 1032, 65 L. R. A. 940; Orient M. Co. v. Freckleton, 27 Utah 125, 74 Pac. Rep. 652; Matheson v. Ward, 24 Wash. 407, 64 Pac. Rep. 520, 85 Am. St. Rep. 955; Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331; Miller v. Douglas, 7 Ariz. 41, 60 Pac. Rep. 722; Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 Pac. Rep. 494; Dalton v. Rentaria, 2 Ariz. 275, 15 Pac. Rep. 37.

[10] For actions for injunctions, see Chap. 81.

For actions for damages, see Secs. 1660-1704.

§ 1128. Estoppel by matter in pais—Riparian owners estopped when.—As is the case with those who have acquired their rights by the Arid Region Doctrine of appropriation, discussed in the previous sections,[1] so, also, may riparian owners estop themselves from asserting their rights as against persons who have been induced by their conduct to go to the expense of making improvements for the utilization of the waters of a stream on the faith of such representations made by them in such a way that it would constitute a fraud upon the other parties for him afterward to claim the right.[2] So, therefore, where a riparian proprietor has been guilty of misrepresentation or some degree of moral turpitude, as in other cases,[3] and has stood by and permitted others to appropriate the waters of a stream at great expense, he may be estopped from claiming his right to the water as such riparian proprietor. But usually something more than mere silence is required to create such an estoppel; and a riparian proprietor who sees parties preparing to appropriate the

"Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at a large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused, and the party is left to his action for such damages as he can prove." Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, Miller & Lux v. Madera C. & Irr. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

1 See Secs. 1125-1127.

2 Curtis v. La Grande etc. Co., 20 Ore. 34, 23 Pac. Rep. 808, 25 Pac. Rep. 378, 10 L. R. A. 484; Biddle Boggs v. Merced M. Co., 14 Cal. 279, 10 Morr. Min. Rep. 334; Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361; Andrus v. Berkshire Pr. Co., 145 Fed. Rep. 47; reversing 147 Fed. Rep. 76, 77 C. C. A. 248; McBroom v. Thompson, 25 Ore. 559, 37 Pac. Rep. 57, 42 Am. St. Rep. 806; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 150 Cal. 206, 110 Pac. Rep. 927.

Where a riparian owner diverts the stream into an artificial channel and continues such change for the time exceeding the statute of limitations, he is estopped as against a person making a beneficial use of the water to return it to the latter. Hallet v. Davis, 54 Wash. 326, 103 Pac. Rep. 423.

A riparian owner who knowingly stands by while a public service corporation constructs and completes at great expense a system of works designed for public use is estopped from invoking the aid of equity to restrain the diversion of water necessary for the works, and his remedy is at law for damages. Miller & Lux v. Madera C. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

3 See Sec. 1125.

waters of a stream, and constructing their ditches, canals, or other works, has been held not to lose his rights by mere silence in not objecting.[4] Nor is an upper riparian proprietor who enters into an agreement with a lower proprietor whereby the latter grants for a certain term the right to the use of the water of the adjoining stream, upon the expiration of the agreement, estopped from asserting his rights as a riparian proprietor to the use of the water of such stream, by virtue of his own ownership.[5] Further, no estoppel can arise from the failure of a riparian proprietor to object to the use of the water of a stream by another proprietor during such times as there is an abundant supply for the use of all.[6] Again, in the absence of some representations showing misconduct, the mere non-user of the water by a riparian owner creates no estoppel.[7]

[4] Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390.

A riparian owner is not estopped by mere silence and not objecting to maintain a suit to enjoin an unlawful diversion of water above his lands by any delay in not bringing the suit short of the statutory period of limitations. California v. Enterprise & Ag. Co., 127 Fed. Rep. 741.

[5] Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Metcalfe v. Faucher, —— Tex. Civ. App. ——, 99 S. W. Rep. 1038.

[6] Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623; Zimmler v. San Luis W. Co., 57 Cal. 221.

[7] California etc. Co. v. Pastoral etc. Co., 127 Fed. Rep. 741; Western Paper Co. v. Pope, 155 Ind. 394, 57 N. E. Rep. 719, 56 L. R. A. 899.

CHAPTER 58.

THE POLLUTION OF WATERS.

§ 1129. Scope of chapter—Pollution of waters defined.
§ 1130. Pollution—In general.
§ 1131. Pollution of water used for irrigation.
§ 1132. Pollution of water used for various purposes.
§ 1133. Pollution from sewage.
§ 1134. Pollution from sewage—Missouri v. Illinois.
§ 1135. Pollution from the discharge of water from factories and mills.
§ 1136. Pollution from debris from mines and reduction mills.
§ 1137. Pollution by miscellaneous means.
§ 1138. The pollution of underground waters.
§ 1139. The acquisition of the right of pollution by contract and prescription.
§ 1140. Pollution as against the rights of riparian owners.
§ 1141. Pollution as against the rights of appropriators—Priority.
§ 1142. Remedies for injuries from pollution.
§ 1143. Remedies—Injunctions.
§ 1144. Remedies—Actions for damages—Measure of damages.
§ 1145. Remedies—Criminal prosecution.
§ 1146. Remedies—Defenses.
§ 1147. Remedies—Evidence—Burden of proof.

§ 1129. Scope of chapter—Pollution of waters defined.—As the pollution of waters constitutes a distinct phase of the subject of the law of waters, in order to discuss the entire subject together in this chapter, we will discuss the subjects of the pollution of waters, protection against pollution, and remedies therefor.

Pollution of waters may be defined as any use of a stream, or other body of water, that materially fouls the water, or the deposit therein of any filth or debris that so far affects the water as to impair its value for ordinary purposes, or anything which renders the water offensive to taste or smell, or which is calculated to excite disgust in those using it for ordinary purposes.[1] In this chapter, however, we will go further than is defined by the above definition, and include the debris from mines and mills cast into streams.

[1] Shoffner v. Sutherland, 111 Va. 298, 68 S. E. Rep. 996.

§ 1130. **Pollution—In general.**—Water may be polluted in any one of three states or in all. First, in falling through the air the rain water naturally washes out any impurities held there in suspension, which impurities may consist of dust of organic and mineral matter. Consequently, oftentimes, when the rain falls upon the earth, it is not, as commonly supposed, pure water; second, water after it strikes the surface of the earth, either flowing over the earth as what is known technically as surface water, or in streams and rivers, gathers up many more impurities, such as organic matter, algae, disease germs, and mineral substances; third, water may be polluted in its passage underground, where it comes in contact with organic or mineral substances, and although it may be practically pure when it strikes the earth and sinks into the ground, it may emerge in the form of springs in a polluted condition.[1] All of these polluted conditions of waters may be solely the result of natural laws, or they may have been materially aided by the works of man. With the first, in this work, we have nothing to do; with the second we will treat only so far as the legal phases of the question are concerned.

Wherever man exists the pollution of the natural waters caused by his agency will also be found to a more or less extent. And as the population of the country becomes more and more dense, the pollution of the natural streams increases proportionately. The subject has long occupied the attention of chemists, engineers, legislatures, and the courts. And it has been determined that, wherever civilization exists, it is an absolute impossibility to wholly prevent it. As well may we attempt to legislate against the pollution of streams by the laws of Nature as to attempt to prohibit by legislation any pollution of streams in a country where man exists and carries on the various occupations of civilization. But by wise laws the pollution of natural waters may be restricted and the injuries resulting therefrom minimized.

In an economic sense, as to whether or not water must be deemed polluted or not, depends largely upon the purpose for which it is used, and the extent and character of the impurities in the water. And as we will discuss in the following sections of this chapter the

[1] See for normal and polluted waters, Water-Supply and Irrigation Paper No. 79, U. S. Geological Survey, 1903, by M. O. Leighton.

law, to a greater or less extent follows this rule. Streams or bodies of water used only for navigation may stand any amount of impurities, and so long as the water is sufficient in amount to float vessels, as far as navigation is concerned, it can not be deemed as polluted water. The same may be said, in a general way, of water used for power, which depends upon the amount or fall of the water forcibly delivered upon the water wheels used to operate machinery. The constituents of the water used for the development of power are not of great importance; therefore, polluted or unpolluted water may be used, and accomplish, as far as this use is concerned, the same results. Yet, upon the other hand, if it were attempted to use the very water which can accomplish these two results successfully in an impure state, for some other purpose, such as drinking, domestic, ice-making, or manufacturing purposes, where the water itself enters largely into the product, such water would be deemed polluted in the worst sense of the term.

§ 1131. **Pollution of water used for irrigation.**—From the standpoint of absolutely pure water, water used for irrigation may contain a large amount of impurities and still be bettered for the purpose for which it is used. One of the benefits derived from the cultivation of crops by irrigation is the increased fertility of the soil caused by the substances carried in the water and spread over the land with the irrigation water.[1] Therefore, where the water carries quantities of silt, not containing any deleterious mineral matter, it is considered a benefit to the irrigator rather than an injury. This is illustrated where the farmers below Salt Lake City, Utah, recently voluntarily traded their water rights to the water in Big Cottonwood Creek—which water is as clear and pure as any that can be found running in surface streams—to the city for water from Utah Lake, which water contains large quantities of silt, and can not be used for domestic purposes. The result of such a trade was that both parties were benefited. Another example is that the sewage of cities mixed with irrigation water is considered exceedingly beneficial to vegetation.[2] And in foreign countries especially the sewage of cities is utilized to aid in the cultivation of lands in this manner. But sewage pollutes the water to such an extent as

[1] See Sec. 13.

[2] For the use of sewage in Italy, see Sec. 146.

to render it absolutely worthless for drinking and domestic purposes. Again, some of the mineral solutions are beneficial to vegetation, while others contain chemical poisons which are destructive to both animal and vegetable life. So, as far as the use of the water for irrigation is concerned, it is not necessary that the water be chemically pure. And, further, it may contain impurities of such a nature and to such an extent that it would render it absolutely worthless and harmful for some of the other uses, and still for irrigation the very impurities render the water more valuable.[3]

But, upon the other hand, water may be so polluted that it is unfit for irrigation purposes. Water used for this purpose must contain none of the various mineral impurities, which are known to have injurious effect upon vegetation. And, as the irrigated portions of this country more often than otherwise lie in the valleys of mountainous regions, and in the mountains and at the headwaters of the sources of water supply are mines, the irrigation waters of the streams are oftentimes polluted by the discharge into them of mineral substances from the mines, and from the mills used in the reduction of their ores. The effect of this depends largely upon the nature and amount of the deleterious substances so discharged into the waters. At times, the effect is not only to kill all vegetation which such polluted water touches, but also to poison the soil to such an extent that, until the poison is finally washed out, future crops can not be raised. Animals are also poisoned and killed from drinking such water, and from eating the forage over and through which such water has been permitted to run. Water may also be polluted to such an extent that it is unfit for irrigation by the discharge of alkali water into the streams or ditches. Again, it may be rendered unfit by the discharge of large quantities of vegetable matter, such as sawdust. All of these acts tending to pollute the water constitute a nuisance, and work actual injuries to the owners of the land, who have the right to use the water for irrigation.[4]

[3] See Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583, holding that what deterioration in quality will constitute an evasion of the rights of a prior appropriator will depend upon the circumstances of each particular case. "A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation."

[4] The owners of a water ditch are entitled to have the water flow therein in its natural state, and when they claim such water by prior appropria-

§ 1132. Pollution of water used for various purposes.—There are other uses of water for which the highest degree of purity possible must be maintained. The standards set for water used for drinking and domestic purposes are higher than those prescribed for any other use. And the greatest effort is exercised by the legislatures and those in authority to maintain a water supply fit for drinking and domestic purposes, and to prevent the water from coming into contact with any substance which will contaminate it and render it unfit for use. Where the water supply is from surface streams or other surface bodies special care is exercised in this respect. The health and prosperity of any community largely depends upon the character of its supply of drinking water. The value of water for this purpose is commonly reckoned according to its availability for public consumption. To be acceptable to the public it must have little or no turbidity, and must contain little or no sediment or organic waste, color, taste, or odor.

The requirements of water to be used as a source of ice supply are practically the same as those above described with reference to the use of water for drinking and domestic uses.

The same requirements as above are essential where the water is used in manufacturing processes, and where the water enters into one of the constituent parts of the product. It is essential that a water used for such a purpose shall contain nothing which, from a chemical or sanitary standpoint shall be injurious to health.

The pollution of the fresh water streams of the country and its injury to fisheries has received considerable attention from the legislatures and the courts. Many of the waters of the country that formerly were good fishing grounds have, within recent years, become practically destitute of fish because of the discharge of wastes from factories, mills, or public sewers into lakes and rivers. The

tion, its corruption by any stranger is a private nuisance. Crane v. Winsor, 2 Utah 248.

See, also, North Point Consol. etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607, where it was held that the drainage of alkali waters into an irrigation ditch constituted a nuisance.

See, also, Cushman v. Highland D. Co., 3 Colo. App. 437, 33 Pac. Rep. 344; Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476; Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629.

pollution of the water of a river by means of such wastes or refuse from factories and mills, so as to destroy the fish therein is a nuisance.[1]

Where the water is used merely for navigation, mining, or for the generation of power, the amount of impurities in the water makes little difference, so long as the quantity is sufficient to float vessels, or the force with which it is delivered upon the wheels is sufficient for the development of the power.[2]

Having discussed the various uses for which polluted water must not be used, and cases which polluted water may be used without injury, in the following sections we will discuss briefly the specific causes of pollution.[3]

§ 1133. **Pollution from sewage.**—One of the most common methods of the pollution of waters, and one that is not confined to any particular country, or to any particular locality in any country, is that of the discharge of the sewage of cities and towns into the running streams or other bodies of water. This subject is one that has occupied the attention of scientists, legislative bodies, and the courts, for many centuries, and still it is today unsettled, as to what cities and towns may do with the great amounts of refuse, and not impair the health, surroundings, or the property, not only of the citizens of such municipalities, but also of the citizens of the country lower down on the streams, through which such waters flow. In the older and more thickly settled communities, the conditions in this respect are the worse, and yet no legislature has been able to stop it, and no court has been able to lay down such a rule that can or will prohibit this pollution from continuing. Its injurious effects are manifest in many ways, for no matter how the sewage is disposed of, whether it is discharged directly into the streams, or whether it is discharged upon the land and finally washed away by the rains, all, or a large portion thereof, eventually finds its way into the streams. This discharge of sewage into the streams, or other bodies of fresh water, is

1 Pollution of water of a river by means of refuse from a sawmill, so as to destroy fish therein, is a nuisance. People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183.

See, also, Threatt v. Brewer M. Co., 49 S. C. 95, 26 S. E. Rep. 970; Seaman v. Lee, 10 Hun, 607; Fitzgerald v. Firbank, 2 Ch. 96, 66 L. J. Ch. N. S. 529, 76 L. T. N. S. 564.

2 See, also, Sec. 1130.

3 See Secs. 1133-1138.

injurious to life and health of human beings, in fact to all animal life which comes in contact therewith, both that which lives upon the land, as well as that which lives in the water. Yet legislation or the courts have not been able to prohibit this evil; and about all that they have been able to do is to mitigate it, and in some instances to counteract its results.

The discharge of sewage and drainage from their streets by cities and towns into the streams and other bodies of fresh water includes many intricate questions, which, in detail, it is not the purpose of this work to discuss. Therefore, only the most general discussion of the subject will be covered.

Municipalities have the same rights, and are subject to the same restrictions as other riparian owners in the disposition of filth, such as the washings of their streets and sewage, into the waters which flow by such cities and towns. They may discharge sewage and other filth into such waters, provided always that by so doing they cause no injury to the persons or property of those below; and, provided further, they do not thereby increase the flow of the water in the streams so as to exceed the capacity of the channel of the streams to carry it off.[1] Where, however, by such acts a nuisance is maintained and the property or lives of the owners below on the stream are injured, the overwhelming weight of authority, both in England and in this country, denies such a right, and the parties injured have their remedy both at law, for damages, and in equity, to prevent the continuance of such a nuisance. As was said by what may be called a leading case upon the subject by the Supreme Court of Connecticut: "The use of a stream for drainage may under some circumstances be reasonable, although the water is thereby rendered unfit for its primary use; but the concentration of filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the river in such quantities that it is necessarily carried to the premises of another where it produces a nuisance dangerous to the health and destructive of the value of his property, must be unreasonable."[2]

1 Bainerd v. Newton, 154 Mass. 255, 27 N. E. Rep. 995; Cone v. Hartford, 28 Conn. 363.

2 Platt Bros. v. Waterbury, 72 Conn. 531, 45 Atl. Rep. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335.

See, also, Spokes v. Banbury Local Bd. of Health, L. R. 1 Eq. 42, 35 L. J. Ch. N. S. 105, 13 L. T. N. S. 428, 14 Week. Rep. 128; Goldsmid v. Tonbridge Wells Imp. Co., L. R. 1 Ch. App. 349, 35 L. J. Ch. N. S. 382, 12

Private parties or other institutions than municipalities can not turn sewage into a stream to the injury of lower proprietors.[3] Neither will a legislative enactment add to the rights of a city in this respect, except as far as the State is concerned. Where a municipality is expressly authorized by statute to construct a system

Jur. N. S. 208, 14 L. T. N. S. 154, 14 Week. Rep. 562; Attorney General v. Richmond, L. R. 2 Eq. 306, 12 Jur. N. S. 544, 35 L. J. Ch. N. S. 597, 14 Week. Rep. 686, 14 L. T. N. S. 398; Attorney General v. Leeds, L. R. 5 Ch. App. 583, 39 L. J. Ch. N. S. 711, 19 Week. Rep. 19; Attorney General v. Birmingham, L. R. 17 Ch. Div. 685, 4 Kay & J. 528, 6 Week. Rep. 811, 50 L. R. Ch. N. S. 786, 44 L. T. N. S. 906, 29 Week. Rep. 753, 46 J. P. 36; Attorney General v. Metropolitan Board of Works, 1 Hem. & M. 298, 11 Week. Rep. 820, 9 L. T. N. S. 139, 2 New Rep. 312; People v. San Luis Obispo, 116 Cal. 617, 48 Pac. Rep. 723; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557; Markwardt v. City of Guthrie, 18 Okla. 32, 90 Pac. Rep. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581; Morgan v. Danbury, 67 Conn. 484, 35 Atl. Rep. 499; Nolan v. New Britain, 69 Conn. 668; Columbia etc. Co. v. Prison Commission, 92 Fed. Rep. 801; Village of Dwight v. Hayes, 150 Ill. 273, 37 N. E. Rep. 218, 41 Am. St. Rep. 367; Robb v. LaGrange, 158 Ill. 21, 42 N. E. 77; Randolf v. Bloomfield, 77 Iowa 50, 41 N. W. Rep. 562; Loughbran v. Des Moines, 72 Iowa 382, 34 N. W. Rep. 172; Topeka etc. Co. v. City of Potwin, 43 Kan. 404, 23 Pac. Rep. 578; Bainard v. Newton, 154 Mass. 255, 27 N. E. Rep. 995; Morse v. Worcester, 139 Mass. 389, 2 N. E. Rep. 694; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Haskell v. New Bedford, 108 Mass. 208; Woodward v. Worcester, 121 Mass. 245; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; O'Brien v. St. Paul, 18 Minn. 176, Gil. 163; Joplin etc. Co. v. Joplin, 124 Mo. 129, 27 S. W. Rep. 406; Vale Mills v. Nashua, 63 N. H. 136; Doremus v. Paterson, 65 N. J. Eq. 711, 55 Atl. Rep. 304; Grey, Attorney General *ex rel.* Simmons v. Paterson, 60 N. J. Eq. 385, 45 Atl. Rep. 995; Chapman v. Rochester, 110 N. Y. 273, 18 N. E. Rep. 88, 1 L. R. A. 296, 6 Am. St. Rep. 366; Good v. Altoona, 162 Pa. 493, 29 Atl. Rep. 741, 42 Am. St. Rep. 840; San Antonio v. Smith, 94 Tex. 266, 59 S. W. Rep. 1109.

But see Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. Rep. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305, holding that an injunction would not be granted to restrain a city from maintaining its sewer system; Valparaiso v. Moffit, 12 Ind. App. 250, 39 N. E. Rep. 909, 54 Am. St. Rep. 522, holding that a city is liable in damages for the discharge of sewage in a stream; Richmond v. Test, 18 Ind. App. 482, 48 N. E. Rep. 610, holding that a city is not liable in damages for the discharge of sewage in a stream. "It is difficult to reconcile these conflicting decisions of the Indiana courts." Markwardt v. City of Guthrie, 18 Okla. 32, 90 Pac. Rep. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581.

[3] Trevett v. Prison Assn., 98 Va. 332, 36 S. E. Rep. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727; Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589.

of sewerage, and to discharge the sewage matter into any particular waters, the statutory authority thus granted is to be exercised subject to the implied condition that such discharge will not constitute a nuisance, and thereby cause injury to the property of others. As was said in the Connecticut case: "So the legislative authority for emptying the sewage of cities into water courses is coupled with the provision that no nuisance is thereby authorized."[4] Any other construction would be in effect the taking of property without due process of law and without just compensation, contrary to the provisions of the Federal and State constitutions. And, as to whether or not the use of a river by a municipality for such a purpose is a reasonable one which the court will allow depends upon the circumstances of each particular case, and is essentially a question of fact.[5] It therefore follows that the burden of proof is upon the party alleging that such a nuisance is being committed and that he is materially injured thereby.[6]

§ 1134. Pollution from sewage—Missouri v. Illinois.—The most famous case in this country involving this question is that of Missouri v. Illinois,[1] an original action brought by the plaintiff State against the defendant State in the Supreme Court of the United States to enjoin the discharge of the sewage of the City of Chicago through an artificial channel into the Desplaines River, which river empties into the Illinois River, and the latter empties into the Mississippi at a point about forty-three miles above the City of St. Louis. It was alleged in the bill that the result of the threatened discharge would be to send 1,500 tons of poisonous filth daily into the Mississippi, to deposit great quantities of the same upon the part of the

[4] Platt Bros. v. Waterbury, 72 Conn. 531, 45 Atl. Rep. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335.

See, also, Attorney-General v. Leeds, L. R. 5 Ch. App. 583, 39 L. J. Ch. N. S. 711, 19 Week. Rep. 19.

See, also, cases cited above.

[5] Platt Bros. v. Waterbury, 72 Conn. 531, 45 Atl. Rep. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; Keeney etc. Co. v. Union etc. Co., 39 Conn. 576; Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

[6] For evidence of pollution—burden of proof, see Sec. 1147.

See, also, next section, No. 1134, for the case of Missouri v. Illinois.

[1] 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

bed of the river belonging to the plaintiff, and to so poison the water of the river, upon which various of the plaintiff's cities, towns, and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing purposes. The decision of the Court upon the demurrer was mainly upon the question of the jurisdiction of the Court as to the parties to the action, and the subject-matter of the action; and it was held that the Court had original jurisdiction both over the parties[2] and the subject-matter, and that: "The nuisance set forth in the bill was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch." And, the demurrer being overruled, leave was granted the defendant State to answer the allegations of the bill.[3] Upon the merits of the case, it was decided for the defendant upon the ground of the failure of proof, that the nuisance complained of was not proven by satisfactory evidence, which left it in doubt whether such pollution can and did survive the journey from Chicago to St. Louis, and reach the intake of the latter city, and especially where the evidence showed other possible sources of infection in the discharge of sewage above St. Louis from other towns and cities, some of which were situated in Missouri.

§ 1135. Pollution from the discharge of waste from factories and mills.—Probably the most common cause of the pollution of waters, next to that of sewage,[1] and one that is universal to the entire country, is the discharge of refuse and waste from factories and mills, into the streams or other bodies of water. As a general rule the owner of property is entitled to the free use and enjoyment of the same, so long as the rights and property of others are not injured thereby.[2] This rule applies with especial force to the owners of lands bordering upon streams and other bodies of fresh water. He may work and develop his own land as he sees fit, and is not answerable for the elements and forces of Nature that may by natural processes affect the lands of others below him on the stream. But the owners of factories and mills are usually engaged

2 For original jurisdiction in actions between States, see Sec. 1233.

3 See first citation, *supra*.

1 For the pollution by sewage, see Secs. 1133, 1134.

2 For the rights of riparian owners, see Sec. 1140.

in bringing to the same, not from their own premises, but from elsewhere, materials, which they work up into the products; and, where such mills are located upon the banks of a stream, even if the waste is not directly discharged into the same, by the washings of rains, it, or the most of it, finds its way into such streams, unless special works are constructed to effectually destroy or to carry off such waste. And the rule of law upon this subject is that any material which finds its way into streams, from mills and factories, that so befouls and pollutes the water as to impair its value for the ordinary purposes of life, is deemed a violation of the rights of the lower owners on the stream, and is actionable in equity or at law. As was said by the Indiana Court upon this subject: "No court, so far as we have observed, has gone so far as to recognize the right of a manufacturer to establish his plant upon the banks of a non-navigable stream, and pollute its waters by a business wholly brought to the place, entirely disconnected with any use of the land itself, and which he may just as well conduct elsewhere, without responding in damages to those injured thereby, and to injunction if the injury done is substantial and continuing." [3]

The pollution of waters by operators of saw mills throwing the sawdust into streams comes properly under this classification. Such deposits discolor the water, and in warm weather the decaying sawdust gives it an offensive odor. Livestock in some instances refuse to drink the water, and it is even less fit for domestic purposes. The decaying sawdust affects the purity of the water to such an extent

[3] Weston Paper Co. v. Pope, 155 Ind. 394, 57 N. E. Rep. 719, 56 L. R. A. 899.

See, also, Baltimore v. Warren Mfg. Co., 59 Md. 96; Indianapolis W. Co. v. American Strawboard Co., 53 Fed. Rep. 970; Muncie Pulp Co. v. Martin, 23 Ind. App. 558, 55 N. E. Rep. 796; Robb v. Carnegie Bros., 145 Pa. 324, 22 Atl. Rep. 649, 14 L. R. A. 329, 27 Am. St. Rep. 694; Holsman v. Boiling Springs Bleaching Co., 14 N. J. Eq. 335; Lentz v. Carnegie Bros., 145 Pa. 612, 23 Atl. Rep. 219, 27 Am. St. Rep. 717; Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. Rep. 454, 7 L. R. A. 457, 26 Am. St. Rep. 340; Richmond Mfg. Co. v. Atlantic De Laine Co., 10 R. I. 106, 14 Am. Rep. 658; Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. Rep. 26, 30 Am. St. Rep. 546; Silver Spring Bleaching & Dyeing Co. v. Wanskuck Co., 13 R. I. 611; Carhart v. Auburn Gaslight Co., 22 Barb. 297 (N. Y.); Hipkins v. Birmingham & S. Gaslight Co., 1 L. T. N. S. 303, 5 Hurls. & N. 47, 29 L. J. Exch. N. S. 169, 8 Week. Rep. 182; Babcock v. New Jersey Stockyards Co., 20 N. J. Eq. 296; City of Durango v. Chapman, 27 Colo. 169, 60 Pac. Rep. 635.

that it generally causes disease along the streams where found.[4] It also destroys the fish in the stream.[5] The sawdust also tends to clog up the ditches and canals so as to diminish the flow of the water therein.[6] All of these acts which tend to befoul and pollute the water to the extent that it is not fit for the ordinary purposes of life are held to be nuisances which may be abated in equity, and for which damages will lie for actual injuries sustained.[7]

§ 1136. Pollution from debris from mines and reduction mills.—A common cause of the pollution of streams, and one that has received considerable attention of legislatures and the courts, is that from the casting of the debris from mines and the tailings from reduction mills into the streams. Of course, pollution from this cause is local to those sections of the country where there are such mines and reduction mills, but in the irrigated mountainous regions, where there are many mines and such mills, the waters of the running streams of many localities are affected. Some of the material thus cast into the streams from this cause is entirely harmless, and the only injury resulting is that of impeding the natural flow of the water both in the streams and in the ditches and canals which take out the waters. And where the water is used for irrigation, oftentimes the land itself is injured by being covered with particles of rock, gravel, coal, or waste, which is carried onto the land with the irrigation water and thereby prevents the growing of crops. Examples of this are seen from the operations of placer

[4] Shoffner v. Sutherland, 111 Va. 298, 69 S. E. Rep. 996; People *ex rel.* Ricks W. Co. v. Elk River etc. Co., 107 Cal. 221, 40 Pac. Rep. 521, 48 Am. St. Rep. 125; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Mitchell v. Barry, 26 U. C. Q. B. 416; Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. Rep. 167, 44 Am. Rep. 194; State v. Mitchell, 47 W. Va. 789, 35 S. E. Rep. 845; Washburn v. Gilman, 64 Me. 163, 18 Am. Rep. 246; State v. Griffin, 69 N. H. 1, 39 Atl. Rep. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139; City of Aberdeen v. Lytle Logging etc. Co., 58 Wash. 368, 108 Pac. Rep. 945.

[5] People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183, where it is held that the pollution of water of a river by means of refuse from a sawmill, so as to destroy fish therein, is a nuisance.

See, also, State v. Kroenert, 13 Wash. 644, 43 Pac. Rep. 876.

[6] Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185.

[7] See Sec. 1144.

mining, both where worked by hand by the means of ordinary sluices,[1] and where worked by hydraulic rams or other devices;[2]

1 Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410, where it is held that a clause in a contract for the delivery of water at the head of grantee's ditch, reserving the right to use it for mining purposes, confers no right to pollute the water to any greater extent than that permitted by law.

In placer mining the operator has no right to deposit tailings, etc., in a running stream to such an extent as to cause his neighbor's land to be flooded by them, and thereby to substantially impair its usefulness; and, if he does so, he is liable in damages, regardless of the question of negligence, or of the question whether his mine can be operated successfully without such result, or of the question of priority of appropriation of the waters of the stream. Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, 63 Am. St. Rep. 622.

See, also, McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7; Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692, 12 Morr. Min. Rep. 232; Yuba County v. Kate Hayes M. Co., 141 Cal. 360, 74 Pac. Rep. 1049; Sierra County v. Butler, 136 Cal. 547, 69 Pac. Rep. 418; Esmond v. Chew, 15 Cal. 137, 5 Morr. Min. Rep. 175; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Stone v. Bumpus, 40 Cal. 428, 4 Morr. Min. Rep. 278; Gregory v. Harris, 43 Cal. 38, 14 Morr. Min. Rep. 91; Pilot Rock Creek C. Co. v. Chapman, 11 Cal. 162; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. Rep. 823, 16 Morr. Min. Rep. 252.

But see the early cases of California and Colorado, where an exception was made in favor of miners to use the streams to carry off waste as against the agriculturists on the stream below. Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161; Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64.

"The law appears to be that a person located on a mining stream and operating a placer mine is entitled to a reasonable and proper use of the channel and the water. To unreasonably restrict such use is to interdict the prosecution of a lawful and valuable enterprise. However, such miner has no legal right to dump his mining debris into the channel or stream and allow it to be carried down by the water to the land of a lower proprietor, or to fill up the channel to the injury of such riparian proprietor." Provolt v. Bailey, —— Ore. ——, 121 Pac. Rep. 961, citing Lindley on Mines, 2d Ed., Sec. 841; Atchison v. Peterson, 1 Mont. 561; *Id.*, 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Carson v. Hayes, 39 Ore. 97, 104, 65 Pac. Rep. 814; York v. Davidson, 39 Ore. 81, 65 Pac. Rep. 819; Brown v. Gold Coin Min. Co., 48 Ore. 277, 86 Pac. Rep. 361.

2 Woodruff v. North Bloomfield etc. Co., 16 Fed. Rep. 25, 8 Sawy. 628; *Id.*, 18 Fed. Rep. 753, 9 Sawy. 441; Keyes v. Little York etc. Co., 53 Cal. 724; Fritts v. Camp, 94 Cal. 393, 29 Pac. Rep. 867; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Woodruff v. Bloomfield, 27 Fed. Rep. 795, 11 Sawy. 590; Eureka Lake etc. Co. v. Yuba County, 66 Cal. 311, 5 Pac. Rep. 490;

and at times it is also seen from the working of lode mining claims,[3] and stamp and concentration mills used in connection therewith in the reduction of their ores.[4] The injuries of this nature are also

affirmed, 116 U. S. 410, 29 L. Ed. 671, 6 Sup. Ct. Rep. 429; Golden Gate etc. Co. v. Yuba County, 65 Cal. 187, 3 Pac. Rep. 628; Hardt v. Liberty Hill etc. Co., 27 Fed. Rep. 788, 11 Sawy. 611; United States v. North Bloomfield etc. Co., 53 Fed. Rep. 625; Fairplay Hydraulic M. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725; McLaughlin v. Del Re, 71 Cal. 230, 16 Pac. Rep. 881; City of Helena v. Hale, 38 Mont. 481, 100 Pac. Rep. 611; Gold Ridge M. Co. v. Tallmadge, 44 Ore. 34, 74 Pac. Rep. 325, 102 Am. St. Rep. 602; Travis Placer M. Co. v. Mills, 94 Fed. Rep. 909, 37 C. C. A. 536; Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597; *Id.*, 32 Cal. 166; United States v. North Bloomfield etc. Co., 81 Fed. Rep. 243; North Bloomfield v. United States, 88 Fed. Rep. 64, 32 C. C. A. 84; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Yuba County v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740.

As a result of the many California cases involving hydraulic mining and the depositing debris in the navigable rivers, especially relating to the Sacramento and San Joaquin, Congress prohibited the depositing of such debris in such rivers, except under the terms and conditions as granted by the debris commission, provided for by the Act. See 5 Fed. Stat. Ann., 1905, pp. 61-67; U. S. Comp. Laws, 1901; 27 Stat. L. 507. Approved March 1, 1893.

For the construction of the above Act, see North Bloomfield etc. Co., 81 Fed. Rep. 243, 88 Fed. Rep. 64, 32 C. C. A. 84; 20 Op. Atty. Gen. 604; 21 Op. Atty. Gen. 62; 22 Op. Atty. Gen. 554.

It was also held by the Supreme Court of California that, while the purpose of the Act was to prevent injuries from the discharge of debris from hydraulic mines, it was not intended to exonerate the miner from liability therefor, nor to limit the powers of the State courts to protect private property from threatened injury, and to redress inflicted injury thereto from the operation of hydraulic mines, though carried on under a permit and in strict compliance with the plans of the commission. Sutter County v. Nichols, 152 Cal. 688, 93 Pac. Rep. 872, 15 L. R. A., N. S., 616, 14 Am. & Eng. Ann. Cas. 900.

See, also, Yuba County v. Kate Hayes M. Co., 141 Cal. 360, 74 Pac. Rep. 1049.

3 "No person, natural or artificial, has a right directly or indirectly, to cover his neighbor's land with mining debris, sand, and gravel, or other material, so as to render it valueless." Hobbs v. Amador etc. Co., 66 Cal. 161, 4 Pac. Rep. 1147.

See, also, Lincoln v. Rodgers, 1 Mont. 217; Nelson v. O'Neal, 1 Mont. 284; Potter v. Froment, 47 Cal. 165; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; Courtwright v. Bear River D. Co., 30 Cal. 573; Brown v. Gold Coin etc. Co., 48 Ore. 277, 86 Pac. Rep. 361; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465.

4 Suffolk Gold etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; Crane v. Winsor, 2 Utah 248, 11 Morr. Min. Rep. 69; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; Richard v. Hupp, 104 Cal. 18, 37 Pac. Rep. 920; Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U.

seen from the discharge of the tailings and waste from coal mines.[5] Again, at other times, the material so discharged from such mines or reduction works and carried down to the lower lands by the water is highly poisonous to all animal and vegetable life. Such is especially the case where such washings and tailings are from cyanide plants and from mills reducing arsenical, lead, and copper ores.[6] Such was held to be the case in a recent action in Kansas against a salt mining company, where it was proven that the company deposited a large quantity of refuse salt in such a manner that by the action of the rain upon it the water underlying an adjacent tract was impregnated with salt through percolation so as to render it unfit for use and harmful to vegetation and established a legal wrong against the owner of the tract.[7]

S. App. 629; Edwards v. Allouez M. Co., 38 Mich. 46, 31 Am. Rep. 301, 7 Morr. Min. Rep. 577; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. Rep. 192; Drake v. Lady Ensley Coal etc. Co., 102 Ala. 501, 14 So. Rep. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77; Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361; McCarthy v. Bunker Hill etc. Co., 164 Fed. Rep. 927, 92 C. C. A. 259; Humphreys Tun. etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Hill v. Standard etc. Co., 12 Idaho 223, 85 Pac. Rep. 907.

5 Robinson v. Black Diamond Coal M. Co., 57 Cal. 412, 40 Am. Rep. 118; Hunter v. Taylor Coal Co., 16 Ky. L. 159, 190; Bowling Coal Co. v. Ruffner, 117 Tenn. 180, 100 S. W. Rep. 116, 9 L. R. A., N. S., 923, 10 Ann. Cas. 581; Roaring Creek etc. Co. v. Anthracite etc. Co., 212 Pa. St. 115, 61 Atl. Rep. 811; Columbus etc. Co. v. Tucker, 48 Ohio St. 41, 26 N. E. Rep. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528; Sanderson v. Pennsylvania Coal Co., 86 Pa. 401, 27 Am. Rep. 711, 11 Morr. Min. Rep. 60; *Id.*, 94 Pac. Rep. 302, 39 Am. Rep. 785, 1 Morr. Min. Rep. 79; *Id.*, 102 Pa. 370. But see the same case, 113 Pa. 126, 6 Atl. Rep. 453, 57 Am. Rep. 445, where the Court held that an exception was made in favor of miners as against agriculturists to use the streams for the drainage of debris from their mines, without being liable for injuries to others caused thereby. Commenting upon this latter decision, Mr. Farnham says: "No comment is necessary upon that decision. The very course which the Court took is sufficient to overthrow it." 2 Farnham, Waters and Water Rights, p. 1700.

See, also, Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S. W. Rep. 420, disapproving the last above decision.

6 Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907; Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; McCarthy v. Gaston Ridge etc. Co., 144 Cal. 542, 78 Pac. Rep. 7; Crane v. Winsor, 2 Utah 248; Humphreys etc. Co. v. Frank, 46 Colo. 254, 105 Pac. Rep. 1093.

7 Gilmore v. Royal Salt Co., 84 Kan. 729, 115 Pac. Rep. 541, 34 L. R. A., N. S., 48.

See, also, Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. Rep. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, 21 Morr. Min. Rep. 38.

No one has the right to poison water, however innocently, or to contaminate it so that when it reaches his neighbor's land it is in such a condition as to be unfit for use, either by man or beast.[8] In either case, where there is a positive, material, and continuing injury, to the owners of lands below, or to the waters, the right to the use of which another is entitled, either as an appropriator or as a riparian owner, a nuisance is committed which a court of equity will abate by a direct action brought for that purpose,[9] or by an injunction;[10] also, an action at law for damages for past injuries which have actually resulted from such acts.[11]

Each case for an injunction or damages, involving the pollution of waters by debris and deleterious substances from mines and reduction works must be determined from its own facts and circumstances. No positive rule of law can be laid down which will be applicable to all cases. Mining and the reduction of ores from mines is a lawful and necessary business; and, even if conducted in the most careful and prudent manner, some of the debris or other impurities will find their way into the running streams and pollute their waters. Therefore, the rights of both parties to such an action, the nature and extent of the pollution of the water, the purposes for which the water is being used, and the nature and extent of the injuries caused by such pollution, must be carefully considered by the jury, under proper instructions of the court, or by the court, if tried without a jury. As was said by the Montana Court: "It is a field of litigation filled with great annoyance and difficulty to both legislatures and courts. It will continue to be such as long as the interests of men conflict."[12]

In the State of Idaho, as we have discussed under the subject of preference uses,[13] the second preference is given to mining. But, in the face of the statute, the Idaho Court holds that even a miner is

8 Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. Rep. 937, 7 L. R. A. 451, 25 Am. St. Rep. 545, 11 Ky. Law. Rep. 692; Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S. W. Rep. 420.

9 See Sec. 1142.

10 See Sec. 1143.

11 See Sec. 1144.

12 Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, 63 Am. St. Rep. 622.

See, also, Lindley on Mines, Secs. 838-853; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597.

13 For preference uses, see Secs. 771-794.

not permitted to pollute the stream as against prior appropriators using the water for irrigation purposes.[14]

§ 1137. Pollution by miscellaneous means.—There are many causes of the pollution of waters other than those discussed in the previous sections.[1] In fact, any use of a stream that materially befouls the water, or deposits therein any filth which so far affects the water as to discolor it, or anything which renders the water offensive to taste or smell, and so affects the water as to impair its value for ordinary purposes, is deemed a pollution, and for which an action will lie by those actually and materially injured to enjoin the acts causing such pollution in the future and for damages for past injuries.

A very common cause of the pollution of the waters of running streams is that from cattle, sheep, horses, and hogs, or other animals being fed or permitted to pasture in close vicinity to such streams and to wade in or drink from the same.[2] But as to whether or not an action will lie for an injunction against, or damages for such pollution of a stream, depends upon the use that the plaintiff makes of the water, or, in other words, as to whether or not the plaintiff is being or was actually injured by such impurities in the water. In some cases, he might be actually benefited, as would likely be the case where the water was used for irrigation only. But in other cases, he might be materially injured, as where he used the contaminated water for drinking and culinary purposes.[3] Of

[14] Hill v. Standard etc. Co., 12 Idaho 223, 85 Pac. Rep. 907; McCarthy v. Bunker Hill etc. Co., 164 Fed. Rep. 927, 92 C. C. A. 259.

[1] See Secs. 1130-1136.

[2] Where the defendant fed a maximum of 3750 head of cattle near a running stream, and washed out his barn daily by means of pumps, and such washings were carried by means of sewers into the stream, and by the stream down to and upon the plaintiff's land, thereby fouling and polluting the water, and rendering it unfit for use, and creating an atmosphere of stench and nuisance, it was held that the defendant would be enjoined from continuing such a nuisance. Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. Rep. 454, 7 L. R. A. 457, 26 Am. St. Rep. 340.

Where the defendant drove 6000 head of sheep along the land lying along the banks of a creek, to the injury of rights to the water thereof appropriated for irrigation, domestic, and culinary purposes. Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. Rep. 432.

[3] For the pollution of water used for irrigation, see Sec. 1131.

course, if the plaintiff was actually benefited by such a use of the water, it stands to reason that he can neither enjoin such acts nor recover damages.[4]

Then, again, as far as the pasturing of animals is concerned, the courts hold that the owners of lands through which streams flow have the right to use such lands and to pasture their animals thereon so long as such use is not made in an unreasonable manner, regardless of the stream, and even if the water is contaminated to some extent thereby; and as to what constitutes a reasonable or unreasonable use of the land for this purpose is a question of fact for the court or jury to decide from the facts and circumstances surrounding each particular case.[5] Even where the water is used by others for domestic or municipal purposes, it is held that every land owner has the right to the natural use and enjoyment of his property, if exercised within reasonable limits; and those who have the right to the use of the water of such streams must themselves take steps to protect the water from contamination.[6]

[4] For injunctions against pollution, see Sec. 1143.

For damages for pollution, see Sec. 1144.

[5] The owner of 7½ acres of land upon which springs arose, forming a pond, the waters of which flowed across the property of another, had a right to permit his stock, consisting of as many as six cows, six or seven horses, and his geese, to the number of about 20, to drink from the pond and to go into it, though a pollution of the water resulted; such use not being unreasonable. McEvoy v. Taylor, 56 Wash. 357, 105 Pac. Rep. 851.

An appropriator making no use of the water below another appropriator's dam is not entitled to an injunction restraining the other from polluting the water by allowing sheep to go into it. Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

See, also, Hazeltine v. Case, 46 Wis. 391, 1 N. W. Rep. 66, 32 Am. Rep. 715; Gould v. Hudson River R. Co., 6 N. Y. 522; People v. Hulbert, 131 Mich. 156, 91 N. W. Rep. 211, 64 L. R. A. 265, 100 Am. St. Rep. 588, 18 Am. & Eng. Ency. of Law 135, 139; Helfrich v. Cantonsville W. Co., 74 Md. 269, 22 Atl. Rep. 72, 13 L. R. A. 117, 28 Am. St. Rep. 245; Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108.

[6] The fact that a municipality uses water that it conveys to a place of use through a ditch that runs across the field of another does not of itself entitle the municipality to maintain an action against the owner of the land for a perpetual injunction restraining him from allowing his cattle to feed and graze in the field along the banks of the ditch, and to cross over the same or wade the waters thereof; but in such case the primary duty of fencing or protecting the ditch and the waters therein from contamination and impurities rests upon the owner of the easement, and not upon the owner of the fee. City of Belle-

Water may be polluted by the felling of trees and permitting them to lie therein, or by permitting logs to remain in the water for an unreasonable time.[7] Again, it may be polluted from oil wells.[8] It may be polluted by the location of a cemetery.[9] Again, the pollution may consist of the filling up of the natural channel or the ditches and canals taken therefrom with the debris from mining claims or reduction works, although such debris contains no poisonous or deleterious matter. However, a late Idaho case attempts to make a distinction between the pollution of the quality of the water and filling up of the bed of the stream by dumping matter in it.[10]

Again, it is held upon the principle that each owner through which a stream flows has the right to make such a reasonable use of the water as he can without materially injuring the rights of those below, and that bathing in the water is not an unreasonable use, even when such use has the tendency to render the water less desirable for drinking and culinary purposes.[11]

vue v. Daly, 14 Idaho 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992.

See, also, Helfrich v. Cantonsville W. Co., 74 Md. 269, 22 Atl. Rep. 72, 13 L. R. A. 117, 28 Am. St. Rep. 245; People v. Hulbert, 131 Mich. 156, 91 N. W. Rep. 211, 64 L. R. A. 265, 100 Am. St. Rep. 588, 18 Am. & Eng. Ency. Law 135, 139; McEvoy v. Taylor, 56 Wash. 357, 105 Pac. Rep. 851.

7 Fisher v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77; City of Aberdeen v. Lytle Logging etc. Co., 58 Wash. 368, 108 Pac. Rep. 945.

8 Benjamin v. Gulf etc. R. Co., 49 Tex. Civ. App. 473, 108 S. W. Rep. 408; Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S. W. Rep. 420; Mexia etc. Co. v. Johnson, —— Tex. Civ. App. ——, 120 S. W. Rep. 534; Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. Rep. 937, 7 L. R. A. 451, 25 Am. St. Rep. 445, 11 Ky. Law. Rep. 692; Ohio Oil Co. v. West Fall, 43 Ind. App. 661, 88 N. E. Rep. 354.

9 Barrett v. Mount Greenwood Cemetery Assn., 159 Ill. 385, 42 N. E. Rep. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168; Elliott v. Ferguson, —— Tex. App. ——, 103 S. W. Rep. 453; Jung v. Neraz, 71 Tex. 396, 9 S. W. Rep. 344.

10 See Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907.

See, also, Hill v. Smith, 27 Cal. 476, 4 Morr. Min. Rep. 597; *Id.*, 32 Cal. 166; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Gregory v. Harris, 43 Cal. 38, 14 Morr. Min. Rep. 91; Junkens v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Phoenix etc. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185.

11 People v. Hulbert, 131 Mich. 156, 91 N. W. Rep. 211, 64 L. R. A. 265, 100 Am. St. Rep. 588, 18 Am. & Eng. Encyc. Law. 135, 139; Barnard v. Shirley, 135 Ind. 547, 34 N. E. Rep. 600, 35 N. E. Rep. 117, 24 L. R. A. 568; *Id.*, 151 Ind. 160, 47 N. E. Rep. 671, 41 L. R. A. 737; St. Louis etc. R. Co. v. Burrows, 29 Okla. 378, 118 Pac. Rep. 143.

§ 1138. **The pollution of underground waters.**—As far as the pollution is concerned, it makes no difference whether the contaminating matter is discharged directly into a running stream, or whether it is deposited over the surface of the ground, and by the action of the rains and melting snows is drawn underground and carried with the percolations until it reappears with the water in the streams, springs, or wells of the land owners below. If the pollution of the water can be traced directly to the acts of the defendant, and to the actual, positive, material injury of the complainant, it is a nuisance which is actionable both in equity and at law, regardless of the fact as to whether the water so polluted first appears in living streams or in springs or wells. This principle was illustrated in a recent Kansas case, where the defendant company deposited a large amount of waste salt upon its own land and where the rain dissolved a part of the salt and by percolation carried it into the soil of the land of the plaintiff, injuring the vegetation and imparting a salty taste to a number of springs on his land, and in deciding the case the Court said: "We regard it as well settled by the weight of authority, and in accordance with sound reason, that one has no right to deposit upon his land refuse matter of any sort, whether in itself offensive or not, by which the water underlying his neighbors' land may be so affected through percolation as to be unfitted for ordinary use, or injurious to vegetation."[1] And, whatever may be held to be the rights of an owner of the soil to the waters percolating underneath and whether under the old common law rule he is considered the absolute owner thereof the same as he is of the stones found therein or whether under the more modern and more equitable rule that such land owner has but a right to a reasonable use of such waters,[2] under neither rule has he "the right to poison the water, or to contaminate, so that when it reaches his neighbor's land it is in such a condition as to be unfit for use, either by man or beast."[3] So, also, one is liable for the pollution of a subsurface

1 Gilmore v. Royal Salt Co., 84 Kan. 729, 115 Pac. Rep. 541, 34 L. R. A., N. S., 48; Mann v. Retsof M. Co., 49 App. Div. 454, 63 N. Y. Supp. 752.

See, also, Mears v. Dole, 135 Mass. 508.

2 For the rights in percolating waters, see Secs. 1185-1211.

3 Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. Rep. 937, 7 L. R. A. 451, 25 Am. St. Rep. 545, 11 Ky. Law. Rep. 692.

See, also, Collins v. Chartiers Val. Gas Co., 139 Pa. 111, 21 Atl. Rep. 147; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. Rep. 925, 43 Am.

stream of water, whose course is known and defined, to the same extent and for the same causes that he would be liable for the pollution of a surface stream.[4]

But before a party claiming to be injured from the pollution of subterranean waters can recover either in an action in equity or at law, as in other cases, he must prove by competent evidence that the injury resulted from the defendant's acts. This may be, at times, harder to do than where the action is for the pollution of surface streams.[5]

§ 1139. The acquisition of the right of pollution by contract and prescription.—The right to pollute waters may be acquired by contract or by prescription, and as between the parties thereto such a right may be enforced. As was said by the United States Circuit Court of Appeals in a recent case:[1] "We think the agreement granted to the defendants an easement to have the slimes and tailings from their mills flow through the flumes, pipes, sluices, and reservoirs upon the properties of complainant in question, and as a natural incident thereto, upon his said lands."[2]

Under certain conditions, a right may be acquired by prescription to pollute the waters of a stream to a greater extent than is allowed under the rule of common or reasonable use, and to such an extent

St. Rep. 711; Dillon v. Acme Oil Co., 49 Hun, 565, 2 N. Y. Supp. 289, 18 N. Y. St. Rep. 477; Ottawa Gaslight v. Graham, 28 Ill. 78, 81 Am. Dec. 263; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Clark v. Lawrence, 59 N. C. (6 Jones Eq.) 83, 78 Am. Dec. 241; Barnard v. Shirley, 135 Ind. 547, 35 N. E. Rep. 117, 24 L. R. A. 568, 34 N. E. Rep. 600; *Id.*, 151 Ind. 160, 47 N. E. Rep. 671, 41 L. R. A. 737; Sherman v. Fall River etc. Co., 5 Allen (Mass.) 213; Greencastle v. Hazelett, 23 Ind. 186; Wahle v. Reinbach, 76 Ill. 325.

4 Collins v. Chartiers Val. Gas Co., 131 Pa. 143, 18 Atl. Rep. 1012, 6 L. R. A. 280, 17 Am. St. Rep. 791; *Id.*, 139 Pa. 111, 21 Atl. Rep. 147; Hodgkinson v. Ennor, 9 Jur. N. S. 1152, 4 Best & S. 229, 241, 32 L. J. Q. B. N. S. 231, 8 L. T. N. S. 451, 5 Week. Rep. 775.

5 For evidence of pollution, see Sec. 1147.

See, also, Keiser v. Lovett, 85 Ind. 240, 44 Am. Rep. 10; Lytton v. Steward, 2 Tenn. Ch. 586.

1 Schwab v. Smuggler Union etc. Co., 174 Fed. Rep. 305, 98 C. C. A. 160.

2 Provolt v. Bailey, —— Ore. ——, 121 Pac. Rep. 961, where it was held that complainants were bound to comply with the conditions of an arrangement to prevent the mining water from running into the irrigation ditch before obtaining relief in a Court of equity as to such water.

that even a nuisance is committed. But a distinction must be made in this respect between acts constituting a private nuisance as against certain individuals and public nuisances against the public at large, or as against a certain portion of the public. Prescriptive rights of pollution may be acquired to maintain a private nuisance in this respect.[3] But if such pollution of a stream is such as to constitute a public nuisance, or if it is forbidden by statute, no prescriptive right can be acquired.[4] In Idaho it is also held that a "continuing injury" is not barred by the statute of limitations.[5] In order to acquire a right to pollute a stream as against the private

[3] Masonic Temple Assn. v. Harris, 79 Me. 250, 9 Atl. Rep. 737; Lentz v. Carnegie Bros., 145 Pa. 612, 23 Atl. Rep. 219, 27 Am. St. Rep. 717; Boston Rolling Mills v. Cambridge, 117 Mass. 396.

Under Sec. 3463, Comp. Laws Utah, the mixing of impure water with water used for irrigation and domestic purposes, which renders it unfit for such use, causes a nuisance; and a prescriptive right to maintain a private nuisance must be adverse, under a claim of right, uninterrupted and continuous for 20 years, with the knowledge and acquiescence of the party whose right is invaded. North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

[4] The right to continue a public nuisance can not be acquired by custom or prescription. People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80.

See, also, Bowen v. Wendt, 103 Cal. 236, 37 Pac. Rep. 149; Woodruff v. North Bloomfield etc. Co., 18 Fed. Rep. 753, 9 Sawy. 441; State v. Griffin, 69 N. H. 1, 39 Atl. Rep. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177; Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. Rep. 430, 10 L. R. A. 586; Douglass v. State, 4 Wis. 387; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Martin v. Gleason, 139 Mass. 183, 29 N. E. Rep. 664.

A custom to discharge tailings from stamp mills into streams does not give a right to do so to the injury of others having rights to the waters of the stream. Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828.

The befouling of the waters of a canal from which a number of persons, more than three, obtain water for irrigation, culinary, and other domestic purposes, so that it is unfit for use, is a public nuisance, under Sec. 4566, Comp. Laws of Utah, 1888, and the right to maintain it can not be gained by prescription. North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

[5] Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907, where it is said: "The plaintiffs could have commenced their action when the damage first developed, or they may wait until their property is entirely destroyed and rendered valueless for any purpose, and then sue to recover the value of the property in damages."

rights of individuals, such a use of the stream must be under a claim of right, an invasion of the rights of the persons against whom the claim is made, and continued for the full period of time required by law and must have all of the essential elements necessary for the acquisition of the title of real property and heretofore discussed in this work.[6] The right is also limited to the nature and extent of the pollution during such period. And if either during such time the nature or extent of the pollution is increased, the statute begins to run from the time of such increase.[7] In an action brought against one claiming the right to pollute a stream by prescription, the burden of proof, as in other cases where such rights are claimed, is upon the defendant under his proper pleadings in the case.[8]

§ 1140. Pollution as against the rights of riparian owners.—Under the rule of the common law that riparian proprietors have the right to insist that the waters of streams which flow through or adjoin their lands shall continue to flow as they are wont by Nature, undiminished in quantity as well as undeteriorated in quality,[1] any unreasonable pollution of a stream by one proprietor, appropriator, or another to such a degree as to impair its purity and usefulness for any of the purposes to which the lower proprietor has the right to apply the water, is an invasion of the private rights of such proprietor who is actually and materially injured thereby, and for which such proprietor has a remedy both in equity and at law.[2]

6 For the acquisition of title by prescription, see Secs. 1033-1058.

See, also, Lockwood v. Lawrence, 77 Me. 277, 52 Am. Rep. 763; Holsman v. Boiling Springs Bleaching Co., 14 N. J. Eq. 335; North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

7 Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. Rep. 26, 30 Am. St. Rep. 546; Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; McCallum v. Germantown W. Co., 54 Pa. 40, 93 Am. Dec. 656; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814.

A right of prescription is limited by the character and extent of the user during the period requisite to acquire the right. Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410.

8 See Sec. 1147.

See, also, McCallum v. Germantown W. Co., 54 Pa. 40, 93 Am. Dec. 656.

1 For the common law rule, see Secs. 543-547.

2 A lower riparian owner is entitled to protection by injunction from pollution of a stream which prevents his reasonable use of the water, in the absence of special equities or qualifying circumstances which take the case out of the general rule. Thropp v.

But as each riparian proprietor upon the same stream has the right to a reasonable use of the waters thereof, having due regard to the like right of the other owners, even if some impurities are cast or permitted to run into the stream, as the population along these streams increases, the strict rule of the common law that the stream must continue to flow as it was wont by Nature is modified by the authorities, both as to the diversion of the waters[3] and the impairment of their quality. It therefore follows that no riparian proprietor, under the more modern rule, can insist on having the water come down to him in its natural purity, when such a claim, if granted, would have the effect of the destruction or impairment of the rights of the upper owners to a reasonable use of the waters of such stream.[4] So it is held that each riparian owner has the right

Harpers Ferry Paper Co., 142 Fed. Rep. 690, 74 C. C. A. 22.

See, also, Provolt v. Bailey, —— Ore. ——, 121 Pac. Rep. 961; Mason v. Hill, 5 B. & Ad. 1, 3 B. & Ad. 304, 2 Nev. & Man. 747, 2 L. J. K. M. N. S. 118, 110 Eng. Reprint 692; Tenant v. Goldwin, 2 Ld. Raym. 1089, 92 Eng. Reprint 222; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Bealey v. Shaw, 6 East 208, 2 Smith 321, 102 Eng. Reprint 1266; Aldred's Case, 9 Coke Rep. 57, 77 Eng. Reprint 816; Stonehewer v. Farrar, 6 Q. B. 730, 115 Eng. Reprint 275; Merrifield v. Lombard, 13 Allen, 16, 90 Am. Dec. 172; Woodard v. Worcester, 121 Mass. 245; Dwight Printing Co. v. Boston, 122 Mass. 583; Gladfelter v. Walker, 40 Md. 1; Silver Spring etc. Co. v. Wankuck etc. Co., 13 R. I. 611; McCallum v. Germantown W. Co., 54 Pa. 40, 93 Am. Dec. 656; Richmond Mfg. Co. v. Atlantic DeLaine Co., 10 R. I. 106, 14 Am. Rep. 658; Rudolph v. Pennsylvania etc. R. Co., 186 Pa. 541, 40 Atl. Rep. 1083, 47 L. R. A. 782; Ferguson v. Firmenich Mfg. Co., 77 Iowa 576, 42 N. W. Rep. 448, 14 Am. St. Rep. 319; Potter v. Froment, 47 Cal. 165; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312.

See, also, Gould on Waters, 3d Ed., Sec. 219, and cases cited; Farnham on Waters and Water Rights, Secs. 515-517, and cases.

[3] That riparian proprietors have the right to make reasonable diversion of the water, see Secs. 483-497.

For the common law right to use the water for irrigation, see Secs. 498-525.

[4] "In acquiring estates and in erecting homes along water courses, notice must be taken of the conformation of the territory, the natural lines of drainage that farms, cities, and villages may gather along its banks, and that the impurities incident to the trades, to agriculture and population, that fall upon the surface, will find their way into the stream, and that the enjoyment of the stream is liable to be modified and abridged, if not altogether suspended, in many uses to which it might originally have been fitted, by those above, in the exercise of their own equal rights." Valparaiso v. Hagen, 135 Ind. 337, 54 N.

to use his land to pasture a reasonable number of cattle even if considerable impurities in the stream are caused thereby, but that such right must be consistent with the rights of the other riparian proprietors upon the same stream.[5] The same can be said where the impurities in the streams come from factories, mills, mines, or works for the reduction of ore, as discussed in previous sections of this chapter,[6] and where the complaining riparian proprietor is not seriously injured by such pollution, and where the effect would be, if it could not be allowed to a reasonable degree, that it would stop the operation of such works.[7] But, upon the other hand, for any unreasonable pollution of the waters of a stream by any of the causes mentioned, or by the discharge of great quantities of sewage,[8]

E. Rep. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305.

See, also, McNamara v. Taft, 196 Mass. 597, 83 N. E. Rep. 310, 13 L. R. A., N. S., 1044; Boyd v. Schreiner, —— Tex. App. ——, 116 S. W. Rep. 100; Tetherington v. Donk etc. Co., 232 Ill. 522, 83 N. E. Rep. 1048.

5 McEvoy v. Taylor, 56 Wash. 357, 105 Pac. Rep. 851; City of Bellevue v. Daly, 14 Idaho 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992; Helfrich v. Cantonsville W. Co., 74 Md. 269, 22 Atl. Rep. 72, 13 L. R. A. 117, 28 Am. St. Rep. 245; Gould v. Hudson River R. Co., 6 N. Y. 522, 552.

6 See Sec. 1135.

7 Townsend v. Bell, 167 N. Y. 462, 60 N. E. Rep. 757; Claude v. Weir, 4 Mont. L. Rep. 197; Weeks v. Heward, 10 Week. Rep. 557; Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589; Barnard v. Shirley, 135 Ind. 547, 34 N. E. Rep. 600, 35 N. E. Rep. 117, 24 L. R. A. 568; *Id.*, 151 Ind. 160, 47 N. E. Rep. 671, 41 L. R. A. 737.

8 For the pollution by sewage, see Secs. 1133, 1134.

As was summed up in a recent case by the Supreme Court of Oklahoma of Markwardt v. City of Guthrie, 18 Okla. 32, 90 Pac. Rep. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581, in which the Court said: "From a careful examination and consideration of these authorities, and many others, we have reached the conclusion: (1) That the settled doctrine of the English courts, as well as some of our State courts, is that a lower riparian proprietor is entitled to recover damages for the pollution of the waters of a stream by a municipal corporation, by the discharge of sewage into the stream, on the broad ground of common sense and natural justice; (2) that the Supreme Court of the United States and a number of the State courts base their decisions on the ground that it is a taking of private property for public use, within the meaning of the Federal Constitution; (3) that other States hold that it is a damage to property, within the meaning of their constitutional inhibitions against the taking or damaging of property without just compensation; and (4) a number of the States hold that the lower riparian proprietor is entitled to recover damages for injury to his health, comfort, and repose, on the ground that it is the maintenance of a nuisance. While these decisions are based upon different grounds, yet, upon whatever

whereby the lower riparian proprietor has suffered a real, material, and substantial injury by rendering the waters of the stream unfit for his use, he may maintain an action for damages for the injuries which are the direct result of such unlawful acts;[9] and if such acts are continuing he may maintain an action in equity to perpetually enjoin such acts as cause the injury.[10]

But, as can be readily seen, no positive rule can be laid down as to just when either or both of such actions will lie by a riparian owner, which will be applicable to all cases. It therefore follows, that both the questions as to what constitutes a reasonable or unreasonable pollution of the waters of the stream, and as to what constitutes "a real, material, and substantial injury," to the riparian ownership, are questions of fact for the court or jury to decide upon the particular facts and circumstances surrounding each individual case.[11]

ground they may rest, they all, with the exception of the decisions of the Indiana courts, seem to uniformly hold that, under such circumstances, damages are recoverable; and many of them hold that, where the evidence is clear and convincing, injunction will lie to restrain the continuance of the nuisance."

See, also, Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557; People *ex rel.* Lind v. San Luis Obispo, 116 Cal. 617, 48 Pac. Rep. 723.

A non-riparian proprietor has no right of action for the pollution of the waters of a stream by a riparian owner who, in the interest of sanitary conditions, discharges sewage into the stream. Conrad v. Arrowhead etc. Co., 103 Cal. 399, 37 Pac. Rep. 386.

9 For actions for damages for pollution, see Sec. 1144.

10 For injunctions against pollution, see Sec. 1143.

Neither can a riparian proprietor use the water of a stream in such a manner as to corrupt the atmosphere, to the injury of other riparian proprietors, or to the community at large. Story v. Hammond, 4 Ohio 376.

"He must not pollute the water to the injury of others entitled to it." Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

See, also, City of Aberdeen v. Lytle etc. Co., 58 Wash. 368, 108 Pac. Rep. 945; Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361; Fisher v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77; Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. Rep. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, 21 Morr. Min. Rep. 38; Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. Rep. 454, 7 L. R. A. 457, 26 Am. St. Rep. 340; People *ex rel.* Ricks W. Co. v. Elk River etc. Co., 107 Cal. 221, 40 Pac. Rep. 521, 48 Am. St. Rep. 125; Barrett v. Mt. Greenwood Cem. Assn., 159 Ill. 385, 42 N. E. Rep. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168; Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N. E. Rep. 354.

11 Tiede v. Schneidt, 105 Wis. 470, 81 N. W. Rep. 826.

§ 1141. Pollution as against the rights of appropriators—Priority.—In the Western States, where the Arid Region Doctrine of appropriation of waters for beneficial uses or purposes is in force,[1] an appropriator of the waters of a certain stream, as far as the question of pollution is concerned, must take the water as he finds it in that regard at the date of the inception of his rights, so long as a public nuisance is not maintained.[2] But he may insist that the water

1 For the Arid Region Doctrine of appropriation, see Secs. 585-594.

2 "Locators and appropriators of the waters of a stream have no rights antecedent to the date of their location. If others have, prior to their location, decreased the quantity of the water flowing in such stream, or caused a deterioration of its quality, the subsequent locator can not complain. Familiar examples of the application of this rule, as between appropriators, are of frequent occurrence in the mining regions of this State, where water is diverted from flowing streams upon which mining has destroyed the purity of the water. In such case the appropriator takes the water with his eyes open—takes it as he finds it—and as to him the like continued deterioration is *damnum absque injuria.*" Conrad v. Arrowhead etc. Co., 103 Cal. 399, 37 Pac. Rep. 386; Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233, 13 Morr. Min. Rep. 161; O'Keefe v. Cunningham, 9 Cal. 581, 9 Morr. Min. Rep. 451; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243.

See, also, Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

So it was held in a case where the defendant had built its mill and had been engaged for years in manufacturing lumber, whereby the water of the stream was polluted to a certain extent, and subsequently a water company appropriated the polluted water below the defendant's works to supply the public, it was held that the mill company could not be enjoined from continuing the pollution, as long as a public nuisance was not maintained, the Court saying: "After he had built his mill and had been for years engaged in manufacturing lumber, the relator built its works, and in defiance of law, which provides that it shall only supply the city with pure water, commenced taking the water from the stream, 4½ miles below the mill, to sell to the inhabitants of Eureka. The water had been condemned by the board of health of the city of Eureka before it was taken by the relator. Apparently the relator attempted through this proceeding to enable itself to perform its duty to sell pure, fresh water. Instead of taking pure water, as the Court found it could have done, it will make this stream pure by destroying the property of the defendant." People *ex rel.* Ricks W. Co. v. Elk River etc. Co., 107 Cal. 221, 40 Pac. Rep. 521, 48 Pac. Rep. 125.

But see *Id.*, 107 Cal. 214, 40 Pac. Rep. 486, 48 Am. St. Rep. 121.

But see the case of Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828, where the Court held that the appropriator of a part only of the waters of a stream, the remainder being open to appropriation by others, takes title to the part appropriated, subject to the limitation that its use will not injure

continue to flow down to his point of diversion in the same condition of purity that it was at the date of his appropriation, if by any further pollution a real, material, and substantial injury to his rights is caused thereby. As one of the essential elements of a valid appropriation is that of priority over others, we believe that this is the only logical rule which can be adopted. As was stated in a recent Arizona case: "Under the doctrine of appropriation, he who is first in time is first in right, and so long as he continues to apply the water to a beneficial use, subsequent appropriators may not deprive him of the rights his appropriation gives, either by diminishing the quantity or deteriorating the quality."[3]

And, as we discussed in previous sections of this work, as the same degree of purity of water is not required for all uses,[4] it therefore follows as to what constitutes real, material, and substantial injury to the rights of a prior appropriator depends upon the following conditions: First, upon the use or purpose for which the water was appropriated; and, second, upon the nature and extent of the pollution. So, where the prior appropriator makes his appropriation for domestic or culinary purposes, he has the right to insist that the quality of the stream remain in the same condition as it was at the date of the inception of his right, in order that his use for those purposes may continue. But, if his appropriation was for the generation of power, where no actual injury resulted from the pollution, or if it was for the purpose of irrigation where the very pollution

or pollute the remainder of the waters of the stream, to the detriment of other users, though subsequent in right, where the use made of it leaves it possible for him, by taking reasonable measures to that end, "at a very slight expense, and at very slight inconvenience," to enjoy his own rights and to observe such limitation.

See, also, Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, 63 Am. St. Rep. 622.

[3] Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465.

See, also, Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629; Crane v. Winsor, 2 Utah 248; Cushman v. Highland D. Co., 3 Colo. App. 437, 33 Pac. Rep. 344.

"As we have already seen, plaintiff acquired valid rights as the result of his direct appropriation from the stream, and to the overflow of the stream for his meadow lands, and these rights were vested before the defendant began the construction or the operation of its mill. Plaintiff's rights were, of course, paramount to any rights defendant had to the waters of the stream." Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093.

[4] See Secs. 1131, 1132.

might be a benefit, he has no right to complain.[5] At an early day in California, a sort of preference right was sought to be given to miners to pollute the waters of the streams, at the expense of the agriculturists, and even at the expense of other miners. And it was in effect held that as the operation of especially placer mining claims naturally caused more or less debris and sediment to be deposited in the streams and upon the lands below, the business of mining being of such a paramount interest any pollution of streams from that cause might be permitted and that, too, whether there was a direct injury to agriculturists or to other miners.[6] But later cases of the same court repudiated this doctrine upon the ground that it would annihilate the doctrine of priority in all cases where the controversy was between the miner or ditch owner and one who claims the exercise of any other kind of right or the ownership of any other kind of industry. "To such a doctrine we are unable to subscribe."[7] "Neither the miner nor the riparian proprietor

5 As said by the Supreme Court of the United States in one of its earliest cases upon this subject: "What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant." Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

See, also, Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Crane v. Winsor, 2 Utah 248; Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 162; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656.

An appropriator making no use of water below another appropriator's dam is not entitled to an injunction restraining the other from polluting the water by allowing sheep to go into it. Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

6 Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Hill v. King, 8 Cal. 336, 4 Morr. Min. Rep. 533; Mokelumne etc. Co. v. Woodbury, 10 Cal. 185; Butte etc. Co. v. Vaughn, 11 Cal. 143, 17 Am. Dec. 769, 4 Morr. Min. Rep. 552; Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629; Phoenix etc. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185.

7 Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Pilot Rock etc. Co. v. Chapman, 11 Cal. 162.

can so use the water as to prejudice or injure the prior right to a like use by another. The question between miners is the same as between riparian proprietors: 'Is the plaintiff's use and enjoyment of the water for the purpose for which he claims it impaired by the acts of the defendant?' "[8]

So, as far as the rights of the prior appropriator are concerned, it may be regarded as a settled rule of law, that any use which defiles or corrupts the water so as to essentially impair its purity and usefulness for the purpose for which the water was appropriated by such prior appropriator is an invasion of his private rights, and for which he is entitled to a remedy both at law and in equity.[9] And as in other cases of this nature as to what constitutes such an invasion of the rights of the prior appropriator for which an injunction will be granted or for which damages may be awarded, is a question of fact for the court or jury.[10]

But the natural right of an appropriator, as is the case with riparian proprietors,[11] to have the water descend to him in its pure state must yield in a reasonable degree to the rights of those who have located above upon the stream and subsequently to him. This is especially true where the purpose of the appropriation is that of irrigation, and it is of public importance that the proprietor of useful manufactories, the owners of mines or reduction works, or of other industries, where some pollution of the waters of the stream upon which their works are located necessarily follows their operation, should be held responsible only for real, material, and substantial injury caused by their works, and not for any slight inconvenience or occasional annoyances, or even some degree of interference with irrigation or agricultural pursuits.[12]

[8] Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597.

[9] Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Crane v. Winsor, 2 Utah 248; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Courtright v. Bear River etc. Co., 30 Cal. 573; Arizona Copper Mining Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465.

[10] Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629.

For the evidence in such cases, see Sec. 1144.

[11] See Sec. 543.

[12] "We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a Court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, or even some degree of inter-

As the population grows more and more dense along the streams in the Western portion of this country, it is becoming more and more an impossibility to keep the water of the streams in their naturally pure condition. Nor is this condition peculiar to the West, but there is the same condition of affairs in the East and in all countries where there is a considerable population. Great industries exist along these streams, which have equal rights to the use of water, and equal right of existence, and from the operation of which necessarily there is more or less a pollution of the waters of the streams. To stop the operation of these legitimate enterprises is a serious question, and one which might affect the welfare and prosperity of an entire State. Therefore, when an injunction is sought, which may have the effect of stopping the operations of large and expensive works which cause the waters to be polluted, it must clearly appear that a real, material, and substantial injury is being caused the prior appropriator by such operations, that the remedy at law is entirely inadequate, and that he will suffer irreparable injury from the continuance of such pollution.[13]

§ 1142. **Remedies for injuries from pollution.**—In cases of private nuisances from the pollution of waters, or where the rights of certain individuals alone are affected, there are two principal remedies through the courts which are open to the injured party, and these are: First, an action for an injunction against the continuance of the injuries;[1] and, second, an action for damages for past injuries.[2] And although one form of these actions appeals to the equity side of the court and the other to the law, where there are the proper parties, both of these remedies may be granted in the same action, as in the case of other actions for the protection of and dam-

ference, so long as they do no substantial damage, but to permit a subsequent appropriator to so pollute or burden the stream with debris as substantially to render it less available to the prior appropriator causes him to lose the rights he gained by appropriation as readily as would be the diversion of a portion of the water which he appropriated." Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; People v. Rogers, 12 Colo. 278, 20 Pac. Rep. 702; McCauley v. McKeig, 8 Mont. 389, 21 Pac. Rep. 22, 16 Morr. Min. Rep. 1.

[13] For injunctions against pollution, see Secs. 1142, 1143.

[1] For injunctions against pollution, see Sec. 1143.

[2] For damages for pollution, see Sec. 1144.

ages to water rights, discussed in previous portions of this work.[3] Where both remedies are prayed for, the question as to whether or not the injunction should be granted is for the court to decide; but the questions as to whether damages should be awarded and the measure of damages should be submitted to a jury, unless the trial by jury is waived.[4]

Upon the subject of parties to these actions, the same rules are followed as in other actions for the injury to or the protection of water rights, and later discussed.[5] Where the action is for an injunction only, if several persons are similarly affected, they may join as parties plaintiff in one action.[6] So, also, may a single action be maintained against several persons as parties defendant, for the maintenance of a common nuisance in the pollution of the waters of a stream, although it was the result of their individual acts.[7] But in actions for damages, several persons can not be joined as parties plaintiff or defendant, unless as plaintiffs they have some joint interest or as defendants they were joint and not several tort feasors.[8]

In actions for the abatement of public nuisances for the pollution of the waters of streams, such an action must be brought by the State, or by some political division thereof, or by some public official designated by the statute. A private person can not maintain an action to abate a public nuisance, unless it is specially injurious to him, in which case such special injuries must be alleged

3 For injunctions and damages in the same action, see Secs. 1536, 1599.

See, also, Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. Rep. 432; North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Id.*, 23 Utah 199, 63 Pac. Rep. 812; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14.

4 Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; North Point etc. Co. v. Utah etc. Co., 23 Utah 199, 63 Pac. Rep. 812; Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891.

5 For parties to actions, see Chaps. 78, 81.

6 Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. Rep. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, 21 Morr. Min. Rep. 38.

7 Woodruff v. North Bloomfield etc. Co., 16 Fed. Rep. 25, 8 Sawy. 628; Lockwood etc. Co. v. Lawrence, 77 Me. 277, 52 Am. Rep. 763.

8 For the parties in action for damages, see Chap. 83.

See, also, Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; Miller v. Highland D. Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254.

and proven.[9] To authorize a private person to maintain an action to abate a public nuisance, he must show a special injury different in kind, and not merely in degree, from that suffered by the public generally.[10]

In Colorado, where under the constitution, the Supreme Court will assume original jurisdiction in actions to abate public nuisances, it is held that it will do so only in cases of public character; and that it will not assume jurisdiction of a case, where it does not involve the interest of the State at large, except incidentally, or affect in any manner its sovereignty, or the liberty of its citizens.[11]

Where the action is between two States, the Supreme Court of the United States will assume original jurisdiction to hear and determine such case.[12]

§ 1143. **Remedies—Injunctions.**—A riparian proprietor or an appropriator whose right to the use and enjoyment of the waters of a stream have been invaded by the pollution thereof by another, if the facts warrant it, will be granted an injunction in a proper action brought for that purpose. As far as the procedure is concerned, it does not differ from that in actions brought to enjoin other invasions against a water right, discussed in other sections of this work,[1] or, in fact, from that in actions brought to enjoin an invasion of rights other than water rights. Before the injunction will be granted to permanently restrain the acts causing the pollution of the waters, it must be shown by the party seeking such relief that all the essential facts exist, which are necessary to confer jurisdiction upon a court of equity for this purpose. It must be shown that the acts causing the injury are a real, material, and substantial invasion of the

[9] Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108.

[10] Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465.

See, also, Georgetown v. Alexandria Canal Co., 12 Pet. 91 (U. S.), 9 L. Ed. 1012; Mississippi etc. R. Co. v. Ward, 2 Black. 485, 17 L. Ed. 311; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181.

[11] People v. Rogers, 12 Colo. 278, 20 Pac. Rep. 702.

[12] Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 286, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713, the Court in the latter decision saying: "Whatever differences of opinion there may be upon matters of detail, the jurisdiction and authority of this Court to deal with such a case as that is not open to doubt."

[1] See Chap. 81.

See, also, for actions to abate nuisances, Chap. 81.

plaintiff's rights,[2] that the injuries are likely to continue unless restrained,[3] that such injuries are in their nature irreparable,[4] and that there is no adequate remedy at law.[5] A material injury which

[2] Equity will refuse to grant the injunction if the injury is merely nominal. McCauley v. McKeig, 8 Mont. 389, 21 Pac. Rep. 22, 16 Morr. Min. Rep. 1; Atchison v. Peterson, 1 Mont. 561; affirmed, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Bowen v. Wendt, 103 Cal. 236, 37 Pac. Rep. 149; Yuba County v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740.

Mere apprehension of injury, without establishing with reasonable certainty that such injury will result, is not sufficient to sustain an action for an injunction. Cushman v. Highland D. Co., 3 Colo. App. 437, 33 Pac. Rep. 344; Hutchinson v. Delano, 46 Kan. 345, 26 Pac. Rep. 740.

See, also, Chap. 81.

[3] Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. Rep. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, 21 Morr. Min. Rep. 38.

[4] See Chap. 81.

See, also, Hobbs v. Amador etc. Co., 66 Cal. 161, 4 Pac. Rep. 1147; Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361; Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907; Crane v. Winsor, 2 Utah 248.

[5] See Chap. 81.

See, also, Woodruff v. North Bloomfield etc. Co., 18 Fed. Rep. 753, 9 Sawy. 441; United States v. North Bloomfield etc. Co., 81 Fed. Rep. 243; *Id.*, 88 Fed. Rep. 64; *In re* North Bloomfield etc. Co., 27 Fed. Rep. 795, 11 Sawy. 590; Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692, 12 Morr. Min. Rep. 232; McLaughlin v. Del Re, 71 Cal. 230, 16 Pac. Rep. 881; Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. Rep. 454, 7 L. R. A. 457, 26 Am. St. Rep. 340; Sierra County v. Butler, 136 Cal. 547, 69 Pac. Rep. 418; Yuba County v. Kate Hayes M. Co., 144 Cal. 360, 74 Pac. Rep. 1049; McCarthy v. Gaston Ridge etc. Co., 144 Cal. 542, 78 Pac. Rep. 7; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629; Robinson v. Black Diamond Coal Co., 57 Cal. 412, 40 Am. Rep. 118; People v. San Luis Obispo, 116 Cal. 617, 48 Pac. Rep. 723; Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557; Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; People v. Truckee Lum. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Salstrom v. Orleans Min. Co., 153 Cal. 551, 96 Pac. Rep. 292; Hobbs v. Amador etc. Co., 66 Cal. 161, 4 Pac. Rep. 1147; Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; Yuba County v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740; Humphreys' Tunnel Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Golden Gate Hy. M. Co. v. Yuba County, 65 Cal. 187, 3 Pac. Rep. 628; Eureka Lake etc. Co. v. Superior Court, 66 Cal. 311, 56 Pac. Rep. 490; affirmed, 116 U. S. 410, 29 L. Ed. 671, 6 Sup. Ct. Rep. 429.

necessarily results to the one entitled to the use of the water from the conduct of the business of another whereby the pollution is caused will be enjoined by a court of equity on account of the inadequacy of the remedy at law and also in order to prevent a multiplicity of suits.[6] A preliminary injunction may be granted in a proper case, even without notice. But, as in other cases, in order for such a peremptory writ to issue, a clear showing must be made that there is an urgent necessity for the same.[7] An injunction will also be granted not only where there is a pollution of the quality of the water as a fluid by discharging some deleterious substance therein, but also where the bed of the stream is filled up by dumping material in it and thereby causing it to overflow,[8] so that the lands of the plaintiff are injured thereby, or where the plaintiff is prevented from getting the quantity of water to which he is entitled.[9] As the converse of the right of injunction against the pollution of streams, the Oregon Court held that where a dam erected by a lower riparian proprietor backed the water and the debris up on the mining ground of the upper proprietor, who possessed the superior right to the use of the water, and prevented the upper proprietor from discharging the debris from his mine into the stream, and thereby interfered with the operation of the mine, the upper proprietor was entitled to have the maintenance of the dam enjoined, so as to permit his use of the stream for that purpose.[10]

As was held in a late Idaho case,[11] the rule that "every person

[6] Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. Rep. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, 21 Morr. Min. Rep. 38; Jessup etc. Co. v. Ford, 6 Del. Ch. 52, 33 Atl. Rep. 618; Harris v. Mackintosh, 133 Mass. 228; Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557.

[7] For preliminary injunctions, see Sec. 1607.

See, also, Eureka Lake etc. Co. v. Yuba County Supr. Ct., 66 Cal. 311, 5 Pac. Rep. 490; affirmed, 116 U. S. 410, 29 L. Ed. 671, 6 Sup. Ct. Rep. 429; Golden Gate etc. Co. v. Yuba County Supr. Ct., 65 Cal. 187, 3 Pac. Rep. 628; Hobbs v. Amador etc. Co., 66 Cal. 161, 4 Pac. Rep. 1147.

[8] Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907; Sutter County v. Nichols, 152 Cal. 688, 93 Pac. Rep. 872, 15 L. R. A., N. S., 616.

[9] Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185.

[10] Kane v. Littlefield, 44 Ore. 299, 86 Pac. Rep. 544.

See, also, Turner v. Locy, 37 Ore. 158, 61 Pac. Rep. 342.

[11] City of Bellevue v. Daly, 14 Idaho 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992.

shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public," [12] must be considered and applied in the light of that other principle, "that every man has a right to the natural use and enjoyment of his own property, and if while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria,* for the rightful use of one's land may cause damage to another without any legal wrong." [13] Therefore, it is held that the fact that a municipality uses water that it conveys to the place of use through a ditch that runs across the field of another does not of itself entitle the municipality to maintain an action against the owner of the land for a perpetual injunction restraining him from allowing his cattle to feed and graze in the field along the banks of the ditch, and to cross over the same or wade through the waters thereof, but that the primary duty of protecting the waters from contamination was upon the city.[14]

In general, we will add that as to whether or not an injunction will be granted against the contamination or pollution of the waters of a stream should depend upon the real equities, as shown by the facts and circumstances of each particular case. The court should consider the rights of the respective parties, the use for which the party asking for the injunction is making of the water, the nature of the pollution, the injurious effect which it has upon the rights of the plaintiff, the continuing nature and extent of the injury, and the means available for its correction.[15] And in the decree of injunc-

12 People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199; Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. Rep. 937, 7 L. R. A. 451, 25 Am. St. Rep. 545, 11 Ky. Law. Rep. 696; Gilmore v. Royal Salt Co., 84 Kan. 729, 115 Pac. Rep. 541, 34 L. R. A., N. S., 48.

13 Beach on Injunctions, Sec. 1112, note 1; Barnard v. Shirley, 135 Ind. 547, 34 N. E. Rep. 600, 35 N. E. Rep. 117, 24 L. R. A. 568; *Id.*, 151 Ind. 160, 47 N. E. Rep. 671, 41 L. R. A. 737.

14 City of Bellevue v. Daly, 14 Idaho 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992.

15 Whether in such case relief may be had by injunction depends upon the equities of the case, in view of the practical consequences of the wrong and the means available for its correction. Gilmore v. Royal Salt Co., 84 Kan. 729, 115 Pac. Rep. 541, 34 L. R. A., N. S., 48.

"In short, each case must be gov-

tion, no greater relief will be granted than is necessary to put an end to the pollution of the water, and to restore the rights of the plaintiff. The conducting of a legitimate business will not be enjoined, and only the acts causing the pollution.[16] It therefore follows that the defendant may take such steps as he may see fit to stop the pollution, and still continue his business.[17] Again, under the same rule, a riparian owner can not be enjoined from felling trees upon his own lands into a stream, on the ground that the water is rendered unfit for domestic use by an owner lower down the stream, where it does not appear that the quality of the water was materially affected.[18] But the connection of a sewer underdraining a cemetery into a stream of water which is used for do-

erned by the circumstances that surround it, and by relative equities." Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557.

See, also, Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

16 Schumacher v. Shawhan, 93 Mo. App. 573, 67 S. W. Rep. 717; Spence v. McDonough, 77 Iowa 460, 42 N. W. Rep. 371.

17 Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465, where it was said: "We think, to enable the mining company to take advantage of any efforts it may make in this direction, it should be left to the discretion of the trial Court hereafter, upon a proper showing made to it temporarily, to modify the injunction so as to permit of reasonable experiments being made to ascertain the probability of successfully erecting and maintaining settling basins to effectually dispose of the tailings and slimes without detriment to the lands lying under the canals, and with authority in the District Court likewise permanently to enforce or modify the injunction in accordance with the conditions as they shall be found to be."

See, also, Brown v. Gold Coin etc. Co., 48 Ore. 277, 86 Pac. Rep. 361; Humphreys Tunnel Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093.

18 Fisher v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77, where it is said: "No doubt the defendants could be enjoined from felling trees into the stream, if thereby the water was made unfit for domestic use; but on that subject the findings should, we think, be more certain and specific. It does not fully appear that the injury thus done to the quality of the water was material; and the finding as to that matter is rather inconsistent with the other finding that all the damage done by all of the alleged acts of defendants amounted to only 1 cent. If there be another trial, there should be a fuller finding on the subject."

See, also, City of Aberdeen v. Lytle etc. Co., 58 Wash. 368, 108 Pac. Rep. 945.

mestic purposes, watering animals, making ice for domestic use, is held to be a nuisance and may be enjoined.[19]

§ 1144. Remedies—Actions for damages—Measure of damages.—As is the case of other injuries to water rights, the party who has been injured by the pollution of water to which he is entitled to the use, in an action at law, may recover damages for past actual injuries and that, too, regardless of the fact as to whether he claims the use of the water as a riparian proprietor or as an appropriator.[1] The mode of procedure in actions for damages resulting from the pollution of waters does not differ from other actions for damages to injuries to water rights,[2] or, in fact, to other rights. A complaint that states fully and concisely the nature of the damage, the amount, and that it was caused by the unlawful, wrongful, and negligent acts of the defendant, and specifying such acts, states a cause of action.[3] As a general rule, however, in such actions it is not necessary to set forth any act of negligence upon the part of the defendant, which caused the injury. The injury itself and that it was caused by the acts of the defendant are all that is necessary for the plaintiff to allege or prove.[4]

[19] Barrett v. Mt. Greenwood Cemetery Assn., 159 Ill. 385, 42 N. E. Rep. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168; Elliott v. Ferguson, — Tex. Civ. App. ——, 103 S. W. Rep. 453.

[1] For actions for damages for injuries to water rights, see Chap. 83.

See, also, Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907; Durfee v. Granite etc. Co., 13 Mont. 181, 33 Pac. Rep. 3; Montana etc. Co. v. Gehring, 75 Fed. Rep. 384, 21 C. C. A. 414, 44 U. S. App. 629; Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; McLaughlin v. Del Re, 71 Cal. 230, 16 Pac. Rep. 881; Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, 63 Am. St. Rep. 622; Long v. City of Emporia, 59 Kan. 46, 51 Pac. Rep. 897; Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891.

Where the evidence upon the question of damages is meager and inconclusive, no damages can be recovered. Branstetter v. Williams, 6 Idaho 574, 57 Pac. Rep. 433.

Damage to a riparian proprietor by the pollution of a stream is not distinguishable in results from an appropriation, as he has a property right in the water. Rudolph v. Pennsylvania etc. R. Co., 186 Pa. 541, 40 Atl. Rep. 1083, 47 L. R. A. 782.

[2] For actions for damages for injuries to water rights, see Chap. 83.

[3] Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907.

[4] Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907.

"However cautiously or carefully the miner works is of no consequence, for, if his work in fact injures an-

Where the plaintiff is entitled to recover at all, as in other actions for damages, he may recover for all injuries which were the direct and proximate result of the unlawful acts of the defendant in polluting the water.[5] Where there is a total destruction of the value of land or other property, a recovery may be had for the full value of such property before the injury.[6] Where there is a permanent injury to land, the measure of the damages is the difference between the value of the land immediately prior to the injury and its value immediately after the injury. And the recovery of such damages for a total and permanent injury to land includes all injuries—past, present, and future.[7] But where the injury is but temporary, as for example for the destruction of crops for a certain year, the plaintiff is entitled to recover all damages which were the natural, obvious, and proximate consequence and result of the acts complained of.[8]

other, he is none the less liable." 2 Lindley on Mines, Sec. 843.

See, also, Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814.

5 For measure of damages for injuries to water rights, see Secs. 1697-1701.

6 Where property is entirely destroyed and rendered valueless for any purpose, plaintiff may sue to recover the value of the property in damages. Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907.

See, also, Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62.

7 The measure of damages for permanent injury to land, resulting from the poisoning of the waters of a stream, is the difference between the value of the land prior to the injury and its value after the injury. Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14.

"The difference between the value of the land with and without the permanent injury is recoverable." Drake v. Lady Ensley Coal etc. Co., 102 Ala. 501, 14 So. Rep. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77.

See, also, Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62; Unscheid v. San Antonio, —— Tex. Civ. App. ——, 69 S. W. Rep. 496.

8 For the measure of damages for the loss of crops, see Chap. 83.

So, in an action for the loss of water by the pollution of the water in a canal, it was held that the proper measure of damages was what the water was worth in the market for irrigation purposes. North Point etc. Co. v. Utah etc. Co., 23 Utah 199, 63 Pac. Rep. 812.

So, where the injury can be repaired by the removal of the debris, the measure of damages is the cost of its removal up to the value of the entire property, which it can not exceed. Stevenson v. Ebervale Coal Co., 201 Pa. 112, 50 Atl. Rep. 818, 88 Am. St. Rep. 805; *Id.*, 203 Pa. 316, 52 Atl. Rep. 201.

See, also, Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642; Mineral Wells v. Russell, 30 Tex. Civ. App. 232, 70 S. W. Rep. 453; Hollenbeck v. Marion, 116 Iowa 69, 89 N. W. Rep. 310; Schoen v. Kansas City, 65 Mo. App. 134.

Where in such a case the injury is to the land, but is temporary, a common method is to assess the damages according to the depreciation of the rental value of the property from that before the injury was committed.[9]

In a late case in California,[10] where there was a partial injury to land and a total destruction of growing crops, it was said: "The true rule as to the measure of damages in the case at bar was this: Plaintiffs were first entitled to the value of the growing crop destroyed. As to the land available exclusively for mining purposes, if the cost of repairing the injury by removing the debris deposited by defendant would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damage; but, if such cost of repair or of restoration would exceed such value, then the value of the property would be the proper measure."

Where a permanent injury to land for agricultural purposes does not immediately result from the acts complained of, but several years elapse before the injury is completed, the plaintiff is entitled to damages for the yearly injury to his crops, caused by the continuing nuisance, until the completion of the total and permanent injury, but no damages can be allowed for injury to crops after that time, as they are all included in such permanent injuries.[11] Again, damages resulting from the pollution of a stream, are not restricted to the mere depreciation of property, but may also include the expense caused by sickness and the inconvenience and discomfort caused to the plaintiff and his family by the emanation of noxious odors from the polluted water.[12]

9 Bennett v. Marion, 119 Iowa 473, 93 N. W. Rep. 558.

10 Salstrom v. Orleans etc. Co., 153 Cal. 551, 96 Pac. Rep. 292.

11 Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14.

12 Weston Paper Co. v. Pope, 155 Ind. 394, 57 N. E. Rep. 719, 56 L. R. A. 899; Mansfield v. Hunt, Ohio C. C. 488; Baltimore etc. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. Rep. 719; Threatt v. Brewer M. Co., 49 So. Car. 95, 26 S. E. Rep. 970; Tennessee etc. Co. v. Hamilton, 100 Ala. 252, 14 So. Rep. 167, 46 Am. St. Rep. 48; Gulf etc. Co. v. Reed, 80 Tex. 363, 15 S. W. Rep. 1105, 26 Am. St. Rep. 749; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. Rep. 878; Ferguson v. Firmenich Mfg. Co., 77 Iowa 576, 42 N. W. Rep. 448, 14 Am. St. Rep. 319.

Where, from the nature of the action, the law furnishes no rule for the measurement of damages, their assessment is peculiarly within the province of the jury, or of the Court, where the case is tried without a jury.

§ 1145. Remedies—Criminal prosecution.—In every State there are penal codes against the pollution of waters, where such acts constitute a public offense or a public nuisance. In most of the States it is made a felony, punishable in the penitentiary, to poison the water of any spring, well, or reservoir. For lesser offenses it is usually made a misdemeanor, punishable either by confinement in jail or by fine, or both. It is not our purpose to discuss these statutory laws to any great extent in this work. And those who wish to make a further examination of the same will find about the best compilation upon the subject in a pamphlet published by the Government, entitled "A Review of the Laws Forbidding Pollution of Inland Waters in the United States."[1]

A statute prohibiting the pollution of waters by defining what acts shall constitute the same and fixing the penalty therefor must be strictly construed. Therefore, a statute which prohibits the pollution by placing in the stream any dead animal, or putrid, nauseous, or offensive substance, is held not to apply to sawdust; and if the statute is limited to streams or other bodies of water used for domestic purposes, it is held not to apply to other streams, the waters of which are not used for those purposes.[2] And where the defendant built dams across bayous on his land for irrigating purposes, and after the waters which had risen on the lands of others had receded, a disagreeable smell arose, it was held that no criminal prosecution would lie where it was not shown that there was the intent upon the part of the defendant to produce such smells.[3] But the keeping of sheep in a corral on the banks of a stream from which a city's water supply is drawn, and thereby polluting the water, is a misdemeanor for which criminal prosecution will lie.[4] As in civil cases, there must be proof that the water was polluted before a conviction can be maintained. So, where the waters of a lake were used for a bathing resort by the defendant, and which

Aldrich v. Palmer, 24 Cal. 513; North Point etc. Co. v. Utah etc. Co., 23 Utah 199, 63 Pac. Rep. 812; Kewanee v. Guilfoil, 81 Ill. App. 490; Wood on Nuisance, 2d Ed., Sec. 866.

1 Water-Supply and Irr. Paper No. 152, 2d Ed., by Edwin B. Goodell, pp. 33-144.

See, also, for the statutes of the various States upon the subject of pollution, Part XIV.

2 State v. Mitchell, 47 W. Va. 789, 35 So. Rep. 845.

3 Stacy v. State, 54 Tex. Civ. App. 610, 114 S. W. Rep. 807, 12 L. R. A., N. S., 1259.

4 People v. Borda, 105 Cal. 636, 38 Pac. Rep. 1110.

waters were also used by a municipality for its water supply, where there was no proof that any injury resulted, it was held that a conviction of the defendant was erroneous and was set aside.[5]

At common law, without any special statute governing the subject, the maintenance of a public nuisance by the pollution of waters, is a criminal offense for which an indictment will lie, and, if convicted, the defendant will be punished therefor.[6]

The indictment and conviction of a person for maintaining a nuisance by polluting waters will not bar a civil action in favor of persons who were injured by the act.[7]

§ 1146. **Remedies—Defenses.**—The defendant, in an action for an injunction or for damages for the pollution of waters, in addition to his denial of the allegations of the plaintiff's complaint, may set up such special defenses as he may have by properly pleading the same. Where a right has been acquired against the plaintiff by prescription to pollute the waters, such a defense is good if the same is properly pleaded and proven. But where the acts of the defendant constitute a public nuisance, such a defense can not be maintained. This subject has been sufficiently discussed in a previous section of this chapter.[1] But where a public nuisance is maintained, and the plaintiff is a private individual, who brings the action in behalf of himself, it is a good defense in an action for an injunction that the plaintiff has not sustained special injuries, or injuries other than are common to the public at large.[2]

5 People v. Hulbert, 131 Mich. 156, 91 N. W. Rep. 211, 64 L. R. A. 265, 100 Am. St. Rep. 588, 18 Am. & Eng. Ency. Law 135, 139.

6 Douglass v. State, 4 Wis. 387; State v. Bell, 5 Port. (Ala.) 365; People v. Townsend, 3 Hill 479.

7 Columbus etc. Co. v. Tucker, 48 Ohio St. 41, 26 N. E. Rep. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528.

See, also, Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108.

1 For the acquisition of the right of pollution by prescription, see Sec. 1139.

2 Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; Georgetown v. Alexandria Canal Co., 12 Pet. 91 (U. S.), 9 L. Ed. 1012; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181.

A bill in equity to abate a public nuisance may be filed by one who has sustained special damages; but, unless one shows that he has sustained and is still sustaining individual damage from such nuisance, he can not maintain such bill. Mississippi etc. Co. v. Ward, 67 U. S. 2 Black 485, 17 L. Ed. 311.

It is also a good defense as against a private individual who brings the action that the right to pollute the water was acquired by grant or contract.[3] So, a contract granting an easement to the defendants to discharge tailings from their mills or other works, through the reservoirs, sluices, and pipes of a placer mining company, is held good during the designated term, both as against the original owners and as against subsequent purchasers of the property.[4] But a contract is no defense where a public nuisance is maintained.[5] The acquiescence of the plaintiff to the acts of pollution by the defendant may also constitute a good defense;[6] or, again, such acts as would constitute an estoppel.[7] Again, an action may be defeated by the showing of accord and satisfaction, as in the case where a receipt is shown against all claims for damages.[8] But, upon the other hand, it is no defense for the pollution of a stream that a mine was worked carefully and without actual negligence upon the part of the defendant.[9] As was said in a late California case:[10] "It is thoroughly established that, no matter how carefully the miner may conduct his operations, he has no lawful right to flood or wash away his neighbor's land, or deposit mining debris thereon, to its injury, and that, if by the deposit of mining debris in the stream he causes such a result, he is liable for the resulting damage. The fact that he uses all the care for the protection of his neighbor's property consistent with the successful conduct of his mining operations is immaterial."[11] Or the fact that others contributed to the contamination in the water is no

3 Crossley v. Lightowler, L. R. 3 Eq. 296, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 16 L. T. N. S. 438, 15 Week. Rep. 801.

4 Schwab v. Smuggler-Union M. Co., 174 Fed. Rep. 305, 98 C. C. A. 160; Scheel v. Alhambra M. Co., 79 Fed. Rep. 821.

5 Weston Paper Co. v. Comstock, 58 N. E. Rep. 79; Terre Haute Gas Co. v. Teel, 20 Ind. 131.

6 Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725.

7 Lowenback v. Switzer, 1 Va. Dec. 141.

But see Weston Paper Co. v. Pope, 155 Ind. 394, 57 N. E. Rep. 719, 56 L. R. A. 899; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Snow v. Williams, 16 Hun, 468; Silver Spring etc. Co. v. Wanskuck, 13 R. I. 611.

See, also, for acts constituting an estoppel, Secs. 1121-1128.

8 Vedder v. Vedder, 1 Denio 257.

9 Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814.

10 Salstrom v. Orleans etc. Co., 153 Cal. 551, 96 Pac. Rep. 292.

11 Citing Hill v. Smith, 27 Cal. 476; *Id.*, 32 Cal. 166, 4 Morr. Min. Rep. 597; Robinson v. Black Diamond Coal Co., 57 Cal. 412, 40 Am. Rep. 118; Hobbs v. Amador etc. Co., 66 Cal. 161,

defense of one against whom the action is brought, if, in fact, he himself was guilty of polluting it.[12] But as one party is liable in damages only for the injuries caused by him, in mitigation of damages only, the plea that others are also contributing to the pollution of a stream is good.[13]

§ 1147. Remedies—Evidence—Burden of proof.—The burden of proof in an action either for an injunction, or for damages, or for both, for the pollution of waters, as is the case in other actions for the invasion of or injury to water rights,[1] is, in the first instance, upon the plaintiff to establish by competent and material evidence the injury to his rights or other property, and that the same was caused by the unlawful acts of the defendant. This well-known principle of evidence is best illustrated in the decisions in the case of Missouri v. Illinois, where the Supreme Court of the United States first held upon demurrer that the bill was good and that "the nuisance set forth in the bill was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch," but "that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and imminent." But upon the final hearing of the action the Court held that the evidence was not sufficient to establish within the rule laid down in the previous hearing either

4 Pac. Rep. 1147; Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. Rep. 416, 63 Am. St. Rep. 622.

12 The fact that other manufacturers are doing the same thing as the one against whom an injunction is sought, will not prevent the relief, but may require it. Strobel v. Kerr Salt Co., 164 N. Y. 303, 59 N. E. Rep. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, 21 Morr. Min. Rep. 38.

The fact that others besides the defendant have polluted the stream, will not prevent an action against one actually polluting it. Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472.

See, also, Weston Paper Co. v. Pope, 155 Ind. 394, 57 N. E. Rep. 719, 56 L. R. A. 899; Bradley v. Warner, 21 R. I. 36, 41 Atl. Rep. 564.

13 Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Tennessee etc. Co. v. Hamilton, 100 Ala. 252, 14 So. Rep. 167, 46 Am. St. Rep. 48; Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642.

1 For the burden of proof in injunction suits, see Chap. 81.

For the burden of proof in damage suits, see Chap. 83.

the injury itself, or, if any, that it was caused by the act of the defendant in discharging the sewage of the City of Chicago into the river, and in concluding the Court said: "But our conclusions upon the present evidence are that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause."[2]

Therefore, it may be stated as a rule of evidence well settled by the above case, and many others, that a permanent injunction will be granted by a court of equity to restrain a nuisance based upon the pollution of waters of a stream only in cases where the fact of the nuisance is made out upon determinate and satisfactory evidence. If the evidence is conflicting, and the injury doubtful, such conflict and doubt will be ground for refusing to grant the injunction; but if these facts are established by such evidence, the Court will grant the injunction.[3] But where the interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, the proofs must show such a state of facts as will manifest the danger to be real and immediate before the injunction will be granted.[4]

In an action to recover damages for the pollution of waters, the plaintiff must show, by a preponderance of the evidence, the wrongful act of the defendant that he has suffered real, material, and substantial injuries from such acts, and the pecuniary amount in

2 Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268; *Id.*, upon assessment of costs in actions between States, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

3 "It is not shown that any such germs ever did reach the intake pipe, or that any illness in Battle Creek could be traced to the use of the water taken from this lake." People v. Hulbert, 131 Mich. 156, 91 N. W. Rep. 211, 64 L. R. A. 265, 100 Am. St. Rep. 588, 18 Am. & Eng. Ency. Law 135, 139.

See, also, Missouri v. Illinois, *supra;* Markwardt v. City of Guthrie, 18 Okla. 32, 90 Pac. Rep. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581; Platt Bros. v. Waterbury, 72 Conn. 531, 45 Atl. Rep. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; Esson v. Wattier, 25 Ore. 7, 34 Pac. Rep. 756; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814.

4 Missouri v. Illinois, *supra;* Esson v. Wattier, 25 Ore. 7, 34 Pac. Rep. 756; Cushman v. Highland D. Co., 3 Colo. App. 437, 33 Pac. Rep. 344; Branstetter v. Williams, 6 Idaho 574, 57 Pac. Rep. 433.

See, also, for actions for injunction for pollution, Sec. 1143.

which he has been damaged thereby.[5] It is then left to the jury or the Court, if the case is tried without a jury, to assess the damages.[6]

5 "It is hardly probable that any serious damage would result to plaintiffs from the mining operations of the defendant. In fact, the evidence upon this question on the part of the plaintiffs is so meager and inconclusive as to scarcely raise a presumption." Branstetter v. Williams, 6 Idaho 574, 57 Pac. Rep. 433.

In an action for damages caused by the pollution of a stream, testimony as to the effect of the water on land and crops is not objectionable as opinion evidence; a non-expert witness, when he states facts showing his competency, may give his opinion of the amount of injury or damage. Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; Columbus etc. Co. v. Freeland, 12 Ohio St. 392.

6 Tiede v. Schneidt, 105 Wis. 470, 81 N. W. Rep. 826.

PART X.

SUBTERRANEAN WATERS AND RIGHTS ACQUIRED THERETO.

CHAPTER 59.

SUBTERRANEAN WATERS IN GENERAL—CLASSIFICATION.

§ 1148. Scope of part—Scope of chapter.
§ 1149. Subterranean waters—In general.
§ 1150. Underground waters—How derived and distributed.
§ 1151. Subterranean waters—Cause of utilization.
§ 1152. Subterranean waters defined and classified.

§ 1148. Scope of part—Scope of chapter.—In a previous chapter of this work we classified and defined the different classes of water according to the bodies, streams, or conditions, where found.[1] But outside of the bare classification of subterranean waters we did not discuss that subject,[2] deeming it better to discuss the subject of subterranean waters altogether in this part. Therefore, in this part of this work, we will confine our discussion to subterranean or underground waters, and the rights which may be acquired in them by individuals, both under the Arid Region Doctrine of appropriation and at common law.

The scope of the present chapter will be confined to a discussion of subterranean waters in general, and to the classification of those waters. As the character and extent of the rights which may be acquired by individuals in and to subterranean waters depend largely upon the character of the subterranean streams and bodies themselves, the classification of these waters into their main divisions and subdivisions will be as they are known and recognized by the most modern scientific authorities and by the courts. The definitions, descriptions, and the rights which may be acquired to

1 See for classification and definitions of waters, Chap. 14, Secs. 292-323.

2 See Sec. 323.

these waters will be discussed in the following chapters of this part under their respective divisions.

§ 1149. **Subterranean waters—In general.**—In all parts of the world where there are land and a precipitation of moisture there is subterranean or underground water. This is especially true of the arid, or mountainous regions of the earth. A large portion of the precipitation, whether it comes in the shape of rain or snow, instead of flowing off over the surface of the land, or in the surface water courses, owing to the dry, rocky, and gravelly soil, sinks below the surface of the land, and thereby subterranean streams or other bodies of underground water are formed. Even in the great desert areas of the earth these underground waters are found, notably in the Great Sahara Desert, where great tracts of barren land have been reclaimed and brought under cultivation solely by the means of these underground waters.[1] Upon the great plains, the part that is called the semi-arid or subhumid region of our own country, these underground waters are found in great quantities. The same may be said of every valley of the mountainous and arid regions of this country. These underground waters, either keeping themselves within the underground channels of the surface streams or by independent underground streams, taking their sources in the higher lands, gradually flow downward under the valleys, where either by Nature itself or by the hand of man aiding Nature, they are brought to the surface, and thus augment the scanty flow of the surface streams of these regions in the reclamation of barren lands. In many sections of the country the reclamation of large tracts of land is carried on entirely by underground water, as, for example, where the land is at considerable distance from surface streams. As through scientific research the knowledge of the movement of subterranean waters becomes better known, and the devices for raising these waters to the surface become perfected, these waters will be utilized more and more as the years go by.

The investigation of underground waters is a branch of geology known as hydrology.[2]

1 See Sec. 163.

2 Geology and Underground Waters of South Dakota, by N. H. Darton, 1909, Water-Supply Paper No. 227, U. S. Geological Survey.

§ 1150. Underground waters.—How derived and distributed.—Subterranean or underground water is derived from rain and melted snows and passes underground in porous materials, such as sandstone, sand, and gravel. Some of the subterranean water is absorbed directly by such materials immediately after it has fallen or has melted, but much water passes underground by the sinking of streams, or water from streams; many of the surface streams lose a portion of their flow in crossing porous strata or coming in contact with fissures. When the surface water comes in contact with the porous strata it is absorbed and immediately begins moving downward, or as nearly in that direction as is possible with the obstacles which it encounters. Sooner or later it comes in contact with an impervious stratum below, and thereafter can only move laterally down the incline of that surface. The rapidity of motion of underground water depends principally upon two conditions—the angle of inclination of the impervious surface and the degree of porosity of the material through which the water moves. In the case of fissures the movement of the water may be very rapid and equal to that of surface streams. At times the water sinks under impervious strata of clay or rock, and is held by them underground, oftentimes to a great depth, thus forming the artesian basins, which we will discuss more at length in a succeeding section of this part.[1] More often, however, the water is held above the impervious clay or rocks and thus forms the subsurface flow of surface streams,[2] and the "ground water," or those great bodies of water under, but near, the surface of the earth which are discoverable by shallow wells, and which are slowly percolating their way to a lower level. By the recent scientific investigations, both those made by the United States Geological Survey and others, this movement of underground waters has been ascertained in many localities. By borings its width of flow has been determined, also the depth of strata through which it flows; also the rapidity with which it flows through the strata has been ascertained. Its total flow, from this data, has been reduced into cubic feet per second.[3] Or, from the same data, with the additional data of the amount of water to each cubic foot of this porous earth, from any given section, the

[1] See Secs. 1166-1184.

[2] See Secs. 1161-1163.

[3] See the Underflow of the South Platte Valley, Water-Supply and Irr. Paper No. 184, 1906, by Chas. S. Slichter and H. C. Wolf, p. 12.

amount of water therein contained may be measured like wheat in a bin. It matters not whether this porous stratum is on the surface of the ground in the form of a soil covering or whether it is deeply buried by impervious layers, the water movement within it is practically the same. When the porous layer is on the surface, as is often the case on the Great Plains, no pressure or head can be produced, for the water is simply running down an inclined plane underneath the surface, with nothing above to prevent it from rising. This water, however, can be collected in surface wells, from which it may be pumped by any mechanical power, as is so often the case in many portions of this country, and after it has been brought to the surface, it may be used for domestic, irrigation, or any other purpose. It is by this means and by this water that many thousands of acres of land are irrigated which would otherwise remain in their barren condition.[4] Where, however, the porous strata through which the water is slowly flowing lies under

[4] For irrigation by means of pumping plants, see the following works: Pumping Water for Irrigation, by Herbert M. Wilson, containing an interesting description of early devices for pumping water for irrigation, and the history of their use. Water-Supply and Irr. Paper No. 1, U. S. Geol. Survey, 1896; Mechanical Tests of Pumping Plants in California, by J. N. LeConte and C. E. Tait, U. S. Dept. of Agriculture, Office of Exper., Bulletin No. 181, 1907; Windmills for Irrigation, by E. C. Murphy, Water-Supply and Irr. Paper No. 8, U. S. Geol. Survey, 1897; Mechanical Tests of Pumps and Pumping Plants, by W. B. Gregory, U. S. Dept. of Agriculture, Office of Exper. Stations, Bulletin No. 183, 1907; Irrigation Practice on the Great Plains, by E. B. Cowgill, Water-Supply and Irr. Paper No. 5, U. S. Geol. Survey, 1897; Underground Waters of the Coastal Plain of Texas, by Thomas U. Taylor, Water-Supply and Irr. Paper No. 190, 1907; Underground Waters of Southwestern Kansas, by E. Haworth, Water-Supply and Irr. Paper No. 6, U. S. Geol. Survey, 1897; Geology and Underground Waters of South Dakota, by N. H. Darton, Water-Supply and Irr. Paper No. 227, U. S. Geol. Survey, 1909; Underground Waters in the Valleys of Utah Lake and Jordan River, by G. B. Richardson, Water-Supply and Irr. Paper No. 157, U. S. Geol. Survey, 1906; A Reconnoissance in Southeastern Washington, by I. C. Russell, Water-Supply and Irr. Paper No. 4, 1897; Water Resources of Beaver Valley, Utah, by W. T. Lee, Water-Supply and Irr. Paper No. 217, 1908.

See, also, the many reports of the Government in the Water-Supply and Irrigation Papers, upon the subject of Geology and Water Resources of certain sections of the country, in the portion devoted to underground waters, containing a detailed description of the underground water supply and the methods used in those particular sections for utilizing it.

impervious strata of clay or rock, and a sufficient head is produced, a well drilled through the upper and impervious layers allows the water to rise through the drill hole, and an artesian well results.[5] Thus, again, by the hand of man are the underground waters tapped and brought to the surface, and thereby many thousands of acres of arid land reclaimed and made to produce crops.[6] Oftentimes, without the aid of the hand of man, the underground water in slowly flowing to lower levels strikes a cross dyke of impervious rock or clay, and if this dyke is high enough and of sufficient length, it acts as a dam to this subterranean stream, and causes the water to rise even to the surface, where it passes out of the earth from springs, the original source of the most of the surface streams. And thereafter these waters are governed by the laws of surface streams, treated in the previous chapters of this work. But before they make their appearance at the surface they must be treated both in law and in fact, as subterranean and underground waters—the principal subject under discussion in this chapter. Again, the same physical result may be had in certain sections of the country by the sinking of trenches to bedrock and the construction of artificial dams in the place of the natural dykes, and thus damming these subterranean streams. But as these waters are forced to the surface by artificial means, and as they run off in artificial channels, ditches, or canals, and not in natural water courses, such waters are treated as subterranean or underground waters, and not the waters of natural surface water courses.[7]

§ 1151. Subterranean waters—Cause of utilization.—Since the first edition of this work was written, in 1893, the courts have been called upon to decide certain questions relative to underground

[5] For artesian wells, see Secs. 1169, 1170.

[6] See for the reports of artesian wells, the following: Geology and Underground Waters of South Dakota, by N. H. Darton, Water-Supply and Irr. Paper No. 227, 1909; Preliminary Report on Artesian Basins in Southwestern Idaho and Southeastern Oregon, by I. C. Russell, Water-Supply and Irr. Paper No. 78, 1903; Underground Waters of Southwestern Kansas, by E. Haworth, Water-Supply and Irr. Paper No. 6, 1897; Underground Waters of Coastal Plain of Texas, by T. U. Taylor, *Id.*, No. 190.

See, also, the parts relating to artesian wells in the many reports of the Government on the subject of Geology and Water Resources of certain sections of the country, in the Water-Supply Papers of the U. S. Geological Survey.

[7] See Secs. 1197-1204.

waters which either had never been raised or had never been decided before. This is specially true relative to percolating waters. It will be also noticed that what were termed percolating waters in some cases have been either taken from that class and placed in the class known as underground waters or classified as different kinds of percolating waters.[1] This is due largely to the conditions of the country where these questions have been raised and the great need of water for all useful purposes in those regions. In the arid region of this country the greater proportion of the rainfall sinks below the surface of the earth and is there stored by Nature. This section of the country having naturally a very fertile soil and a fine climate, together with great mineral resources, has drawn from the Eastern States thousands of intelligent people, who have made this Western country their homes, hence the demand on the water resources of this section has, in many places, greatly exceeded the surface supply, and still there were, and now are, vast tracts of as fertile land as can be found in God's sunshine lying barren and unproductive, simply because there was no water for it. In this extremity it was found that there were great bodies of subterranean or underground waters, which were slowly flowing or percolating their way under the surface of the earth, and from which practically no benefit was being derived. The people who had settled in this Western country, possessing great intelligence, and, in many instances great wealth, after the surface water became so scarce that the supply was practically exhausted, as far as any additional drafts on it were concerned—as high as $1,000 being paid for a miner's inch of flow, or $50,000 for a stream flowing at the rate of one cubic foot per second [2]—naturally turned to the great bodies of subterranean or underground waters, which at that time were practically unknown, except the bare fact that they were there and wholly undeveloped. By scientific research, assisted by the Government in its Geological Survey, and their own native ingenuity, these people began in various ways to draw upon the subterranean waters and to use the same for the irrigation of tracts of land and other useful demands. Of course, as this use extended and the draft upon the subterranean waters increased, and, as was the case

[1] See subterranean or underground water courses, Secs. 1153-1165.

[2] See Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

of surface waters in this same section of the country, adverse claims arose to certain rights, or supposed rights, and thus the questions finally got into the courts; hence new classifications of underground waters were made and new rights in them defined and allowed.[3] Owing to the elasticity of our laws, which are so framed to meet new conditions as they arise, and to apply the principles of morals, justice, and equity to all new cases, this was and is permitted. In our classification and treatment of this subject we will endeavor, as far as possible, to conform to this new classification and to the new principles of law governing these subterranean waters.

§ 1152. **Subterranean waters defined and classified.**—That certain rights may be acquired in and to these subterranean or underground waters is recognized by law in all countries and in all jurisdictions, and as the nature and extent of these rights depend entirely upon the character of the subterranean streams or bodies themselves, it becomes necessary to define these waters and to classify them.

Subterranean or underground waters may be defined as all waters flowing, percolating, or lying underneath the surface of the earth and not visible without exploitation. They comprise all waters which, for the time being, are below the surface of the ground, and that, too, whether they have reached their present position by penetrating the ground directly after the fall of rain or the melting of snow, or by the escape of surface bodies or streams of water; whether they are confined to definite channels or are dissipated throughout the mass of more or less porous rock or earth; and whether they are ultimately to reach the sea without reappearing at the surface, or are soon to emerge as well-defined streams or numerous widely distributed springs from which natural streams and rivers have their original source.

These waters are divided by the later authorities into three main classes, depending largely upon their condition and where found, namely: First, subterranean water courses or streams;[1] second, artesian waters;[2] and, third, percolating waters.[3]

Subterranean water courses or streams are again subdivided into

[3] For rights in subterranean or underground waters, see Secs. 1153-1211.

[1] See Chap. 60, Secs. 1153-1165.

[2] See Chap. 61, Secs. 1166-1184.

[3] See Chap. 62, Secs. 1185-1211.

two general classes: First, those whose channels are known and defined; and, second, those whose channels are unknown and undefined.[4] Those waters whose channels are known and defined are again subdivided into two classes: First, known independent subterranean water courses,[5] and known dependent subterranean water courses, as where the underground waters are dependent for their supply upon surface streams or the underflow of such streams.[6]

The second main class of subterranean waters, artesian waters, need no further classification as far as this work is concerned, and will, therefore, be treated together as one class.[7]

Percolating waters, the third main class of subterranean waters, are divided by the authorities into four subdivisions, which are: First, diffused percolations;[8] second, percolations tributary to water courses or other surface bodies of water;[9] third, percolations tributary to underground reservoirs, or reservoirs or lakes of water below the surface of the earth;[10] and, fourth, seepage waters.[11]

We will now take up the subject of these waters and discuss them further in the following chapters, following the main division, as set forth above, for the subject matter of the respective chapters.

4 See Sec. 1155.
5 See Secs. 1156-1160.
6 See Secs. 1161-1163.
7 For artesian waters, see Secs. 1166-1184.
8 See Secs. 1187-1190.
9 See Secs. 1193-1196.
10 See Secs. 1197-1204.
11 See Secs. 1207, 1208.

CHAPTER 60.

SUBTERRANEAN WATER COURSES.

§ 1153. Scope of chapter.
§ 1154. Subterranean or underground water courses—In general.
§ 1155. The classification of "defined and known," or "undefined and unknown" made both at common law and under the Arid Region Doctrine.
§ 1156. Known independent subterranean water courses.
§ 1157. Known independent subterranean water courses—Rights which may be acquired therein.
§ 1158. Known independent subterranean water courses—Riparian rights thereto.
§ 1159. Known independent subterranean water courses—Rights by appropriation.
§ 1160. Known independent subterranean water courses—Both riparian rights and those by appropriation.
§ 1161. Known dependent subterranean water courses—The underflow of surface streams.
§ 1162. The underflow dependent on surface streams—Rights which may be acquired therein—At common law.
§ 1163. The underflow dependent on surface streams—Rights under the law of appropriation.
§ 1164. Undefined and unknown water courses.
§ 1165. Existence, how proven and thereby become known—Burden of proof.

§ 1153. Scope of chapter.—In this chapter we will discuss subterranean water courses as distinguished from artesian waters and percolating waters, discussed in subsequent chapters of this part.[1]

§ 1154. Subterranean or underground water courses—In general.—Under our main division in our classification of subterranean or underground waters, in a preceding section,[1] the first, and, we will say, at present, the most important class of subterranean waters, is that to which subterranean water courses and streams belong. These subterranean water courses are, as their name indicates, those streams or currents of water which flow under-

[1] For artesian waters, see Secs. 1166-1184. For percolating waters, see Secs. 1185-1211.

[1] See Sec. 1152.

neath the surface of the earth in water courses.[2] A large portion of the Great Plains, and also the valleys of the mountainous regions of the West, is underlaid by strata of water-bearing sand and gravel which are fed by the mountain drainage. These water-bearing strata are oftentimes of great thickness, and the water moving freely through them is practically inexhaustible; and if it can be brought to the surface it is sufficient to irrigate a large portion of the country overlying it. Again, in and near the mountains many streams have their beds underneath the surface of the earth which were formerly upon the surface. This is caused by the canyon or gorge, after the stream had once formed, later being filled up with rock, gravel, and other debris. And while, apparently, the canyon is dry, the stream is still there, but below the more recent surface, with its waters passing through the boulders and gravel, to reappear upon the surface only when some rocky, impervious natural reef, or subterranean dam constructed by the hand of man stops the downward flow of the water and forces it to the surface. The movement of this water in subterranean streams, owing to the declivity of their beds, is often quite rapid, and oftentimes nearly equaling that of the surface streams, but usually the movement of the water is much slower. Thus great volumes of water oftentimes pass down the channels of these subterranean water courses, entirely hidden from sight, and, as far as all practical purposes are concerned, unless "developed" by man, are practically lost.

It is a description of and the rights in these subterranean streams or water courses which we propose to discuss in this chapter.

§ 1155. The classification of "defined and known," or "undefined and unknown," made both at common law and under the Arid Region Doctrine.—The only classification of subterranean or underground waters made by the common law is based on the method of transmission through the ground, and is that they belong to one of only two classes, namely: First, underground currents of water flowing in known and defined channels, or water courses; or, second, water passing through the ground beneath the surface in channels which are undefined and unknown. And, generally speaking, the rights which may be acquired by individuals to one of these two classes of water are, under the common law, entirely different

[2] For a description of surface water courses, see Secs. 301-310.

from the rights which may be acquired to the waters of the other class. The rights to the waters of the first class are governed by the rules of law governing surface streams; while the waters of the second class are treated as mere percolations, and, therefore, belong to the owner of the soil wherein they are found.[1]

The first of these subterranean water courses have all of the characteristics of surface water courses, that is to say, they have beds,[2] banks forming a channel,[3] and a current of water. The second class, while upon the one hand, may have all of these characteristics, upon the other hand these, as their names indicate, are still unknown and undefined. However, that they are there is well known as a scientific fact, and as the years go on, by the exploitation of these streams many of the underground water courses in the latter class, which were formerly undefined and unknown, become defined and known, and thus pass from the second class to the first. It is necessary to bear this distinction in mind in our discussion, as these two classes are governed by entirely different principles at common law.[4] However, as we shall see in subsequent sections, under the Arid Region Doctrine of appropriation the tendency has been more and more to treat the waters flowing or percolating beneath the surface to a great extent the same as surface streams, except as to what is now known as diffused percolations, and as to these there still remains a distinction.[5] And this is probably due to the fact that they are still unknown and still undefined. And in this connection it will be well to say that the word "defined" means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word "known" refers to the knowledge of the course of the stream by reasonable inference.[6]

1 See Secs. 1188-1190.

2 See Secs. 303, 304.

3 See Sec. 305.

4 For the rights to subterranean waters at common law, see Secs. 1188, 1189.

5 See Sec. 1188 for diffused percolations.

6 Black v. Ballymena Commissioners, Ir. L. R. 17, Eq. 459; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Brown v. Illius, 25 Conn. 583; Haldman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511.

"'Defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word 'known' refers to knowledge of the course of the stream by reasonable inference." City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585, quoting from Kinney on Irr., 1st Ed., Sec. 48.

The common law classification as given above as to the general division of subterranean or underground waters into "defined and known" or "undefined and unknown" streams, has, as will be noticed by the authorities cited, been adopted to a great extent by the States composing the arid and semi-arid regions. However, as the scientific investigations of the movements of these waters progress, there is a constantly growing tendency to take from what was formerly the unknown and add to the known. Also, led off by the State of California, in the case of Katz v. Walkinshaw, there is a tendency to classify what, under the common law, were all included in the unknown streams and percolations, and to change the rule of law relative to the rights which might be acquired thereto. We will discuss this subject in a future chapter of this part.[7]

§ 1156. Known independent subterranean water courses.—Those subterranean water courses whose channels are known and defined, as stated in our classification,[1] are again subdivided into known independent subterranean water courses and known dependent subterranean water courses.[2] Known independent subterranean water courses are those which, independent of the influence of any surface streams, flow underneath the surface of the land in well-defined and known channels, the courses of which can be distinctly traced.[3]

See, also, Willow Cr. Irr. Co. v. Michaelsen, 21 Utah 428, 60 Pac. Rep. 943, 51 L. R. A. 280; Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933; Deadwood C. R. Co. v. Barker, 14 S. D. 558, 86 N. W. Rep. 619, all citing Kinney on Irr., 1st Ed., Sec. 49.

7 See Chap. 62, Secs. 1193-1204.

1 See Sec. 1152.

2 For known dependent subterranean water courses, see Secs. 1161-1163.

3 For the distinction between independent subterranean water courses and dependent subterranean water courses, see Sec. 1161.

For the definition of "well-defined" and "known," see Sec. 1155.

"Subterranean streams" are those which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor. Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262.

See, also, Deadwood Cent. R. Co. v. Barker, 14 S. D. 558, 86 N. W. Rep. 619; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Wyandot Club v. Sells, 6 Ohio N. P. 64, 9 Ohio S. & C. P. Dec. 106; Case v.

There are many of these independent subterranean water courses, especially in the Western portion of this country, which are defined and therefore known. It is often the case with streams in the arid region that the waters appear at the surface only at times of high water or freshets. Again, there are many streams where the water appears at the surface only at occasional points along the channel, while at other points the waters entirely sink below the surface, there flowing downward underground until they strike some barrier or less permeable ground, and then they reappear upon the surface. If a surface stream flows into a sink hole in a definite direction, pursues for a short space a subterranean course, and then emerges on the surface again, it is considered to have a defined and known channel. There are, as we shall see in a future section, many methods by which these streams may be traced and their channels be defined and therefore become known.[4] But the evidence upon this point must be definite and certain, for otherwise they belong to the class of streams undefined and unknown, or are treated as mere percolations.[5]

§ 1157. Known independent subterranean water courses—Rights which may be acquired therein.—Where an independent underground stream has once become defined and known as such, the same principles of law of the jurisdiction where the same is found governs it as governs the surface streams. Therefore, if the laws of that particular jurisdiction recognize only the common law of riparian rights, only such rights attach to these streams, and in favor of the riparian owners thereon.[1] In those States where the common law of riparian rights has been abolished, and the law recognizes only the rights which can be acquired by the Arid Region Doctrine of appropriation, such is the law governing the rights which can be acquired to the waters of these streams.[2]

Hoffman, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; *Id.*, 100 Wis. 314, 72 N. W. Rep. 390, 74 N. W. Rep. 220, 75 N. W. Rep. 945, 44 L. R. A. 728; Board of Supervisors Clarke County v. Mississippi Lum. Co., 80 Miss. 535, 31 So. Rep. 905.

4 For the proof of subterranean water courses, see Sec. 1165.

5 For percolating waters, see Secs. 1188-1190.

1 For the common law of riparian rights, see Chap. 22, Secs. 457-466.

For riparian rights on subterranean water courses, see Sec. 1158.

2 For the States which have abolished the common law of riparian rights, see Sec. 621.

For the Arid Region Doctrine of

And, again, in those States which have the dual laws governing waters within their respective jurisdiction of both the common law of riparian rights and the Arid Region Doctrine of appropriation, rights may be acquired to these subterranean water courses and to the waters flowing therein both by virtue of the ownership of riparian lands on these streams and by the appropriation of their waters under the doctrine of appropriation.[3]

We will now discuss these subjects in the order named.[4]

§ 1158. Known independent subterranean water courses—Riparian rights thereto.—In those States which have only the common law of riparian rights governing water courses and the waters flowing therein, no distinction is made by the law as to whether the water courses or streams flow upon or under the surface of the earth in well-defined and known channels.[1] Therefore, in these jurisdictions, if in fact or by reasonable inference it is known that a subterranean stream of water flows in a well-defined channel, capable of being distinctly traced, riparian rights attach to such a stream by virtue of the ownership of the land through or adjoining which it naturally flows, the same as though the stream flowed entirely upon the surface.[2] But in order for such rights to attach

appropriation, see Chap. 31, Secs. 585-594.

For the appropriation of water, see Chap. 38, Secs. 706-732.

For the appropriation from subterranean streams, see Sec. 1159.

[3] For the States having both the common law and the law of appropriation governing waters, see Sec. 507.

For the laws governing the waters of subterranean streams in these States, see Sec. 1158.

[4] See Secs. 1158-1163.

[1] For the common law of riparian rights, see Chaps. 21-28, Secs. 450-551.

[2] "If, in fact, or by reasonable inference, it is known that a subterranean stream of water flows in a well-defined channel, capable of being distinctly traced, it is said to be governed by the rules of law applicable to streams flowing upon the surface of the earth." Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124, citing Kinney on Irr., 1st Ed., Sec. 48.

"If the course of a subterranean stream were well known, as is the case with many which sink underground, to pursue for a short space a subterranean course and then emerge again, it could never be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." Dickinson v. Grand Junction Canal Co., 7 Exch. 299, 21 L. J. Exch. N. S. 241, 16 Jur. 200.

See, also, Chasemore v. Richards, 7

the proof must be definite and certain that the underground water flows in well-defined and known channels, so as to constitute regular and constant streams,[3] for otherwise the presumption will be that the waters have their sources in the percolations through the soil.[4] This is the rule under the common law of England, as will be seen from the cases cited, and the States in question, closely following that law as to riparian right, have adopted the same rule. The same rule is also applied in those Western States which adhere to the common law of riparian rights as one of their systems of laws governing water.[5]

§ 1159. Known independent subterranean water courses—Rights by appropriation.—In the particularly arid States which by statutory enactment or by Court decisions have abolished the common law of riparian rights,[1] and the Arid Region Doctrine of appropriation only is in force, the right to the use of the waters of

H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; affirming 2 Hurlst. & N. 168; Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; Dudden v. Clutton Union Guardians, 1 Hurlst. & N. 627, S. C. 26 L. J. Exch. N. S. 146, 38 Eng. L. & Eq. 526; Bradford Corporation v. Ferrand, 2 Ch. Div. 655; Smith v. Adams, 6 Paige 432; Mason v. Cotton, 2 McCreary 82, 4 Fed. Rep. 792; Delhi Trustees v. Youmans, 50 Barb. 316; Wheatley v. Baugh, 25 Pa. 531, 64 Am. Dec. 721; Fraiser v. Brown, 12 Ohio St. 294; Whetstone v. Bowser, 29 Pa. 59; Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62; Haldman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; Heltman's Appeal, 4 Walk. (Pa.) 35; Collins v. Chartier's Gas Co., 131 Pa. St. 143, 18 Atl. Rep. 1012, 6 L. R. A. 280, 17 Am. St. Rep. 791; *Id.*, 139 Pa. 111, 21 Atl. Rep. 147; Good v. City of Altoona, 162 Pa. St. 493, 29 Atl. Rep. 741, 42 Am. St. Rep. 840; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Wyandot Club v. Sells, 6 Ohio N. P. 64, 9 Ohio S. & C. P. Dec. 106; Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Springfield Waterworks Co. v. Jenkins, 62 Mo. App. 74.

But see Green Castle v. Hazelett, 23 Ind. 186, where it was held that the laws regulating the relative rights of riparian owners to surface streams do not apply to subterranean streams, no distinction being made in subterranean streams and percolations.

For rights to percolating water, see Secs. 1185-1211.

[3] For the proof of subterranean water courses, see Sec. 1165.

[4] For rights to percolating waters, see Secs. 1185-1211.

[5] Yarwood v. Los Angeles etc. Co., 132 Cal. 240, 64 Pac. Rep. 275; Verdugo Water Co. v. Verdugo, 155 Cal. 655, 93 Pac. Rep. 1021; Taylor v. Welch, 6 Ore. 198; Hale v. McLea, 53 Cal. 578.

[1] For these States, see Sec. 621.

known defined subterranean streams can be acquired by a valid appropriation and perpetuated by the continuous use of the water for some beneficial purpose.[2] And after it has been once appropriated and actually applied to some beneficial use or purpose, it can not be interfered with either by subsequent appropriators or by the land owners through which these streams naturally flow. No distinction in this respect exists between waters running under the surface in well-defined and known channels and those running in distinct channels upon the surface.[3] As was said by the Supreme Court of Utah: "That known underground streams of water flowing in well-defined channels, such as the one under consideration is shown to be, are subject to appropriation, and that the rights acquired in them by appropriation can not be diverted by the wrongful act of another, is so well settled that we deem it unnecessary to enter upon a discussion of the question."[4] Furthermore, the method of making a valid appropriation of these waters is the same under the same rules of the law of the jurisdiction where they are found as govern the appropriation of the waters of surface streams.[5] But the right acquired by appropriation of the waters of such streams, as is the case of riparian rights to the same,[6] must depend upon the

2 For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the appropriation of water, see Chap. 38, Secs. 706-732.

3 Where a vein of water was struck in running a tunnel to a mining claim, and the water of which was appropriated by the one who discovered it, a later comer intercepting the flow of the stream, was enjoined from depriving the prior appropriator of its use. Cole S. M. Co. v. Virginia etc. Co., 1 Sawy. 470, Fed. Cas. No. 2,989, 7 Morr. Min. Rep. 503.

See, also, Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280; Keeney v. Carillo, 2 N. M. 480; Copper King v. Wabash M. Co., 114 Fed. Rep. 991; Howard v. Perrin, 8 Ariz. 347, 76 Pac. Rep. 460; affirmed, 200 U. S. 71, 26 Sup. Ct. Rep. 195, 50 L. Ed. 374; Ryan v. Quinlan, —— Mont. ——, 124 Pac. Rep. 512.

4 McCarty, J., in Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764, citing Kinney on Irr., 1st Ed., Sec. 44.

5 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431, where it is said: "Underground currents of water which flow in well-defined and known channels, the course of which can be distinctly traced, are governed by the same rules of law as streams flowing upon the surface." Citing Kinney on Irr., 1st Ed., Sec. 48.

For methods of making an appropriation without code, see Secs. 706-732.

For methods of appropriation under codes, see Secs. 1349-1357.

See, also, for appropriation under the various States, Part XIV.

6 See Sec. 1155, 1158.

fact as to whether their course underground is well defined and known.[7] However, it is held that the channels and existence of such streams, though not visible, are "defined" and "known" within the meaning of the law when their courses and flow may be determined by reasonable inference.[8]

§ 1160. Known independent subterranean water courses—Both riparian rights and those by appropriation.—In those jurisdictions which have both the common law of riparian rights and the Arid Region Doctrine of appropriation [1] the same rules govern the rights to the known independent subterranean water courses and the waters flowing therein as govern surface streams. Therefore, where underground currents of water flowing in well-defined channels are shown to exist, the rules of law which govern the use of similar streams flowing upon the surface of the earth are applicable to them.[2] And in these jurisdictions, as to these subterranean streams also, we have the same clashing of interests in respect to the rights claimed on the same streams under these two irreconcilable principles of law as we find is the case where the streams flow wholly upon the surface.[3] Therefore, when riparian rights have once attached in these jurisdictions to these underground water courses, the riparian owner may invoke the same rules under the common law in insisting upon their uninterrupted flow as though the stream flowed entirely upon the surface. And all appropriations of their waters made thereafter must be made subject to these riparian rights.[4]

7 For defined and known subterranean streams, and how proven, see Sec. 1165.

8 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

1 For these States, see Secs. 507, 621.

2 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Hale v. McLea, 53 Cal. 578; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep.. 558; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

3 See appropriation as against rights of riparian owners, Chap. 44, Secs. 811-823.

4 For the right to the uninterrupted flow at common law, see Secs. 543-546, 549.

See, also, Taylor v. Welch, 6 Ore. 198; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; Hale v. McLea, 53 Cal. 578; Yarwood v. West Los Angeles etc. Co., 132 Cal. 204, 64 Pac. Rep. 274; Bar-

The only difference in the application of the law to surface and sub terranean streams is the additional requirement in the case of subterranean streams to prove that its waters flow in well-defined and known channels and are not mere percolations.[5]

Again, the waters of well-defined subterranean and known streams may be appropriated in the jurisdictions having both laws governing the rights to waters as is the case where the laws of the State provide for the acquisition of water rights only by the doctrine of appropriation.[6]

§ 1161. Known dependent subterranean water courses—The underflow of surface streams.—The second class of "defined and known" subterranean or underground streams or water courses, under our classification,[1] are the known dependent subterranean water courses. These waters are dependent for their supply upon the surface streams, or are the "underflow," "sub-surface flow," "subflow," or "undercurrent," as they are at times called, of surface streams. These waters may be defined as those which slowly find their way through the soil, sand, and gravel constituting the beds of streams, or the lands under and adjacent to the surface streams, and are themselves a part of the surface streams.[2] Those who are acquainted with the water courses in the arid portion of our country know that some of the most important and well-defined surface streams in that section become almost, and sometimes entirely, dry during a portion of the year. All of them, nevertheless, have well-defined beds, channels, banks, and currents of water at least a portion of the year, and there is at all times what is known as the underflow, and they are in every respect natural water courses, to which legal rights may attach. At certain periods of the year water flows on the surface in a well-defined course, and there is at all times what is known as the underflow. This is the broad and deep subterranean

clay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Springfield Waterworks Co. v. Jenkins, 62 Mo. App. 74; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

5 Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124.

As to how subterranean water courses may be determined, see Sec. 1165.

6 See Sec. 1159.

1 See Sec. 1152.

2 For rights to the waters of these streams, see Secs. 1162, 1163.

volume of water which slowly flows through the sand and gravel underlying the most, if not all, of the streams which traverse the country adjacent to the mountain systems of the arid region. These underground streams are probably much greater in volume in some cases than the water upon the surface, and are, as far as rights of appropriation or riparian rights are concerned, but a valuable portion of the well-defined surface stream.[3] In fact, it is a common expression used in the West that during part of the season certain streams "flow upside down"; that is to say, the rocks and gravel are on top and the water flowing underneath. There is considerable truth in this statement, for at times during the dry season the surfaces of many of them are entirely dry, while underneath their dry surfaces may be found flowing the subterranean water.[4]

3 Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 824; Platte Val. Irr. Co. v. Buckers Irr. Mill. & Imp. Co., 25 Colo. 77, 53 Pac. Rep. 334; Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; Howcroft v. Union & Jordan Irr. Co., 25 Utah 311, 71 Pac. Rep. 487; Wiel on Water Rights in the Western States, 3d Ed., Sec. 1078, all citing Kinney on Irr., 1st Ed., Sec. 44.

See, also, Gould v. Eaton, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; *Id.*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Barker v. Gould, 122 Cal. 240, 54 Pac. Rep. 845; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Los Angeles v. Hunter, 156 Cal. 603, 102 Pac. Rep. 755; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Petterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

4 See Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; La Jara Creamery & Live Stock Assn. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665; *Id.*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; Whitmore v. Utah, 26 Utah 488, 73 Pac. Rep. 764.

"The existence of a well-defined subsurface flow within the bed and banks of streams such as this is well recognized." Vineland Irr. Co. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820, citing Kinney on Irr., 1st Ed., Sec. 44.

See, also, for scientific investigations made along this line, The Underflow of the South Platte Valley, by C. S. Schlicter and Henry C. Wolf, Water-Supply and Irr. Paper No. 184, 1906, U. S. Geol. Survey.

See, also, the Geology and Water Resources of many sections of the country, issued as Water-Supply Papers by the U. S. Geol. Survey.

As our name to this class of these waters—the underflow of surface streams—indicates, physically they constitute a part of the surface streams themselves, and are simply incidents thereto; and, also, they in the main depend upon the surface streams to which they are incident for the greater portion of their water supply; the test being that there can not be any abstraction of the water of the underflow, without abstracting a corresponding amount from the surface stream. This is so for the reason that the water from the surface stream must first necessarily fill the loose, porous material underneath to the point of complete saturation before there can be any surface flow, and by tapping and drawing off a quantity of water from the underflow, it draws on the surface flow to the same extent to fill the void.[5] Therefore, the river bed must continue to

[5] Montecito v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113, where the Court held that it was not error to instruct that tunnels driven into the sub-flow created an artificial draft, first upon the saturated strata which support the flow of the stream, and, exhausting that, or, in the process of exhausting that, to suck down and drain directly the waters flowing in the channel of the stream.

"It is true that there is evidence to the effect that during the summer months, when the stream is dry in the San Pasqual Valley, there is some water running at the defendant's point of diversion. It does not follow, however, that the taking of this water would not injure the respondents. There are long stretches of sandy bottom between the defendant's proposed works and the lands of the plaintiffs. Water flowing over the rocky bed above sinks into the sand, which must become saturated before there can be a flow over its surface. To so fill this sand requires, as a witness testifies, several weeks. The Court was justified in drawing from this testimony the inference that an interruption to the flow of this water would prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to plaintiffs' lands. Such postponement would be a clear injury to the plaintiffs, whose interest in the waters of the stream included the right to have the river bed continue to hold sufficient water to supply and support the surface stream in its natural state." Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

The sub-surface supply of a stream, whether it comes from tributary swamps or runs in the sand or gravel constituting the bed of the stream, is held to be as much a part of the stream as the surface flow, and is governed by the same rules. Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

See cases *supra*.

See, also, McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Hale v. McLea, 53 Cal. 578; Vineland Dist. v. Azusa Dist., 126 Cal. 486, 58 Pac. Rep. 1057, 26 L. R. A. 820; Yarwood v. West L. A. W. Co., 132 Cal. 204, 64 Pac. Rep. 275; Verdugo Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep.

hold sufficient water to support the surface stream, as it were, for otherwise in drawing upon the underground flow of the stream will draw upon the water flowing upon the surface.[6]

If the bed of a stream is not solid rock, but gravel or earth, through which water will percolate, or flow, undoubtedly water will be found sometimes many feet below the surface, and the lighter the soil the more easily will it find its way downward, and the more water will be discoverable by exploring the subsurface. Undoubtedly, too, in many cases there may be corresponding to the flow on the surface a current underneath the surface, but the presence of such subsurface water, even though in places of considerable amount and running in the same direction, *is something very different from an independent subsurface water course. "It is not properly denominated a second and subsurface stream. It is rather to be regarded as merely the accumulation of the water which will always be found beneath the bed of any stream whose bottom is not solid rock. . . . As subsurface water it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water, the further it will reach in its percolations on*

1021; Cohen v. La Canada Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 150 Cal. 680, 91 Pac. Rep. 584; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Howcroft v. Union & Jordan Irr. Co., 25 Utah 311, 71 Pac. Rep. 487; Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764.

"It must not be forgotten that the sub-surface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules." Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

6 "It is obvious that the continued presence in the soil, sand, and gravel composing the bed of the canyon of a sufficient quantity of water to supply and support these surface streams in their natural state is essential to their existence and preservation, and that the parties have a clear right to have this quantity remain underground for that purpose as they have to the stream upon the surface. Neither party should be permitted to decrease this necessary quantity of underground water to the depletion of the surface stream and the injury of those to whom it has been assigned." Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

See, also, Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. App. 483; Village of Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; affirming *Id.*, 50 Barb. 316; English v. Metropolitan etc. Co., 1 K. B. 601.

either side, as well as more distinct will be its movement down the course of the stream."[7] Again, as was held in the leading case in California upon this subject, where water passes through the voids of any loose, permeable material, filling or partially obstructing the channel of a stream, it is still a part of the stream. If it all sinks below the surface, the whole stream is subterranean. If a part sinks and the remainder is on the surface, that water which is invisible is as much a part of the stream as the surface flow.[8] Again, many of the streams of this Western country flow a portion of the way over the surface, there being at all times the underflow, and at certain intervals the surface portion of the flow sinks from sight and is carried down with the underflow until it strikes some less permeable ground, when a portion of the water may again rise to the surface. Streams of this character are termed intermittent streams, and both the surface flow and the underflow are treated as a single stream.[9] These waters, in order to constitute the underground flow of surface streams, must be connected with the stream and strictly confined to the river bottom and moving underground, as was stated in a California case, "in connection with it, and a course within a space reasonably well defined."[10] In other words, the water must be within the bed of the surface stream itself.[11] Otherwise such underground waters must be classified with percolating waters, hereinafter discussed.[12]

7 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665; *Id.*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

For independent subterranean water courses, see Secs. 1156-1160.

8 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

9 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Yarwood v. West Los Angeles etc. Co., 132 Cal. 204, 64 Pac. Rep. 275; Hilger v. Sieber, 38 Mont. 93, 98 Pac. Rep. 881; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, 185 U. S. 125, 46 L. Ed. 833, 22 Sup. Ct. Rep. 552.

10 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

11 McClintock v. Hudson, 141 Cal. 280, 74 Pac. Rep. 849; Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820.

12 For percolating waters, see Secs. 1185-1211.

See, also, Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

§ 1162. The underflow dependent on surface streams—Rights which may be acquired therein—At common law.—The underflow of surface streams being dependent upon the surface streams for their water supply, both at common law and under the Arid Region Doctrine of appropriation, are recognized as parts thereof and incidents thereto.[1] Under both of these rules of law rights may be acquired therein, but these rights can be acquired only as a portion of the surface streams. This rule is by no means new to the Arid Region Doctrine of appropriation, but this dependent underflow of surface streams has been recognized at common law both by the English, the Eastern American, and also the Western authorities in those States which have both rules of law governing the waters flowing within their respective jurisdictions. Therefore, the general law upon the subject is that the underflow of surface streams, being portions of them, are governed by the same rules as the surface streams themselves.

Therefore, under the common law water can not be diverted by tapping the underflow of surface streams feeding the same to the injury of the vested rights of riparian proprietors on the stream. This is the rule of all jurisdictions where the common law of riparian rights is in force.[2] In the Western States of this country, where

1 See previous section, No. 1161.

2 "If you can not get at the underground water without touching the water in a well-defined surface channel, I think that you can not get at it at all." Lord Hatherly in Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 483, 24 L. T. N. S. 402, 19 Week. Rep. 569.

See, also, Village of Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; affirming *Id.*, 50 Barb. 316, where Mr. Justice Peckham said: "If the action of the defendant took the water away from springs, after it had reached there, after it had become a part of an open, running stream, then this action would lie." Citing Rawstron v. Taylor, 33 Eng. L. & Eq. 428, 25 L. J. Exch. N. S. 33, 11 Exch. 369, 4 Week. Rep. 290; Broadbent v. Ramsbotham, 34 Eng. L. & Eq. 553, 11 Exch. 602, 25 L. J. Exch. N. S. 115, 4 Week. Rep. 290; Chasemore v. Richards, 7 H. of L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; affirming 2 Hurlst. & N. 168; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 299; Goodale v. Tuttle, 29 N. Y. 459; Ellis v. Duncan, 21 Barb. 230, 11 How. Prac. 515. But holding in the case at bar that where a land owner dug a well which prevented the water from reaching, by percolations, a spring or open running stream of an adjoining owner, that an action would not lie to prevent such use. The decision thus made a distinction between underground waters before and after they reached the surface stream or the underflow thereof.

riparian rights have not been abolished, the same rule is in force. The leading case in California upon this subject, of which the Court itself says, "This is, in fact, the pioneer case of its kind, so far as this Court is concerned," in construing one of the instructions of the trial court, said: "But the instruction is limited to subterranean water, which is a part of the stream, as in other instructions defined, and if it is a part of the stream it can not be diverted, whether it would come to the surface or not. *It belongs to the stream and must flow on to the lower riparian proprietor.* His right to the subsurface portion of the stream is identical with his right to the surface flow, and is entitled to the same protection."[3] This case has been followed by other California cases, and may be called the well-settled law in that State, one of the latest cases upon the subject holding that where waters in an underground stratum are in such immediate connection with a surface stream so as to make them a

See, also, for rights to the waters of springs, Secs. 648, 1196.

Rights to the waters of surface wells, Secs. 1201, 1202.

3 Los Angèles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585, in which is to be found: "No case involving directly the rights of parties in subterranean streams has been decided in this Court, but the law, as applicable to the present case, is well epitomized in section 48 of Kinney on Irrigation, as follows." Quoting all of Sec. 48, 1st Ed., Kinney on Irrigation.

For the earlier decisions of California leading to this rule, see Gould v. Eaton, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; *Id.*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Barker v. Gould, 122 Cal. 240, 54 Pac. Rep. 845.

"One who has no legal right to the surface flow of the stream may not, by indirection, acquire that right by a subterranean tapping and taking of it. Riparian proprietors and appropriators of the surface water still have the right to invoke the maxim, '*Aqua currit et debet currere ut currere solebat.*'" Montecito Valley W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 51 Cal. 377, 90 Pac. Rep. 935.

See, also, McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; City of Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. Rep. 151; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Cave v. Tyler, 147 Cal. 454, 82 Pac. Rep. 64; Anaheim etc. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

part of the stream, land overlying the water is riparian to the stream and entitled to riparian rights with reference to such water.[4]

§ 1163. The underflow dependent on surface streams—Rights under the law of appropriation.—Under the Arid Region Doctrine of appropriation, the underflow of surface streams is considered, and, therefore, treated as part of the surface streams from which they, in the main, receive their water supply. And upon this subject the law has become well settled that one may, by appropriate works, develop and secure for useful purposes the subsurface flow of the streams flowing within the States where the doctrine of appropriation is in force and become a legal appropriator by so doing. However, in acquiring such a right, due regard must be had to the vested prior rights of others to the waters of the stream, whether these others claim also by appropriation, or as riparian owners, in those jurisdictions where both laws are in force, either to the surface stream or to its subsurface flow.[1] And, as we shall see in a

4 Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. E. 956, 27 Sup. Ct. Rep. 655, holding that the underflow is not a separate stream, and that it must be considered a part of the surface stream upon which it is dependent for its water supply.

1 In the case of Vineland Irr. Co. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1056, 46 L. R. A. 820, which may be regarded as the leading case upon this subject, at least in California, the Court said: "We therefore hold it to be the law, and we think it to be a moderate and just exposition thereof, that one may, by appropriate works, develop and secure to useful purposes the subsurface flow of our streams, and become, with due regard to the rights of others in the stream, a legal appropriator of waters by so doing." Citing Kinney on Irr., 1st Ed., Sec. 44.

See, also, Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Howcroft v. Union & Jordan Irr. Co., 25 Utah 311, 71 Pac. Rep. 487; Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; Wiel on Water Rights in the Western States, 2d E., Sec. 353, all citing or quoting from Kinney on Irr., 1st Ed., Sec. 44; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719, all citing Kinney on Irr., 1st Ed., Sec. 48.

See, also, Montecito Valley W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17

subsequent section of this work, this is the same rule which is applied to the appropriation and diversion of percolating waters where those waters feed the stream and are necessary to its continued flow.[2]

There is no reason in law why separate rights, under certain circumstances, may not be acquired by appropriation of the underflow of surface streams. In this portion of the country, in many of the streams, the greater portion of the water may be found in the underflow.[3] In a country where water is so scarce and so much depends upon the available supply all being used, the underflow of surface streams should be utilized. Where there is a large surplus underflow which can be tapped by either tunnels or excavations and the waters of the underflow thus drawn off without injury to the prior rights of the appropriators of the surface flow, this should be allowed. But, as we have seen, drawing off the waters of the underflow draws also upon the surface flow and if this is all claimed by the prior appropriators, it is hard to imagine a case of this kind where injury would not result to the rights of the appropriators of the surface flow. And as the law now stands, no party is permitted to decrease the quantity of the underflow to the depletion of the surface stream and to the injury of those who have lawful claims

Am. & Eng. Ann. Cas. 1222; Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Cave v. Tyler, 147 Cal. 454, 82 Pac. Rep. 64; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; *Re* Priority of the Bravo Ditch, 1 Denver Legal Adv. 419; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Yarwood v. West Los Angeles etc. Co., 132 Cal. 204, 64 Pac. Rep. 275; Roberts v. Crafts, 141 Cal. 20, 74 Pac. Rep. 281.

For the presumption and burden of proof as to these waters, see Sec. 1165.

2 For percolating waters feeding surface streams, see Secs. 1193-1195.

"There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow. . . . Such waters, together with the surface stream supplied by them, should be considered a common supply." Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755.

3 See Sec. 1161.

thereto.[4] Where, however, the claim to the underflow is prior to the claim to the waters of the surface flow there may be a valid appropriation of the underflow which will hold good as against later appropriations of the surface flow.[5]

§ 1164. Undefined and unknown water courses.—The waters which flow in undefined and unknown channels [1] come under the second class of subterranean or underground waters as we have classified them.[2] This, as we have seen, was the only classification known to the common law and included percolating waters.[3] But, as the rights which might be acquired to these undefined and unknown streams were the same as might be acquired to percolating waters, the entire subject will be fully discussed in connection with the subject of percolating waters.[4]

§ 1165. Existence, how proven, and thereby become known—Burden of proof.—The existence of both independent [1] and dependent [2] subterranean or underground water courses may be proven by a number of methods, and the tendency is, as scientific investigations progress and greater knowledge is year by year acquired of the movement of subterranean waters, to take from the general class of the undefined and unknown streams and correspondingly to add to the defined and known streams. The difficulty has been not so much to determine the law as to rights which may be acquired in subterranean waters, where certain water has been determined to be of a certain character, as it has been to determine the character or the particular class to which the water belongs. This is a question of fact to be determined by the facts of each particular case, and any evidence tending to prove that a certain body or stream belongs to a particular class, whether it be from surface indications or from subterranean explorations, is admissible. How-

4 Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021.

5 Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; Roberts v. Crafts, 141 Cal. 20, 74 Pac. Rep. 281; Vineland etc. Co. v. Azusa etc. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820.

1 For definitions, see Secs. 1154, 1155.

2 See Sec. 1152.

3 See Sec. 1155.

4 See Secs. 1185-1211.

1 See Secs. 1156-1160.

2 See Secs. 1161-1163.

ever, it is much more difficult to prove the existence of a subterranean water course than it is to prove the existence of a surface water course. This is largely due, as was held in an early Vermont case,[3] to the physical laws governing underground water and its subterranean progress being irregular and unknowable to any certainty, and such water being changeable and uncontrollable in character and subject to secret and incomprehensible influences.

Therefore, for the reasons set forth above, the authorities adopted the rule that underground waters are presumed to be percolating waters, until it is shown that they flow in well-defined and known channels.[4] So, in a recent case decided by the Supreme Court of the United States, where the finding of fact sustained by the testimony was that the only water on the land in question was percolating water, oozing through the soil beneath the surface in an undefined and unknown channel, Mr. Justice Brewer, in rendering the opinion of the Court, said: "Of course, this excludes the idea of a 'river, creek, or stream of running water.'"[5] However, the presumption that underground waters are percolations, as is the case of other presumptions, may be rebutted. But such being the presumption, the burden of proof is upon those asserting the right to waters below the surface upon the ground that they flow in defined channels to establish the existence of such channels by a preponder-

[3] Chatfield v. Wilson, 28 Vt. 49; *Id.*, 27 Vt. 670; *Id.*, 31 Vt. 358.

[4] Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Yarwood v. West Los Angeles W. Co., 132 Cal. 204, 64 Pac. Rep. 275; Pence v. Carney, 58 W. Va. 296, 52 S. E. Rep. 702, 6 L. R. A., N. S., 266, 112 Am. St. Rep. 963; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 746; Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Hougan v. Milwaukee & St. Paul R. Co., 35 Iowa 558, 14 Am. Rep. 502; Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933; Case v. Hoffman, 100 Wis. 314, 72 N. W. Rep. 390, 74 N. W. Rep. 220, 75 N. W. Rep. 945, 44 L. R. A. 728; *Id.*, 84 Wis. 438, 54 N. W. Rep. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419; Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Taylor v. Welch, 6 Ore. 198; Wyandot Club v. Sells, 6 Ohio N. P. 64, 9 Ohio S. & C. P. Dec. 106.

[5] Howard v. Perrin, 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. Rep. 195; affirming *Id.*, 8 Ariz. 347, 76 Pac. Rep. 460.

ance of the evidence and to prove by the facts of each particular case as to how these channels may become known.[6] Otherwise, the presumption that they are percolations will govern, and a different rule of law applies as to the rights which may be acquired thereto.[7]

There are a number of methods whereby subterranean waters may be proven to flow in well-defined channels and thus become known. Their courses may be distinctly traced by the topographical features of the country, and the geological character of the ground through which they flow;[8] also, by the trees, shrubs, bushes, and grasses which grow along their courses.[9] They may also be traced by a series of wells or borings,[10] or by the means of tunnels.[11] Evidence is also

6 Subterranean water is presumed to be percolating, and one who claims rights in such water as a flowing stream has the burden of showing its existence as a stream. Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Black v. Ballymena Comrs. Irr., L. R. 17 Eq. 459; Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933; Lybe's Appeal, 106 Pa. 626, 51 Am. Rep. 542; Collins v. Chartiers Val. etc. Co., 131 Pa. 143, 18 Atl. Rep. 1012, 6 L. R. A. 280, 17 Am. St. Rep. 791; *Id.*, 139 Pa. 111, 21 Atl. Rep. 147; Tampa W. Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Howard v. Perrin, 8 Ariz. 347, 76 Pac. Rep. 460; affirmed in 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. Rep. 195; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Pence v. Carney, 58 W. Va. 296, 52 S. E. Rep. 702, 6 L. R. A., N. S., 266, 112 Am. St. Rep. 963; Taylor v. Welch, 6 Ore. 198; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 746; Ocean Grove Camp Meeting Assn. v. Ashbury Park, 40 N. J. Eq. 447, 3 Atl. Rep. 168; Cole v. Bacon, 63 Cal. 571; Clarke County v. Mississippi Lum. Co., 80 Miss. 535, 31 So. Rep. 905.

7 For the rights to percolations, see Chap. 62, Secs. 1185-1211.

8 "The topography of the country and the situation of San Jose Creek, with the character of its bed, are alone almost sufficient to prove this fact." McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849.

See, also, Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Vineland Irr. Co. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, where it was held from the topographical and geological features that the water did not flow in an underground water course.

9 Hale v. McLea, 53 Cal. 578.

10 Yarwood v. West Los Angeles W. Co., 132 Cal. 204, 64 Pac. Rep. 275; Burroughs v. Satterlee, 67 Iowa 396, 25 N. W. Rep. 808, 56 Am. Rep. 350.

11 Cole etc. Co. v. Virginia etc. Co., 1 Sawy. 470, Fed. Cas. No. 2,989; Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; McClintock v. Hudson, 141 Cal. 257, 74 Pac. Rep. 849; Keeney v. Carillo, 2 N. M. 480.

admissible to prove this point upon the fact that material of some sort was placed in the stream above and appeared again in openings below;[12] so, also, that the color and character of the water is the same, and different from other water in the immediate neighborhood;[13] and, again, the sound of the water passing underneath the surface of the earth.[14] Evidence may also be admitted of the fact that by the sinking of a second well into the subterranean stream, the flow of the water of a prior well ceased;[15] again, where by the tapping of the underground flow by means of tunnels, springs dry up or their flow is diminished.[16]

As to the underflow of surface streams,[17] where water has once reached the banks of a stream and there disappears in the sands of the bed, the presumption is that such water augments the flow of the surface stream; and the burden of proving the contrary is upon the party claiming and diverting the water.[18] As was well said in a recent California case:[19] "With a creek bed as porous as this is conceded to be, no evidence is necessary to establish the fact that the taking of a substantial part of the underflow from the channel at any point on the stream would cause a corresponding diminution in the surface stream below. The law of gravitation would raise a presumption that it would operate to that effect. One who would establish the contrary would have the burden of proving conditions which would prevent such diminution."

12 Washington County Water Co. v. Garver, 91 Md. 398, 46 Atl. Rep. 979.

13 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Washington etc. Co. v. Garver, 91 Md. 398, 46 Atl. Rep. 979.

14 Black v. Ballymena Twp. Ir., L. R. 17 Eq. 459.

15 Burroughs v. Satterlee, 67 Iowa 396, 25 N. W. Rep. 808, 56 Am. Rep. 350.

16 Where the evidence shows and the trial Court finds that certain springs, which had for many years and uninterruptedly formed a portion of the water supply of a creek, the waters of which had been appropriated by the plaintiff, were in some instances diminished in flow, and in others dried up, after the running of defendants' tunnels, the conclusion is irresistible that the tunnels cut the underground channels of the springs; and this, too, although the channels of the springs are not traceable. Herriman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930. But see Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719, where the same waters were held to be percolations.

17 See Sec. 1162.

18 Platte Valley Irr. Co. v. Buckers, 25 Colo. 77, 53 Pac. Rep. 334; Howcroft v. Union etc. Co., 23 Utah 311, 71 Pac. Rep. 487; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

19 Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

CHAPTER 61.

ARTESIAN WATERS.

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§ 1183. Rights acquired and lost by estoppel.
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§ 1166. Scope of chapter.—In this chapter we will discuss the subject of artesian basins, artesian waters, and wells, and the general rights which may be acquired to such waters, and the regulations governing the same. Artesian waters belong in general to percolating waters, but to a distinct class of such waters. The distinguishing features are described in the following section.[1]

§ 1167. Artesian waters—In general.—Our second main class of subterranean waters are the artesian waters.[1] Underground water is derived from rain and melted snow, and passes underground in porous materials, such as sandstone, sand, and gravel. Some of the rain and melted snow is absorbed directly by such materials, but

1 See Sec. 1167.

1 See Sec. 1152.

much water passes underground by the sinking of surface streams in crossing the upturned edges of sandstone and other porous rock, or in passing over the sandy or gravelly beds. Many of the surface streams by this means lose a large portion of the volume of their flow, and the water thus absorbed seeps slowly through the rocks as their dip carries it to lower levels, until sometimes a great depth has been attained. Oftentimes the water is kept underground by a thick stratum of impervious shale or other rock overlying the porous strata through which the water has sunk, and thus artesian belts or basins are formed.

Artesian waters are, therefore, those waters which underlie the lower lands of a section of the country having seeped there through porous strata from upper levels, and which are kept down within their natural basins by the impervious shale or other rock overlying the saturated porous strata, but which, if tapped from above, will rise above the depth at which it is struck, and oftentimes above the surface of the earth.

The waters of subterranean basins, although technically percolating waters, differ materially from the ordinary percolations from the fact that they are kept down within their basins by the impervious stratum above, which, when tapped by wells, by their own pressure from above, are forced to the surface. Therefore, artesian waters stand in a class by themselves, and in this work they will be so treated.[2]

§ 1168. **Artesian belts, or basins.**—Artesian belts, or basins as they are sometimes called, are composed of those underground strata of gravel or loose, porous, water-bearing material, lying at a greater or less depth from the surface of the earth, and under stratum of an impermeable character, the edges of which are usually in distant hills or mountains, thus forming in the lower levels strata where water may settle under pressure, varying in accordance with the height of the edges of the strata, or source of water. The word "belt" is indefinite and refers simply to the region or section of the country where the above conditions may be found. A stratification is an essential characteristic of an artesian belt. These artesian belts or basins usually lie at a considerable depth from the surface of the earth, and before the expense incident to the drilling of the deep

2 See *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

wells necessary to tap them is incurred, it is desirable to give attention to at least two conditions: First, the conditions which render the obtaining of artesian water possible; and, second, the geology of the region where it is proposed to drill a well. The conditions requisite are not found in all sections of the country, but after a study of these questions by a competent man in reference to a given locality, one may predict with considerable confidence whether or not success is possible, and thereby at times save useless expense. In what is properly termed an artesian basin the layers of rock are bent downward, so as to resemble a pile of shallow plate-shaped dishes, placed one within another. One or more of the beds of rock are porous and allow the water, supplied by rain or the melting of snows on its upturned and exposed margin, to percolate into it. Above and below the water-charged layer are impervious strata of shale or other impervious rock, or closely textured beds of clay, which prevent the escape of the water in the layer between them. The leading conditions which characterize artesian basins may be reproduced on a small scale if one tin pan is placed within another and the two separated by a layer of sand and the spaces between the sand grains are filled with water. If a hole is drilled in the bottom of the uppermost pan, the water will rise from below and overflow, until the level of the water in each pan is the same.

The old prevalent idea that the waters supplying artesian wells came from vast subterranean channels, caverns, or lakes, in which the waters flow, has, by the investigations of the scientists, been long since abandoned. There is no longer any doubt upon the subject, and it is held that the courts may take judicial notice of the question of the source of supply of the waters of artesian wells.[1]

1 Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933, where it is said: "Were there any doubt of this conclusion from the evidence, scientific knowledge on the subject of the sources of artesian wells in general, and the artesian wells of Wisconsin in particular, is now so complete and certain as to leave no room for doubt, and of such facts courts may take judicial notice. It has long since become a matter of scientific knowledge that the ordinary artesian well derives its supply from a pervious stratum of rock imprisoned between two impervious strata of earth or rock, the water bearing stratum being inclined, and coming to the surface at some distant and higher point, called the 'intake,' where it receives the water, and that the water percolates with greater or less rapidity along and through the inclined stratum, obedient to the law of gravity, until it reaches some obstruction so as to be

The artesian conditions of many sections of this country have been carefully investigated by the Department of the Interior of the Government, under the division known as the United States Geological Survey, and much valuable information may be had from these reports. This is true both as to the conditions of certain specific localities where a survey has been actually made and also information as to the general conditions requisite for artesian basins, which information may be applied to localities where a survey has not been made.[2]

Under the terms of the National Reclamation Act,[3] the Secretary of the Interior was thereby instructed and directed to make examinations and surveys for and to locate and construct, as therein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress the results of such examinations and surveys. Much valuable information may therefore be obtained from the various reports of the Reclamation Service since its organization as to the results of these investigations.[4] Also, much valuable information may be acquired upon this subject from the investigations of the agricul-

imprisoned, in which event, if the stratum be pierced, water will rise in a tube by hydrostatic pressure, due to the greater height of the intake. The idea that there are vast subterranean channels or caverns, in which artesian waters flow like a river, has been long since abandoned."

2 For information upon this subject, see the following: The Requisite and Qualifying Conditions of Artesian Wells, by T. C. Chamberlain, Fifth Ann. Rep. U. S. Geol. Survey, 1885, pp. 125-173; General Principles Pertaining to Artesian Water, in A Geological Reconnoissance in Central Washington, by I. C. Russell, 1893, Water-Supply Paper No. 108, U. S. Geol. Survey; A Reconnoissance in Southeastern Washington, by Russell, 1897, Water-Supply Paper No. 4, *Id.*; Preliminary Report on Artesian Basins in Southwestern Idaho and Southeastern Oregon, by Russell, 1903, Water-Supply Paper No. 78; Underground Waters of Southeastern Kansas, by Erasmus Haworth, 1897, Water-Supply Paper No. 6; Geology and Underground Waters of South Dakota, by N. H. Darton, Water-Supply Paper No. 227, *Id.*

See, also, the many reports upon the subject of "Geology and Water Resources" of certain specified sections of the country, as contained in the Water-Supply Papers, by various Government experts.

3 Act of June 17, 1902, 7 Fed. Stat. Ann., 1905, p. 1098; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388, Sec. 2.

4 These reports can be had from the Secretary of the Interior, the Superintendent of Documents, or through some member of Congress.

tural colleges of the Western States; also from those made by the State engineers.[5]

§ 1169. Artesian wells—Origin and definitions.—Artesian wells derive their name from the word "artésién," after the town Artois, in France, from the notable occurrence of these wells in and near that town, and where this kind of a well was first sunk.[1]

Artesian wells are simply vertical perforations from the surface of the earth down through the impervious stratum and into the strata charged with water, together with the water itself, which is forced upward toward the surface by its own pressure. The term "artesian well," as commonly employed, signifies a well which overflows upon the surface. But this is not necessarily so. "In an artesian well the water sometimes rises to the surface and overflows, or it may be under sufficient pressure to form a fountain-like jet above the surface; in other cases the water rises some distance in the well, but fails to reach the surface. In all these instances the well is classed as artesian."[2] "Better usage, however, restricts it to those wells in which water is under sufficient pressure to cause it to rise notably above the depth at which it is struck, whether or not it overflows at the surface."[3] But the statutes of the various States are not inclined to use the technical definition given these wells by the scientists. The term "artesian well" is used in its more popu-

5 The reports of these investigations are usually obtainable from the agricultural colleges, or from the reports of the State engineers.

1 Andrews v. Cross, 8 Fed. Rep. 269, 19 Blatchf. 294.

2 I. C. Russell, in a Reconnoissance in Southeastern Washington, Water-Supply Paper No. 4, U. S. Geol. Survey.

The word "artesian" is sometimes used in reference to underground waters which, by reason of pressure, will rise to its natural level, though not to the surface of the ground, when the stratum in which it lies is pierced by a well. Burr v. Maclay etc. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 713.

See, also, *Ex parte* Elam, 6 Cal. 233, 91 Pac. Rep. 811, defining an artesian well as being an artificial opening in the ground through which water naturally flows from subterranean sources to the surface of the ground.

3 G. A. Waring in Geology and Water Resources of the Harney Basin of Oregon, 1909, Water-Supply Paper No. 231, U. S. Geol. Survey.

See, also, Ure's Dict. of Arts, Manufactures, and Mines, Sub., Artesian Wells; Hattiesburg Plumbing Co. v. Carmichael, 80 Miss. 66, 31 So. Rep. 536, holding that the word "artesian" is one of equivocal significance; Andrews v. Carman, 1 Fed. Cas. 868, 13 Bl. 307, 2 B. & A. 277; Foster v. City of Joliet, 27 Fed. Rep. 899.

lar sense. In Colorado, by statute, an "artesian well" is defined for the purpose of the Act as applying to any artificial well the waters of which, if properly cased, will flow continuously over the natural surface of the ground adjacent to such well at any season of the year.[4] The primary definition of the dictionaries of the term also indicates a well from which the water flows naturally to the surface of the earth without any artificial pressure. In other words, it is a flowing well.[5] As the rights which may be acquired to the waters of these wells are the same in either case, whether the water rises and flows over the surface from its own pressure or whether it rises only a portion of the way to the surface, and from that point has to be pumped to the surface, we will not confine our discussion to either class. These waters all lie below the impervious strata, and upon being tapped rise either to the top of the well or a considerable distance toward the top. As was said in a recent California case, where several plaintiffs were the owners of separate tracts of land situated over an artesian basin, on which each had been accustomed to use the waters of the basin: "'Some of them obtain the water by means of pumps, or artesian wells, and others by means of diversions from natural streams forced to the surface from subterranean strata within the basin by the pressure of the water from the higher lands surrounding it.'"[6]

The waters of artesian basins are easily distinguishable from the ordinary percolations from the fact that they are always found below the impervious strata and are under pressure, while the ordinary percolating waters lie above the impervious strata and are under no pressure.[7] In fact, the cause of the water of many artesian wells not overflowing the surface is due to the lack of or improper casing. The water rising in these wells above the im-

[4] Mills' Ann. Stat. Colo., 1891, Sec. 164.

See, also, for the various statutes, Part XIV.

See, also, California Act of March 6, 1907, Cal. Stat., 1907, p. 122, Chap. 101; and the case of *Ex parte* Elam, 6 Cal. 233, 91 Pac. Rep. 811, construing the Act and distinguishing artesian wells naturally flowing to the surface and those requiring pumping.

[5] Webster's Dict.: "Artesian wells, wells made by boring into the earth till the instrument reaches the water, which, from internal pressure, flows spontaneously like a fountain. They are usually of small diameter and of great depth. Brande."

[6] Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

[7] For percolating waters, see Secs. 1185-1211.

pervious strata comes to strata which is porous and seeps away through the ground before it reaches the top.

With the definitions and illustrations given in this and the preceding sections,[8] it will be easier to understand the rules of law provided by the statutes and the courts governing artesian waters when we come to that discussion.[9]

§ 1170. **The use and value of artesian waters.**—In certain portions of this country, at a distance from other sources of water supply, where the conditions are such that artesian wells may be successfully sunk, the use of artesian water is of almost inestimable value. On account of the ease with which it is brought to the surface and made to run over the ground, this is especially true of the waters of flowing artesian wells. In fact, the land in many instances would be practically worthless and entirely uninhabitable were it not for the waters from this source. For example, take some of the lands in South Dakota, Southeastern Washington, Southern Oregon, and the lands of many of the valleys within the Rocky Mountains, where many of these wells are found. An extreme example of the reclamation of lands by this means is that of the Great Sahara Desert, portions of whose sandy wastes have been brought under cultivation and made to produce crops by the use of the waters from artesian wells.[1]

In general, however, the water from artesian wells is not so desirable for irrigation as is the waters from rivers and creeks. This is due to the fact that the water from the latter usually contains a large amount of silt, which serves to enrich the land and prevent loss of fertility. Artesian water, upon the other hand, is almost always clear, although it sometimes carries a quantity of mineral salts in solution. Their waters range from those nearly as soft as rain water to the strongest brine. Other minerals, such as sulphur or lime, are also at times found. But, in spite of these facts, there are many wells the water of which may be used for irrigation, culinary and other domestic or beneficial purposes, and thousands of acres of land throughout this Western country have been reclaimed and made productive and made to produce crops, where

8 See Secs. 1167, 1168.

9 For rights to artesian waters, see Secs. 1173-1183.

1 See Sec. 163.

without the use of this water they would have remained unsettled and uninhabitable, and still a part of the public domain, valuable only for the scanty pasturage which they afforded. Again, in many parts of the country, in sections where there are surface streams, there are to be found artesian basins, and water has been obtained from them by the means of these wells. This water serves to help out the surface supply, which, in many instances, is scanty. There is usually more land which might be irrigated within the arid region than there is water to irrigate it. Therefore, any additional supply from artesian sources can always be utilized.

There is another advantage to the farmer in the use of this water, and that is the ownership of his own source of supply, instead of having to depend upon the water, ditches, and canals owned by others, as is oftentimes the case. Again, after a good flowing artesian well has been once sunk, the expense of keeping it in condition is trifling, as compared with the cost of ditch repairs, water rental, and other expenses incident to the appropriation of water from the surface streams.

§ 1171. **The conservation of artesian waters.**—The waters of artesian basins are not inexhaustible. It has been found from experience that where many wells which have tapped the same basin have been permitted to run continually for a considerable period of time, the flow of some of the wells would stop entirely and that of others would be materially lessened. If an artesian basin is perforated by a number of wells the water in the basin is gradually lowered, and, therefore, the pressure upon the water discharged by the wells is lessened. And unless the supply of the water which finds its way into the basin is equal to, or more than equal to, the water flowing from the wells, this process is carried on until the rim of the water sinks below the surface of the earth or the opening of the wells, when the natural discharge will cease entirely. Of course, the more wells that there are tapping the basin, the quicker will be the reduction of the pressure and the failure of the wells. Therefore, it is even of more importance that the waters of these basins should be conserved and not wasted than it is that the waters of surface streams should be used economically and without waste.[1]

[1] For the economical use of water and the prevention of waste, see Secs. 874-916.

The water of surface streams, even if wasted one year, are replenished by the precipitation during the fall, winter, and spring for the next season. While, upon the other hand, it may take years to replenish the waters of an artesian basin, depending as it does upon the slow seepage of water through miles of porous strata.

This loss of water from artesian basins may in a measure be obviated to a great extent; but the loss is by no means entirely after the wells have been constructed by permitting them to flow continually, but it enters into the construction of the wells themselves. There are three principal restrictions which have been adopted by statutory law in the most of the States where artesian basins are common, and these restrictions should be adopted in all others.

First—Every drill hole in an artesian basin should be properly cased. By this is meant that an iron casing or tube should line the drill hole and be made sufficiently tight to prevent the water from rising outside of it or leaking through. This is accomplished in the following manner: As the hole is made the iron pipe for the casing is passed down, more or less closely following the bit. The pipe is lowered or gently forced down length upon length, each new length being screwed tightly into the coupling of the preceding one, until the water is reached. The lower end of the casing should be just above the water-bearing stratum. The reason why the owner of a well should be required by law to properly case it is that the lateral escape of the water may be prevented. The escape of water from an artesian basin in excess of the natural overflow results in a decrease in pressure on the portion of the water remaining within the casing, and consequently a lowering of the artesian head. Therefore, in arid regions especially, the sources of supply of an artesian basin may be small, and the question of economically using the water it contains and maintaining the artesian head are not only matters of interest to the owner of the well, but are matters of public concern.

Second—Every artesian well, when not in use, should be securely closed. The principal reason why a law to this effect should be enacted and enforced is that the waters of an artesian basin are not an inexhaustible supply. At best it is but a reservoir, and when the water is once drawn off the supply is exhausted, at least until considerable time has elapsed for the reservoir to again fill. Therefore, every practical means should be employed by law for the conserva-

tion of this supply and its legitimate use. There may be exceptional cases when it would not be wise to close an artesian well absolutely tight, as in cases where the well throws sand or other material. This can be obviated, however, by not completely shutting it off, but allowing a small stream to flow.

Third—Every abandoned drill hole in an artesian basin should be completely filled with impervious material. A desirable way in which to do this is to fill the hole slowly with moist clay and ram it down with a heavy, blunt tool. The most effective way, however, is to fill the hole with Portland cement. The object of this filling of abandoned holes is in order that leakage may be prevented. In many wells of this nature the water rises some distance toward the surface, but does not overflow the surface, and because of this the wells are abandoned, usually after the casing has been drawn, if any was used. The water, therefore, rising in the wells above the impervious stratum which confines it, comes to strata of porous material or fissures in the earth, and thus either seeps or drains away. This, as can be readily seen, reduces the artesian pressure and at the same time no benefit to any one has been derived.

In many of the States of the West laws have been enacted providing for these restrictions, and for severe penalties in case of their violation.[2] Some of the States, however, have been negligent in failing to pass such laws, and others, after passing them, have failed to enforce them. The above rules are not only the result of scientific investigations, but also are based upon actual experience with the waters of artesian basins, and by their strict enforcement much of the waters may not only be conserved for present use, but the life of the artesian water of the basins will be greatly prolonged.

Having sufficiently discussed the natural laws governing artesian basins, their waters, and wells, we will now discuss the laws of man upon the subject.[3]

§ 1172. Power of the legislature to regulate the use of the water from artesian wells.—From experience it has been ascertained that the waters of artesian basins, like the waters of other basins, are not inexhaustible. They are originally the accumulation of the percolations of many years.[1] Where the porous strata has

2 For the laws of the various States, see Part XIV.

3 See Secs. 1172-1184.

1 See Secs. 1167-1169.

been tapped by wells of a sufficient number and capacity that the flow exceeds the supply from the percolations, there can be but one result, and that is that eventually the artesian pressure will be decreased as the water in the rim of the basin gets lower and lower. This may be noticed by the decrease in the flow from the wells as the water gets lower and lower, the flow from the surface may entirely cease, until the basin is again replenished from the percolations. It stands to reason, therefore, that it is even more necessary to conserve the supply of artesian basins than it is to conserve the supply from surface streams, which is replenished each year by the annual precipitation; while, upon the other hand, the supply of an artesian basin may not be replenished for a number of years, so that its water will again overflow from the wells tapping it. However, by the conservation of their supply they may be made to last for long periods of time. And by regulating the amount of water which may be drawn off and keeping it down to within the amount of the supply from the percolations from the lands above, these basins may be made to be practically inexhaustible. This is exactly what the legislature of a number of the States have attempted to do.[2]

We will now discuss the power of a State legislature to regulate the flow from artesian wells.

Artesian basins and the waters percolating through them, lying as they do under large tracts of land sometimes owned by many owners, belong to all of these owners, and to each of them, according to their respective holdings.[3] And as drawing off the waters of these basins draws the waters from the lands of all the owners, it is a matter of public concern, at least to the community directly interested in these basins and their waters, that these waters be conserved. It is also a matter of public interest to the public at large and to the State where found, that these waters be not wasted and that they be only used "as may be necessary for some useful purpose in connection with the land from which they are taken."[4] Also, whenever one land owner exceeds this reasonable use, and

2 See, also, for the laws of the various States upon the subject, Part XIV.

3 For artesian waters and basins, see Secs. 1167-1171.

4 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

either allows the water from artesian wells to run to waste when the same is not needed, or actually uses even for a beneficial use or purpose, more water than he is justly entitled to under his holdings over the basin, he is appropriating to himself that which belongs to others, who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its reasonable enjoyment by all the owners thereof. These acts, therefore, apply to the waters of artesian basins, the right to the use of which is common to a large portion of the community, and affect the general public. These waters do not belong to a single land owner, even if he has the only wells tapping the basin; but, again, whatever right one has, even to his own, is subject to that well-established principle of law, that his use shall not be injurious to the rights of others or to the rights of the general public. It therefore follows that the use of property which is common to all owners over an artesian basin is, to a much greater extent, a matter of public concern than the use of property by an absolute individual owner of the same. It therefore follows that a State legislature has the power to enact laws regulating the use of the waters of these artesian basins and preventing waste thereof, and such legislation affects the public welfare and comes under the police power of a State, which is "the power to make laws to secure the comfort, convenience, peace, and health of the community."[5] It may therefore be regarded as the settled law that all property is held subject to the exercise of police power, and that the provisions of the Constitutions declaring that property shall not be taken without due process of law have no application in such cases. The substances of gas and oil lie in similar basins to those containing artesian water; in fact, in the sinking of artesian wells sometimes one substance is struck and sometimes another.[6] Therefore, legislation restricting the wasting and use of gas and oil is strictly analogous to legislation restricting the wasting and use of artesian water. And upon this subject it was held by the Supreme Court of the United States[7] that the re-

[5] *Ex parte* Whitwell, 98 Cal. 79, 32 Pac. Rep. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152.

See, also, *Ex parte* Drexel, 147 Cal. 766, 82 Pac. Rep. 429, 2 L. R. A., N. S., 588.

[6] See De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001, where in sinking for oil a flow of water was struck.

[7] Ohio Oil Co. v. State of Indiana, 177 U. S. 190, 44 L. Ed. 729, 20

striction on the waste of gas and oil by the owners of land overlying the oil-bearing strata was not the taking of the private property of the owners of land without adequate compensation and therefore without due process of law, since the owner of the surface has no property right in the gas or oil until he has actually reduced it to possession; or, if he has any property right therein, it is a right in common with the coequal rights of other land owners to take from the common source of supply, and, therefore, subject to the legislative power to prevent the destruction of the common property by one of the common owners. This case was followed in an exceedingly well-argued case decided recently by the California Court of Appeals relating to artesian waters,[8] where it was held that one land owner has no right to extract artesian water from a common basin underlying the lands of others in excess of a reasonable and beneficial use on the land from which it was extracted, and, therefore, the Act of the legislature of March 6, 1907,[9] declaring an artesian well not provided with appliances for preventing the flow of the water therefrom to be a nuisance and prohibiting the wasting of these waters, and providing penalties for its violation, did not deprive him of his property without due process of law, and that the Act in question was within the police powers of the State to enact and enforce. It is true that the Supreme Court of Wisconsin held exactly to the contrary in the case of Huber v. Merkel,[10] where it was held that the police power of a State does not justify legislation prohibiting the waste of water from artesian wells where sunk by a land owner upon his lands, but that such owner can use the water flowing therefrom to any extent, or he may allow it to run to waste, regardless of the effect upon his neighbors' wells or lands, and that, too, even in a case where it was done maliciously. But, fortunately, whatever was the old rule upon the subject, that case, as we have said,[11] while it may govern artesian waters in the State of Wisconsin until it is overruled, or until the Supreme Court of the United States decides the question, is not the law, or, at best, it is "bad law." As we shall discuss in the following sections the law

Sup. Ct. Rep. 576, 30 Morr. Min. Rep. 466; affirming *Id.*, 150 Ind. 698, 50 N. E. Rep. 1125.

[8] *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

[9] Cal. Stat., p. 122, Chap. 101.

[10] 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933.

[11] For further discussion of this case, see Sec. 1175.

of correlative rights in and to the waters of artesian basins has, during the more recent years, been adopted as the law upon the subject in most jurisdictions, and is the only just and equitable rule upon the subject.[12]

§ 1173. **Correlative rights to the waters of artesian basins—Origin and cause of the doctrine.**—Although the waters of artesian basins are, in the main, treated as percolations,[1] and under the early common law rule were considered a part of the soil where found, and belonged to the owner of the soil, there are some important rules under the more modern authorities governing the drawing off and the use of these artesian waters which must be observed. If these waters, like the earth under which they flow or percolate, remained perfectly stationary, and the same were in fact a part and parcel thereof, there would be no question as to the right of the owner of the land to draw off the water to any extent, to use or to waste it, as he saw fit, as his own individual property, the same as he might take out the mineral, rock, beds of clay, or the earth itself. And as long as he drew off only such water as was within his own lines, he could not be prevented from taking out any portion or all of the water within them. But, unfortunately for this rule, water never remains stationary, fixed, or immovable while in the ground. As was said in a recent Minnesota case: "While water is defined to be a mineral, the rules of law as to its use must logically vary from those applicable to coal, ore, and the like. Water is a fluid, and mobile, 'a fugitive.' Coal and ores have a fixed and permanent place."[2] Water is constantly seeking its level, and hence it follows that for a land owner to draw off unlimited quantities of the artesian waters from his lands not only takes the supply from his own lands, but also draws from the lands of his neighbors. His boundary line fences do not extend downward as impervious subterranean dams and thereby keep the underground waters from flowing or percolating from his lands under those of his neighbors, or the waters from the lands of his neighbors from flowing or percolating under his

12 See Secs. 1173, 1174.

1 For rights to percolating waters, see Chap. 62, Secs. 1185-1211.

2 Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1050, 10 Am. & Eng. Ann. Cas. 843; *Id.*, 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

lands. Neither are there imaginary vertical planes drawn from his surface lines downward, as is the case where there is ore, coal, or other solid material in question, to which he may go in their extraction, but no further. But from the very nature of the element and its movements underground when he draws upon his own supply he also draws upon the supply in the lands adjoining his. Hence the early common law rule, as laid down by the English authorities, and even by some of the American cases, that all underground waters not flowing in defined and known channels[3] belong to the soil, and that the owner of the land may draw them off at pleasure, though in so doing he may entirely drain such waters from the lands of adjacent or neighboring owners to or from which they would necessarily pass, has, in most jurisdictions in this country, been modified and given way to the more equitable rule of the correlative rights of all the owners of the lands under or through which these waters find their way.[4] And although this rule applies to all percolating waters, except what are known as diffused percolations,[5] it is especially true in the case of the waters of artesian basins, where they flow through all the lands of their respective owners through the same porous strata, and where the tapping of these strata by the means of artesian wells will draw upon the entire supply. In the following section we will discuss more at length the correlative rights to the waters of artesian basins and the limitations to the use of these waters.[6]

In another chapter of this part we will discuss the correlative rights to the use of other percolations, not strictly connected with artesian basins.[7]

§ 1174. Correlative rights to the waters of artesian basins—Definition—Limitations to use.—The doctrine of the correlative

3 For the rights to these waters, see Secs. 1155, 1188-1190.

4 For the reason of this change, see the well considered cases of Pence v. Carney, 58 W. Va. 296, 52 S. E. Rep. 702, 6 L. R. A., N. S., 266, 112 Am. St. Rep. 963; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1050, 10 Am. & Eng. Ann. Cas. 843, 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

5 For the correlative rights to percolating waters, see Secs. 1198-1200.

6 See Sec. 1174.

7 See Chap. 61, Sec. 1166.

rights to the use of the subterranean or underground waters, whose channels are unknown or undefined, is that doctrine which modifies the common law maxim of *cujus est solum, ejus est usque ad infernos,* or "he who owns the soil owns it to the lowest depths below," by the maxim of the civil law of *sic utere tuo ut alienum non laedas,* or, "so use your own as not to injure another's property." The *cujus est solum,* etc., doctrine as modified relative to these waters means in effect that, although you may be the owner of the soil and everything in it to the lowest depths, you must so use these subterranean waters found in your own land that the use will not injure the rights or property of another. And although this modified maxim or rule of law applies to other percolating waters than the ones now under discussion,[1] it applies with special force to the waters of artesian basins for the reason that the porous strata wherein these waters are found usually underlie large areas of country, and the tapping of which by artesian wells will draw the waters from the lands of many owners. And, although even the modern authorities are by no means unanimous in the adoption of this modified rule, we are of the opinion that it is the only just and equitable one. And, therefore, the rule should be applied to all cases where it is known that by the flow of artesian wells naturally overflowing the surface, or the pumping of water in considerable quantities from wells on the lands of one person it draws from or prevents it from percolating to the lands of others, to their injury. And this rule of correlative rights has been adopted as the rule of law governing the waters of artesian basins in many States.[2] As there are no riparian rights

[1] For correlative rights to percolating waters, see Secs. 1198-1200.

[2] The law of correlative rights applies to the use by adjoining land owners of waters drawn from an artesian basin. Such proprietors must so use their wells as to not unreasonably injure their neighbors. Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1050, 10 Am. & Eng. Ann. Cas. 843; *Id.,* 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

The use of water from a flowing well for usual domestic purposes can not lawfully be impaired by pumping from another well which reaches the same subterranean stream for a city water supply. Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124.

Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, where it was held that where a tract of land is saturated below the surface by water percolating from the mountain slopes to the valley, and is held under an impervious stratum of earth, so that, when the latter is per-

in and to these artesian basins, the common rules governing the waters of surface streams and those of defined and known subterranean streams do not apply.[3] Neither should the rules of the law of appropriation of waters apply as to priority of right, exclusive use, etc., for the reason that these waters are not visible, and neither do they flow in defined and known subterranean streams. They are discoverable usually only by deep exploitation, and the owner of the land might be in possession of the same for many years before he became aware of the fact that there were artesian waters under his land. And, therefore, if the rule of priority governed as to these waters, they might be all exhausted by another before the owner of the land was aware of the fact that a portion of them came from his lands.

§ 1175. Correlative rights not the rule in all jurisdictions.—But the correlative rights to the use of waters of artesian basins, as

forated, the pressure from above causes artesian wells, the owner of a portion of the tract of land so saturated can not remove the water from the wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment.

See, also, the recent case of Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A. 772, where it was held that the rights of owners of land overlying a water-bearing artesian stratum to withdraw and use the waters are correlative, so that one owner may not divert such waters for sale elsewhere to the injury of others, and that an injunction would be granted to prevent the same.

See, also, an analogous case relating to oil and gas wells of Ohio Oil Co. v. State of Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 30 Morr. Min. Rep. 466; affirming *Id.*, 150 Ind. 698, 50 N. E. Rep. 1125, in which it was held that the right to gas or oil is a right in common with the co-equal right of other land owners to take from the common source of supply.

See, also, Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Forbell v. New York, 164 N. Y. 522, 58 N. E. Rep. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; affirming *Id.*, 47 App. Div. 371, 61 N. Y. Supp. 1005; *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331, where it was held, relative to the waters of artesian basins, that the doctrine of correlative rights was a change in the law, so that a clear case must be made thereunder to justify an injunction to prevent a continuance of the use of such waters, taken in good faith before such doctrine was enunciated, and which use was in full operation at that time.

3 That there are no riparian rights to artesian basins, see Sec. 1176.

treated in the preceding sections, is not the rule of law adopted by all jurisdictions in this country, even by the more modern authorities.[1] Some of the States still follow the English rule and classify all subterranean waters into but two classes; that is, those flowing in channels defined and known, and those flowing in channels undefined and unknown, all of which are treated as mere percolations, and therefore a part of the very soil itself, belonging to the owner of the land where they are found. In view of the fact that these waters of artesian basins,[2] as determined beyond all question by scientific investigations, underlie great areas of land, and the flow of a well sunk upon the land of one owner draws its supply from the lands of all owners of the basin, the determined adherence of some of the courts to the old English rule that one land owner has a right to sink an artesian well on his land and use the water therefrom as he chooses, or allow it to flow away regardless of the effect of such use upon his neighbors' wells or land, even with malicious intent, is not only against the great weight of authority in this country, against sound reason and justice, but also is against the common law in adapting itself to varying conditions and circumstances. Yet this is exactly what some of our courts have done in their more recent decisions, as will be seen from our note.[3] Again,

1 For the correlative rights to artesian waters, see Secs. 1173, 1174.

For correlative rights to percolating waters, see Secs. 1198-1200.

2 See Secs. 1167, 1168.

3 In Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933, decided in 1903, the Court held that a land owner had a right to sink a well on his premises and use the water thereof as he chooses, or allow it to flow away regardless of the effect of such use upon his neighbors' wells; and such right is not affected by malicious intent, and that, too, where the Court had full knowledge of the source of supply of the waters of artesian basins, as is stated in the argument and indicated by the following expression: "Thus in the present case both evidence and well established scientific knowledge agree as to the source of the water supply of the wells in question." The Court, to be sure, cited the first edition of this work, Section 48, but the expression used referred only to the early common law classification; and then, the case of Katz v. Walkinshaw had not been decided at the time the section was written.

Of the decision in the above case an eminent law writer upon the subject says: "There is absolutely no principle on which that decision can be founded. It is opposed to good morals, good sense, and all common law principles which are applicable to analogous subjects, and the later and better considered cases are beginning to recognize correlative rights in percolating waters and confine land own-

where the common law can not be made to adapt itself to different conditions and circumstances from those existing in England, where it originated, as we have discussed in a previous portion of this work, it may be abrogated as to any particular condition where by its strict application injustice would be worked, even where it has been adopted as the law of that jurisdiction. As was said by the Court in the leading case upon this subject, and in regard to these waters: "An ordinary difference in the conditions would scarcely justify the refusal to adopt a rule of the common law, or one which has been so generally supposed to exist; but where the differences are so radical, as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative."[4] Again, in the State of Minnesota, where theretofore no other law was recognized governing the waters within that jurisdiction other than the

ers to a reasonable use of it." Farnham on Waters and Water Rights, Sec. 938, p. 2718.

"The merits of that opinion justify little more than reference to it." Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1050.

In a case decided by the Texas Supreme Court, the Court held the same with the exception of the question of malice. See Houston etc. R. Co. v. East, 98 Tex. 146, 81 S. W. Rep. 279, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827. Of this case the same authority, Mr. Farnham, in the note to the L. R. A. report, says: "The above case is not only opposed to the trend of the modern decisions upon the subject of subterranean waters, but it would also seem to be opposed to equity, justice, and sound reason. There is no doubt but that the exhaustion of the subterranean water from a tract of land will not only destroy the wells, but render the land sterile and unproductive, and any system of reasoning which will authorize the unreasonable use of a parcel of land within the tract, such as the use of the railroad company in this case was found to be, by removing therefrom great and unusual quantities of water so as to materially depreciate the value of the remaining tract, must be unsound, and require careful revision."

See, also, Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; Stoner v. Patten, 132 Ga. 178, 63 S. E. Rep. 897.

"The water is a part of the land so long as it is on the land or in it, and it was definitely granted by the appellant's grantor." Charon v. Clark, 50 Wash. 191, 96 Pac. Rep. 1040, 17 L. R. A., N. S., 647, 126 Am. St. Rep. 896.

[4] Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

NOTE.—It is interesting to see how the Court of California has repudiated the common law as to the rights to subterranean waters, and at the same time adhered so strenuously to the common law of riparian rights to surfact streams, a law abrogated by the most of the Western States.

rules of the common law, the rule of the correlative rights of the waters of artesian basins was adopted in a leading and most well-considered case; and in the opinion the Court said: "Nothing is better settled than that the fundamental principles of right and justice, on which the common law is founded, and which its administration is intended to promote, require that a different rule should be adopted whenever it is found that, owing to the physical features and character of a State, and the peculiarities of its climate, soil, products, and water supply, the application of a common law rule tends constantly to cause injustice and wrong, rather than the administration of justice and right."[5] And, furthermore, under our system of law, in time right and justice are bound to prevail. Therefore, before many years go by we look for an overruling of the Wisconsin and Texas cases cited in our notes, and the adoption of the rule of correlative rights governing the waters of artesian basins and all percolating waters, except what are known as diffused percolation,[6] as the only just and equitable rule upon the subject.

§ 1176. No riparian rights to artesian basins.—As we have stated before, under the common law subterranean waters are divided into two classes: Those whose channels are defined and known, and those whose channels are undefined and unknown.[1] The latter included all percolations, which also included the waters of artesian basins. We have also discussed the rights which can be acquired in and to the waters of defined and known subterranean streams,[2] and the rights to the undefined and unknown streams, or percolations, both at common law and under the Arid Region Doctrine of appropriation, will be discussed when we come to the subject of percolating waters.[3]

Under the common law there are no riparian rights recognized to artesian basins or to the waters percolating therein, such as are recognized and enforced to surface water courses and their waters. In the leading case deciding this question it was held that water percolating from the mountain slopes to the valley, where it reaches

5 Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1250, 10 Am. & Eng. Ann. Cas. 843; *Id.*, 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

6 See Secs. 1188-1190.

For the correlative rights to percolating waters, see Secs. 1198-1200.

1 See Sec. 1155.

2 See Secs. 1156-1163.

3 See Chap. 62, Secs. 1185-1211.

an impervious barrier and is held under an impervious stratum of earth so that when the latter is perforated the pressure from above causes artesian wells, can not be regarded as a water course so as to confer riparian rights upon the owners of the surface.[4]

The waters of these artesian basins, although they are in a way percolating, being held under an impervious stratum of clay or rock and under pressure of itself from above,[5] legally must be treated as a class by themselves. They differ from the ordinary percolations in that they are above the impervious stratum and are under no pressure.[6] There is also a distinction between wells having a natural flow and those not so constituted. It is, therefore, obvious that different legislation and laws are required peculiar to those waters and wells from those of the ordinary percolations.[7]

§ 1177. The appropriation of waters from artesian basins under public lands.—While the artesian waters still remain in their natural artesian basins underlying the public lands of the United States, undiscovered and untapped, no valid appropriation can be instituted of them which will in anywise affect the title to the lands afterwards acquired from the Government by private individuals or others.[1] It is only after the wells have been sunk and the waters rise to the surface of the earth and form a stream, the same as though they flowed from natural springs, that a valid appropriation can be made of them and finally consummated.[2] In other words,

4 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1250, 10 Am. & Eng. Ann. Cas. 843; *Id.*, 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

5 For artesian waters, see Secs. 1167, 1168.

For rights to these waters, see Secs. 1173-1175.

6 For percolating waters, see Chap. 62, Secs. 1185-1211.

7 For the rights to percolating waters, see Chap. 62, Secs. 1185-1211.

"It is obvious that different legislation is required peculiar to those whose lands are so situated with reference to the artesian supply that a natural flow results from a penetration into the subterranean reservoir. The distinction between wells having a natural flow and those not so constituted as natural, reasonably indicates the necessity or propriety of legislation restricting the former class." *Ex parte* Elam, 6 Cal. 233, 91 Pac. Rep. 811.

1 For the acquisition of lands from the Government, see Chap. 20, Secs. 408-449.

2 For the appropriation of water from springs, see Secs. 648, 1195.

a stream of water must be discovered and must be produced, and in this respect it makes no difference whether the aperture or opening through which it flows is the result of Nature's forces or the result of the sinking of artesian wells by artificial means. When, however, a stream of unappropriated water flows from an artesian well having its location upon occupied Government land, it is the subject of a valid appropriation to the same extent as the waters of a natural spring likewise located,[3] under the Acts of Congress of 1866 and 1870,[4] where the right of appropriation of water is recognized by the local customs, laws, and decisions of the courts. The appropriator takes the water at the starting point; that is to say, at the mouth of the well, and if after the right of the appropriation has once vested the Government sells the land upon which the artesian wells are situated, the purchaser takes it subject to the rights acquired by the appropriator, both as to the water flowing from the wells and the right of way for the necessary ditches used in connection therewith.[5] Therefore, while the land is still a part of the public domain the posting of a valid notice of appropriation of the waters of certain wells sunk thereon and abandoned by the parties sinking the same, by another person, followed up with reasonable diligence in the construction of the ditches for the conducting of the waters to the place of use, constitutes a valid appropriation of the waters flowing from the wells, together with the necessary rights of way. The water in question being the stream issuing from the surface of the earth, it is immaterial whether this stream is supplied by water percolating and filtering through the earth or not, after it has gathered into a stream and flows over the surface of the

3 For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the appropriation of water, see Chap. 38, Secs. 706-732.

4 See Secs. 611-619.

5 De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; but see the criticism of the ruling in this case in jurisdiction where the rule of correlative rights to the use of these waters has been adopted, Sec. 1178.

Where one enters land under the desert land laws on which is situated a spring and an old artesian well which was constructed prior to the entry of the land, and the water was originally used for watering stock, and the person who made the well afterward sold his interest in the same to the entryman, and she made application of the water to irrigate the land on said entry, it was held that her appropriation was as valid as though she had made application to the State Engineer for a permit to appropriate the same. Youngs v. Reagan, 20 Idaho 275, 118 Pac. Rep. 499

earth.[6] And if the land is filed upon by a homestead entryman after the rights of an appropriator have once vested, he takes the lands subject to the vested rights of the appropriator. And, furthermore, where the entryman capped the wells and enjoined the appropriator from completing his ditches, the entryman is estopped to deny that the appropriator had prosecuted the work with sufficient diligence to acquire the rights by a valid appropriation.[7] But after the land has been once entered as a homestead, the appropriator, by virtue of his prior appropriation is entitled to enter the land only to avail himself of the water flowing from such wells as supplied a stream of running water, legally appropriated by him before such entry. He can not enter the land for the purpose of developing water by boring additional wells.[8] The rights of such an appropriator are subject, however, to the rights of all the land owners whose lands overlie the same artesian basin.[9]

§ 1178. Correlative rights—Doctrine of appropriation.—Each State has the right to adopt whatever rule of law it may see fit governing both the surface and subterranean waters within its jurisdiction.[1] Therefore a State has the right to either adopt the rule of correlative rights to the waters of artesian basins or other percolating waters,[2] or it may adopt the law known as the Arid Region Doctrine of appropriation.[3] But where the law of correlative rights as to the waters of artesian basins has once been adopted by a State, as the law governing those waters within that jurisdiction, the doctrine of appropriation can not also apply as to all of its features, for the reason that the right to the use of these waters under the two doctrines respectively are entirely different, especially upon the question of the exclusive use of the water based upon a priority of appropriation. As far as the rights of the United States are con-

6 "No distinction can be made between the water flowing from these artesian wells and that flowing from springs." De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

For the reasonable diligence in constructing works, see Secs. 733-741.

7 De Wolfskill v. Smith, *supra*.

8 De Wolfskill v. Smith, *supra*.

9 See next section, No. 1178.

See, also, Burr v. Maclay etc. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715.

1 See Sec. 593.

See, also, Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

2 For rights to percolating waters, see Chap. 62, Secs. 1186-1204.

3 For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

cerned, and as between appropriators who have sunk artesian wells on the public lands tapping artesian basins lying thereunder, and even as against the rights of those who have afterwards entered the lands and acquired title thereto from the United States, a State can undoubtedly adopt a law that a priority of appropriation gives a priority of right. Under this rule the appropriator will be entitled to the use of the entire flow of the water from the wells, and that, too, even if he drained the entire basin. But where a State has once adopted the law of correlative rights to the waters of artesian basins,[4] where one has sunk artesian wells on lands which were then a part of the public domain, these lands and the others lying over the same artesian basin, after they have passed into private ownership, are as much entitled to the use of the waters of the artesian basin as the lands of the one who sunk the wells. And while the one who sunk the wells on these lands would undoubtedly own the wells and be entitled to the use of his share of the waters from the same and the right of way over the lands for his ditches, when it comes to the amount of water which he may use, he can only use his share, having due regard to the rights of others owning lands overlying the same basin under the rule of correlative rights.

The California Court of Appeals, in the case of De Wolfskill v. Smith, decided in 1907,[5] held in effect that an appropriator of the waters of artesian wells sunk upon the public lands of the United States by virtue of his priority had the exclusive right to conduct the full flow of the wells to other and distant lands, regardless of the rights of the one who afterwards acquired title to the land upon which the wells were sunk and also of the rights of other owners of lands overlying the same artesian basin. The court of appeals in this case therefore disregarded the rule of correlative rights to these artesian waters, which rule had been adopted in the State of California in 1902 in the case of Katz v. Walkinshaw and reaffirmed by the Supreme Court of that State in many cases since.[6] This was upon the theory, however, that the water flowing from the well was the same as from a surface stream or spring, and not artesian waters. Upon this subject the Court said: "The law is well settled that

[4] See Secs. 1173-1175.

[5] 5 Cal. App. 175, 89 Pac. Rep. 1001. See, also, preceding section, No. 1177.

[6] Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. See, also, Secs. 1198-1200.

water flowing from springs upon the public lands of the United States is subject to appropriation, under Section 1410 of the Civil Code, which provides that 'The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.'[7] . . . The water in question here is the stream issuing from the wells, and it is immaterial, for the purposes of this decision, whether this stream is supplied by water percolating and filtering through the earth or not; at all events, it has gathered into a stream. No distinction can be made between the water flowing from these artesian wells and that flowing from springs. . . . When a stream of unappropriated water flows from an artesian well having its location upon unoccupied Government land, it is the subject of appropriation to the same extent as the waters of a natural spring likewise located." It seems to us that the Court of Appeals endeavored to draw a too fine distinction between "artesian waters" and waters flowing from an artesian well. The natural source of supply in either case is the artesian basin. Then, again, the Court was unfortunate in its comparison as to the water flowing from an artesian well—an artificial means of diversion—and that of a spring, a natural source of water supply. As well might the Court have said that the water might be appropriated from an artificial ditch or canal as from an artificial well. The artesian well was but the artificial means of the diversion of the water from the artesian basin.

In a later case, decided by the Supreme Court in 1908,[8] the question was presented as to whether or not, after an appropriator of water from common water-bearing strata has begun to take water therefrom to distant lands not situated over the artesian basin for use thereon, the owner of other overlying land, upon which he had never used the water, may invoke the aid of a court of equity to protect him in his right to thereafter use the water on his land, and thus prevent the appropriator from defeating the landowner's right or acquiring a paramount right by adverse use, or by lapse of time. The Court held that this might be done, and that the rights of the appropriator for use on distant lands are subject to the reasonable use by the owners of land overlying the same artesian basin. The Court also held that the rights of these owners were *analogous*

[7] 2 Kerr's Cyc. Codes, p. 1137.

[8] Burr v. Maclay etc. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715.

to the rights of the owners of land riparian to a surface stream who, by virtue of the situation of the lands with reference to the stream, are given rights to the waters thereof, having due regard to the rights of the other owners on the same stream, so far as necessary for the use on their lands, which rights are paramount to the right of one riparian owner to divert the waters to lands not riparian. In view of the adoption in that State of the rule of correlative rights, this is the only decision which could be made by the Court which would be equitable and just in the premises and consistent with the rights of the respective owners of land overlying the same artesian basin.

§ 1179. **Rights to, may be acquired how—Grants.**—As is the case of the waters of natural surface streams, the right to the use of waters of artesian basins is subject to grant,[1] and the right to their use may be lost by abandonment.[2] The right to their use may also be acquired by one party and correspondingly lost by another by prescription[3] or by estoppel.[4] The right to their use may also be acquired by virtue of the power of eminent domain.[5]

In the following sections we will discuss the acquisition and loss of the rights to these waters by the methods mentioned.

§ 1180. **The acquisition of rights by grant.**—The right to the use of waters may be acquired by a grant from the owner thereof; and, as is the case with other grants, the right of the grantee must be determined from the construction of the instrument alone where its terms are clear. Where, however, the terms of the instrument are ambiguous and uncertain, the intent of the parties may be determined from the instrument itself and the surrounding facts and circumstances. And if the granting instrument conveyed all of the artesian water within a certain tract of land, the grantor is liable

1 For the sale of water rights, see Secs. 994-1032.

2 For abandonment, see Secs. 1099-1117.

For abandonment of artesian waters, see Sec. 1181.

3 For rights by prescription, see Sec. 1182.

For right by prescription to artesian waters, see Sec. 1182.

4 For estoppel, see Sec. 1183.

For rights by estoppel, see Secs. 1121-1128.

5 For eminent domain, see Secs. 1059-1098, 1210.

For right by eminent domain to percolating waters, see Sec. 1210.

for subsequently diverting and intercepting it to the injury of the right of the grantee.[1] So, where the owner of an artesian well granted a perpetual flow to a certain amount of water therefrom, and then when the grantee was in possession and enjoyment of such flow of water he granted another party the land embracing the well, subject to all existing rights to take water therefrom, the last grantee can not be protected in his interference with the flow of the well under the principle applying, in the absence of contract, to the diversion of percolating subterranean waters.[2] This comes under the general rule that a grant of a thing without reservation will preclude the grantor, his heirs or assigns, from doing anything which will interfere with the enjoyment of the thing granted.[3]

Where an oil company bored three wells on the public domain in a vain search for oil, and after producing two artesian wells of water abandoned the land, it was held that a subsequent deed to the wells passed no title.[4]

In a recent case in California,[5] "a contract in terms granted all the water now flowing or hereafter to flow" from three wells on a certain five acres of land, and covenanting that the water flowing from the wells at the date of the contract was 110,000 gallons during each twenty-four hours. It was held by the Court that no specific quantity of water was mentioned or granted, but that the amount granted was all of the waters of the three wells "now flowing or hereafter to flow therefrom." The Court said: "What the grantor did convey was all the water flowing from the three wells, whatever that amount might be, with an accompanying agreement that he would endeavor to keep that flow up to 110,000 gallons by certain means to be taken by him for that purpose, and to the extent of one-third of the water obtained by such means; but this falls far short of a grant of a specific quantity of water."

1 Whitehead v. Parks, 27 L. J. Exch. N. S. 169, 2 Hurlst & N. 870.

2 Charon v. Clark, 50 Wash. 191, 96 Pac. Rep. 1040, 17 L. R. A., N. S., 647, 126 Am. St. Rep. 896.

3 Minard v. Currier, 67 Vt. 488, 32 Atl. Rep. 472; Charon v. Clark, 50 Wash. 191, 96 Pac. Rep. 1040, 17 L. R. A., N. S., 647, 126 Am. St. Rep. 896; Johnstown Cheese Mfg. Co. v. Veght, 69 N. Y. 16, 25 Am. Rep. 125; Davis v. Spalding, 157 Mass. 431, 32 N. E. Rep. 650, 19 L. R. A. 102; Pain v. Chandler, 134 N. Y. 385, 32 N. E. Rep. 18, 19 L. R. A. 99.

4 De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

See, also, Miller v. Crisman, 140 Cal. 440, 73 Pac. Rep. 1083, 74 Pac. Rep. 444.

5 Jones v. Van Nuys, —— Cal. ——, 118 Pac. Rep. 541.

§ 1181. **Rights to artesian waters and wells may be lost by abandonment.**—The right to the waters of artesian wells sunk upon the public domain may be lost by abandonment.[1] So, also, may the wells themselves be abandoned and so lost to those who sunk them. When this is the case the waters flowing from them may be appropriated by others, who take the proper steps to consummate their appropriation within a reasonable time.[2] The rights of an appropriator thus acquired, however, are subject to the rights of all of the owners of land overlying the same artesian basin in those jurisdictions where the law of correlative rights has been adopted as the rule of law governing the waters of artesian basins.[3]

§ 1182. **Rights acquired and lost by prescription.**—The right to the use of artesian waters from wells sunk on the lands of one land owner after notice to other land owners that thereby the waters of the general source of supply underlying their lands were being exhausted may be acquired by adverse user amounting to prescription.[1] Therefore, where wells were sunk and the waters from the same used for a period longer than the period required as a bar for the commencement of an action for the recovery of real property, and during this period the other land owners knew of the existence of the wells and also knew that by their flow the waters of the general supply of the artesian basin underlying their lands were being decreased, an action to prevent the flow from the wells will be barred.[2]

§ 1183. **Rights acquired and lost by estoppel.**—Again, where the facts warrant it, one may lose the right to the use of the waters

1 De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

For doctrine of abandonment, see Secs. 1099-1117.

2 For reasonable time, see Secs. 733-741.

3 See for rule of correlative rights, Secs. 1173-1178.

1 For prescriptive rights to the use of water, see Chap. 54, Secs. 1033-1058.

2 "These wells were sunk more than five years before the action was begun. The evidence shows that the plaintiff knew of such use and knew that the flow in the creek immediately decreased. By reasonable inquiry she could have ascertained that the decrease was caused by the wells. Under these circumstances the action is clearly barred." Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, Burr v. Maclay W. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715.

from an artesian basin by estoppel.[1] Or, to state the case differently, a land owner whose lands overlie an artesian basin, who has stood by while a development of the waters of the basin was being made by others for a public use, by the means of artesian wells, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it will affect injuriously his own water supply, will be estopped from enjoining the continued use of such wells, and he will be left to his action for such damages as he can prove that he has sustained by such operations.[2]

§ 1184. **Contracts to sink artesian wells.**—The general rules of the law of contracts also apply to contracts for the sinking of artesian wells; but the conditions to be complied with in these contracts are at times so peculiar that it has frequently happened that the parties have had to resort to the courts to obtain a construction as to what was the true intent of the parties. It therefore follows that these contracts should be drawn as carefully as possible, and that the true intent of the parties thereto should be expressed in their terms as clearly and as definitely as possible. The term "artesian well" includes not only the hole, but it also implies the water. In other words, a well is not a well unless it also has the water.[1] Therefore, where one contracts to sink an artesian well, the courts hold that not only must the hole be sunk, but that it must also furnish water. And, therefore, where a dry hole is sunk under such a contract, the contractor can not recover unless the well does furnish water. However, if water is found, and no specification is made as to the quantity of the flow, the land owner must pay the contract price, whether there is sufficient for his use or not.[2] So,

1 For the doctrine of estoppel, see Secs. 1121-1128.

2 "Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused, and the party left to his action for such damages as he can prove." Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

See, also, injunctions, Chap. 81.

1 For definition of artesian wells, see Sec. 1169.

2 Omaha etc. Co. v. Burns, 49 Neb. 229, 68 N. W. Rep. 492; Elmendorf v. Classen, 92 Tex. 472, 49 S. W. Rep. 1043; Jackson v. Creswell, 94 Iowa 713, 61 N. W. Rep. 383; Stewart v. Weaver, 12 Ala. 538.

where after a contract to sink an artesian well was rescinded by the land owner assuming the responsibility of driving a 10-inch pipe farther than the contractor thought safe, and the pipe subsequently collapsed, the contractor may collect the contract price up to the time of the rescission.[3] And, again, it may be said that if the owner interferes with or obstructs the performance of the contract, he may be held liable either for the contract price or damages, according to the circumstances in the case.[4] Again, the land owner may recover damages against the contractor for the breach of the contract. So, where the contract provided that, upon the condition the well was abandoned, the casing furnished the contractor was to be drawn, and the well was abandoned by the contractor, who failed to draw the casing, the landowner may recover damages for the value of the casing.[5]

In a recent case in Washington,[6] where there was a contract to sink a well, and a reasonable price for the same agreed upon, and there was no guarantee that water would be obtained, it was held that the contractors had a right to a mechanic's lien on the premises for the drilling actually done.

But see Bohrer v. Stumpff, 31 Ill. App. 139, which held that the contractor need go but a reasonable depth.

See, also, Simons v. Payne, —— Tex. Civ. App. ——, 140 S. W. Rep. 854.

3 Charleston etc. Co. v. Joyce, 63 Fed. Rep. 916, 11 C. C. A. 496.

4 Kearns v. Burling, 14 Ind. App. 143, 42 N. E. Rep. 646; Thompson v. Brown, 106 Iowa 367, 76 N. W. Rep. 819; Wilderman v. Pitts, 39 Ill. App. 416.

5 Elmendorf v. Classen, 92 Tex. 472, 49 S. W. Rep. 1043.

6 Behne v. Stapish, —— Wash. —, 122 Pac. Rep. 1002.

CHAPTER 62.

PERCOLATING WATERS.

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§ 1208. Seepage waters—Rights to.
§ 1209. Rights acquired to percolating waters by prescription.
§ 1210. Rights acquired to percolating waters by eminent domain.
§ 1211. Rights acquired or lost to percolating waters by estoppel.

§ 1185. Scope of chapter.—In this chapter we will discuss what are known strictly as percolating waters, and the classification of such waters, under the modern scientific investigations, as upheld by

the courts. We will also discuss the rights which may be acquired in and to such waters. In a previous chapter we have discussed the subject of percolating waters as tributary to artesian basins.[1] Also, we have discussed the underflow of surface streams, where it is seen that such waters are a part and parcel of the streams themselves.[2]

§ 1186. Percolating waters—Defined and described.—As we have stated before, as the result of the extensive scientific investigations made during the recent years as to the movement of subterranean waters through the ground, much of the underground waters, which were formerly classified as those of undefined and unknown courses, or as mere percolations, have been reclassified by the authorities as either belonging to defined and known water courses or as different classes of percolating waters.[1]

Percolating waters may be defined as those waters which slowly percolate or infiltrate their way through the sand, gravel, rock, or soil, which do not then form a part of any body of water or the flow of any water course, surface or subterranean, but which may eventually find their way by force of gravity to some water course or other body of water, with whose waters they mingle, and thereby lose their identity as percolating waters. The underflow of surface streams, treated in a previous chapter in this part of our work,[2] are not, strictly speaking percolating waters, although they flow through the sand and gravel of the beds of the stream; this is so for the reason that they are a part of the streams themselves, and are so treated.[3] Upon the other hand, the waters supplying artesian basins are percolating waters. But, owing to the importance of that subject, we have treated those waters in a separate chapter

1 For artesian basins, see Chap. 61, Secs. 1166-1184.

2 See Secs. 1161-1163.

1 For the common law classification of subterranean waters, see Secs. 1152, 1155.

See, also, Sec. 1187.

2 See Secs. 1161-1163.

3 See Sec. 1163.

See, also, Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820, holding that the term "percolating waters" as applied to the underflow of surface streams was incorrect and not justified by the facts.

See, also, Montecito W. Co. v. City of Santa Barbara, 144 Cal. 587, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

For the investigations by the Government of these waters, see the reports cited to Sec. 1168, note.

by themselves.[4] The popular name of "ground water" is sometimes given to percolating waters, and at times the term "seepage water" is applied. As such, "seepage water" has been defined by a very eminent authority [5] as "the water which reaches the lowest grounds or stream channels, swelling the latter by imperceptible degrees, and keeping up the flow long after the rains have ceased and the snow melted." [6]

§ 1187. **Classification of percolating waters.**—Strictly speaking, water while it is still percolating through the ground can not be itself classified, but all comes within the definition given in the last section. It is only during the recent years that an attempt has been made to clasify percolating waters. This classification is made not from any distinction which may be made in the water itself or in its percolations through the ground, but with reference to the streams or other bodies of water of which the percolating waters are tributary. The courts, especially some of those within the arid region of this country, led off by those of California, have decided that certain percolating waters which supplied streams or other bodies of water had such a status that rights may be acquired therein where rights had already been acquired to the waters of the streams or other bodies. This is upon the principle that the percolating waters are tributary to those waters, and the owners of rights to waters of streams are also the owners of rights to the waters of their tributaries so far as are necessary to supply their needs within their respective rights. We will, therefore, adopt a classification of percolating waters, with reference to the bodies of water of which the percolating waters are tributary, if they are so tributary; if they are not tributary to other bodies of water, they will be classified as diffused percolations. This classification, then, is as follows: First, diffused percolations; [1] second, percolating waters tributary to surface water courses or other bodies of surface waters; [2] third, percolating waters tributary to underground reservoirs or other bodies of underground waters; [3] fourth, seepage waters.[4]

4 See Chap. 61, Secs. 1166-1184.

5 Prof. Samuel Fortier, now Chief of Irrigation and Drainage Investigations, Water-Supply and Irr. Paper No. 7, p. 11, U. S. Geol. Survey.

6 For seepage water, see Secs. 1207, 1208.

1 See Secs. 1188-1190.

2 See Secs. 1193, 1194.

3 See Secs. 1197-1204.

4 See Sec. 1207.

We will now take these classes up in the order named and further define and describe them, and also discuss the rights which may be acquired to their use.

§ 1188. **Diffused percolating waters.**—Probably the most of the waters percolating through the ground come under the class of diffused percolating waters. These waters have been defined as "vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance."[1] It is essential to the nature of diffused percolating waters that they do not form a part of a stream or other body of water, either surface or subterranean.[2] Diffused percolating waters may have their source in the rains or melting snows, or they may be waters seeping through the beds or banks of streams or other bodies of water, and which have so far left the bed and other waters as to have lost their character as a part thereof.[3] These waters are those which, as far as known, do not contribute, or are not tributary to the flow of any definite stream or body of surface or subterranean waters. Under the common law classification these waters, known under the more recent classification as diffused percolations, composed the greater portion of the second class of subterranean or underground waters, which were: First, those which flowed in defined and known channels; and, second, those which flowed in undefined or unknown channels, or percolating waters. In other words, all subterranean waters which do not flow in defined and known channels are presumed to be percolating waters and are not further classified.[4] Under this rule of law they are considered as a part of the very soil itself and belong to the realty in which they are found.[5]

1 City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755.

2 "It is essential to the nature of percolating waters that they do not form a part of the body or flow, surface or subterranean, of a stream." Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820.

3 Vineland Irr. Dist. v. Azusa Irr. Co., *supra*.

See, also, Montecito v. City of Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935.

See, also, Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

4 For the classification under the common law, see Secs. 1152, 1155.

5 For rights to diffused percolating waters, see Secs. 1188-1190.

It is plain to see that, as the years go by, the class of diffused percolating waters will be growing smaller and smaller. This is due to the scientific investigations of the movements of percolating waters through the ground, and also to the discoveries which are constantly being made that certain waters which were once considered mere percolations flowed in defined subterranean channels which have become known.[6] This is particularly true in arid countries, as, for example, the Western portion of our own country, where the demand for water is great, and enterprise and scientific investigations stimulated thereby. In time, if the courts are as active in establishing new rules governing subterranean waters within the next few years as they have been in the past ten years, which rules have but kept pace with the scientific investigations upon the subject, this class of subterranean waters will pass from the class of those flowing in unknown courses to those flowing in known courses, and the "secret incomprehensible influences," and "practical uncertainties"[7] will become comprehensible influences and practical certainties.

§ 1189. Rights in diffused percolating waters—Common law rule.—The English rule is that all percolating waters are considered a part of the soil where found, and, therefore belong absolutely to the owner thereof. In the leading case of Chasemore v. Richards[1] it was also settled that, so far as that rule was concerned,

[6] For defined and known subterranean water courses, see Chap. 60, Secs. 1155-1163.

[7] Chatfield v. Wilson, 28 Vt. 49; *Id.*, 27 Vt. 670; *Id.*, 31 Vt. 358.

[1] Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; affirming *Id.*, 2 Hurlst. & N. 168, where it is said: "There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? The principle applying to surface water not flowing in any defined natural water course applies equally, if not more strongly, to subterranean water of the same casual, indefinite, and varying description."

Percolating water "rather falls within the principle which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or veinous earth, or part soil,

no right can be acquired to the permanent use of water, either surface or subterranean, the definite course of which can not be traced. This rule of the common law as to all percolating waters was generally adopted by the various States and Territories of this country, both East and West; and, until the more recent decisions, subdividing percolating waters into those which were tributary to streams or other bodies of water, and diffused percolations was regarded as the law upon the subject.[2] And in all jurisdictions, at the present time,

part water." Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289.

See, also, the opinion of Mr. Justice Temple, in the case of Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, where he referred to the rule stated in the text and said: "The defense, conceding that the water held in the earth is percolating water, relies upon certain decisions which assert and apply literally the maxim, *Cujus est solum, ejus est usque ad infernos*, and that the water percolating in the ground, or held there in saturation, belongs to the land owner as completely as do the rocks, ground, and other material of which the land is composed, and therefore he may remove it and sell it, or do what he pleases with it."

See, also, Broadbent v. Ramsbotham, 11 Exch. 602, 25 L. J. Exch. N. S. 115, 4 Week. Rep. 290, 34 Eng. L. & Eq. 553; New River Co. v. Johnson, 2 El. & L. 434, 105 Eng. Com. L. 29, L. J. Mag. Cas. N. S. 93, 6 Jur. N. S. 374, 1 L. T. N. S. 295, 8 Week Rep. 179; Bradford v. Pickles (1895), A. C. 587; Ballacorkish etc. Co. v. Harrison, L. R. 5 C. P. 62, 43 L. J. P. C. N. S. 19, 29 L. T. N. S. 658, 22 Week. Rep. 227; Popplewell v. Hodkinson, L. R. 4 Exch. 248, 38 L. J. Exch. N. S. 126, 20 L. T. N. S. 587, 17 Week. Rep. 806; Rawston v. Taylor, 25 L. J. Exch. N. S. 33, 11 Exch. 369, 4 Week. Rep. 290; *Id.*, Eng. L. & Eq. 428; Regina v. Metropolitan Board of Works, 3 Best & S. 708, 32 L. J. Q. B. N. S. 105, 9 Jur. N. S. 1008, 8 L. T. N. S. 238, 11 Week. Rep. 492; Hodgkinson v. Ennor, 9 Jur. N. S. 1152, 4 Best & S. 229, 32 L. J. Q. B. N. S. 231, 8 L. T. N. S. 451, 5 Week. Rep. 775; English v. Metropolitan etc. Co., 1 K. B. (1907) 601; Grand Junction v. Shugar, L. R. 6 Ch. App. 483, 24 L. T. N. S. 402, 19 Week. Rep. 569;

2 For percolating waters tributary to other bodies of water, see Secs. 1193-1204.

The owner of land through which sub-surface water, without any distinct, definite, and known channel, percolates or filters through the soil to that of an adjoining owner, is not prohibited from digging into his own soil and appropriating the water found there to any legitimate purpose of his own, though by so doing the water may be entirely diverted from the land to which it otherwise would naturally have passed. Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262.

"When percolations are gathered into sufficient volume to have an appreciable value, and flow into a clearly defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the

what are considered mere diffused percolations[3] come within the common law rule as stated above. Even the Western States which distinguish those percolating waters which are the source of supply to other waters, from diffused percolations, apply the common law rule to diffused percolations and that, too, since the modern classification was made, which originated with the case of Katz v. Walkinshaw.[4] The common law rule was also applied to all percolating

owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly the law has never gone so far as to recognize in one man a right to convert another's farm to his own use, for the purpose of a filter." Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721, 13 Morr. Min. Rep. 374.

Even as to waters of known artesian basins, it is held that the right of a land owner to sink wells and gather and use percolating waters as he will, even though the flow of his neighbor's well be diminished, can not be taken away from him or impaired by legislation, unless by the exercise of the power of the eminent domain or police power; and that the police power does not justify legislation prohibiting the waste of water from artesian wells to the injury of wells of neighboring proprietors. Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933. For the further discussion of this ruling, see Sec. 1175, note.

See, also, Edwards v. Haeger, 180 Ill. 99, 54 N. E. Rep. 176; Wyandot Club v. Sells, 6 Ohio N. P. 64, 9 Ohio S. & C. P. Dec. 106; Houston etc. R. Co. v. East, 98 Tex. 146, 81 S. W. Rep. 279, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 299; Ellis v. Duncan, 21 Barb. 230, 11 How. Prac. 515, 15 Morr. Min. Rep. 182; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Brown v. Illius, 27 Conn. 84, 71 Am. Dec. 49; Greenleaf v. Francis, 18 Pick. 117; Davis v. Spaulding, 157 Mass. 431, 32 N. E. Rep. 650, 19 L. R. A. 102; Haldman v. Bruckhard, 45 Pa. 514, 84 Am. Dec. 511, 5 Morr. Min. Rep. 108; Fraizer v. Brown, 12 Ohio St. 294; Ocean Grove etc. Assn. v. Ashbury Park Comrs., 40 N. J. Eq. 447, 3 Atl. Rep. 168; Board of Supervisors of Clarke County v. Mississippi Lum. Co., 80 Miss. 535, 31 So. Rep. 905; Deadwood Cent. R. Co. v. Barker, 14 S. D. 558, 86 N. W. Rep. 619; Chatfield v. Wilson, 28 Vt. 49, 27 Vt. 670, 31 Vt. 358; Clark v. Conroe, 38 Vt. 469.

[3] For definition of percolating waters, see Sec. 1186.

[4] See Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098, which case dealt purely with diffused percolating waters, and in which it is said: "The decision in Katz v. Walkinshaw is adhered to, but plaintiffs, on the facts, failed to establish any ground for relief under the principles there laid down."

See, also, Cohen v. La Canada etc. Co., 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752, where it is held that percolating waters which do not supply springs, or other bodies of

waters in the State of California, before the modern classification was made of these waters in that State under the rules established by that case and the later cases following its decision.[5] The common law rule is also applied in all jurisdictions where the classification originated with the case of Katz v. Walkinshaw[6] has not yet been attempted.[7]

water, may be developed by a tunnel and conducted away from the land, as against the owners of adjoining lands, where the waters otherwise in their natural flow sink into the ground and be lost, and that the rules laid down in the case of Katz v. Walkinshaw did not apply to such waters.

See, also, for the distinction between the rights to "strictly percolating waters" and those percolations which feed subterranean reservoirs, in City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755.

5 One has the right to dig trenches upon his own land for a useful purpose, although percolating waters are thereby diverted from a spring from which others obtain a water supply. Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92.

Even as late as 1899, it was held that: "Percolating waters are a part of the soil, and belong to the owner of the soil. He may impound them at will, and the proprietor of lower lands injuriously affected can not be heard to complain." Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820.

See, also, Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; Gould v. Eaton, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; *Id.*, 117 Cal. 539, 49 Pac Rep. 577, 38 L. R. A. 181; Painter v. Pasadena etc. Co., 91 Cal. 74, 27 Pac. Rep. 539; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124, citing Kinney on Irr., Sec. 48.

6 *Supra.*

7 "Water intermingling with the ground, or flowing through it by filtration or percolation, or by chemical attraction, is but a component part of the earth, and has no characteristic of ownership distinct from the land itself. In the eye of the law, water so commingled and flowing, or motionless, underneath the surface, is not the subject of ownership apart and distinct from the soil." Willow Cr. Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687, citing Kinney on Irr., 1st Ed., Secs. 48, 49.

See, also, Sullivan v. Northern Spy M. Co., 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186; Herriman v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Deadwood etc. R. Co. v. Barker, 14 S. D. 558, 86 N. W. Rep. 619, all citing Kinney on Irr., 1st Ed., Secs. 48, 49.

See, also, Crescent M. Co. v. Silver King M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Taylor v. Welch, 6 Ore. 198; West v. Taylor, 16 Ore. 165, 13 Pac. Rep. 665; Mosier v. Caldwell, 7 Nev. 363; Howard v. Perrin, 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. Rep. 195; affirming 8 Ariz. 347, 76 Pac. Rep. 460.

§ 1190. Diffused—No riparian rights and no rights by appropriation can be acquired.—Diffused percolations being but a component part of the earth, or ground, where they are found, it follows that they are not subject to ownership separate and distinct from the soil itself. And from their very nature they can not be treated as are the waters of defined and known streams, either surface or subterranean. It therefore follows that there can be no riparian rights to these waters. They must therefore be treated in a class by themselves.[1]

Again, while waters come under the classification of diffused percolations, no right can be acquired to their use by appropriation under the Arid Region Doctrine, as is the case with the waters of the surface,[2] and even subterranean, streams having known and defined channels.[3] As held by the Utah Court, the owner of the soil is entitled to the waters percolating through it, and therefore such water is not subject to appropriation.[4] But see the inconsistent holding by the same Court in an earlier case,[5] where it was held that under

1 For the common law rule as to diffused percolations, see previous section, No. 1189.

In a leading English case upon the subject of percolating waters it is said: "The case under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith." Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289.

2 For the doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the appropriation of water, see Chap. 38, Secs. 706-732.

3 For subterranean water courses, see Chap. 60, Sec. 1159.

4 "The ordinary rules applying to the appropriation of surface streams do not apply to percolating waters, with undefined and unknown courses and banks." Willow Cr. Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687, quoting from Kinney on Irr., 1st Ed., Sec. 48.

Percolating water, oozing through the soil beneath the surface in an undefined and unknown channel, is not within the provisions of the Ariz. Rev. Stat., 1887, Par. 3199, Sec. 1, Par. 3201, Sec. 3, for the appropriation of water from rivers, creeks, or streams of running water. Howard v. Perrin, 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. Rep. 195; affirming *Id.*, 8 Ariz. 347, 76 Pac. Rep. 460.

See, also, Crescent M. Co. v. Silver K. M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810, 14 Utah 57, 45 Pac. Rep. 1093; Deadwood etc. R. Co. v. Barker, 14 S. D. 558, 86 N. W. Rep. 619; Hansen v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Mosier v. Caldwell, 7 Nev. 363; Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92.

See, also, cases cited in the preceding section, No. 1189.

5 Sullivan v. Northern Spy M. Co., 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186.

the Acts of Congress of 1866 and 1870 [6] the discoverer of a *flow* of percolating waters on the public lands may, by digging wells and constantly using the water for a beneficial purpose, acquire a right to take the water from such wells as against one who by subsequent location acquires title to the land; and, at the same time the Court stated that: "The doctrine may be said to be well settled that the owner of lands has a right to dig thereon and to appropriate and use percolating waters therein, although by so doing he may dry up the wells or spring of an adjacent proprietor." If such an appropriation was a valid one it was good as against all subsequent claimants. But the Court, although holding the appropriation valid, rendered the same nugatory by holding that: "This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises, although he should thereby dry up that of the first appropriator." Therefore, the Court, even in this case, in effect held that there could be no valid appropriation of these percolating waters by permitting the very waters appropriated to be taken away from him by another. With this construction of the case it is in harmony with the general rule upon the subject that mere diffused percolating waters spreading themselves, or infiltrating throughout the soil, are not subject to appropriation any more than what are known as diffused surface waters, or waters which after a fall of rain or the melting of snow spread themselves over the surface of the ground, are subject to a permanent right acquired by appropriation.[7]

§ 1191. **The doctrine of reasonable use.**—The English rule has at least been consistent upon the subject of the rights to percolating waters, always treating them as a part of the soil itself, and therefore holding that the owner of one tract of land is permitted to draw off the water found in his own land, even for sale to a distant municipal corporation, or that a corporation could buy up the particular tract of land for the express purpose of abstracting the water therefrom for municipal use, and that, too, although the effect is to destroy the wells and springs upon the lands owned by others in the neighborhood; and that, because of this right, the injury to the other land owners is *damnum absque injuria*.[1] This rule, which we

[6] See for Acts, Secs. 611-619.

[7] For diffused surface waters, see Secs. 318, 654.

[1] New River Co. v. Johnson, 29 L. J. Mag. Cas. N. S. 93, 6 Jur. N. S. 374, 2 El. & El. 435, 1 L. T. N. S.

may term the doctrine of unreasonable use of percolating waters, originated in the humid climate of England, where there is ample water for all, and is based upon the theory that the taking out all the waters from different tracts of land by one owner was no injury to the other land owners for the reason that the water was regarded as practically valueless. But in this country, especially the Western portion thereof, where there is always a shortage of surface water and where the greater portion of the water is found beneath the surface of the earth, we are presented with a different physical condition. And, therefore, what might be a reasonable use of these waters in England might be a most unreasonable use in different sections of this country. However, a number of our Eastern States adopted the English rule of the use of all percolating waters regardless of any class distinctions; and, prior to the decision of the Supreme Court of California in the case of Katz v. Walkinshaw, as surprising as it may seem, it was the general rule of law throughout the Western States.[2] But this English rule which permits one man to draw off the percolating waters from the lands and wells of his neighbors; and, in turn, permits these neighbors by means of larger

295, 8 Week. Rep. 179; Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; affirming *Id.*, 2 Hurlst. & N. 168; Ballard v. Tomlinson, L. R. 29 Ch. Div. 115, 24 Am. L. Reg. N. S. 636, 54 L. J. Ch. N. S. 454, 52 L. T. N. S. 942, 33 Week. Rep. 533, 49 J. P. 692, where it is said that every one has an unlimited right to appropriate percolating water while it is under his own land, and may take it all so as to prevent it going onto the land of others; Popplewell v. Hodkinson, L. R. 4 Exch. 248, 38 L. J. Exch. N. S. 126, 20 L. T. N. S. 587, 17 Week. Rep. 806, where it was held that the absolute right to drain away percolating water was given even in case the effect would be to remove the support from the surface of the neighboring land.

2 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

For the rule of correlative rights in percolating waters, see Secs. 1198-1200.

For correlative rights in artesian waters, see Secs. 1173-1175.

For the common law rule adopted in Western States, see diffused percolating waters, Sec. 1189.

Also for other cases adopting the English rule, see Clarke County v. Mississippi Lum. Co., 80 Miss. 535, 31 So. Rep. 905; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Houston etc. R. Co. v. East, 98 Tex. 146, 81 S. W. Rep. 279, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933.

wells, or tunnels, or more powerful pumps, to drain these waters from the land of the first and to dry up his wells, and again in turn about to dry up each others' wells in the same manner, is not the rule in the great majority of the States of this country. During the later years the doctrine of the maxim, "*Sic utere tuo alienum non laedas,*" has been adopted in the majority of the States, which doctrine restricts one owner not only to a reasonable use of his own property, but where, as is the case of water percolating from the land of one man to the lands of others, and there is therefore a common ownership in these waters, and the drawing off large quantities of water from one tract draws from all and where the amount is unreasonable, it is a positive injury to the lands and wells of the other land owners, it is held that the rule of reasonable use applies with much greater force than where a man is simply using his own absolute property. This rule of reasonable use is therefore simply this, that one man must so use the waters percolating through his own lands in a manner reasonable to the needs and necessities of his own tract of land, and thereon, and also having due regard to the coequal rights of his neighbors whose lands overlie the same strata or saturated basins. One of the first courts to adopt this rule of reasonable use of percolating waters, upon principle, common sense, and justice, rather than English precedent, was the Supreme Court of New Hampshire, in the case of Bassett v. Salisbury Mfg. Co., in 1862.[3] In fact the Court in rendering its decision recognized the fact that it was against precedent, in the following language: "We are aware that since the case of Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Ex., N. S., 289, the weight of authority elsewhere is against the view of the law which we have adopted." But with that decision as the opening wedge against the strict English rule, many of the Eastern and Western courts have fallen in line and have adopted the rule of the reasonable use of all waters percolating from the lands of one person to the lands of others, and which finally led up to the rule of correlative rights in these waters as laid down in the case of Katz v. Walkinshaw;[4] and, in the majority of the opinions it will be noticed that the case of Bassett v. Salisbury Mfg.

[3] 43 N. H. 569, 82 Am. Dec. 179.

[4] *Supra.* For rule of correlative rights, see Secs. 1173-1175, 1198-1200.

Co.[5] is cited as one of the leading authorities upon which their decisions are based.[6]

§ 1192. Distinction between the rule of "reasonable use" and that of "correlative rights."—It must be noticed that there is a distinction between the English rule as modified by the modern American rule of reasonable use and the rule of correlative rights. Under the rule of reasonable use some of the authorities hold that a land owner has a right to make such a beneficial use of the water found percolating through his land to the extent that may be necessary for the improvement of his land, so long as it is used thereon, although in so doing he may drain the lands of his neighbors.[1] Upon the other hand, the rule of correlative rights to these owners is the rule which abrogates the English rule as to these waters and

5 *Supra.*

6 Tending to sustain the later doctrine of reasonable and beneficial use of percolating waters, see the following: Pence v. Carney, 58 W. Va. 296, 52 S. E. Rep. 702, 6 L. R. A., N. S., 266, 112 Am. St. Rep. 963; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Forbell v. New York, 164 N. Y. 522, 58 N. E. Rep. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; affirming *Id.*, 47 App. Div. 371, 61 N. Y. Supp. 1005; Hathorn v. Dr. Strong's etc. Sanitarium, 106 N. Y. Supp. 553, 55 Misc. Rep. 445; Reisert v. New York, 174 N. Y. 196, 66 N. E. Rep. 731; Smith v. Brooklyn, 160 N. Y. 357, 54 N. E. Rep. 787, 45 L. R. A. 664; Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124; Stillwater W. Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541; Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1250; *Id.*, 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. Rep. 949; Gagnon v. French Lick Sprs. Co., 163 Ind. 687, 72 N. E. Rep. 849, 68 L. R. A. 175; Little v. American Tel. Co., 6 Del. 374, 67 Atl. Rep. 169; Louisville Gas Co. v. Kentucky etc. Co., 117 Ky. 71, 77 S. W. Rep. 368, 70 L. R. A. 558, 111 Am. St. Rep. 225, 25 Ky. Law. Rep. 1221; Hamby v. City of Dawson Sprs., 126 Ky. 451, 104 S. W. Rep. 259, 12 L. R. A., N. S., 1164, 13 Ky. Law. Rep. 814.

See, also, cases cited under correlative rights to artesian waters, Secs. 1173-1175.

Also correlative rights to percolating waters, Sec. 1200.

1 Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Tampa W. Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. Rep. 949; Miller v. Black Rock etc. Co., 99 Va. 747, 40 S. E. Rep. 27, 86 Am. St. Rep. 924.

For the doctrine of reasonable use, see Sec. 1191.

holds that the rights of all land owners over a common basin, saturated strata, or underground reservoir, are coequal or correlative, and that one land owner can not extract more than his share of the water even for use on his own lands, where the rights of others are injured thereby.[2]

§ 1193. Percolating waters tributary to surface waters—Definition and description.—Our second class of percolating waters we will define as those waters which infiltrate their way through the adjoining ground to some surface water course or other body of surface water.[1] These waters differ from the underflow of surface streams in the fact that they have not yet reached the channels of the water courses to which they are tributary; while, upon the other hand, the underflow of surface streams have reached these channels and are therefore dealt with as component parts of such streams.[2] These waters are those which come from rain or the melting of snows within the watershed of any stream, or other body, and sinking below the surface for the time being again reappear when the channel is reached and swell the flow of such surface streams or other bodies. They are therefore properly treated as tributary to those streams. They also differ from diffused percolations, treated in the previous sections of this chapter, which are mere vagrant drops moving in any and every direction and which, as far as known, are not tributary to any stream, nor swell the volume of water flowing therein. The distinction between diffused percolations and percolating waters supplying the flow of a stream is correctly drawn in a recent case decided by the Supreme Court of California,[3] wherein it was held that the waters of the San Fernando Valley were not "percolating waters" in the common law sense of the term "vagrant wandering drops moving by gravity in any and all directions"; that these waters percolate, it is true, but only in the

2 Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 90 Am. St. Rep. 35.

For the doctrine of correlative rights, see Secs. 1173-1175, 1198-1204.

1 For classification of subterranean waters, see Sec. 1152.

2 See Sec. 1161.

3 City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755.

See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

sense that they form a vast mass of water, always moving downward to the outlet, which was the Los Angeles River.

It was not until the case of Katz v. Walkinshaw was decided that the courts classified these waters as a distinct class of percolating waters, although their existence had been recognized by much earlier decisions. They were regarded as too precarious in their movements to be considered as anything but a part of the soil itself and accordingly they were so treated. In the early cases it was considered that a stream took its source only in the water that could be seen with the eye issuing from the surface of the ground, from a spring, or otherwise;[4] and that, too, without regard to the source of supply of the spring, or the water percolating from the sides into the water course. But the case of Katz v. Walkinshaw was decidedly revolutionary in character, and not only gave these waters, which slowly percolate into and feed the surface water courses a distinct classification, but also decided that certain rights could be acquired in them as tributaries to the surface water course.[5] This decision grew out of the very necessities of the conditions in the arid region of this country, and all common law distinctions were expressly repudiated.[6]

§ 1194. Percolating waters tributary to surface waters—Rights thereto.—It was not until the more recent scientific investigations, before mentioned,[1] as to the movements of underground waters through the soil, that these percolating waters tributary to surface waters were recognized as belonging to any particular class, or that any rights could be acquired in them other than the rights which could be acquired to the soil itself, through which they found their way, of which soil, under the prevailing common law rule, they were

4 Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; Chasemore v. Richards, 2 Hurlst. & N. 168, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92; Gould v. Eaton, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; *Id.*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

5 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

6 For rights in waters tributary to surface water courses, see Secs. 649, 1194.

1 See Secs. 1150, 1151, 1186.

considered component parts.[2] But, by these geological and topographical investigations made by the Government and others, it has been proven in many instances that waters percolating through the soil of watersheds were not only the sources of supply, but the only source of supply of certain streams and other surface bodies of water. It being proven absolutely that these percolating waters physically are directly tributary to these streams, the law has kept pace with these scientific investigations proving this fact; and, therefore, it follows that in law they should be, and in many jurisdictions are, dealt with and treated as tributary waters. And, where rights to the waters of the stream itself have been once acquired, by appropriation or otherwise, it is unlawful for persons owning land bordering on the stream to intercept the waters percolating through them on their way to the stream, and apply it to any use other than its reasonable use upon the land upon which it is taken, if he thereby diminishes the flow of the stream to the damage of those having rights therein.[3] Therefore, this rule modifies the common law rule that the owner of the land is also the owner of all the water found percolating as a part of the soil itself, and that he may use and dispose of it as he sees fit,[4] to the extent that he may only use these waters so percolating through his land, subject: First, to the rights of others to the water flowing in the stream which this water augments, upon the same principle as though this water was a part of the stream itself, as, for example, its underflow;[5] and, second, the

2 For rights in diffused percolations, see Secs. 1188-1190.

3 It is unlawful for one owning land bordering on a stream to intercept percolating waters therein and apply it to any use other than its reasonable use on the land from which it is taken, if he thereby diminishes the stream to the damage of those having rights therein. City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755.

4 For the common law rule as to percolating waters, see Sec. 1155.

5 "There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes." Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

"It is usual to speak of the extraction of this water from the ground as the development of a hitherto unused supply. But is it not demonstrated that the process is not in fact, for the most part, an exhaustion of the underground sources from which the surface streams and other supplies previously used have been fed and supported? In some cases this has been proven by the event. The danger of exhaustion in this way threatens surface streams as well as underground percolations and reser-

reasonable use of the water so percolating through his land, limited only by the operation of the maxim, "*Sic utere tuo ut alienum non laedas,*" for the reason that, as held by a very recent California case, all who have access to these waters, by virtue of their natural situation and the ownership of the lands through which these waters find their way, "have a common right, and of which they may each make a reasonable use upon the land so situated. . . . The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative." [6] This latter rule goes farther than even the courts of

voirs." Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

"Under the rule established with respect to percolating waters, it is not lawful for one owning land bordering on a stream to excavate in his land, intercept percolating water therein, and apply it to any other than its reasonable use upon the land from which it is taken; he thereby diminishes the stream to the damage of others having rights therein." McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849.

It must be noted that the Court in the case of Katz v. Walkinshaw, although referring to the danger of the exhaustion of surface streams by the taking of percolations as above, established no rule relative thereto. The rights decided by that case were simply the rights of the owners of lands to the waters of subterranean basins or reservoirs. Therefore the McClintock case added the rule as to percolations supplying surface streams.

See, also, City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Cohen v. La Canada Land & W. Co., 142 Cal. 437, 76 Pac. Rep. 47, 11 L. R. A., N. S., 752, 151 Cal. 680, 91 Pac. Rep. 584; Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Wilson v. Ward, 26 Colo. 39, 56 Pac. Rep. 573; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280; Ogilvy etc. Co. v. Insinger, 19 Colo. App. 386, 75 Pac. Rep. 598; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; Bruening v. Door, 23 Colo. 195, 47 Pac. Rep. 290, 35 L. R. A. 640; Herriman etc. Co. v. Butterfield etc. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Malad etc. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Flemming v. Davis, 37 Tex. 173; Hale v. McLea, 53 Cal. 578.

See, also, dissenting opinion by Mr. Justice McFarland in Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92.

See, also, Platte Valley Irr. Co. v. Buckers, 25 Colo. 77, 53 Pac. Rep. 334; Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76.

6 Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

California had therefore gone relative to the correlative rights to percolating waters which supply streams. But as these waters percolate from the lands of one owner to the lands of others through common porous strata on their way to the stream, there is no reason why the same rules should not be applied to them as are applied to the percolating waters of artesian basins [7] and catchment basins.[8] And, in fact, in the State of California it may now be said that the common law rules as to all percolating waters with the exception of what are termed mere diffused percolations,[9] have been wholly abrogated, and the doctrine of correlative rights to all waters percolating through common strata underlying the lands of a number of land owners has been substituted therefor. As was said in a still more recent case:[10] "With the common law doctrine modified to meet the conditions in this State necessitating it, and modified so as to preserve to each owner of lands overlying a common stratum of percolating waters a right to a fair, reasonable use of these waters of which their lands have a natural advantage, no reason suggests itself why the same rule should not apply as between appropriators of waters of a stream for use elsewhere than on riparian lands and the owners of lands overlying a water-bearing channel, so directly connected with the stream as to be supplied by percolation from it. The conditions in all cases are analogous as far as the natural supply of waters is available upon the lands concerned, whether the lands be riparian to the stream or overlying a common subterranean stratum, or whether the underlying strata are connected and supplied directly from the flow of the stream itself." As yet the courts of the other States have not gone to the extent in respect to these waters as have the courts of California, in abrogating the common law rule. But, as we view the subject, it is only a question of time when they will. In a country where the greater portion of the water supply percolates through a common stratum which underlies the lands of all, the common law rules governing these waters are wholly inapplicable.

See, also, City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755.

7 For artesian waters, see Secs. 1166-1184.

8 See Secs. 1197-1204.

9 For diffused percolations, see Secs. 1188-1190.

10 Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

In Kansas it is provided by statute that "no person shall be permitted to take or appropriate the waters of any subterranean supply which naturally discharge into any superficial stream, to the prejudice of any prior appropriator of the water of such superficial channel." [11]

§ 1195. Percolating waters tributary to springs.—Percolating waters supplying natural springs come under this classification of percolating waters tributary to surface streams. A spring of water may be defined as water flowing out of the ground by natural forces at a particular place.[1] When a spring flows from the ground over the surface of the earth in a well-defined channel, from the point where the water issues, it becomes a surface water course and the waters therein are treated according to the laws governing surface water courses. But, before these waters reach the outlet of the spring they are subterranean waters, and are therefore treated according to the laws governing those waters. If the waters flow to the point of outlet in a well-defined and known subterranean channel, they are then treated as subterranean or underground water courses, which, as we have seen, are governed by the same rules of law as those which govern the waters of surface streams.[2] If, however, the waters of the springs are supplied from percolations, the laws then governing the waters until they reach the outlet are the laws governing percolating waters. In point of value, springs are one of the most valuable sources of domestic and stock water supply. They are found in every section of the country, some of them of such a capacity that large tracts of land are irrigated by their waters.[3] Springs are also the principal source of supply to the surface rivers and streams.[4]

§ 1196. Percolating waters tributary to springs—Rights which may be acquired thereto.—Under the English rule of the common law, percolating waters tributary to springs were treated the same as all other percolating waters as a part of the soil where found

11 General Statutes of Kansas, Dassler, 1909, Sec. 4428.

1 Furner v. Seabury, 135 N. Y. 50, 31 N. E. Rep. 1004.

2 For subterranean water courses, see Secs. 1153-1165.

3 For the investigation of subterranean waters by the Government, see Water-Supply Papers, cited in Section 1186.

For the description of the Giant Springs of Montana, see Water-Supply Paper No. 221, U. S. Geol. Survey.

4 See Secs. 313, 648, 649.

and belonged absolutely to the owner thereof, who could do what he pleased with them, even though in abstracting the water it dried up the springs, to which the water was tributary, on the land of another.[1] And it is immaterial that the springs so supplied with water were the sources of a stream or surface water course upon which riparian rights had vested, provided that the water was intercepted while it was still percolating through the soil before it had reached the surface of the ground at the springs. And any injury to the rights of the owner of the spring were deemed excusable and *damnum absque injuria.*

But under the principles of reasonable use and correlative rights to percolating waters, discussed more in detail in other sections, the American courts have, in some jurisdictions, refused to adopt the English rule as to these percolating waters so supplying springs. And the modern American rule upon this subject is to the effect that a land owner who explores for and develops percolating water within the boundary of his land is limited to a reasonable use of such water, when to otherwise use it would deplete the water supply of a natural spring of another on adjoining or neighboring land, and thereby materially injure or destroy such spring.[2]

Under the Arid Region Doctrine of appropriation, where the waters of springs have been appropriated for a beneficial use or pur-

1 For common law rule, see Secs. 1155, 1188; Regina v. Metropolitan Bd. of Works, 3 Best & S. 708, 32 L. J. Q. B. N. S. 105, 9 Jur. N. S. 1008, 8 L. T. N. S. 238, 11 Week. Rep. 492; Willow Cr. Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92; Fraizer v. Brown, 12 Ohio St. 294; Ellis v. Duncan, 21 Barb. 230, 11 How. Prac. 515, 15 Morr. Min. Rep. 182; Mosier v. Caldwell, 7 Nev. 363; Elster v. Springfield, 49 Ohio St. 82, 30 N. E. Rep. 274; Chase v. Silverton, 62 Me. 175, 16 Am. Rep. 419; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Wyandot Club v. Sells, 9 Ohio S. & C. P. Dec. 106.

2 Pence v. Carney, 58 W. Va. 296, 52 S. E. Rep. 702, 6 L. R. A., N. S., 266, 112 Am. St. Rep. 963; Gagnon v. French Lick etc. Co., 163 Ind. 687, 72 N. E. Rep. 849, 68 L. R. A. 175; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. Rep. 949; Smith v. Adams, 6 Paige N. Y. Chan. 432; Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 1 L. R. A., N. S., 752; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Stillwater W. Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541; Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76.

pose, later comers can not acquire rights to the waters of the springs simply because the means by which the waters are conveyed to the springs are by percolations.[3]

§ 1197. Percolating waters tributary to underground reservoirs or catchment basins—Definition and description.—The third class of percolating waters, under our classification,[1] we may define as those waters which percolate down through the gravel porous rock, and soil from various directions until they reach some barrier of impervious rock, clay, or other material, constructed either by Nature or by the hand of man, thereby forming catchment basins, and there these percolating waters, mingling with the rock, gravel, sand and soil, form what are called underground reservoirs, with the water at times rising nearly or quite to the surface of the earth. These catchment basins differ from artesian basins in that the water is above the impervious rock instead of below it.[2] Again, where the porous layer is next to the surface and above the impervious rock, as is often the case on the Great Plains and in California and other parts of the West, no pressure or head can be produced, for the water is simply running down an inclined surface, with no impervious stratum above to prevent it from rising, so that it would be comparable to water flowing down a wide, open trough slightly inclined and filled with loose gravel. In this case, when the water reaches the end of the trough, it will rise toward the surface. As is the case with percolating waters tributary to surface streams,[3] and the waters of artesian basins,[4] heretofore discussed, it has been but within the last few years that these waters were recognized as a separate class, to which rights could attach. This class of underground waters also draws upon what was known under the common law as "percolating waters," a part of the soil itself, without being attached to any body or stream of water, either surface or subterranean, and which we have classified in this work as diffused percolating waters. These

3 Bruening v. Dorr, 23 Colo. 195, 47 Pac. Rep. 290, 35 L. R. A. 640; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; Brown v. Ashley, 16 Nev. 311.

For the right to appropriate the waters from springs, see Sec. 648.

1 See Secs. 1152, 1187.

2 For artesian basins, waters, and wells, see Secs. 1166-1184.

3 See Secs. 1193, 1194.

4 See Secs. 1166-1184.

waters tributary to underground reservoirs percolate, it is true, but only in the sense that they form a vast mass of water confined in a basin filled with detritus, always moving slowly down to lower levels in the effort, in conformity with physical law, to attain a uniform level.[5] The classification of these waters also had its inception in the scientific investigations which have been made during the recent years relative to the movements of percolating waters through the ground, and the general physical and topographical conditions of the arid and semi-arid portions of our country, where every drop of water is of value. Many early cases had recognized these waters, but had failed to define or classify them, or to define any rights which could be acquired in them, unless it is with the single exception that some of the authorities held that percolating waters should be so drawn upon within reason, or with reference to a reasonable use, where it was found that others were affected by that use.[6] Based upon the investigations of scientists, these underground reservoirs or catchment basins were first recognized by the California court in 1899, in which it was held that the lands including them might be condemned by a city in order to acquire the waters which they contained.[7] And three years afterwards, in 1902, the same court further recognized these waters and in such

[5] For the distinction between diffused percolating waters and the percolating waters supplying subterranean reservoirs, see City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A. 772.

[6] For the doctrine of reasonable use of percolating waters, see Sec. 1191.

[7] Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585, in which it is said: "The land is found to be saturated with water to within a few feet of the surface. It is proposed to construct a subterranean dam at the lower end of the tract. A sub-surface dam, of course, would not have the effect of flooding the surface permanently, but it would permanently raise the plane of saturation. This being done, it is next proposed to tap this heavily saturated bed of sand and gravel by means of a tunnel connected with lateral galleries, through which the water will be drained off and conducted to the supply pipes. In other words, the land is to be used as a reservoir, such as essentially it is, and none the less so because the water does not rise and stand above the surface. The evidence in the case shows that from one-fifth to one-third of the entire bulk of the material filling the valley below the plane of saturation is water. The land in its natural state, therefore, is a reservoir, and a subsurface dam is to be constructed in order to make it better serve the purposes of a reservoir."

a manner that, in that jurisdiction, at least, they must be regarded as belonging to a distinct class of percolating waters, and upon which we base our classification to them.[8]

The classification originating with this case has been followed by the courts of a number of the States, and, in fact, by some of the courts of the Eastern States, within what is known as the humid region, and where the needs of water are not so great as in the arid West and in California, where the case was decided.

We will now discuss the rights which may be acquired in and to these percolating waters tributary to and within underground reservoirs or catchment basins.

§ 1198. Percolating waters tributary to underground reservoirs —Correlative rights thereto.—As we have seen in the preceding sections, although the doctrine of certain percolating waters had been modified in a number of the States of this country,[1] it was not until the case of Katz v. Walkinshaw was decided by the Supreme Court of California,[2] that percolating waters tributary to underground reservoirs or catchment basins, after they had filled these reservoirs or basins, were recognized as a distinct class of percolating waters and the rights which might be acquired to them decided. The facts in this case also involved the rights to the

8 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, in which Mr. Justice Shaw, in rendering the opinion upon the rehearing, at which all phases of the case were most ably presented, said: "The geological history and formation of the country is peculiar. Deep borings have shown that almost all of the valleys and other places where water is found abundantly in percolation were formerly deep canyons or basins, at the bottom of which anciently there were surface streams or lakes. Gravel, boulders, and, occasionally, pieces of driftwood have been found near the coast far below tide level, showing that these sunken streams were once high enough to discharge water by gravity into the sea. These valleys and basins are bordered by high mountains, upon which there falls the more abundant rain. The deep canyons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks, and slowly moves through the lands by the process usually termed 'percolation,' forming what are practically underground reservoirs."

See, also, the cases cited in the following section, No. 1198.

1 See Sec. 1191.

2 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

waters of artesian basins, heretofore discussed in a separate chapter.[3] As to both of these classes of waters, this decision, as far as the State of California is concerned, utterly abrogated the English common law rule that all percolating waters were a part of the soil where found, and that the owner thereof had the exclusive right to them while they were on his land, and that he could draw them off and use them, sell, or waste them, as he saw fit, even if in so doing he might also draw off all of the waters from the lands of his neighbors.[4]

Physically, the reason for this decision was based upon the geological history and formation of the country, as compared to that of England, where the common law rule originated, the recent scientific investigations and discoveries as to the movements of percolating waters through the ground, and the peculiar needs of the arid region for water, in order to develop the country to the fullest possible extent. As was said by the Court: "An ordinary difference in the conditions would scarcely justify the refusal to adopt a rule of the common law, or one which has been so generally supposed to exist; but where the differences are so radical as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative."[5] Legally it was based upon the more modern American authorities, adopted in some of the States, holding that one land owner had the right to only the reasonable use of the waters percolating through his land, having due regard to the rights of the other land owners through whose lands these waters also percolated.[6] In other words, the doctrine of the maxim, *Cujus est solum, ejus est usque ad infernos,* "that water percolating in the ground or held there in saturation belongs to the land owner as completely as do the rocks, ground, and other material of which

[3] For rights to artesian waters, see Secs. 1166-1184.

[4] For the rights to percolating waters under the common law, see diffused percolations, Secs. 1188, 1189.

[5] Mr. Justice Shaw in Katz v. Walkinshaw, *supra.*

[6] For the reasonable use of percolating waters, see Sec. 1191.

"I think it clear that the American cases do not require us to hold that the maxim, *Sic utere tuo,* does not limit the right of the land owner to the use of subsurface water, but, on the contrary, all the cases in which the question has been discussed hold or admit that such maxim should limit such right where justice requires it. Such, I think, is the proper rule." Mr. Justice Temple in Katz v. Walkinshaw, *supra.*

the land is composed, and therefore he may remove it and sell it, or do what he pleases with it," was utterly repudiated, and in lieu thereof the doctrine of the maxim, *Sic utere tuo alienum non laedas*, "you must so use your own as not to injure another's property," was substituted in its stead.[7] This is the doctrine of correlative rights as to these waters, which in effect means that although you may be the owner of the soil and everything therein to the lowest depths, you must so use the percolating waters to which this class belongs, found in your own lands, that that use will not injure the rights or property of others to the correlative use of these waters which also percolate through their lands. This is a doctrine which, owing to its just and equitable rules, has already been adopted in a number of the States, and which in time is bound to be adopted in all as to all waters, regardless of class, percolating to and from the land of one person from and to the lands of others.

§ 1199. Percolating waters—Correlative rights thereto—Extension of doctrine.—The doctrine of correlative rights as to the percolating waters tributary to underground reservoirs, as enunciated in the case of Katz v. Walkinshaw,[1] discussed in the preceding section,[2] did not stop with this particular class of percolating waters, nor is it limited to the State of California, where that case was decided, but has been extended to other classes of percolating waters, and has been adopted by other jurisdictions as the law governing waters percolating from the land of one person to the lands of others. As we have seen in a previous chapter, the rule has been adopted relative to the waters of artesian basins in the majority of the States where those rights have been considered.[3] As to correlative rights to artesian waters, the rule of Katz v. Walkinshaw was specifically adopted by the Supreme Court of Minnesota,[4] but

7 For a further discussion of this subject, see artesian waters, Secs. 1173-1175.

1 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

2 See Sec. 1198.

3 For correlative rights to the waters of artesian basins, see Chap. 61, Secs. 1173-1175.

4 Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1250, 10 Am. & Eng. Ann. Cas. 843; *Id.*, 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

it was rejected in Texas [5] and in Wisconsin,[6] the first of these cases being decided just after and the latter a few months before the Katz case. In West Virginia the doctrine was adopted as to percolating waters which supplied the waters of a spring of another on adjoining or neighboring land.[7]

In Colorado the law as to percolating waters seems to be still undecided. The Supreme Court in a late case said: "The law regulating the ownership of percolating waters in the arid States is now of great—as time passes it will be of still greater—importance, and until a proper case is presented calling for it we decline to announce the rule applicable to our local conditions." [8]

§ 1200. Rule of correlative rights—Effect of rule in California upon the common law rule.—Although the decision in the case of Katz v. Walkinshaw positively decided that the rule of correlative rights applied to waters both of artesian basins and saturated underground reservoirs or catchment basins, where these underlaid the lands owned by a number of land owners, some confusion existed as to the effect of the decision upon the common law rule of percolating waters, which, prior to that decision, had been the rule in California.[1] This was due largely to the different lines of argument used by Mr. Justice Temple in rendering the first opinion of the Court, and by Mr. Justice Shaw in rendering the opinion upon the rehearing of the case. In brief, Mr. Justice Temple contended that the old English rule as to percolating waters,[2] as laid down in the early cases of Acton v. Blundell,[3] and Chasemore v. Richards,[4] should be adhered to as the foundation of the decision, but modified only where injury occurred to the neighboring land owners by the

5 Houston etc. R. Co. v. East, 98 Texas 146, 81 S. W. Rep. 279, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827.

6 Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933.

7 Pence v. Carney, 58 W. Va. 296, 52 S. E. Rep. 702, 6 L. R. A., N. S., 266, 112 Am. St. Rep. 963.

8 Smith etc. Co. v. Colo. etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

1 See Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

For the common law rule as to percolating waters, see Sec. 1189.

2 See Secs. 1155, 1189.

3 12 Mees. & W. 324, 13 L. J. Exch., N. S., 289.

4 2 Hurlst. & N. 168, 7 H. L. Cas. 349, 29 L. J. Exch., N. S., 81, 5 Jur., N. S., 873, 7 Week. Rep. 685.

withdrawal by one land owner of more than his share of the water, or his unreasonable use of the water, by the rule adopted by the later Eastern American authorities of reasonable use. In other words, he adopted *in toto* the reasoning and conclusions reached by the New Hampshire Court in the case of Bassett v. Salisbury Manufacturing Company upon the question of reasonable use of percolating waters.[5]

Mr. Justice Shaw, upon the other hand, contended that as the common law is entirely unsuited to the conditions of the State of California as far as these percolating waters are concerned, that, as to those waters in question, the common law rule was entirely abrogated, and in lieu thereof the doctrine of the correlative rights of the respective land owners was adopted in its stead. All of the other justices of the court concurred in both opinions. Mr. Justice Angellotti, in a short concurring opinion, stated that he concurred in the views expressed in the opinion of Mr. Justice Temple as to the application of the doctrine of reasonable use to percolating waters. And he further stated: "I also concur generally in the views expressed by Mr. Justice Shaw in the majority opinion as to the same subject matter; but several important questions are discussed that are not necessary to a decision of this case, and as to which the opinion herein can not hereafter be considered as authority. As to such matters, I refrain from expressing any opinion." The other justices filed no separate opinions, but concurred in both opinions generally. As can be readily seen, this was a somewhat anomalous condition. And the question arose as to what was the status of the common law rule as to percolating waters which had formerly been the rule in that State. Was the common law rule entirely abrogated or was it simply modified? But whatever may have been the contentions pro and con as to the condition, as we view the matter, the question has been finally settled, in the later decisions of the same court, in favor of the abrogation of the com-

5 "But by far the most satisfactory case upon the subject is Bassett v. Salisbury Mfg. Co., 43 N. H. 569, 82 Am. Dec. 179. That was a most elaborately considered case, and this precise question is discussed with a fullness and ability which I am not so vain as to think I could improve upon. I would like to transcribe the entire argument, but, as it is accessible to the profession, I need only say that I adopt it in full. The decision was approved in Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276." Mr. Justice Temple in Katz v. Walkinshaw, *supra*.

mon law rule. The latest exposition upon the subject is to be found in the case of Miller v. Bay Cities W. Co.,[6] in the opinion of which, after citing the Katz case, is to be found the following: "The common law rule was rejected as inapplicable to the conditions of this State, and the rule of *sic utere tuo* announced, and, applying it, it was held that the rights of the parties in the suit to take these particular waters were correlative, and that defendant could not divert them for sale elsewhere so as to prevent the plaintiff from obtaining a reasonable supply for irrigation and other ordinary uses upon the land. The doctrine thus announced in this pioneer case has been subsequently followed, so that the rule is now settled beyond further question."[7]

Therefore, under the California rule the common law of percolating waters, as to those waters in particular which are found in artesian or catchment basins, is entirely abrogated and the rule of correlative or relative rights substituted therefor. And it must necessarily follow that any excessive or wasteful use of these waters

[6] 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

[7] Citing McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Cohen v. La Canada W. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Burr v. Maclay, 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331; City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811; Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. Rep. 151; Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Pomona Water Co. v. San Antonio Water Co., 152 Cal. 618, 93 Pac. Rep. 881; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; DeWolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118.

See, also, Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148, in which, referring to the rulings of the California court, it is said: "To what extent, if at all, the common law doctrine of ownership of percolating water shall be modified, was held to depend upon the particular facts of the case; but in any controversy of this nature the general doctrine *cujus solum* might be, the Court said, qualified by the maxim, *Sic utere tuo*," etc.

by one land owner on his own land, causing material and substantial injury to the rights of the other owners, whose lands overlie the same basin, will be prevented by the courts. And as to what is an excessive or unreasonable use by one owner is held to be a question of fact, and depends on the circumstances of each particular case.[8]

§ 1201. **Percolating waters supplying surface wells.**—The water supplying surface wells comes under this class of percolating waters tributary to underground reservoirs or catchment basins. These wells must be distinguished from artesian wells treated in another chapter,[1] for the reason that they are usually more shallow and larger in circumference, and their waters lying above the impervious stratum are not under pressure, and do not rise above the point where first struck, and, therefore, have to be lifted or forced to the surface by some mechanical device.

The term "surface well," or "well," in its ordinary signification means merely a pit or hole sunk into the ground until the water is reached, together with the water in it. It is from wells of this character that the greater portion of the culinary and domestic supply all over the entire country is furnished, especially in the

[8] Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062, wherein it is said: "Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until he diverts more than his share and injures and damages the other thereby. Here the defendants were not, with respect to the land irrigated, riparian owners, but were trespassers on plaintiffs' property rights from the beginning, and the continuance of the trespass for a sufficient time would divest the right of the plaintiffs with respect to the water diverted. The same distinction exists with respect to cases cited involving the taking of percolating water for use by one owner upon his land, to the detriment of other land over the same saturated plane. The rights in such cases are correlative, and, if an injunction can issue at all therein, it can be only when one owner takes more than his due proportion, and damage to the other ensues from such excessive taking."

See, also, Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650; Stillwater etc. Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541.

See cases cited in last note, *supra*.

See, also, Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. Rep. 849, 68 L. R. A. 175.

[1] For artesian waters and wells, see Chap. 61, Secs. 1166-1184.

smaller towns and country districts. During the later years, in the Western States, where the surface of the land overlies strata heavily charged with water, as is the case of the underground reservoirs or catchment basins, described in preceding sections,[2] much water has been and is now being drawn from the ground and used for irrigation and other beneficial and useful purposes. Pumps run by steam, gasoline, electricity, wind, and all sorts of mechanical power, and sometimes of enormous capacity, are being used, and great quantities of water are being drawn from the ground for the various uses upon the surface.[3] Many schemes have also been devised whereby great quantities of water have been withdrawn from the ground for use not upon the surface of the land from which the water was taken, but for use at some distant point. Municipal corporations have acquired small tracts of land overlying heavily saturated strata and have sunk shallow wells, installed pumps of large capacity, and have carried the water by means of pipes for the use of distant cities and towns. As has been seen in the previous sections, the withdrawing of such large quantities of water not only drew the supply from the land where the wells were situated, but also drew from the other lands overlying the same basin owned by others.[4]

§ 1202. Percolating waters supplying surface wells—Rights thereto.—The development and history of the laws governing the water supplied by wells is interesting. These waters are supplied by percolations from the neighboring land. The law as to these waters, as we have seen in previous sections of this work,[1] originated

2 See Secs. 1197-1200.

3 See Pumping Water for Irrigation, by Herbert N. Wilson, 1896, Water-Supply Paper No. 1, U. S. Geol. Survey; Irrigation Practice on the Great Plains, by E. B. Cowgill, 1897, Water-Supply Paper No. 5; Windmills for Irrigation, by E. C. Murphy, 1897, Water-Supply Paper No. 8; Mechanical Tests of Pumps and Pumping Plants Used for Irrigation and Drainage in Louisiana in 1905 and 1906, by W. B. Gregory, 1907, Office of Experiment Stations, Bulletin No. 183, U. S. Dept. of Agriculture; Tests of Internal-Combustion Engines on Alcohol Fuel, by Chas. E. Lucke and S. M. Woodward, 1907, Bulletin No. 191, *Id.*; Cost of Pumping from Wells for the Irrigation of Rice in Louisiana and Arkansas, by W. B. Gregory, 1908, Bulletin No. 201, *Id.*

See, also, the many reports of the geology and water resources of many sections of the country by the U. S. Geological Survey, contained in the water-supply papers of various numbers.

4 See Secs. 1197, 1198.

1 See Secs. 1197, 1201.

in England, and the percolating waters were considered a part of the soil where they might be found, the same as the stones or earth. Therefore, the owner of the surface of the land, under the doctrine of the maxim of *cujus est solum*, etc., might withdraw as much water found on his land as he saw fit, regardless of the place where or the manner how the water was used, or he might let the water run to waste, and any injury done to the lands of the neighboring owners was regarded as *damnum absque injuria*, upon the ground that the owner of the land where the well was situated was also the owner of the water found therein, and, therefore, he could do as he pleased with what was his own.[2] This common law of England as to these waters, and as to other subjects, was adopted by the various States of the Union, and at an early day the same rules were applied as were applied to the same class of water in England. This rule continued to hold good in all of the States as long as the amount of water drawn out on the land of one person was of small quantity and used upon his land for domestic and culinary purposes by himself and his family. Under this rule a person owning a town lot could sink a well on the same and draw off the water from the same, and if this act dried up a well upon the lot of a neighbor it would be *damnum absque injuria*, for the reason that it was considered that he had the perfect right to do so.[3] But as time went on and the demand for water, or, in some cases, purer water, became greater, and it was ascertained that in certain sections of the country there were vast supplies of these percolating waters lying beneath the surface, which, owing to the invention in the meantime of mechanical devices for pumping large quantities, might be utilized for municipal, irrigation, and other purposes requiring large quantities of water. A municipal corporation or an irrigation company organized for the purpose of selling water to irrigate distant lands would therefore buy up a small tract of this heavily saturated land, sink a well, or wells, install pumps of large capacity, and thereby draw off vast quantities of water for use in distant places. This, as can be readily seen, was a great injury to the neighboring lands

[2] For the common law right to percolating waters, see Secs. 1186-1188.

[3] Greenleaf v. Francis, 18 Pick. 117; Ocean Grove etc. Assoc. v. Ashbury Park, 40 N. J. Eq. 447, 3 Atl. Rep. 168; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; New Albany etc. R. Co. v. Peterson, 14 Ind. 112, 77 Am. Dec. 60.

by draining off all the water thereunder and drying up the wells and springs thereon. As the owners of these neighboring lands have the same right to the water percolating under them as the owner of the wells in question, this was the taking of their property without due process of law against the provisions of the Constitution. This condition of affairs eventually forced a change of the rule of law governing these waters from the strict English rule to the more modern doctrine of reasonable use or correlative rights of the various land owners to these waters, to the effect that one owner has the right to the use of the water pumped from his own lands only to the extent of what is a reasonable use on his own lands, having due regard to the rights of the owners of neighboring lands to a similar use. Under this rule one land owner can not sell the water pumped from wells on his own land for use by a distant municipal corporation or for the purpose of irrigating distant lands. Neither can a corporation, municipal or otherwise, purchase a small tract of land, sink a well thereon, and pump the water underlying all of the lands in that neighborhood for use by the distant city or for the irrigation of distant tracts without first acquiring the right from the other land owners in some lawful manner.[4] However, some of the authorities, while holding that the water can not be sold

[4] The draining of land of a private proprietor by city pumping works which exhausts from all the region thereabout the natural supply of underground or subsurface water and thus prevents the raising of crops to which the land was and is peculiarly adapted, renders the city liable to him for damages which he sustains, and entitles him to an injunction against a continuance of the wrongs. Forbell v. New York, 164 N. Y. 522, 58 N. E. Rep. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; aff'g *Id.*, 47 App. Div. 371, 61 N. Y. Supp. 1005.

The owner of a portion of a tract of land which is saturated below the surface can not remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, Pence v. Carney, 58 W. Va. 296, 52 S. E. Rep. 702, 6 L. R. A., N. S., 266, 112 Am. St. Rep. 963; Stillwater W. Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 79 Am. St. Rep. 541; Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1050; Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; Hamby v. City of Dawson Sprs., 126 Ky. 451, 104 S. W. Rep. 259, 12 L. R. A., N. S., 1164, 13 Ky. Law Rep. 814; Reisert v. New York, 74 N. Y. Supp. 673, 69 App. Div. 302; Hathorn v. Dr. Strong's etc. Sanitarium, 106 N. Y. 553, 55 Misc. Rep. 445; Miller v. Bay

or used at a distant point from the lands where it is extracted, do not go to the extent of the rule of correlative or coequal rights between the respective land owners. This line of authorities hold to the effect that a land owner has the right to make such a beneficial use of the water percolating under his land from the lands of others as he may see fit in the improvement of his estate and where the water is used thereon and not wasted.[5] And, again, a very few of the States adhere to the old English rule, to the effect that even with a malicious intent one land owner may draw water from his land and use the water therefrom as he chooses, or allow it to flow away to waste, regardless of the effect of such a use upon his neighbors' wells.[6] Fortunately, this inequitable and unjust rule does not govern in many States.[7]

§ 1203. Waters tributary to underground reservoirs or catchment basins—Nature of ownership in such waters.—Under the new doctrine of correlative rights, discussed in previous sections of this chapter,[1] in and to the percolating waters of underground reservoirs or catchment or artesian basins,[2] the nature of the ownership in such waters has been completely changed, and instead of belonging to the owner of the soil where found, as held under the common law rule, like the rock or stones therein,[3] it is held that the right of

Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; U. S. v. Alexander, 148 U. S. 186, 37 L. Ed. 415, 13 Sup. Ct. Rep. 529.

See, also, the cases cited in the preceding section, No. 1201.

5 Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. Rep. 949; Tampa W. Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262.

6 Huber v. Merkel, 117 Wis. 355, 94 N. W. Rep. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933; Houston etc. R. Co. v. East, 98 Tex. 146, 81 S. W. Rep. 279, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827.

7 See, also, Secs. 1197-1200.

Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch., N. S., 81, 5 Jur., N. S., 873, 7 Week. Rep. 685; aff'g 2 Hurlst. & M. 168; Delhi v. Youmans, 50 Barb. 316, 45 N. Y. 362, 6 Am. Dec. 100; Fraizer v. Brown, 12 Ohio St. 294; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Chesley v. King, 74 Me. 164, 43 Am. Rep. 569; Bartlett v. O'Connor, 102 Cal. 17, 36 Pac. Rep. 513; Southern Pacific R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92.

1 See Secs. 1197-1200.

2 For artesian basins, see Secs. 1166-1184.

3 See Secs. 1186-1188.

In general it may be said that the rule of ownership of artesian basins and of catchment basins is practically the same.

the owner of the land over such waters is merely usufructuary,[4] or, as expressed by the California Court in a late case, each land owner has "a common and correlative right to the use of these waters upon his land."[5] It must therefore follow that if each owner has a common or correlative right to the use of the water underlying the common lands of all, no one owner can have the title to such waters which may be found in his individual lands. Therefore, as far as the title to these waters is concerned, while they are percolating through the soil, under this theory of the proposition it has the same status as the water flowing in surface streams, that is to say, it belongs to no one in particular, but its use only belongs to those who may legally avail themselves thereof.[6]

4 "Such rights are usufructuary only." Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Burr v. Maclay Rancho Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715.

5 Hudson v. Dailey, *supra;* Burr v. Maclay Rancho Co., *supra.*

See, also, Katz v. Walkinshaw, *supra;* McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Barton v. Riverside Water Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

6 See *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811, in which case, after citing the case of Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 30 Morr. Min. Rep. 466, 150 Ind. 698, 50 N. E. Rep. 1125, the Court said: "By that case it is established that water, oil, gas, and all fugitive substances held in their natural subterranean reservoirs are exceptions to the general rule establishing absolute ownership in the proprietor of the surface of all that lies underneath; that these minerals, being migratory in their nature, having no fixed *situs*, are a part of the soil only so long as they are on or in it, but after they escape and go to other lands the title of the former owner is gone; that it follows, therefore, that no one owner of the surface of the earth within the area beneath which these minerals move can exercise his right to extract from the common reservoir in which the supply is held without diminishing the source of supply as to which all other owners of the surface must exercise their rights; that, in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all, and of the public at large, the State could lawfully exercise the power to regulate the rights of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein

But, as stated in the case cited in our note:[7] "This water, the ownership of which until actual possession is acquired being in the public, or at least that portion of the public who may own the surface of the soil within the artesian belt, is subject to a reasonable use only by those interested therein."[8]

§ 1204. **Waters tributary to underground reservoirs or catchment basins—Extent of ownership in such waters.**—The extent of the right of each land owner whose land overlies a catchment or an artesian basin, under the theory of correlative rights, is well stated by the California Court as follows:[1] "The general rule, as now established by the decisions of this Court, undoubtedly is that where two or more persons own different tracts of land, underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the use of this water upon his land to the full extent of his needs, if the common supply is sufficient, and to the extent of a reasonable share thereof if the supply is so scant that the use by one will affect the supply of the others."[2]

The limitations prescribed by the above rule for the use of such waters by the land owners overlying the same are as follows: First, there must be an ownership of the land "underlaid by porous material extending to and communicating with them all." In other words, there must be lawful access to such waters by the ownership of the land overlying the same. As was said in the same case, from

they were deposited, as well as the public, had an interest."

For title to running water, see Secs. 455, 772.

7 *Ex parte* Elam, *supra*.

8 See, also, Katz v. Walkinshaw, *supra;* Burr v. Maclay, *supra;* Hudson v. Dailey, *supra;* Barclay v. Abraham, 121 Iowa 619, 96 N. E. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

1 Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

2 Citing Katz v. Walkinshaw, 141 Cal. 134, 144, 150, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Burr v. Maclay R. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715; Barton v. Riverside Water Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

which the above rule was quoted: "All the parties having access to it would have the right to share reasonably in its use. . . . The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom. This right arises from the fact that the water is then in his land, so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, '*Sic utere tuo, ut alienum non laedas.*'"[3]

The second limitation is that in case of an insufficient quantity of water to supply all the wants of the land owners whose lands overlie such basins, each land owner is limited to a reasonable or correlative share thereof, as against the rights of other land owners. In case, however, of an ample supply, each land owner "has a common and correlative right to the use of this water upon his land to the full extent of his needs."[4]

The third limitation set forth in the above rule is that each land owner has the right to such use of the water "upon his land" as his needs or the conditions of the water supply may require or allow. In other words, not only must the land owner use the water upon his own land, but by the analogy to the common law of riparian rights in surface streams he must use the water upon the land which directly overlies such basin. As was said in a recent California case:[5] "The reasonable rule here would be to hold that the defendant's appropriation for distant lands is subject to the reasonable use

[3] See, also, cases cited, *supra;* Cohen v. La Canada etc. Co., 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; *Id.*, 142 Cal. 437, 76 Pac. Rep. 47; Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

[4] Hudson v. Dailey, *supra.*

[5] Burr v. Maclay Rancho Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715. In the second appeal it was said: "The existence of a common supply of water in a state of percolation of such a character that the taking from one overlying tract will subsequently diminish the quantity available in another overlying tract gives correlative rights in the common supply and creates a right in one such land owner to prevent another from taking the water to distant lands not overlying the common supply, if such taking is injurious to him."

of the water on lands overlying the supply, particularly in the hands of persons who have acquired it because of these natural advantages, and we therefore hold this to be the law of the case with respect to the lands upon which no water has been used by the plaintiff."[6] Neither has such a land owner the right to sell the water discovered in his own land as against the rights of the other land owners whose lands overlie the same basin either to water distant lands or to cities and towns for their use and for the use of their inhabitants. As was held in a late California case,[7] the rights of owners of land overlying a water-bearing subterranean basin to withdraw and use the waters are correlative, so that one land owner is not permitted to divert such waters for sale elsewhere, to the injury of the other land owners, and that one owner of land overlying such a basin is entitled to enjoin the diversion of the waters for use elsewhere than on the lands under which they lie.[8]

Furthermore, it is held that the rights acquired by land owners to lands overlying underground reservoirs or catchment basins are based more nearly upon the rule of the common law of riparian rights in surface streams,[9] and that the doctrine of prior appropriation does not apply to these waters. In other words, the rights of the land owners are correlative or equal, and priority does not apply, even as against the rights of a land owner who does not exercise the same in the use of the water.[10]

[6] See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118; Cohen v. La Canada etc. Co., 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; *Id.*, 142 Cal. 437, 76 Pac. Rep. 47.

[7] Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

[8] See, also, Erickson v. Crookston etc. Co., 100 Minn. 481, 111 N. W. Rep. 391, 8 L. R. A., N. S., 1050, 10 Am. & Eng. Ann. Cas. 843; *Id.*, 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650; Meeker v. City of East Orange, 77 N. J. L., 623, 74 Atl. Rep. 379, 23 L. R. A., N. S., 465, 134 Am. St. Rep. 798; Forbell v. New York, 164 N. Y. 522, 58 N. E. Rep. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; aff'g *Id.*, 47 App. Div. 371, 61 N. Y. Supp. 1005; Hamby v. City of Dawson Spring, 126 Ky. 451, 104 S. W. Rep. 259, 12 L. R. A., N. S., 1164, 13 Ky. Law Rep. 814.

[9] For riparian rights, see Secs. 450-551.

[10] Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Miller v. Bay Cities Water Co. 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Vanderwork v. Hewes, 15 N. M. 429, 110 Pac. Rep. 567.

§ 1205. "Developed" or "artificial" water—Definition and description.—Owing to the great scarcity of water in certain sections throughout the arid West, great efforts have been made during the recent years to find new sources of supply of subterranean or underground waters from which water might be drawn for irrigation and other useful purposes. Therefore, the question of "developed," or, as it is sometimes called, "artificial" water [1] has called forth considerable discussion and a number of decisions by the courts.

"Developed" water may be defined as such subterranean or underground water as is discovered and brought to the surface by the exploitation of man, and which otherwise would run to waste. The last clause of this definition is important, for the reason that by the recent scientific investigations as to the movements of subterranean waters through the ground it has been ascertained that a great portion of these waters are tributary to either surface streams or other bodies of surface water,[2] or to artesian, underground reservoirs, or catchment basins.[3] Therefore, whenever any of the underground waters which are tributary or feed these other bodies, the rights to the waters of which have already been acquired, are exploited and drawn off before they reach the other bodies of water, they can not, under the definition, belong to the class of developed waters; but they belong to the waters to which they are tributary and their use to the owners thereof according to their respective rights.[4] But developed waters, strictly speaking, must be those waters which would run to waste except for their discovery and development.

The means of their development is immaterial, as far as their status as "developed" water is concerned. It may be by means of tunnels run into the mountain sides, or it may be by wells or shafts sunk vertically into the ground; or, again, it may be by a combination of both methods, as is the case of a winze sunk vertically from tunnels.[5] Regardless of the means, water which would otherwise

1 Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

2 For percolating waters tributary to surface streams, see Secs. 1193-1196.

3 See Secs. 1168, 1197.

4 For the rights to tributaries, see Sec. 649.

5 "Tunnels" are practically horizontal wells, differing from ordinary "wells" only in that the water from the former finds its way to the surface by gravity, while in the latter pumping must be resorted to to bring the water to the surface; both disturbing the natural flow of the subterranean waters, and both being artificial means of reaching and controlling the natural subterranean flow. Garvey v.

run to waste or remain stationary, concealed beneath the surface of the ground, which is brought to the surface and thereby made available for use, may be called "developed" water.

Although some of these developed waters, when fully exploited, may be found to belong to underground water courses,[6] a subject which we have heretofore discussed, until their courses become defined and known they belong to percolating waters. Therefore we will treat the rights which may be acquired to developed waters in the present chapter on percolating waters.

§ 1206. Rights to developed waters.—Whenever subterranean water discovered and brought to the surface by exploitation is strictly developed water, as the same is defined in the preceding section,[1] the use thereof belongs to those persons who, by their own exertions, discovered and developed the water as far as their needs and necessities require.[2] The water thus developed may be turned

Huntington etc. Co., 154 Cal. 232, 97 Pac. Rep. 428.

6 For underground water courses, see Chap. 60, Secs. 1153-1165.

1 See Sec. 1205.

2 Where persons have by their own exertions developed a supply of water theretofore not a part of the waters of a creek and not before available to the users of the stream, they have the first right to take and use such increase. Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

Burnett v. Whitesides, 15 Cal. 35; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Herriman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Hanson v. McCue, 42 Cal. 306, 10 Am. Rep. 299; Gould v. Eaton, 111 Cal. 639, 44 Pac. Rep. 319, 52 Am. St. Rep. 201; *Id.*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Roberts v. Crafts, 141 Cal. 20, 74 Pac. Rep. 281; Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820; Beck v. Pasadena W. Co., 130 Cal. 50, 62 Pac. Rep. 219; rev'g 59 Pac. Rep. 387.

Percolating waters may be developed by a tunnel and conducted away from land, as against owners of adjoining lands, where the waters would otherwise in their natural flow sink into the ground and be lost. Cohen v. La Canada etc. Co., 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; *Id.*, 142 Cal. 437, 76 Pac. Rep. 47.

See, also, Yarwood v. West Los Angeles W. Co., 132 Cal. 204, 64 Pac. Rep. 275; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Cardeli v. Comstock Tun. Co., 26 Nev. 284, 66 Pac. Rep. 950, holding that rights to water developed by the drainage of a mine could not be acquired by an ap-

into a natural stream and conducted therein to the place of use and there be recaptured by the parties developing the same.[3] In doing so, however, the rights of the prior claimants to the waters of the stream must not be injured or impaired.[4] But under the claim that water has been developed by him, one can not intercept waters which find their way through the ground and are tributary to either surface or subterranean streams, or other bodies of water, the rights to the waters of which have been previously acquired, upon the principle that the right to the use of the waters of a certain stream gives the right to the waters of the tributaries.[5] Neither can water be claimed as developed water where a portion of the natural flow of the stream was saved by the reconstruction of its original dam and is in no sense salvage waters. As was said in a recent Washington case:[6] "If the appellant had, by turning additional streams into the river, or by some form of works prevented loss by seepage, evaporation, or the like, and thereby increased its natural flow, it might with some reason claim the additional waters as salvage waters and appropriate them to an independent use. But the natural flow of waters saved by the reconstruction of its own dams are in no sense such salvage waters."[7]

propriation by others; Deadwood Cent. R. Co. v. Barber, 14 S. D. 558, 86 N. W. Rep. 619; Jordan v. Lang, 22 S. C. 159; Ripley v. Park Center etc. Co., 40 Colo. 129, 90 Pac. Rep. 75; Garvey W. Co. v. Huntington etc. Co., 154 Cal. 232, 97 Pac. Rep. 428; Mayberry v. Alhambra Add. W. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68.

[3] For right of recapture, see Secs. 798-800.

For right to use stream as a part of ditch system, see Sec. 832.

[4] Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Farmers' Union D. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042.

Where it is a question of simply saving water and not developing it, no right can be allowed. Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

[5] For right to tributaries, see Sec. 649.

[6] Evans v. Prosser Falls etc. Co., 62 Wash. 178, 113 Pac. Rep. 271.

[7] The rule as to development of water does not apply to the mere removal of obstructions or the hastening of the flow, so that the actual amount of the water is not increased, but only in cases in which a supply of water is added to the stream which would not otherwise have flowed there. Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

Where a surface stream under nor-

The burden of proof is upon the one who has discovered certain subterranean water and claiming the same to show that such water is, in fact, "developed water."[8] Therefore, whoever asserts that he is entitled to the exclusive use of water by reason of his having discovered and "developed" the same, must assure the Court by a preponderance of the evidence that he is not intercepting the tributaries of the main stream or other body to the waters of which others are entitled.[9]

§ 1207. Seepage waters — Definition and description. — The fourth and last class of percolating waters, under our classification,[1] is that of seepage waters. Although the terms "seepage waters" and "percolating waters" are frequently used interchangeably, the former are but a subdivision of percolating waters. As understood by Western irrigators, "seepage" waters have a more restricted meaning than the ordinary percolating waters, which we have discussed in the preceding sections of this chapter.[2] The term "seepage water" is applied particularly to the water which begins to appear in spots below irrigation canals and fields cultivated by irrigation, usually some months, or even years, after irrigation has been introduced, and which tends to convert the lowlands into marshes and gives rise to springs, and which, in turn, may be employed in watering other fields.[3] In other words, under this definition the

mal conditions was proportionate to the contributions of water from rainfall and underground storage, and the defendant's artesian wells drew from the underground supply, with the effect of appreciably diminishing the surface flow, the Court properly found that the waters developed in the wells were a part of the subterranean flow of the water. City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755.

See, also, Hudson v. Dailey, 156 Cal. 317, 105 Pac. Rep. 748; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

8 For the definition of developed water, see Sec. 1205.

9 Howcroft v. Union & Jordan Irr. Co., 25 Utah 311, 71 Pac. Rep. 487; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Beaverhead C. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. 875; Herriman Irr. Co. v. Butterfield etc. Co., 19 Utah 453, 57 Pac. Rep. 573, 51 L. R. A. 930.

1 For classification of percolating waters, see Secs. 1152, 1187.

2 See Secs. 1186-1204.

3 Fortier, Water-Supply and Irr. Paper No. 7, p. 11, U. S. Geol. Survey.

source of seepage water is usually an artificial one, such as that water which percolates through the soil from canals, reservoirs, or from the irrigation of lands.

§ 1208. **Seepage waters—Rights to.**—As a general rule seepage water finding its way underground from the works or irrigated fields of one person to those of another is treated as waste or escaped water, and therefore while one may use the water temporarily, no permanent right can be acquired by the user to have the seepage water kept up.[1] The prior appropriator and original user of the water may at any time change his place and manner of the use of the water and thereby cut off the seepage. Or he may reconstruct his ditch or canal from the open earth ditch to a cement conduit or pipe line, and thereby also cut off all seepage. In either case the one who had temporarily used the water by collecting the seepage has no recourse against the owner of the water right. In going to the expense to use such water he simply takes his chances that the supply will be kept up.[2] To hold otherwise would be to hold that the prior appropriator could not change the manner of the use of the water[3] or the place where the water was originally used;[4] but that he must continue to use the water in the original wasteful method and in the same place in order that the supply of seepage water be kept up. In 1889 the Colorado legislature passed an Act which provided that ditches for utilizing seepage or spring waters

1 For the rights of waste water, see Secs. 661, 1115.

2 Burkart v. Meiburg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567.

Where a creek from which waters were taken for irrigation purposes had its source in certain springs, the fact that the volume of the water in the creek was increased by seepage from irrigated lands above them did not entitle defendants to divert the spring water, as against prior appropriators. Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588.

3 For change of manner of use, see Secs. 869-872.

4 For change of place of use, see Secs. 867-871.

As was well said in a recent Utah case (Garns v. Rollins, decided by the Utah Supreme Court, June 20, 1912): "The law is well settled; in fact the authorities all agree that one land owner receiving waste water which flows, seeps, or percolates from land of another, can not acquire prescriptive right to such water, nor any right (except by grant) to have the owner of the land from which he obtains the water continue the flow."

shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams.[5] If it is meant by this that priority should govern as between such ditches only, the law is all right; but if the Act means that one who has acquired a right under it can compel the original owner of the right to continue to use the water in the same manner and in the same place so that the seepage may be kept up, upon the same principle that the user of the seepage was a subsequent appropriator of the waters of a surface stream, the law is clearly unconstitutional.[6] However, it was held in a California case,[7] that where one was entitled to the right of all the surface water of a stream for irrigation and domestic purposes, attempts to sell the right to the city for its use, necessitating the piping of the water beyond the watershed, the owner of a riparian right in the stream was entitled to enjoin such use without proof of damages, it appearing that by permitting the water to flow in the usual way and by using it for the irrigation of the land, some of it would seep into and percolate through the soil, and again reach the stream, to the benefit of such riparian proprietor, and that the right to make such a radical change was subordinate to the right of the riparian proprietor.

Upon the other side of the question the Utah Court held that one could not acquire a prescriptive right to permit seepage from his irrigation ditch to escape and injure the lands of others, upon the ground that it would in effect give a prescriptive right to be negligent.[8]

§ 1209. Rights acquired to percolating waters by prescription.—Under the old rule all percolating waters were treated as a part of the soil where found.[1] No right to their use could be acquired by prescription without also acquiring the right to the land itself.[2]

5 Colo. Laws, 1889, p. 215.

6 In the case of La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644, the Court seems to express some doubt as to the constitutionality of the Act, but held that the case did not come within its provisions.

7 Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767.

8 Jenkins v. Hooper etc. Co., 13 Utah 100, 44 Pac. Rep. 829.

1 For the common law rule, see Secs. 1186-1189.

2 Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Crescent etc. Co. v. Silver King etc. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093.

However, it is held that the right to take water from a well may be acquired by prescription.[3] But under the new rule of correlative rights,[4] where the right to the use of certain classes of percolating waters is distinctly recognized, the rule is different, and rights to these waters may be acquired by prescription. As is the case with the waters of artesian basins, discussed in a previous section,[5] the right to the use of waters of a subterranean reservoir or catchment basin may be acquired by prescription by one land owner whose land overlies the common basin, and from which the water is extracted, and upon which it has been used, as against the rights of all the other land owners whose lands overlie the same basin.[6] It is also held that the lower use in a valley is not adverse to the right of a land owner in the upper part of the valley, the rule in this respect not being different from the rule of the common law of riparian rights in surface streams.[7]

§ 1210. Rights acquired to percolating waters by eminent domain.—Under the new rule as to the correlative rights of waters supplying subterranean reservoirs or catchment basins, there is no reason in principle why the rights to the use of these waters can not be acquired by eminent domain upon the institution of condemnation proceedings. This may be done either by a condemnation of the lands containing these waters or it may be done by the condemnation of the waters themselves, provided, of course, all of the parties interested in the common basin or the common supply are served with notice and given an opportunity to be heard before the proper tribunal. In either case the acquisition of the use of the waters being the gist of the action, the taking of those waters should be an element of damages. The water itself is property, and the land

For rights to the use of water rights by prescription, see Secs. 1033-1058.

3 Hoag v. Pierce, 65 Hun, 424, 20 N. Y. Supp. 224.

4 See Secs. 1173-1178.

5 See Sec. 1182.

6 Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

The owner of land overlying common water-bearing strata, upon which he has never used the water, "may invoke the aid of a court of equity to protect him in his right to thereafter use such water on his land, and thus prevent the appropriator from defeating such landowner's right, or acquiring a paramount right, by adverse use, or by lapse of time." Burr v. Maclay etc. Co., 154 Cal. 428, 98 Pac. Rep. 260.

7 See Secs. 1039-1041.

may be practically valueless without it. With the water, which can be used at no other place by the owner than upon the land itself, the land may be of great value. In a California case, decided before the adoption in that State of the rule of correlative rights to these waters,[1] it was held that a certain tract of land which contained from one-fifth to one-third water, and was therefore a natural underground reservoir, might be acquired by eminent domain by a city for the sole purpose of acquiring the underlying water, but that the percolating water was not an element of damage that could be considered in estimating the value of the property so taken. This ruling was probably correct under the old rule that the percolating water was a part of the soil itself, but under the later rulings of that Court as to the rule of correlative rights to the use of these waters it would be erroneous. It would be equivalent to the taking of land and a surface water right therefor and for the purpose of securing the water right, and only estimating as the damages the value of the land without considering the value of the water right.

In the second hearing of the case of Burr v. Maclay Rancho W. Co.[2] it was held that water pumped from wells on land overlying percolating waters extending under adjacent land to fulfill private contractual obligations to deliver water to land sold with a water right is not a taking for public use, but is strictly a private one. And upon this subject the Court said: "The water taken by the defendants to supply the needs of the interveners is not taken for public use. It is not offered to the public generally, or to all who may want it within a certain territory. It is taken solely to fulfill the private contractual obligations of the defendants to deliver water to certain lots which it has sold with a water right. This is a private use."[3]

§ 1211. Rights acquired or lost to percolating waters by estoppel.—Under the doctrine of equitable estoppel, discussed in previous sections of this work,[1] it is held relative to the waters of artesian or catchment basins that the right to an injunction by cer-

1 Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585.

2 160 Cal. 268, 116 Pac. Rep. 715.

3 Citing Hildreth v. Montecito, 139 Cal. 22, 72 Pac. Rep. 395; Barton v. Riverside, 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331; Gilmer v. Lime Point, 18 Cal. 229.

1 See Secs. 1125-1128.

tain land owners against another land owner for an excessive use of which exceeds the latter's strict correlative rights in and to the water, may be lost and each land owner injured by such use relegated to an action for such damages as he may prove. As was said by the leading case upon the subject:[2] "Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused and the party left to his action for such damages as he can prove."[3] Again, in a still later California case,[4] it was said: "This rule, briefly stated, is that where one whose property is taken for a public use has stood by without objection, knowing that it was so taken and applied, and has allowed the public use to be instituted and carried on at great expense, and has permitted the people benefited thereby to adapt themselves to the new conditions and avail themselves of the conveniences and advantages thereby afforded, he can not thereafter maintain an action to enjoin the continuance of such public use, or to recover possession of the property so taken, but will be relegated to an action for damages."

It was said in a late California decision:[5] "The rule concerning the establishment of public service with property of another taken without previous compensation has for its basis chiefly the inconvenience to the public if the service is interrupted by the issuance of an injunction to restrain the use. It does not apply to the taking of property for private use. With respect to private uses, the general law of estoppel controls."

2 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

3 Citing Fresno Street R. Co. v. Southern Pac. R. Co., 135 Cal. 202, 67 Pac. Rep. 773; Southern California R. Co. v. Slauson, 138 Cal. 342, 71 Pac. Rep. 352, 94 Am. St. Rep. 58.

See, also, Barton v. Riverside Water Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

See, also, for actions for injunctions, Chap. 81.

4 Barton v. Riverside Water Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

5 Burr v. Maclay Rancho W. Co., 160 Cal. 268, 116 Pac. Rep. 715.

A TREATISE

ON THE

LAW OF IRRIGATION

AND WATER RIGHTS

AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS

AS THE SAME IS IN FORCE IN THE STATES OF THE ARID AND SEMI-ARID REGIONS OF THE UNITED STATES; AND ALSO INCLUDING AN ABSTRACT OF THE STATUTES OF THE RESPECTIVE STATES, AND THE DECISIONS OF THE COURTS RELATING TO THOSE SUBJECTS.

BY

CLESSON S. KINNEY

OF THE

SALT LAKE CITY BAR.

SECOND EDITION

IN FOUR VOLUMES.

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KINNEY

ON

IRRIGATION AND WATER RIGHTS.

SECOND EDITION—VOLUME THREE.

PART XI.

INTERNATIONAL, INTERSTATE, FEDERAL, STATE, AND MUNICIPAL CONTROL.

CHAPTER 63.

INTERNATIONAL CONTROL.

§ 1212. Scope of chapter.
§ 1213. Definition—Subject in general.
§ 1214. Treaty-making power—The establishment of commissions.
§ 1215. Treaties with Great Britain.
§ 1216. Treaties with Mexico, relative to international waters.
§ 1217. Treaties with Mexico—International boundary commission.
§ 1218. Condition leading to treaty of May 21, 1906, governing the division of the waters of the Rio Grande.
§ 1219. Text of treaty of May 21, 1906, relative to division of the waters of the Rio Grande.
§ 1220. Treaty of May 21, 1906, with Mexico—Effect of treaty.

§ 1212. Scope of chapter.—In this chapter we will discuss, in all its phases, the subject of the rights to waters flowing in what are known as international streams, or other bodies of waters, both as respecting the countries through which or adjoining which these streams or bodies of water flow or lie, and also as respecting the rights of citizens of the respective countries.

§ 1213. Definition—Subject in general.—International waters are those waters which flow through or bound two or more separate and independent countries.[1]

As is the case with interstate waters, so it is with international waters, the most of the law upon the subject has been developed within the last few years. In the early history of this country, when

[1] For the appropriation of the waters of international streams, see Sec. 665.

the waters of these international streams were sufficient for all the uses to which they were put, very little attention was paid to how much or how little was diverted from them by the citizens of the respective nations affected by them. But late years, with the constantly increasing use of these waters, and the growing demand for a still further use, questions have arisen respecting the division of the waters of these streams between the respective countries, which questions are of international importance. And when serious international questions arise between two countries they must be adjusted by the two nations or they lead to war. Two independent and sovereign nations have a different standing in respect to each other than have two States of the Union. A controversy between two States, as we have shown in the preceding chapter, can not lead to war between them, but may be settled by an original action brought in the Supreme Court of the United States.[2] While, upon the other hand, an independent and sovereign nation, for injuries committed by another sovereign nation, may seek a remedy by negotiation and treaty, and, failing in that, may resort to force.[3] The usual method, however, in settling these controversies as to the rights of the respective countries in and to the waters of international streams, both with our neighbors on the north and on the south, has been, and, as we hope will long continue to be, by negotiations by those in authority leading up to treaties between the countries. It is against all principles of good morals, equity, and justice that there should be an unregulated scramble between the citizens of one nation to appropriate for themselves the greatest possible portion of the waters of international streams to the complete exclusion of the rights in and to those waters of the citizens of the adjoining nation. Each country must concede the rights of the other and of its citizens. These rights can be and should be determined by careful investigation, and should be finally fixed by treaties.

2 See chapter on interstate waters, Secs. 1221-1234.

See, also, Kansas v. Colorado, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, on final determination, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, on final determination, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 286, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

3 Missouri v. Illinois, *supra;* Kansas v. Colorado, *supra.*

§ 1214. **Treaty-making power—The establishment of commissions.**—It is within the treaty-making power of this and adjoining countries to adjust by treaty all controversies relating to the use of the waters of all international streams or other bodies of water, either by the countries themselves or by their citizens. This power, as far as this country is concerned, rests with the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur.[1] In order to carry out the provisions of a treaty it is within the treaty-making power to provide for a commission to be appointed for that purpose to make an equitable adjustment of the rights of the respective countries affected and of their citizens to appropriate and divert the waters of international streams or other bodies of water for the purpose of irrigation or for any other purpose. Upon such an apportionment the rights of each country and its citizens are limited to the amount of water awarded in the aggregate to each country. With the amount of water fixed which each country is entitled to, or its citizens, as between the citizens of the different countries, the right to appropriate the waters of an international stream depend upon the laws of the country where the appropriation is made and the rules and regulations established by the treaty between the two countries or those established by the commission appointed to make the apportionment.

§ 1215. **Treaties with Great Britain.**—By the treaty with Great Britain, proclaimed July 4, 1871,[1] relative to the maintenance of the navigation of the streams bounding the United States and Canada, it was provided: "Article XXVI. The navigation of the River St. Lawrence, ascending and descending from the forty-fifth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The navigation of the Rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall

1 Const., Art. 11, Sec. 2.

1 7 Fed. Stat. Ann., 1905, p. 599; Treaties and Conventions, 1899, p. 478.

See, also, the treaty of May 13, 1910, relative to the equal division of the waters of the St. Mary and Milk Rivers.

forever remain free and open for the purposes of commerce to the subjects of Her Britannic Majesty, and to the citizens of the United States, subject to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation."

Already protests have been filed by the Dominion of Canada with the Secretary of War of the United States against the increasing of the diversion of the water from Lake Michigan through the great drainage canal from 4,000 cubic feet to 10,000 cubic feet per second. Undoubtedly as to whether the rights of Canada as to navigation and otherwise will be injured by this increased diversion of the amount of water from the lake will have to be determined by expert examination and finally adjusted by treaty between the two countries.

§ 1216. Treaties with Mexico, relative to international waters.—By the seventh article of the Treaty of Guadalupe Hidalgo, of February 2, 1848,[1] it is provided that "the River Gila and the part of the Rio Bravo del Norte (the Colorado) lying below the southern boundary of New Mexico being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundaries shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments. The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits."

By the fourth article of the Gadsden Treaty of June 30, 1854,[2]

1 7 Fed. Stat. Ann., 1905, p. 694; Treaties and Conventions, 1889, p. 681; 9 Stat. L. 948.

2 7 Fed. Stat. Ann., 1905, p. 704; Treaties and Conventions, 1889, p. 694; 10 Stat. L. 1034.

between the same countries, the provisions of the article above quoted were modified, owing to the fact that the boundary line between the two countries was changed by the latter treaty, Article IV of which provides: "The several provisions, stipulations, and restrictions contained in the seventh article of the Treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte below the initial of said boundary provided in the first article of this treaty; that is to say, below the intersection of the 31° 47′ 30″ parallel of latitude with the boundary line by the late treaty dividing said river from its mouth upwards, according to the fifth article of the Treaty of Guadalupe." [3]

By the boundary convention of September 14, 1886,[4] it is provided that the Rio Grande and Colorado Rivers, where designated, should remain the boundary, and subject to the provisions, as follows:

"Article I. The dividing line shall forever be that described in the aforesaid treaty, and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through slow and gradual erosion and deposit of alluvium and not be the abandonment of an existing river and the opening of a new one.

"Article II. Any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

3 "It is apparent from these treaty stipulations that we may not, without the consent of Mexico, take any action on the Colorado River where it forms the boundary line between the United States and Mexico, which would impede or interrupt navigation in whole or in part, and this would necessarily be the ultimate effect of subjugating the river absolutely to the purposes of irrigation where it forms such boundary line." Op. Atty. Gen., quoted in opinion, California Dev. Co., 33 Land Dec. 391.

See, also, U. S. v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428.

4 7 Fed. Stat. Ann., 1905, p. 710; Treaties and Conventions, 1889, p. 721.

"Article III. No artificial change in the navigable course of the river by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid commissions in 1852, or as determined by Article I hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current shall not be deemed an artificial change."

Article IV provides for and the marking of international bridges.

"Article V. Rights of property in respect to lands which may have become separated through the creation of new channels, as defined in Article II hereof, shall not be affected thereby, but such lands shall continue to be under the jurisdiction of the country to which they previously belonged.

"In no case, however, shall this retained jurisdictional right affect or control the right of navigation common to the two countries under the stipulations of Article VII of the aforesaid Treaty of Guadalupe Hidalgo; and such common right shall continue without prejudice throughout the actual navigable main channels of the said rivers from the mouth of the Rio Grande to the point where the Rio Colorado ceases to be the international boundary, even though any part of the channel of the said rivers, through the changes herein provided against, may be comprised within the territory of one of the two nations."

§ 1217. **Treaties with Mexico—International boundary commission.**—Again, by a convention between the United States and Mexico, proclaimed December 26, 1890,[1] provision was made for an international boundary commission and their jurisdiction in the following terms:

"Article I. All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado Rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid

[1] 7 Fed. Stat. Ann., 1907, p. 712; 26 Stat. L. 1512.

Rio Grande and that of the aforesaid Colorado River, or of works that may be constructed in said rivers, or any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or questions."

Article II provides that the commission shall be composed of a commissioner appointed by the President of the United States of America and another appointed by the President of the United States of Mexico, of a consulting engineer, and of such secretaries and interpreters as each Government may see fit to add to its commission. "Each Government, separately, shall fix the salaries and emoluments of the members of its commission."

"Article III. The International Boundary Commission shall not transact any business unless both commissioners are present. It shall sit on the frontier of the two contracting countries, and shall establish itself at such places as it may determine upon; it shall, however, repair to places at which any of the difficulties or questions mentioned in this convention may arise, as soon as it shall have been duly notified thereof.

"Article IV. When, owing to natural causes, any change shall take place in the bed of the Rio Grande or in that of the Colorado River, in that portion thereof wherein those rivers form the boundary line between the two countries which may affect the boundary line, notice of that fact shall be given by the proper local authorities on both sides to their respective commissioners of the International Boundary Commission, on receiving which notice it shall be the duty of the said commission to repair to the place where the change has taken place, or the question has arisen, to make personal examination of such change, to compare it with the bed of the river as it was before the change took place, as shown by the surveys, and to decide whether it has occurred through avulsion or erosion, for the effects of Articles I and II of the convention of November 2, 1884; having done this, it shall make suitable annotations on the surveys of the boundary line.

"Article V. Whenever the local authorities on any point of the frontier between the United States of America and the United States of Mexico, in the portion in which the Rio Grande and the Colorado River form the boundary between the two countries, shall think that works are being constructed in either of those rivers, such as are

prohibited by Article III of the convention of November 12, 1884, or by Article VII of the Treaty of Guadalupe Hidalgo of February 2, 1848, they shall so notify their respective commissioners in order that the latter may at once submit the matter to the International Boundary Commission, and that said commission may proceed, in accordance with the provisions of the foregoing article, to examine the case, and that it may decide whether the work is among the number of those which are permitted, or of those which are prohibited by the stipulations of those treaties.

"The commission may provisionally suspend the construction of the works in question pending the investigation of the matter, and if it shall fail to agree on this point, the works shall be suspended, at the instance of one of the two Governments.

"Article VI. In either of these cases the commission shall make personal examination of the matter which occasions the change, the question, or the complaint, and shall give its decision in regard to the same, in doing which it shall comply with the requirements established by a body of regulations to be prepared by the said commission and approved by both Governments.

"Article VII. The International Boundary Commission shall have power to call for papers and information, and it shall be the duty of the authorities of each of the two countries to send it any papers that it may call for relating to any boundary question in which it may have jurisdiction in pursuance of this convention.

"The said commission shall have the power to summon any witnesses whose testimony it may think proper to take, and it shall be the duty of all persons thus summoned to appear before the same and to give their testimony, which shall be taken in accordance with such by-laws and regulations as may be adopted by the commission and approved by both Governments. In case of the refusal of a witness to appear, he shall be compelled to do so, and to this end the commission may make use of the same means that are used by the courts of the respective countries to compel the attendance of witnesses, in conformity with their respective laws.

"Article VIII. If both commissioners shall agree to a decision, their judgment shall be considered binding upon both Governments, unless one of them shall disapprove it within one month, reckoned from the day on which it shall have been pronounced. In the latter case both Governments shall take cognizance of the matter, and shall

decide it amicably, bearing constantly in mind the stipulation of Article XXI of the Treaty of Guadalupe Hidalgo of February 2, 1848.[2]

"The same shall be the case when the commissioners shall fail to agree concerning the point which occasions the question, the complaint, or the change, in which case each commissioner shall prepare a report, in writing, which he shall lay before his Government."

§ 1218. **Conditions leading to treaty of May 21, 1906, governing the division of the waters of the Rio Grande.**—For more than two centuries the Mexicans living along the lower part of the Rio Grande River have made extensive use of the waters of the river for the purpose of irrigating their lands. But in recent years private companies on the upper waters of the river, in the United States, have, by the construction of wing dams, diverted a large part of the water to this side of the river, where it is used for the same purpose. Furthermore, according to the plans of the Reclamation Service of the United States, if carried out, it was made certain that unless some equitable division of the waters of the river was made between the two countries, by the treaty-making powers, practically all of the waters would be diverted and used on this side, and that, too, regardless of the rights of the Mexicans upon the other side. The construction of the great dam across the Rio Grande River at Engle, New Mexico, brought the matter to a climax and led to negotiations, which finally culminated in a treaty between the two countries, which is the fundamental law governing the division of the waters of the river between Mexico and the United States.[1]

2 Article XXI of the treaty provides for the settlement of differences by friendly and pacific negotiations.

1 See plans for irrigation of the Rio Grande Valley, 3d Annual Report of the Reclamation Service, pp. 395-426.

For the text of the treaty, see Sec. 1219.

See, also, United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; California Dev. Co., Op. Atty. Gen., 33 Land Dec. 391.

See, also, for treaty between the United States and Mexico of March 1, 1889, providing for an international boundary commission to settle all international differences on the Rio Grande and Colorado Rivers, 7 Fed. Stat. Ann., 1905, p. 712; 26 Stat. L. 1512.

§ 1219. Text of treaty of May 21, 1906, relative to division of the waters of the Rio Grande.—The treaty of May 21, 1906, between the United States and the Republic of Mexico, relating to the distribution of the waters of the Rio Grande River, is as follows:

"THE UNITED STATES OF AMERICA AND THE UNITED STATES OF MEXICO, being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a convention for these purposes, and have named as their Plenipotentiaries:

"The President of the United States of America, Elihu Root, Secretary of State of the United States; and

"The President of the United States of Mexico, His Excellency Senor Don Joaquin D. Casasus, Ambassador Extraordinary and Plenipotentiary of the United States of Mexico at Washington,

"Who, after having exhibited their respective full powers, which were found to be good and in due form, have agreed upon the following articles:

"ARTICLE I.

"After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exists above the City of Juarez, Mexico.

"ARTICLE II.

"The delivery of the said amount of water shall be assured by the United States, and shall be distributed through the year in the same proportions as the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicinity of El Paso, Texas, according to the following schedule, as nearly as may be possible:

See, also, for the text of treaty of May 21, 1906, between Mexico and the United States relative to the division of the waters of the Rio Grande River, Sec. 1219.

	Acre feet per month	Corresponding cubic feet of water
January	0	0
February	1,090	47,480,400
March	5,460	237,837,600
April	12,000	522,720,000
May	12,000	522,720,000
June	12,000	522,720,000
July	8,180	356,320,000
August	4,370	190,357,200
September	3,270	142,441,200
October	1,090	47,480,400
November	540	23,522,400
December	0	0
Total	60,000	2,613,600,000

"In case, however, of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States.

"ARTICLE III.

"The said delivery shall be made without cost to Mexico, and the United States agrees to pay the whole cost of storing the said quantity of water to be delivered to Mexico, of conveying the same to the international line, of measuring the said water, and of delivering it in the river bed above the head of the Mexican Canal. It is understood that the United States assumes no obligation beyond the delivering of the water in the bed of the river above the head of the Mexican Canal.

"ARTICLE IV.

"The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Texas, and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages

alleged to have been sustained by the owners of land in Mexico by reasons of the diversions by citizens of the United States of waters of the Rio Grande.

"ARTICLE V.

"The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted, or which may be hereafter asserted, by reason of any losses incurred by the owners of land in Mexico, due, or alleged to be due, to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the portion of the Rio Grande which forms the international boundary, from the head of the Mexican Canal down to Fort Quitman, Texas, and in no other case.

"ARTICLE VI.

"The present convention shall be ratified by both contracting parties in accordance with their constitutional procedure, and the ratifications shall be exchanged at Washington as soon as possible.

"IN WITNESS WHEREOF, the respective plenipotentiaries have signed the convention both in English and Spanish languages, and hereunto affixed their seals.

"Done in duplicate at the City of Washington, this 21st day of May, one thousand nine hundred and six.

"ELIHU ROOT. (Seal.)
"JOAQUIN D. CASASUS." (Seal.)

§ 1220. **Treaty of May 21, 1906, with Mexico—Effect of treaty.**—The effect of the treaty of May 21, 1905, with Mexico,[1] relative to the division of the waters of the Rio Grande River, is to bind the United States to build the project mentioned in the treaty and to annually deliver to Mexico at the point named 60,000 acre-feet named in accordance with the schedule as set forth in Article II. This is approximately the amount of water that has been used for about three hundred years in the old Mexican Canal

[1] For full text of treaty, see Sec. 1219.

prior to 1880, since which time irrigation by American citizens on the headwaters in Colorado has caused a deficiency in the low-water flow of the Rio Grande River at the head of the canal. Upon the other hand, in return for the United States furnishing to Mexico the 60,000 acre-feet of water, the Mexican Government has waived all other claims to the water in the Rio Grande above the town of Fort Quitman, Texas, and also all claims for past damages for the shortage of water. As the United States Government is put to the entire expense of constructing the irrigation project, the Mexican share is only a fractional part of the whole flow of the river. The lands for which the Government contemplates furnishing the water under this project are 180,000 acres—110,000 acres in New Mexico, 45,000 acres in Texas, and 25,000 acres in Mexico.[2]

The Secretary of the Interior holds that he may make withdrawals of public land from the operation of the Right of Way Act of March 3, 1891.[3] This was upon the ground that whether the United States has a prior or superior and paramount claim to the waters of the Rio Grande River to the extent necessary to enable it to keep its obligations with the Republic of Mexico with reference to the delivery of such waters as provided for under the treaty of May 21, 1906,[4] is a question not within the competency of the Land Department to determine. And the Secretary of the Interior will not embarrass the decision of such question, nor the fulfillment of the nation's obligations under such treaty by approving applications for rights of way under the Act of March 3, 1891, which rest upon the appropriation of such waters under State laws and their proposed diversion to other and adverse uses.[5] And the Secretary, upon the subject, said: "After a most painstaking consideration of the entire subject with reference to the situation presented, the department can not see its way clear to approve this application. It may, for the purpose of this case, be admitted that under ordinary circumstances the Secretary of the Interior is without discretion to withhold his approval of an application filed conformably to the Act of March 3, 1891. But manifestly here is a situation unusual and

2 See for Rio Grande Project, 3d Annual Report Reclamation Project, pp. 395-426; 6th Annual Report, *Id.*, pp. 220-224.

3 For the Act of March 3, 1891, and its construction, see Secs. 937-950.

4 For the terms of the treaty, see Sec. 1219.

5 Francis W. Bosco, 39 Land Dec. 104.

critical, which demands the exercise of such discretion. The paramount rights and interests of the United States are vitally involved in this proceeding. No question of the authority of the United States can well be urged in this proceeding. The power to make treaties with foreign nations has been delegated by the States to the Nation, and is exclusive; and it is well settled that where such a power has been delegated the grant carries with it all subsidiary powers necessary to its exercise. Moreover, the question is one not within the competency of the Land Department to determine, and this is sufficient reason to justify that department in refusing to take any action which might in any way embarrass the United States in fulfilling its treaty obligations or further complicate a question it is without right or jurisdiction to decide. It is not overlooked that the contention is made upon this record, and was presented at length at the oral hearing that the diversion of water necessary to carry the Wagon Wheel Gap Project to completion will in nowise interfere with the storage of the necessary waters by the United States Engle dam, to enable it to keep both its treaty obligations with the Republic of Mexico and its contractual obligations with the water users' associations above referred to. The department is by no means convinced that this is true, and in the absence of such conviction it is believed to be the duty of the Secretary of the Interior to exercise such discretion as is necessary to protect the interests of the United States."

In construing the scope of the National Reclamation Act,[6] in connection with the treaty of May 21, 1906,[7] the United States Circuit Court of Appeals recently said:[8] "By the Act of February 25, 1905,[9] the provisions of the Reclamation Act of June 17, 1902, were extended to the portion of the State of Texas bordering upon the Rio Grande which could be irrigated from a dam constructed near Engle in the Territory of New Mexico. This Act was passed for the purpose of enabling the United States to carry into effect the terms of a proposed treaty or convention with Mexico, which was afterward signed on May 21, 1906.[10] This treaty, or convention, provided that: 'After the completion of the proposed storage dam

[6] For the National Reclamation Act, see Sec. 1244.

[7] For the text of treaty, see Sec. 1219.

[8] Burley v. United States, 179 Fed. Rep. 1, 101 C. C. A. 429.

[9] 33 Stat. 814.

[10] 34 Stat. 2953.

near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exist above the City of Juarez, Mexico.'

"By the Act of March 4, 1907,[11] an appropriation of $1,000,000 was made available as needed, and to be expended under the direction of the Secretary of the Interior, for the construction of the above-mentioned dam in connection with the irrigation project on the Rio Grande. By the Act of June 12, 1906,[12] the provisions of the Reclamation Act were extended so as to include and apply to the State of Texas, where there never has been any public lands of the United States, but where such streams as the Pecos and the Rio Grande, rising in New Mexico, a Territory of the United States, and flowing into Texas, have become important factors in the irrigation and reclamation of the arid lands of that State."

[11] 34 Stat. 1357.

[12] 34 Stat. 259; U. S. Comp. St. Supp., 1909, p. 603.

CHAPTER 64.

INTERSTATE CONTROL.

§ 1221. Scope of chapter.
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§ 1223. The equitable rights of respective States.
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§ 1233. Jurisdiction of courts—Original jurisdiction of the Supreme Court of the United States.
§ 1234. Jurisdiction of courts—Federal and State.

§ 1221. Scope of chapter.—In this chapter we will discuss, in all its phases, the subject of the rights to waters flowing in what are known as interstate streams, and also the right to conduct the waters from the streams or other bodies from one State for the use in another.

§ 1222. Definition—Subject in general.—Interstate waters are those which flow through or bound two or more States.[1] When the first edition of this work was published in 1893, there was no law upon the subject of the application of the Arid Region Doctrine of appropriation, either statutory or case, as specially applied to interstate waters.[2] In fact, nearly all the law upon the subject has been developed within the last ten years. Owing to the fact that all of

[1] For the right to appropriate water from interstate streams, see Sec. 664.

[2] For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

the important streams and other bodies of water of this country are not confined within the boundaries of any particular State, the conflicting interests of the respective States through which or adjoining which they flow have led to a number of interesting questions. These conflicts have arisen not only because of the physical fact of the situation of these waters in respect to the different States, but also on account of the difference in their laws governing waters flowing in the respective jurisdictions. This is true as relating to the claim of one State upon the upper reaches of a river to divert and use, if necessary, all of the water of the river, under its laws adopted in accordance with the Arid Region Doctrine of appropriation, before it reaches the boundary line of an adjoining State, which claims the right to the unimpaired flow of the water of the river under the common law of riparian rights, as was especially illustrated in the case of Kansas v. Colorado.[3]

§ 1223. **The equitable rights of respective States.**—It must be borne in mind that a river which takes its head in one State and flows down to and through another State does not end at the boundary line of the States, and a new river begin at that point, but it is one and the same stream throughout its entire course. As was said by Judge Hallett in Hoge v. Eaton,[1] "Water is essential to human life in the same degree as light and air, and no bounds can be set to its use for supplying the natural wants of man other than the mighty barriers which the Creator has made on the face of the earth." Therefore, regardless of the form of its laws governing the waters flowing within its boundaries, each State has rights in and to the waters of such a river which should be respected by the other State. And, while the upper State through which such a river flows has the undoubted right to make such a reasonable use of its waters, even to the extent that the State below may be somewhat damaged thereby, provided that the upper State does not take the waters in excess of what will give to it an equitable apportionment of the benefits of the river, it can not divert and use all of the water

[3] See Sec. 1224.

[1] 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

See, also, Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552, and the portion of the opinion cited in the next section.

of the river, and thereby deprive the lower State of its entire benefits. In fact, the law upon this subject, as it stands today, is that the right to the use of the waters of an interstate river, by the respective States through which it flows, is analogous to the right of individuals to the use of the waters of a stream flowing by or through their respective lands, under the common law doctrine of riparian rights, as modified by some of the Western States, and discussed in a previous portion of this work.[2] While the upper owner on the stream may take out a considerable portion of the water for irrigation, or for other beneficial uses, even to the extent of considerable injury to the rights of the lower owner, he has no right to take all of the water, and thus deprive the lower proprietor of all the benefits of the stream. And, upon the other hand, the lower proprietor, although his rights may be injured to a considerable extent by such a use of the water by the upper owner, must look for relief by way of an action for damages against the upper owner, and his claim to the right of the undiminished flow of the stream will not be sustained by the courts by way of injunctive relief against any diversion at all by the upper owner.[3]

It must not be understood that the equitable division of the waters of an interstate stream means the equal division of the natural flow of the stream between the States through which it runs. The lower States may not need as much of its waters as the upper States for the reason that the upper Sates are more arid and have less rainfall than the lower States. Then, again, the lower States may be benefited more by the subterranean waters which flow under the surface of the soil, and caused to a great extent by the use of the water by the upper States for irrigation. This is illustrated in the Kansas-Colorado case. Colorado has an arid climate, the land is of a much higher altitude than that of Kansas, and the rainfall is much less than Kansas, and what little rainfall there is in Colorado, on account of the slope of the lands, runs off rapidly to the lower lands in Kansas; and, again, by the use of the water for irrigation in Colorado, the lands in Kansas are greatly benefited by the underflow caused thereby. Hence, to say that the waters of the natural flow of the Arkansas River should be equally divided between the two States would not be an equitable division of its waters.

2 For the modified doctrine of riparian rights, see Secs. 505-515.

3 For right to injunctive relief, see Chap. 81.

§ 1224. **The Kansas-Colorado case.**—In the history of water right litigation, no case has created more interest or has been of so great importance, from a Western standpoint, as the decision handed down on May 13, 1907, in the original action brought in the Supreme Court of the United States in the case of State of Kansas v. the State of Colorado.[1] While that decision bore directly on that particular case, and also involved a number of questions under which it has been already cited in previous portions of this work, being decided by the highest court of the land, it established a precedent that will be followed in all future controversies as to the rights of States to use the waters of an interstate stream in the reclamation of arid land. This action was brought by the State of Kansas against the State of Colorado and a large number of private corporations, to prevent such a use of the waters of the Arkansas River in Colorado as would cause such a depletion of the flow of the waters of the river through the State of Kansas that it would be an injury to the interests of the State of Kansas and her people. The right of the United States to intervene on the ground of the superior right of the National Government to control the flow of the river as a part of the system or scheme for the reclamation of arid lands, under the National Reclamation Act,[2] was denied by the Court without prejudice to the right of intervention only if necessary to preserve or improve the navigability of the river. The right of the State of Kansas to bring the suit was sustained on the ground that the question involved was a matter of State interest, affecting the general welfare of the State, and that in bringing such an action the State was not merely representing individual citizens. Also, that it does not follow that because Congress can not determine the rule of law which shall control the waters flowing through the respective States, or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the dis-

1 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665; *Id.*, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

2 For the National Reclamation Act, see Chap. 65, Secs. 1235, 1286; 7 Fed. Stat. Ann., 1905, p. 1098; 32 Stat. L. 388. See Sec. 8, wherein it is provided, "and nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

agreement, coupled with its effect upon the stream passing through the two States, made the matter in controversy a subject for investigation and determination by the Supreme Court. And, referring to the case of Missouri v. Illinois, which case involved the question of the pollution by one State of an interstate stream, the Court said. "In other words, through these successive disputes and decisions this Court is practically building up what may not improperly be called interstate common law."

A very original and somewhat unique contention upon the part of Colorado was that the Arkansas River in that State terminated at the State line, and that the Arkansas River in Kansas was a new river, beginning below the State line. But upon this subject Mr. Justice Brewer, in speaking for the unanimous Court, said: "Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the State line, and the other commencing at or near the place where the former ends, and from springs and branches starting a new stream to flow onward through Kansas and Oklahoma toward the Gulf of Mexico. From time immemorial the existence of a single continuous river has been recognized by geographers, explorers, and travelers. That there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows."

But the great question involved in the case was that of the right of the people of Colorado to take the water from this interstate river for the purpose of irrigating arid lands to such an extent that it would thereby diminish the flow of the river through the State of Kansas, and so cause some injury to the riparian owners in the State of Kansas. This question involved, first, the question whether the common law rule of riparian rights or the rule under the Arid Region Doctrine of appropriation should govern; and, second, if the use of the waters for irrigation by the State of Colorado was lawful, to what extent might that State go in such a use. Upon this question the Court held that it was for each State to determine for

itself whether the common law rule or the doctrine of appropriation should govern the waters within its territory, and that Congress can not enforce either rule upon any State. Neither can either State legislate for or impose its own policy upon the other. But the decision also held that since Kansas itself recognized the right of appropriation of the waters of the natural streams for the purpose of irrigation, she could not complain of the adoption of that doctrine by the State of Colorado. Upon the second phase of the question as to the extent to which the appropriation and use might be made, the Court held that there is one cardinal rule underlying all the relations of the States to each other, and that is equality of right, and that the Court must "so adjust the dispute upon the basis of equality of rights as to secure, as far as possible, to Colorado the benefits of irrigation, without depriving Kansas of the like beneficial effect of a flowing stream." That the Court is called upon to settle the dispute in such a way as will recognize the equal rights of both and at the same time to establish justice between them. The Court then found directly that, owing to the diversion of the waters of the river in Colorado, there had been a perceptible injury to the portions of the Arkansas Valley in the State of Kansas, and particularly to those portions closest to the Colorado line; that the result of that appropriation, upon the other hand, had been the reclamation of large areas in Colorado, and the transforming of thousands of acres of arid lands into fertile fields, and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied. And, as previously stated in the opinion, "When we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that the equality of right between the two States forbids any interference with the present withdrawal of water in Colorado for the purposes of irrigation." The Court further held that at the same time it was obvious that if the depletion of the waters of the river in the State of Colorado continues to increase, there will come a time when Kansas may justly say that there is no longer an equitable division of the benefits, and may rightfully call for relief against the action of Colorado, its corporations and citizens, in appropriating the waters of the Arkansas River for irrigation purposes. The decree accordingly dismissed the bill of the State of Kansas as against all defendants without prejudice to the

right of Kansas to institute new proceedings whenever it shall appear that, through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.

Therefore, as to the rights in and to the waters of interstate streams the law of this case, summed up in a concise statement, seems to be that each State through which an interstate river runs is entitled to make reasonable use of its waters, even to the extent that the State below may be damaged to a considerable extent thereby, provided the upper State does not divert the waters in excess of what will give it an equitable apportionment, all facts considered, of the benefits of the river, which apportionment is not confined to an equal division between the two States, or the respective States, of the entire natural flow of the stream.

§ 1225. **Rights of appropriators—Adjoining States are not affected by State lines.**—The rights of the respective States and of the citizens thereof in and to the use of waters of an interstate stream depend somewhat upon the laws of those States governing waters. If the common law is the only law of waters governing two adjoining States through which an interstate river flows, or if both States have adopted the Arid Region Doctrine of appropriation, the right to the use of the waters of an interstate stream is not affected by the boundary line which divides the States. But where there is conflict of the laws relative to the subject of water, that is to say, the lower State upon the stream having only the common law of riparian rights, and the upper State having adopted the Arid Region Doctrine of appropriation, the rule is different, and will be discussed in a subsequent section of this chapter.[1]

The rights as between appropriators of the waters of an interstate stream are not affected by the boundary line between the two States. As was said by a Wyoming case:[2] "The separation of lands capable of irrigation from such streams is of no consequence."[3]

1 For effect of conflict on interstate streams, see Sec. 1227.

2 Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

3 See, also, Howell v. Johnson, 89 Fed. Rep. 556.

As was said in a recent Idaho case:[4] "The relative rights, therefore, of appropriators of waters of an interstate stream are the same, whether the appropriations are all in the same State or some in one State and the balance in another State."[5] "The right to divert running waters for irrigating lands in an arid country is not controlled or affected by political divisions. It is the same in all States through which the streams may pass."[6]

[4] Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

[5] See Anderson v. Bassman, 140 Fed. Rep. 10, 140 Fed. Rep. 14, where a decree was rendered in California settling the rights of the respective appropriators both in California and Nevada.

Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265, where in a case tried in Nebraska and where the plaintiff's mill where he used the water was in Kansas, the Court said that this fact "ought not to deprive him of any rights which the laws of our State give to a lower riparian owner. Any attempt of our legislature to discriminate against him as compared with the resident mill owners would be promptly declared unconstitutional by the Federal courts. Any such determination by the courts would seem to be equally obnoxious to the Federal Constitution. It seems clear that the plaintiff should be allowed the same standing as one of our own citizens with a mill on this side of the State line."

See, also, Conant v. Deep Creek etc. Irr. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721, where it is said: "It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and, if the settlers higher up on the stream, in another State, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter state will protect the first settler in his rights. The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto."

"The fact of a State line intersecting the stream does not, within itself, impinge upon the right." Rickey etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 574; affirmed, 218 U. S. 258, 54 L. Ed. 1032, 11 Sup. Ct. Rep. 11.

See, also, Rickey Land etc. Co. v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; affirmed, 218 U. S. 258, 54 L. Ed. 1032, 31 Sup. Ct. Rep. 11; Bigelow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570; Turley v. Furman, —— N. M. ——, 114 Pac. Rep. 278; Lamson v. Valies, 27 Colo. 201, 61 Pac. Rep. 231; Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

[6] Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

It was also held in the Kansas-Colorado case [7] that the determination of the respective rights of the States of Kansas and Colorado to the benefit of the waters of the Arkansas River can not be affected by any theory that, because at times and in some places the entire bed of the channel was dry, there were two rivers, one commencing in the mountains of Colorado and terminating at or near the State line, and the other commencing at or near the place where the former ends, and from springs and branches starting as a new stream to flow onward through Kansas and Oklahoma toward the Gulf of Mexico, the Court holding that the equitable division of the waters of an interstate stream between the respective States through which or adjoining which the stream flows was the only true rule.[8]

The Supreme Court of the United States, in a decision rendered in 1911,[9] held that that Court, in the absence of Montana legislation to the contrary, will assume that prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against subsequent or junior appropriators of the waters of the same stream in Montana, enforceable in the latter State. And Mr. Justice Holmes, in rendering the decision of the Court upon this subject, after referring to the common law rule, said: "There is even stronger reason for the same assumption here. Montana can not be presumed to be intent on suicide, and there are as many, if not more, cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage Creek, flows back into that State. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory,[10] and is recognized by both States now. Before the State lines were drawn, of course, the principles prevailed between the lands that were

[7] 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

[8] See Sec. 1223.

[9] Bean v. Morris, 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; affirming same case below, 159 Fed. Rep. 651, 86 C. C. A. 519.

[10] Rev. Stat., Secs. 2339, 2340; U. S. Comp. Stat., 1901, p. 1437; Act of March 3, 1877, Chap. 107; 19 Stat. L. 377, U. S. Comp. Stat., 1901, p. 1548.

destined to be thus artificially divided. Indeed, Morris had made his appropriation before either State was admitted to the Union. The only reasonable presumption is that the States, upon their incorporation, continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed."

§ 1226. Rights of riparian owners in the respective States are not affected by State lines.—As is the case with the rights of appropriators only in different States taking water from an interstate stream not being affected by State lines as to their respective rights, so also it is the case in those States which only have the common law of riparian rights by governing the waters of the streams. In a recent case decided by the Supreme Court of the United States [1] Mr. Justice Holmes referred to the common law rule in the following language: "But with regard to such rights as came into question in the older States, we believe that it always was assumed, in the absence of legislation to the contrary, that the States were willing to ignore boundaries, and allowed the same rights to be acquired from outside the State that could be acquired from within." [2] It therefore follows that where there is but one rule of law governing the waters of the respective States through which an interstate stream flows, the right to the use of the waters of such stream is not affected by the boundary line which divided the States. Where, however, there is a conflict of laws, the rule is somewhat different, as will be discussed in the next section.

A decision pertinent to the subject under discussion was rendered by the United States Circuit Court of Appeals for the second circuit

1 Bean v. Morris, 121 U. S. 165, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; affirming same case below, 159 Fed. Rep. 651, 86 C. C. A. 519.

2 Citing Mannville etc. Co. v. Worcester, 138 Mass. 91, 52 Am. Rep. 261; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474; Slack v. Walcott, 3 Mason 508, 516, Fed. Cas. No. 12,932; Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13,446; Rundell v. Delaware & R. Canal Co., 1 Wall. Jr. 275, Fed. Cas. No. 12,139, 14 How. 80, 14 L. Ed. 335; Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4,908; Wooster v. Great Falls Mfg. Co., 39 Me. 246, 253; Armendiaz v. Stillman, 54 Tex. 623; State v. Lord, 16 N. H. 357; Howard v. Ingersoll, 17 Ala. 780, 793; reversed, 54 U. S. 13 How. 381, 14 L. Ed. 189; Ruckman v. Green, 9 Hun, 225.

in the case of Pine v. Mayor etc. of the City of New York.[3] The Court held that the State of New York could not, under its power of eminent domain, authorize water to be taken from a non-navigable stream having its source in New York for the purpose of supplying a municipal corporation at a distance therefrom if the effect would be to materially diminish the flow of the stream to the injury of the rights of riparian owners on the same stream in the State of Connecticut. It is further held that a Connecticut riparian owner might maintain a suit in equity to enjoin the diversion of the water from the stream in New York State to his injury, although the diversion was made under an attempted exercise of the right of eminent domain, and that he was not bound to seek his remedy in compensation in the eminent domain proceedings. This decision was rendered by two of the judges of the Court, with one dissenting. The effect of the decision, however, is left in considerable doubt by reason of the fact that the case was appealed to the Supreme Court of the United States, and there the decision was reversed on other grounds.[4] The Supreme Court of the United States withheld any opinion as to the right as to the diversion of the water, but held that the decree of the lower court was erroneous in the measure of relief given, even if it were assumed that the diversion of the water violated a legal right of the complainant. Therefore, as far as the decision of the lower court is concerned, it is not of much weight as an authority.

§ 1227. **Effect of the conflict of laws on interstate streams.**—The equitable division of the waters of interstate streams between the States through which or adjoining which such streams flow being the rule of law adopted by the Supreme Court of the United States as governing the subject, in what that Court terms the "practically building up what may not be improperly called interstate common law,"[1] as discussed in the preceding sections,[2] it must therefore follow that this rule is not affected by the conflict of the laws of the respective States governing the waters flowing within

[3] 112 Fed. Rep. 98, 50 C. C. A. 145.

[4] 185 U. S. 93, 46 L. Ed. 820, 23 Sup. Ct. Rep. 592.

[1] Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665.

See, also, Rickey Land and Cattle Co. v. Miller & Lux, 218 U. S. 258, 54 L. Ed. 1032, 31 Sup. Ct. Rep. 11.

[2] See Secs. 1225, 1226.

their respective jurisdictions. Although each State has the power to adopt such laws as it sees fit to govern the waters within its own territory, no State has the power to enact such laws for another State. As said by Mr. Justice Brewer in rendering the opinion of the unanimous Court in the Kansas-Colorado case: "Neither State can legislate for nor impose its own policy upon the other." So, as far as this rule of equitable division of the waters of an interstate stream is concerned, it makes no difference as to whether or not one of the States has utterly repudiated the common law of riparian rights and adopted the Arid Region Doctrine of appropriation and another State relies wholly upon the common law of riparian rights. The rule of equitable division between the two States must prevail in any event. This rule of law is illustrated by the Kansas-Colorado case, where the Arkansas River takes its rise in the mountains of Colorado, where the rule of law governing the waters of the State is that of the Arid Region Doctrine of appropriation only, and where the stream flows into the State of Kansas, where it was contended that the prevailing rule of law was the common law doctrine of riparian rights, but which State, in fact, had both systems of laws governing waters.

Again, the rule is illustrated in the case of Anderson v. Bassman, where the stream in question takes its rise in the high Sierras in California, which State has both rules of law governing its waters, the doctrine of appropriation and the common law of riparian rights, and where the stream flows into the State of Nevada, which State has utterly repudiated the common law of riparian rights and has adopted the Arid Region Doctrine of appropriation as its only rule of law governing the waters flowing within its boundaries.[3]

Neither does the fact that one of the States has dedicated all the waters flowing within its boundaries, either by constitutional provisions or by statutory enactment,[4] to the State and to its citizens affect the right of the division of the waters of interstate streams

[3] Anderson v. Bassman, 140 Fed. Rep. 14, where it was held that riparian owners of lands on an interstate stream in California and appropriators of the waters from the same stream in Nevada were equally protected in the rights given them by the laws of the respective States, both subject to the limitation that a reasonable quantity of water only for the beneficial use to which it was devoted should be taken.

[4] For the dedication of its waters to the State, see Secs. 372-389.

upon an equitable basis.[5] As was stated by Judge Hallett in the case of Hoge v. Eaton:[6] "The idea of an exclusive right in the people of a State to divert its running waters, to the injury of riparian owners in another State, must be equally untenable. Indeed, the doctrine of riparian ownership and the use of running water is not subject to political boundaries. Between hostile States the doctrine may not be recognized, but any such repudiation would be simply *vis major*. Between States dwelling in peace and concord, as are the States of our Union, the equal right of the inhabitants of each State must always be recognized."[7]

The validity of an appropriation or other use of the waters of an interstate stream is governed by the laws of the State where the appropriation or use is made.[8] A valid appropriation once made in one State will be so recognized and upheld by the courts of another State.[9]

§ 1228. The appropriation of the waters in one State for use in another—Interstate streams.—It often happens that, while the use of the waters of an interstate stream is in one State, in order to obtain the necessary fall to conduct the water to the place of use, the diversion must be made in another State. Where this is the case no distinction can be made. The drawing water through a canal from one State for use in another from a stream which naturally flows from the former to the latter is not necessarily a violation

[5] Drawing water through a canal from one State into another for the purpose of irrigating lands in the latter State is not necessarily a violation of the constitution, laws, or policy of the former State, although the State reserves all the waters for itself and its citizens, so far as they are necessary for the beneficial uses to which the State and its citizens apply them. Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, in Perkins County, Nebraska v. Graff, 114 Fed. Rep. 441, 52 C. C. A. 243.

[6] 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

[7] See, also, Anderson v. Bassman, 140 Fed. Rep. 10, 14; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939, where upon streams flowing from a State which recognized riparian rights into a State which denied them, the riparian rights in the former State were upheld.

[8] Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Morris v. Bean, 146 Fed. Rep. 432; affirming *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed, 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Anderson v. Bassman, 140 Fed. Rep. 14.

[9] *Id.*

of the constitution, laws, or policy of the former State, although that State reserves all its waters for itself and citizens.[1]

There is a rather anomalous condition of affairs between Colorado and New Mexico involving appropriations from interstate streams where the point of diversion was in Colorado and the lands to be irrigated in New Mexico. In a case decided in 1900 by the Supreme Court of Colorado,[2] it was held that the statute of Colorado providing for the statutory adjudications of water rights for irrigation purposes had no application to cases where the point of diversion is within the State but the lands to be irrigated lie without the territorial limits, and hence in a proceeding under such statutes water will not be decreed to irrigate New Mexico lands. Again, in a case decided in 1911 by the Supreme Court of New Mexico,[3] after citing the Colorado case above referred to, it was held that a project to irrigate lands in New Mexico from the waters of a natural stream running from Colorado into New Mexico, when the point of diversion, the headgate, and about six miles of the canal are in Colorado, is not within the jurisdiction of the Territorial Engineer of New Mexico, and that he is without authority to issue a permit for such project.

§ 1229. **The appropriation of waters in one State for use in another—State streams.**—The right to divert the waters of a stream or other body of water which is not interstate, but wholly confined within the boundaries of a State, for use in another State by the citizens of either, presents a different phase of interstate control from that discussed in the preceding sections of this chapter respecting the waters of interstate streams. All authority seems to be against the proposition that this may be done, even where there is not a statute of the State wherein the stream or other body of water flows or lies, prohibiting such a diversion and use.[1] This right of ownership and control of all the waters of a State is in the State itself.[2] This is true either with or without a statutory enactment by the State either dedicating its waters to the State or making it

1 Perkins County v. Graff, 114 Fed. Rep. 441, 52 C. C. A. 243.

But see Biglow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570.

2 Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231.

3 Turley v. Furman, —— N. M. —, 114 Pac. Rep. 278.

1 For the dedication of the waters of a State to the State or the public, see Secs. 372-389.

2 See Secs. 507, 593.

unlawful for any person or corporation to divert and carry its waters into another State for use therein. But where such a statutory enactment is provided, it makes the case so much the stronger, and such a diversion, transportation, and use can not be made. This law, as it seems to us, has been settled by the Supreme Court of the United States in the recent case of Hudson County Water Company v. McCarter,[3] and although it is stated by Mr. Justice Holmes in rendering the opinion of the Court that "the problems of irrigation have no place here," the principles laid down in the case apply as much to cases where the diversion and use is made for the purpose of irrigation as for culinary and domestic purposes of a great city, as was the fact in the case at bar.

The facts in that case were that the legislature of the State of New Jersey in 1905 enacted among other provisions of the Act the following: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh-water lake, pond, brook, creek, river, or stream of this State into any other State for use therein."[4] After the passage of this statute the defendant made a contract with the City of New York to furnish adequate water for the burrough of Richmond, and of not less than three million gallons a day. Thereupon the action was brought praying that, pursuant to the above Act and otherwise, the defendant be enjoined from carrying the waters of the Passaic River out of the State. An injunction was issued by the chancellor,[5] the decree was affirmed by the court of errors and appeals,[6] and the defendant company, upon constitutional grounds, then appealed the case to the Supreme Court of the United States, and the decree was affirmed by that Court on all grounds. It was held by the latter Court that a State, even without statutory enactment, "as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the private own-

[3] 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529, 4 Ann. Cas. 560; affirming *Id.*, 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S., 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116.

[4] Laws New Jersey, 1905, Chap. 288, p. 461.

[5] McCarter v. Hudson County W. Co., 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S., 197, 118 Am. St. Rep. 754, 10 Am. & Eng. Ann. Cas. 116; affirmed, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529.

See, also, Walbridge v. Robinson, —— Idaho ——, 125 Pac. Rep. 812.

[6] *Id.*, 70 N. J. Eq. 695, 65 Atl. Rep. 489.

ers of the land most immediately concerned." Therefore, no agreement of private owners can sanction the diversion of an important stream outside of the boundaries of the State in which it flows. The Court further held that the police power of a State justifies the enactment forbidding such a diversion and use, and that a riparian owner under the same may be prevented from diverting the waters of a stream of such State into any other State for use therein; that neither due process of law nor the equal protection of the laws is denied by such a statutory enactment; that the obligations of a contract to divert the waters of such a stream into another State, for use therein, are not unconstitutionally impaired by the enactment of such a statute; that the commerce between different States is not unlawfully interfered with thereby, and that the privileges of the citizens of the State owning such waters are not denied to the citizens of other States by such an enactment.

There is no principle of law, as far as we are able to distinguish, why the same principles as laid down in the above case should not equally apply to a case where the diversion and use of the water was made for the purpose of the irrigation of land as well as to a case where they were for municipal purposes.

§ 1230. The division of interstate waters involves no question of international law.—The equitable division of the waters of interstate streams between the respective States through or by which they flow involves no question of international law, as is the case of the division of the waters of streams which flow through or bound different independent countries. Under Article I, Section 10 of the Constitution of the United States, it is provided: "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State," etc. Therefore, "they can not enter upon diplomatic relations, and make treaties."[1] "Bound hand and foot by the prohibition of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress."[2] Therefore, a resort to the judicial power is the only means for adjusting the rights to the waters of

[1] Kansas v. Colorado, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

[2] Rhode Island v. Massachusetts, 37 U. S. 12 Pet. 657, 9 L. Ed. 1233.

interstate streams between the different States entitled thereto. And, again, the idea that there can arise any international question in the case of the use of the waters of an interstate stream by the different States of this country, through which or adjoining which such a stream flows, can not be maintained.[3]

§ 1231. **Late statutes relating to interstate waters.**—Section 8 of the National Reclamation Act provides: "And nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." [1]

The legislatures of a number of the States in 1911 evidently fearing that their rights were not being sufficiently protected in the waters of interstate streams, passed a number of Acts and resolutions regarding the same.

The legislature of California, by the Act of April 8, 1911, amending Section 1410 of the Civil Code,[2] provided that: "All water or the use of water within the State of California is the property of the people of the State of California." And by the Act approved March 3, 1911,[3] it was further provided: "It shall be unlawful for any person, firm, association, or corporation to transport or carry through pipes, conduits, ditches, tunnels, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this State into any other State, for use therein." Again, by the joint resolution, No. 8,[4] the State of California claimed to own the major portion of the waters of Lake Tahoe, lying on the boundary of California and Nevada, and protested against the diversion of said waters by the United States Reclamation Service for use in the State of Nevada.[5]

[3] Howell v. Johnson, 89 Fed. Rep. 556; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665.

For the international control of waters, see Chap. 63, Secs. 1212-1220.

[1] 7 Fed. Stat. Ann., 1905, p. 1100; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388.

For copy of the National Reclamation Act, and construction thereof, see Chap. 65, Secs. 1244-1280.

[2] Stats. & Amdts., 1911, p. 421; Kerr's Bien. Supp. Ann., 1911, p. 584.

[3] Stats. & Amdts., 1911, p. 271; Kerr's Bien. Supp. Ann., 1911, p. 1474.

[4] Stats. & Amdts., 1911, Chap. 18, p. 1550.

[5] See, also, on this subject, the laws of California—An Act to prevent the waters of the State from being carried into other States.

During the same year the legislature of Nevada, by a retaliatory resolution, denied the claim of California above set forth, and laid claim to the waters in question, for use in that State.[6]

The State of Oregon the same year passed an Act to the effect that the State Engineer may reject all applications for water for use in the State which did not allow diversions for use in Oregon.[7]

The legislature of Wyoming in the year 1911 passed an Act authorizing the Attorney General of that State to take all steps necessary to protect the rights of Wyoming in and to the waters of interstate streams.[8]

§ 1232. **The pollution of interstate streams by a State.**—There is another subject kindred to that of the diversion and use of waters of interstate streams, by the respective States thereon, which needs a short discussion in this place, and that is the right of an upper State to the use of such streams as will pollute the waters thereof to such an extent that they will remain polluted, when they reach the boundaries of the States below, and to their injury. The rule of law upon this subject, as laid down by the Supreme Court of the United States, is that the threatened daily transportation by one State, by artificial means and through an unnatural channel, of large quantities of sewage and of accumulated deposits which will poison the water supply of the inhabitants of a lower State, and injuriously affect that portion of the bed or soil of the river which lies within its territory, entitles a lower State to maintain a suit for equitable relief, in advance of any actual injury sustained thereby.[1] But it was further held that, at the hearing of such a case the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and immediate. Therefore, at the determination of the case of the State of Missouri v. State of Illinois it was held that the discharge into the Mississippi River through an artificial drainage channel of the sewage of the City of Chicago, mixed with a large

6 Nevada Laws, 1911, p. 453.

7 See, also, the Laws of Oregon, Part XIV, Chap. 97.

8 Laws of Wyoming, 1911, Chap. 43, p. 57.

1 Missouri v. Illinois, original, on demurrer, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

For the pollution of waters, see Secs. 1129-1147.

volume of pure water from Lake Michigan, will not be enjoined by the Federal Supreme Court on complaint by the State of Missouri that the result of such an action is to poison the water supply of its inhabitants, though disclosing an increase in deaths from typhoid fever in St. Louis, leaves it doubtful whether the typhoid bacillus can and does survive the journey and reach the intake of St. Louis in the Mississippi, and shows other possible sources of infection in the discharge of sewage above the St. Louis intake from other towns and cities, some of which are situated in Missouri.[2]

§ 1233. Jurisdiction of courts—Original jurisdiction of the Supreme Court of the United States.—The United States Supreme Court has original jurisdiction in a controversy between States, both situated upon an interstate stream, which is presented by a bill filed by one State against another State, the averments of which bill raise the question whether the latter State has the power to wholly deprive the lower State of the benefit of the waters of such river.[1]

The original jurisdiction of the Supreme Court of the United States extends to a controversy between the State of Kansas and the State of Colorado and the United States, presenting the questions whether Kansas has a right to the continuous flow of the waters of the Arkansas River as that flow existed before any human interference therewith, or whether Colorado has the right to appropriate the waters of that stream so as to prevent that continuous flow, or whether the amount of the flow is subject to the superior authority and supervisory control of the United States. See Kansas v. Colorado upon determination of the case,[2] where it is said: "Force, under our system of government, is eliminated. The clear language of the Constitution vests in this Court the power to settle those disputes."

So, too, the construction by a public corporation, as an agency

2 Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268; 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

1 Kansas v. Colorado, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552, where it is said: "The States of this Union can not make war upon each other. 'They can not grant letters of marque and reprisal.' They can not make reprisal upon each other by embargo. They can not enter into diplomatic relations, and make treaties."

2 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

of the State, of a system of public works to promote the health and prosperity of its inhabitants, but which endangers the health and prosperity of the inhabitants of another State below upon an interstate stream, furnishes a sufficient basis for a controversy between the States, of which the Supreme Court of the United States can take original jurisdiction.[3] This is upon the theory that the right to the use of water is real property;[4] and, therefore, a suit to quiet title to a water right for irrigation purposes, and to determine the land owner's right to divert the waters from the stream for such a purpose, is in the nature to quiet title to real estate. Therefore, the suit must be brought to quiet title to the land in the State court having the proper jurisdiction where the land is situated, or where the water is used.[5] However, the courts of one State in ascertaining, decreeing, and protecting property rights in water appropriations within the jurisdiction of that State, may at the same time and for that purpose inquire into and determine rights and priorities on the same stream that are located and situated higher up on the stream and beyond the State line, in order to fairly and finally judicially determine the relative rights of the parties and decree the extent of title and the right of possession of the subject matter located and situated within the State.[6]

3 Missouri v. Illinois, on demurrer, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331, where it is said: "If Missouri were an independent and sovereign State, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the General Government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering." See, also, *Id.*, on the determination of the case, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 713.

4 See Secs. 768, 769.

5 Where the defendant claimed title by prior appropriation to a certain part of the flow of an interstate river to irrigate its lands in Nevada, and alleged that such rights were being interfered with by defendant, an appropriator of the waters of the same stream in California, of which State the defendant was a resident, complainant was entitled to sue to quiet its title to such water right in the Federal courts sitting in Nevada, and such jurisdiction will be maintained as against subsequent similar actions brought by defendant for the same purpose in the California State courts. Rickey etc. Co. v. Miller & Lux (Nev.), 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 547.

See, also, Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

6 Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

In a case decided in 1910 by the Supreme Court of the United States [7] it was held that the Federal Circuit Court for the District of Nevada and the California State courts have concurrent jurisdiction to determine the relative rights of parties claiming, the one in Nevada and the other in California, to be entitled to appropriate, as against each other, the waters of an interstate stream, and whichever court first acquired jurisdiction is entitled to proceed to final determination without interference from the other. And Mr. Justice Holmes, in rendering the opinion of the Court upon the subject, said: "We are of the opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the Court first seised should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the States."

§ 1234. **Jurisdiction of courts—Federal and State.**—In suits between individuals concerning the waters of interstate streams, no different rule prevails governing the jurisdiction of the Federal Courts than that which prevails in the matter of the jurisdiction of the same courts in other suits. There must be the diversity of citizenship, the requisite amount involved, and the other requisites necessary to confer jurisdiction upon the Federal courts.[1]

[7] Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 54 L. Ed. 1032, 31 Sup. Ct. Rep. 11; affirming the same case below, 152 Fed. Rep. 11, 81 C. C. A. 207.

[1] The incorporation in the State of Nevada by direction of a California corporation for the sole purpose of having the matters in dispute between such California corporation and another corporation of that State determined by a Federal rather than in the State Court, where they were pending and undetermined, must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the Federal Court, which, under the Act of March 3, 1875 (18 Stat. L. 470, 472, Chap. 137; U. S. Comp. Stat., 1901, pp. 508, 511), Sec. 5, requires the dismissal of the suit, where the new corporation assumes to be the owner of the property rights which the old company had asserted only that it may have a standing in the Federal Court as a litigant in respect of those rights, and the old corporation can not control the conduct of the suit brought by the new corporation at any time up to the date of the decree, and can require the new corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the old corporation without any new or valuable consideration. Miller & Lux v. East Side

In all other cases the State courts where the diversion is made have full and complete jurisdiction to determine all questions, with the exception of that of the right to quiet title to the use of water where a stream rises in one State and flows into an adjoining State and is there diverted and used for irrigation. In such a case the courts of the former State have no jurisdiction to try and determine the right to the use of the water in the latter State.[2]

Canal & Irr. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111.

2 Conant v. Deep Creek etc. Irr. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721, where it is held that, where a stream rises in the State of Idaho, and flows into the State of Utah, a Court of the former State has no jurisdiction to try and determine the right to the use of water flowing in that portion of the stream which is situated in Utah, and there diverted and used for irrigation of lands therein.

Lamson v. Valies, 27 Colo. 201, 61 Pac. Rep. 231, where the same rule was adhered to where the point of diversion was within the first State, but the lands to be irrigated were without its territorial limits.

The District Court of Wyoming has jurisdiction to adjudicate the rights of the owners of land in Montana to the water of the stream so far as may be necessary to protect their rights, though the Court may not have jurisdiction to enter a decree for quieting the title of such owners to the water claimed. Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939, and where it is said: "If, therefore, a decree adjudicating the various priorities of the parties would operate as a decree quieting title to the lands of plaintiffs Willey and Ellison in another State, it is quite obvious that it would be beyond the jurisdiction of the Court."

CHAPTER 65.

THE NATIONAL RECLAMATION ACT.

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§ 1235. Scope of chapter.—As is the case with the Carey Law, discussed in another chapter, so it is with the National Reclamation Act, the subjects of the acquisition of both the land and water rights are so interwoven that they must be discussed together. In this chapter, therefore, we will discuss the "National Reclamation Act," or "the National Irrigation Act," as it is sometimes called, in all its phases.[1]

1 For the Carey Act, see Chap. 67, Secs. 1312-1336.

§ 1236. General scope of the law.—The National Reclamation Act of June 17, 1902, is the first Act of Congress which provides for the disposal of both lands and a water right therefor by the Federal Government to individuals.[1] In fact, this was the first attempt upon the part of the Government to provide National projects for the construction of irrigation works for the reclamation of its arid public lands, and to dispose of both its lands and a water right to settlers.

The Act authorizes the Secretary of the Interior at or immediately prior to the time of the beginning of the surveys for any contemplated reclamation project to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, that all lands entered and entries made under the homestead laws within the areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of the Act. If after a complete survey and estimates the project should be deemed impracticable or unadvisable, the lands withdrawn must be restored to entry; if, however, it is decided that the irrigation project is practicable, the public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than 40 nor more than 160 acres, and shall be subject to the limitations, charges, terms, and conditions as in the Act provided; *Provided*, that the commutation provisions of the homestead laws shall not apply to entries made under the Act.[2] Upon the completion of the works the Secretary of the Interior shall give public notice of the lands irrigable under any project, and the limit of the area per entry; also of the charges which shall be made per acre upon said entries, and upon lands already in private ownership which may be irrigated by the water of said project, and the number of annual installments, not exceeding ten, in which such charges shall be paid, and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the

[1] For the full text of the Act, see Sec. 1244.

For the full text of the amendatory Acts to the National Reclamation Act, see Secs. 1245-1260.

For the regulations of the Secretary of the Interior, under the Act and its amendments, see Secs. 1271-1280.

[2] See, for homestead laws, Sec. 435.

estimated cost of the construction of the project, and shall be apportioned equitably. The entryman upon the lands to be irrigated by such works shall, in addition to the compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry, and shall pay to the Government the charges apportioned against such tract, and then he will be entitled to a patent. An actual and *bona fide* residence upon the land is required,[3] and no right to the use of water for land already held in private ownership shall be sold for a tract exceeding 160 acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident on such lands, or occupant thereof residing in the neighborhood of said land, and no right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under the Act, as well as any moneys already paid thereon.

Such in effect are the general provisions of the National Reclamation Act providing for the disposal of both lands and waters therefor by the Government to settlers. The other provisions of the Act will be discussed in the future sections of this chapter.

§ 1237. Conditions leading to its enactment.—In Section 34 of the first edition of this work, published in 1893, in discussing how the natural water supply of the country which was then not utilized might be made available for irrigation and reclamation of the vast tracts of the then arid and barren lands, we said: "The last method for adding to our supply of water, in order to increase the acreage that may be cultivated by its artificial application, is the construction of large and expensive works to divert the water from large rivers upon the lands. Although in the arid region there are a great number of small canals which take the waters from the inferior streams, there are no large canals that take the waters from the large rivers. These works can only be constructed at immense cost, and eventually the Government will either have to undertake them or offer some special advantage to induce private enterprise to do so. Although we have no such rivers in the arid region as the Ganges, in India, still a few, such as the Columbia, Missouri, Rio

[3] For actual and *bona fide* residence, see Secs. 1271, 1274.

Grande, and Sacramento, discharge large volumes of water, much of which may at some future time be utilized. There is no doubt but in the matter of irrigation we are behind Europe, Asia, and even Africa, not only in the extent of our works, but in their cost and engineering features. We are not only behind the marvelous nations of antiquity, but also behind the people of modern India, Algeria, Italy, and Spain. The explanation of this is, as before stated, that the time has not yet arrived when the subject of irrigation has become a great national question or national necessity, as it has in the more densely populated countries of the old world."

Our prediction as set forth in the above paragraph has become true, and sooner than expected. As this Western country has become more thickly settled, the demand for available water has become greater and greater for the irrigation of the lands settled upon. In fact, in order to have the arid lands settled and made inhabitable for man, it was oftentimes necessary that the water for their reclamation should be first made available. In order to do this the waters from the larger sources of supply must be utilized. Therefore, greater diverting works and longer and larger canals must be constructed than was the former need in order that the waters may be made to reach the lands lying further back from the rivers or other sources of supply. This, of course, requires a great amount of capital in order that these great reclamation works may be properly and safely constructed. The General Government, since the writing of the above paragraph, has taken both of the steps suggested therein. By the provisions of the Carey Act it has given special advantages so that private enterprise, backed by private capital, has been induced to undertake the construction of these irrigation works for the reclamation of these lands; and by the National Reclamation Act, the Government itself has undertaken to construct works even greater than those which would be undertaken by private enterprise, or, at least, those of such great magnitude, that private capital for many years to come would be loth to undertake. These Acts were passed not so much due to the present necessities as they were looking to the future prosperity of the country. As was said by the United States Circuit Court of Appeals in a recent case,[1] in speaking of the unlimited power of Congress to dispose of the public lands of the United States: "In pursuance

1 United States v. Hanson, 167 Fed. Rep. 881.

of that power Congress passed the Reclamation Act to make marketable and habitable large areas of desert land within the public domain, which lands are valueless and uninhabitable unless reclaimed by irrigation, and the irrigation whereof is impracticable except upon expenditure of large sums of money in the construction of a system of reservoirs and distributing canals. All previous efforts to make these arid lands available for settlement had resulted in failure. By the Desert Land Act of March 3, 1875,[2] Congress made provision for their use by individual settlers, and on March 3, 1877,[3] had enacted further legislation to facilitate the reclamation of such lands by private entrymen, and in 1894,[4] to provide for the irrigation of the arid public lands, had passed the Carey Act, by which it proposed to donate to the States in which such lands were located so much thereof not exceeding 1,000,000 acres in each State, as the State would cause to be reclaimed. These efforts having failed to accomplish the desired end, the Reclamation Act was passed."

We are not prepared to go to the extent that the Circuit Court of Appeals went in the above quotation, and designate the Desert Lands Acts and the Carey Law as failures, because in their workings they have accomplished great results, but even in their operation the more accessible lands were taken up. The National Reclamation Act was designed to reclaim those lands lying further back from the streams, or which were more inaccessible to the source of supply of water for their reclamation.[5] It is possible for all of these laws to work in perfect harmony with each other, and all of them are needed. This great country, rapidly nearing its hundred millions of population, is approaching a period when the subject of the reclamation and cultivation of the now arid lands of the West is becoming more and more each year "a great National question, or a National necessity, as it has in the more densely populated countries of the Old World."

§ 1238. Conditions leading to its enactment—President Roosevelt's message to Congress.—The causes and conditions leading up

[2] 18 Stat. L., Vol. 3, 497.

[3] Act March 3, 1877, 19 Stat. L. 377; U. S. Comp. Stat., 1901, p. 1548.

[4] Act Aug. 18, 1894, Chap. 301, 304; 28 Stat. L. 422; U. S. Comp. Stat., 1901, p. 1554.

[5] For the comparison as to the results as between the Carey Act and the National Reclamation Act, see Secs. 1239, 1240.

to the passage of the National Reclamation Act can not be better stated than as given in a portion of President Roosevelt's first message to Congress, delivered December 3, 1901. This portion of the message has become a classic upon the subject, and undoubtedly was the first definite step taken by one in authority, which led in the following year to the National Reclamation Act, which became a law on June 17, 1902.[1] Upon this subject he said:

"In the arid region it is water, not land, which measures production. The Western half of the United States would sustain a population greater than that of our whole country today if the waters that now run to waste were saved and used for irrigation. The forest and water problems are perhaps the most vital internal questions of the United States.

"The forests are natural reservoirs. By restraining the streams in flood and replenishing them in drought they make possible the use of waters otherwise wasted. They prevent the soil from wasting, and so protect the storage reservoirs from filling up with silt. Forest conservation is therefore an essential condition of water conservation.

"The forests alone can not, however, fully regulate and conserve the waters of the arid region. Great storage works are necessary to equalize the flow of streams and to save the flood waters. Their construction has been conclusively shown to be an undertaking too vast for private effort. Nor can it be best accomplished by the individual States acting alone. Far-reaching interstate problems are involved; and the resources of single States would often be inadequate. It is properly a National function, at least, in some of its features. It is as right for the National Government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storage of the floods at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same stream.

"The Government should construct and maintain there reservoirs as it does other public works. Where their purpose is to regulate the flow of streams, the water should be turned freely into the chan-

[1] For the full text of the Act and its amendments, see Sec. 1244.

nels in the dry season to take the same course under the same laws as the natural flow.

"The reclamation of the unsettled arid public lands presents a different problem. Here it is not enough to regulate the flow of the streams. The object of the Government is to dispose of the land to settlers who will build homes upon it. To accomplish this object water must be brought within their reach.

"The pioneer settlers on the arid public domain chose their homes along streams from which they could themselves divert the water to reclaim their holdings. Such opportunities are practically gone. There remain, however, vast areas of public land which can be made available for homestead settlement, but only by reservoirs and main-line canals, impracticable for private enterprise. These irrigation works should be built by the Government for actual settlers, and the cost of construction should, so far as possible, be repaid by the land reclaimed. The distribution of the water, the divisions of the streams among irrigators, should be left to the settlers themselves, in conformity with the state laws, and without interference with those laws or with vested rights. The policy of the National Government should be to aid irrigation in the several States and Territories in such a manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation.

"The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of Ohio and Mississippi Valleys brought prosperity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade with Asia will consume the larger home supplies and effectually prevent competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would otherwise not come into existence at all. Our people as a whole will profit, for successful home-making is but another name for the upbuilding of the nation.

"The necessary foundation has already been laid for the inauguration of the policy just described. It would be unwise to begin by doing too much, for a great deal will doubtless be learned, both as to what can and what can not be safely attempted, by the early efforts, which must of necessity be partly experimental in character.

At the very beginning the Government should make clear, beyond shadow of doubt, its intention to pursue this policy on lines of the broadest public interest. No reservoir or canal should ever be built to satisfy selfish personal or local interests, but only in accordance with the advice of trained experts, after long investigation has shown the locality where all the conditions combine to make the work most needed and fraught with the greatest usefulness to the community as a whole. There should be no extravagance, and the believers in the need of irrigation will most benefit their cause by seeing to it that it is free from the least taint of excessive or reckless expenditure of the public moneys."

§ 1239. Its operation as compared to that of the Carey Law from the standpoint of the State and private enterprise.—As to the true merits of the workings of the National Reclamation Act, as compared with those of the Carey Act,[1] it is yet too early to attempt to decide. However, in this and the following section[2] we shall attempt to draw some comparisons between the operations of these two laws, as at present they appear to us, and as they affect those most interested.

The National Reclamation Act is, in a way, a rival of the Carey Act, discussed in another chapter.[3] By the withdrawal of vast tracts of lands irrigable from certain sources of water supply in nearly every State and Territory throughout the West by the Secretary of the Interior, for the purposes of the Reclamation Act, it has greatly hampered the future operations under the Carey Act, and thereby has also hampered the projection of private projects in the reclamation of large tracts of arid lands. Some law should be enacted by Congress whereby, when the Secretary of the Interior was satisfied that a certain project would be taken up and prosecuted to its conclusion by a private company, that the Government would relinquish its right to the lands segregated and set apart for the purposes of the National Reclamation Act, and thus permit the works to be taken up by the State and private enterprise under the provisions of the Carey Law in the States where that law applies and which have accepted its provisions. From experience during

1 For the Carey Act, see Chap. 67, Secs. 1312-1336.

2 See Sec. 1240.

3 For the Carey Act, see Chap. 67, Secs. 1312-1336.

the ten years' operation under the National Reclamation Act, it has been ascertained that the Government moves with great deliberation in these matters. Many projects begun a number of years ago are still unfinished. Many other contemplated projects, where vast tracts of land have been reserved from entry or from the operation of private enterprise under the Carey Law, have not yet been commenced. The reclamation fund has been exhausted, and money from other sources has been appropriated by the General Government in order to finish the projects already commenced. As the Federal Government has left the subject as to what laws should govern the waters to the respective States within which they flow, so also should the Government leave to the States and to private enterprise, under State control, as far as possible, the subject of the reclamation of the arid lands within their respective boundaries, especially where the State is willing to undertake the burden thereof.

Upon the other hand, the operations under the Carey Law under wise State control has been such as to give the utmost satisfaction. The lands have been set aside to the State for the purposes of the law, the works have been prosecuted in many cases with the utmost diligence to completion, the water conducted to the land as required by the law, and the land thus been reclaimed and made ready for settlers, who are now enjoying the benefits of the law. The progress of the country has been very rapid, and towns and cities have sprung up under its influence. As soon as the settler secures title to his land, which may be done as soon as he complies with the law, and under this system not have to wait through a long series of years as is the case with the National Reclamation Act, it becomes private property, and is taxable, and thus another benefit accrues to the State.

According to the report of the preliminary results of the thirteenth census of the United States, 1910, in 1909 there were under actual irrigation from water furnished by National Reclamation projects 395,646 acres. The acreage irrigation projects were capable of irrigating, in 1910, is given as 786,190 acres. The acreage included in enterprises completed or under construction in 1910 were 1,973,016 acres.

§ 1240. Its operation as compared to that of the Carey Law from the standpoint of the settler.—But those most interested in the operations of these two laws are the settlers who go upon the

lands segregated under the respective Acts to make homes for themselves and their families. The National Reclamation Act provides that the amount of land to be taken by any one settler must not exceed 160 acres; but this amount may be cut down, at the option of the Secretary of the Interior, to a small acreage, as in his judgment might reasonably be required for the support of a family. In order to acquire title to the land filed upon by him, he must reside upon it for the full period of five years, and fully comply with the other provisions of the homestead law, in order to make his final proof, and also prior to his obtaining patent to the land covered by his entry he must pay to the Government the charges for water apportioned against his tract. The law also provides for not to exceed ten annual installments, and in practice the Reclamation Service has provided a ten-year period. So that in addition to five years of residence, there must be an additional five years of residence during which the installments on the water right must be paid before the patent is issued by the Government. In order to make final proof it is necessary for the settler to reclaim at least one-half of the total irrigable entry for agricultural purposes.

One feature of the National Reclamation Act which is liable to cause considerable trouble lies in the applying of the homestead law to the conditions existing necessary for the reclamation of these lands. In the enactment of the National Reclamation Act the homestead law was attached to and made a part of the same. The original place of operation of the homestead law was in that portion of our country where there was annually an ample rainfall, and it was easy the first year to bring a considerable portion of the land entered under cultivation. It needed only fencing, plowing, and cultivation. In fact, under the homestead law the Government practically donated a farm to any settler who would cultivate and improve the same and reside upon the land for a period of five years. If the settler got ahead, he might commute his entry by paying the Government the sum of $1.25 per acre, and receive his patent before the expiration of the five-year period. But under the National Reclamation Act the donation feature of the original homestead law is practically removed. To be sure, he gets title to the land without charge, but this is absolutely worthless to him without the water right, and for this he pays the Government full value, or his proportion of the full cost of the works. "The said charges shall

be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably." The only ostensible advantage in the Act to the settler is the freedom of an interest charge on the cost of his water right, but this is more than counterbalanced by the additional burdens imposed upon him by way of additional residence, annual payments for the water right, and necessary cultivation of one-half of the land covered by his entry. Even the old commutation clause, originally an attractive feature of the homestead law, is made not to apply to entries made under the Reclamation Act.

In short, as the law stands today, the settler under a reclamation project is confronted with all the so-called safeguards which a banker might take in order to obtain security for a loan of money. Or, by way of a better illustration, the precautions which are taken by those who sell merchandise upon the partial-payment plan and reserve the title in the vendor until the property is fully paid for, and providing, in case the payments are not made when due that the vendor is entitled to the recovery of the property so sold, and that all moneys paid under the contract shall be forfeited as liquidated damages. The Reclamation Act also provides that "a failure to make any two payments when due shall render the entry subject to cancellation, with a forfeiture of all rights under the Act, as well as of any moneys already paid thereon." From many years of experience it has been ascertained that where a settler attempts to make a home upon the arid lands of the West, even under the most favorable conditions, without considerable ready money, which the average settler does not possess, for the first few years it is a hard proposition to make a bare living for himself and family, even with the greatest industry and economy. And as the National Reclamation Act now stands, with its drastic forfeiture clause, an additional burden is imposed upon the settler, which, we predict, he will not always be able to meet.

In contradistinction to the National Reclamation Act the requirements of the Carey Act affecting the settlers are as follows: The settler may take any portion of 160 acres, by legal subdivisions, which he may choose to enter. He may reside on the entry for a period of three years before making his final proof, but if he so desires he may prove up in a much shorter period. No payment on his water contract with the construction company is necessary in

order to obtain title to the land. As soon as he makes his final proof as required by the law, the State issues the final certificate or the patent, as the case may be, and the land is then subject to the lien of the construction company for the deferred payments. Another advantage of the Carey Law is the knowledge by the settler as to the exact amount of charges against the land for the water furnished. These are fixed and settled in advance by the specific terms of the contract. The construction company even guarantees the maximum cost of the maintenance, this maintenance being oftentimes fixed as low as thirty-five cents per acre, while on National Reclamation projects the price of the water right is not fixed until after settlement, nor is it fixed until construction is well under way. In order to make final proof the settler under the Carey Law is required to cultivate and reclaim an eighth of the land covered by his entry. This is the same requirement as under the Desert Land Act.[1]

There is another thing which should be mentioned in comparing the workings of these two laws as they now exist, and that is the credit of the settlers under the respective laws. The average settler has but little ready money to live upon during the first few years. Therefore, he must depend largely upon the credit which he can obtain from those with whom he deals. Credit, as much as the fact is to be deplored, is the absolute necessity of the pioneer. The settler under a National Reclamation project, with all his rights subject to the drastic forfeiture clause above quoted, goes to his country store for credit and finds that it is practically limited to the value of his team, wagon, and harness. At the bank it is also curtailed to the same extent. Upon the other hand, the settler under the Carey Law project can assign or transfer his entry as soon as it is made; he can obtain credit thereon, and oftentimes it is so arranged that the construction company, or a company organized for that purpose, will advance the necessary credit for the first few years until the settler gets a start. Under the former Act the holdings of the settler is but a prospect, which, if his health continues good, by the utmost economy he may develop to maturity in the dim future, while the holdings of a settler under the Carey Law project become at once property, a titled asset available for use as credit. The patent is promptly issued and again the settler's credit is strength-

[1] For the provisions of the Desert Land Acts, see Chap. 66, Secs. 1287-1311.

ened to the full capacity of his acreage. He may thus tide over the first few years of hardship until he has got a start, while under the National Reclamation Act, as it now exists, in case of a failure of crops, sickness, or financial distress or from other sources, only forfeiture of all of his rights faces the failure to make "any two payments when due." It will be ascertained shortly, when the payments of the settlers under National Reclamation Act projects become due, that extensions will have to be granted by Congress, otherwise more failures will be recorded than successes.

§ 1241. Criticism of the Act—The opinion of Elwood Mead.—Mr. Elwood Mead, now chairman of the Water Supply Commission of Victoria, Australia, formerly State Engineer of Wyoming, and Chief of Irrigation Investigations under the Department of Agriculture of the United States, visited this country in 1911 and examined a number of reclamation projects constructed and controlled by the National Reclamation Service under the provisions of the Act in question.

Although the preceding sections [1] were written long before the letter quoted herein from Mr. Mead was written, it will be seen that his criticism is somewhat in accord with our own views upon the subject. Mr. Mead said: "I do not think either the settlers or the Government are doing as well as they should under a number of the National projects. The reasons for this seem to be the poverty of the settlers and the severe conditions of payment exacted by the Government. When these projects were inaugurated settlers with little or no capital were allowed to file on the land, and in some instances encouraged to do so before there was water for irrigation or any means for productive employment. Before the settler was in a position to grow crops all his money had been dissipated in living expenses and erecting a habitation, and now, when there is water to use and an obligation to pay for it, the settler lacks seed, teams, tools, and money to live on, all of which are essential to growing a crop or utilizing the land and water.

"This distressing situation is made worse by the Government requiring these settlers to repay the cost of the works in ten years. In some cases this payment reaches $5 an acre, or $400 for an eighty-acre farm. There are few cases where the first crop is a success.

1 See Secs. 1239, 1240.

It is rare that it repays the cost of cultivation; hence the settler, if he pays the Government charge, must pay it from money he brought with him. Those who did not have considerable money to start with are not paying. Worse than this, they are living under hard conditions, and are not developing the land in a way to pay in the future.

"The remedy or remedies would seem to be: Extend the terms of payment. Make the period thirty years, charging nothing but interest for the first five years. Failure to charge interest on deferred payments is a fundamental mistake of the Act. It is an incentive to men to defer payments. It was one of the causes for making the time of repayment so short. Better results will come to both settlers and the Government by giving ample time and charging a low rate of interest on deferred payments.

"More than this is needed to enable many settlers to cultivate their farms and make any payments to the Government in the near future. They must have money to enable them to prepare the land, plant, cultivate, and harvest crops."

§ 1242. The Act is constitutional—Doubts expressed in Kansas-Colorado case.—In rendering the opinion in the case of Kansas v. Colorado,[1] Mr. Justice Brewer made use of some expressions which have led some to the belief that the National Reclamation Act was unconstitutional. He said: "At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a National control of the arid regions or their reclamation. But as our National territory has been enlarged we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may be well that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised." It will be noticed that in the language used it was not held that no such power was granted. In fact, there was nothing in the case which called for a decision upon this point. The language quoted had reference

[1] 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

solely to the question of the power of Congress to interfere with the State control over the flow of waters within its limits, which control, subject to the power of Congress to regulate commerce, is vested wholly in the State. Further along in the opinion the Justice said: "As to those lands within the limits of the States, the National Government is the most considerable owner, and has the power to dispose of and make all needful rules and regulations respecting its property." This is expressly granted to Congress by Section 3 of Article IV of the Federal Constitution, which provides as follows: "The Congress shall have the power to dispose of and made all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

Therefore, the United States being the owner of these arid lands, Congress is vested with the unlimited authority over the same. It may dispose of these lands without improving them, or, upon the other hand, it has the unquestioned right to expend money thereon for their improvement by reclaiming them, and afterward dispose of the lands so reclaimed as it sees fit;[2] provided, that it does not interfere with the right of the State legislation controlling the waters flowing within the respective jurisdictions. And in this respect the National Reclamation Act itself in Section 8 recognizes the right of the States to regulate the control, appropriation, use, and distribution of water, wherein it is said: "That nothing in this Act shall be construed as affecting or intending to affect or to any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State, or of the Federal Government, or

2 "This power has been vested in Congress without limitation." United States v. Gratiot, 39 U. S. 14 Pet. 526, 10 L. Ed. 573.

"That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the modes of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made." Gibson v. Chouteau, 80 U. S. 13 Wall. 92, 20 L. Ed. 534.

of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

§ 1243. The Act is constitutional—Decisions and conclusion.—The United States Supreme Court has not yet decided the question of the constitutionality of the National Reclamation Act; and other than the expressions used by Mr. Justice Brewer in the case of Kansas v. Colorado, we find no statement by that Court tending to hold that the law is either valid or invalid. But the United States Circuit Court of Appeals, the Court next in authority to that of the Supreme Court of the United States, has held that the Act was constitutional in a case decided in 1909 [1] wherein it is held that the Act providing for the irrigation by the United States of arid public lands is within the power of Congress as to lands within the States, as well as in the Territories, under the Federal Constitution, Article IV, Section 3, giving it power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States, and is not in violation of the Constitution on the ground that it authorizes the expenditure of public money without an appropriation, since it is in itself an appropriation of the proceeds of the land sold, nor as delegating legislative authority to the Secretary of the Interior. In performing the duty imposed by the Act the Secretary of the Interior only executes the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power.[2]

In a still later case decided by the same Court [3] the same conclusions were reached, that the Act was constitutional, and the Court said: "We come now to the consideration of the real question in this case, which is presented as a constitutional question, and may be stated in the following terms: Can the United States, owning arid lands within a State, organize and maintain a scheme or project whereby it will associate with itself other owners of arid lands for the purpose of reclaiming and improving such lands, and in that behalf exercise the right of eminent domain against another land

1 United States v. Hanson, 167 U. S. 881.

2 See Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367.

3 Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

owner for the purpose of obtaining the title and possession of land absolutely necessary in carrying the proposed scheme or project into effect? . . . It would be strange if the National Government could enter the territory of a State where there were no public lands of the United States requiring irrigation, and no public lands through which water flows necessary for the irrigation of arid lands, and by legislation provide a system of irrigation for the private lands within the State and control its administration. It would indeed be a strange proceeding, and obviously wholly outside of the authority of Congress. But in this case the United States is the owner of large tracts of land within the States named in the Act of June 17, 1902. The public welfare requires that these lands, as well as those held in private ownership, should be reclaimed and made productive. To do this effectively and economically with the available water supply, large tracts must be brought into relation with a single system or project. . . . The Act of June 17, 1902, not only recognizes the Constitution and laws of the State providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws. In what respect does such a proceeding contravene the Constitution of the United States? Has not the United States as a land owner the same rights within the State that any other land owner has? And when the land is of such a character that, to be useful, it must be irrigated and reclaimed in large tracts, may not the United States, co-operating with such other land owners, organize and establish an effective and economical system or project for such irrigation and reclamation? And, finally, if the necessary use of lands for such a purpose is made a public use by the State, is there any reason why the United States should not exercise its right of eminent domain to acquire title to lands absolutely necessary to such public use? We can think of no constitutional objection to such a proceeding when it is clearly established that with respect to surrounding circumstances and conditions the use is a public use; and while it has been held that the law of the State is not conclusive upon this subject, the Supreme Court of the United States in numerous cases has determined that such a use as here described in the project under consideration is a public use."

As we view the law upon the subject, there can be no doubt but that the National Reclamation Act is constitutional as to all objections which may be raised against it, and clearly within the power granted by the Federal Constitution to dispose of and make all needful rules and regulations respecting the arid lands of which the United States is the proprietor. And it is to be remembered that the questions raised in the Kansas-Colorado case do not involve Government irrigation projects, and neither do they in any way involve the construction of the National Reclamation Act, but the Court, in rendering its decision, merely indulged in a wide field of speculation, and by indirection intimated a doubt, to put it in the strongest manner possible, as to the validity of the law. But to date there has been no decision by the Supreme Court of the United States upon the direct question as to the constitutionality of the Act.

As held by the Federal Court in two recent cases, one decided in Idaho in 1911,[4] and the other in Oregon,[5] the Reclamation Act is not a "revenue law of the United States" within the meaning of Section 643 of the Revised Statutes[6] authorizing the removal of any suit brought in any State court against any officer appointed under or acting by authority of any revenue officer of the United States, and such section does not apply to a suit against the officer in charge of a reclamation project because of acts done under the color of his office.

§ 1244. The full text of the National Reclamation Act of June 17, 1902.—The full text of the National Reclamation Act, approved June 17, 1902,[1] and the amendments since enacted thereto, is as follows:

TITLE—"*An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.*

"Section 1. That all moneys received from the sale and disposal of the public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma,

4 Twin Falls Canal Co. v. Foote, 192 Fed. Rep. 583.

5 City of Stanfield v. Umatilla River Water Users' Assn., 192 Fed. Rep. 596.

6 United States Compiled Statutes, 1901, p. 521.

1 7 Fed. Stat. Ann., 1905, p. 1098; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388.

Oregon, South Dakota, Utah, Washington, and Wyoming,[2] beginning with the fiscal year ending June 30, 1901, including the surplus of fees and commissions in excess of allowance to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury, to be known as the 'reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided,* that in case the receipts from the sale and disposal of lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August 30, 1890, entitled, 'An Act to apply a portion of the proceeds of the public lands to the more competent endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an Act of Congress approved July 2, 1862,' the deficiency, if any, in the sum necessary for the support of said colleges shall be provided for from any moneys in the treasury not otherwise appropriated.

"Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction, as well as of those which have been completed.

"Sec. 3. That the Secretary of the Interior shall, before giving

[2] By the Act of June 12, 1906, the provisions of the Reclamation Act were thereby extended so as to include and apply to the State of Texas. Supp. Fed. Stat. Ann., 1909, p. 705, 34 Stat. L. 259.

the public notice provided for in Section 4 of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, that the commutation provisions of the homestead laws shall not apply to entries made under this Act.

"Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole projects, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges

shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided,* that in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract as provided in Section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands under this Act.

"Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided,* that when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the land irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

"Sec. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

"Sec. 8. That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limitation of the right.

"Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semi-arid lands within the limits of such State or Territory: *Provided,* that the Secretary may temporarily use such portion of said funds for the benefit of arid or semi-arid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

"Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying the provisions of this Act into full force and effect."

§ 1245. Acts amendatory—Indian reservations and lands—Acts of April 21, 1904, April 27, 1904, March 6, 1906, June 21, 1906, March 1, 1907.—As a rule, ceded Indian lands are subject to disposition under certain specific Acts mentioned in the treaty or the Act of Congress providing for the cession, and hence would not be subject to withdrawal under the provisions of the Reclamation Act. Specific decisions will be made by the Secretary of the Interior in each case.[1]

The original National Reclamation Act has been added to by several amendatory Acts of Congress enacted from time to time. Several of these amendatory Acts relate to Indian reservations and to Indian lands, and are as follows:

By Sections 25 and 26 of the Indian Department appropriation Act of April 21, 1904,[2] it was provided that "in carrying out any irrigation enterprise which may be undertaken under the provisions of the Reclamation Act of June 17, 1902, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations, in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided,* that there shall be reserved for and allotted to each of the Indians belonging to the said reservations five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provision of the Reclamation Act: *Provided further,* that there shall be added to the charges required to be paid under said Act by settlers upon unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservation before reclama-

1 4th Report Reclamation Service, p. 29.

2 10 Fed. Stat. Ann., 1906, p. 435; 33 Stat. L. 224, 226, Secs. 25, 26.

tion; said sum to be paid in annual installments in the same manner as the charges under the Reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof to be placed to the credit of said Indians, and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit."

Section 26 of the same Act provides in similar terms to the above for the reclamation of the irrigable lands of the Pyramid Lake Indian Reservation, in the State of Nevada.

In Article II of the Act approved April 27, 1904, entitled, "An Act to ratify and amend an agreement with the Indians of the Crow Reservation, in Montana, and making appropriations to carry the same into effect," it is provided that, in consideration of the land ceded, the United States agrees to dispose of the same under the provisions of the Reclamation Act, the homestead, townsite, and mineral land laws, except Sections 16 and 36, or an equivalent of two sections in each township, at not less than $4 per acre. And Section 5 of said article provides:

"Sec. 5. That before any of the lands by this agreement ceded are open to settlement or entry, the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in Section 4 of this Act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except Sections 16 and 36, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purposes, shall be subject to withdrawal and disposition under the Reclamation Act of June 17, 1902, so far as feasible irrigation projects may be found therein. The charges provided for by said Reclamation Act shall be in addition to the charge of $4 per acre for the land, and shall be paid in annual installments as required under the Reclamation Act; and the amounts to be paid for the land shall be credited to the funds herein established for the benefit of the Crow Indians. If any lands in Sections 16 and 36 are included in an irrigation project under the Reclamation Act, the State of Montana may select in lieu thereof, as herein provided, other lands not in-

cluded in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon ceded lands performed directly by the United States under the Reclamation Act preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable: *Provided, however,* that if the lands withdrawn under the Reclamation Act are not disposed of within five years after the passage of this Act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this Act."[3]

One of the most extensive Acts of Congress relative to Indian reservations and lands is the Act of March 6, 1906, relative to the Yakima Indian Reservation, in the State of Washington, and entitled, "An Act authorizing the disposition of surplus and allotted lands in the Yakima Indian Reservation, in the State of Washington, which can be irrigated under the Act of Congress approved June 17, 1902, known as the Reclamation Act, and for other purposes."[4] Said Act provides as follows:

"Sec. 1. That if within the Yakima Indian Reservation, in the State of Washington, as described in the Act approved December 21, 1904, entitled, 'An Act to authorize the sale and disposition of surplus and unallotted lands of the Yakima Indian Reservation, in the State of Washington,' there shall be found surplus or unallotted lands under irrigation projects deemed practicable and undertaken under the provisions of the Act of Congress approved June 17, 1902, known as the Reclamation Act, the Secretary of the Interior is hereby authorized to exclude from the provisions of said Act of December 21, 1904, such surplus or unallotted lands which can be irrigated under such project and to dispose of the same in the manner hereinafter provided, and he is further authorized to make withdrawals of such lands for the purpose provided in said Reclamation Act.

"Sec 2. That the irrigable surplus and unallotted lands in any such project shall be subject to homestead entry under all the provisions of the Reclamation Act at such time as may be fixed by the Secretary of the Interior and at the price determined by appraisal

[3] 33 Stat. L. 352.

For proclamation of President opening Crow Reservation, see 34 Land Dec. 632, 35 Land Dec. 684.

[4] 34 Stat. L. 53; see, also, 5th Annual Report Reclamation Service, p. 22.

as provided in said Act of December 21, 1904. Payments for the land shall be made in annual installments, the number and time of beginning being fixed by the Secretary of the Interior, and shall be deposited in the Treasury of the United States and credited to the Yakima Indian fund, and disposed of as provided by Section 4 of the said Act of December 21, 1904. Such payments shall be in addition to the charges for construction and maintenance of the irrigation system made payable to the reclamation fund by the provisions of the Reclamation Act. In case of failure to make any payment for such lands when due, the Secretary of the Interior shall have the power to cancel the entry and the corresponding water right and declare forfeited to the said Yakima Indian fund and the reclamation fund, respectively, the amounts paid on such entry and water rights. The lands embraced within such canceled entry shall be subject to further entry under the Reclamation Act at the appraised value until otherwise directed by the President, who may, by proclamation, as provided by said Act of December 21, 1904, from time to time fix such price as he may deem most advantageous upon all the lands within such projects not disposed of.

"Sec. 3. That if any lands heretofore allotted or patented to Indians on said Yakima Indian Reservation shall be found irrigable under any project, the Secretary of the Interior is hereby authorized, upon the request or with the consent of such allottee or patentee, to dispose of all land in excess of twenty acres in each case, in tracts of an area approved by him and subject to all the provisions of the Reclamation Act to any person qualified to acquire water rights under the provisions of the Reclamation Act at a price satisfactory to the allottee or patentee and approved by the Secretary of the Interior, or at public sale to the highest bidder. The payments shall be made in annual installments, the number and terms being approved by the Secretary of the Interior. Such payments shall be in addition to the charges for construction and maintenance of the irrigation system made payable to the reclamation fund by the provisions of the Reclamation Act. In case of failure to make any payment for such lands when due or the charges under the Reclamation Act, the Secretary of the Interior shall have the power to cancel the entry and the corresponding water right and again dispose of the land in the manner hereinbefore provided.

"Sec. 4. That from the payments received from the sale of such individual Indian lands there shall be covered into the reclamation fund the amounts fixed by the Secretary of the Interior as the annual charges on account of the land retained by such Indian for the construction and maintenance of the irrigation system as required under the Reclamation Act. The balance, if any, shall be deposited in the Treasury of the United States to the credit of the individual Indians, and may be paid to any of them if, in the opinion of the Secretary of the Interior, such payment will tend to improve the condition and advance the progress of said Indians, but not otherwise.

"Sec. 5. That the Secretary of the Interior is hereby authorized to cover into the reclamation fund from the money of any such Indian, either from his individual credit or from the general Yakima Indian fund, for the payment of such charges for construction and maintenance for the water rights appurtenant to the land retained by him or for the annual maintenance charges payable on account of such water rights after the construction charge thereon has been paid in full. After unconditional title in fee has passed from the United States for any lands retained by such Indians, the water for irrigating such lands shall be furnished under the same conditions in all respects as for other lands under the project: *Provided*, that any Indian taking advantage of this Act shall have a perpetual water right so long as the maintenance charges are paid, whether he uses the water or not, and the Secretary of the Interior is hereby authorized to use the funds of the tribe to pay such maintenance charges, when, in his discretion, it is necessary to preserve said water right: *Provided further*, that he may, in his discretion, use said funds to pay for water rights and maintenance charges on twenty acres of any Indian allotment if the sum obtained from the sale of the allottee's land is in excess of twenty acres and his interest in the tribal funds be insufficient for those purposes.

"Sec. 6. That the Secretary of the Interior shall be authorized, upon compliance with the provisions of this Act and of the Reclamation Act, by any party having purchased such allotted or patented lands as herein provided, to issue patent passing unconditional title in fee by the United States as trustee for the allottee or patentee, and shall cancel any allotment as to the lands disposed of under this Act.

"Sec. 7. That the irrigation works heretofore constructed for the Yakima Indian Reservation may be at a cost to be determined by the Secretary of the Interior included in any project developed under the provisions of the Reclamation Act and of this Act, and become a part of said project for all purposes of the Reclamation Act, and the cost of the same shall be included in the cost of such project and be paid into the Yakima Indian fund out of the proceeds arising from the sale of water rights from time to time as payments on account thereof are received. The provisions of this Act may be construed as superseding or amending any provisions of the said Act of December 21, 1904, so far as any conflict may appear.

"Sec. 8. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

Under the authority of the above Act, and the Act of June 27, 1906, authorizing the Secretary of the Interior to fix a lesser area than forty acres as the minimum entry,[5] twenty acres is fixed as the unit for Indian ownership to be irrigated by the waters of any such project.[6]

The Act of June 21, 1906, providing for the contingent expenses of the Indian Department for the fiscal year ending June 30, 1907, provides:[7] "That any Indian allotted lands under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, may sell and convey any part thereof, under the rules and regulations prescribed by the Secretary of the Interior, but such conveyance shall be subject to his approval, and when so approved shall convey full title to the purchaser the same as if final patent without restrictions had been issued to the allottee: *Provided,* that the consideration shall be placed in the Treasury of the United States and used by the Commissioner of Indian Affairs to pay the construction charges that may be assessed against the unsold parts of the allotment, and to pay the maintenance charges thereon during the trust period, and any sur-

[5] For Act of June 27, 1906, see Sec. 1252.

[6] Opinion Atty. Gen., 34 Land Dec. 110.

[7] See Supp. Fed. Stat. Ann., 1909, p. 208; 34 Stat. L. 327.

plus shall be a benefit running with the water right to be paid to the holder thereof." [8]

The Indian Appropriation Act approved March 1, 1907,[9] contains the following provision relative to the employment of Indian labor on reclamation projects:

"That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the directions of the Secretary of the Interior. And the employment of such Indians and the hiring of their property, in connection with the construction of any irrigation project under the Reclamation Service, shall be exempt from the provisions of Sections 3709 and 3744, Revised Statutes."

The same Act also contains the following provision in regard to the disposition of lands opened to settlement in the Blackfeet Indian Reservation:

"That if, after the approval of the classification and appraisement, as provided herein, there shall be found lands within the limits of the reservation under irrigation projects deemed practicable under the provisions of the Act of Congress approved June 17, 1902, known as the Reclamation Act, said lands shall be subject to withdrawal and be disposed of under the provisions of said Act, and settlers shall pay in addition to the cost of construction and maintenance provided therein the appraised value, as provided in this Act, to the proper officers, to be covered into the Treasury of the United States to the credit of the Indians: *Provided, however,* that all lands hereby opened to settlement remaining undisposed of at the end of five years from the taking effect of this Act shall be sold to the highest bidder for cash, at not less than $1.25 per acre, under rules and regulations prescribed by the Secretary of the Interior, and any lands remaining unsold ten years after said lands shall have been opened to entry shall be sold to the highest bidder, for cash, without regard to the minimum limit above stated: *Provided,* that not more than 640 acres of land shall be sold to any one person or company." [10]

The same Act also contains the following provision authorizing the

[8] A right of way for a canal may be conveyed over allotted Indian lands. Lucy Hawk Shively, 36 Land Dec. 135.

[9] 34 Stat. L. 1015-1052; Supp. Fed. Stat. Ann., 1909, p. 226.

[10] 34 Stat. L. 1037.

Secretary of the Interior to use part of the sum appropriated for an irrigation system for the Pima Indians in payment of their proportion of the cost of constructing the Salt River project, in Arizona: "That the Secretary of the Interior may, in his discretion, use such part of the $300,000 heretofore appropriated for an irrigation system for the Pima Indians in the payment of such Indians' proportionate part of the construction of the Salt River project, and such funds may be transferred to the reclamation fund, to be expended by that service in accordance with its rules and regulations, the Indians to receive a credit upon the reclamation charge assessed against their lands under the Salt River project for the amount so transferred." [11]

§ 1246. **Acts amendatory—Military reservations—Act of June 9, 1906.**—Lands included within military reservations are not subject to withdrawal and disposition under the Reclamation Act, without a specific Act of Congress authorizing the same. By the Act of June 9, 1906,[1] entitled, "An Act to provide for the disposition under the public land laws of the lands in the abandoned Fort Shaw Military Reservation, Montana," such reservation was opened for such disposal, said Act being as follows:

"That the Secretary of the Interior is hereby authorized to dispose of the lands in the abandoned Fort Shaw Military Reservation, in Montana, under the provisions of the public land laws, and the public surveys shall be extended over the lands therein: *Provided*, that he may reserve for Indian school purposes the following-described lands" (describing lands): "*Provided further*, that before opening the reservation to entry the Secretary of the Interior may withdraw any other lands needed in connection with an irrigation project under the provisions of the Act of June 17, 1902, known as the Reclamation Act, for use or disposition thereunder." [2]

§ 1247. **Acts amendatory—Construction of Rio Grande dam.**—The Act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June 30, 1908, contains the

[11] 34 Stat. L. 1022.

[1] 34 Stat. L. 228.

[2] The Secretary of the Interior is without authority to segregate lands in abandoned military reservations for use as reservoir sites in connection with reclamation projects. Instructions, 33 Land Dec. 130.

following provision in pursuance of a convention between the United States and Mexico, proclaimed January 16, 1907:

Convention With Mexico: Toward the construction of a dam for storing and delivering 60,000 acre-feet of water annually in the bed of the Rio Grande at the point where the headworks of the Acequia Madre now exists, above the City of Juarez, Mexico, as provided by a convention between the United States and Mexico, proclaimed January 16, 1907, one million dollars, to be available as needed and to be expended under the direction of the Secretary of the Interior in connection with the irrigation project on the Rio Grande: *Provided,* that the balance of the cost of said irrigation project over and above the amount herein appropriated shall be allotted by the Secretary of the Interior as may be needed and as may be available from time to time from the reclamation fund and collected from the settlers and owners of the land benefited under the provisions of the Reclamation Act approved June 17, 1902, and Acts supplemental thereto or amendatory thereof." [1]

§ 1248. Acts amendatory to the National Reclamation Act—The use of materials from the public lands—Act of February 8, 1905.—The Act of February 8, 1905,[1] provides: "That in carrying out the provisions of the National irrigation law, approved June 17, 1902, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under the rules and regulations to be prescribed by him, such earth, stone, and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose under rules and regulations to be prescribed by him." [2]

§ 1249. Acts amendatory to the National Reclamation Act—As relating to certain lakes—Act of February 9, 1905.—By the Act of

[1] 34 Stat. L. 1357.

For the treaty with Mexico relative to the above, see Secs. 1218-1220.

[1] 10 Fed. Stat. Ann., 1906, p. 433; 33 Stat. L. 706.

[2] By the Act of Feb. 1, 1905, 10 Fed. Stat. Ann., 1906, p. 404, 33 Stat. L. 628, the control of the forest reserves was transferred to the Agricultural Department.

February 9, 1905,[1] the Secretary of the Interior was authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the National Reclamation Act and which may involve the character of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any river or other body of water connected therewith, in the States of Oregon and California, to raise or lower the level of said lakes as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the National Reclamation Act.

§ 1250. **Acts amendatory to the National Reclamation Act—As relating to the sale of material used—Act of March 3, 1905.**—The Act of March 3, 1905,[1] provides: "That there shall be covered into the reclamation fund established under the Act of June 17, 1902, known as the Reclamation Act, the proceeds of the sales or material utilized for temporary work and structures in connection with the operations under the Act, as well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said Reclamation Act."

§ 1251. **Acts amendatory to the National Reclamation Act—As relating to townsites—Acts of April 16, 1906, June 11, 1910, February 24, 1911.**—The Act of April 16, 1906,[1] providing for the withdrawal from public entry of lands needed for townsite purposes in connection with projects under the Reclamation Act of June 17, 1902, and for other purposes provides:

"Sec. 1. That the Secretary of the Interior may withdraw from public entry any lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June 17, 1902, not exceeding 160 acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes."

Section 2 provides for the appraisement and sale of such town

[1] 33 Stat. L. 714.

[1] 10 Fed. Stat. Ann., 1906, p. 433; 33 Stat. L. 1032.

[1] Supp. Fed. Stat. Ann., 1909, p. 539, 34 Stat. L. 116.

lots to the highest bidder for cash, and that the "reclamation funds may be used to defray the necessary expense of appraisement and sale, and the proceeds of such sale shall be covered into the reclamation fund."

Section 3 provides for the improvement of public reservations and that the use of the same shall forever be for public purposes.

"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the Reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for irrigation projects from which water is taken.

"Sec. 5. That whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said Reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided,* that no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: *Provided further,* that the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of Section 6 of the Reclamation Act approved June 17, 1902."

As amended by the Act approved February 24, 1911,[2] it was provided as follows:

[2] Public, No. 417.

Applications for water rights under the Reclamation Act by individual lot owners, for lands which have been

"Sec. 3. That any townsite heretofore set apart or established by the proclamation of the President, under the provisions of Sections 2380 and 2381 of the Revised Statutes of the United States, within or in the vicinity of any reclamation project may be appraised and disposed of in accordance with the provisions of the Act of Congress approved April 16, 1906, entitled,[3] 'An Act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June 17, 1902, and for other purposes,' and all necessary expenses incurred in the appraisal and sale of lands embraced within any such townsite shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

"Sec. 4. That in the townsites of Heyburn and Rupert, in Idaho, created and surveyed by the Government, on which townsite settlers have been allowed to establish themselves, and had actually established themselves prior to March 5, 1906, in permanent buildings not easily moved, the said settlers shall be given the right to purchase the lots so built upon at an appraised valuation for cash, such appraisement to be made under the rules prescribed by the Secretary of the Interior. Providing that the limitation on the size of townsites contained in the Act of April 16, 1906,[4] . . . shall not apply to the townsites named in this section; and whenever, in the opinion of the Secretary of the Interior, it shall be advisable for the public interest, he may withdraw and dispose of townsites in excess of 160 acres under the provisions of the aforesaid Act, approved April 16, 1906, and reclamation funds shall be available for the payment of all expenses incurred in executing the provisions of this Act, and the aforesaid Act of April 16, 1906, and the proceeds of all sales of townsites shall be covered into the reclamation fund."

subdivided into town lots, will not be allowed; but water may be supplied to towns from reclamation projects by delivery to some convenient point to be handled and distributed to the inhabitants of the town by the municipal authorities in accordance with the provisions of the Act of April 16, 1906. Instructions of March 21, 1911, 39 Land Dec. 591.

Also, by Secs. 3 and 4 of the Act of June 27, 1906, Supp. Fed. Stat. Ann., 1909, p. 543; 34 Stat. L. 519.

For the balance of the Act of June 27, 1906, relating to subdivisions which may be entered, and to desert land entries, see Sec. 1253.

[3] See *supra*.

[4] See *supra*.

Again, by the Act of June 11, 1910, it was further provided, relative to the sale of town lots, as follows: "That the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within townsites on projects under the Reclamation Act heretofore or hereafter appraised under the provisions of the Act approved April 16, 1906, entitled 'An Act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June 17, 1902, and for other purposes,' and the Act approved June 27, 1906, entitled 'An Act providing for the subdivision of lands entered under the Reclamation Act, and for other purposes'; and thereafter to proceed with the sale of such town lots in accordance with said Acts.

"Sec. 2. That in the sale of town lots under the provision of the said Acts of April 16 and June 27, 1906, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of 6 per centum per annum on deferred payments.[5]

"In all cases where the Secretary of the Interior shall direct the reappraisement of unsold lots under the first section of the above quoted Act, the reappraisement will be conducted under the regulations provided for under the original appraisement of lots in townsites created under the laws in said Act mentioned. The lots to be reappraised will not, from the date of the order therefor, be subject to disposal until offered at public sale at the reappraised value, which offering will be conducted under the regulations providing for the public sale of lots in such townsites. The lots so offered at public sale will then become subject to private sale at the reappraised price. Whenever the Secretary of the Interior, in the exercise of the discretion conferred upon him by Section 2 of said Act, shall order the payment of the purchase price of lots, sold in townsites created under the laws in said Act mentioned, to be made in annual installments, the same will be done under such regulations as may be issued in each particular instance."[6]

[5] Session Laws, 1910, Chap. 284, p. 465, 61st Cong., 2d Session; 36 Stat. L. 465.

[6] Instructions, Sept. 13, 1910, 39 Land Dec. 205.

§ 1252. Acts amendatory to the National Reclamation Act—Relating to subdivisions—The farm unit—Act of June 27, 1906.—The Act of June 27, 1906,[1] an Act providing for the subdivision of land under the Reclamation Act, and for other purposes, provides as follows:

"Sec. 1. That whenever, in the opinion of the Secretary of the Interior, by reason of the market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the Act of June 17, 1902, known as the Reclamation Act, he may fix a lesser area than forty acres as the minimum entry and may establish farm units of not less than ten nor more than 160 acres. That whenever it may be necessary for the purpose of accurate description to further subdivide lands to be irrigated under the provisions of the Reclamation Act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the reclamation service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivision surveys shall be noted upon the tract books in the General Land Office, and they shall be paid for from the reclamation fund: *Provided,* That an entryman may elect to enter under said Reclamation Act a lesser area than the minimum limit in any State or Territory.

"Sec. 2. That whenever the Secretary of the Interior, in carrying out the provisions of the Reclamation Act, shall require by relinquishment lands covered by a *bona fide* unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made."[2]

Sections 3 and 4 of the Act apply to townsites, and are quoted in another section.[3]

Section 5 of the Act applies to desert land entries, and is quoted in another section.[4]

[1] Supp. Fed. Stat. Ann., 1909, p. 543; 34 Stat. L. 519.

[2] The protection of the possession of a settler who prior to the date of the Reclamation Act of June 17, 1902, took possession of unsurveyed lands of the United States with intent to file a homestead thereon whenever the lands should be surveyed or offered for settlement, is not given by this section. U. S. v. Hanson, 167 Fed. Rep. 881.

[3] See Sec. 1251.

[4] See Sec. 1253.

Under this Act, the entries may be reduced in area to the limit representing the acreage which, in the opinion of the Secretary of the Interior, may be reasonably required for the support of a family upon the lands in question, and the lands within a reclamation project are platted to farm units representing such areas. The farm units may be as small as ten acres where the lands are suitable for the raising of fruit and garden produce, etc., but under most projects so far, they have been fixed at from forty to eighty acres each. These areas are announced on the farm unit plats, and public notice is given stating the amount of charges, and other details concerning the payment are issued by the Secretary of the Interior, shortly before the Government is ready to furnish water. Until this public notice is given no definite information is given as to any particular tracts or as to the details to be covered by such notice.[5] Inasmuch as every entry within the limits of a withdrawal under the Reclamation Act is subject to a conformation to an established farm unit, improvements placed upon different subdivisions by the entryman prior to such conformation are at his risk.[6] They should be confined to one legal subdivision until the entry is conformed. In adjusting such an entry the Secretary is not required to confine the farm unit to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract lying outside of the entry so as to equalize in value the several farm units.[7]

Under Section 5 of the Act of June 25, 1910,[8] it is provided "That no entry shall be hereafter made and no entryman shall be permit-

[5] See Regulations, 38 Land Dec. 628, Sec. 3; Opinion Atty. Gen., 35 Land Dec. 110.

[6] Jerome M. Higman, 37 Land Dec. 718; Regulations, 38 Land Dec. 630, Sec. 16.

[7] Where a homestead entry within a reclamation project is divided into farm units, the entryman is entitled to retain only one of such units to be designated by him, and as to the remaining units, the entry must be canceled, or where satisfactory proof has been submitted an assignment may be made under the provisions of the Act of June 23, 1910. Sarah S. Long, 39 Land Dec. 297.

So, also, where a portion of the homestead entry, made subject to the provisions of the Reclamation Act, is subsequently eliminated, and the portion remaining within the project is designated as a farm unit, the entryman may retain either the farm unit or the portion lying without the limits of the project, at his election, and the entry will be canceled as to the remainder. Laurel S. Shell, 39 Land Dec. 502.

[8] 26 Stat. L. 837.

For full text of Act, see Sec. 1257.

ted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same." And it was held that under this provision, a homestead entry of land within a reclamation project allowed subsequently to the Act of June 25, 1910, upon an application in all respects regular, filed prior to that Act, and upon which action was delayed only because of pressure of business in the local office, is not in violation of the provisions of Section 5 of said Act.[9]

§ 1253. **Acts amendatory to the National Reclamation Act—Relating to desert land entries—Act of June 27, 1906.**—Section 5 of the Act of June 27, 1906,[1] relating to *bona fide* desert land entries which have or may be embraced within the limits of a reclamation project, provides as follows:

"Sec. 5. That where any *bona fide* desert land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the Act entitled" (the Reclamation Act)[2] "approved June 17, 1902, and the desert land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert land entryman has been or may be so hindered, delayed, or prevented from complying with the desert land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements

[9] Charles C. Conrad, 39 Land Dec. 432.

See, also, Anna G. Parker, 40 Land Dec. 406.

[1] Supp. Fed. Stat. Ann., 1909, p. 543; 34 Stat. L. 520.

[2] For the full text of the Act, see Sec. 1252.

heretofore made on any such desert land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert land entry, the entryman shall thereupon comply with all the provisions of the aforesaid Act of June 17, 1902, and shall relinquish all land embraced within his desert land entry in excess of 160 acres, and as to such 160 acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said Act of June 17, 1902, and not otherwise. But nothing herein contained shall be held to require a desert land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said Reclamation Act."

This Act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project or by the withdrawal of public lands under the Reclamation Act, from improving or reclaiming the lands covered by their desert land entries. An entryman will not need to invoke the privileges of the Act in this connection until his final proof is due. If the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert land entry, the entryman must comply with all the provisions of the Reclamation Act and must relinquish all the land embraced in his entry in excess of 160 acres; and upon making final proof and complying with the terms of payment prescribed in the Reclamation Act, he will be entitled to patent for the amount of land retained.[3]

[3] Regulations, 38 Land Dec. 644, Secs. 70-79.

See, also, desert land Acts, Secs. 1287-1311.

While desert land entrymen and their assignees are not invested with the legal title, they have such an equitable title and interest in the land as to constitute them proprietors within the spirit and purpose of the Reclamation Act, and the right to use water may be granted them, if they bring themselves within the provisions of the Act that "no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual and *bona fide* resident on such land or occupant thereof residing in the neighborhood of said lands." Instructions, 34 Land Dec. 29.

A desert entryman, whose land is included in a reclamation project, may elect to proceed with the reclamation thereof, on his own account, and thus acquire title to all, or so much of the

Where lands are in private ownership in blocks of more than 160 acres the excess may be conveyed to members of the owner's family, provided the transfer is *bona fide* and the requirements of the Reclamation Act as to residence are complied with.[4] A final certificate and patent will not issue upon a desert land entry within a reclamation project until all payments for a water right under such project have been made and the water permanently attaches to the land.[5]

§ 1254. Acts amendatory—Entryman may assign his entry when—Act of June 23, 1910—The Act approved June 23, 1910, further amended the original Reclamation Act by providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years as though said entry had been made under the original Homestead Act. The full text of this Act is as follows: "That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the Act of June 17, 1902, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said Act of June 17, 1902, may receive from the United States a patent

land included within his entry as he can secure water to irrigate, or accept the conditions of the Reclamation Act and acquire title thereunder to 160 acres; but he can not avail himself of both the reclamation project, and other means of reclamation, and thus acquire title to more than 160 acres of land. Robert J. Slater, 39 Land Dec. 380.

See, also, Instructions, Jan. 20, 1912, 40 Land Dec. 386.

[4] Instructions, 32 Land Dec. 647.

For the disposal of such excess lands by vesting the title to the same in the water users' associations, with authority to sell the same in case of the failure of the owner to dispose of them, see Instructions, 33 Land Dec. 202.

[5] Leroy W. Furnas, 38 Land Dec. 194.

Under the Desert Land Act, as modified by Act of June 27, 1906, final proof, upon the desert entry within a reclamation project, can not be held to have been made and completed until the payments required by said Acts and the Act of June 17, 1902, have been made; and the Department is without authority to accept or regard final proof in such cases as complete or to issue patent thereon, until after full compliance with the terms of payment imposed by the Reclamation Act. W. H. Skinner, 39 Land Dec. 519.

for the lands: *Provided,* That all assignments made under the provisions of this Act shall be subject to the limitations, charges, terms, and conditions of the Reclamation Act.[1]

"Under the provisions of this Act persons who have made or may make homestead entries subject to the Reclamation Act may assign their entries in their entirety at any time after filing in this office satisfactory proof of residence, improvements, and cultivation for the five years required by the ordinary provisions of the homestead law. The Act also provides for the assignment of homestead entries in part, but such assignments, if made prior to the establishment of farm units, must be made in strict accordance with the legal subdivisions of the public survey, and if made after such units are established must conform thereto. Such assignments which shall be made expressly subject to the limitations, charges, terms, and conditions of the Reclamation Act will be accepted by you, duly noted on your records and forwarded to this office in the usual manner, and the assignees in each case will be allowed to submit proof of reclamation and make payment of the water right charges as would the original entryman, and after full compliance with the law will be given final certificate and patent.[2]

"Assignments under this Act must be made expressly subject to the limitations, charges, terms, and conditions of the Reclamation Act, and inasmuch as that Act limits the rights of entry to one farm unit, the assignee must present a showing in the form of an affidavit, duly corroborated, that he has not acquired title to, and is not claiming, any other farm unit or entry under the Reclamation Act."[3]

§ 1255. New Mexico and Arizona—Price fixed for lands—Reservations.—In the Enabling Act of New Mexico and Arizona, ap-

1 Session Laws, 1910, Chap. 357, p. 592, 61st Cong., 2d Session; 36 Stat. L. 592.

A homestead entryman who has not acquired title to his land can not convey or agree to convey to a water users' association one or more legal subdivisions of his entry to be held in trust, and to be sold for his benefit. Opinion Atty. Gen., 34 Land Dec. 532.

2 Instructions of Sept. 13, 1910, 39 Land Dec. 202.

3 Circular of December 17, 1910, 39 Land Dec. 421.

See, also, Sarah S. Long, 39 Land Dec. 297.

proved June 20, 1910,[1] it was provided, relative to New Mexico,[2] that lands in such State "east of the line between ranges eighteen and nineteen east of the New Mexico principal meridian shall not be sold for less than five dollars per acre, and lands west of said line shall not be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any Government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in Section 11 of this Act."

Relative to Arizona, it was provided:[3] "No land shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such Government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in Section 24 of this Act."

§ 1256. Acts amendatory to the National Reclamation Act—The Reclamation Fund Act of June 25, 1910, as amended February 18, 1911.—The Reclamation Service, acting under the directions of the Secretary of the Interior, after the passage and approval of the Reclamation Act, took immediate steps for the segregation of great tracts of land and for the commencement of the construction of the works of many reclamation projects in the States and Territories

[1] 36 Stat. L. 557.
[2] See Sec. 10 of the Enabling Act.
[3] See Sec. 28 of the Enabling Act.

named, and to which the Act applies. In fact, so strenuous had been the operations under the provisions of the Act in commencing these projects, that early in 1910 it was ascertained that the money received and which would be received in the immediate future from the sale of the public lands in those States and Territories would not be nearly sufficient to complete the projects then under various stages of construction without their being long delayed. Therefore, Congress by the Act approved June 25, 1910,[1] entitled, "An Act to authorize advances to the 'reclamation fund,' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes," provided for the appropriation of $20,000,000 from other funds of the United States, to be applied to the completion of such works as had already been commenced as the Secretary of the Interior might require.

The full text of this Act is as follows:

"Sec. 1. That to enable the Secretary of the Interior to complete Government reclamation projects heretofore begun, the Secretary of the Treasury is authorized, upon request of the Secretary of the Interior, to transfer from time to time to the credit of the reclamation fund created by the Act entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June 17, 1902, such sum or sums, not exceeding in the aggregate twenty million dollars, as the Secretary of the Interior may deem necessary to complete the said reclamation projects, and such extensions thereof as he may deem proper and necessary to the successful and profitable operation and maintenance thereof or to protect water rights pertaining thereto claimed by the United States, provided the same shall be approved by the President of the United States; and any such sum or sums as may be required to comply with the foregoing authority are hereby appropriated out of any money in the treasury not otherwise appropriated:

"*Provided,* That the sums hereby authorized to be transferred to the reclamation fund shall be so transferred only as such sums shall be actually needed to meet payments for work performed under existing law: *And provided further,* That all sums so transferred shall be reimbursed to the Treasury from the reclamation fund, as herein-

[1] Public, No. 289; 36 Stat. L. 835.

after provided: *And provided further,* That no part of this appropriation shall be expended upon any existing project until it shall have been examined and reported upon by a board of engineer officers of the army, designated by the President of the United States, and until it shall be approved by the President as feasible and practicable and worthy of such expenditure; nor shall any portion of this appropriation be expended upon any new project.

"Sec. 2. That for the purpose of providing the Treasury with funds for such advances to the reclamation fund, the Secretary of the Treasury is authorized to issue certificates of indebtedness of the United States in such form as he may prescribe and in denominations of $50, or multiples of that sum, said certificates to be redeemable at the option of the United States at any time after three years from the date of their issue and to be payable five years after such date, and to bear interest payable semi-annually, at not exceeding 3 per centum per annum; the principal and interest to be payable in gold coin of the United States. The certificates of indebtedness herein authorized may be disposed of by the Secretary of the Treasury at not less than par, under such rules and regulations as he may prescribe, giving all citizens of the United States an equal opportunity to subscribe therefor, but no commission shall be allowed and the aggregate issue of such certificates shall not exceed the amount of all advances made to said reclamation fund, and in no event shall the same exceed the sum of twenty million dollars. The certificates of indebtedness herein authorized shall be exempt from taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority; and a sum not exceeding one-tenth of one per centum of the amount of the certificates of indebtedness issued under this Act is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expense of preparing, advertising, and issuing the same.

"Sec. 3. That, beginning five years after the date of the first advance to the reclamation fund under this Act, 50 per centum of the annual receipts of the reclamation fund shall be paid into the general fund of the Treasury of the United States until payment so made shall equal the aggregate amount of advances made by the Treasury to said reclamation fund, together with interest paid on

the certificates of indebtedness issued under this Act and any expense incident to preparing, advertising, and issuing the same.

"Sec. 4. That all money placed to the credit of the reclamation fund in pursuance of this Act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included with all other expenses in future estimates of construction, operation, or maintenance, and hereafter no irrigation project contemplated by said Act of June 17, 1902, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States.

"Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same: *Provided,* That where entries made prior to June 25, 1910, have been or may be relinquished in whole or in part the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an Act entitled 'An Act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June 17, 1902.[2]

"Sec. 6. That Section 9 of said Act of Congress, approved June 17, 1902, entitled, 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' is hereby repealed.

"Approved, June 25, 1910."

§ 1257. Acts amendatory—Leaves of absence granted when—Act of June 25, 1910.—The Act of June 25, 1910, also amended the original homestead law where entries are made under reclamation projects, by providing that where water is not available for the irrigation of their lands, leaves of absence to homesteaders may be granted, until the water is turned into the main canals from which

2 As amended by the Act approved Feb. 18, 1911; Public, No. 386; 36 Stat. L. 835.

See instructions of Sept. 13, 1910, 39 Land Dec. 202; Annie G. Parker, 40 Land Dec. 406.

the land is to be irrigated. The full text of the Act is as follows: "That all qualified entrymen who have heretofore made *bona fide* entry upon lands proposed to be irrigated under the provisions of the Act of June 17, 1902, known as the National Irrigation Act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided,* That the period of actual absence under this Act shall not be deducted from the full time of residence required by law." [1]

As construed by the Secretary of the Interior, the Act of June 25, 1910, was intended to relieve entrymen who had made entry for lands within a reclamation project prior to the passage of said Act, and prior to the applying of water by the project, upon the necessity of maintaining residence upon the land "until water for irrigation is turned into the main irrigation canal from which the land is to be irrigated." It condones the prior failure of an entryman to maintain residence where water has not been available for irrigation of the land and suspends the running of the seven-year limitation of the life of the entry by allowing the period of residence to commence from the time when the water is made available.[2]

§ 1258. Acts amendatory—The sale of lands acquired under the provisions of the Act when not needed for its purposes—Act of February 2, 1911.—By the Act approved February 2, 1911, entitled "An Act to provide for the sale of lands acquired under the provisions of the Reclamation Act and which are not needed for the purposes of that Act," [1] it was provided that whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the Reclamation Act, "or under the provisions of any Act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said Reclamation Act are

[1] Session Laws, 1910, Chap. 432, p. 864, 61st Cong., 2d Session; 36 Stat. L. 864.

See, also, Instructions, 39 Land Dec. 203, 204, as amended by 39 Land Dec. 278.

[2] Roberts v. Spencer, 40 Land Dec. 306.

[1] Public, No. 338.

not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land.

"Sec. 2. That upon payment of the purchase price, the Secretary of the Interior is authorized by appropriate deed to convey all the right, title, and interest of the United States of, in, and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secretary may deem proper: *Provided,* That not over 160 acres shall be sold to any one person.

"Sec. 3. That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired."

§ 1259. **Acts amendatory—The Government may contract for impounding, storing, and carriage of water, and to co-operate with other projects—Act of February 21, 1911.**—Under the Act approved February 21, 1911, entitled "An Act to authorize the Government to contract for impounding, storing, and carriage of water, and to co-operate in the construction and use of reservoirs and canals under reclamation projects and for other purposes,"[1] it was provided "that whenever in carrying out the provisions of the reclamation law, storage, or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August 18, 1894, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual

[1] Public, No. 406; 36 Stat. L. 925; Supp. U. S. Comp. Stat., 1911, p. 681.

water users by the party with whom the contract is made: *Provided, however,* that water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

"Sec. 2. That in carrying out the provisions of said reclamation Act and Acts amendatory thereof or supplementary thereto the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to co-operate with irrigation districts, water users' associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users' associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes: *Provided,* that the title to and management of the works so constructed shall be subject to the provisions of Section 6 of said Act: *Provided further,* that water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one land owner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided,* that nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

"Sec. 3. That the moneys received in pursuance to such contracts shall be covered into the reclamation fund and be available for use under the terms of the Reclamation Act and the Acts amendatory thereof or supplementary thereto."

§ 1260. Acts amendatory—Act authorizing the Secretary of the Interior to withdraw public notices—Act of February 13, 1911.—Under the Act approved February 13, 1911, entitled, "An Act to authorize the Secretary of the Interior to withdraw public notices issued under Section 4 of the Reclamation Act, and for other purposes,"[1] it was provided: "That the Secretary of the Interior may in his discretion, withdraw any public notice heretofore issued under Section 4 of the Reclamation Act of June 17, 1902, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users' associations and others entered into prior to the passage of this Act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts, and proceed in all respects as if no such notice had been given."

§ 1261. Action of the States affected.—The majority of the States and Territories affected by the Reclamation Act have assisted the Government in the work of the reclamation of the arid lands within their borders by enacting laws granting rights of way over the State lands, and by further providing that no lands belonging to the State, within the areas to be irrigated from works constructed or controlled by the United States, shall thereafter be sold except in conformity with the classification of farm units by the United States, and that the title to such lands shall not pass from the State until the applicant therefor shall have complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to the use of water from such works, and shall produce evidence thereof duly issued. In order for this provision to take effect, however, the area or areas to be so irrigated by the Government shall be determined by due notice given by the United States and filed with the State Land Board. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of State lands within the limits of such withdrawal shall be accepted, except under the conditions prescribed above. These statutes also provide to the effect that any State lands needed by the United States for irrigation works shall be sold to the Government at private sale at the appraised value of such lands.

[1] Public, No. 353.

In some of the States provision is made for the confirmation of the right to use the water upon the filing of evidence that construction has been authorized by the Secretary of the Interior.

Provisions are also made for the formation of water users' associations, which are usually exempted from the payment of any corporation tax and the annual franchise tax.

For the purposes of the Act the United States is also authorized to make appropriations of water.[1]

§ 1262. **The withdrawal and restoration of lands for the purposes of the Act.**—There are two classes of withdrawals of land authorized by the Reclamation Act: First, under Section 3 of the Act, the Secretary of the Interior is authorized to withdraw from public entry the lands required for any irrigation works contemplated under the provisions of the Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not so acquired. Withdrawals of this class are designated by the Secretary as "Withdrawals under the first form," and only embrace lands that may possibly be needed in the construction and maintenance of the irrigation works. After the lands have been withdrawn under the first form they can not be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations will be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal.[1]

[1] For the statutes of the various States in aid of the National Reclamation Act, see Part XIV, under each State.

[1] For the powers granted the Secretary of the Interior under the National Reclamation Act, see United States v. Burley, 172 Fed. Rep. 615; *Id.*, 179 Fed. Rep. 1, 102 C. C. A. 429; United States v. Cantrall, 176 Fed. Rep. 946; Twin Falls Canal Co. v. Foote, 192 Fed. Rep. 583; Regulations, 38 Land Dec. 628, Secs. 5 and 6; Ernest Woodcock, 38 Land Dec. 349.

By the mere filing of an application to enter under the homestead law, upon which action is suspended, and tender of necessary fees, the applicant acquires no vested right to or interest in the land applied for, nor does such application have the effect to segregate the land from the public domain so as to prevent a withdrawal thereof for reclamation purposes under the provisions of the Reclamation Act. John A. Maney, 35 Land Dec. 250.

See, also, Board of Control, Canal No. 3, State of Colorado v. Terrence, 32 Land Dec. 472; Annie G. Parker, 40 Land Dec. 406; Todd v. Hayes, 34

It is held by the Land Department that even a valid homestead entry for land within the limits of a withdrawal for irrigation works, under the authority of the Act, existing at the date of such withdrawal, upon which final certificate had not issued, or legal or equitable title to the land embraced therein become vested, may be canceled by the Department if it appear that such land is required for use in the construction and maintenance of such works, for such withdrawals have the force of legislative withdrawals, and are therefore effective to withdraw all lands within the designated limits to which a right has not vested.[2] Neither does the Reclamation Act contain any provision for the recognition or protection of any right of a settler on unsurveyed public lands which may be withdrawn and reserved thereunder for use in construction of irrigation works, and such settler has no right which he can oppose to the taking of the land for such purpose.[3] Although the right of the Government to appropriate lands for its use in the construction and operation of irrigation works under the Act is not affected by the fact that the land is mineral in character, these lands are not by a withdrawal taken out of the operation of the mining laws, but continue open to exploration and purchase under such laws.[4]

The first form of withdrawal, under which no entries of any kind can be allowed, may be used in all preliminary withdrawals.[5]

Land Dec. 371; Charles A. Guernsey, 34 Land Dec. 560; Mary A. Sands, 34 Land Dec. 653; Instructions, 33 Land Dec. 607.

2 See Instructions, 32 Land Dec. 387; John A. Maney, 35 Land Dec. 250; Opinion Atty. Gen., 34 Land Dec. 421, 445; Instructions, 33 Land Dec. 607; Instructions, 34 Land Dec. 158; Mary C. Sands, 34 Land Dec. 653; Charles G. Carlisle, 35 Land Dec. 649.

3 United States v. Hanson, 167 Fed. Rep. 881.

But a homestead entry upon which final proof has been made showing compliance with the law up to the date thereof, but where final certificate has not issued, has the same status as an entry upon which final certificate has issued, so far as it may be affected by any withdrawal under the Reclamation Act. 5th Annual Rept. of the Reclamation Service, p. 25.

No such rights are acquired by settlement upon lands embraced in the entry of another as will attach upon cancellation of such entry, where at that time the lands are withdrawn for use in connection with an irrigation project under the Reclamation Act. George Anderson, 34 Land Dec. 478.

The practice of designating certain withdrawals made under the Act as "temporary" was discontinued. Charles G. Carlisle, 35 Land Dec. 649.

4 Instructions, 35 Land Dec. 216.

5 Instructions, 33 Land Dec. 104.

No authority is granted by the Reclamation Act for the withdrawal of

There is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, nor will it in any manner interfere with the laws relating to the control, appropriation, use, or distribution of the same.[6] Withdrawals under the first form of withdrawal are absolute, and the Land Department may remove persons from such lands as trespassers.[7] The Secretary of the Interior is without authority to segregate lands in abandoned military reservations for use as reservoir sites in connection with reclamation projects.[8] However, lands in forest reservations and in National parks may be appropriated and used for irrigation works to be constructed under the Act.[9]

The second class of withdrawals is also authorized by Section 3 of the Act, wherein it is provided that at or immediately prior to the time of beginning of the surveys for any contemplated irrigation works, the Secretary of the Interior is authorized "to withdraw from entry, except under the homestead law, any public lands believed to be susceptible of irrigation from said works." This class of withdrawals is designated by the Secretary of the Interior as "withdrawals under the second form," and which embrace lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works.[10] Withdrawal under the second form precludes any kind of entry, or appropriation of the land, other than under the homestead laws.[11] More lands are withdrawn by the Secretary

lands for reservoir sites for storing water to be used for domestic purposes. Opinion Atty. Gen., 33 Land Dec. 415.

[6] Opinion Atty. Gen., 32 Land Dec. 254.

[7] 4th Annual Rept. Reclamation Service, p. 29.

[8] Instructions, 33 Land Dec. 130.

[9] Opinion Atty. Gen., 33 Land Dec. 389.

[10] Regulations, 38 Land Dec. 628, Sec. 5.

[11] Land so withdrawn can not be taken up in lieu of land relinquished to the United States in a forest reserve. Santa Fe Pac. R. Co., 33 Land Dec. 360.

Neither are they subject to soldiers' additional entry under Section 2306 of the Rev. Stat. of the U. S. Cornelius J. MacNamara, 33 Land Dec. 502; Nancy C. Yaple, 34 Land Dec. 311.

An application to enter under the provisions of Sec. 2306 of the Revised Statutes, even though approved by the Commissioner of the General Land Office, will not, prior to the allowance of entry thereon, prevent a withdrawal of the land covered thereby under the provisions of the Reclama-

than are finally included within any contemplated project. Only a portion of the lands withdrawn will be irrigated even if the project is feasible and the works finally constructed; this is so for the reason that it is impossible to decide in advance of careful examination what lands may be irrigated. It can not be determined in advance how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed. Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character will be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes.[12] And for the purpose of construction all entries made upon the lands are subject to the Right of Way Act of August 30, 1890,[13] and, therefore, all or any portion of such entries may be taken where the land is required for irrigation works constructed by the authority of the United States for the purposes of the Reclamation Act. All withdrawals under the Act become effective on the date upon which they are ordered by the Secretary of the Interior, and all orders for restoration on the date they are received in the local land office, unless otherwise specified in the order.[14] Upon the cancellation of an

tion Act. Charles A. Guernsey, 34 Land Dec. 560; Mary C. Sands, 34 Land Dec. 653.

A settler on unsurveyed land subsequently embraced in a withdrawal under the Reclamation Act, may, upon survey of the land, make and complete entry for the full area allowed by law, notwithstanding such withdrawal previous to entry, free of added conditions and limitations imposed by the Reclamation Act. William Boyle, 38 Land Dec. 603.

Nor to desert entry. James Page, 32 Land Dec. 536.

Neither are they subject to disposal under the coal land laws. John Hopkins, 32 Land Dec. 560.

12 Regulations, 38 Land Dec. 629, Sec. 8.

13 6 Fed. Stat. Ann., p. 508; 26 Stat. L. 391.

For text of this Act, and construction, see Sec. 952.

14 Regulations, 38 Land Dec. 629, Sec. 10.

The filing of such plats in the office of the Commissioner of the General Land Office and in the local offices shall be regarded as equivalent

entry covering lands within a withdrawal under the Act, such withdrawal becomes effective as to such lands without further order.[15] A withdrawal under the Reclamation Act becomes operative upon the lands covered by timber and stone applications when no payment has been made, and terminates the contingent right of the applicant.[16] Again, by a successful contest against a desert-land entry, the contestant does not acquire such a preference right of entry as will, prior to its exercise, except the land from the operation of a withdrawal under the provisions of the Reclamation Act.[17]

Lands so withdrawn from entry may be restored by the Secretary of the Interior. In an opinion of the Attorney-General, approved by the Secretary of the Interior, it is held that when an order of withdrawal is revoked, the time for making entries may be fixed at some date in the future, leaving the lands subject to settlement from the date of the order of the revocation. This permits a right to attach to such lands, as the result of settlement, in advance of the possible filing of an entry for the same land by one who has not settled thereon.[18]

§ 1263. **Reservation of rights of way for Government use.**—By Section 1 of the Sundry Civil Appropriation Act of August 30, 1890,[1] still further provisions were made for rights of way for ditches and canals, the said Act being as follows:

to an order withdrawing such lands under the second form under the Act. George B. Pratt, 38 Land Dec. 146; Circular, 37 Land Dec. 27; Regulations, 38 Land Dec. 630, Sec. 12.

Where lands which have been withdrawn from all disposition are restored to entry, no application will be received or any rights recognized and initiated by the tender of an application for any such lands until the order of restoration is received at the local land office. George B. Pratt, 38 Land Dec. 146.

See, also, Circular, 37 Land Dec. 27.

15 Regulations, 38 Land Dec. 629, Sec. 11; Cornelius J. MacNamara, 33 Land Dec. 520.

16 Instructions, 32 Land Dec. 387.

17 Emma H. Pike, 32 Land Dec. 395.

18 Crichton v. Shelton, 33 Land Dec. 205.

The revocation of a withdrawal of its own force subjects the lands to entry and disposal under the general land laws free from all conditions, except such as are imposed by those laws, and removes the conditions prescribed by the Reclamation Act that had attached to entries made during the existence of the withdrawal. Opinion Atty. Gen., 34 Land Dec. 445.

1 6 Fed. Stat. Ann., 1905, p. 508; 2 U. S. Comp. Stat., 1901, p. 1570; 26 Stat. L. 391.

See, also, Sec. 936.

". . . That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this Act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."

By the terms of this Act it is evident that the Government was providing for some future reclamation Act by taking steps to reserve rights of way for its use for its works over all lands conveyed by the Government after the approval of the Act of August 30, 1890. And these reservations are now being utilized for the works being constructed under the National Reclamation Act.

By this Act Congress provided for reservations in all patents granted of rights of way for ditches and canals by enacting that in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by the Act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. The purpose of this provision was to reserve and retain in the United States a right of way over all lands within the territory mentioned which may be disposed of under any land laws of the United States after the passage of the Act, and although it declares that such reservation shall be expressed in the patent, it does not follow that the reservation is less effective as to lands which are disposed of under land laws not requiring or authorizing the issuance of patents as evidence of the right of the grantee. The Act can not be confined to entries under land laws by which individuals alone acquire rights, but to all land laws in general in their operation under which inchoate and vested rights may be acquired under executive supervision by following the mode of procedure provided for by the Act. It was intended to apply to general land laws as distinguished from grants or other special Acts of Congress.[2] Hence it is held that the right of way acquired under the general law of

[2] Instructions, 32 Land Dec. 147; Regulations, 38 Land Dec. 629, Sec. 8.

All public lands west of the one hundredth meridian taken up under allotment, sale, homestead, or other form of disposition, subsequent to the Act of August 30, 1890, as to which there is no claim by reason of settlement, occupancy, or otherwise, prior to that date, are subject to the reservations provided by that Act, to be expressed in the patent for right of

March 3, 1875,[3] after the passage of the Act of August 30, 1890, is burdened with the reservation for the right of way for canals and ditches provided for by the latter Act, which right of way may be utilized by the Government without compensation, except for actual loss or damage, provided such use will not impair or defeat the use of the railroad right of way for the legitimate corporate purposes of the company.[4] The railroad company may, therefore, occupy the lands *in presenti*, legally conveyed to it within a reclamation reservation by a homestead entryman. It may also be occupied by the entryman.[5]

The word "constructed," as used in the Act of 1890, quoted above, is construed not to limit the reservation to a right of way already constructed, but extends to those ditches or canals to be constructed by the Government in furtherance of its irrigation schemes for the reclamation of arid lands.[6]

§ 1264. The acquisition of rights of way for Government use.—In addition to the rights of way reserved in all patents to land granted since 1890, discussed in the previous section,[1] the Reclamation Act in Section 7 provides that where in carrying out the provisions of the Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums needed for that purpose. It is also made the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under the Act, to cause proceedings to be

way for ditches and canals by authority of the United States. Clement Ironshields, 40 Land Dec. 28.

See, also, Minidoka etc. R. Co. v. Weymouth, —— Idaho ——, 113 Pac. Rep. 455, where it was held that the Acts of Congress, relative to the public lands, providing for entries thereof, and authorizing easements and rights of way thereover, must be construed together and in the light of the constitutions of the country as they existed when several Acts were passed.

[3] 6 Fed. Stat. Ann., 1905, p. 501; 2 U. S. Comp. Stat., 1901, p. 1568, Chap. 152; 18 Stat. L. 482.

[4] Instructions, 36 Land Dec. 482.

[5] For the acquisition of rights of way by the Government, under the Reclamation Act, see Chap. 51, Sec. 936.

[5] United States v. Minidoka etc. R. Co., 176 Fed. Rep. 762; Green v. Wilhite, 14 Idaho 238, 93 Pac. Rep. 971.

[6] Green v. Wilhite, 160 Fed. Rep. 755; Green v. Wilhite, 14 Idaho 238, 93 Pac. Rep. 971.

[1] See Secs. 936, 1263.

commenced for condemnation within thirty days from the receipt of the application of the Secretary of the Interior at the Department of Justice.[2] Under this section water rights as well as land for rights of way may be condemned by the Government.

In the event any lands embraced in any entry on which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation works (other than for right of way for ditches or canals reserved under the Act of August 30, 1890) under the Reclamation Act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands, the rights of the claimants being adjusted upon the basis of the status of the land at the time such determination was made.[3] The rights of the entryman as to the measure of compensation and the character of the action that may be taken by the Government in acquiring or appropriating the land embraced in his entry must be determined by the status of the entry at the time of the withdrawal of the lands for such purposes.[4] Where the owners of the improvements shall fail to agree with the representative of the Government as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings, as provided by Section 7 of the Reclamation Act.[5]

Again, for the purposes of carrying out the provisions of the Reclamation Act, the Government may avail itself of the privileges conferred by the Right of Way Act of March 3, 1891,[6] granting rights of way through the public lands for the construction of ditches and reservoirs for irrigation purposes, to the same extent that individuals, corporations, or associations of individuals may exercise such privileges, and subject to the same conditions and limitations.[7]

2 For full text of Section 7, see Sec. 1244.

For instructions relative to condemnation, see 38 Land Dec. 58.

3 Opinion Atty. Gen., 34 Land Dec. 421; Regulations, 38 Land Dec. 630, Sec. 14.

4 Agnes C. Pieper, 35 Land Dec. 459.

5 Regulations, 38 Land Dec. 630, Secs. 14, 15.

6 For the Act, and construction thereof, see Secs. 937-950.

7 Opinion Atty. Gen., 33 Land Dec. 563.

A permanent easement attaching to public lands by the construction of a reservoir and canals upon a right of

§ 1265. Water rights—Acquisition of, by the Government for its projects.—The Federal Government has the power under the Reclamation Act to acquire water rights for the use of its projects in the irrigation and reclamation of the lands thereunder by appropriation, purchase, or condemnation.[1] The Director of the Geological Survey is authorized by the Secretary of the Interior to designate suitable persons to file notices of water appropriation or to otherwise comply with the law of the respective States relative to the making valid appropriations of water for the projects of the Reclamation Service, in the name and on the behalf of the Secretary of the Interior, in pursuance of the provisions of Section 8 of the Reclamation Act.[2] The laws governing waters being left to the respective States where they naturally flow, this leaves the Government in the anomalous position of having to go to the State laws in order to acquire a right to the water necessary for these projects and flowing over its own lands.[3]

Statutes have been enacted by the legislatures of the various States affected, in aid of the National Reclamation Act, which statutes are fully discussed in a future part of this work.[4]

§ 1266. Water rights—Reservation of waters by the Government for its projects.—As has been stated before, the United States, first by its forbearance and afterward by its several Acts of Congress, has permitted vested rights to be acquired by individuals and others to the waters flowing over the public domain, separate and apart from the land itself.[1] But we have seen that the United

way under the Act of March 3, 1891, does not, upon acquisition of such irrigation system by the United States for use in connection with a reclamation project, become extinguished by merger in the estate of the Government in such reservoir lands; and entries allowed for lands within and below the flowage contour line of the reservoir as marked upon the township plat, are subject to the right of flowage by storage of waters in the reservoir. McMillan Res. Site, 37 Land Dec. 6.

1 The United States may exercise the right of eminent domain against other land owners to obtain land necessary to carry a proposed project under the National Reclamation Act into effect. Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

2 4th Annual Rept. of the Reclamation Service, p. 26.

3 That the government of the waters is left to the States, see Secs. 507, 593.

4 See for statutes in aid of the National Reclamation Act, Part XIV.

1 See for history of the Arid Region Doctrine of appropriation, Chap. 32, Secs. 595-626.

States still has rights in and to the water flowing over the public domain as a riparian proprietor,[2] and has the power authorized to maintain the navigability of the navigable waters of the United States.[3] That as such proprietor, where the particular circumstances required, the Government has the right to reserve from all appropriation such waters for its own use and for particular purposes, such as the preservation of the navigable capacity of the rivers,[4] or the use upon Indian reservations.[5] The National Reclamation Act, in Section 8, provides: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws."[6] And, in practice, the Secretary of the Interior proceeds under the laws of the respective States where the project is being constructed for the acquisition of the water rights.

But where the Government is the sole owner of both the lands and the waters, as where it is the sole riparian proprietor, and no vested rights have accrued in and to the waters, as is the case on some of the larger rivers, as was said in a recent case decided by the United States:[7] "Has not the United States, as a land owner, the same rights within the State that any other land owner has?" We think it has, and as the sole riparian proprietor upon some of the streams, where it can be done without interfering with vested rights, not only this, but it has the right under its power to make reservations[8] to reserve such waters from all appropriation under State laws, and in the face of the dedication by a State of all the waters flowing within its boundaries to the State or to the public.[9] As was said by the Supreme Court of the United States: "The power of the Government to reserve the waters and exempt them from appro-

2 For the United States as a riparian proprietor, see Sec. 480.

3 See Chap. 16, Secs. 341-357.

4 See Secs. 354-357, 388.

For power of Government to make reservations, see Secs. 411, 414.

5 See Secs. 667, 668.

6 For full text of Act, see Sec. 1244.

7 Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

8 See sections cited *supra*.

9 For dedication of water as against the United States, see Sec. 388.

priation under the State laws is not denied, and could not be."[10] Again, in a case decided in 1910, by the United States Circuit Court of Appeals,[11] where the questions under consideration were the constitutionality of the National Reclamation Act and the rights of the United States to acquire property for the purpose of the Act by the exercise of eminent domain, it was said: "That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose. . . . The authority of the United States to reserve the waters of its streams in the arid region for a beneficial purpose has been recently extended to the settlement of a long-standing controversy between the United States and Mexico respecting the use of the waters of the Rio Grande."[12] In the latter matter referred to, the Secretary of the Interior refused to grant rights of way to utilize the water of the Rio Grande River where it might tend to embarrass the project near Engle, New Mexico, and where it would tend to interfere with the carrying out of the treaty of this country with Mexico.[13]

As we view the subject, the United States has the same authority to reserve waters flowing over the public domain to which vested rights have not attached, for the purposes of carrying out the provisions of the National Reclamation Act, as it has to make reservations for its own use, for the use upon Indian reservations, or to preserve the navigable capacity of the navigable streams of the United States.

§ 1267. Duty of the Secretary of the Interior to construct the works—Contracts.—It is made the duty of the Secretary of the Interior to construct all the reclamation works contemplated by the

10 Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; affirming *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666; *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546.

See, also, United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662; United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Conrad Investment Co. v. United States, 161 Fed. Rep. 829, 88 C. C. A. 647; *Id.*, 156 Fed. Rep. 130; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup Ct. Rep. 655.

11 Burley v. United States, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

12 For the treaty in question with Mexico, see Secs. 1218-1220.

13 See Francis W. Bosco, 39 Land Dec. 104.

Act. Section 4 of the Act provides that, upon determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund.[1] Under this authority the Secretary may, in his discretion, enter into contracts for the construction of the works or construct such works by labor employed and operated under the superintendence and direction of Government officials.[2] The primary power thus conferred by the Act upon the Secretary of the Interior is to construct irrigation works for the storage and development of waters when in his judgment the cost of the works, considered in reference to the quantity and character of the lands that may be irrigated therefrom, will justify their construction. The cost of construction is therefore a controlling factor in determining whether a contemplated irrigation project is practicable. There is no limitation imposed by the Act upon the Secretary in reference to how the works shall be constructed. Therefore, he may employ such means in the construction of the works as in his judgment will be most feasible.

It is held by the Federal Court in a case decided in Idaho[3] that in the construction of works for the irrigation of arid lands under the Reclamation Act the United States is not exercising governmental functions, or even a strictly public function, but is promoting its proprietary interests, and such advantage as arises therefrom to the public at large is material and not governmental.

Section 4 of the Act provides: "That in all construction work eight hours shall constitute a day's work." To the engineer in charge, subject to review by his superiors, is intrusted the discretion in determining upon the existence of an extraordinary emergency requiring work in excess of eight hours. Extraordinary emergency is not defined in the Act, but depends wholly upon the facts of each particular case. However, the following has been given as a definition: "An extraordinary emergency is the sudden, unexpected happening of something not of the usual, customary, or

1 For full text of section, see Sec. 1244.

2 Opinion Atty. Gen., 34 Land Dec. 567.

3 Twin Falls Canal Co. v. Foote, 192 Fed. Rep. 583.

regular kind, demanding prompt action to avert imminent danger of life, limb, health, or property; the possibility of either is not enough. The peril must be sudden, unusual, imminent, and actual in order to constitute an extraordinary emergency."[4]

In the case of contracts, the power of the Secretary of the Interior to extend a contract is limited to causes which were beyond the control of the contractor, such as the acts of Providence, fortuitous events, or the like, within the meaning of the contract.[5] In computing 50 per cent of a contract for the construction upon which a deduction or "holdback" of 20 per cent is retained, the whole amount of work under the contract must be considered, and not merely the estimated amount.[6] Where a contract provides for a penalty of a certain amount per day occupied in excess of the time set for the completion of the contract, the word "occupied" used in this connection is construed to mean that the duration of a delay shall be computed upon a basis of the actual working days, exclusive of holidays and Sundays. An executive officer has no authority to waive the provisions of a contract relating to deductions for delays, though the Government has suffered no loss by the delay. Neither should any statement be given by any official to a surety tending to indicate that there might be no liability, or the extent of the liability, if any, until the work has been completed and the liability of the principal, if any, has been ascertained.[7]

Where the works are constructed by contract, the contracts are so drawn that, in case of the suspension of the contract on account of a defaulting contractor, the Government has the right, as provided therein, to take possession of all materials belonging to the contractor delivered on the ground. In other words, under such circumstances, the contract provides that the Government shall act in the place and stead of the contractor, using his plant, materials, and appliances, as far as possible, for the completion of the work. There is no provision made in such contracts requiring the Government to purchase or pay for the materials thus taken. There is no purchase. They are used by the Government on the contractor's

[4] 6th Annual Rept. Reclamation Service, p. 6.

[5] Decision of the Comptroller, 6th Annual Rept. Reclamation Service, p. 5.

[6] Decision of the Comptroller, 6th Annual Rept. Reclamation Service, p. 5.

[7] 6th Annual Rept. Reclamation Service, p. 6.

account, and there exists no relationship or obligation as between the Government and the unpaid material-men who furnished them. The title to such materials will legally be presumed to have passed to the contractor, as in the case of any other personality in ordinary cases, upon delivery. Of the materials, etc., thus taken possession of by the Government, due and accurate account will be kept, in order that in final settlement of the contractor's account his proper credits may be definitely ascertained. So, too, should accurate account be kept of the cost of the work, including the purchase of other materials, that the excess cost of the work, if any, above the contract price may be determined and due payment thereof demanded of the sureties. The principle above stated applies equally to materials which have been built into the work, but which were not paid for by the contractor.[8]

§ 1268. **Title and management of reclamation works.**—Section 6 of the Reclamation Act provides that the title to and the management and operation of the reservoirs necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.[1]

The regulations of the Secretary of the Interior also provide that the control of the operation of all sublaterals constructed or acquired under the Act is retained by the Secretary of the Interior to such extent as may be necessary or reasonable to assure to the water users served therefrom the full use of the water to which they are entitled.[2]

§ 1269. **The reclamation fund—The use of.**—The Secretary of the Interior is authorized to use the reclamation fund provided for by the Act for the purpose of locating and constructing all irrigation works,[1] for the operation and maintenance of all reservoirs and works constructed,[2] also for the purpose of acquiring any rights or property necessary for the operation of any reclamation project.[3] But outside of the purposes directly authorized by the Act, the

[8] Decision of the Comptroller of the Treasury, 5th Annual Rept. Reclamation Service, p. 28.

[1] For the text of the Act, see Sec. 1244.

[2] Regulations, 37 Land Dec. 468; 38 Land Dec. 636, Sec. 43.

[1] See Section 2 of the Act, Sec. 1244.

[2] See Section 6 of the Act.

[3] See Section 7 of the Act.

Secretary has no authority to use any portion of the reclamation fund. Therefore, the reclamation fund can not be used for drilling artesian wells for exploration. Such wells may be paid for from the reclamation fund only in cases when there is sufficient knowledge in advance to make it probable that water will be obtained from them in sufficient quantities for the irrigation of lands, with the probability that the cost will be returned to the reclamation fund.[4] However, it is held by the Attorney-General that the drilling of wells in the vicinity of an irrigation project for the purpose of determining whether underground water exists that may be available in connection with the project comes within the power conferred by the second section of the Act, "to make examinations and surveys . . . for the development of waters."[5]

The payment for the construction of the reclamation works is directly authorized by the Act from the reclamation fund, and that, too, whether the works are constructed by contract or under the superintendence and direction of Government officials, who perform their duties under the direction of the Secretary of the Interior.[6]

Transportation may be furnished laborers from the place of entering into contracts for service to the place where the services are to be rendered as a part of the consideration for such services.[7] Where an irrigation system already constructed and in operation may be utilized in connection with a greater system to be constructed by the Government, its purchase for such purpose comes within the purview of the Reclamation Act.[8] The purchase of lands necessary for the construction and operation of the works may be made from the reclamation fund; but the fund can be used only for the purchase of lands necessary within the territorial limits of the United States.[9] The rights of the entryman as to the measure of compensation and the character of the action that may be taken by the Government in acquiring or appropriating the land embraced in his entry for use in the construction and operation of the irrigation works under the Act must be determined by the status of the entry

[4] Instructions, 32 Land Dec. 278.

[5] Opinion Atty. Gen., 34 Land Dec. 533.

[6] Opinion Atty. Gen., 34 Land Dec. 567.

[7] 6th Annual Rept. Reclamation Service, p. 7.

[8] California Dev. Co., 33 Land Dec. 391; Opinion Atty. Gen., 34 Land Dec. 351.

[9] California Dev. Co., 33 Land Dec. 391.

at the time of the withdrawal of the lands for such purposes. And where the entryman at the time of the withdrawal had earned title to the land by full compliance with the law, he is entitled to compensation for the land and the improvements thereon as fully as if the legal title had passed to him, but no evidence of title, either equitable or legal, will be issued.[10] The expenses of procuring abstracts of title to lands or rights are properly payable from the reclamation fund, provided the lands or rights are to be purchased and not condemned.[11] No abstracts are required where the land is donated to the Government, but in lieu thereof a certificate of the engineer that the tax records have been examined and indicate that the grantors are the owners, and that the said parties are the reputed owners, and that the land is not in the possession of one claiming adversely to the grantors. The abstracts should be prepared by a bonded abstractor, abstract company, or public officer, bonded or otherwise, whose duty it is to furnish such information. Abstracts should be examined by local counsel familiar with the local law applicable to title of real estate, corporations, and water rights, and preferably by the local United States attorney.[12] The payment of a sum of money for an option for a right of way, water right, or land needed for the reclamation work is not a proper expenditure from the reclamation fund.[13] The private lands necessary for the construction of reclamation works must be purchased outright or condemned. The Secretary has no authority to permit the owner of lands that are needed for a reservoir to be constructed under the terms of the Reclamation Act to select other lands of the same area within the district that may be made susceptible of irrigation from the proposed reservoir in exchange for the lands needed for reservoir purposes.[14] There is no law which prevents the United States from purchasing property encumbered with liens.[15] It is within the power of the Secretary of the Interior to make a purchase under such conditions and to exact an indemnifying bond to protect against defects of title, and in order to secure immediate possession of the property.[16]

10 Agnes C. Pieper, 35 Land Dec. 459.

11 4th Annual Rept. of the Reclamation Service, p. 28.

12 6th Rept. Reclamation Service, p. 5.

13 4th Annual Rept. Reclamation Service, p. 29.

14 Opinion Atty. Gen., 32 Land Dec. 459.

15 10 Opinion Atty. Gen. 353.

16 12 Compt. Repts. 691.

The necessary printing of specifications for the Reclamation Service as soon as they are received, at the lowest possible price for prompt delivery, may be paid for out of the fund; as is also the other necessary printing by the engineers in the field.[17] Settlers upon lands within the limits of a withdrawal made under the terms of the Reclamation Act can not be compensated for their improvements when the lands are taken for construction purposes unless they have acquired a right as qualified settlers under the public land laws at the date of withdrawal.[18] But where settlers have fully complied with the law and have made a *bona fide* settlement and cultivated and improved their lands, they are entitled to compensation for their improvements, although they have not placed their claim of record because of the unsurveyed condition of the land.[19]

§ 1270. Disposition of property not needed for a time—Leases.—It often occurs that after property has been once acquired by the Government, or has been withdrawn from public entry for the purposes of the Reclamation Act, that a considerable period of time elapses before it is actually used by the Government for the purpose for which it was acquired or withdrawn. It is the general rule that where land has been once acquired or withdrawn from public entry for a particular purpose, in the absence of any express prohibition as to the particular property, the head of the Executive Department in whose care and custody public property is placed to be used for a particular purpose may, until the property is needed for the purpose indicated, exercise his judgment and discretion as to its proper care and disposition, and any use of it not incompatible with the purpose intended is not a diversion to other uses and neither a violation of law nor an abuse of the supervisory authority and discretion reposed in him.[1] However, upon the other hand, where the lands are not taken out of the category of public lands, the Secretary of the Interior has no authority under his general power of supervision and control of the public domain to lease

[17] 4th Annual Rept. Reclamation Service, p. 29.

[18] 4th Annual Rept. Reclamation Service, p. 28.

[19] 5th Annual Rept. Reclamation Service, p. 25.

However, there is no authority for the purchase of a claim of one who has settled upon the lands of another, or of his improvements. George Anderson, 34 Land Dec. 478.

[1] Opinion Atty. Gen. 549.

any part of it, unless authorized to do so by an Act of Congress.[2] But under the provisions of the Reclamation Act, providing for the construction and maintenance of irrigation works, the Secretary of the Interior is authorized to withdraw from public entry lands required for such works contemplated by the Act. The lands are thus withdrawn for a particular purpose, and for the time being are segregated from the public lands. It is heretofore held that the Secretary of the Interior may establish rules regulating the use of the withdrawn lands while not needed for the purpose for which they are reserved, and may lease them for grazing and limit the number of animals to be grazed thereon, the revenue derived from the leases going into the reclamation fund provided for by the Act.[3]

The same rule as above stated also applies to water rights. During the construction of a Government project the renting of the temporary use of the water rights and canals of an irrigation system purchased by the Government for conveying water to lands that would otherwise be allowed to go to waste is not incompatible with the purposes of the Act, but is directly in pursuance of the object for which the property was acquired.[4]

§ 1271. Entries allowed only under the homestead law.—Section 3 of the Reclamation Act [1] provides for the withdrawal of lands

[2] Clyde v. Cummings, 35 Utah 461, 101 Pac. Rep. 106; Opinion Atty. Gen., 34 Land Dec. 549.

[3] Clyde v. Cummings, 35 Utah 461, 101 Pac. Rep. 106.

The Secretary of the Interior has authority to make temporary leases of lands reserved or acquired by purchase for use in connection with an irrigation project contemplated under the provisions of the Reclamation Act, where use under the proposed lease will not interfere with the use and control of the lands when needed for the purposes contemplated by the reservation or purchase. Opinion Atty. Gen., 34 Land Dec. 480.

[4] 5th Annual Rept. Reclamation Service, p. 8; Alhambra Brick and Tile Co., 40 Land Dec. 573.

All leases should state the purpose for which the lands were acquired, and that such purpose will not in any manner be interfered with or be delayed by the lease. They should specifically provide for the immediate or speedy termination of a lease in event it is desired to utilize the land or any part thereof for reclamation works, or in event that the work of reclamation is found to be hindered or delayed by reason thereof. They should be limited to one year, but may contain provisions for renewal for the succeeding year in event the lands would not be needed for reclamation purposes. Instructions, Feb. 28, 1911, 39 Land Dec. 525.

[1] For full text, see Sec. 1244.

from all disposition other than that provided for by the Act, and under the section lands withdrawn are subject to entry under the provisions of the homestead law only, as far as the right to make entries thereof are concerned.[2] Therefore, the homestead law must in all cases be complied with, both as to the original rights granted thereunder and also subject to all provisions, limitations, charges, terms, and conditions of the original Reclamation Act and its amendments relating to homestead entries. The Act relating to the making of homestead entries within reclamation projects has been amended in a number of instances in matters of minor importance.

The Act of April 28, 1904, to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska, and to extend the homestead entries on arid lands in said State to 640 acres,[3] in the proviso to Section 1, it is "*Provided,* that there shall be excluded from the provisions of this Act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the National law, or by private enterprise; and the Secretary shall, prior to the date above mentioned, designate and exclude from entry under this Act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid, and shall thereafter, from time to time, open to entry under this Act any of the lands so excluded, which, upon further investigation, he may conclude not to be practically irrigated in the manner aforesaid."

By the Act of June 22, 1910, entitled, "An Act to provide for agricultural entries on coal lands,"[4] it was provided that from and after the passage of the Act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only,[5] under the desert-land law,[6] to selections under the Carey Act,[7] and

[2] Regulations, 38 Land Dec. 627, Sec. 1.

[3] 10 Fed. Stat. Ann., 1906, p. 360, Sec. 1; 33 Stat. L. 547, Sec. 1.

[4] Public, No. 227; 36 Stat. L. 583. For the full text of Act, see coal lands, Sec. 443.

[5] For the homestead laws, see Secs. 434, 435.

[6] For the desert land law, see Secs. 1287-1311.

[7] For the Carey Act, see Secs. 1312-1336.

to withdrawal under the Reclamation Act,[8] whenever such entry, selection, or withdrawal shall be made with the object of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same.

§ 1272. Opening of land to entry—Entries to be made under the homestead law.—When a National reclamation project is sufficiently completed so the entries to the land thereunder may be made, the Secretary of the Interior is required by the Act [1] to give public notice of this fact, also of the lands irrigable under such project, and the limit of area per entry, the charges which shall be made per acre for the water for such entries, and the lands in private ownership which may be irrigated by the waters of the said project, the number of annual installments, not exceeding ten, in which such charges shall be paid, and the time when such payments shall commence. The entries of such lands are made practically in the same manner as the usual homestead entries, but they are subject to all the provisions, limitations, charges, terms, and conditions of the Reclamation Act.[2] Therefore, in so far as those limitations and conditions impose additional burdens or are inconsistent with the general homestead law, they operate as a modification or repeal thereof.[3]

When an application for entry is allowed under the Reclamation Act, the registers and receivers are required to indorse across the face of each homestead application the following: "This entry allowed subject to the provisions of the Act of June 17, 1902 (32 Stat., L. 388)," and must advise each entryman of the provisions of the Act by furnishing him with a copy of the current circular

[8] For the Reclamation Act, see Sec. 1244.

[1] See Section 4 of the original Act, Sec. 1244.

[2] Regulations, 38 Land Dec. 627, 629, Sec. 7.

The public lands lying within the irrigable area of a reclamation project can be disposed of only under the homestead law and in conformity with the legal subdivisions defined by the public land surveys. Instructions, 34 Land Dec. 66. But see amendatory Act of June 27, 1906, Sec. 1252.

[3] Charles O. Hanna, 36 Land Dec. 449, where it was held that an entry of lands subject to the provisions of the Reclamation Act will not be allowed as additional to a prior entry subject only to the provisions of the general homestead law.

See, also, Frederick C. Long, 36 Land Dec. 332.

containing the various Acts of Congress and the regulations appertaining to the subject.[4]

These entries are not subject to the commutation provisions of the homestead law.[5] All applications to make selections, locations, or entries of any other kind than under the homestead law will be rejected, regardless of whether they were presented before or after the date that the lands were withdrawn by the Secretary for the purposes of the Act.[6]

Additional entries may be made under certain circumstances. But a person who has entered and proved up on a farm unit within a reclamation project can not make an additional entry of public lands outside of the project, nor can a person make entry for a unit of less than 160 acres within a project after proving up on the same or make an additional entry within the same project, nor under another project. One who has made an entry upon the public domain for less than 160 acres is disqualified from making an additional entry of a farm unit within a reclamation project, which farm unit is equivalent to a homestead entry of 160 acres outside of the reclamation project. Where, however, the first or original homestead entry was made subject to the restrictions and conditions of the Reclamation Act, any entry additional thereto would be likewise subject to the same restrictions and conditions, and in such cases additional entries may be allowed within reclamation projects under Acts authorizing additional entries, except where farm units have been established prior to the filing of the applications. Both entries so allowed are subject to the same adjustment to one farm unit as if the entire tract had been included in the first entry.[7]

§ 1273. **Contests—Cancellation of entries.**—No contests are allowed by the Land Department against any entry included within the area of any "first-form withdrawal," or where the land withdrawn is needed in the construction and maintenance of irrigation works;[1] and in all cases where a contest has been allowed prior to

[4] Regulations, 38 Land Dec. 628, Sec. 2.

[5] Regulations, 38 Land Dec. 628, Sec. 3.

[6] 38 Land Dec. 629, Sec. 7.

[7] Henry N. Williamson, 38 Land Dec. 233; Instructions, 38 Land Dec. 58; Archie M. Willis, 38 Land Dec. 58; Regulations, 38 Land Dec. 631.

[1] For "first and second form" of withdrawals, see Sec. 1262.

The above rule, however, has no application to a protest by one claiming under a placer location against a

such withdrawal the withdrawal, if made before the termination of the contest or before entry by the successful contestant, will, *ipso facto,* terminate all right that was acquired by reason of such contest. Upon the other hand, any land embraced within the area of a "second-form withdrawal" may be contested after farm units have been established covering such entry, and public notice has been issued in connection with the same, fixing the water charges and the date when water can be applied, and if at the date of entry by the successful contestant the lands have not been released from withdrawal under the provisions of the Reclamation Act, his entry will be subject to the limitation charges and conditions imposed by that Act.[2]

The cancellation of entries made under the Act may be made for the following causes: First, all persons must, in addition to paying the water right charges, reclaim at least one-half of the total irrigable area of their entries as finally adjusted for agricultural purposes, and reside upon, cultivate, and improve the lands embraced in their entries for not less than a period required by the homestead law. Any failure to comply with the law in this respect will subject the entries to cancellation. Second, any failure to make any two payments when due will also render these entries subject to cancellation, and the money already paid by them subject to forfeiture, whether they have filed water right applications or not.[3] The cancellation of an entry, whether by relinquishment or otherwise, carries with it a forfeiture of the water right appurtenant to such land. When the land is re-entered the water right that attaches to the land by force of the statute inures to the second entryman, who obligates himself to pay the charges apportioned to such tract.[4] An installment due for the payment of a water right by a defaulting entryman is an obligation resting upon the land to which the first or subsequent entry is subject, and which the Government can always enforce by withholding patent until it is paid and by cancellation of the entry if it is not paid.[5]

conflicting desert land entry, no question of preference right of entry being involved in such proceeding. New Castle Co. v. Zanganella, 38 Land Dec. 314.

2 Circular of Oct. 15, 1910, 39 Land Dec. 296, amending Regulations, 38 Land Dec. 631, Secs. 19, 20.

3 Regulations, 38 Land Dec. 632, Sec. 21.

4 5th Annual Rept. Reclamation Service, p. 27.

5 Instructions, 35 Land Dec. 29.

A successful contestant of an entry within a reclamation project will be required, in making entry in exercise of his preference right, to pay the building charge obtained at the time his application is filed, and is not entitled to the rate in effect when the former entry was made, nor to credit for the payments made by the former entryman.[6]

§ 1274. Final proof on entries.—Owing to the fact that the National Reclamation Act was so recently enacted that sufficient time has not elapsed for the making of final proofs under the Act, there are few, if any, decisions upon the subject. However, the Secretary of the Interior has promulgated rules and regulations upon the subject.[1]

All persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the Reclamation Act will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the land, and the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statutes. It is true that under the recent Act of June 25, 1910, an entryman may, upon application and a showing that he has made substantial improvements upon his land, and that water is not available for the irrigation of the same, within the discretion of the Secretary of the Interior, obtain leave of absence until the water is turned into the main canals from which the land is to be irrigated. But this provision applies to the residence only, as in the proviso to the Act it is provided "that the period of actual absence under the Act shall not be deducted from the full time of residence required by law." In other words there must be five years of actual residence upon the land.[2]

To establish compliance with the clause of the Reclamation Act that requires reclamation of at least one-half of the irrigable area of an entry, entrymen will be required to make proof by submitting testimony corroborated by two witnesses, showing that the land has

[6] Henry A. Schroder, 40 Land Dec. 458.

[1] See Regulations, 38 Land Dec. 632, Secs. 22-40.

[2] For the text of Act of June 25, 1910, see Sec. 1256.

been cleared of sagebrush or other incumbrance and leveled, that sufficient laterals have been constructed to provide for the irrigation of the required area, that the land has been put in proper condition, and has been watered and cultivated, and that the growth of at least one satisfactory crop has been secured thereon.[3] But persons who have resided upon, cultivated, and improved their lands for the length of time prescribed by the homestead law will not thereafter be required to continue such residence and cultivation, and they may make final proof of reclamation at any time, when they can also make proof of necessary residence, cultivation, and improvement for five years, but no final certificate or patent will issue until all fees, commissions, and construction charges, including operation and maintenance charges due at the time of payment, have been paid in full.[4]

Soldiers and sailors of the war of the rebellion, the Spanish-American War, or the Philippine insurrection and their widows and minor orphan children who are entitled to claim credit for the period of the soldier's service under the homestead laws, will be allowed to claim credit in connection with entries made under the Reclamation Act, but will not be entitled to receive final certificate or patent until all the water rights charges have been paid in full and the requirements as to reclamation have been met.[5]

The widows or heirs of persons who have made entries under the Reclamation Act will not be required both to reside upon and cultivate the lands covered by the entry of the person from whom they inherit, but they must reclaim at least one-half of the total irrigable area of the entry for agricultural purposes and make payment of all unpaid charges when due and before either final certificate or patent can be issued. Upon the death of a homesteader having an entry within an irrigation project, leaving no widow and only minor heirs, his right may, under Section 2292, Revised Statutes of the United States, be sold for the benefit of such heirs.[6]

[3] Regulations, 38 Land Dec. 633, Sec. 28; Instructions, 36 Land Dec. 256; Circular, 38 Land Dec. 229.

[4] Regulations, 38 Land Dec. 633, Sec. 25.

[5] Regulations, 38 Land Dec. 633, Sec. 26.

[6] Heirs of Frederick C. DeLong, 36 Land Dec. 332; Regulations, 38 Land Dec., Secs. 22, 23.

The fact that a widow, who under Section 2291 of the Revised Statutes of the United States, succeeds to the right of her husband in an unperfected homestead entry within a reclamation project, has previously secured water

While entries can not be made of lands which have been withdrawn under the "first form" of withdrawal for use by the Government for construction purposes,[7] valid entries which are made prior to such withdrawal are not defeated by the withdrawal, except as to the lands actually needed for construction purposes.[8] Therefore, final proof will be received, under certain conditions, of lands entered before a withdrawal was made under the first form. When the registers and receivers issue final proof notices of any lands withdrawn under the first form of withdrawal, they will at once mail a copy of such notice to the engineer in charge of the reclamation project in which the lands are situated, for report, and indorse upon the back of such notice the following: "For report within thirty days by indorsement hereon as to whether or not the within described lands or any of them are needed for construction purposes." When they are informed that the lands described are needed for construction purposes, final proof may be submitted as in other cases, but the proof must be at once forwarded to the General Land Office, without issuance of final certificate, together with the report received from the reclamation engineer. If the report received is that none of the lands involved are needed for construction purposes, the register and receiver will consider and act on the proof in the same manner as though the lands had not been withdrawn, forwarding with the final papers the report of the reclamation engineer, and noting on the proof "Lands not needed for construction purposes." The regulations also provide for a second notice to the engineer should the first remain unanswered. Should no report be received under this second call, nor the registered letter be returned unclaimed, the register and receiver will proceed as if the report had been received that the lands are not needed. If, however, the registered letter is returned unclaimed, all papers will be forwarded to the General Land Office for instructions.[9]

When an entryman or the heirs of any entryman apply to make final proof after all the requirements of the homestead laws as to

from the project for reclamation of land held by her in private ownership, in nowise affects her right to acquire water under the project for completion of such entry under the Reclamation Act. Anna M. Wright, 40 Land Dec. 116.

[7] For first form of withdrawal, see Sec. 1262.

[8] Regulations, 38 Land Dec. 629, Secs. 6, 8.

[9] Regulations, 38 Land Dec. 633, Secs. 29-33.

residence and cultivation have been complied with, the proof offered by them, if found by the register and receiver to be regular, in all cases where all the charges have not been fully paid, will be forwarded to the General Land Office without issuance of final certificate. If any proof offered under the Act be irregular or insufficient the register and receiver will reject it and allow the entryman the usual right of appeal; and if the General Land Office finds any proof to be fatally defective in any respect, the entryman will be notified of that fact and given an opportunity to cure the defect or to present acceptable proof.[10]

The registers and receivers are directed to notify, in writing, every person who makes final proof on a homestead entry which is subject to the limitations and conditions of the Reclamation Act, embracing land included in an approved farm-unit plat, where the entry does not conform to an established farm unit, and conformation notice has not been already issued, that thirty days from notice is allowed such entryman to elect the farm unit he desires to retain, in default of which the entry will be conformed by the General Land Office.[11]

§ 1275. Action on final proof.—Before acting on final proof for lands entered subject to the Reclamation Act, in all cases where no public notice has issued, the Commissioner of the General Land Office will refer such cases to the Director of the Reclamation Service for report as to whether acceptance of proof and issuance of final certificate will conflict with any contemplated reclamation operations. In such cases as embrace lands in a project where the irrigation works will not be ready to furnish water for irrigation of such lands within a reasonable time, the land in question will be relieved from the withdrawal under said Act provided the entryman

[10] Regulations, 28 Land Dec. 634, Secs. 34, 35.

[11] Regulations, 38 Land Dec. 634, Sec. 36.

Under the Desert Land Act, as modified by the Act of June 27, 1906, final proof upon the desert entry within a reclamation project can not be held to be made and completed until the payments required by said Acts and the Act of June 17, 1902, have been made; and the Department is without authority to accept or regard final proof in such cases as complete or to issue patent thereon, until after full compliance with the terms of payment imposed by the Reclamation Act. W. H. Skinner, 39 Land Dec. 519.

subscribes to the Water Users' Association for the land covered by his entry in such manner as to make the same subject to a lien for the charges fixed under the Act.[1]

Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead law and have reclaimed at least one-half of the irrigable area of their farm units as required by the Act, and have submitted proof which has been found satisfactory to the General Land Office, will be excused from further residence on their lands, and a notice will be issued to them reciting that the conditions of residence, cultivation, improvement, and reclamation have been complied with, and that final certificate and patent will issue upon payment of the charges imposed by the public notice issued in pursuance of Section 4 of the Reclamation Act. In such cases, upon payment of the charges by the entryman, or in his behalf, final certificate and patent will issue in due course. Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws, and have submitted proof which has been found satisfactory thereunder by the General Land Office, but who are unable to furnish proof of reclamation because water has not been furnished to the farms or farm units established, will be excused from further residence on their lands, and will be given notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry as finally adjusted and payment of all charges imposed in pursuance of Section 4 of the Reclamation Act.[2]

§ 1276. Water rights—For lands in private and corporate ownership.—Section 5 of the Reclamation Act specifically provides for the sale of water rights from a Government reclamation project to owners of land other than those who have made entries of lands with the project, under the provisions of the Act itself. Therefore, lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the Reclamation Act, but water right applications can not be made for more than

[1] Regulations, 38 Land Dec. 635, Secs. 37, 38.

For water users' associations, under the Act, see Secs. 1281-1286.

[2] Regulations, 38 Land Dec. 635, Secs. 39-42; for forms of notices under above, see Secs. 41, 42.

160 acres by any one land owner, and such land owner must be an actual *bona fide* resident on such land or occupant thereof residing in the neighborhood.[1] A land owner may, however, be the purchaser of the use of water for more than one tract in the prescribed neighborhood at one time, provided that the aggregate area of all the tracts involved does not exceed the maximum limit established by the Secretary of the Interior nor the limit of 160 acres fixed by the Reclamation Act; and a land owner who has made application for the use of water for 160 acres and sold the same, together with the water right, can make other and successive applications for other irrigable lands owned or acquired by him.[2] Therefore, owners of lands acquired under the provisions of the Carey Act,[3] or the Desert Land Act,[4] may purchase such additional rights to the use of water from the Government, to be furnished from a National reclamation project, as may be necessary to fully develop, cultivate, and reclaim the irrigable portions of their lands, subject to all the conditions governing the right to the use of water under any particular project.[5] The provision of Section 5 of the Reclamation Act, limiting the area for which the use of water may be sold, does not prevent the recognition of all vested rights for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.[6]

1 Twenty miles in a direct line is the maximum limit of distance for which residence will be construed as being in the neighborhood of the land for which a water right application is made. 5th Annual Rept. Reclamation Service, p. 26.

2 Regulations, 38 Land Dec. 637, Sec. 44.

The provisions of Section 5 of the Reclamation Act restricting the sale of a right to the use of water for land in private ownership to not more than for 160 acres will not prevent the recognition of a vested water right for a larger area and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. Opinion Atty. Gen., 34 Land Dec. 351.

See, also, ruling of June 25, 1906, 5th Annual Rept. Reclamation Service, p. 26.

3 For the Carey Act, see Secs. 1312-1336.

4 For the Desert Land Act, see Secs. 1287-1311.

See, also, Sec. 1253, this chapter.

5 Opinion Atty. Gen., 35 Land Dec. 222.

For the use of water on desert lands, see Sec. 1253.

6 Regulations, 38 Land Dec. 637, Sec. 45; 40 Land Dec. 139.

For form of water right applications, see 39 Land Dec. 532.

Corporations are also qualified to acquire a water right for lands owned by them in pursuance of the Act, provided their home office is on or in the neighborhood of the land for which they seek water service. Further, the corporation must show its stockholders that as individuals they have not in the aggregate taken water rights that, with that claimed by the corporation, will amount to more than 160 acres or the maximum limit established by the Secretary of the Interior. This construction does not tend to defeat the evident intent of the Act to assure actual small holdings.[7]

The requirements as to reclamation imposed upon lands under homestead entries under the Act are also imposed upon lands in private ownership and land entered prior to withdrawal, namely, that the land owner will reclaim at least one-half of the total irrigable area of his land for agricultural purposes, and no right to the water will permanently attach until such reclamation has been shown.[8]

Whenever in case of foreclosure of a mortgage given to secure a loan on land in private ownership for which charges are payable for a water right under a reclamation project, the mortgagee buys in the land, no steps will be taken to cancel the water right application on account of failure to maintain residence upon or in the neighborhood of the land until the expiration of one year from the date of the foreclosure sale; provided, that all charges that may be due or that may accrue during such interval be paid, and also that within such period of one year a water right application for such land be filed by a qualified person who, upon submitting satisfactory evidence of transfer of title, shall be entitled to credit equal to all payments theretofore made on account of the water right charges for said land.[9]

§ 1277. **Water rights—Applications for same.**—Upon the issuance of the public notice authorized by the Secretary of the In-

For form of water right certificates, see 39 Land Dec. 197.

[7] Williston Land Co., 37 Land Dec. 428; Regulations, 38 Land Dec. 637, Secs. 46, 47.

[8] Regulations, 37 Land Dec. 468; 38 Land Dec. 638, Sec. 48.

The applicant for a water right on land in private ownership must state accurately upon the proper form the nature of his interest in the land. If this interest is such that it will ripen into a perfect title, at or before the time when the last annual installment of the water right is due, the application should be received. Circular, 34 Land Dec. 544.

[9] Instructions, 38 Land Dec. 480.

terior that the Government is ready to receive applications for water rights under a particular reclamation project in order for an entryman or private owner of lands to secure a water right, he must first file a formal application for the same on one of the forms furnished by the Land Department. These forms vary according to the conditions of the case, and depend upon the fact as to whether the applicant is a homesteader who has made an entry of land under the project; a homesteader who is an assignee of credits paid by a prior entryman of the same lands; a private owner of lands embraced within a project; a private owner of such lands who is an assignee of credits paid by a prior owner of the same lands; or whether he is an Indian allottee of land within a project. Blanks of these forms will be furnished by the registers and receivers of the local land offices, and they must be used in all applications for water rights in any of the reclamation projects.[1]

When practicable, all applications for water rights should be submitted by the applicants to the project engineer of the United States Reclamation Service for his examination and approval before the applications are filed in the local land office, in which cases the project engineers will endorse their approval upon the application forms, if found correct, or point out defects and suggest corrections if any are required. Where it is not practicable to have water right applications examined and approved by the project engineer prior to the filing in the local land office, the applications must be

1 Regulations, 38 Land Dec. 638, Secs. 50-54.

For form of water right applications, see 39 Land Dec. 532.

An applicant for a water right must be the owner of the land and actually reside thereon or in the neighborhood. Having these qualifications, he may, after having disposed of the previously acquired water right, make another application, and after that may be considered in the position of an original applicant. The land owner may be the purchaser of the right for use of water for separate tracts at the same time, provided that he can properly qualify, and that the tracts involved do not exceed 160 acres in the aggregate. 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 10.

A settler on unsurveyed land subsequently embraced in a withdrawal under the Reclamation Act may, upon survey of the land, make and complete entry for the full area allowed by law and appropriated by his settlement, notwithstanding such withdrawal previous to entry is free of the added conditions and limitations imposed by the Reclamation Act upon settlers subsequent to the withdrawal. William Boyle, 38 Land Dec. 603.

See, also, 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 11.

executed in duplicate and filed in the local land office. Registers and receivers will then suspend action in such cases and forward to the project engineer one copy of each of such water right applications for examination and return by the engineer within fifteen days, approved by him, or with defects indicated and corrections suggested if not in form for approval. In the latter case the applicant must be promptly advised and allowed thirty days to make the necessary amendments, in default of which the application will be rejected. The details for the certificate for correctness are fully given in the regulations.[2] If the Secretary of the Interior has made a contract with a water users' association under the project, due notice thereof will be given to the registers and receivers, and applications for water rights will not be accepted in such cases unless the certificate at the end thereof has been duly executed by said association.

With reference to water right applications for land in private ownership, included in entries not subject to the Reclamation Act, where an application is presented covering only a part of the irrigable land of the owner, the register and receiver will accept it, provided it bears the usual certificate of the project engineer and the local water users' association, where such association has been formed under the project. In case of sale by a private owner of a part of his irrigable land covered by a subsisting water right application, the vendor, in order to have his water right charges adjusted to the reduced acreage retained by him, will be required to present the following evidence: A certificate of the proper officer having charge of the county records showing a record of a subscription for stock in the local water users' association covering the land in question, and that the land has been duly conveyed by the subscriber at a time subsequent to the recording of the stock subscription; also the certificate of the local water users' association, if one has been organized on the project, under the corporate seal, to the effect that proof has been presented to the association of the transfer of the land to the person named, and that the appropriate transfer has been made on its books of the shares of stock appurtenant to said land. In case of a relinquishment by an entryman whose entry is not subject to the Reclamation Act, of a part of the land included in his entry, appropriate notation will be made on the water

2 Regulations, 38 Land Dec. 639, Sec. 55.

right application, showing such relinquishment, and his charges will be reduced accordingly. Where this is the case, and the next person who enters the land so relinquished claims credit for installments paid by the first entryman, he must at the time of such entry file with his application to enter evidence showing that he is entitled to such credit, also a water right application covering the land.[3]

In order that there may be no unnecessary delay in the obtaining of water by entrymen and land owners in reclamation projects, after they have filed water right applications and made the preliminary payment, the register and receiver must issue in triplicate certificates of water right applications accepted, furnishing one copy to the applicant and mailing, on the day issued, one copy to the engineer in charge of the reclamation project, and at the end of each month they are to prepare a schedule of certificates issued upon water right applications accepted during the month, and an abstract of collections of charges made during the month, forwarding the original in triplicate to the General Land Office and furnishing the Director of the Reclamation Service and the project engineer with copies of each monthly schedule of certificates and abstract of collections made.[4]

Persons holding contracts to purchase land from the State on deferred payments, no conveyance of title to be made to the purchasers until full payment is made, are entitled, if not in default and their contracts are in good standing, to subscribe for and purchase water rights under the Reclamation Act for irrigation of such lands subject to the provisions and limitations of that Act.[5]

§ 1278. Water rights — Charges for same — Cancellation of water right.—Section 4 of the Reclamation Act provides that the charges for water rights shall be determined with a view of returning to the reclamation fund the estimated costs of construction of the project, and shall be apportioned equitably.[1] Therefore, the Secretary of the Interior will, at the proper time, fix and announce the area of lands which may be embraced in any entry theretofore made under the Act; the amount of water to be furnished per an-

[3] Regulations, 38 Land Dec. 640, Sec. 56.

[4] Regulations, 38 Land Dec. 641, Secs. 57 59.

[5] Instructions of Sept. 11, 1911, 40 Land Dec. 270.

[1] For text of Act, see Sec. 1244.

num per acre, and the charges which shall be made per acre for the lands embraced in such entries and lands in private ownership, for the estimated cost of building the works and for operation and maintenance, and prescribe the number and amount and the date of payment of the annual installments thereof. Section 4 of the Act provides that the number of annual installments shall not exceed ten.[2]

There is nothing in the Act to prohibit a graduated scale of payments, and in all cases where it is advisable to do so it will be adopted.[3]

It was held by the Federal Court that the Act leaves the estimation and apportionment of charges against the land entirely to the Secretary of the Interior, that he may divide the charges into two parts, one for construction of works and one for their maintenance. It was held, however, that it was not within the power of the Secretary to fix charges which are unreasonable.[4]

The charges so assessed against lands entered under the Act attach to the lands themselves while so embraced in entries, and as annual installments thereof accrue they become fixed charges on the land in the nature of a lien. If any entry is canceled by reason of relinquishment, all annual installments due and unpaid on the reliquished entry at the date of its cancellation must be paid at the time of filing application to enter by any person who thereafter enters the land.[5]

[2] For full text of section, see Sec. 1244.

For the regulations for the collection of water right charges, see 37 Land Dec. 11, 12, 13, 16, as amended by Regulations, April 8, 1911, 40 Land Dec. 15.

[3] Instructions, 34 Land Dec. 78.

Registers and receivers are not entitled to fees in connection with the filing of applications for water rights, but each are entitled to a commission of one per cent on all moneys received from water users at the office for which they are appointed to the extent of the maximum salary fixed by law. Opinion Atty. Gen., 35 Land Dec. 357.

[4] United States v. Cantrall, 176 Fed. Rep. 949.

[5] Regulations, 38 Land Dec. 642, Secs. 60, 61; Instructions, 36 Land Dec. 256; 35 Land Dec. 29.

No power exists in the Secretary of the Interior to formally grant specific extensions of time for payment of overdue water right charges. 8th Annual Rept. Reclamation Service, p. 4.

See, also, Walter L. Minor, 39 Land Dec. 351.

Where a payment is tendered for a part only of either an annual installment of water right building charges, or an annual operation and maintenance charge, receivers are instructed

The Reclamation Act does not make it a mandatory duty of the Secretary of the Interior to assess operation and maintenance charges against unentered land within a reclamation project, but he has authority to do so, and he has also sole authority to determine the time when such charges may be so assessed.[6]

Applicants for water rights are required to pay for water for the entire irrigable area of their entries, as shown on the plat of which the construction charges are apportioned; and where mistakes in the plat are alleged as to the irrigable area of the entry, application for correction thereof should be made to the local office of the Reclamation Service. No deduction from the irrigable area subject to the water charges will be made on account of easements for a right of way or irrigating ditches.[7] A person who has entered lands under the Reclamation Act, and against whose entry there is no pending charge of non-compliance with the law or regulations, or whose entry is not subject to cancellation under the Act, may relinquish his entry and assign to a prospective entryman any credit he may have for payments already made on account of said entry, and the party taking such assignment may, upon making proper entry of the land and proving the good faith of the prior entryman to the satisfaction of the Commissioner of the General Land Office, receive full credits for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the Reclamation Act.

Again, under the more recent amendatory Act of June 23, 1910,[8] it is provided that from and after the filing with the Commissioner of the General Land Office of proof of residence, improvement, and cultivation for five years, persons who have made entries under the Act, may assign such entries or any part thereof, to other persons,

to accept the same if the insufficient tender is, in the opinion of the receiver, caused by the misunderstanding as to the amount due, and approximates the same, and the claimant is then allowed thirty days from notice to pay the balance. Circular, May 31, 1910, 40 Land Dec. 317.

[6] 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 11.

Water can not be furnished from a reclamation project to the Idaho Experiment Farm free of charge. 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 11.

[7] Williston Land Co., 39 Land Dec. 2.

[8] 36 Stat. L. 592; for text of Act, see Sec. 1254.

and such assignees, and the charges against the land for the water right may be apportioned.

All charges due for operation and maintenance of the irrigation system for all the irrigable land included in any water right application must be paid on or before April 1 of each year, except where a different date is specified in the orders relating to a particular project, and in default of such payment no water will be furnished for the irrigation of such lands.[9]

The provisions of Section 5 of the Reclamation Act relative to the cancellation of entries for failure to make any two payments when due states the rule to govern all who receive water under any project, and accordingly a failure on the part of an applicant to make any two payments when due shall render his water-right application subject to cancellation with a forfeiture of all rights under the Reclamation Act as well as of any moneys already paid to or for the use of the United States upon any water right sought to be acquired under the Act. Therefore, "in the case of one who has made a homestead entry subject to the terms of the Reclamation Act, the entry shall be subject to cancellation in case of such delinquency in payment." [10]

It is also provided by the regulations of the Secretary of the Interior that: "If any entry subject to the Reclamation Act of June 17, 1902,[11] is canceled or relinquished, the payment for water-right charges already made and not assigned in writing to a prospective or succeeding entryman under the provisions of paragraph 62 of the circular of May 31, 1910, are forfeited. All water-right charges which remain unpaid are canceled by the relinquishment or cancellation of the entry except as provided by the specific provisions of public notices applicable to particular projects. Any person who thereafter enters the same land must, in the absence of an assignment in writing or public notice to the contrary, pay the water-right charges as if the land had never been previously en-

[9] Regulations, 38 Land Dec. 642, Secs. 62, 63.

See Edwin P. Osgood, 38 Land Dec. 374, where payment was deferred where filing was too late in the year to raise a crop.

[10] Regulations, 37 Land Dec. 468; *Id.*, 38 Land Dec. 638, Sec. 49.

For the specific directions and regulations as to the collection of reclamation water right charges by receivers of public moneys, see Regulations, 38 Land Dec. 643, Secs. 64-69; Fleming McLean, 39 Land Dec. 580.

[11] 32 Stat. L. 388.

tered. No credit will be allowed in such cases for the payment made by the prior entryman, and the new entryman must pay at the time of filing his homestead application and water-right application, such charges for building and operation and maintenance as are required by the public notice in force at the time on the particular project." [12]

§ 1279. **Water rights—As appurtenances.**—The express purpose of the Reclamation Act, as first stated by Secretary Garfield,[1] is to secure the reclamation of arid or semi-arid lands and to render them productive. Section 8 of the Act [2] declares that the right to the use of water acquired under the Act shall be appurtenant to the land irrigated and that "beneficial use shall be the basis, the measure, and the limit of the right." There can be no beneficial use of water for irrigation until it is actually applied to the reclamation of the land. The final and only conclusive test of reclamation is production. This does not necessarily mean the maturing of a crop, but does mean the securing to actual growth of a crop. This rule as to appurtenances is applied by the Secretary of the Interior to lands which are owned by individuals and corporations and for the reclamation of which water rights are sold by the Government.

We have discussed in a previous chapter the question of the attempt upon the part of a State to make a water right an inseparable appurtenance to a particular tract of land. We there held that it could not be done,[3] where an individual was the absolute owner of the right; that the water right was a species of property as much as was the land to which it was applied; that the owner of the right could sell and dispose of the same to others, or could transfer its use to other lands. Therefore, we are of the same opinion as to the water rights acquired under the Reclamation Act, where they have been fully paid for by the owner thereof, and where all of the conditions necessary for the acquisition of the right imposed by the Government have been fully complied with. When this is the case, the owner thereof has the same right under the law to sell or dispose of his water right or to transfer its use to other lands as he has the

12 Circular, Feb. 2, 1912, 40 Land Dec. 398.

1 Regulations, 37 Land Dec. 468. See, also, Regulations, 38 Land Dec. 638, Sec. 48.

2 For full text, see Sec. 1244.

3 See Secs. 1015, 1016.

right to sell or dispose of any other property absolutely owned by him. Where, however, any of the conditions imposed by the Government remain unfulfilled, the Government has the undoubted right to insist that the water right remain an inseparable appurtenance to the particular tract of land for the irrigation of which it was originally acquired.

Again, take the case, as it often happens, where, by the irrigation of lands above, the lands of an entryman are supplied with seepage water, even to the point that it becomes a question of drainage rather than of irrigation, and this entryman has fully paid for his water right which, owing to the above conditions, he has no further use for. Has he not some property right which he may sell to another who is in need of the water, and for which he has fully paid the Government?

§ 1280. **Appeals from the action of field officers in the Reclamation Service.**—Appeals from the action of project engineers lie in the first instance to the Director of the Reclamation Service with right of further appeal to the Secretary of the Interior. "The Secretary of the Interior is the supervising head of the Reclamation Service, as he is of the Land Department and the Indian Office. Persons dealing with the Reclamation Service have the right to ask his ultimate decision, as do persons dealing with the Indian Office, and the General Land Office. The project engineer is simply the local representative of the Secretary of the Interior in deciding such matter." [1]

"In order to provide for the orderly review by the Secretary of errors that may occur in the establishment of farm units or in passing upon water right applications the following procedure will be followed:

"1. All cases of error should be promptly called to the attention of the project engineer by the party affected.

"2. If the project engineer decides not to take the steps necessary to grant relief, the matter may be brought to the attention of the Secretary of the Interior, as hereinafter provided.

"3. The party aggrieved should promptly file with the project engineer a written statement addressed to the Director setting out clearly and definitely the grounds of complaint.

[1] Williston Land Co., 39 Land Dec. 2.

"4. The project engineer will note thereon the date of its receipt in his office and promptly forward the same with report and recommendation to the Director through the Supervising Engineer, who will attach his recommendation.

"5. Upon receipt of the papers in the Director's office, the matter will be carefully reviewed and if the action of the project engineer is concurred in, the claimant will be allowed sixty days in which to file with the Director an appeal to the Secretary of the Interior. In case of appeal, the matter will be submitted to the Secretary for consideration and appropriate action." [2]

§ 1281. **Water users' associations—Objects.**—Section 6 of the Reclamation Act provides that when the payments required by the Act are made for the major portion of the lands irrigated from the waters from any of the reclamation works, "then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior." [1]

Therefore, under the authority of the Act, as above set forth, corporations known as "Water Users' Associations" are organized by the actual or contemplated water users of the water furnished from each of these reclamation projects. The objects of the organization of these corporations are twofold: First, to have some responsible organization, acceptable to the Secretary of the Interior, to which the management and operation of such irrigation works may, as contemplated by the Act, be eventually turned; and, second, owing to the fact that in practically all of these Government projects, there are several hundreds or even thousands of land owners, who are, or are contemplated water users, and who claim their rights by private ownership, or from applications under the provisions of the Act itself, it was found essential at an early stage of the operations under the Act to create one organization, so that the Government instead of dealing with hundreds of individuals separately could transact the business with one organization or with a small

[2] Regulations of June 27, 1910, 39 Land Dec. 51.

See, also, Anna M. Wright, 40 Land Dec. 116.

[1] For full text of Act, see Sec. 1244.

committee of men representing all of the water users under any particular project.[2]

§ 1282. **Water users' associations—Organization.**—The organization of these water users' associations, in order to secure the benefits of the Reclamation Act and to conform to its provisions, must primarily be in such form as will be acceptable to the Secretary of the Interior. The first step toward the formation of these associations was made by the water users under the Salt River project in Arizona, which resulted, after a discussion lasting nearly one year, in the organization of what is known as the Salt River Valley Water Users' Association, and the principles embodied in which organization have formed the basis of many similar organizations under other reclamation projects elsewhere. The essential features of these articles of incorporation are that they provide means for putting into effect the provisions of the Reclamation Act in regard to the ownership of the reclaimed areas in small tracts and for guaranteeing repayment to the United States of the cost of the reclamation of the land by the Government. The property of the water users is, in effect, mortgaged to the Government to secure the repayment of the estimated cost of the construction of the works; and the requirements of the law regarding the cultivation of the land in small tracts, the appurtenance of the water to the separate tracts, and other details are carefully guarded. The articles of incorporation represent a series of adjustments, and compromise and harmonize many complications of water right claims and of land ownership. The articles are set out in full in the Second Annual Report of the Reclamation Service.[1] This organization was satisfactory to the Secretary of the Interior as to that particular project, and while the main features of the same may be adopted in other locations, these must be made to conform to local conditions and to the laws of the respective States regarding corporations. According to the plan adopted by the Reclamation Service, the articles of incorporation themselves must follow the usual forms of the various States, and

[2] See Third Annual Rept. of the Reclamation Service, 1903-1904, p. 54; Water-Supply Paper No. 93; Second Annual Rept. of the Reclamation Service, pp. 76-87.

[1] See pages 76-87.

See, also, Third Annual Rept., pp. 54-56; Water-Supply Paper No. 93, pp. 130-158.

contain only the essential features required by their law to be specified in such articles. The by-laws, which constitute the second part of the organization, must prescribe the internal administration and the relations of the stockholders to each other and to the Government in the matter of water rights and the other features required by the Secretary of the Interior to comply with the provisions of the Reclamation Act.

The United States is not a party to a contract between water users' associations and the owners of lands lying within the irrigable areas of a reclamation project; its only interest in the agreement or benefit it may derive therefrom is in the subdivision of large holdings in tracts not exceeding 160 acres and the transfer of the excessive lands to individuals who will reside thereon and bring them within the provisions of the Reclamation Act, and in the mutual agreement to be secured thereby between water users throughout the irrigable area upon the use and distribution of the water and the subordination of whatever rights they may have theretofore acquired to the provisions of the Reclamation Act.[2]

While it is not our intent to devote much space to the subject of forms, for the reason that they are always subject to change and can always be secured from the executive officers in charge of the particular phase of the subject, these articles of incorporation contain so many new features which are of such vital importance to the water users and property owners under these reclamation projects, it is essential that we embody these forms,[3] together with the form of contract between the United States Government and these associations.[4] And while these general forms have been approved by the Secretary of the Interior, it must be borne in mind that the articles, by-laws, and contract must conform to local conditions, especially as relating to the laws of the respective States and be always subject to the approval of the Secretary of the Interior, as provided for in Section 6 of the Reclamation Act.

§ 1283. Water users' associations—Articles of incorporation.—The following form of articles of incorporation for water users' associations has been adopted as acceptable to the Secretary of the Interior:

2 Instructions, 33 Land Dec. 202.
3 See Secs. 1283-1285.
4 See Sec. 1285.

ARTICLES OF INCORPORATION OF THE ——— WATER USERS' ASSOCIATION.

Know all men by these articles of incorporation:

That we, the undersigned, have associated ourselves together under the laws of the ——— of ——— as a body corporate.

ARTICLE I.

The name of the corporation shall be and is ——— Water Users' Association.

ARTICLE II.

The names of the incorporators are: ———, but others may become members of this association by subscribing for the stock of this association or by the transfer of stock to them in the regular course of the administration of the affairs of the association.

ARTICLE III.

The principal place of transacting the business of the association shall be at ———, in the county of ———, in the ——— of ———.

ARTICLE IV.

The purposes for which this association is organized and the general nature of the business to be transacted are:

To acquire, furnish, provide for, and distribute to the lands of the shareholders of the association, an adequate supply of water for the irrigation thereof; to divert, store, develop, pump, carry, and distribute water for irrigation and all other beneficial uses, deriving the same from all available sources of supply; to construct, purchase, lease, condemn, or acquire in any manner whatever, and to own, use, sell, transfer, convey, control, maintain, and operate any irrigation works, structures, telephone systems, electric, or other power plants and transmission lines, and property both real and personal of every kind whatsoever, necessary or appropriate for the accomplishment of any of the purposes of this organization; to generate, create, transmit, use, and sell power and electrical energy; to act as trustee, agent, or attorney for the sale, disposal, and transfer of lands, in order to facilitate the disposal of such lands, or any part thereof, to persons qualified to perfect rights to the use of water under the laws of the United States applicable thereto, and the

rules and regulations established thereunder; to incur indebtedness, floating or bonded, and to secure the same by mortgage, deed of trust, pledge, or otherwise; to acquire, hold, and dispose of stock in other corporations, domestic or foreign; to have and exercise all the powers and to perform any and all acts necessary to or appropriate for the accomplishment of one or more of the said purposes or anything incident thereto, or which shall at any time appear conducive or expedient for the protection or benefit of the association or its shareholders, and to that end enter into any contract, agreement, or other arrangement with the proper representative of the United States, or any individual, association of individuals, or corporation, for the accomplishment of any of the aforesaid purposes, by means of the construction, acquisition, or control of appropriate works or structures, or in any other manner whatsoever; to enter into any agreement with the proper representatives of the United States with reference to the collection and payment of any and all charges made under the Federal statutes, for the works providing water for the lands of its shareholders, and to comply with the provisions of any Federal statutes applicable to the work done by the United States in connection with such system of water supply, and any rules and regulations established thereunder.

ARTICLE V.

The capital stock of the association shall be $——— divided into ——— shares, of the par value of $——— each, and said stock shall be assessable.

ARTICLE VI.

This corporation shall endure for the term of ——— years.

ARTICLE VII.

The exercise of the corporate powers of this association and the management of its affairs shall be vested in seven directors, elected to serve one year; and a president and vice president, each elected to serve two years. The president and vice president shall be ex-officio members of the board of directors. The board shall annually elect a secretary and treasurer.

ARTICLE VIII.

The individual property of the shareholders shall be exempt from liability for the corporate indebtedness of this association, except as provided herein or in the by-laws.

ARTICLE IX.

The corporate indebtedness shall not exceed two-thirds of the amount of the capital stock.

ARTICLE X.

The amount of capital stock of this corporation that has been actually subscribed, and the number of shares subscribed by each subscriber, and the par value thereof, are as follows:

Name of Subscribers.	*Number of shares.*	*Par value.*
.....	.....	.....

In addition to the above the articles must contain such additional provisions as are required by the laws of the particular State under which the corporation is organized. They must be also executed, and filed in accordance with the provisions of such laws.[1]

It is held in Arizona that a water users' association may condemn land for the use of the association.[2]

§ 1284. **Water users' associations — By-laws.** — The principal features of the organization, and those which are necessary in order to conform to the requirements of the Reclamation Act, must be contained in Article I of the by-laws of the association. The form of by-laws acceptable to the Secretary of the Interior is as follows:

BY-LAWS OF THE ——— WATER USERS' ASSOCIATION

(Adopted ———)

ARTICLE I.

Section 1. The territory within which the lands to be irrigated are situated, to be known as the ——— irrigation district, includes all such lands within ——— Counties, State of ———,

1 See Umatilla Water Users' Assn. v. Irvin, 56 Ore. 414, 108 Pac. Rep. 1016.

2 Lee v. Salt River Valley Water Users' Assn., 268 Ariz. 11, 90 Pac. Rep. 1130.

as may be included in the reclamation project of the United States known as the ——— project, as finally approved by the Secretary of the Interior.

Sec. 2. Only those who are owners of lands, or occupants of public lands having initiated a right to acquire the same, within the area described in Section 1, or within such extensions thereof as may be duly made, shall be qualified to own shares of this association. One share and no more shall be allotted for each acre of land, or fraction thereof.

Sec. 3. Each share and the holder thereof shall be subject to the conditions of the form of stock subscription and contract herein prescribed, and shall execute such form for the stock subscribed by him, and no subscriptions for stock shall be taken or stock issued unless the applicant has subscribed to said form of stock subscription and contract, which shall be signed, executed, and acknowledged by the applicant in the same manner as required for the execution and acknowledgment of deeds of conveyance of real property. Said form of stock subscription and contract shall be as follows:

STOCK SUBSCRIPTION AND CONTRACT.

Know all men by these presents, That I ———, do hereby subscribe for and agree to take ——— shares of the capital stock of the ——— Water Users' Association, a corporation duly organized under the laws of the State (or Territory) of ———, and in conformity with the articles of incorporation and by-laws of said association and in consideration of the benefits to be received therefrom, I hereby covenant and agree as follows:

1. The said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, or incident thereto, are to be inseparably appurtenant to the following described real estate, that is is say: ———.

2. The undersigned hereby agrees that the right to any water heretofore appropriated by him, or his predecessors in interest, for the irrigation of the lands above described or customarily used thereon, shall become appurtenant to such lands and be and remain incident to the ownership of the above shares appurtenant to such lands. There shall be further incident to the ownership of such shares the right to have such water delivered to the owner thereof by the association for the irrigation of said lands as the association

shall from time to time acquire or control means for that purpose: *Provided,* That the whole amount of water actually delivered to such lands from all sources shall not exceed the amount necessary for the proper cultivation thereof.

3. It is agreed and understood that the records of the association, as well as the certificate or other evidence of ownership of the shares of stock in the association, when issued, shall contain a description of the lands to be irrigated, as above described, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights, whatever their source or whatever their manner of acquisition, to the use of water for irrigation of said lands, shall hereafter be forever inseparably appurtenant thereto, together with the said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of this contract, or of the by-laws of this association, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by the undersigned or his successor, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind; *Provided, however,* That if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the lands to which the right to the use of the water is appurtenant, the said right may be severed from the said land and simultaneously transferred and attached to other lands to which shares of stock in this association are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have first been allowed by a two-thirds vote of the board of directors at a regular meeting and approved by the Secretary of the Interior.

4. Every transfer of the title to said lands to which said rights and shares are appurtenant, whether by grant or operation of law (except where the land may be subjected by grant, or involuntarily under any law, to an easement, the exercise of which does not interfere with the cultivation of the soil by the servient owner) shall operate, whether it be so expressed therein or not, as a transfer to the grantee or successor in title of all rights to the use of water for the irrigation of said lands, also all rights arising from or inci-

dent to the ownership of such shares, as well as the shares themselves, and upon presentation to this association of proof of any such transfer of land the proper officer shall transfer such shares of stock upon its books to the successor in title to said lands.

5. Any transfer or attempted transfer of any of the above shares of this association made or suffered by the owner thereof, unless simultaneously a transfer of the land to which they are appurtenant is made or suffered to or in favor of the same party, shall be of no force or effect for any purpose, and shall confer no rights of any kind whatsoever on the person or persons to whom such transfer may have been attempted to be made.

6. The undersigned or his transferee agrees to make prompt application to the proper authorities of the United States for a water right for the land represented by his shares, and duly proceed to the perfection thereof, in full compliance with the law applicable thereto and the rules and regulations established in pursuance thereof, as soon as official announcement shall be made that the water for such lands is available from the works constructed, owned, or controlled by the United States.

7. The undersigned shall, as prescribed in this contract, make application to the proper representative of the United States for a water right, at a rate not to exceed one acre for each share. Upon proper proof to the association that such application has been accepted and that he has complied with all the requirements in relation thereto, such subscriber shall be deemed to have paid on his stock the amount then paid to or for the use of the United States for such rights.

8. Calls and assessments shall be made and levied from time to time for the collection of the amounts due on the shares of stock of the association, in pursuance of the requirements of the United States in connection with such water-right applications; and when all payments required for such rights shall have been made, and when the proper evidence of the perfection of such water right has been issued, his stock shall be deemed and held to have been fully paid up, and until further paid he shall be liable therefor; and the payments due thereon in pursuance of assessments and calls duly made by the association shall be a lien upon such lands and shares, and the said lien shall be enforced by the association by foreclosure and sale of said stock and lands, or so much thereof as may be

necessary, in the manner provided by law for the foreclosure of mortgages, and the purchaser at such sale shall be entitled to the benefit of all payments on the water right appurtenant to the land purchased, and shall take said lands subject to the obligations and conditions herein provided; but nothing herein shall be construed as permitting any redemption of such stock and lands except as provided in the by-laws.

9. Assessments may be made from time to time as required for the operation, maintenance, repair, renewal, replacement, improvement, enlargement, or extension of the works owned, controlled, or to be maintained by the association, and for the construction, acquisition, or control of any works, property, or rights required in connection with the business of the association and for the fulfillment of any obligation undertaken by it, or for the carrying out of any of its purposes.

10. It is understood and agreed that expenditures for purposes that are of benefit to a part only of the shareholders may be especially assessed against such shareholders in proportion to such benefits.

11. Assessments shall become due from time to time, as they are made and levied, a lien on said lands and shares of stock of the undersigned and his transferee, and all rights and interests represented by said shares, and until they are paid or otherwise discharged, shall be and remain a lien thereon. The manner of enforcing said lien shall be by foreclosure and sale of the stock and lands as herein provided for payments on capital stock.

12. It is expressly understood that business may be begun and that the subscriber shall be liable for any assessments or calls made or levied after ——— (insert number of shares) shares of the capital stock shall have been subscribed.

13. The undersigned furthermore grant to the association or to the United States, as the case may be, over the lands described herein, as may be required in connection with the works constructed or controlled by the association or by the United States for the use and benefit of the stockholders, necessary right of way for the construction, operation, and maintenance of canals, tunnels, and other water conduits, telephone and electric transmission lines, drains, dikes, and other works for irrigation, drainage, or reclamation.

14. It is further understood that no stockholder shall be entitled

to more than 160 votes, and the benefit of any laws to the contrary is hereby expressly waived.

15. The undersigned furthermore agree to be bound by all the terms, conditions, limitations, and provisions contained in the articles of incorporation and by-laws of said ——— Water Users' Association, including all amendments thereto now existing or which may hereafter be duly adopted.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this ——— day of ———, 191—.

———————————

———————————

(Signature of Wife.)

Signed in the presence of

———————————

———————————

Witnesses.

State of——————— }
County of——————— } ss.

(The acknowledgment should be made in the form prescribed by the statute of the State or Territory where the land is situated, and must be sufficient to release any homestead exemptions, dower, or other rights.)

The above subscription and contract was accepted and approved by the ——— Water Users' Association at a meeting of the board of directors held on the ——— day of ———, 191—.

——— WATER USERS' ASSOCIATION.

By————, *President.*

Attest:

———————

Secretary.

And such stock subscription and contract shall become binding upon the association only when approved and executed by the association.

Sec. 4. Any shares of stock which may be forfeited under the provisions of the stock subscription and contract, as set forth in Section 3 of Article I of the by-laws, shall at once be canceled and shall not, under any circumstances, be renewed, revived, or reissued. Other stock in lieu thereof up to the limit of the total

number of shares authorized by the articles of incorporation may be subscribed for and issued, subject to all the conditions of these by-laws and the articles of incorporation and to the approval of the Secretary of the Interior.

Sec. 5. The ownership of each share of stock of this association shall carry as incident thereto a right to have water delivered to such shareholder by the association for the irrigation of the lands to which such share is appurtenant.

Sec. 6. The amount of water to be delivered to such owner during any irrigation season shall be that proportionate part of all the water available for distribution by the association during that season as the number of shares owned by him shall bear to the whole number of valid and subsisting shares then outstanding, such water to be delivered to and upon said lands at such times during that season as may be needed for the proper irrigation thereof.

Sec. 7. The records of the association, and each and every certificate or other evidence of ownership of the shares of stock in the association, when issued, shall contain a description of the lands to be irrigated, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights to the use of water for the irrigation of said lands, whatever their source, or whatever their manner of acquisition, shall be forever inseparably appurtenant thereto, together with the said shares of stock, and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of these by-laws, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by such shareholder, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind: *Provided, however,* That if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands to which shares of stock in this association are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have first been allowed and approved by

the Secretary of the Interior. All the provisions and agreements of this section shall be set forth in the aforesaid certificate or other evidence of ownership of shares of stock in the association, together with any other provisions and agreements made necessary by the articles of incorporation, or by-laws, and such certificate or other instrument shall be signed, executed, and acknowledged by the president and secretary of the association, and the board of directors shall pass by-laws prescribing the form of such certificate or other instrument not inconsistent with the articles of incorporation or these by-laws.

Sec. 8. If it should be determined by the United States that the amount of water available from the entire irrigation system as owned or controlled by it and by the association shall be insufficient to properly irrigate one acre of land for each share of the capital stock, then no shares in excess thereof shall be issued, and the number of shares shall be so reduced, by appropriate amendment of the articles of incorporation as not to exceed the number of acres determined by the United States as irrigable from the entire available supply of water.

Sec. 9. If, when such determination is made, the number of shares subscribed shall be in excess of the number of acres so determined, an allotment of shares shall be made to the subscribers equal to the number of acres irrigable, giving preference to cultivated land. The surplus shares so subscribed shall thereupon be canceled, and shall not be reissued. By-laws shall be adopted to govern such allotment.

Sec. 10. If the number of shares of irrigable land or the cost of the works, or both, as determined by the United States, shall exceed the number of shares of the capital stock authorized, appropriate amendment of the articles of incorporation as to the number of shares, the par value thereof, and the capital stock shall be made in compliance with the laws applicable thereto.

Sec. 11. Revenues necessary for the accomplishment of the purposes of this association shall be raised by call or assessment, from time to time as required, upon and against the shareholders.

Sec. 12. The board of directors shall have power to make and enforce necessary by-laws for fixing and enforcing the lien on the

lands of the shareholders, and for making, levying, collecting, and enforcing of all assessments.[1]

Sec. 13. Nothing in the articles of incorporation and by-laws or in the fact of becoming a member of this association shall be construed as affecting, or intending to affect, or in any way interfering with the vested rights of any person to the prior use or delivery of any waters.

Sec. 14. The articles of incorporation or by-laws shall not be so amended as to in anywise conflict with any Federal statutes or the rules and regulations established thereunder for the administration of water from any reservoir or other works acquired, constructed, or controlled by the United States, and which may be used for supplying water to the lands of the shareholders of this association.

Sec. 15. No provision of any by-law embraced in Article I of these by-laws shall be amended or modified except with the approval of the Secretary of the Interior.

It will be noticed that Article I of the by-laws as above set forth has to deal with the relations of the water users' association with the Federal Government, and that no provisions thereof can be amended or modified except with the approval of the Secretary of the Interior. The remainder of the by-laws deal principally with the government of the corporations and are similar to the by-laws of other corporations. These by-laws must conform to the statutes of the State where the corporation is organized, and must not conflict with any Federal statute or the rules and regulations established thereunder for the administration of water or water rights by the Reclamation Service of the Government in relation to these projects. In fact, the main object for the organization of these water users' associations is to aid and not to hinder or interfere with the general scheme of the Federal Government in the operation of these reclamation projects.

[1] Where a water users' association owning lands within a National reclamation project had agreed to collect an assessment levied by the Secretary of the Interior, and the corporation's by-laws also provided for special assessments on property especially benefited, it was held by the Oregon Court that the corporation had power to levy an assessment on its stockholders on property within the reclamation project to meet the assessment levied by the Secretary of the Interior and payable one year before the assessment levied by the Secretary would become delinquent. Umatilla Water Users' Assn. v. Irvin, 56 Ore. 414, 108 Pac. Rep. 1016.

§ 1285. Water users' associations—Contract with the Government.—The organization of a water users' association having been completed in the form approved by the Secretary of the Interior, the following form of contract between the Federal Government and the association has also received the approval of the Secretary of the Interior:

CONTRACT BETWEEN ASSOCIATIONS OF WATER USERS AND THE SECRETARY OF THE INTERIOR.

These articles of agreement, made and entered into this ——— day of ———, 19——, by and between the United States of America, acting on its behalf by ———, Secretary of the Interior, party of the first part, and the ——— Water Users' Association, a corporation duly organized and existing under the laws of the ——— of ———, party of the second part, their successors and assigns,

WITNESSETH: That whereas the ——— Water Users' Association is a corporation organized and existing under the laws of the ——— of ———, for the purposes mentioned in its articles of incorporation and by-laws, copies of which are appended to this agreement, and are, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties thereunder, or to be deemed, held, read, and considered as if fully written out or printed herein, and deemed a part hereof; and,

WHEREAS, the lands embraced within the area proposed to be irrigated as described in said articles of incorporation or by-laws are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unclaimed, unfit for habitation, and uncultivated, in which condition they, or a greater part thereof now are, unless the waters of the ——— River in ——— and ——— tributaries be impounded and the flow thereof regulated and controlled; and,

WHEREAS, the Secretary of the Interior contemplates the construction of certain irrigation works under the provisions of an Act of Congress, entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid

lands," approved June 17, 1902, for the irrigation and reclamation of the lands described in the said articles or by-laws; and,

WHEREAS, the incorporators and shareholders of said ——— Water Users' Association are, and under the provisions of its articles of incorporation and by-laws must be, owners and occupants of lands in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and,

WHEREAS, neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles or by-laws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed among themselves, by the terms and provisions of said articles of incorporation and by-laws, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such water shall be determined;

NOW, THEREFORE, it is agreed and understood by and between the parties hereto:

1. That if the Secretary of the Interior shall authorize and cause the construction of the said irrigation works, the said association will take prompt action to secure the determination by the courts of the relative rights of its shareholders to the use of water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said Act of Congress the rules and principles set out in said articles of incorporation and by-laws, for such determination, shall be deemed and established rules and principles for that purpose.

2. That only those who are or may become members of said association, under the provisions of its articles of incorporation and

by-laws, shall be accepted as applicants for the rights to the use of water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payments for the water rights to be issued to the shareholders of said association, under the provisions of said Act of Congress, shall be divided into not less than ———— annual payments, the first of which shall be payable when the water is first delivered from said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association, and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. That the said Water Users' Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and also for the cost of operation and maintenance as may be assessed from year to year by the Secretary of the Interior, and will promptly levy calls or assessments therefor and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office for the district in which said lands are situated; that it will promptly employ the means provided and authorized by the said articles of incorporation and by-laws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation or by-laws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into the hands of the receiver of the local land office, as provided by law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing collections, the association will adopt and enforce proper by-laws, subject to the approval of the Secretary of the Interior, and not change them so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association will adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and by-laws to adopt and enforce, concerning the use of water by its shareholders and concerning the administration of the affairs of the association, to effectually carry out and promote the purposes of its organization within the provisions of said articles of incorporation and by-laws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them; but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association, as defined or modified by said articles of incorporation and by-laws.

9. That persons who are not now members of the association, but who may be the owners or occupants of land to be irrigated, as described in its articles of incorporation or by-laws, or of added lands as therein provided for and to whom rights to the use of water from the proposed irrigation works may be issued by the United States, may, at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions prescribed for such membership.

10. That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested are to be defined, determined, and enjoyed in accordance with the provisions of the said Act of Congress and of other Acts of Congress on the subject of the acquisition and enjoyment of the

rights to use water; and also by the laws of ———, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and by-laws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation or by-laws of said association in all their details as to form of organization of water users contemplated and authorized by Section 6 of the said Act of Congress of June 17, 1902; but such approval and adoption is expressly reserved until the conditions prescribed in said Act authorizing such approval and adoption shall have arisen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may, from time to time, approve and promulgate, shall be deemed and held to be obligatory upon this association as fully and completely, and to every intent and purpose, as if they were now made, approved, promulgated, and written out in full in this agreement, and the same are to be so read and construed.

IN WITNESS WHEREOF, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

(Department Seal.) ——————————
Secretary of the Interior for and on behalf of the United States of America, Party of the First Part.

(Corporate Seal.) ——————————
By ——————————
Party of the Second Part.

Attest: ——————————,
Secretary.

§ 1286. **Water users' associations—And our conclusions.**—As can readily be seen from the foregoing forms of the articles of incorporation, by-laws, and the contract between these associations

and the Federal Government,[1] everything in connection with the organization of these associations must be in accordance with the Government's method, as approved by the Secretary of the Interior, or not at all. In fact, this whole scheme of reclamation, as included in the National Reclamation Act and all of its amendments, and especially as interpreted by the Secretary of the Interior, as indicated by the rules and regulations promulgated by him, together with his requirements for the incorporation of the water users' associations, is, upon the part of the Government, a cold-blooded business proposition, constructed with the view of returning to the Government every penny that it has expended in the acquisition of rights and the construction of the works under any of these projects. Although this legislation was undoubtedly induced by Western members of Congress, a careful study of the law and the rules and regulations thereunder, as they stand today, leads us to the belief that there is one essential element which has been almost entirely overlooked, and that is the right of the consumer of the water, "the poor, but honest farmer," who is induced to settle upon these desert and arid lands and attempt to make a home for himself and family. The whole scheme seems to be drawn upon the plan of a shrewd Eastern money loaner, who takes extraordinary precautions to secure the payment of the money advanced upon security of doubtful value. Settlers may be induced to make entries under these projects, but when it comes to their making the annual payments for the water furnished, it will be found that the law, as it now stands, is entirely too severe as to forfeitures. From a long experience in the arid West and with settlers under irrigation propositions of various kinds, the writer has ascertained that very few of these settlers, at the time of making their entries, have, as a general thing, more ready money than sufficient to make their entries, purchase a team and the necessary stock, construct a small house, barn, and other necessary buildings, and when it comes to the payments of from $2.00 to $4.00 per acre for the water furnished, and beginning these payments the first year of their settlement, and to earn this money out of the land itself, it will be found that, generally speaking, the burden will be too great for them to bear, and that many forfeitures will be worked. Of course,

1 See Secs. 1282-1285.

the operations under the law are too recent for us to give any direct results of its workings, but we predict that the law will have to be amended in many respects and many extensions granted for the making of the payments for the water, before these reclamation projects can be made to attain the success which was intended.

CHAPTER 66.

THE DESERT LAND ACTS.

§ 1287. Scope of chapter.
§ 1288. "Desert lands"—Provisions for disposal to individuals.
§ 1289. Desert land claims—Water rights—Report of the Commissioner of the General Land Office, 1911.
§ 1290. Full text of Acts—Acts of March 3, 1877, March 3, 1891.
§ 1291. Amendatory Act of June 27, 1906—Delay caused by reclamation projects.
§ 1292. Amendatory Act of March 26, 1908, relative to additional entries.
§ 1293. Amendatory Act of March 28, 1908, restricting entries to the public surveys.
§ 1294. Relative to entries on coal lands—Acts of March 3, 1909, and June 22, 1910.
§ 1295. Effect of Act as relating to navigation and appropriation.
§ 1296. The application for entry.
§ 1297. Quantity of land that may be entered—Land must be in compact form.
§ 1298. Essentials for acquiring land under the desert land laws.
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§ 1300. Essentials—The land must be desert land.
§ 1301. Essentials—The entryman must acquire a water right.
§ 1302. Essentials—Acts tending toward reclamation—Annual proof.
§ 1303. Essentials—Actual reclamation necessary—Final proof.
§ 1304. Essentials—Final proof, when, and how taken.
§ 1305. Essentials—Payment for the land.
§ 1306. The sale or assignment of desert land entries.
§ 1307. Contests.
§ 1308. Relinquishments.
§ 1309. "The Dry Farm Act" or "Enlarged Homestead Act"—Cause of its enactment.
§ 1310. "The Dry Farm Act" or "Enlarged Homestead Act."
§ 1311. "The Dry Farm Act"—Construction of the Act.

§ 1287. Scope of chapter.—In this chapter we will discuss the various Desert Land Acts of Congress, not only in respect to the water rights relating thereto, but also in respect to the acquisition of title to desert lands by their reclamation by the means of irrigation.

§ 1288. "Desert lands"—Provisions for disposal to individuals.—Throughout all of the arid region of the United States are

great tracts of land with a soil as rich as any that can be found on earth, but in localities where the rainfall is so slight that it does not furnish sufficient moisture to nourish plants other than the native sagebrush, greasewood, and vegetation of a similar character. These lands have been denominated by the statutes "desert lands," although in fact they are far from being lands of that character. The very fact that the sagebrush and greasewood will grow with only the moisture furnished by the scanty rainfall tends to prove, in a most conclusive manner, that these lands have a rich and enduring soil, and that with the artificial application of water by means of irrigation, they will produce any crops which can withstand the climate of any particular locality. These lands, as a general thing, are not riparian, but lie back from the streams, and therefore it is more difficult to conduct the water to them. And hence, prior to the year 1877, comparatively small areas of these lands had been taken up and cultivated; and the only use that they were put to was for pasture, especially in winter, for the sheep and stock of the flock and herd masters who ranged their animals in these localities.

In 1877, Congress, viewing the situation relative to these lands, with the object of having them taken up, settled, and cultivated, made special inducements toward that end. By the Act of March 3 of that year [1] Congress provided that any person of the requisite age and citizenship, upon the payment of twenty-five cents per acre, might file a declaration in the local land office that he intended to reclaim a tract of desert land not exceeding 640 acres by conducting water upon the same within the period of three years thereafter, and at any time within said period of three years after the filing of the declaration, upon making satisfactory proof of the reclamation of said tract and upon the payment of the additional sum of one dollar per acre, a patent to the land should be issued to him. The character of the lands which might be so taken up under the Act was described as all lands exclusive of timber and mineral lands which would not, without irrigation, produce some agricultural crop. These lands, within the meaning of the Act were deemed desert lands.

The terms of the Act were amended by the Act of March 3, 1891,[2] requiring the applicant, who must be a resident citizen of the State

[1] 6 Fed. Stat. Ann., 1905, p. 392; 2 U. S. Comp. Stat. 1901, p. 1548; 19 Stat. L. 377.

[2] 6 Fed. Stat. Ann., p. 395; 2 U. S. Comp. Stat., p. 1549; 26 Stat. L. 1096.

or Territory in which the land sought to be entered is located, at the time of his filing his application, to also file a map of said land, which shall exhibit a plan showing a mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary crops, and shall also show the source of the water to be used for irrigation and reclamation of the land covered by his application. There was also another important requirement to the effect that for the first three years, while the application was pending, one dollar per acre must be expended each year by the applicant in permanent improvements, and in the securing of water rights for the irrigation of the land. Also, the time within which the final proofs may be made was extended to four years, and the amount which might be taken up by one person was cut down to 320 acres. However, the amendment provided that all *bona fide* claims initiated before the amending Act might be perfected and patented upon the same terms and conditions as though the amending Act had not been passed.

Also, by the prior Act of August 30, 1890,[3] it was provided that no person after the passage of the Act could enter upon any of the public lands with a view of occupation, entry, or settlement, under any of the land laws, and could acquire title to more than 320 acres in the aggregate under all of said laws, but the limitation was made not to curtail the right of persons who before the passage of the Act had made such entry or settlement on the public lands.

§ 1289. Desert land claims—Water rights—Report of the Commissioner of the General Land Office, 1911.—The situation of the desert lands in connection with the Desert Land Act is summed up in the report of the Commissioner of the General Land Office for the fiscal year ending June 30, 1911,[1] and which is as follows: "The Desert Land Act of 1877, as modified by the amendment of March 3, 1891, recognized the desirability of effecting the reclamation of desert land through the efforts of individual entrymen. At the time of the enactment of these laws there were many sources of water available to the individual, of which he could take advantage and thus secure a water supply sufficient to irrigate the land cov-

[3] 6 Fed. Stat. Ann., 1905, p. 313; 2 U. S. Comp. Stat., 1901, p. 1404; 26 Stat. L. 391.

[1] See above report, p. 17.

ered by his entry. Like the homestead law, the exercise of the right once exhausted the privilege. It also was limited to persons duly qualified in the matter of citizenship, who at the time of entry were residents of the State in which the entry was made. The apparent purpose of these limitations was to prevent the misuse of the beneficent intention of the Act by fraudulent and speculative combinations, made with the purpose of obtaining unlawful control of large bodies of the public lands. It therefore becomes necessary for the land office, in the administration of this law, to carefully consider the good faith of the claim, whether the land is of the character subject to such entry, and, later, whether it has been reclaimed by securing a permanent supply of water sufficient to effect irrigation of the entire tract.

"What constitutes land desert in character is largely dependent upon relative conditions, all of which must be taken into consideration in the adjudication of these claims. The most difficult question, however, is one pertaining to water rights. The Land Department must determine whether, under the laws of the State where the entry is made, the entryman has secured such a water right as will be appurtenant to the land and fully accomplish the intended reclamation. The value of water in States containing arid and semi-arid lands has been recognized by appropriate legislation, under which all water rights must be adjudicated by the State authorities, and it is incumbent upon the Land Department, in passing to title a desert land entry, to see that under such laws and adjudications the entryman has secured a permanent water right.

"The gradual absorption of the water supply from the smaller streams by the individual entryman naturally resulted in the necessity of organizing water companies to bring water from a great distance, and this has led, in some instances, to relations between entrymen and water companies that require the utmost scrutiny to prevent the acquisition of large holdings through entries nominally made for the benefit of the individual, but actually in the interest of the company."

§ 1290. **Full text of Acts—Acts of March 3, 1877, March 3, 1891.**—On March 3, 1877, there was approved an Act passed by Congress, entitled: "An Act to provide for the sale of desert lands

in certain States and Territories,"[1] the full text of which is as follows:

"That it shall be lawful for any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such,' and upon payment of twenty-five cents per acre to file a declaration under oath with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter.

"*Provided, however,* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the waters of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

"Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey.

"At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him.

"*Provided,* that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres, which shall be in compact form.

"Sec. 2. That all lands, exclusive of timber lands, and mineral lands, which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this Act,

[1] 6 Fed. Stat. Ann., 1905, pp. 392-397; 2 U. S. Comp. Stat. 1901, pp. 1548, 1549; Supp. Rev. Stat. U. S., 1874-1891, p. 137; 19 Stat. L. 377.

which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

"Sec. 3. That this Act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

To the above Act, Sections 4 to 8 were added by the Act of March 3, 1891,[2] which provide as follows:

"Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plans of internal improvements.

"Sec. 5. That no land shall be patented to any person under this Act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in the permanent improvements upon said land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of the whole tract reclaimed and patented in the manner following: Within one year after making entry of such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary

[2] 6 Fed. Stat. Ann., 1905, p. 395; 2 U. S. Comp. Stat., 1901, p. 1549; 26 Stat. L. 1096, 1097.

improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than herein prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided,* That proof be further required of the cultivation of one-eighth of the land.

"Sec. 6. That this Act shall not affect any valid rights heretofore accrued under the Act of March 3, 1877, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said Act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this Act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said Act, as amended by this Act, so far as applicable; and all Acts and parts of Acts in conflict with this Act are hereby repealed.

"Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon the payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this Act. *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding Act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to

comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and the moneys paid therefor, shall be forfeited to the United States.

"Sec. 8. That the provisions of the Act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original Act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."[3]

§ 1291. **Amendatory Act of June 27, 1906—Delay caused by reclamation projects.**—Under Section 5 of the Act of June 27, 1906,[1] it is provided that where the desert-land entry has been or may be embraced within the exterior limits of a reclamation project, under the Act of June 17, 1902,[2] and the entryman has been hindered, delayed, or prevented from making his improvements or from reclaiming the land embraced within his entry, by reason of the withdrawal of the land for such reclamation project, the time during which he has been so hindered, delayed, or prevented shall not be computed in determining the time within which such entryman is required to make such improvements and reclamation, if the reclamation project should be afterward abandoned. But if the reclamation project is carried to completion, so as to make available a water right for the land embraced in any such desert-land entry, and the entryman is not the owner of a water right, he is required to comply with all the provisions of the Reclamation Act of June 17, 1902, and to relinquish all land embraced within his desert-land entry in excess of 160 acres, and as to such 160 acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in the said Reclamation Act, and not otherwise. But nothing contained in said Section 5 shall be held to require a desert-land entryman who owns a water

[3] For the full text of Section 5 of the Act of June 27, 1906, making deductions for time the entryman of desert land entries was hindered and delayed by reason of reclamation projects under the National Reclamation Act, and requiring the entryman in certain cases to take advantage thereof, see Sec. 1253.

[1] Supp. Fed. Stat. Ann., 1909, p. 544; 34 Stat. L. 520.

[2] For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

right and thereby reclaims the land embraced in his entry to accept the conditions of the Reclamation Act.[3]

Under this Act, no entryman will be excused from compliance with all the requirements of the desert land law until he has filed in the local land office an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and the extent of the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge. The matter must be then submitted to the General Land Office, where the request will be allowed or denied, as the circumstances justify. An entryman will not need to invoke the privileges of the Act in connection with final proof until such final proof is due. If after investigation the reclamation project is abandoned, the time for compliance with the law will begin to run from the date of notice of such abandonment. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entryman must comply with all the provisions of the Reclamation Act, and must relinquish all the land embraced in his entry in excess of 160 acres. Nothing contained in the Reclamation Act, however, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the Reclamation Act, but he may proceed independently of the Government's plan or irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation. However, desert-land entrymen within the exterior boundaries of a reclamation project who expect to secure water from the Government works must relinquish all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office, and must reclaim at least one-half of the irrigable area covered by their water right in the same manner as private owners of land irrigated under a reclamation project.[4]

"Special attention is called to the fact that nothing contained in

[3] For the full text of Section 5 of the Act of June 27, 1906, see the amendatory Acts to the National Reclamation Act, Secs. 1245-1260.

[4] Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 34-44; Regulations, 38 Land Dec. 644, Secs. 70-79; Regulations, 37 Land Dec. 322, Secs. 34-42.

the Act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the Reclamation Act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation."[5]

§ 1292.—Amendatory Act of March 26, 1908, relative to additional entries.—The amendatory Act of March 26, 1908,[1] provided as follows: "That any person who prior to the passage of this Act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert-land entry under this Act shall furnish the description and date of his former entry: *Provided,* That the provisions of this Act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration."

A person, except as provided for in the above Act, can make but one entry of desert lands. In order to take advantage of the benefits of the Act, it must be shown that the former entry was not assigned in whole or in part or canceled for fraud, and it must be described by section, township, and range, or by the date and number, as to be readily identified on the records of the General Land Office. In such cases it is not sufficient for the applicant to state that he made an entry at a certain land office, about a certain time; but the land must be sufficiently described, or the date and number of the entry stated.[2]

For desert land entries within the boundaries of reclamation projects, see the Reclamation Act, Sec. 1253.

See, also, case of W. H. Skinner, 39 Land Dec. 519; Robert J. Slater, 39 Land Dec. 380.

A desert entryman of lands falling within a Government reclamation project, who seeks to secure water for the reclamation thereof from the project, is required, as a condition precedent to his right to water, to relinquish to the Government all of the land embraced within his entry in excess of 160 acres. Instructions, Jan. 20, 1912, 40 Land Dec. 386.

5 Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 42.

1 Supp. Fed. Stats. Ann., 1909, p. 549; 35 Stat. L. 48.

2 Regulations, 37 Land Dec. 313, Sec. 5.

The above Act was made to apply also to homestead entries by the Act approved February 3, 1911,[3] which is as follows: "That any person who, prior to the approval of this Act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this Act shall furnish a description and the date of his former entry: *Provided,* That the provisions of this Act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.[4]

"A person applying to make second homestead or desert-land entry under this Act must file in the local land office an application to enter a specific tract of public lands, subject to entry under the laws in question, accompanied by his affidavit executed before an officer authorized to administer oaths under the public land laws, stating the description of the former entry by section, township, and range numbers (or the number of the entry and land office where made); date of entry; when he lost, forfeited, or abandoned the same; that it was not canceled for fraud; and the amount, if anything, received for abandoning or relinquishing his former entry. This affidavit must be corroborated by the affidavit of one or more persons having knowledge of the facts relative to the abandonment of the claim, or the relinquishment of the former entry, and the consideration received therefor, which corroborating affidavit may be executed before any officer authorized to administer oaths, and having an official seal."[5]

A second desert land entry, under the above Act, may be held under an assignment of the same. Harrington v. Patterson, 38 Land Dec. 438.

The act of March 26, 1908, does not authorize a second desert entry by one who has received patent on a former entry, notwithstanding the lands so patented have become worthless by reason of the destruction of the reclamation project, upon which irrigation thereof depended. Matthias P. Zindorf, 40 Land Dec. 96.

[3] Public, No. 340; —— Stat. L. —.

[4] For instructions for the above Act, see those of Feb. 28, 1911, 39 Land Dec. 524.

[5] Instructions of May 17, 1911, 40 Land Dec. 91.

§ 1293. Amendatory Act of March 28, 1908, restricting entries to the public surveys.—These Acts were still further amended by the amendatory Act of March 28, 1908,[1] which provided as follows:

"Sec. 1. That from and after the passage of this Act the right to make entry of desert lands under the provisions of the Act" approved March 3, 1877, as amended by the Act approved March 3, 1892,[2] "shall be restricted to surveyed public lands of the character contemplated in the Acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however,* That any individual qualified to make entry of desert lands under said Acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said Acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

Section 2 provides for assignments of desert-land entries, and will be treated in another section.[3]

"Sec. 3. That any entryman under the above Acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said Acts, but that because of some unavoidable delay in the construction of the irrigation works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said Acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof as required by said Acts of the completion of said work."[4]

1 Supp. Fed. Stat. Ann., 1909, p. 550; 35 Stat. L. 52.

2 *Supra.*

3 See Sec. 1306.

See Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 7; Virgil Patterson, 40 Land Dec. 264.

4 The above section contemplates that unavoidable delay in the construction of irrigation works by means of which the entryman intends to convey water upon his claim is the only ground upon which its provisions may be invoked; and in the absence of some actual, tangible work in the way of an irrigation system on the claim,

Prior to the Act of March 28, 1908, a desert-land entry could embrace unsurveyed lands, but, since the date of that Act, desert-land entries can not be made on unsurveyed lands. This Act provides, however, that if a duly qualified person shall go upon a tract of unsurveyed desert land and reclaims, or commences to reclaim, the same he shall be allowed a preference right of ninety days after the filing of the plat of survey in the local land office to make entry of the land. To preserve this preference right the work of reclamation must be continued up to the filing of the plat of survey, unless the reclamation of the land is completed before that time, and in that event the claimant must continue to cultivate and occupy the land until the survey is completed and the plat filed.[5]

§ 1294. **Relative to entries on coal lands—Acts of March 3, 1909, and June 22, 1910.**—By the Act of March 3, 1909,[1] Congress provided that, when any person has in good faith located or entered under the non-mineral land laws of the United States any lands, which subsequently to the entry thereof, are classified as coal lands, he may, if he so elects, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. This Act

a mere intention, or even contract, to obtain water from an irrigation system in the future, in the event the practicability of such system be demonstrated by actual test, is not sufficient to warrant the extension authorized by the above Act. John S. Tendick, 37 Land Dec. 332.

[5] Regulations, 37 Land Dec. 313; Arthur E. Day, 39 Land Dec. 475; Hoobler v. Treffry, 39 Land Dec. 557.

Where, under an action for land claimed under a certificate of entry as a desert location, described as the south half of section 33 of a designated township and range, the evidence showed that the description in the certificate was based on the description in a private survey, and that the land in controversy was under the Government survey in sections 34 and 35, the certificate showed no title, for the description in the certificate must mean the south half of section 33 as finally located by the official survey of the Federal Government. Edgar v. McNair, 157 Cal. 494, 108 Pac. Rep. 306.

The right to extension of time within which to submit final proof upon a desert land entry accorded by the Act of March 28, 1908, is fixed by the Act itself upon a proper showing of facts bringing a case within its provisions and is not a mere privilege resting in the discretion of the Commissioner to allow or deny. Hoobler v. Treffry, 39 Land Dec. 557.

[1] Supp. Fed. Stat. Ann., 1909, 563; 35 Stat. L. 844.

For the full text of the Act, see Coal Lands, Sec. 443.

applies to all desert entries and to other entries made for agricultural purposes and to selections by any State.[2] But Congress did not stop with the above Act. By the Act of June 22, 1910, it provided for a similar patent with a similar reservation to lands which were known and classified to be chiefly valuable for coal, prior to the time of entry. By the Act of June 22, 1910,[3] it was provided that unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are lands valuable for coal, shall be subject to entry by actual settlers only, under the desert-land laws, and under other laws named in the Act, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of the Act shall contain more than 160 acres.

§ 1295. **Effect of Act as relating to navigation and appropriation.**—By these Acts Congress again recognized and assented to the appropriation of water under the Arid Region Doctrine of appropriation,[1] and in contravention of the common law right of the lower proprietor to insist on the continuous flow of the waters of the natural streams flowing over the public domain.[2] And as will be noticed by the terms of Section 1 of the Act the water which may be appropriated is not dedicated for the use of merely those who take advantage of the law to take up lands under its provisions, but all surplus water shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. By this Act, as far as the *Government was concerned,* the right of all riparian proprietors who took up lands after its passage, to the undiminished flow of the natural streams flowing over the public domain, was abrogated, as inapplicable throughout the arid and semi-arid West.[3]

[2] For selections under the Carey Act, see Sec. 1321.

See, also, State of Utah, 38 Land Dec. 245.

[3] Public, No. 227; 36 Stat. L. 583.

For full text of Act, see Sec. 443.

[1] For the Arid Region Doctrine of appropriation, see Secs. 585-594.

For the previous recognition of the doctrine by Congress, see discussion of Acts of 1866 and 1870, Secs. 611-619.

[2] For appropriation as against the rights of riparian owners, see Secs. 810-823.

[3] See discussion upon question of undiminished flow, Sec. 549.

See, also, Hough v. Porter, 51 Ore.

"By this Act the general Government made the water, not only of lakes and rivers, but also other sources of water supply upon the public lands, and not navigable, the subject of appropriation. The conditions about the water shed of Quartz Gulch make it clearly a situation where the water is the subject of appropriation, under the liberal terms of the Act of Congress referred to."[4] The matter, however, was left to the respective States to adopt such rule as it saw fit governing waters within their boundaries.[5] But, under the terms of the Act, Congress did not intend to release its control over the navigable waters of the country, and to grant to those reclaiming arid lands the right to appropriate the waters of either the main stream itself, or the waters of the tributary streams which united into a navigable water course, to the extent that it will thereby destroy the navigability of such water course in derogation of the interests of all the people of the United States.[6] Neither did it release the right upon the part of the Government to make reservations of the waters for certain purposes, discussed in previous sections.[7]

§ 1296. The application for entry.—A person who desires to make an entry under the desert-land laws, must file with the register and receiver of the local land office a declaration or application, under oath, showing that he is a citizen of the United States, or has declared his intention to become a citizen; that he is 21 years of age

318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200; United States v. Conrad Inv. Co., 156 Fed. Rep. 123; State *ex rel.* Liberty Lake Ice Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968; Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; 11 Ariz. 128, 89 Pac. Rep. 504; United States v. Conrad Investment Co., 156 Fed. Rep. 123; Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546; *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666.

[4] Borman v. Blackmon, —— Ore. ——, 118 Pac. Rep. 848.

[5] See Sec. 493.

[6] United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

[7] See Secs. 388, 668.

or over; and that he is also a *bona fide* resident of the State or Territory in which the land sought to be entered is located. He must also state that he has not previously exercised the right of entry under the desert-land laws by making an entry or having taken one by assignment;[1] that he has not, since August 30, 1890, acquired title to, nor is claiming under any of the agricultural land laws, including the lands applied for, lands which in the aggregate exceed 320 acres; and that he intends to reclaim the lands applied for, by conducting water thereon, within four years from the date of his application. This declaration must contain a description of the land, by legal subdivisions, section, township, and range. The terms set forth in the application require a personal knowledge by the entryman of the lands intended to be entered. The affidavit, which is made a part of the application, can not be made by an agent or upon information and belief, and the register and receiver are instructed to reject all applications in which it is not made to appear that the statements contained therein are made upon the applicant's own knowledge and that it was obtained from a personal examination of the lands. A complete statement of the facts must be made, showing the applicant's acquaintance with the land and how he knows it to be desert land.[2] This declaration must be corroborated by the affidavits of two reputable witnesses, who must be personally acquainted with the land, and they must state the facts regarding the condition and situation of the land upon which they base their opinion that it is subject to desert-land entry. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their postoffice addresses. The application and corroborating affidavits must be sworn to before the register or receiver of the land district in which the land is located, or before a United States commissioner of a court exercising Federal jurisdiction in the territory, or before the judge or clerk of any court of record in the county or land district in which the land is situated. In case the application and affidavits are made out of the county in which the land is located, the applicant must show, by affidavit, that the application was made before the nearest or most accessible officer qualified to take such affidavits in the land

1 See, however, for additional desert entries, Secs. 1309-1311.

2 As to what constitutes desert land under the Act, see Sec. 1300.

district;[3] the affidavits of the applicant and his two witnesses must in every instance be made at the same time and place and before the same officer.[4]

As it is required that persons who make desert-land entries must acquire a clear title to the use of sufficient water to irrigate and reclaim the whole of the land entered, or as much thereof as susceptible of irrigation, and to keep it permanently irrigated; therefore, if a person makes an entry before he has acquired a water right, he does so at his own risk, because one entry will exhaust his right, and he will not be repaid the money paid at the time of making the entry. At the time of filing his application with the register and receiver, the applicant should also file a map showing the plan by which he proposes to conduct water upon the land and the manner by which he intends to irrigate the same, and at the same time he must pay the receiver the sum of 25 cents per acre for the land applied for. The receiver will issue a receipt for the money, and the register and receiver will jointly issue a certificate showing the allowance of the entry. This application will be given its proper serial number, and at the end of each month an abstract of the entries allowed under these laws will be transmitted to the General Land Office.[5]

Amendments to desert-land applications may be made under certain conditions. Where, through no fault of the entryman, the lands embraced in an entry are found to be so unsuitable for the purposes for which the entry was made, as to make the completion of the entry impracticable, an amendment of the entry may be allowed by eliminating one or more of the subdivisions entered and including other tracts in lieu thereof. But in such case at least a legal subdivision approximating forty acres in area of the land originally entered, must be retained, and the entry as amended embrace contiguous tracts. The application to amend must be filed within one year from the date of the original entry.[6] So, too, where the entryman can not at the date of his original filing take

[3] See Circular, Sept. 30, 1910, 39 Land Dec. 253.

See Circular, 32 Land Dec. 539; Act of March 11, 1908, 32 Stat. L. 63.

[4] Regulations, 37 Land Dec. 312, Secs. 8-11.

[5] Circular, Sept. 30, 1910, p. 253, Secs. 12, 13; Regulations, 37 Land Dec. 315, Secs. 12, 13.

[6] Jennie M. Mitchell, 37 Land Dec. 43.

See, also, Circular, 36 Land Dec. 287; Circular, 37 Land Dec. 655.

the full quantity of land allowed by law, because of prior entries or filings covering adjacent lands, and he immediately takes steps which result in the clearing of the record as to the tracts desired, he will thereupon be permitted to amend his application by including such tracts to the full extent of the land allowed by law; but he can not make such an amendment where there is any considerable delay in taking the initiatory steps with a view to clearing the record.[7]

§ 1297. Quantity of land that may be entered—Land must be in compact form.—Under the original Act of March 3, 1877,[1] a person was allowed to enter one section, or 640 acres, of desert land. But, by the Act of March 3, 1891, no person is allowed to enter more than 320 acres of desert land. Moreover, by the Act of August 30, 1890,[2] it is provided as follows: "No person who shall after the passage of this Act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement, is validated by this Act."

Under this Act no person is permitted to acquire title, under all the agricultural land laws, to more than 320 acres; therefore, if a person has, since August 30, 1890, acquired, under any of the laws except mineral laws, 320 acres, or is at the date of his application claiming 320 acres under said laws, he is not authorized to make a desert-land entry for any quantity whatever.[3]

A person can only make one entry under the desert-land law, and the right is exhausted by that entry, whether the maximum quantity of land, or less, is entered, except, however, as provided for by the

7 Charles C. Wilson, 37 Land Dec. 769; Instructions, 36 Land Dec. 44.

Where a desert entry is made for a less area than the entryman is entitled to take under the law, he may be permitted, in the absence of adverse claim, to amend his entry to include an adjoining tract. Gust Hammar, 40 Land Dec. 576.

1 See Sec. 1290.

2 6 Fed. Stat. Ann., 1905, 312; 2 U. S. Comp. Stat., p. 1404; 26 Stat. L. 391.

3 For the exception as to mineral laws, see 6 Fed. Stat. Ann., 1905, p. 313; 2 U. S. Comp. Stat., 1901, p. 1405; 26 Stat. L. 1101.

Act of March 26, 1908, where the entry has been abandoned, lost, or forfeited, prior to the passage of that Act.[4]

However, it is held that where a desert entryman could not, at the date of entry because of existing withdrawals covering part of the land desired by him, embrace in his entry the full area allowed by law, he may, upon the restoration of the withdrawn land, be permitted to enlarge his entry to conform to his original intentions.[5]

The land entered under the desert-land laws must be in compact form; which means that it should be as nearly square as possible. Where, however, it is impracticable, on account of the previous appropriation of adjoining lands, or on account of the topography of the country, to take the land in a compact form, all the facts regarding the situation, location, and character of the land sought to be entered, and the surrounding tracts, should be stated, in order that the General Land Office may determine whether, under all the circumstances, the entry should be allowed in the form sought. Entrymen should make a complete showing in this regard, and should state the facts, and not the conclusions they derive from the facts, as it is the province of the Land Department of the Government to determine whether or not, from the facts stated, the entry should be allowed.[6]

§ 1298. Essentials for acquiring land under the desert land laws.—It will be noticed from the provisions of the desert land Acts, as set forth in a preceding section,[1] that in order for a person to acquire title to a tract of desert land, under the Acts, that there are five important essentials which must be complied with. First, there must be the requisite citizenship; second, the land sought to be entered must be desert land within the meaning of the Acts; third, there must be sufficient water appropriated or purchased to irrigate and reclaim the land, and the ditches and other works must be constructed to conduct the water to the place of use; fourth, there must be an actual reclamation of the land, and an actual cultivation of at least one-eighth of the tract entered; and,

4 For the Act of March 26, 1908, see Sec. 1293; Circular, Sept. 30, 1910, 39 Land Dec. 253; Regulations, 37 Land Dec. 313, Sec. 5.

5 Bridget Thibedeau, 39 Land Dec. 48.

6 Regulations, 37 Land Dec. 313, Sec. 6; Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 6.

1 See Sec. 1290.

fifth, there must be the payment of $1.25 per acre. As will be readily seen, the chief object of the law was the reclamation of the land, so as to make it habitable; and, therefore, this reclamation was made a condition precedent to the acquisition of title to the same.

It will also be noticed that under the Acts there is a union of Federal and State control as far as the acquisition of both the lands and water are concerned. The title to the lands comes from the Federal Government, while the title to the water must be acquired under the laws of the respective States. But they are in a way dependent upon each other. The title to the land can not be acquired unless there has been also acquired a title to a water right sufficient to reclaim the land. While, upon the other hand, the title to the water right can not be acquired unless there is the land to which it can be applied for irrigation or some other beneficial use. In the following sections, therefore, we will discuss the subject from the standpoint of the requisite essentials for the acquisition of title to both the land and the water right, and in the order named above.[2]

§ 1299. **Essentials—Citizenship.**—In the first place there must be the requisite citizenship. The applicant must be a "resident citizen" of the State in which the land sought to be entered is located. Relative to individuals this is held to include the citizens of one State who go to another State with the avowed intention to make their permanent home therein.[1] But the citizens of one State can not file the necessary applications for desert land in another State. Under the original Act of 1877, it was held that the language clearly excluded associations or corporations from making desert entries.[2] But under the law as amended in 1891, it is held by the Land Department, that a corporation may make a desert entry; but in order to be qualified to make such an entry, it must show the qualification of each member of such corporation; and if one member is disqualified to make such entry, then such corporation is not qualified to make entry.[3] A woman, whether married or single,

2 See Secs. 1299-1305.

1 Pettet v. McCormick, 34 Land Dec. 586.

2 Salina Stock Co. v. United States, 85 Fed. Rep. 339, 29 C. C. A. 181.

3 Jacob Switzer Company, 33 Land Dec. 383; Silsbee Town Co., 34 Land Dec. 430.

who possesses the necessary qualifications, can make a desert-land entry.[4] At the time of making final proof, an entryman of alien birth must have been admitted to full citizenship, which must be shown by a duly certified copy of the certificate of naturalization.[5]

§ 1300. **Essentials—The land must be desert land.**—The land applied for must be desert land within the meaning of the Acts; that is to say, lands which will not, without irrigation, produce some agricultural crop. The occasion on which the desert character of the land is to be ascertained is at the time of the filing of the declaration. This is also a fact to be determined by the register of the land office upon affidavits or other proper evidence; and his determination is final and conclusive on the courts in the absence of direct impeachment for fraud.[1] And in the determination of the character of the land, the annual rainfall, the crops which may be produced on the land without irrigation, whether the land has living water flowing through it or living springs, the natural growth of the timber on the land, as to whether the land is all or only part desert, and any other facts which enter into each particular case, may be taken into consideration.

Lands not subject to desert land entry under the Act:

First. Lands bordering upon streams, lakes, or other natural bodies of water, or through which or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, until the clearest proof of their desert character is furnished.

Second. Lands which produce native grasses in sufficient quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons, are not desert lands.

Third. Lands which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, are not desert.

Fourth. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.[2]

4 Regulations, 37 Land Dec. 312; Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 4.

5 Regulations, 37 Land Dec. 312.

1 United States v. Mackintosh, 85 Fed. Rep. 333, 29 C. C. A. 176.

2 Circular, Jan. 15, 1902, 31 Land Dec. 228; Regulations, 37 Land Dec. 312.

See, also, Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 3.

Desert land, so far reclaimed by a former entryman that in one year it produced 200 tons of hay, is not sub-

In this connection it is held by the Land Department that is is a mere presumption that lands containing sufficient moisture to produce trees will also produce agricultural crops; but, like all presumptions of fact, it may be rebutted by proof showing that the land is actually desert in character and will not produce agricultural crops without irrigation.[3] Lands that one year after another for a series of years will not without artificial irrigation produce reasonably remunerative crops are desert within the meaning of the desert land law. Therefore, lands situated within a notoriously arid or desert region, and themselves previously desert within the meaning of the desert land law, do not necessarily lose their character as desert lands merely because of unusual rainfall for a few successive seasons their productiveness was increased and larger crops were raised thereon; and, under such circumstances a strong preponderance of evidence will be required to take them out of the class of desert lands.[4] The character of the land at the rate of the desert-land entry controls in determining whether the land is subject to such an entry, and the fact that the entryman purchased the improvements of a prior desert entryman for the same land does not entitle him to have the character of the land determined as of the date of the prior entry.[5]

ject to desert land entry after the relinquishment of the land by such entryman. Fisher v. Ballinger, Court of Appeals, District of Columbia, case decided March 6, 1911.

3 See Instructions, Dec. 5, 1901, 31 Land Dec. 149.

See, also, Heinzman v. Letroadec's Heirs, 28 Land Dec. 497; Instructions, 31 Land Dec. 149; *Id.*, 4 Land Dec. 33; Ruling of Secretary, 6 Land Dec. 662; Babcock v. Watson, 2 Land Dec. 19; C. G. Johnson, 27 Land Dec. 123; Circular, June 27, 1887, 5 Land Dec. 708; Nilson v. Anderson, 23 Land Dec. 138; Dickinson v. Auerbach, 18 Land Dec. 16; Lay v. Hunter, 2 Land Dec. 17; Houck v. Bettelyoun, 7 Land Dec. 425; Riggan v. Riley, 5 Land Dec. 595; Alexander Toponce, 4 Land Dec. 261; Freeman v. Lind, 8 Land Dec. 163; Roots v. Emmerson, 10 Land Dec. 169; W. L. Rynerson, 7 Land Dec. 177; Keys v. Rumsey, 10 Land Dec. 558; United States v. Jenks, 14 Copp's L. O. 61; Andrew Leslie, 9 Land Dec. 204; Sims v. Phalen, 11 Land Dec. 206; United States v. Haggin, 12 Land Dec. 34; Dillon v. Moulton, 15 Land Dec. 271; Wm. H. Wheeler, 22 Land Dec. 412; James A. Hardin, 10 Land Dec. 313; R. W. Makinson, 4 Land Dec. 165; Taylor v. Rogers, 14 Land Dec. 194; Campbell v. Sutter, 16 Land Dec. 40; Wm. Skeen, 14 Land Dec. 270.

4 Pederson v. Parkinson, 37 Land Dec. 522.

5 Chiffin v. Swift, 37 Land Dec. 89; Rivers v. Burbank, 9 C. L. O. 238; Taylor v. Rogers, 14 Land Dec. 194; Campbell v. Sutter, 16 Land Dec. 40.

§ 1301. Essentials—The entryman must acquire a water right.—The third essential in order for the entryman to secure a patent to land under the desert laws is that he must secure a water right sufficient to irrigate the land, and this water right must depend upon a "*bona fide* prior appropriation." He may appropriate the water himself directly from the natural streams, but this is not required by the law. He may purchase the right or acquire it in any legal method permitted for the acquisition of water rights, under the local laws of the State wherein the land is located. Hence a corporation organized for the purpose of appropriating and selling water to settlers may become the intermediary for furnishing water to applicants under the desert land law.[1] The applicant may also sink artesian or other wells and secure the water for the land in this manner, where the physical features of the country will permit.[2] In fact the method of obtaining the water right is immaterial, provided that a permanent water right is acquired by the applicant, and that the water is of sufficient quantity for the cultivation of the land, filed upon by the applicant.[3] There must be a *bona fide* ownership in the applicant of the water right; and an agreement, made between the entry of the land and final proof, to sell the water after such proof, is ground for the cancellation of the entry.[4]

1 Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming 10 N. M. 177, 61 Pac. Rep. 357, where the Court held that irrigation corporations generally are recognized in the legislation of Congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land.

See for powers of corporations, Secs. 1464-1478.

The applicant may purchase stock in an irrigation company, whereby he is entitled to the use of sufficient water. Bradley v. Vasold, 36 Land Dec. 106.

See, also, Instructions, Aug. 25, 1899, 29 Land Dec. 133; A. W. Lindsey, 28 Land Dec. 512; Wallace v. Boyce, 1 Land Dec. 26; Pederson v. Parkinson, 37 Land Dec. 522; Regulations, 37 Land Dec. 320, Secs. 26, 27; Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 12, 14.

See, also, final proof, Secs. 1303, 1304.

2 Orin P. McDonald, 13 Land Dec. 30.

3 Wallace v. Boyce, 1 Land Dec. 26.

4 Wheaton v. Wallace, 24 Land Dec. 100.

Upon the subject of actual reclamation necessary, see next section.

Water acquired to reclaim a desert entry does not become an inseparable appurtenance therefrom, and it may be conveyed separate and apart from a conveyance of the land. Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86.

§ 1302. Essentials—Acts tending toward reclamation—Annual proof.—And, again, before the entryman can secure a title to the land covered by his application, he must make satisfactory proof of the reclamation and cultivation of said land. It was the manifest purpose of Congress to hold out to the citizens of the United States by the Desert Land Acts an inducement to reclaim the waste and desert lands of the public domain, and thus render them subservient to the uses of husbandry by means of irrigation. This is to be accomplished by such a system of ditches as would carry to the subdivisions of the land, a supply of water such as, when let out of the ditches, might spread over the land, and stimulate vegetable life. It is not enough to simply acquire a water right, or to have the ditches constructed in which the water might be conveyed to the land, but there must be proof of the actual reclamation and cultivation of the land to the extent and cost and in the manner provided by the law. The law as amended by the Act of 1891, provides that no land shall be patented to any person under the Act, unless the entryman or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of the whole tract. This expenditure must be made at least at the rate of one dollar per acre per annum beginning with the first year after filing the application; but the applicant may make these expenditures of the whole three dollars per acre at an earlier date than the first three years, and upon making sufficient proof receive his patent: *Provided*, That he also furnishes proof of the actual cultivation of at least one-eighth of the land covered by his application. And determining whether a desert land entryman has complied with the requirement of the statute relative to annual expenditure, the reasonable value of the work done or improvements placed upon the land is the criterion, and not the amount alleged by the entryman to have been expended therefor.[1]

The statutory requirements as to the yearly expenditures is explicit and mandatory, as are all of the other requirements imposed

[1] Bradley v. Vasold, 36 Land Dec. 106; Rigdon v. Adams, 34 Land Dec. 279.

For the method of making annual proofs, see Regulations, 37 Land Dec. 317, Secs. 17-19.

by the Desert Land Act, and the Land Department, in the face of a contest brought upon the ground of failure to comply with the law, is without authority to waive its observance, even though it should be convinced of the intent of the claimant to in the future fully comply with the law; and, hence in cases for non-compliance with the law the only thing that the Department can do is to cancel the entry as provided in the Act.[2]

During the first, second, and third years after making an entry, the entryman must expend one dollar each year for each acre of land entered by him for the purpose of improving and reclaiming the land, and at or before the end of each year he must make and file with the register and receiver proof of such expenditure.[3]

In making annual proof, expenditures for ditches, canals, dams, fences, roads, where they are necessary, the first breaking of the soil for erecting barns, stables, etc., and for digging wells, where

2 Wilkinson v. Stillwell, 35 Land Dec. 92, where the Department held that well casing purchased and placed upon a desert land entry can not, so long as it is unattached to the realty, and retains its status as personal property, be considered a permanent improvement of the land within the meaning of the Act. Rigdon v. Adams, 34 Land Dec. 279.

So also there was the same ruling in the case of expenditures for machinery for boring wells. Nelson J. Littlejohn, 35 Land Dec. 638.

As no residence is required, the expenditure for the erection of a dwelling house is not within the contemplation of the Act. Instructions, Feb. 27, 1906, 34 Land Dec. 465.

An expenditure for "discing" land embraced in a desert land entry, with the view of planting the same to crop, may be accepted as equivalent to the first plowing of the soil, and the entryman is entitled to credit therefor. James Stimson, 37 Land Dec. 75.

See, also, Munsen v. Johnson, 39 Land Dec. 127, where it is held that the payment by a desert land entryman to cover his proportionate share of the cost of construction and maintenance of irrigation, by means of which his land is proposed to be irrigated is a proper basis for annual proof.

To entitle a desert entryman to credit for improvements made upon the land by a former entryman, they must be permanent in character, and have enduring utility, tending to affect reclamation of the land; therefore, expenditures for breaking up land by a previous entryman can not be accepted toward meeting the requirements of the statute where the ground broken has been permitted to relapse into its original state. Heflin v. Schnare, 40 Land Dec. 261.

3 Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 17-19; Regulations, 37 Land Dec. 317, Sec. 17.

A contest may be successfully maintained for the failure to make the requisite annual expenditure. Regulations, 37 Land Dec. 322, Sec. 32.

See, also, contests, Sec. 1307.

they are to be used in irrigating the lands, will be accepted by the Land Department as satisfactory expenditures; but expenditures for surveying the land in order to locate the corners of the same will not be accepted. However, where such surveying is for the purpose of ascertaining the levels of ditches, canals, etc., it will be accepted. Expenditures for cultivation after the soil has been first prepared will not be allowed, because the entryman is supposed to be repaid for such work by the crops to be reaped as the result of cultivation. Expenditures for material of any kind will not be allowed, unless such material has been actually installed or used for the purpose for which it was purchased. The annual proofs must contain itemized statements showing the manner in which expenditures were made. Expenditures for stock or an interest in an irrigation company, through which the water is to be secured for irrigating the land, will also be accepted as satisfactory annual expenditures, when the claimant shall file and make a part of his annual proof:

(a) A receipt or other writing signed by the proper officer or agent of the company showing payment in cash for stock or interest in the company, and the affidavit of the claimant showing that the payment was made in cash and when made.

(b) An affidavit of the claimant showing the nature of the contract or agreement he had with the company entitling him to the use of water, and the quantity of water to which he is entitled under such contract or agreement, or proper showing that the ownership of the stock or interest entitles him to the use of water and the quantity of water to which he is entitled by virtue of such ownership.

(c) A statement, under oath, of the proper officers of the company, showing the right of the company to the use of water; whether such right is based upon a decree, or decrees, of court, or upon appropriation or filings made in conformity to the State laws; the source or sources of its water supply; the quantity of water owned or appropriated by it; the total quantity of water which it is under contract or agreement to deliver to its patrons and stockholders, and the date when, no unforeseen obstacle preventing, it

will be able to deliver water on the land of the entry, which land must be described in the sworn statement.[4]

The annual proofs must be forwarded to the General Land Office at the end of the month during which they are made, after having been properly noted on the records of the local land office. Nothing in the statutes or the regulations should be construed to mean that the entryman must wait until the end of the year to submit his annual proof, because the proof may be properly submitted as soon as the expenditures have been made. Proof for the three years may be offered whenever the amount of $3.00 an acre has been expended in reclaiming and improving the land, and thereafter annual proof will not be required.[5]

§ 1303. **Essentials — Actual reclamation necessary — Final proof.**—One who makes a desert land entry must clearly show, in submitting his final proof, not only that he has a right to a sufficient supply of water to successfully irrigate the lands, and that the system of ditches is adequate for that purpose, but also that the necessary supply of water has been actually used on the lands in a manner to prove the beneficial results.[1] There must be an actual cultivation of at least one-eighth of the land covered by the entry. This provision was added by the amendatory Act of 1891,[2] and the actual tillage of this amount of land as tending to prove reclamation is required.[3] While the law does not require proof that agricul-

4 Regulations, 38 Land Dec. 157, amending that portion of Sec. 18 of the Regulations, 37 Land Dec. 317.

See, also, Caldwell v. Halvorson, 36 Land Dec. 395.

It is not evidence of fraud, or ground of contest, that a group of desert land entrymen agree voluntarily to subject their lands to the support of an irrigation system from which water may be taken for their reclamation. Williams v. Kirk, 38 Land Dec. 429.

5 Regulations, 37 Land Dec. 317, Secs. 18, 19.

1 Pederson v. Parkinson, 37 Land Dec. 522.

2 For text of Act, see Sec. 1290.

3 For the method of making final proof, see Regulations, 37 Land Dec. 318, Secs. 20-22; Mary Munro, 35 Land Decs. 15; Instructions, Feb. 17, 1904, 32 Land. Dec. 456. Final proof, which shows that because of irrigation there is on the land, "a marked increase in the growth of grass," or that "grass sufficient to support stock has been produced on all the land," is not sufficient.

See, also, Brandon v. Costley, 34 Land Dec. 488; Regulations, 37 Land Dec. 319, Sec. 25.

But see John Cunningham, 32 Land Dec. 207; Staats v. Northern Pac. R. Co., 36 Land Dec. 175.

tural crops have been actually raised upon the land by means of irrigation, this fact is considered by the Land Department as one of the best proofs of the reclamation of the land. The law as it now stands only requires that the land be prepared to raise ordinary agricultural crops, and the best proof that can be furnished of its condition is to prove that crops of this kind have been actually raised on them. Actual tillage must be shown. And the Department holds that if the kind of crops required by the statute have not been actually raised on the land, it must be made to conclusively appear, that because of climatic conditions, crops other than grass can not be successfully produced. In that case the actual production of a crop of hay of merchantable value, as a result of actual irrigation, may be accepted as sufficient compliance with the requirement as to cultivation.[4]

The final proof must show specifically the source and volume of water supply, and how it is acquired and how maintained. The number, length, and carrying capacity of all the ditches of each of the legal subdivisions must also be shown. The claimant and his witnesses must each state in full what has been done in the matter of reclamation and improvement of the land, and must answer fully, of their own personal knowledge, all of the questions contained in

4 Instructions, Feb. 17, 1904, 32 Land Dec. 456; Regulations, 37 Land Dec. 319, Sec. 25.

Reclamation shown by crops produced. Wallace v. Boyce, 1 Land Dec. 26.

Where the cultivation of one-eighth of the area of a desert land entry, covering a smallest legal subdivision, is rendered impossible by reason of physical conditions, proof showing that the entryman has cultivated all the area susceptible of cultivation, may be accepted and the entry submitted to the Board of Equitable Adjudication. Henry Welze, 39 Land Dec. 283.

The fact of reclamation may be shown without crops raised by irrigation, under original Act of 1877; Babcock v. Watson, 2 Land Dec. 19; Miller v. Noble, 3 Land Dec. 9; Instructions, July 23, 1885, 4 Land Dec. 51; George Ramsey, 5 Land Dec. 120; Chas. H. Shick, 5 Land Dec. 151; William G. Rudd, 7 Land Dec. 167; Adam Schindler, 7 Land Dec. 253; Emma J. Warren, 8 Land Dec. 113; Vibrans v. Langtree, 9 Land Dec. 419; William Skeen, 14 Land Dec. 270; John H. Kirk, 15 Land Dec. 535; Meads v. Geiger, 16 Land Dec. 366; Dickinson v. Auerbach, 18 Land Dec. 16; Thompson v. Bartholet, 18 Land Dec. 96; Rider v. Atwater, 20 Land Dec. 449; Gage v. Atwater, 21 Land Dec. 211; United States v. McKinney, 27 Land Dec. 516.

See, also, United States v. Mackintosh, 85 Fed. Rep. 333, 29 C. C. A. 176.

the final proof blanks. They must state plainly whether, at any time, they saw the land effectually irrigated, and the different dates on which they saw the land irrigated should be specifically stated. All of each legal subdivision must be actually irrigated. Therefore, it is not sufficient to state that water has been conducted upon each legal subdivision. If there are some high points which it is not practicable to irrigate, the nature, extent, location, and area of such points should be fully stated. If part of a legal subdivision is not susceptible of irrigation, such legal subdivision must be relinquished.[5]

The final proof must also show that the claimant has a right, under the laws of the State in which the land is located, to a sufficient supply of water to successfully irrigate all the irrigable lands embraced in his entry. It must also clearly appear that the system of ditches to conduct the water to the land and to distribute it over the whole of each legal subdivision is adequate for that purpose. Where the final proof submitted upon a desert-land entry shows that the entryman has cultivated and irrigated at least one-eighth of the land, and has constructed ditches, owns a sufficient water right, has brought the water to the land, and is prepared to turn water upon the entire tract when it shall have been prepared for cultivation, he is not required to show further that the water has been actually distributed over all the irrigable land in the entry.[6] In those States where entrymen have made applications for water rights, and have been granted permits, but where no final adjudication of the water right can be secured from the State authorities, owing to delay in the adjudication of the water courses, or other delay for which the entrymen are in no way responsible, proof that the entrymen have done all that is required of them by

5 Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 20-28; Rider v. Atwater, 20 Land Dec. 449.

6 Alonzo B. Cole, 38 Land Dec. 420, giving directions for amendment of Regulations, 37 Land Dec. 312; Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 23-28.

A certificate of stock in a water company which under the by-laws of the company is limited, under penalty, to location and use upon a certain designated 20-acre tract, can not be accepted toward meeting the requirements of the Desert Land Act, with respect to water rights as to another and different 20-acre tract embraced in the same entry, notwithstanding the amount of water to which the entryman is entitled under the stock may be more than sufficient to irrigate the 20 acres to which it is appurtenant. Theodore A. Iasigi, 39 Land Dec. 285.

the laws of the State, together with the proof that the necessary supply of water has been actually used on the land, may be accepted.[7] This modification of the rule that the claimant must furnish evidence of an absolute water right will apply only in those States, where, under the local laws, it is absolutely impossible for the entryman to secure title to his water right within the time allowed him to submit final proof on his entry, and in such cases the best evidence obtainable must be furnished.[8]

§ 1304. **Essentials—Final proof, when and how taken.**—The entryman, or his assignee, if the entry has been assigned, is ordinarily allowed four years from the date of the entry in which to complete the reclamation of the land, and he is entitled to make final proof and receive patent as soon as he has expended the sum of $3.00 an acre in improving and reclaiming the land, and has reclaimed all of the irrigable land embraced in his entry, and has actually cultivated one-eighth of the entire area of the land entered. Under the provisions of the Act of March 28, 1908, the period of four years may be extended, in the discretion of the Commissioner of the General Land Office, for an additional period not exceeding three years, if, by reason of some unavoidable delay in the construction of the irrigating works intended to convey the water to the land, the entryman is unable to make the proof of reclamation and cultivation within the four years. This does not mean that the period within which the proof may be made will be extended as a matter of course. Applications for extensions will not be granted unless it is clearly shown that the failure to reclaim and cultivate the land within the regular period of four years was due to no fault on the part of the entryman, but to some unavoidable delay for which he was not responsible and could not have readily foreseen.[1] Provided an extension has not been granted, where final proof is not made within the period of four years the register and receiver will send the claimant a notice, addressed to him at his postoffice address of record, informing him that he will be allowed ninety days in which to submit final proof. Should no action be taken within the time allowed, the register and receiver will report that

7 Instructions, 35 Land Dec. 305.

8 Regulations, 37 Land Dec. 319, Secs. 23-28.

1 For text of Act of March 28, 1908, see Sec. 1293.

fact, together with evidence of service, to the General Land Office, whereupon the entry will be canceled.[2] An entryman who desires to make application for this extension of time should file with the register and receive an affidavit setting forth fully all the facts, showing how and why he has been prevented from making final proof of reclamation and cultivation within the regular period. This affidavit should be corroborated by two witnesses who have personal knowledge of the facts, and the register and receiver, after carefully considering all the facts, will forward the application to the General Land Office, with appropriate recommendations thereon.[3]

The method of making final proof is as follows: When an entryman has reclaimed the land and is ready to make his final proof, he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land and must describe the entry by giving the number thereof and the name of the entryman. If the proof is made by an assignee, his name as well as that of the original entryman should be stated. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in this notice, two of whom must be used in making the proof. This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land, and it must also be posted in a conspicuous place in the local land office. Proof of publication must be made by affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local land office.

At the time and place mentioned in the notice, and before the officer named in the notice, the claimant will appear with two of the witnesses named in the notice, and make proof of reclamation, cultivation, and improvement of the land. This proof may be taken by any officer qualified to take the affidavits taken at the

2 Regulations, 37 Land Dec. 320, Sec. 28.

By the Act approved Jan. 26, 1912, Public, No. 62, the Secretary of the Interior was authorized to grant a further extension of time within which to make proof upon desert land entries in the counties of Weld and Larimer, Colorado.

3 Regulations, 37 Land Dec. 320, Sec. 29; Mary E. Norton, 38 Land Dec. 215; Gustave Gilbertson, 38 Land Dec. 474.

time of making the original entry. All claimants, however, wherever possible, should make proof before the register and receiver, because, by so doing, they may, in many instances, avoid delay caused by the fact that proofs submitted before officers other than the register and receiver are frequently suspended for investigation by a special agent, the testimony of each claimant should be taken separate and apart from and not within the hearing of either of the witnesses, and the testimony of each witness should be taken separate and apart from and not within the hearing of either the applicant or of any of his witnesses, and both the applicant and each of the witnesses should be required to state, in and as a part of the final proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.[4]

If the original entryman is dead, proof may be made by any one of the heirs or devisees.[5] At the time of making final proof, entrymen of alien birth must have been admitted to full citizenship, which must be shown by a duly certified copy of the certificate of naturalization.[6]

§ 1305. **Essentials—Payment for the land.**—At present, under the Desert Land Acts, there must be a payment by the entryman of 25 cents per acre, at the time of filing his application, and, upon making final proof, there must be a further payment of one dollar per acre. Under the original Act of 1877, there was one exception to this rule, and that was where the filing was made upon the even numbered sections, retained by the Government, within the place limits of a railroad grant. Relative to these lands, it was held that while desert entries might be made, under the Desert Land Act, if they come within the character of desert lands, but that the price of these lands was fixed by the previous Act of Congress of March 3, 1853, embodied in the proviso of Section 2357 of the Revised Statutes of the United States, which provided as follows: "That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any Act of Congress, shall be

[4] Regulations, 37 Land Dec. 318, Secs. 20-22.

[5] Regulations, 37 Land Dec. 321, Sec. 30.

[6] Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 4.

two dollars and fifty cents per acre."[1] As a result prior to the passage of the Act of 1891, lands, although within the general description of desert lands, could not be disposed of at less than $2.50 per acre. Furthermore, cases initiated under the original Act of 1877, but not completed by final proof until after the passage of the Act of 1891, came under the same rule and the sum of $2.50 per acre must be paid—the law, which was in effect at the time the entry was made, governing as to price.[2] After the amendatory Act of 1891, providing that the price of desert lands should be $1.25 per acre and repealing all prior Acts in conflict therewith, this was construed by the Land Department to thereafter authorize desert land entries at that price "without regard to the situation of the land with relation to the limits of railroad grants."[3] This is the present law as to all entries initiated after the passage of the amendatory Act of 1891.[4] Therefore, at the time of making final proof, the claimant must pay to the receiver the sum of $1.00 per acre for each acre of land upon which proof is made; this, together with the 25 cents per acre paid at the time of making the original entry, will amount to $1.25 per acre, which is the price, under the present law, to be paid for all lands entered under the desert-land law, regardless of their location. The receiver will issue

1 See 6 Fed. Stat. Ann., 1905, p. 333; 2 U. S. Comp. Stat., 1901, p. 1444; 3 Stat. L. 566.

2 United States v. Healey, 160 U. S. 136, 40 L. Ed. 369, 16 Sup. Ct. Rep. 247; reversing 29 Ct. Cl. 115; United States v. Ingram, 172 U. S. 327, 43 L. Ed. 465, 19 Sup. Ct. Rep. 177; reversing 32 Ct. Cl. 147.

The principal, if not the only, object of the requirement that the alternate reserved sections along the lines of land-grant railroads should be sold for not less than double the minimum price fixed for other public lands, was to compensate the United States for the loss of the sections given away by the Government. *Id.*

See, also, Wm. Brandt, 31 Land Dec. 277; Circular, June 27, 1887, 5 Land Dec. 708; John Cameron, 7 Land Dec. 436; Daniel G. Tilton, 8 Land Dec. 368; Annie Knaggs, 9 Land Dec. 49; Cyrus Wheeler, 9 Land Dec. 271; Hugh Reese, 10 Land Dec. 541; Henry L. Davis, 12 Land Dec. 632.

It was not ruled in these latter cases that lands within the limits of a railroad grant could not be entered under the Desert Land Act, but simply that they could not be entered for the price named in the Act, $1.25 per acre. J. F. Holcomb, 22 Land Dec. 604; F. W. Lawrence, 23 Land Dec. 450; Kate G. Organ, 25 Land Dec. 231; *Id.*, 20 Land Dec. 406.

3 Instructions, Jan. 13, 1892, 14 Land Dec. 74; Robert J. Gardinier, 19 Land. Dec. 83; Kate G. Organ, 20 Land Dec. 406; *Id.*, 25 Land Dec. 231.

4 For text of Act, see Sec. 1290.

a receipt for the money paid, and, if the proof is satisfactory,[5] the register will issue a certificate in duplicate and deliver one copy to the entryman and forward the other copy to the General Land Office at the end of the month during which the certificate was issued.

If the original entryman is dead, and proof is made by any one of the heirs or devisees, the final certificate should issue to the heirs or devisees generally, without naming them.

When the final proof is made on an entry made prior to the Act of March 28, 1908, for unsurveyed land, if such proof is satisfactory, the register and receiver will approve the same and forward it to the General Land Office, without collecting the final payment of $1.00 an acre, and without issuing final certificate. Fees for reducing the final proof testimony to writing should be collected and a receipt issued therefor, if the proof is taken before the register and receiver. As soon as the land is surveyed, they will call upon the entryman to make proof in the form of an affidavit, duly corroborated, showing the legal subdivisions covered by his entry. When this is done, the register and receiver will correct their records so as to make them describe the land by legal subdivisions, and, if final proof has been made and found satisfactory, and no other objections exist, final papers will be issued, upon the payment of the proper amount.[6] No fees or commissions are required of persons making entry under the desert-land laws, except such fees as are paid to the officers for taking the affidavits and proofs.[7]

§ 1306. The sale or assignment of desert land entries.—Where desert land was filed upon under the original Act of 1877,[1] and an assignment of the entry was made before final proof and before the amendatory Act of 1891 went into effect, it was uniformly held by the Land Department that the assignment was void, and rendered the entry subject to cancellation.[2] But it was held by the courts

5 For making final proof, see Sec. 1304.

6 The above applies only to entries made prior to the Act of March 28, 1908, which provides that thereafter all entries shall conform to the legal subdivisions and that no desert land entries can thereafter be made upon unsurveyed lands. For the text of the Act, and the construction thereof, see Sec. 1293.

7 Regulations, 37 Land Dec. 321, Secs. 30, 31; Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 30, 31.

1 For Act of 1877, see Sec. 1290.

2 Downey Case, 7 Copp's L. O. Dec. 26; David B. Dole, 3 Land Dec. 214; Henry W. Fuss, 5 Land Dec. 167; In-

that there was nothing in the statute denouncing a mere intention upon the part of the locator to transfer his title, when perfected, when he complies fully with the law with respect to the reclamation of the land, and pays the purchase money. In such cases, after the patent has been issued to him he may transfer the land to whom he pleases.[3]

But the Act as amended in 1891,[4] clearly provides for the assignment of these entries. Section 5 provides, "That no land shall be patented to any person under this Act unless he or his *assignors* shall have expended," etc. Also, by Section 7 authority is expressly given to issue patent "to the applicant *or his assigns;* but no person or association of persons shall hold by *assignment* or otherwise prior to the issue of patent, more than 320 acres of such arid or desert lands." Hence it was held by the Land Department that an entry taken up under the original Act of 1877, might, after the passage of the Act of 1891, be assigned to another by the entryman, and the title perfected in accordance therewith.[5] As to all lands taken up after the Act of 1891, there is no question as to the right of assignment before final proof.[6] An assignment, however,

structions, June 27, 1887, 5 Land Dec. 708; Haggin v. Doherty, 14 Land Dec. 123; Gasquet v. Butlers Heirs, 27 Land Dec. 721.

3 United States v. Mackintosh, 85 Fed. Rep. 333, 29 C. C. A. 176; Williams v. United States, 4 Ariz. 19.

4 See Sec. 1290.

5 Gasquet v. Butler's Heirs, 27 Land Dec. 721.

6 Ellingson v. Aitken, 30 Land Dec. 71; S. S. Hobson, 29 Land Dec. 453; Circular, July 11, 1899, p. 42, where it was prescribed that the affidavit of the assignee must be made before a United States Commissioner, or a judge or clerk of a court of record in the county wherein the land in question is situated.

See, also, Anna I. Dool, 31 Land Dec. 184; Arthur F. Hogsett, 29 Land Dec. 355; Luther J. Prior, 32 Land Dec. 608. The assignment of a portion only of a desert entry will not be recognized.

See Jacob Switzer Co., 33 Land Dec. 385; Wm. A. Calderhead, 36 Land Dec. 446; T. C. Power & Bro., 33 Land Dec. 152; Instructions, Sept. 17, 1904, 33 Land Dec. 251; Haggin v. Doherty, 14 Land Dec. 123; Herbert C. Oakley, 34 Land Dec. 383, where it was held that no executory contract on the part of the entryman to convey after securing title would be recognized.

See, also, Wheaton v. Wallace, 24 Land Dec. 100; Campbell v. Glover, 35 Land Dec. 474. A certified copy of the instrument of assignment must be filed with the local land office.

See, also, Wm. H. Calderhead, 36 Land Dec. 446; Green Piggot, 34 Land Dec. 573; Young v. Trumble, 35 Land Dec. 515. Prior to final proof and certificate, an entryman has no such

must be made to one who is qualified to make an original entry under the Act. Therefore, where an assignment is made of an entry and the assignee recognized by the General Land Office, the entryman or person making the assignment thereby parts with his title to the land, even if it be subsequently shown upon contest or investigation that the assignee is not qualified to hold by assignment.[7] Any other rule would permit unlawful assignments without any penalty by way of forfeiture in case of detection.

Under the Act of 1891 an assignment may be made to a corporation; but it is within the power and is the duty of the Land Department to require a corporation, as assignees of the original entryman, to show that the individual members composing the corporation are not disqualified under the desert-land laws from holding and acquiring title to the land covered by such an entry.[8] And no person or association of persons could hold, by assignment or otherwise, prior to the issuance of patent, more than 320 acres of such arid or desert land.[9] However, by Section 2 of the Act of March 28, 1908,[10] it was provided:

"Sec. 2. That from and after the date of the passage of this Act no assignment of an entry made under said Acts shall be allowed or

right in the land as may be assigned by operation of law without any voluntary act on his part.

For procedure upon assignment, see Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 14-16.

7 Bone v. Rockwood, 38 Land Dec. 253; overruling Owens v. State of California, 22 Land Dec. 369; Vradenburg's Heirs v. Orr. 25 Land Dec. 323; Heinzman v. Letroadec's Heirs, 28 Land Dec. 497, in so far as they conflict with the above views.

See, also, Love v. Flahive, 205 U. S. 195, 51 L. Ed. 768, 27 Sup. Ct. Rep. 486; *Id.*, on rehearing, 206 U. S. 356, 51 L. Ed. 1092, 27 Sup. Ct. Rep. 729.

8 J. H. McKnight Co., 34 Land Dec. 443; Jacob Switzer Co., 33 Land Dec. 383; Silsbee Town Co., 34 Land Dec. 430; Nevada So. R. Co., 22 Land Dec. 1.

A corporation of individuals all of whom have exhausted their rights under the desert land law is disqualified to take the assignment of a desert land entry. Edmond A. Fogarty, 37 Land Dec. 567.

9 See Sec. 7 of the Act of 1891, 6 Fed. Stat. Ann., 1905, p. 395, 2 U. S. Comp. Stat., p. 1550; 26 Stat. L. 1097; Silsbee Town Co., 34 Land Dec. 430.

A corporation holding an assignment of a desert land entry must show that the members composing the corporation do not hold, in the aggregate, by assignment or otherwise, more than 320 acres of land under the desert land law. Jacob Switzer Co., 33 Land Dec. 383.

10 Supp. Fed. Stat. Ann., 1909, p. 550; 35 Stat. L. 52.

recognized, except it be made to an individual who is shown to be qualified to make entry under said Acts of the land covered by the assigned entry, and such assignment may include all or a part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized."

Therefore, it is held by the Land Department that, if a person has made an entry in his own right, he can not thereafter take an entry by assignment, notwithstanding the fact that the area of the two entries combined does not exceed 320 acres. The language of the Act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one assignment. However, under the practice recognized by the General Land Office, it is held that, where, prior to the date of the above Act, assignments were taken of more than one entry, or where a person made an entry and also took one or more entries by assignment, the aggregate area of the land embraced in all such entries not exceeding 320 acres, such assignments and entries will not be disturbed. But all assignments and entries made subsequent to the approval of the Act of March 28, 1908, must be governed by the terms of that Act, which is held to mean that the desert-land right is exhausted either by making an entry or by taking one by assignment.[11] The Act of March 28, 1908, forbids the assignment of a desert-land entry to a corporation or an association of individuals.

Subject to the above limitations, desert-land entries may be assigned in whole or in part, and as evidence of the assignment there should be transmitted to the General Land Office the original deed of assignment or a certified copy thereof. Where the deed of assignment is recorded, a certified copy may be made by the officer who has custody of the record. Where the original deed is pre-

11 Regulations, 37 Land Dec. 315, Secs. 14, 15; Harrington v. Patterson, 38 Land Dec. 438.

Where, however, one whom has exhausted his right by taking an entry by assignment was nevertheless permitted to make an additional entry in his own name, it may be permitted to stand within the provisions of the Act of March 28, 1908, authorizing second desert entries, notwithstanding a pending contest charging disqualification at the time the entry was made. Harrington v. Patterson, 38 Land Dec. 438.

sented to an officer qualified to take proof in desert-land cases, a copy certified by such officer will be accepted. Copies of deeds of assignment certified by notaries public or justices of the peace, or, indeed, any other officers than those who are qualified to take proofs and affidavits in desert-land cases, will not be accepted.[12]

An assignee must also file with his deed of assignment an affidavit showing qualifications to take the entry assigned to him. He must show what entries have been made by or assigned to him under the agricultural laws, and he must show his qualifications as a citizen of the United States, that he is 21 years of age or over, and also that he is a resident citizen of the State in which the land assigned to him is situated. In short, the assignee must possess the qualifications required of the party making an entry. No assignable interest is acquired by the applicant prior to the payment of 25 cents an acre.[13] An assignment made prior to or on the day of such payment is treated as evidence of fraud.[14] The sale of the land embraced in an entry at any time before final payment must be regarded as an assignment of the entry, and in such cases the person buying the land must show that he possesses all the qualifications required of an assignee.[15]

§ 1307. **Contests.**—Contests may be instituted against desert land entries for illegality or fraud in the inception of the entry or for failure to comply with the law after entry, or for any sufficient cause affecting the legality of the claim. An entry made in the interest or for the benefit of another is illegal, and is subject to contest on that ground. Successful contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry, and the register will give the same notice, and is entitled to the same fee for notice as in other cases.[1]

A contest charging a desert-land entryman with the failure to make the requisite annual expenditure, thus putting in issue the truth of the annual proof offered by the entryman, may be brought

12 Regulations, 37 Land Dec. 316, Sec. 16.

13 T. C. Power & Bro., 33 Land Dec. 152.

14 Joab Lawrence, 2 Land Dec. 22.

15 Simeon S. Hobson, 29 Land Dec. 453.

See, also, Regulations, 37 Land Dec. 316, Sec. 16.

1 Regulations, 37 Land Dec. 322, Sec. 32; Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 32, 33.

But see Gray v. Dixon, 83 Cal. 33, 23 Pac. Rep. 60.

prior to the expiration of the time allowed for the submission of the final proof.[2] So, too, the charge that the assignee of a desert entry is disqualified to take by assignment is sufficient basis for contest.[3] However, the fact that the annual expenditures for the benefit of a desert-land entry are made by another, for the entryman, is not sufficient ground for contest, if made in good faith to effect reclamation, and not with a view to indirectly obtain title to the land.[4]

The filing of contest against a desert-land entry during the pendency of an application for extension of time under the Act of March 28, 1908, will not prevent the allowance of such application, where the contest affidavit does not charge facts tending to overcome the *prima facie* evidence showing right to the extension set forth in the application.[5]

§ 1308. **Relinquishments.**—A desert land entry may be relinquished at any time by the party owning the same, and when relinquishments are filed in the local land office the entries will be canceled by the register and receiver in the same manner as homestead, pre-emption, and other entries. Where an entry has been relinquished the land reverts to the Government. A relinquishment can not be made in favor of another person.[1] However, one in possession of desert land open to filing under the Desert Land Act may surrender the possession to another, and file a relinquishment to file thereon, and the latter taking possession may file thereon, and obtain a patent upon complying with the law.[2] This ruling, as we view the law, depends upon the condition that such a filing is prior to any other after the relinquishment has been made.

§ 1309. **"The Dry Farm Act" or "Enlarged Homestead Act"—Cause of its enactment.**—In all of the States of the arid West

2 Bradley v. Vasold, 36 Land Dec. 106; Julian v. Harding, 31 Land Dec. 10; Wilkinson v. Stillwell, 35 Land Dec. 92; Porter v. Carlile, 34 Land Dec. 521; Stevenson v. Scharry, 34 Land Dec. 676; Richmond v. Davidson, 40 Land Dec. 452.

3 Bone v. Rockwood, 38 Land Dec. 253.

4 Williams v. Kirk, 38 Land Dec. 429.

5 Hoobler v. Treffry, 39 Land Dec. 557.

1 One who, after attempting to perfect a desert land entry taken by assignment, relinquishes the same in the face of charges by a special agent, is disqualified to make an original entry of the same tract. Ida Lundquist, 37 Land Dec. 149.

2 Moore v. Groftholdt, 10 Cal. App. 714, 103 Pac. Rep. 149.

there are vastly more lands which might be irrigated and reclaimed than there is water to reclaim them. Owing to the recent scientific experiments made by agricultural colleges and the Government experts, it has been ascertained that certain agricultural crops may be raised upon these hot, dry, exceedingly arid lands without irrigation and at some profit. Therefore, Congress, always anxious that the arid lands throughout the West should be brought into a state of cultivation, and always generous to the extreme when it comes to the matter of the granting of its public lands, enacted the Dry Farm Act.

The lands to which the Act applies are "non-irrigable" lands; that is to say, land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to the unusual methods of cultivation, such as the system commonly known throughout the arid West as "scientific dry farming" or "dry farming," and for which there is no known source of water supply from which such lands may be successfully irrigated at a reasonable cost. "What are dry-farming methods? you may ask. Briefly told, simply this: Deep plowing, in order to form a sufficient reservoir for the reception of all the moisture that falls; surface cultivation at the proper times in order to maintain a dust mulch and prevent the evaporation of the gathered moisture; the selection of drouth-resisting crops, which are numerous, and include splendid varieties of all the more important cereals, fruits, and vegetables; careful attention to the surface of the soil while the crop is growing. Simple enough, like standing an egg on end, when you know how, but requiring great care, patience, and thoroughness. Catch all the moisture that falls and do not allow any of it to escape, except as it passes into the growing and ripening crop. Such is the science of dry farming." [1]

§ 1310. "The Dry Farm Act," or "Enlarged Homestead Act."—By the Act of February 19, 1909,[1] there was enacted "The Dry Farm" or "Enlarged Homestead" Act, the full text of which is as follows:

"Sec. 1. That any person who is a qualified entryman under the

[1] From the speech of Hon. Frank W. Mondell of Wyoming, in the House of Representatives, Dec. 14, 1909. Vol. 45 Congressional Record, p. 225.

[1] Supp. Fed. Stat. Ann., 1909, p. 560; 35 Stat. L. 639.

homestead laws of the United States may enter, by legal subdivisions, under the provisions of this Act, in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico, 320 acres, or less, of non-mineral, non-irrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, that no lands shall be subject to entry under the provisions of this Act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

"Sec. 2. That any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer, as required by Section 2290 of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in Section 1 of this Act, and shall pay the fees now required to be paid under the homestead laws.

"Sec. 3. That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his former entry which shall not, together with the original entry, exceed 320 acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

"Sec. 4. That at the time of making final proofs as provided in Section 2291 of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

"Sec. 5. That nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the States named in Section 1 of this Act under the provisions of Section 2289 of the Revised Statutes, but no person who has made such entry under this Act shall be entitled to make homestead entry under the

provisions of said Section, and no entry made under this Act shall be commuted.[2]

"Sec. 6. That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this Act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in aggregate two million acres, and thereafter they shall be subject to entry under this Act without the necessity of residence: *Provided*, that in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section."

Relative to the last clause of the above section, it is held by the Secretary of the Interior that there is no authority for establishing a fixed and arbitrary limit to be measured by distance or time from the land so entered, and it is said by the Secretary: "In the regulations issued by the department for the guidance of registers and receivers in the administration of this law, it was stated that no attempt would be made at that time to determine how far from the land an entryman would be allowed to reside, as it was believed that a proper determination of that question would depend upon the circumstances of each case.[3]

"The department is unable to find in the language of the section any authority or justification for an arbitrary rule fixing a definite distance from the land within which such an entryman must reside

2 For regulations of the Secretary of the Interior under the above Act, see Circular, 37 Land Dec. 546; Instructions, 37 Land Dec. 697, 707; 38 Land Dec. 361.

A homesteader who has made entry under the general law, upon which patent has issued, is not entitled to an additional entry under Sec. 3 of the Act of Feb. 19, 1909.

See, also, William P. Wall, 38 Land Dec. 566.

A married woman is not by reason of her marriage disqualified to make entry under Sec. 3 of the enlarged homestead Act, as additional to an entry made by her prior to her marriage. Alice C. St. John, 38 Land Dec. 577.

3 See 38 Land Dec. 364, 365.

or to fix a period of time within which he must be able to reach his claim, as it is believed, as stated in the regulations, that each case should be decided upon its own merits when actually presented to the department upon final proof, protest, or contest through the regular official channels. However, I think it is proper to state that the entry provided for by this law is a homestead entry. It is so declared in the statute, and the entryman is required to possess the qualifications of a homesteader, notwithstanding the fact that the entryman is excused from actually residing on the land entered. Nevertheless, the law requires that he shall reside within such distance from it 'as will enable him to successfully farm the same, as required by this section.' It is believed that Congress used this language advisedly, and that it was intended that the entryman himself should personally farm the land or personally supervise such farming. Otherwise, the use of the language employed by Congress has no meaning whatever."[4]

By the Act approved June 17, 1910, the "Dry Farm Act" was extended to the State of Idaho, including the provisions of Section 6, above quoted, with the exception that the Secretary of the Interior was authorized to segregate for the purposes of the Act only 320,000 acres.[5]

§ 1311. "The Dry Farm Act"—Construction of the Act.—Lands containing merchantable timber, mineral lands, and lands within a National reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply, can not be entered under the Act. However, it is held by the Secretary of the Interior that minor portions of a legal subdivision sus-

[4] W. L. Roberts, 39 Land Dec. 166.

Lands embraced in entries under the general homestead law are, if the facts justify such action, subject to designation under Section 6 of the enlarged homestead Act, and entrymen will not, after such designation, be required to reside thereon. Instructions, 38 Land Dec. 548.

One who in good faith makes a homestead entry of lands designated under Sec. 6 of the enlarged homestead Act, as not containing a sufficient supply of water suitable for domestic purposes, and therefore subject to entry free from the necessity of residence, will not be required to establish residence should a sufficient supply of water be subsequently obtained. Web. Green, 38 Land Dec. 586. They are, however, required to reside within such a distance as will enable them to successfully cultivate and improve the land.

[5] See Public, No. 214; 36 Stat. L. 531.

ceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under the Act, provided that no one entry shall embrace in the aggregate more than forty acres of such irrigable lands. In order to make the lands subject to entry under the Act, they must have first been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. Therefore, until the lands have been so "designated" by the Secretary, no applications to enter can be received. Again, the fact that lands have been designated as subject to entry is not conclusive as to the character of such lands. But each entryman must furnish the affidavit required by Section 2 of the Act, and should it afterward develop that the lands are not of the character contemplated by the Act, the entry will be canceled or the area reduced, as the circumstances may warrant.

The sixth section of the Act applies alone to the State of Utah and to lands which do not have upon them sufficient water for domestic purposes as will render continuous residence upon such lands possible, in which case the entryman of such lands will not be required to prove continuous residence thereon. The Act provides in such cases that all entrymen must reside within such distance of the land entered as will enable them to successfully farm the same as required by the Act. Just why an exception should be made in this respect for the State of Utah, we are unable to determine, as the physical features of these lands of the character contemplated in the Act are the same in all parts of the arid West. Perhaps it was due to the astuteness of the members of Congress from Utah, and to Senator Smoot in particular, that this State was particularly favored by the Act.[1]

1 For the regulations of the Land Department under the Act, see Instructions, and cases referred to in the last section, No. 1310.

CHAPTER 67.

THE CAREY LAW.

§ 1312. Scope of chapter.
§ 1313. The law—In general.
§ 1314. Cause of the enactment of the Carey Act.
§ 1315. Full text of Act of August 18, 1894.
§ 1316. Acts amendatory—Act of June 11, 1896.
§ 1317. Acts amendatory—Act of March 3, 1901.
§ 1318. Amendatory Acts—Acts of March 1, 1907, and February 24, 1909, relating to Indian lands.
§ 1319. Acts amendatory—Act of March 27, 1908, granting additional land to Idaho and Wyoming, and Act of February 18, 1909, extending the law to New Mexico and Arizona.
§ 1320. Amendatory Acts—Act of March 15, 1910, relating to temporary withdrawals.
§ 1321. Amendatory Acts respecting coal lands—Acts of March 3, 1909, and June 22, 1910.
§ 1322. Amendatory Acts—Act of February 21, 1911, relative to furnishing Carey Act projects with surplus water acquired by the Reclamation Service.
§ 1323. Particular features of the Acts and their operation.
§ 1324. Regulations by the Secretary of the Interior.
§ 1325. Acceptance of the grant made by the Carey Act by the States named.
§ 1326. The powers of the State board.
§ 1327. The acquisition of a water right for projects.
§ 1328. Proceedings under State laws—Application to board for selection of lands.
§ 1329. Proceedings under State laws—Contract between State and applicant.
§ 1330. Proceedings under State laws—The entry and settlement of the land by settlers.
§ 1331. Proceedings under State laws—Duties of settlers.
§ 1332. Proceedings under State laws—Assignment of entries.
§ 1333. Proceedings under State laws—Lands can be disposed of only to actual settlers.
§ 1334. Proceedings under State laws—The lien for the water rights.
§ 1335. Proceedings under State laws—Rights of way for canals and other works.
§ 1336. The proceeds from sale of lands to constitute a State reclamation fund.

§ 1312. Scope of chapter.—There is another method which the United States has for disposing of the desert lands of the public domain, and under the scheme of which the lands must be reclaimed by irrigation, and that is by what is popularly called the "Carey Act."[1] This Act properly comes under the subject of donations of lands by the Government to the States named for internal improvement;[2] but owing to the fact the acquisition of title to these lands also involves the question of the acquisition of the right to the use of water for their reclamation, and in order to discuss these subjects together, we will include the whole subject of the Act in this chapter, both as relating to the acquisition of the title to the lands and to the water rights.

§ 1313. The law—In general.—The Carey Act, approved August 18, 1894, at this writing, has now been in force for eighteen years.[1] As first passed, few, if any, of the States to which it was applicable were in a position to avail themselves of its benefits. The States had no money to construct the great works necessary, or were powerless under their constitutions to do so. So the Act was amended to meet the conditions and needs of the respective States, and, in effect, to enable the States to act as the agents of the General Government, and to authorize the State to make contracts with individuals or corporations who would furnish the financial aid necessary for the construction of the works, and at the same time to give ample security to the parties who furnished the money for the same. Again, for the purpose of securing the necessary money the construction company is permitted to mortgage its equity in the project, to issue bonds, or to assign its contracts with the settlers for the purchase of the water right, which is practically the price the settler pays for his land, the State charging but a nominal price for the same. The only conditions imposed upon the settlers are that they shall occupy, improve, and cultivate the land entered by them, until they secure their patents, which they may obtain upon final proof that the lands have been so occupied, improved, and cultivated, and by paying the balance due the State.[2] They must then

1 For full text of the Act, see Sec. 1315.

2 For the donation of lands for internal improvement, see Secs. 427, 428.

1 For the full text of the Carey Act and its amendments, see Secs. 1315-1322.

2 For the final proof, see Secs. 1330, 1332.

keep up their annual payments with the construction company, for which the company is given a lien until the water right is fully paid for. In many instances it is also provided that when all of the lands have been so entered and full payments for the same have been made, together with the full payments for the water rights, the title to the entire project, together with that of the necessary works, passes to the ownership of the settlers themselves, who thereafterward own and control the same, and the original stockholders of the corporation are superseded by them.

The results of this law have been beneficial in the extreme, as may be seen in the States which have taken advantage of its benefits. Millions of acres have been reclaimed through its means, and thousands of homes have been furnished. The popularity of the law seems to arise from the fact that it furnishes absolute security to all the varying interests involved in the problem of reclamation of lands under this system. To be sure, mistakes have been made, as was especially true during the formative period of the law and its workings. But the problems for its successful outcome have been rapidly solved during the eighteen years of its existence. One feature which indicates its successful working is the fact, as will be noticed in the succeeding sections of this chapter, of the comparatively little litigation, as compared with other special laws for the reclamation of the arid lands.

The amount of land actually reclaimed and under irrigation under the Carey Act, according to the preliminary census results of the thirteenth census, 1910, is 288,553 acres. The acreage enterprises capable of irrigation in 1910, under the Carey Act, is given as 1,089,677 acres. The acreage included in enterprises completed or under construction in 1910, under the same Act, is given as 2,573,874 acres.[3]

Those most familiar with the practical operation and workings of the Carey law, and who have had the best opportunity to study its scope and field of usefulness are its most enthusiastic advocates, and predict that in the end the development of the arid region will be better promoted and the interests of communities better conserved through the agency of this law than through the National Reclamation Act, which law we have discussed in a preceding chapter.[4]

[3] For the irrigation district laws, see Secs. 1386-1432.

[4] For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

§ 1314. Cause of the enactment of the Carey Act.—The law under discussion in this chapter and commonly known as "The Carey Act," was approved August 18, 1894, Senator Carey of Wyoming being the author of the original Act. This Act was afterward amended by the Acts of June 11, 1896, March 3, 1901, and February 18, 1909.[1]

The passage of the Carey Act may be ascribed to two distinct causes, one physical and the other political. The physical cause was that at the time of the passage of the Act the desert lands still owned by the United States and open to settlement were becoming more and more inaccessible from the waters of the natural streams. The homestead and pre-emption laws had been in force for many years; and as there was no limitation as to the exact locality in reference to the natural streams of the lands under these laws which might be taken up, it is natural that the early settlers chose those lands which were the nearest or most accessible to the streams. The desert land law had also been in force for seventeen years. This law prescribed that the lands must not be watered by the natural streams, in order to bring them within the character of the lands which might be filed upon under the Act. But it was natural that the settlers should choose those lands which were the nearest to water, as the law prescribed that the water must be conducted upon the lands in order to reclaim them.[2] So, in 1894, at the time when the Carey Act was passed, a great portion of the best of public lands had been taken up by the settlers, and especially those lands where the water for irrigation could be conducted thereon at a moderate amount of expense; at least, with the amount of capital which the average settler or a combination of a settler and his neighbors could command. The desert lands at this time which were open for filing were further back from the streams, and hence required larger irrigation works and longer canals and ditches, and consequently required a large amount of capital to construct the works necessary for their reclamation. Hence it was considered that large companies with plenty of financial backing would take up these irrigation projects, construct the works, and, being backed in a way by

For a comparison of the workings of the National Reclamation Act and those of the Carey Act, see Secs. 1239, 1240.

1 For the full text of the Act and its amendments, see Secs. 1315-1322.

2 See Secs. 1288-1290.

the State wherein the lands were located, a large amount of lands which were then barren and practically inaccessible to water would thus be brought into cultivation. This is exactly what has been the working effect of the law, as we will show in a future discussion of the subject.[3]

The political cause for the passage of the Act was that the West had long waited for Congress to make some provisions for the construction of the great irrigation works required to irrigate these lands as a National enterprise. Nothing at this time had been done toward that end.[4] At that time failing in getting the General Government to take up the matter of the construction of the great works necessary for the reclamation of the desert lands, there was a general demand made upon Congress by the West that the remainder of the public lands be granted to the respective States wherein they were situated, in order that the States themselves might provide measures for their reclamation. This movement also failed in its entire accomplishment. But the passage of the Carey Act was a sort of a compromise, the object of which Act was to aid the public land States in the reclamation of the desert lands therein.

§ 1315. **Full text of Act of August 18, 1894.**—The original Carey Act was enacted as Section 4 of the Act of August 18, 1894, entitled, "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes."[1]

The full text of the Act, together with the amendatory Acts, is as follows:

"Sec. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation, and sale thereof in small tracts to actual settlers, the Secretary of the Interior, with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act entitled

[3] See Secs. 1315-1336.

[4] This is exactly what was done under the National Reclamation Act of 1902, discussed in a previous chapter of this part. See Chap. 65, Secs. 1235-1286.

[1] 6 Fed. Stat. Ann., 1905, p. 397; 28 Stat. L. 422; 2 U. S. Comp. Stat., 1901, p. 1554.

'An Act to provide for the sale of desert land in certain States and Territories,' approved March 3, 1877, and the Act amendatory thereof, approved March 3, 1891,[2] binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each 160-acre tract cultivated by actual settlers, within ten years next after the passage of this Act, as thoroughly as is required of citizens who may enter under the said desert land law.

"Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

"As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its

2 The desert land Acts, see Chap. 66, Secs. 1287-1311.

The Act applies to the same States to which the desert land Acts apply, which are: California, Colorado, Idaho, Montana, Nevada, North Dakota, South Dakota, Utah, and Wyoming, and by the Act of Feb. 18, 1909, to Arizona and New Mexico. See Supp. Fed. Stat. Ann., 1909, 559; 35 Stat. L. 638.

assigns for said lands so reclaimed and settled: *Provided*, that said States shall not sell or dispose of more than 160 acres of said lands to any one person, and any surplus of money derived by any State from the sale of such lands in excess of the cost of their reclamation shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State."

§ 1316. Acts amendatory—Act of June 11, 1896.—The Act was amended in an important particular by Section 1 of the Sundry Civil Appropriation Act of June 11, 1896,[1] which is as follows:

"Sec. 1. . . . That under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in Section 4 (of the Act set forth above) a lien or liens is hereby authorized to be created by the State to which such lands are granted, and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*, that in no event, in no contingency, and under no circumstances, shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part."

§ 1317. Acts amendatory—Act of March 3, 1901.—The limitation of time in the above quoted Section 4 was modified by Section 3 of the Sundry Civil Appropriation Act of March 3, 1901,[1] which provides as follows:

"Sec. 3. That Section 4 of the Act of August 18, 1894, entitled, etc. (see Section 4, quoted above) is hereby amended so that the ten years' period within which any State shall cause the lands applied for under the Act to be irrigated and reclaimed, as provided in said

[1] 6 Fed. Stat. Ann., 1905, p. 398; 2 U. S. Comp. Stat., 1901, p. 1556; 29 Stat. L. 434.

[1] 6 Fed. Stat. Ann., 1905, p. 398; 31 Stat. L. 1188.

section as amended by the Act of June 11, 1896, shall begin to run from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if the State fails within said ten years to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period of not exceeding five years, or may, in his discretion, restore such lands to the public domain." [2]

§ 1318. **Amendatory Acts—Acts of March 1, 1907, and February 24, 1909, relating to Indian lands.**—By the Act of March 1, 1907,[1] the provisions of the foregoing Acts were extended to the desert lands within the former Southern Ute Indian Reservation in Colorado not included in any forest reservation: "*Provided*, that before a patent shall issue for any of the lands aforesaid under the terms of the said Act approved August 18, 1894, and amendments thereto, the State of Colorado shall pay into the Treasury of the United States the sum of $1.25 per acre for the lands so patented, and the money so paid shall be subject to the provisions of Section 3 of the Act of June 15, 1880, entitled, 'An Act to accept and ratify the agreements submitted by the confederated bands of Ute Indians in Colorado for the sake of their reservation in said State, and for other purposes, and to make the necessary appropriation for carrying out the same.'

"Sec. 2. That no lands shall be included in any tract to be segregated under the provisions of this Act on which the United States

2 For instructions governing the extension of time for irrigation and reclamation, under the amendment, see 37 Land Dec. 682, where it is held that applications for extension of time will only be entertained upon the showing of the happening of some event as specified preventing the completion of the reclamation which could not have been reasonably anticipated or guarded against, such as: The destruction of the works by flood or other unavoidable casualties; inability to complete construction of works because of unforeseen structural or physical difficulties encountered; error or misjudgment in surveying and locating works, necessitating new surveys and construction; financial failure on the part of the contractor under the State; other reasons not specified but falling within the general scope of the instructions will be considered if presented. In all cases the showing must be made by or through the proper State authorities and clearly and specifically set forth all the facts and reasons which prevented the completion of the contract or reclamation of the land within the ten year period.

1 34 Stat. L. 1057.

Government has valuable improvements or which have been reserved for Indian schools or farm purposes."

Also, by the provisions of the Act of February 24, 1909,[2] the provisions of the foregoing Acts were extended to the desert lands within the former Ute Indian Reservation in Colorado, under the same terms and subject to the same limitations as the provisions of the Act last above extending the provisions of the Acts to the former Southern Ute Indian Reservation.

§ 1319. **Acts amendatory—Act of March 27, 1908, granting additional land to Idaho and Wyoming, and Act of February 18, 1909, extending the law to New Mexico and Arizona.**—Also, in the Sundry Civil Appropriation Act of March 27, 1908,[1] under the head of "Arid Lands in Idaho and Wyoming," there are the following provisions:

"That an additional one million acres of arid lands within each of the States of Idaho and Wyoming be made available and subject to the terms" of the Carey Act and its amendments, "and that the States of Idaho and Wyoming be allowed under the provisions of said Acts said additional area or so much thereof as may be necessary for the purposes and under the provisions of said Acts."

Again, by the Act of February 18, 1909,[2] the provisions of the Carey Act and its amendments were extended to the Territories of New Mexico and Arizona, "and that said Territories, upon complying with the provisions of said Act, shall be entitled to have and receive all of the benefits therein conferred upon the States."

§ 1320. **Amendatory Acts—Act of March 15, 1910, relating to temporary withdrawals.**—Again, by the Act of March 15, 1910,[1] Section 4 of the Carey Act was amended so as to authorize the "Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: *Provided,* that if the State or Territory shall not pre-

2 Public, No. 255.
1 35 Stat. L. 317-347.

2 Public, No. 244.
1 Public, No. 87; 28 Stat. L. 372.

sent its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made."[2]

To obtain the benefits of this amendatory Act, the State, through its proper official, will be required to file in the local land office an application therefor in the form provided, which shall set forth the name of the individual or corporation proposing to reclaim the lands; that all of the forms and conditions imposed by the State law upon the proposer, prior to segregation, have been complied with; that from the showing made, or other source of information, it is believed that sufficient water to irrigate the whole tract asked to be withdrawn, over and above prior appropriations, is available, and that the proposer has either acquired title to such water, or applied for the same, and that the lands are desert in character. Appended to the application should be a list of the lands asked to be withdrawn; if the lands are unsurveyed, the fact should be set forth, together with a statement that an application has been filed for the survey in the office of the Surveyor-General. Accompanying such application should be filed an affidavit, in the form provided, based upon personal examination, that the lands are desert in character, and are non-mineral. This affidavit should be made either by the proposer, his or its engineer, or by the State engineer, or one of his assistants. Where the lands sought to be withdrawn are situated in more than one land district, a list must be filed in each district, describing the lands in that district.

Upon the filing of such application the register will at once note the same upon his records, and will thereafter reject all applications to enter, purchase, or select any of such lands, excepting when settlement or application to enter, purchase, or select prior to the date of the filing of the State application is alleged, or disclosed of record; he will then at once transmit the application to the General Land Office for further action, first noting thereon the date of filing, over his written signature.

Within three months after the date of filing the application for withdrawal in the local land office, the State must file a corroborated affidavit by the proposer, his or its engineer, or the State engineer,

2 For regulations issued under the Act, see those of April 25, 1910, 38 Land Dec. 580.

that the work of surveying and laying out the proposed irrigation system has been actually commenced in the field and is being energetically prosecuted; this affidavit should show the work accomplished and the results. In default of such showing by the State, the withdrawal will be promptly revoked.

In the event that any of the tracts withdrawn are found to be above the proposed irrigation works, or for any other reason not susceptible of irrigation, the fact and description of the non-reclaimable land by smallest legal subdivisions should be at once communicated to the General Land Office, that they may be relieved from the withdrawal. Again, if at any time after withdrawal it is shown that the State is not energetically prosecuting the investigation and survey of the lands, that the same are not reclaimable by the proposed system of reclamation, are not desert in character, or for any reason are not subject to the provisions of the Carey Act, or that the proposer is not proceeding in good faith, the withdrawal will be at once revoked.

The year mentioned in the Act as the period of withdrawal will commence to run from the date of filing the application for withdrawal in the local land office.

§ 1321. Amendatory Acts respecting coal lands — Acts of March 3, 1909, and June 22, 1910.—The Act of March 3, 1909, entitled, "An Act for the protection of the surface rights of entrymen,"[1] provides that any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same.

No complete equitable title or interest vests in a State by the approval of a segregation list under the Carey Act; and if subsequent to such approval and prior to the final approval of the patent list lands in the segregation list are classified as coal lands, it is held by the Secretary of the Interior that the department is without

[1] Supp. Fed. Stat. Ann., 1909, p. 563; 35 Stat. L. 844. For full text of Act, see coal lands, Sec. 442.

authority, so long as such classification stands, to approve or patent such lands to the State, except in accordance with the Act of March 3, 1909; and the State will then be called upon to elect to accept a patent to the lands with a reservation of the coal deposits, or to proceed to a hearing to ascertain and adjudicate the character of the land, at which the burden of sustaining the coal classification will rest upon the Government. If upon such hearing the tracts are determined to be coal lands, the State may still take a patent for the surface, and if non-coal, patent without reservation may issue, all else being regular.[2]

By the Act of June 22, 1910, entitled, "An Act to provide for agricultural entries on coal lands,"[3] it was provided that unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are lands valuable for coal, shall be subject to selection under the Carey Act, and for entry under other laws mentioned in the Act, with a reservation of the United States of the coal in such lands and the right to prospect for, mine, and remove the same.[4]

§ 1322. Amendatory Acts—Act of February 21, 1911, relative to furnishing Carey Act projects with surplus water acquired by the Reclamation Service.—By the Act of February 21, 1911, the Reclamation Service was authorized to contract for the impounding, storing, and carriage of water and to co-operate in the construction and use of reservoirs and canals under reclamation projects and for other purposes. The full text of the Act is given in a previous section under our chapter upon the National Reclamation Act.[1] It was especially provided in the Act that surplus water from reclamation projects might be furnished to projects constructed under the law known as the Carey Act, and those constructed by individuals, corporations, associations, and irrigation districts organized for or engaged in distributing the water for irrigation. It was provided

2 State of Wyoming, 38 Land Dec. 508; State of Utah, 40 Land Dec. 340.

See, also, Instructions, 37 Land Dec. 489.

3 Public, No. 227; 36 Stat. L. 583.

For full text of Act, see coal lands, Secs. 442, 443.

4 That this Act is applicable to desert land entries, see Sec. 1294.

That it is applicable to reservations under the National Reclamation Act, see Sec. 442, 443.

1 See Sec. 1259.

See, also, 36 Stat. L. 925; Supp. U. S. Comp. Stat., 1911, p. 682.

that a proper charge should be made for the impounding, storing, and carrying of such surplus water by the Secretary, who is to take into consideration the cost of the construction and maintenance of the works by which such water is to be impounded or carried.

§ 1323. Particular features of the Acts and their operation.—It will be noticed from the provisions of the law quoted in the preceding sections,[1] that there are many features of the law in common with the provisions of the desert land laws discussed in the previous chapter.[2] The intent of the law is evidently to permit the several States named in the Act, by the construction of the irrigation works necessary to aid their citizens in irrigating and reclaiming large tracts of lands which are deemed desert under the Desert Land Acts. The significant features of the original Act are that it calls for reclamation by irrigation, occupation, and cultivation before any patent should pass from the United States to the State or to its assigns. Another feature worthy of note is that the States are not authorized to lease or use or dispose of the lands selected in any way whatever, except to secure their reclamation, cultivation, and settlement. Patents are to be issued by the Government when the lands shall be reclaimed and occupied by actual settlers. Very little seems to have been done under the original Act except that some of the States passed statutes accepting the benefits of the grant and made provisions by various methods for the beginning of the work looking to the reclamation of arid tracts of lands within their boundaries. As early as November 22, 1894, rules and regulations were drawn up by the General Land Office, as provided for in the Act, governing the selection and withdrawal of lands under the Act.[3] And as the law has been amended from time to time, so the regulations have also been amended.[4]

By the Act of June 11, 1896, a very important amendment was made to the original Act.[5] One object of the amendment was that it had been ascertained that the States named in the Act, and which

1 See Secs. 1315-1322.

2 See Chap. 66, Secs. 1287-1311.

3 See Regulations, 20 Land Dec. 440.

4 See Regulations of March 15, 1898, 26 Land Dec. 480; Sept. 20, 1898, 27 Land Dec. 635.

5 For text of this amendment, see Sec. 1316.

For the discussion of the amendment in the House, see 28 Cong. Record, pp. 622 *et seq.*

were expected to take advantage of the same, either had not the means or were prohibited by their constitutions from lending their credit to the construction of the large canals and irrigation works necessary to reclaim large tracts of land; and that it was necessary to make some provision by which persons or corporations having ample means, and acting for the States in the construction of these works, should be made secure by a lien or liens on the lands and water rights for the large sums of money necessarily advanced by them. In the discussion in the House upon the amendment, referred to in our note, it was distinctly pointed out that this amendment, in the form in which it finally passed, would necessarily result in the acquisition by wealthy individuals and corporations of large bodies of land, to the exclusion of the settler. This result was practically conceded by the friends of the measure, but it was also pointed out that in no other manner could the law be made to operate beneficially, and that in any event the desert lands which were then practically worthless would become valuable to the States, even though held by large corporations, and that the States and the citizens would not be damaged by the reclamation of these then worthless lands even if the large corporations and wealthy individuals were given a lien upon them for the money advanced by them for the construction of the works.

This amendment was a distinct departure in some respects from the theory of the original Act. As above pointed out, emphasis was laid in the original Act upon the settlement, occupation, and reclamation by irrigation, and that the actual settlers would receive patents for the separate parcels of land, not exceeding 160 acres, as fast as the same were reclaimed. The amendment contains but two provisions, but they are important, and were sufficient to change the theory of the original Act of 1894. The first is the authorization of a lien or liens to be created by the State to which such lands are granted under the original Carey Act, and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon until disposed of to actual settlers. This provision was evidently in contemplation of the fact that the States must necessarily procure individuals or corporations to act as the construction agents of the irrigation works, construct such works at their own expense, and that

the liens so authorized by the various States upon the lands and water rights are liens operating for the benefit of these construction agents as security for the money advanced by such agents. The second provision is that when an ample supply of water is actually furnished in a substantial ditch or canal to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such States, without regard to settlement or cultivation. This second provision is a decided departure from the requirements of the original Act, in that the State is not required to await the actual settlement, occupation, or cultivation of the lands before demanding from the General Government a patent therefor. All that is required is that the State produce the proper evidence of the reclamation of the land, or rather that an ample supply of water is actually furnished in "a substantial ditch or canal, or by artesian wells or reservoirs," to reclaim the lands. The necessary result of this provision is that the State may obtain a patent for the entire tract of land selected by it under the original Act before a single settler had gone upon the land. This is also the construction of the amendment by the Land Department.

Subsequent to the passage of the amendment of 1896 a question arose as to its proper construction, and on January 22, 1898,[6] Secretary Bliss, in a communication to the Commissioner of the General Land Office, held that, under this amendment, patents for desert lands may issue to the States when an ample supply of water is actually secured, without regard to the settlement and cultivation, and that this provision is not limited to lands on which liens have been placed under the amendment, but is applicable to all lands donated by the original Act of August 18, 1894.[7] It therefore fol-

[6] State of Washington, 26 Land Dec. 74.

[7] The following language is used in the opinion: "A construction should not be put upon the Act which discriminates in favor of lands irrigated by the expenditure of money obtained through a lien, as against lands irrigated by the use of money derived from other sources. The purpose and object of the law is to enable the State to reclaim the lands as an inducement to their settlement and cultivation by actual settlers in small tracts, and it is immaterial whether the money expended in such reclamation is obtained through the instrumentality of a lien or otherwise. The Act of 1896 is remedial in its purpose and should receive such construction, consistent with the language there employed, as will best tend to accomplish the ultimate and great purpose of this legislation. The Act of 1896 should be treated as amending the Act of 1894 by authorizing a lien to be

lows that should the State have the power and see fit to advance the money itself for the reclamation of the lands selected, it will be entitled to a patent to the same, as well as though the lands had been reclaimed by the means of the liens authorized by the State for the benefit of the construction company. It will be noted that there is no attempt in the amendment of June 11, 1896, to repeal any portion of the original Carey Act of August 18, 1894. Therefore, so far as the latter Act is not inconsistent with the former, both will necessarily stand together. It must also be borne in mind that the original Carey Act as amended is still in force, to the effect that the State shall not dispose of more than 160 acres of land to any one person, and this provision stands side by side with the latter provision by which the entire control of the lands may, upon their reclamation, as provided in the amendment, be turned over to the State through and under a patent legally issued.

§ 1324. Regulations by the Secretary of the Interior.—Under the original Carey Act [1] the Secretary of the Interior is given the power to make necessary regulations for the reservation of the lands applied for by the States, and the following is an abstract of the latest regulations promulgated by him under this authority, under date of April 9, 1910: [2]

"1. Under the provisions of the Acts quoted the States and Territories are allowed ten years from the date of the approval of the application for the segregation of the land by the Secretary of the Interior in which to irrigate and reclaim them. The Secretary of the Interior may, however, in his discretion, extend the time for irrigating and reclaiming the lands for a period of five years, or he may restore to the public domain the lands not reclaimed at the expiration of the ten years, or of the extended period.

"2. The lands selected under these Acts must all be desert lands as defined by the Acts of 1877 and 1891, and the provisions and regulations of this department therein provided for." [3]

placed upon the lands as an aid in the accomplishment of their reclamation, and as also amending the original Act in the matter of patenting the lands to the States, by dispensing with proof of settlement and cultivation of the reclaimed lands according to the expressed purpose of the first Act."

1 For text of Act, see Sec. 1315.

2 See 37 Land Dec. 624.

3 That is to say, "All lands exclusive of timber lands and mineral lands which will not, without artifi-

Lands which produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop in usual seasons are not desert lands. Lands which will produce an agricultural crop of any kind in amount sufficient to make the cultivation reasonably remunerative are not desert. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

Lands occupied by *bona fide* settlers and lands containing valuable deposits of coal or other minerals are not subject to selection.[4]

"3. The second paragraph of Section 4, before quoted, provides that before the application of any State is allowed or any contract or agreement is executed, or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the land selected and proposed to be irrigated, which shall exhibit a plan showing the mode of contemplated irrigation and the source of the water."

However, under the provisions of the amendatory Act of March 15, 1910, public lands may be temporarily withdrawn upon proper application of the beneficiary State that proper surveys may be prepared and investigation made preliminary to the filing of the application by such State for the segregation of such lands. If such application is not filed within one year from the date of withdrawal, the lands so withdrawn will, as directed by the Act, be immediately restored to entry. No provision is made for the extension of such temporary withdrawal.[5]

In accordance with the requirements of the Act, the State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops, for which purpose a statement by the

cial irrigation, produce some agricultural crop, shall be deemed desert land." Circular, Dec. 15, 1902, 31 Land Dec. 228; Regulations, Sept. 20, 1898, 28 Land Dec. 635; Instructions, Dec. 5, 1901, 31 Land Dec. 149; State of Oregon, 33 Land Dec. 374, where it was held that the burden of proof was upon the State to show that the lands selected are of the character contemplated by the Act.

See, also, State of Oregon, 36 Land Dec. 509, where it was held that in cases where lands had been patented to the State not of the character contemplated in the Act, that suit should be brought to cancel the patent to those particular tracts.

For instructions relative to the inspection as to the character of the land selected, see 37 Land Dec. 489.

4 But see the Acts of March 3, 1909, and June 22, 1910, Secs. 442, 443.

5 For the text of the Act of March 15, 1910, and regulations thereunder, see Sec. 1320.

State engineer of the amount of water available for the plan of irrigation will be necessary. The other data required can not be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the land selected must be submitted. Upon filing the map showing the plan of irrigation and the lands selected, such lands will be withheld from other disposition until final action is had thereon by the Secretary of the Interior. If such final action be a disapproval of the map and the plan, the lands selected shall, without further order, be subject to disposition as if such reservation had never been made.

4. This section prescribes the rules for the drawing of the map and for the field notes which must be submitted. The map and field notes must also show full data to admit of retracing the lines of the survey of the irrigation works on the ground.

"5. The map must bear an affidavit of the engineer who made or supervised the preparation of the map, and also of the officers authorized by the State to make its selections. The map must also be accompanied by a list in triplicate of the lands selected, designated by legal subdivisions, properly summed up at the foot of each page, and at the end of the list. The party appearing as agent of the State must also file with the register and receiver written and satisfactory evidence, under seal, of his authority to act in the premises; such evidence once filed need not be duplicated during the period for which the agent was appointed. When a township has not been subdivided, but has had its exteriors surveyed, the whole township may be designated, omitting, however, the sections to which the State may be entitled under its grant of school lands. When the records are in such condition that the proper notations may be made, a section, or part of a section, of unsurveyed land may be designated in the list, but no patent can issue thereon until the land has been surveyed."

It is held that no preference right of selection inures to a State by virtue of an application for survey of lands under the Carey Act where the State fails to publish notice of the application as required by the Act.[6]

[6] State of Idaho v. Northern Pacific R. Co., 39 Land Dec. 343; *Id.*, 39 Land Dec. 583. See, also, Opinion of Attorney General, Jan. 30, 1911, 39 Land Dec. 482.

6. This section provides for the contract to be executed by and between the Secretary of the Interior, for and on behalf of the United States, party of the first part, and by the duly authorized officer for and on behalf of the State, party of the second part, according to the form prescribed and furnished.[7]

"7. The lists must be carefully and critically examined by the register and receiver and their accuracy tested by the plats and records of their office. When so examined and found correct in all respects, they will attach a certificate at the foot of each list according to the form prescribed."[8]

The section then provides for the making of the records in the local land office, and the transmission of all papers and maps to the General Land Office.

"For rejected selections a new list will be required, upon which the register will note opposite each tract the objections appearing on the records and indorse thereon his reasons in full for refusing to certify the same. The State will be allowed to appeal in the manner provided for in the Rules of Practice.

"8. When the canals or reservoirs required by the plan of irrigation cross public land not selected by the State, an application for a right of way over such lands under Sections 18-21, Act of March 3, 1891 (26 Stat., 1095), should be filed separately, in accordance with the regulations under said Act.[9]

"9. Upon approval of the map of the lands and the plan of irrigation, the contract is executed by the Secretary of the Interior and approved by the President, as directed by the Act. Upon the approval of the map and plan, the lands are reserved for the purpose of the Act, said reservation dating from the date of the filing of the map and plan in the local land office. A duplicate of the approved map and plan, and of the list of lands, is transmitted for the files of the local land office, and a triplicate copy of the list is forwarded to the State authorities.[10]

7 For form of this contract, see 37 Land Dec. 634, form 5.

Under the provisions of the State statute accepting the terms of the Act, a contract on behalf of the State, with the United States, executed by the commissioner of arid lands for the State of Washington, is not valid if not approved by the Governor and the Attorney General of the State. State of Washington, 25 Land Dec. 33.

8 For form of the certificate, see 37 Land Dec., p. 634, form 4.

9 For the provisions of said Act, see rights of way over public lands, Secs. 937-950.

10 The approval or rejection of an application by a State to select lands

"10. When patents are desired for any lands that have been segregated, the State should file in the local land office a list, to which is prefixed a certificate of the presiding officer of the State Land Board, or other officer of the State who may be charged with the duty of disposing of the lands which the State may obtain under the law, in the form furnished,[11] to the effect that the laws of the said State relating to the said grant from the United States have been complied with in all respects, and followed by an affidavit of the State Engineer or other State officer whose duty it may be to superintend the reclamation of the lands, in the form furnished,[12] to the effect that he has examined the lands designated on the foregoing list, and that an ample supply of water has been actually furnished (in a substantial ditch or canal, or by artesian wells or reservoirs) for each tract in said list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise the ordinary agricultural crops.

"11. The certificate of Form 6 is required in order to show that the State laws accepting the grant of the lands have been duly complied with.

"12. The affidavit of the State Engineer is required to show compliance with the provisions of the law, that an ample supply of water has been actually furnished as required by the Act, and as above set forth. A separate statement by the State Engineer must also be furnished, giving all the facts as to the water supply and the nature, location, and completion of the irrigation works.[13]

"If there are some high points which it is not practicable to irri-

under the provisions of the Acts is a matter wholly within the discretion of the Land Department. State of Wyoming, 36 Land Dec. 399; Yakima Dev. Co. v. Washington, 34 Land Dec. 453.

It is held by the Federal Court of Oregon that a suit brought by a State to annul a grant under the Carey Act is removable to the Federal Court as a suit involving some title, right, privilege, or immunity upon which the recovery depends, and which will be defeated by one construction of the Constitution or laws of the United States, and sustained by the opposite construction. State of Oregon v. Three Sisters Irr. Co., 158 Fed. Rep. 346.

11 For form of certificate, see 37 Land Dec. 636, No. 6.

12 For the form of the affidavit, see 37 Land Dec. 637, No. 7.

13 As is the case of individual desert land entries, there must be an ample supply of water for the land actually secured; then and not until then will a patent be issued to the State. The terms of the Act itself are explicit upon this point. "When an ample supply of water is actually furnished in a substantial ditch or canal, or by

gate, the nature, extent, location, and area of such points should be fully stated. If no part of a legal subdivision is susceptible of irrigation, such legal subdivision must be relinquished. Lands upon which valuable deposits of coal or other minerals are discovered will not be patented to the State under these Acts.

"13. These lists will be called 'lists for patent,' and should be numbered by the State consecutively, beginning with No. 1.

"14. Upon the filing of such list the local officers will place thereon the date of filing and note on the records opposite each tract listed, 'List for patent, serial No. ——, filed ——.———,' giving the date.

"15. When the said list is filed in the local land office there shall also be filed by the State a notice, in duplicate, prepared for the signature of the register and receiver, describing the land by sections, and portions of sections, where less than a section is designated, according to the form prescribed.[14] This notice shall be published at the expense of the State once a week in each of nine consecutive weeks, in a newspaper of established character and general circulation, to be designated by the register, as published nearest the land. One copy of said notice shall be posted in a conspicuous place in the local land office for at least sixty days during the period of publication.

"16. At the expiration of the period of publication the State shall file in the local office proof of the said publication and of the payment for the same. Thereupon the register and receiver shall forward the list for patent to the General Land Office, noting thereon any protests or contests which may have been filed, transmitting such papers, and submitting any recommendations they may deem proper. They will also forward proofs of publication, and of payment therefor, and of the posting of the list in their office.

"17. Before patents are issued for lands within the former Southern Ute and the Ute Indian Reservations in Colorado, the

artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation." State of Washington, 26 Land Dec. 74; Yakima Dev. Co. v. Washington, 34 Land Dec. 453; State of Oregon, 36 Land Dec. 509.

For provisions of the desert land law in this respect, see Sec. 1301.

[14] For the form of this notice, see 37 Land Dec. 637, form 8.

State will be required to pay the price ($1.25 per acre) fixed by the Acts of March 1, 1907, and February 24, 1909.

"18. Upon receipt of the papers in the General Land Office such action will be taken in each case as the showing may require, and all tracts that are free from valid protest or contest, and respecting which the law and regulations have been complied with, will be certified to the Secretary of the Interior for approval and patenting." [15]

§ 1325. **Acceptance of the grant made by the Carey Act by the States named.**—The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof. Now this acceptance can only be made by an Act of its legislature, in the exercise of its power, and in order to make such acceptance effective.[1]

The conditions imposed by the United States in granting the lands under the provisions of the Carey Act to the States entitled thereto have been accepted, and provisions made in order to make such acceptance effective, and governing boards provided in order to fully carry out the details of the law, by Acts of the legislatures of Colo-

[15] It must be noticed that all regulations of the Land Department are often changed to conform with new statutes or decisions of the courts, therefore the last rules promulgated upon any subject should always be consulted.

[1] "We are satisfied that the law is valid. The United States had the power to make the offer to the State, to grant it the lands, provided the State would reclaim them. Now, if the State could accept the offer of the United States at all, it could only act through its legislature, in the exercise of power requisite to making its offer effective." State *ex rel.* Armington v. Wright, 17 Mont. 565, 44 Pac. Rep. 89.

See, also, Howlett v. Cheetham, 17 Wash. 626, 50 Pac. Rep. 522; State *ex rel.* Nolan v. Marshall, 20 Mont. 510, 52 Pac. Rep. 268, where the decision of the Court was in favor of the validity of the accepting Act, and where it is held that the only limitation imposed upon the commission provided for in the accepting Act in the way of making contracts for the construction of irrigation works is that its acts must be for the benefit of the State.

rado,[2] Idaho,[3] Montana,[4] Nevada,[5] New Mexico,[6] Oregon,[7] South Dakota,[8] Utah,[9] and Wyoming.[10]

The acceptance by the States is usually in the following form: That the State hereby accepts the conditions of Section 4 of the Act of Congress, entitled, "An Act making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes," approved August 18, 1894, and the Acts of Congress amendatory thereof, together with all grants of land to the State under the provisions of the aforesaid Acts.

§ 1326. **The powers of the State board.**—Under the laws enacted by the respective States accepting the provisions and grant of the Carey law, the selection, management, and disposal of the land selected is vested in the State board named in the Acts. The board is also authorized to make all contracts necessary to carry out the

2 See Mill's Ann. Stat., 1905, Secs. 3662a-3662x.

Governing Board: State Board of Land Commissioners, consisting of Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, Registrar of Land Department.

3 See Rev. Codes of Idaho, 1908, Secs. 1613-1634.

Governing Board: State Board of Land Commissioners, consisting of Governor, Attorney General, Secretary of State, Superintendent of Public Instruction, Registrar of Land Department.

4 See Rev. Code, Mont., 1907, Secs. 2255-2282.

Governing Board: Carey Act Board, consisting of the State Engineer, Secretary of State, State Examiner.

5 Laws, 1911, Chap. 205, p. 439; Laws, 1911, p. 452; Rev. Laws, 1912, Secs. 3063-3097.

6 Governing Board: Carey Act Land Board, consisting of the Governor, Commissioner of Public Lands, Territorial Engineer.

7 See Bellinger & Cotton's Codes, 1902, Secs. 3283-3293; L. O. L., Secs. 3860-3877.

Governing Board: Desert Land Board, consisting of the Governor, Secretary of State, Treasurer, Attorney General, State Engineer.

8 See Laws S. D., 1909, p. 135.

Governing Board: Carey Land Act Board, consisting of the State Engineer, State Auditor, Commissioner of School and Public Lands.

9 See Comp. Laws of Utah, 1907, Secs. 2372-2388, as amended by Laws Utah, 1909, Chap. 31, p. 29.

Governing Board: State Board of Land Commissioners, consisting of five resident citizens appointed by the Governor, with the consent of the Senate.

10 See Rev. Stat. Wyo., 1910, Secs. 661-696.

Governing Board: State Board of Land Commissioners, consisting of the Governor, Superintendent of Public Instruction, Secretary of State.

provisions of the Acts of Congress and the Acts of the legislature, and may make such rules not in conflict with the said Acts of Congress or the Acts of the legislature as it may deem best. In fact, the only limitation imposed on the board is that their acts must be in conformity with the Acts of Congress, the Act of the State under which they are working, and their acts must be for the benefit of the State.[1]

§ 1327. The acquisition of a water right for projects.—The party contracting with a State must acquire a water right under some of the laws of the State in which the project is being constructed. This water right may be acquired by appropriation, purchase, or by some other legal method of acquisition, and the water must be sufficient to irrigate and reclaim the amount of land segregated for the purposes of the project. The question of the acquisition of water rights has been discussed in previous chapters under the old rule of appropriation, and will be discussed in a subsequent chapter of this part under the new water or irrigation codes adopted by many of the States.[1]

In most of the code States, as a means of protection of the rights of all interested parties, it is provided that the State Engineer or some board have a sort of supervisory control, and the project may be rejected if for any reason it should be found to be detrimental to public interests or that the project is not feasible for any physical reasons or the proposed use would be a menace to the safety and welfare of the public. These are wise provisions, as in the early history of the law a great many wild-cat schemes were projected, which neither had the water right to irrigate the land or the irrigable or cultivable lands to irrigate. However, under these protecting provisions this feature of the operations under the law is eliminated, and the projects are rejected by the officers placed in

1 State *ex rel.* Nolan v. Marshall, 20 Mont. 510, 52 Pac. Rep. 268; State *ex rel.* Armington v. Wright, 17 Mont. 565, 44 Pac. Rep. 89.

A relinquishment on the part of a State of desert lands in a contract under the Carey Act, to be effective, must be executed by the officers designated by the State legislature to manage and dispose of such lands. State of Wyoming, 24 Land Dec. 562.

1 For the appropriation of water, see Secs. 706-732.

For the acquisition of water rights under code procedure, see Chap. 68, Secs. 1337-1367.

authority, should it be found that they were detrimental in any way to the public interests, as above set forth.[2]

§ 1328. Proceedings under State laws—Application to board for selection of lands.—Having discussed in the preceding sections the Acts of Congress and the regulations of the Secretary of the Interior thereunder, and how the title to the lands selected under the provisions of the Acts passes from the United States to the State selecting them, we will now proceed to discuss how the title to the lands passes from the State to the individual, and in order to do this we shall have to go back to the very inception of the proceedings, which begin usually with the individual or company.

The State statutes provide that any person, company, association, or corporation desiring to construct ditches, canals, reservoirs, or other irrigation works to reclaim lands under the provisions of the Acts shall file with the board an application for the selection of the lands to be reclaimed, designating the lands by legal subdivisions. This application shall be accompanied by a proposal to utilize or extend an irrigation system already constructed, or one in process of construction, or the rights to construct which have been acquired, or to construct ditches, canals, reservoirs, or other irrigation works for the complete reclamation of the lands so designated. The proposal shall be prepared in accordance with the rules of the board,[1] and the regulations of the Department of the Interior,[2] which shall state the source of the water supply, whether the right to the same has been acquired or is sought to be acquired; the location and dimensions of the works already constructed or in process of construction, or the location and dimensions of the proposed works, with estimated cost of such works, the maximum price and terms per acre at which perpetual rights will be sold to settlers on the land to be reclaimed, and the maximum price per acre for the maintenance tax, and all other facts prescribed by the rules of the board of the State where the application is made. In case a corporation is the applicant, it shall state the name of the corporation, the purpose of

2 See Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88.

1 These rules can be obtained upon request to the boards named in the note to Sec. 1325, and should always be consulted before an application is filed.

2 For the last regulations of the department, see Sec. 1324.

the incorporation, the names and places of residence of its directors and officers, the amount of its authorized and paid-up capital, where incorporated, and the other facts required by the rules. If the applicant is not a corporation, the proposal shall set forth the name or names of the parties, and such other facts as shall enable the board to determine as to their financial ability to carry out the proposed enterprise.

There is nothing in the State Acts or in the Acts of Congress which prevents the application from being made by individuals, but the benefits of the Carey Act, in so far as they relate to the segregation of lands and the acquisition of title, apply in the same degree to the individual who may wish to construct his own irrigation plant to furnish water for 160 acres of land for himself, or to an association of persons who may desire to co-operate toward this end. Some small tracts have been taken up from time to time by this method by separate individuals, or by two or three individuals combined. In fact, the statutes of Colorado, Montana, and South Dakota specially provide for the entry and reclamation of land under the Acts by individuals duly qualified, either acting singly or together; but owing to the fact that the greater amount of settlement occurs upon the larger tracts of land, and the fact of the great cost necessary for the construction of the works, the greater amount of lands is segregated and set aside to corporations or associations of individuals controlling large capital.

A certified check is required by the statute, in such a sum as is named therein, and must accompany the application or proposal, the same to be held as a guaranty for the execution of the contract with the State in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the board, and to be forfeited to the State in case of failure of said parties to enter into a contract with the State in accordance with the provisions of the law.

In some States it is required that the party or parties making the application shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the board. This is particularly applicable to the States which have the provisions for State control, and where all appropriations of water must be made by an application to the State Engineer or to the governing board. The application to

appropriate water must be made in accordance with the rules of the Board of State Control.[3]

Upon receipt of the application mentioned above, the board shall examine the same, and if it does not comply with the regulations of the Department of the Interior and the rules of the board, it must be returned to the applicant for correction; but if it does so comply, the board shall determine whether the reclamation of the land applied for can be secured by means of the irrigation system proposed to be constructed, and whether there are or there may be sufficient water rights secured for the reclamation of the same. And at this point the most of the statutes require that the matter shall be referred to the State Engineer who is required to make a full detailed report thereon to the board. And no request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board. Time is then given the applicant to file another application and proposal.

Notice of the application must be given as provided by the statute. Written objections to the application may be then filed with the board within the time specified in the statute, and the board shall consider and decide upon the merits and sufficiency of such objections.

Upon the filing of such application, the board shall forthwith file a list of the lands contained in the application in the local land office with a request for the withdrawal of the land described therein from entry.[4]

§ 1329. **Proceedings under State laws—Contract between State and applicant.**—Upon the withdrawal of the land by the Department of the Interior, it is made the duty of the board to enter into a contract with the applicant, which contract must contain complete specifications of the works to be constructed, and the estimated cost of the same, and the maximum price and terms per acre at which perpetual water rights shall be sold to settlers, and the maximum

[3] For State Control and the appropriation of water thereunder, see Chap. 68, Secs. 1337-1367.

[4] For the statutes accepting the provisions of the Carey Act and providing for its operation, see Part XIV, under the various States.

cost per annum for the maintenance tax, and the price and terms upon which the State is to dispose of the land to settlers, and other provisions and conditions as the board may direct.[1] This contract must not be entered into until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond upon the part of the proposed contractor, in the penal sum fixed by the statute, and to be conditioned for the carrying out of the provisions of the contract with the State.

In some States it is provided that, in the discretion of the board, the contract may provide that the sale to a settler of a tract of land with a permanent water right shall include a *pro rata* interest in the irrigation works equal to the proportion that the tract of land purchased by him bears to the entire tract to be reclaimed by the said irrigation system; and that upon the full payment of the purchase price of the said land and water right, capital stock of the corporation representing such interest shall be transferred to such settler. If the said irrigation system be constructed by a corporation, or if by a person or company then such interest shall be conveyed to the settler by the person or company constructing the said irrigation system.

The time within which the work must be commenced is fixed by the statute; also the work must be prosecuted diligently and continuously to completion, and that a cessation of the work under a contract for the period fixed by the statute shall forfeit to the State all rights under said contract and the penal sum named in the bond; provided, that no property or right which was vested in the applicant or contractor at the date of the contract shall be forfeited. Provisions are also made as to how the contracts and the rights acquired thereunder may be declared forfeited.

The statutes of the respective States differ where an actual forfeiture has been worked and duly declared. In Colorado, it is provided that nothing in the Act shall be construed as authorizing the board to obligate the State to pay for any work constructed under any contract, or to hold the State in any way responsible to settlers for the failure of contractors to complete the work according to the terms of their contracts with the State.[2] But in Utah, after a for-

1 For the further provisions of these contracts, see the rules and regulations of the State board, to be had upon application.

2 Mill's Ann. Stat., Sec. 3662n.

feiture has been worked, the board may advertise for proposals to complete the work and may, in proper cases, contract with the bidder who will pay the original contractor the highest sum for the works partially completed, and complete the said works and supply the water rights to the settlers on the lands to be reclaimed, for the price and upon the terms stated in the original contract. If no bid shall be received for the completion of said works and furnishing water rights to such settlers, for the price and upon the terms stated in the original contract, then the board shall bring the proper action for recovering the amount of the bond of the contractor.[3]

§ 1330. **Proceedings under State laws—The entry and settlement of the land by settlers.**—In all the States, the statutes thereof provide how the lands shall be opened for settlement. In the majority of the States it is provided that immediately upon the withdrawal of any land by the Department of the Interior, and the inauguration of the work by the contractors, it is made the duty of the board to give notice as provided that the lands are open to settlement. But, owing to the fact that the work has often been delayed, and a longer time has elapsed than was first anticipated before the water was brought upon the land so that it might be used by the settlers, the rules of the boards of Idaho, Utah, Montana, and New Mexico provide that the lands may be thrown open from time to time as the construction proceeds, and the application to enter such lands by any one qualified will be received after notice has been given that the land is open to entry.

The qualifications prescribed for the entry of such land are that any citizen of the United States, or any person having declared his intention to become a citizen, may make an application to the board to enter any of such lands, not exceeding 160 acres. In Oregon, Wyoming, and Utah married women are permitted to file; in Montana they may file if they are heads of the families; but in Idaho and Colorado they are not permitted to file. The right to enter

[3] Comp. Laws, Utah, 1907, Sec. 2381. For construction of contracts between a State and the applicant or contractor, see McKinney v. Big Horn Basin Development Co., 167 Fed. Rep. 770, 93 C. C. A. 258; State of Oregon v. Three Sisters Irr. Co., 158 Fed. Rep. 346; State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039; Sommerville v. Idaho Irr. Co., —— Idaho ——, 123 Pac. Rep. 302; Hanes v. Idaho Irr. Co., —— Idaho ——, 122 Pac. Rep. 859; Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88.

land under these Acts is not restricted by the general land laws of the United States, and persons are qualified to enter land under their provisions even if they have exhausted all of their right under the general land laws of the United States.

The lands must be entered according to the legal subdivisions. Therefore, settlers may take up 40, 80, 120, or 160 acres—160 acres being the maximum. In the most of the States, one filing by a person for a less amount than 160 acres may be succeeded by others provided the maximum of 160 acres be not exceeded; but in Utah, it is provided "no settler shall be entitled to make more than one entry."

The usual method in all of the States of throwing the lands open for settlement is by a drawing, under the supervision of the board. In all States, applications are required to be made out on special blank forms, furnished by the board, setting forth that the application is made for the purpose of actual reclamation, cultivation, and settlement; that the applicant has never received the benefits of the Act to an amount greater than 160 acres, including the amount specified in the application. Such application must be accompanied by a certified copy of a contract for a perpetual water right made by the applicant with the person or corporation authorized by the board to furnish water for the reclamation of such lands,[1] together with 25 cents per acre for the land applied for, and containing the declaration that he will settle upon and improve said land. If said application is allowed, the board shall cause to be issued a certificate of location to the applicant. In case the application is rejected the money advanced must be refunded to the applicant. In Montana, South Dakota, Utah, and Wyoming, where the company fails to furnish water to any settler under any provisions of its contract with the State, the State shall refund to such settler all payments that he shall have made to the State.

The price of the land charged by the States varies. In Colorado, Idaho, New Mexico, Utah, and Wyoming the price is fixed at 50 cents per acre, payable 25 cents per acre at the time of filing and 25 cents per acre when the final proof is offered. The Montana and

1 For the construction of settlers' contracts with the applicant or contracting party, see Hanes v. Idaho Irr. Co., —— Idaho ——, 122 Pac. Rep. 859.

See Sommerville v. Idaho Irr. Co., —— Idaho ——, 123 Pac. Rep. 302.

South Dakota statutes provide for the appraisal of the land, and for the payment of 25 cents per acre at the time of filing, and provision is made for the payment of any balance when final proof is offered. The Oregon Statute of 1909 [2] states that: "Each application shall be accompanied by a payment of not less than $1 per acre, to be made by the contractor out of the applicant's first payment and to be returned if the application be not approved." In Montana the regulations provide for a maximum price of $1 per acre and the payment in full at the time of making the application.

§ 1331. Proceedings under State laws—Duties of settlers.—Either the statutes or the rules of the board of all the States require that within one year after the party contracting with the State to construct the irrigation works shall have notified the settlers who have taken up lands under such works, that he or it is prepared to furnish water, the settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon; and within two years after such notice the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice the settler shall appear before the board or some designated officer thereof and make final proof of reclamation, settlement, and occupation. The entryman must give notice of his intention to make his final proof by publication as provided either by the statute or by the regulations. And, upon making his final proof of reclamation, settlement, and occupation in accordance with the regulations of the Department of the Interior, the statutes of the State and the rules of the board, and upon final payment for the land entered by him, the State shall issue its patent for the land to the settler. And in all of the States it is provided that the water rights acquired to all lands under the provision of the Acts shall attach to and become appurtenant to the land as soon as the title passes from the United States to the State.

The statutes or the rules of the board provide that the rights of the entryman shall be subject to forfeiture for the following: Failure to take up residence on the lands; failure to submit annual and final proof; failure to make payments for the water rights as they become due, or the failure to redeem to water right or the shares sold

[2] Lord's Ore. Laws, Secs. 3872, 3873.

by the sheriff within the time provided by law in the event of the foreclosure of the lien against said water right.

In Idaho, Montana, and Wyoming an entryman may obtain leave of absence upon application to the State board but must in all respects comply with the law requiring cultivation and reclamation. The maximum length of time for which leave of absence may be granted is six months. In other States leave of absence from the land may also be granted by the board for a limited time.

In some of the States it is specified by the rules as to the character of the house which shall be constructed by the entryman. In Idaho it is provided that no final proof shall be accepted where the entryman established residence in a tent or a house covered with canvas. Wyoming requires a house that is "habitable regardless of its character where the entryman shows good faith by his continuous residence." Montana requires simply a dwelling regardless of character. In Oregon, where the residence on the land has been continuous, so long as the settler's affidavit of final proof states "that he has built a house," it is sufficient regardless of its character. But if the alternative proof of thirty days' residence is made,[1] then a substantial house of at least four rooms is required to have been constructed before final proof.

In Colorado, Idaho, Montana, Oregon, Utah, and Wyoming actual cultivation by some one upon behalf of the entryman is permitted, provided that the entryman, in person, complies with the requirements as to settlement and residence.

§ 1332. Proceedings under State laws—Assignment of entries.—In Colorado, Idaho, Montana, New Mexico, Oregon, and Utah it is provided either by statute or by the rules of the board that the original entryman may assign his entry and all rights which have accrued thereunder, both to the land and the water, to another person; but the assignee shall possess all the qualifications of the original entryman. Such assignee must file a certified copy of the deed of assignment of all the rights of the original entryman together with evidence in writing from the construction company of the transfer to him of all interests in the canal system contracted for by the original entryman. The assignment of entries up to 160 acres

1 Oregon rules of the Desert Land Board, 9-A; see, also, annual and final proof.

in those States where more than one entry is allowed up to that amount of land bars the assignor from making any further entry under the Acts. In Utah, where but one entry is allowed regardless of the amount of land, an assignment of any entry for a smaller amount also bars the original entryman from making any further entries. In Wyoming assignments of entries as such are not permitted, but an entryman is permitted to relinquish his entry to the State, thereby forfeiting his first payment to the State. He may then assign the credit for water charges already paid to the company to a subsequent entryman on the same land, or he may arrange with the company for a refunding of payments already made. The original entryman may then make a new filing upon land up to the maximum of 160 acres of land, as though the original entry had not been made.

§ 1333. **Proceedings under State laws—Lands can be disposed of only to actual settlers.**—Since the amendatory Act of June 11, 1896,[1] the presence of actual settlers prior to the issuance of the patent by the United States to the State is not necessary. A conditional title may pass to the State before there is an actual settler on the ground. But the requirement that the State must sell the land thus acquired to actual settlers is still in force. The amendatory Act, in addition to changing the conditions precedent to patent, authorizes the State to create a lien on the reclaimed land from the date of its reclamation "until disposed of to actual settlers." Therefore, after the State has complied with the conditions precedent, and reclaimed the land, by furnishing an ample supply of water in a substantial ditch or canal, or by artesian wells, or reservoirs, there is still another condition which must be complied with, before an absolute title to the land can vest, and that is that the land must be disposed of only to actual settlers, as specified in the amendatory Act. It therefore follows that, where a State attempts to dispose of the land to others than to actual settlers as specified in the Act, it subjects itself to liability to forfeiture of the lands for conditions broken.[2] Under the Act, the United States, even after patent to a

[1] For the full text of this Act, see Sec. 1316.

[2] State of Oregon, 36 Land Dec. 509, opinion by Pierce, First Assistant Secretary of the Interior; State of Washington, 26 Land Dec. 74.

The phrase, "actual settlers," so often used in the Federal and State

State, exercises a supervisory control over the lands, to the extent of enforcing a full compliance with the law by the State; and each State is required to furnish the Secretary of the Interior annually a statement of the lands patented each year by the State to individuals.[3]

§ 1334. Proceedings under State laws—The lien for the water rights.—By the amendatory Act of Congress of June 11, 1896,[1] it was provided "that under any law heretofore or hereafter enacted by any State" for the reclamation of the lands in question, "a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed, for the actual cost and necessary expenses of reclamation and interest thereon from the date of reclamation until disposed of to actual settlers." It therefore devolves upon the State in order to take advantage of this provision to enact laws providing for such a lien and its enforcement. This all of the States accepting the benefits of the Carey Act have provided for, in effect, as follows: Any person or corporation furnishing water for any tract of land acquired under the law shall have a first and prior lien on the said water rights and the land upon which the said water is used, for all deferred payments for said water rights, and said lien to be in all respects prior to any or all other liens created or attempted to be created by the owner and possessor of the land, and shall remain in full force and effect until the last deferred payment for the water rights is fully paid and settled according to the terms of the contract under which the said water rights were acquired. The contract for the water rights giving this lien must be recorded in the office of the county official as provided by the statute. Upon the default

laws regarding the disposal of the public lands, has a well defined meaning, involving the idea of *actual residence.* State of Oregon, *supra;* Gavitt v. Mohr, 68 Cal. 506, 10 Pac. Rep. 337; Mosley v. Torrence, 71 Cal. 318, 12 Pac. Rep. 430; Baker v. Millman, 77 Tex. 46, 13 S. W. Rep. 618; Bratton v. Cross, 22 Kan. 673; Turner v. Ferguson, 58 Tex. 6; Rene v. Pendergast, 17 Land Dec. 385; United States v. Atterbury, 10 Land Dec. 36, 8 Land Dec. 173; Samuel M. Frank, 2 Land Dec. 628.

[3] Instructions, March 30, 1908, 36 Land Dec. 342.

[1] For text of Act, see Sec. 1316.

of any deferred payments secured by any such lien, the person or corporation holding or owning said lien may foreclose the same according to the terms and conditions of the contract and such foreclosure shall be either in the manner that mortgages are foreclosed in the State where the lien is sought to be enforced, or in the manner specially provided by the statute in these cases. The time within which the redemption may be made is provided for and also the manner of the same.

§ 1335. **Proceedings under State laws — Rights of way for canals and other works.**—The statutes of all the States provide that the maps in the office of the board shall show the location of the canals or other irrigation works, and that all State lands entered under the provisions of the Acts shall be subject after entry to the rights of way of such canals or irrigation works. The said right of way is to embrace the entire width of the canals and such additional width as may be required for its proper operation and maintenance. No deductions can be made to the settlers for the amount of land taken by such rights of way.

§ 1336. **The proceeds from sale of lands to constitute a State reclamation fund.**—The original Carey Act provides that any surplus of money derived by any State from the sale of lands under the Acts in excess of the cost of their reclamation, shall be held as a trust fund by such State and be applied to the reclamation of other desert lands in such State. The statutes of all the States therefore provide in effect that all moneys received by the board from the sale of lands selected under the provisions of the Acts shall be deposited with the State Treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the board in carrying out the provisions of the Acts, and such expenses shall be paid in a warrant drawn by the State Auditor in the manner that other expenses of the board are paid; and any balance remaining over and above the expenses necessary to carry out the provisions of the Acts shall constitute a trust fund to be used for the reclamation of other desert lands. This reclamation fund is a trust fund as provided by the Act of Congress. The State can not make it a fund of its own, to be dealt with as are the other funds which are owned by the State. No

control can be exercised over it beyond such as is consistent with the Act of Congress in the execution of the trust, which is to aid the State in the reclamation of desert lands, and the settlement, cultivation, and the sale thereof to other actual settlers.[1]

[1] State *ex rel.* Armington v. Wright, 17 Mont. 565, 44 Pac. Rep. 89.

CHAPTER 68.

THE LAWS OF STATE CONTROL.

§ 1337. Scope of chapter.
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§ 1365. Statutes for prorating in times of scarcity.

§ 1366. Vested rights can not be impaired by procedure under the laws of State control.
§ 1367. Criticism of the laws of State control.

§ 1337. Scope of chapter.—In the previous chapters we have discussed the appropriation and use of waters under the older method of appropriation, and without codes.[1] During the recent years many of the States have passed elaborate irrigation or water codes for the control and regulation of waters flowing within their respective boundaries.[2] And in this chapter we will discuss in detail the laws of State control, as far as they relate to the administrative or executive features of the laws of waters.

§ 1338. The laws of State control—In general.—As we have seen in previous parts of this work each State has the power, either by legislative enactment or by court decision, to adopt such a rule governing the waters flowing within its boundaries as it sees fit.[1] It may adopt the common law rule of riparian rights or a modification of that rule.[2] It may entirely abrogate the common law of riparian rights and adopt in lieu thereof the Arid Region Doctrine of appropriation.[3] Or, again, it may retain the common law of riparian rights and at the same time adopt the doctrine of appropriation, and thus have dual systems of laws governing the subject of waters flowing within its jurisdiction. And, as far as the Government of the United States is concerned, as decided by the Supreme Court of the United States, "Congress can not enforce either rule upon any State."[4] The sole power of governing and controlling the waters within its boundaries being vested entirely with the State, the legislatures of many of the States of the arid and semi-arid regions have, within recent years, enacted elaborate Irrigation Codes, or Water Codes, regulating in detail how the rights to the use of water may be acquired, and how the same may be permanently held

1 See Chaps. 31-40, Secs. 585-756.

2 For the statutes of the respective States, see Part XIV.

1 See Secs. 507, 593.

2 For the common law of riparian rights, see Chaps. 21-30, Secs. 450-551.

3 For the Arid Region Doctrine of appropriation, see Secs. 585-594.

4 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

as against all others. They specify with great particularity how an appropriation may be instituted, after the passage of the Act, how and within what period the work must be begun and completed, how the water must be used and the preference uses to which it must be put, and what acts are necessary upon the part of the appropriator for the continuance of the right, and the extent of the failure to perform which shall be deemed a forfeiture of his right to the use.[5] The administration of these laws is placed in the hands of some governing board, or in the hands of some State official designated by the Act, usually the State Engineer, whose duties are to receive applications to appropriate the water, to determine the priorities, and to award certificates to the lawful claimants, which specify in detail the amount of water to which each is entitled, the source from which it is to be taken, the beneficial use or purpose to which it is to be applied; and, in some States, to hear in a judicial capacity contests as to conflicting rights, and to determine the parties who are the lawful claimants therefor. The Acts also provide for dividing of the States into divisions, and over each division there is what is called a division engineer, or a division superintendent; however, in some of the States they are given another title, but all are subordinate to the State Engineer.[6] Again, under the authority of these Acts, persons called water commissioners, water masters, under assistants, or supervisors, are appointed, whose duties are to see that the water is properly divided among the lawful claimants according to their respective rights, and to protect the valid rights of one claimant against the wrongful invasion of others.

The States which have adopted these laws of State control are, first, Wyoming;[7] afterward, Colorado;[8] afterward, copying after one or both of the States named and adapting the law to their own particular conditions, are the States of Idaho,[9] Nebraska,[10] Ne-

[5] For forfeiture of right, see Secs. 1118-1120.

For the Irrigation and Water Codes, see Part XIV.

[6] For the duties and powers of division superintendents and engineers, see Sec. 1345.

[7] For laws of Wyoming, see Chap. 104.

[8] For the laws of Colorado, see Chap. 87.

[9] For the laws of Idaho, see Chap. 89.

[10] For the laws of Nebraska, see Chap. 92.

vada,[11] North Dakota,[12] Oklahoma,[13] Oregon,[14] South Dakota,[15] Utah,[16] and New Mexico.[17]

In their main features these laws are largely alike and only differ as to details. It will be found from an examination of these laws that their scope was mainly for the purpose of accomplishing three objects: First, the adjudication or the determination of existing rights; second, the supervising the acquirement of new rights, and, third, the controlling and supervising the distribution of water.

§ 1339. State constitutions providing for the law of State control or State administration.—The constitutions of a number of the States of the West provide for the enactment of laws of State control, or State administration, of the waters flowing within their respective boundaries.

In California, the first constitution contained no such provisions, but in the amended constitution adopted in 1879 and which went into effect the first day of January, 1880, it is provided that: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."[1] But, outside of the law relative to the State control of water rates, which is provided for in the constitution, and discussed in the next chapter, and the Water Power Act of 1911,[2] the legislature of California has passed no laws providing for a State administrative system, as the same is understood and discussed in the present chapter. In regard to the declaration that the use of the water is a public use, the court holds that the use being public, the State may by law regulate it.[3] The same construction may also be applied to

11 For the laws of Nevada, see Chap. 93.

12 For the laws of North Dakota, see Chap. 95.

13 For the laws of Oklahoma, see Chap. 96.

14 For the laws of Oregon, see Chap. 97.

15 For the laws of South Dakota, see Chap. 100.

16 For the laws of Utah, see Chap. 102.

17 For the laws of New Mexico, see Chap. 94.

1 Cal. Const., Art. 16, Sec. 1.

For the other provisions of the California Constitution, see Chap. 86.

2 See Sec. 1373.

For the statutes of California, see Part XIV.

For the water power Act of California, see California, Chap. 86.

3 Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87, where it is said:

the similar provisions of the constitutions of other States, an abstract of which will be found herein. The word "appropriated" as used in the section, is held to mean only such waters as are appropriated for sale, rental, or distribution.[4]

In Colorado, the constitution provides: "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as herein provided." [5]

In Idaho, it is provided that: "The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, also all water originally appropriated for private use, but which, after appropriation, has heretofore been, or may hereafter be, sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law." [6]

In Montana: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use . . . shall be held to be a public use." [7]

In New Mexico, Article 16 of the new constitution provides as follows: "Sec. 2. The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the State. Priority of appropriation shall give the better right.

"Sec. 3. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.

"Sec. 4. The legislature is authorized to provide by law for the organization and operation of drainage districts and systems."

"The clause merely declares that the use of water appropriated for distribution, etc., is a public use, and that the State may by law regulate it."

4 Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267.

5 Colo. Const., Art. 16, Sec. 5.

For other provisions of the Colorado Constitution, see Chap. 87.

6 Idaho Const., Art. 15, Sec. 1.

For other constitutional provisions of Idaho, see Chap. 89.

7 Montana Const., Art. 3, Sec. 15.

For other constitutional provisions of Montana, see Chap. 91.

In North Dakota: "All flowing streams and natural water courses shall forever remain the property of the State for mining, irrigating, and manufacturing purposes." [8]

In Washington: "The use of the waters of this State for irrigation, mining, and manufacturing purposes shall be deemed a public use." [9]

The most extensive and elaborate provisions relative to the subject of State control are to be found in the constitution of Wyoming. It is provided that: "Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved." [10] It is furthermore provided that the water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are declared to be the property of the State. A board of control is provided for, to be composed of the State Engineer and the superintendents of the water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith, its decisions to be subject to review by the courts of the State. The legislature is directed to divide the State into four water divisions and to provide for the appointment of the superintendents thereof. Provisions are also made for the appointment by the Governor of a State Engineer, his qualifications, and duties; that he shall be president of the board of control and "shall have general supervision of the waters of the State, and of the officers connected with its distribution." [11]

§ 1340. General statutory declarations preliminary to the laws of State control.—In many of the statutes of the States of the arid and semi-arid West, there are preliminary declarations to the effect that the waters within their respective jurisdictions are

[8] North Dakota Const., Art. 17, Sec. 210.
See, also, Chap. 95.

[9] Washington Constitution, Art. 21, Sec. 1.
See, also, Chap. 103.

[10] Wyoming Const., Art. 1, Sec. 31.
See, also, Chap. 104.

[11] Wyoming Const., Art. 8, Secs. 1-5.
For the full provisions of the Wyoming Constitution, see Chap. 104.
For the duties of the State Engineer, see Sec. 1343.

public, and subject to the appropriation and use as may thereafter be provided by law.

Arizona: "All rivers, creeks, and streams of running water in the Territory of Arizona are hereby declared to be public, and applicable to the purposes of irrigation and mining as hereinafter provided." [1]

California: By the Act of April 8, 1911, amending Section 1410 of the Civil Code, it is provided: "All water or the use of water within the State of California is the property of the people of the State of California." [2]

Idaho: "All waters of the State, when flowing in their natural channels, including the water of all natural springs and lakes within the boundaries of the State, are declared to be the property of the State." [3]

Nebraska: "The water of every natural stream not heretofore appropriated, within the State of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the State, subject to appropriation, as hereinbefore provided." [4]

Nevada: "All water courses and natural lakes and the waters thereof which are not held in private ownership, belong to the State, and are subject to appropriation for beneficial uses." [5]

New Mexico: "All natural waters flowing in streams and water courses, whether such be perennial, or torrential, belong to the public and are subject to appropriation for beneficial use." [6]

North Dakota: In this State, in addition to the constitutional provision quoted in the preceding section,[7] the statute has the following: "All waters within the limits of the State from all sources of water supply belong to the public." [8]

1 Arizona Stat., 1901, Sec. 4174.

For the laws of Arizona, see Chap. 85.

2 Kerr's Bien. Supp. Ann., 1911, p. 584; Stats. & Amdts., 1911, p. 421.

See, also, Chap. 86.

3 Revised Codes of Idaho, 1908, Sec. 3240.

See, also, Chap. 89.

4 Comp. Stat. Neb., 1911, Sec. 6450.

For the laws of Nebraska, see Chap. 92.

5 Rev. Laws Nev., 1912, Sec. 4672; Comp. Laws Nev., 1900, Sec. 354.

For the laws of Nevada, see Chap. 93.

6 Laws N. M., 1907, p. 73, Sec. 1.

For the laws of New Mexico, see Chap. 94.

7 See Sec. 1339.

8 Laws N. D., 1905, Chap. 34, Sec. 1; Rev. Codes, 1905, Sec. 7604.

For the laws of North Dakota, see Chap. 95.

Oklahoma: "The unappropriated waters of the ordinary flow or underflow of every running stream or flowing river, and the storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State of Oklahoma in which, by reason of the insufficient rainfall or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided." [9]

Oregon: "The use of the water of the lakes and running streams of the State of Oregon, for general rental, sale, or distribution for purposes of irrigation, and supplying water for household and domestic consumption, and watering live stock upon dry lands of the State, is a public use, and the right to collect rates or compensation for such use is a franchise." [10]

South Dakota: "All the waters within the limits of the State from all sources of water supply belong to the public, and except as to navigable waters, are subject to appropriation for beneficial use." [11]

Texas: In Texas it is provided that waters "are hereby declared to be the property of the public," etc.[12]

Utah: "The waters of all streams and other sources in this State, whether flowing above or under the ground, in known or defined channels, are hereby declared to be the property of the public, subject to all existing rights to the use thereof." [13]

Washington: "The right to the use of water in any lake, pond, or flowing spring in this State, or the right to the use of water flowing in any river, stream, or ravine of this State, for irrigation, mining, or manufacturing purposes, or for supplying cities, towns, or villages with water, or for waterworks, may be acquired by appropria-

9 Compiled Laws of Okla., 1909, Sec. 3915.

See Chap. 96.

10 Lord's Ore. Laws, Sec. 6525; Bal. & Cot. Ann. Codes, Sec. 4993; see, also, Sec. 5022.

For the laws of Oregon, see Chap. 97.

11 Laws S. D., 1907, p. 737, Sec. 1. See, also, Chap. 100.

12 Sayles' Civ. Stats., 1900, Sec. 3115; Rev. Civ. Stat., 1911, Sec. 4991.

For the laws of Texas, see Chap. 101.

13 Comp. Laws Utah, 1907, Sec. 1288x18.

For the laws of Utah, see Chap. 102.

tion, and as between appropriations, the first in time is the first in right." [14]

§ 1341. Power of the legislature to regulate the use of water—Police power.—The power of a State legislature to enact laws for State control and for the government of the waters flowing within its boundaries and the regulation of their use is unquestioned. This comes strictly within the police power of the State, which is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life.[1]

Relative to the use of the waters flowing within the boundaries of a certain State, this police power is the authority to establish such rules of good conduct, which are calculated to prevent a conflict of rights and to insure to each owner of a right the uninterrupted enjoyment of his own, so far as reasonably consistent with the corresponding enjoyment by others of their rights. Whatever right one has, even in his own, is subject to that well-established principle that his use shall not be injurious to the similar rights of others.[2] Such being the law as to private rights, to a much greater extent does the police power of a State apply to rights which are public, as is the case of the waters within its boundaries, the right to the use of which is common to a large portion of the community. And, in this respect, it is the unanimous consensus of authority that the use of water in the arid region of the West, especially for the irrigation and reclamation of land, is a public use, in which the general public are directly interested. And, holding to this view, the Supreme Court of the United States has gone to the extent that even one person might condemn a right of way through the lands of others for a ditch the purpose of which was to conduct therein water for the irrigation of his own private land.[3] Therefore, legislation by a State in relation to the waters flowing within its boundaries directly affects the public welfare, and the right to legislate in re-

[14] Rem. & Ball. Ann. Codes, 1910, Sec. 3616.

[1] Cooley, Const. 227; Cooley, Const. Lim. 572; 4 Bla. Com. 162.

[2] *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

See, also, power of legislature to regulate the use of water from artesian wells, Sec. 1172.

[3] Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

gard to its use, regulation, and conservation is referable to the police power of the State.[4]

As was well said in a late Colorado case:[5] "The laws of the State providing for officials to distribute the waters of our streams for agricultural uses according to adjudicated priorities were passed for the purpose of securing an orderly distribution of such waters and to prevent breaches of the peace which would inevitably ensue if the owners of priorities were permitted to divert and divide the waters of our streams according to their ideas of their adjudicated

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

See, also, for "public use," for which the right of eminent domain may be exercised, Secs. 1063-1074.

4 Such an Act is a proper exercise of the police power of the State to prevent personal conflicts by treating the decrees rendered in the several districts as *prima facie* correct, and regulating the distribution of water accordingly, until the rights of the parties can be adjudicated. Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, and in which the Court said: "This Court has repeatedly held that statutes like the one under consideration may be enacted in the exercise of the police power of the State."

"The authority of the general assembly to enact laws regulating the distribution of water to actual appropriators, providing they do not substantially affect constitutional or vested rights, is undoubted." Mr. Justice Elliott in Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

"This Act therefore relates to waters, the right to the use of which is common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the State." *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

"These Acts have been called police regulations, and they are intended to regulate the distribution of the water among the inhabitants of a stream so as to insure to each his rightful proportion according to the extent of his appropriation." Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; affirming 5 Colo. App. 1, 31 Pac. Rep. 345; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Cummings v. Hyatt, 54 Neb. 37, 74 N. W. Rep. 411.

5 McLean v. Farmers' High Line etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

rights and needs. These laws must be strictly enforced and observed, and the courts have no power to annul them."[6]

And, in general, it may be said that the right of the legislatures of the States to regulate the use and prohibit the destruction of property extends, not only to that class of property over which the State, as sovereign, has a qualified ownership, but includes every species of property in the preservation and use of which the public has an interest, either because of its nature, or because the public health, the public safety, the public morals, or the general public welfare in any respect is involved.

In relation to the subject of waters, as was stated by the Supreme Court of the United States:[7] "The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in Farm Investment Co. v. Carpenter,[8] 'to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water.'"[9]

Under the police power of the State, the legislature has also provided for the punishment of the unlawful interference of water rights, the waste of water, or the obstruction of the work of officials in the performance of their duty.[10]

§ 1342. Governing boards—Powers and duties of.—Some of the States adopting the law of State control of the waters within their respective jurisdictions have placed primarily the administration of

6 The State has control of the public water of the State and may prescribe rules and regulations whereby they may be appropriated and applied to a beneficial use. Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

See, also, Speer v. Stevenson, 16 Idaho 707, 102 Pac. Rep. 365.

7 Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67.

8 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

9 See, also, Hamp v. State, —— Wyo. ——, 118 Pac. Rep. 653.

10 For the criminal statutes for the respective States upon the above subject, see Part XIV.

In Wyoming it was held in a recent case that in a prosecution for unlawfully interfering with the headgate of an irrigation ditch contrary to the statute, the question of the ownership of the ditch and headgate was immaterial. Hamp v. State, —— Wyo. ——, 118 Pac. Rep. 653.

those laws in the hands of special tribunals, or governing boards, created by the Acts for that purpose.

In Wyoming, the first to provide for such a tribunal, when it was admitted as a State in 1890, the outlines of the system were embodied in the constitution, which provided that the legislature should by law divide the State into four water divisions, and provide for the appointment of superintendents thereof; that there should be a State Engineer, who should be appointed by the governor, and who, with four division superintendents, should compose the "Board of Control," and of which the State Engineer should be president.[1] Pursuant to the constitutional requirements, the first State legislature passed an Act entitled, "An Act providing for the supervision and use of the waters of the State," approved December 22, 1890,[2] and in which the provisions of the constitution were fully complied with as above set forth. The system thus adopted in the State of Wyoming at that time, and still in existence, with only minor changes, was founded upon a new principle of American irrigation law. It contained two radical departures from the existing practice in this country. These were: First, the acquirement of rights to the use of water through an application to a public board, or official, who had the power to refuse it under certain circumstances, rather than the old system of appropriation, discussed in previous chapters;[3] and, second, the adjudication of the rights of claimants to the use of water by an administrative board.[4]

In Idaho the State constitution provides for State control of the waters flowing within its boundaries.[5] For the purpose of administering and controlling the waters within the State, it is divided into three water divisions, and for each of these divisions there is a water commissoner appointed by the Governor and confirmed

1 See Const. Wyo., Art. 8, Secs. 1-5.
See, also, Const. Wyo., Sec. 1339.

2 See Comp. Stat. Wyo., 1910, Secs. 761-798.
See, also, laws of Wyoming, Chap. 104.

3 For Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.
For the appropriation of water, see Chap. 38, Secs. 706-732.
For the details as to the application, see Sec. 1350.

4 For the adjudication of water rights by the board, see Chap. 80.

5 See Const. Idaho, Art. 15, Sec. 45.
See, also, for Constitution of Idaho, Sec. 1339.
See, also, Chap. 89.

by the senate. The State Engineer, also appointed in the same manner, and the three water commissioners constitute the "State Board of Irrigation." This board has the power to make rules in regard to the making proof of the completion of the works and the application of the water to beneficial purposes, and also all needful rules for the distribution of the water. The board has nothing to do with the acquirement of the rights. But before the construction, enlargement, or extension, or change in the point of diversion of any ditch, canal, or other distributing works, an application must be made to the State Engineer for a permit.[6] Neither the board nor the State Engineer has any power under the law to make adjudications of rights, but this is left to the courts.[7]

In 1895, the legislature of Nebraska adopted a system of public control similar in outline to the Wyoming system, but differing considerably in detail. It provided for the administrative adjudication of existing rights, for the acquirement of rights under State supervision, and for the distribution of water by State officials.

A board called the State Board of Irrigation was at the head of the system, but in 1911 the law was amended and there was created "a State Board of Irrigation, Highways, and Drainage." And it was provided that the new board shall exercise the powers and perform the duties of the old board. This board differs from the Wyoming "Board of Control" in that it is composed of State officers having other duties than officers having to do only with the administration of water laws. The board is composed of the Governor, the

6 Rev. Codes of Idaho, 1908, Secs. 3275 *et seq.*

For applications, see Sec. 1350.

See Idaho Stat., 1903, p. 223, Sec. 1, as amended, 1905, p. 357.

For the laws of Idaho, see, also, Chap. 89.

7 For the adjudication of water rights, see Chap. 78.

The Code of Civil Procedure, 1901, Sec. 3791, provided as to the determination of existing priorities that, where the waters of any stream had not yet been adjudicated, that the water commissioners must bring suit in the District Court against any and all claimants whose rights were unadjudicated, serving summons by publication. This was declared unconstitutional in the case of Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179, the Court holding: "Under the police power of the State the legislature can not authorize a public officer to bring a suit to settle private rights to the use of water or the priority of such rights." The Court also held that the provisions for the service of summons was clearly in violation of the provisions of Section 26, Article 5, of the State Constitution.

Attorney-General, and the Commissioner of Public Lands and Buildings. The board elects a Secretary, who must be a hydraulic engineer, and is commonly called the State Engineer. The board has the power of making determinations of all existing water rights. The State is divided into two water divisions, and the control of each division rests with an assistant secretary, who must also be an engineer.[8]

In Nevada the statute declares that: "All natural water courses and natural lakes and the waters thereof which are not held in private ownership belong to the State, and are subject to appropriation for beneficial uses."[9]

In this State, in 1901, there was created by the legislature a "State Board of Irrigation," composed of the Governor, the Surveyor-General, and the Attorney-General. The office of the State Engineer was created in 1903, and in 1905 he was made a member of the board. The duties of the board are to divide the State into water divisions and districts, to appoint water commissioners over the same, and to make such rules as to the acquisition and use of water as it shall deem advisable. The principal duties as to the acquisition of water rights and the adjudication of existing prorities fall upon the State Engineer, who is, in fact, the executive officer of the board.[10]

In North Dakota the State Engineer is appointed by the Governor. Complete records of his work must be kept in his office for public inspection. He has the power to make all necessary rules and regulations to carry into effect the duties of his office. It is made his duty to make hydrographic surveys of each stream system, obtaining and recording all valuable data for the determination, development, and adjudication of the water supply of the State. He also has jurisdiction of the applications to appropriate water.[11]

In South Dakota, for the distribution of water, the State is divided into three divisions, for each of which there is a water com-

8 Compiled Stat. of Neb., 1911, Secs. 6409-6430.

9 Rev. Laws Nev., 1912, Sec. 4672; Comp. Laws, 1900, Sec. 354; see, also, Stat., 1907, p. 30, Sec. 1.

10 Rev. Laws Nev., 1912, Secs. 4679-4685, 4706; Laws Nev., 1907, p. 30, Secs. 21 *et seq.*

As to the duties of the State Engineer, see Sec. 1343.

For the Laws of Nevada, see Chap. 93.

11 Revised Codes N. D., 1905, Secs. 7608-7617; see, also, Secs. 7622-7629

For the laws of North Dakota, see Chap. 95.

missioner appointed by the Governor. These commissioners and the State Engineer form the "State Board of Water Commissioners," who have the general supervision and control over the waters of the State, and may adopt such rules and regulations for the acquisition of water rights and the use of the water as they may see fit. The adjudication of all water rights is left to the courts, in either suits brought by private parties or in those brought by the Attorney-General, and in which all rights to the use of the water of any certain stream may be determined.[12]

In New Mexico the Act of the legislature of 1907 provides for the division of the Territory into stream systems, over which the engineer appoints water masters. The engineer has the general supervision of the apportionment and distribution of the water in the Territory. The acquisition of new rights must be made by an application to the Engineer, who may approve or reject the application. The adjudication of existing water rights is left to the courts.[13]

It will be noticed that even in States which have governing boards that large powers are granted to the State Engineer, who is made a member of the board itself, and is the executive officer thereof, and upon whom the greater portion of the duties in administering the law devolves.

§ 1343. **The State Engineer—Duties of.**—The office of the State Engineer is peculiar to the Western States, and of these States to those which have adopted the laws of State control of the waters flowing within their respective boundaries. His duties are chiefly with the question of waters, and more especially with the use of water for the irrigation and reclamation of land. His powers and duties vary greatly in the different States from merely the making of hydrographic surveys, as is the case in Oregon, to practically the complete control of the water supply, including judicial powers, as is the case in Nevada. In all of these States, whether there are governing boards or not,[1] he is the chief administrative and execu-

[12] Laws S. D., 1907, p. 385, Sec. 41. For the laws of South Dakota, see Chap. 100.

[13] Laws N. M., 1907, p. 92, Secs. 63 *et seq.* For the laws of New Mexico, see Chap. 94.

[1] For the duties and powers of governing boards, see Sec. 1342.

tive officer and whatever there is of State control of waters centers in his office. For the purposes of this work we will briefly make a comparative statement of the powers and duties of the State Engineers as prescribed by the statutes of their States, leaving the more extended statement to the laws of the respective States themselves, an abstract of which will be found in another part of this work.[2]

This statement would not be complete without reference to the State of California. Although this State has no State Engineer at present, it was originally the first to have one. The office was created in 1878, and was for the purpose of collecting information [3] as to the water resources and irrigable lands. The office, however, was abolished in 1887.[4] The legislature of the State again recreated the office of the State Engineer in 1907,[5] but few powers were given to the State Engineer beyond those of co-operating with the United States Reclamation Service. In 1909 the legislature passed an Act providing for the hydrographic survey of the State.[6] In 1911 the California legislature again provided for a State Engineer and a Board of Irrigation, but confined the duties of both to an investigation of the resources of the State.[7]

Colorado was the pioneer State in providing for the distribution of water by public officials, and the State Engineer is at the head of the system. This office was created in 1881, and the engineer was given general charge of the distribution of water through the State. The Act also provided for the filing of new claims with the county clerk and the State Engineer. The provision for the filing of the new claims was, however, declared void by the court because of defective title.[8] No judicial powers were given him, but these were left entirely to the courts. Under this plan the engineer is considered a purely administrative officer, and his duties were con-

2 For the laws of the various States, see Part XIV.

3 Stats. and Amdts., 1877-1878, p. 634.

4 See the reports of Wm. Ham Hall on Irrigation in Italy, Spain, and France, and on San Diego, San Bernardino, and Los Angeles counties, California.

5 Stats. and Amdts., 1907, Chap. 83.

6 California Stats. and Amdts., 1909, Chap. 704.

7 For the California statutes upon the subject, see Part XIV.

8 Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261; Rio Grande etc. Co. v. Prairie etc. Co., 27 Colo. 225, 60 Pac. Rep. 726; Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Mohl v. Lamar C. Co., 128 Fed. Rep. 776.

fined to the general supervision of the distribution of waters after the rights had been adjudicated. However, by an Act passed by the legislature in 1903, he was given additional powers in the matter of the acquisition of new rights, and the approval of the plans therefor, which must be filed with him within sixty days after beginning the construction work.[9]

In Idaho the office of State Engineer was created in 1895, in connection with the acceptance of the conditions of the Carey Act.[10] His duties are to examine plans submitted under that Act and to determine whether they are feasible and beneficial to the public. Since 1901 irrigation district plans are also subject to the approval of the State Engineer; since 1903 he has also had control of the acquisition of all new rights, and any party wishing to acquire the right to the use of any of the waters of the State must make an application in proper form to the State Engineer.[11] The State Engineer as the head of the State Board of Irrigation also practically has full charge of the distribution of the water to the lawful claimants, the determination of whose rights is left entirely to the courts, and, therefore, the engineer has no judicial powers to determine existing rights.[12]

In Montana, while the office of State Engineer was created in 1903 in connection with the acceptance of the Carey Act, he has nothing to do with the control of the waters of the State. His duties are confined to the examination of State lands to determine their irrigability, and to examine and measure the streams of the State. He is also required to examine the land applied for under the Carey Act and to determine the feasibility of its reclamation, and to exercise general supervision over the carrying out of the plans. He has no judicial powers.[13]

In Nebraska, under the law of 1895, the State Board of Irrigation

9 For the laws of Colorado, see Chap. 87.

For the duties of the State Engineer of Colorado, see Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3321-3332.

10 For the Carey Act, see Chap. 67, Secs. 1312-1336.

11 This part of the Act was held constitutional in Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325; Trade Dollar M. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37.

12 Rev. Codes Idaho, 1908, Secs. 149-153.

For the laws of Idaho, see Chap. 89.

13 Stats. of Mont., 1911, Chap. 128, p. 352.

For the laws of Montana, see Chap. 91.

elects a secretary, who must be a hydraulic engineer, and is commonly called the State Engineer. He has all the powers and duties commonly given to State Engineers, and more than is granted in some States. It is made the duty of the secretary to measure, or cause to be measured, the flow of streams of the State; the State board, through its secretary, has general authority over the distribution of the water, and a party wishing to acquire a water right is required to file an application with him for the same, and he is required to refuse an application if there is no unappropriated water in the source of supply, or if it is deemed detrimental to the public welfare. This, as will be seen, gives him great power. Appeal from the rulings of the secretary, or from the board, may be had to the District Court, and from there to the Supreme Court. But the Court holds that the power of the secretary is practically absolute to approve or reject applications.[14] Probably the greatest power granted the secretary, or the State Engineer, is the power to define or to determine existing rights. No method of making adjudications was prescribed by the Act, and this matter was left entirely to the board. Rules were at once adopted under which the adjudication is to be made by the secretary, from whose decision appeal may be had to the board; but in case there is no appeal the board merely adopts the report of the secretary. Appeals may then be had from the rulings of the board to the courts.[15]

In Nevada, the office of the State Engineer was created in 1903, and in 1905 he was made a member of the State Board of Irrigation. In this State also he is given great powers. He has the general supervision of the distribution of waters in the State. Parties wishing to appropriate water must file a proper application with him for the same; written protests against the granting of the application, stating the reasons therefor, may be filed by other parties. The engineer may, in his discretion, then hear evidence in support of or against any application, and shall then take such action thereon as he deems to be proper and just. Under the Act of 1907, no right of appeal from his decision is given, but the Act provides that any party feeling himself aggrieved by the decision of the State Engi-

[14] Comp. Laws Neb., 1911, Secs. 6415-6417; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

[15] For the laws of Nebraska, see Chap. 92.

neer may bring an action, within sixty days after his notice in writing of such decision, in the court having the proper jurisdiction against the State Engineer and all parties having interests adverse to him, and the matter "shall be tried *de novo* by the court."[16] The State Engineer is also given absolute power to determine existing water rights in the first instance. But any party feeling himself aggrieved by the decision of the State Engineer is given the right to bring an action against such engineer and all parties having interests adverse to him at any time within one year after the record of the list of the priorities and awards has been recorded.[17]

In New Mexico the office of Territorial Engineer was first created in 1905, but no provision was made for salary and expenses, and the law proved in this respect ineffective. Later, in 1907, the legislature again created the office and provided for salary. Under this law he is given full supervision of the apportionment of the water in the State; applications for future rights must be made to him, and he is given the power to approve or reject the same. He is given no judicial powers as to existing water rights.[18]

In North Dakota, in 1905, the office of State Engineer was created, and he was given "general supervision of the waters of the State and of the measurements and appropriation thereof." The distribution of the water is directly under the four water commissioners appointed by the Governor, according to licenses issued by the State Engineer. All applications for the future appropriation of water must be made to him in the proper form, and he may ap-

16 Rev. Laws Nev., 1912, Sec. 4701; Laws Nev., 1907, p. 30, Secs. 24-29.

17 Rev. Laws Nev., 1912, Sec. 4690.

See Laws Nev., 1907, p. 30, Secs. 17-19.

See, also, for the adjudication of water rights, Chap. 79.

18 Laws N. M., 1907, p. 78, Secs. 4 *et seq.*

For laws of New Mexico, see Chap. 94.

By the Supreme Court of New Mexico it was held that the jurisdiction of the Territorial Engineer, under Section 12 of the Act of 1907, only related to public unappropriated waters within the Territory, and had no application to seepage or spring water arising on the land of a proprietor from an unknown source. Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567.

It was also held that the Territorial engineer is without authority to issue a permit for a project to irrigate lands in New Mexico from the waters of a natural stream running from Colorado into New Mexico, when the point of diversion, the headgate, and about six miles of the irrigation ditch are in Colorado. Turley v. Furman, —— N. M. ——, 114 Pac. Rep. 278.

prove or reject such application. Appeal may be had from his decision to the courts. He is given no power to determine or adjudicate existing water rights.[19]

In the State of Oklahoma, the water code refers to the State Engineer all through its provisions. But there is no statutory provision for the creation and maintenance of an office of State Engineer. However, by statute it is made the duty of the secretary of the State Board of Agriculture to perform all the duties assigned to the State Engineer in the code. The said secretary is empowered by and with the advice and consent of the Governor to temporarily employ the services of a technically qualified and experienced engineer for the purpose of examining, investigating, or determining upon any professional engineering questions.[20]

In Oregon the office of State Engineer was created in 1906, but he was given little control of the waters of the State, his duties being confined almost entirely to making hydrographical and topographical surveys. He was given no power over the distribution of water throughout the State.[21] But under the Act of 1909 the State Engineer and the superintendent of the two water divisions constitute the Board of Control, which "have the supervision of waters of the State and of their appropriation, distribution, and diversion, and of the various officers connected therewith." [22]

In South Dakota the office of State Engineer was created in 1900, and he, with the aid of the water commissioners under him, has general supervision of the distribution of the waters of the State. For the future acquisition of rights an application must be filed with the engineer, who has the power to approve or reject such application. No judicial powers are granted as to existing rights.[23]

In Utah the office of State Engineer was first created in 1897, but at first he was given practically no powers as to the control of the water supply. His duties were principally to make the surveys and to submit plans and estimates for reservoirs and supervise the construction of reservoirs by the State. Under this Act there was no

19 Rev. Codes, 1905, Secs. 7608-7617.

For the laws of North Dakota, see Chap. 95.

20 Compiled Laws of Okla., 1909, Sec. 3982.

21 For laws of Oregon, see Part XIV.

22 L. O. L., Secs. 6598-6602.

23 Laws, 1907, pp. 374-376, Secs. 5-14.

For laws of South Dakota, see Chap. 100.

element of State control. In 1901 the powers and duties of the State Engineer were considerably enlarged, and the authority of the State to regulate the use of water was recognized, and the State Engineer was placed at the head of the system. By the Act of 1903 a complete system of State control was adopted, and the State Engineer was given "general supervision of the waters of the State and of their measurement, apportionment, and appropriation." By the Act of 1905, as amended by the Acts of 1907 and 1909, the system was still further perfected. He has power to supervise the distribution of water throughout the State, and acts through the superintendent of the water divisions and the supervisors of the water districts. He has general supervision of the appropriation of all surplus or unappropriated water, and those desiring to appropriate water must file the proper application with him, which he may approve or reject, and from his decision there is no appeal. However, any applicant who is dissatisfied with the action of the State Engineer may bring an action in the District Court and have the question adjudicated by the court. It is held that he has discretionary power to extend the time within which the construction of the works must be completed, if the time is kept within the maximum allowed by law.[24] The State Engineer has no judicial powers, either for the determination of existing rights or for the determination of the rights of applicants for the appropriation of water where protests have been filed. The law of 1903 provided for a hearing on a protested application, but the Court held that the provision was unconstitutional as attempting to confer judicial power upon the State Engineer. The protests, however, may be made by affidavits, to which the applicant may file reply affidavits.

In Washington there is no State Engineer, but under a bill that was submitted to the legislature in 1911 a complete law upon the theory of State control was proposed. This bill provides for a State Engineer, who is to be a hydraulic engineer.[25]

The State of Wyoming, although last alphabetically, was the first State to adopt the complete system of State control of the waters flowing within its boundaries. This was accomplished under the

[24] Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289.

[25] For abstract of proposed bill, see criticism of the Washington laws, Chap. 103.

See, also, Laws, 1911, p. 658, House Bill No. 284.

direct influence and supervision of that astute hydraulic and irrigation engineer, Mr. Elwood Mead, who was appointed the first State Engineer under the Act of 1886. Under this system the State Engineer is given full control and supervision of the distribution of the waters within the State, which is more directly accomplished by division superintendents and by the water commissioners. Relative to the acquirement of new rights, the person wishing to acquire a right must, before beginning construction, make application to the State Engineer. The engineer has the authority to refuse an application when there is no unappropriated water in the source of supply or when its granting would be contrary to public policy, and since 1895 the applicant is required to show his financial ability to carry out the proposed project. Full judicial power is granted to the State Board of Control, of which the State Engineer is president, to determine existing rights upon testimony taken by the board or by the division superintendents. It was even provided that the cases pending in the courts when this law took effect might be turned over to the board, and this was done in a few instances. The Board of Control may grant a rehearing or an appeal may be taken to the courts. This law, as will be noticed from the above abstract of laws of the various States, has been followed by a number of the other States in its main features, and this system is often referred to as the "Wyoming System" of State control.[26]

§ 1344. **The State Engineer—Power and authority of.**—As will be seen from the abstract of the laws of the various States adopting the law of State control, as given in the preceding section,[1] the powers granted the State Engineers vary from that of merely making geographical and topographical surveys and stream measurements to those of almost absolute control of the distribution of the waters of the State, the granting of permits to make future appropriations, and the adjudication and determination of existing rights. In the States of Wyoming, Nebraska, and Nevada, his powers, together with those of the governing board, of which he is either the acting member or the president, are almost absolute, as far as those granted by statute are concerned, upon the question of the appropriation and use of the water within their respective jurisdictions

26 Wyo. Comp. Stat., 1910, Secs. 761-798. See, also, Chap. 104.

1 See Secs. 1339, 1340.

and the adjudication of existing rights. In the hands of a capable and honest engineer the granting of this autocratic power may work out all right, but in the hands of one not familiar with hydraulic engineering or the duties of the office, and appointed merely, as is too often the case, for political purposes, it is entirely too great a power to grant to one man, having as he does one of the principal natural elements under his absolute control, which in turn, in a number of instances, controls the greatest industry of the State—agriculture.[2]

Although the courts of these States have in the main upheld the statutory law granting these excessive powers to one person as constitutional,[3] in a number of instances these powers have been limited by Court decisions. In Wyoming it was held that where the law declared that an appeal should lie from a decision of the commissioner to the district superintendent, from him to the State Engineer, and from his decision to the Circuit Court, a decision of a commissioner and superintendent, though not appealed from, was not an adjudication conclusive on the courts.[4] In Nebraska the power to adjudicate the rights of uncompleted ditches was denied by the Supreme Court.[5] In Idaho, although the State Engineer is given the power of approving or rejecting applications to appropriate water, it is held that this right is purely ministerial, and that he acts *ex parte*, and that such action is subject to judicial inquiry by the courts.[6] And it is further held that, upon proper proof of the application of water sought to be applied to a beneficial use, the State Engineer is required to issue a license confirming the right to such use of water for the specified beneficial purpose; and where

2 "In Wyoming charges of favoritism were made against the engineer, and the exercise of this authority has given him a great deal of trouble." R. P. Teele, in The State Engineer and His Relation to Irrigation, 1906, Bulletin No. 168, U. S. Dept. of Agriculture.

3 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25; Pool v. Utah County etc. Co., 36 Utah 508, 105 Pac. Rep. 289.

See, also, Gay v. Hicks, —— Okla. ——, 124 Pac. Rep. 1077.

4 Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661.

5 Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

6 Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

the engineer refuses to do this, he may be compelled to perform the ministerial duties of his office by a writ of mandate.[7] In Utah the law passed in 1903 provided for a hearing by the State Engineer on a protested application, but when the engineer attempted to hold such a hearing he was prohibited by an order of the District Court, on the ground that that provision of the law was unconstitutional, for the reason that it attempted to confer judicial power on the State Engineer. Since that time the law has been repealed in this respect, and all determination of rights must be by the courts.

§ 1345. Division engineers and division superintendents.—In the most of the States adopting the laws of State control the State is divided into two or more divisions, and in these States the officer next in rank to the State Engineer is the division engineer or the division superintendent, or some other officer in charge of a division. In Nebraska these division officers are styled "under secretaries,"[1] and in South Dakota "water commissioners,"[2] and the same in North Dakota.[3] In Colorado the law first provided for "division superintendents," but this was changed to "irrigation division engineers," who are to be appointed by the Governor upon a competitive examination.[4] These officers have the more direct control of the waters of their respective divisions, and as a general thing they are hydraulic engineers, and are second in authority and assistants to the State Engineer,[5] and the power conferred upon them is a part of the police power of the State.[6] The law presumes that

7 Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

1 See Neb. Comp. Stat., 1911, Secs. 6419 *et seq.*

2 S. D. Laws, 1907, p. 384, Secs. 39 *et seq.*

3 N. D. Rev. Codes, 1905, Secs. 7640-7644.

4 3 Colo. Stat. Ann., Morr. Edition, 1911, Secs. 3335 *et seq.*; Revised Stat. Colo., 1908, Secs. 3335 *et seq.*

5 "By the Act the superintendent is made a subordinate of, and assistant to, the State Engineer. His acts are not conclusive unless acquiesced in. The State Engineer is made the responsible party." Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. Rep. 556.

6 For police power of State to enact such laws, see Sec. 1341.

For duty of division superintendents, see McLean v. Farmers' High Line Canal and Res. Co., 44 Colo. 184, 98 Pac. Rep. 16, in which it is said: "It is the duty of the superintendent of a water division to make such distribution by direction to the water commissioners under his control." Citing Lower Latham D. Co. v. Louden I. C. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80.

public officials discharge their duties in conformity with the statutes, and the burden of showing to the contrary rests with him who relies thereon. In Wyoming the power of the division superintendents is extended to that of having quasi-judicial power over the rights within their respective jurisdictions, and the four division superintendents, with the State Engineer, constitute the Board of Control.[7] In some of the States the division engineer or division superintendent is paid by the State by salary designated by the Act. In Wyoming his salary is fixed at $1200 per annum. In most of the States, however, they are paid by the State at a per diem rate. In some of the States his salary is paid by the counties over which he has jurisdiction. This is true in Colorado, and it is held that where a county has no land which is irrigated within a certain irrigation division, it is not liable for any part of the salary of the superintendent of that division.[8]

§ 1346. Water commissioners—Water masters—Under assistants—Supervisors.—For the more complete control and supervision of a State the water divisions mentioned in the last section [1] are divided into water districts. Usually these districts include only some branch or tributary of the main stream, from which the water is taken by the various ditches and canals. It must be noted here that these districts have no connection with the irrigation districts provided for in some of the States following in form the irrigation districts of California, organized under the "Wright Law," and which will be discussed in a future chapter.[2] In the State of Wash-

7 Comp. Stat. Wyo., 1910, Secs. 753 *et seq.*

For governing boards, and their duties and powers, see Sec. 1342; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

8 Chew v. Board of County Commrs. of Fermount Co., 18 Colo. App. 162, 70 Pac. Rep. 764; Chapman v. Board of County Commrs. of Phillips Co., 17 Colo. App. 236, 68 Pac. Rep. 134.

In Wyoming, mandamus was held maintainable to compel a State auditor to issue a warrant on the treasurer for relator's salary as superintendent of a water division, after relator's alleged improper removal from such office and the appointment of his successor. State *ex rel.* Hamilton v. Grant, 14 Wyo. 41, 81 Pac. Rep. 795.

1 See Sec. 1345.

2 See Chap. 70, Secs. 1386-1432.

An early statute of California (Cal. Stat., 1854, p. 76) provided for commissioners whose duties were to apportion and divide the water among the various users. These provisions are now obsolete, although not having been repealed.

ington by statute each county is made an irrigation district.[3] In Wyoming the State Board of Control is given the power to create "water districts" as the necessity arises.[4] In North Dakota,[5] South Dakota,[6] Oklahoma,[7] and Utah,[8] the statute provides that the water divisions shall be subdivided into districts by the State Engineer, which districts shall be so constituted as to secure the best protection to the water users and the most economical supervision on the part of the State. In Colorado these districts are created by statute.[9] In Nebraska the State Board of Irrigation may create these water districts when necessary, upon a petition of the parties interested.[10] In Idaho the same board creates the districts,[11] and in Nevada the board is given the power to divide the State into "water subdivisions." [12]

Over each of these water districts the laws provide for the appointment, sometimes by the Governor, but usually by the State Engineer, of an officer under whose direct supervision the water is distributed to the various users within his jurisdiction. These officers are termed "water commissioners," "water masters," "under assistants," or "supervisors." In authority these division officers are subject to the direction of the division engineer, who, in turn, is under the State Engineer. His duties consist of the apportionment of the water in the natural stream or streams in his district among the several ditches, in accordance with their priorities. He must see that the water is not used by those not entitled thereto where the rights of those lawfully entitled thereto are injured. He must also see that the water is not wastefully used by those entitled to rights. In many of the States these officers are vested with the power of deputy sheriffs or constables, and may make arrests for the unlawful in-

See Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Charnock v. Rose, 70 Cal. 189, 11 Pac. Rep. 625.

3 Rem. & Bal. Ann. Codes, Sec. 6350.

4 Comp. Stat. Wyo., 1910, Secs. 799 *et seq.*

5 Rev. Code, 1905, Sec. 7645.

6 Laws, 1907, p. 385, Sec. 43.

7 Comp. Laws Okla., 1909, Secs. 3960-3964.

8 Comp. Laws, 1907, Sec. 1286.

9 3 Colo. Stat. Ann., Morr. Edition, 1911, Secs. 3353-3426; Revised Stat. Colo., 1908, Secs. 3353-3426.

10 Comp. Stat., 1911, Secs. 6441 *et seq.*

11 Rev. Codes, 1908, Secs. 3274, 3275, 3284; Laws, 1903, p. 240, Sec. 23.

12 Laws Nev., 1907, p. 30, Secs. 22, 23; Rev. Laws, 1912, Secs. 4693, 4694.

terference with the water. Their duties are, in fact, in the nature of water police, whose duties are to protect the rights of the lawful appropriators, and to arrest those who unlawfully infringe upon their rights. They are usually equipped with sufficient knowledge to make immediate measurements of the water under the rules furnished by the State Engineer, and can thus ascertain whether each party is getting the water to which he is entitled. They are usually paid by the counties in which their respective districts are situated such a sum *per diem* as is fixed by the statute.[13] Being on a *per diem* compensation in most of the States, it is provided that these officers shall not begin their work until they have been called upon by two or more owners or managers of ditches, by application in writing, and they shall not continue to perform services after the necessity therefor shall cease. In Idaho in a recent case this provision of the statute was held to be mandatory, and that the water master had no authority to begin his work until he had been so called upon, and until so called upon he could not draw pay for his services.[14]

[13] For the general powers and authority of such officers, see Boulder v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75; Hamp v. State, —— Wyo. ——, 118 Pac. Rep. 653; Stetham v. Skinner, 11 Idaho 374, 82 Pac. Rep. 451; Robertson v. People *ex rel.* Soule, 40 Colo. 119, 90 Pac. Rep. 79; Cache La Poudre etc. Co. v. Hawley, 43 Cal. 32, 95 Pac. Rep. 317.

See Board of County Commrs. v. Locke, 2 Colo. App. 508, 31 Pac. Rep. 351, holding that it devolved upon each county within a district to pay an equal part of the commissioner's compensation.

See, also, Board of County Commrs. v. Gould, 6 Colo. App. 44, 39 Pac. Rep. 895, holding that where a water commissioner appointed by the Governor under the law, qualified as required by statute, and began the performance of his duties, the presumption of a compliance with all the conditions authorizing the appointment is conclusive, as against collateral attack, and the judgment to recover for services is affirmed.

[14] Until called upon, "the water master has no authority whatever to begin work as such water master. Said water master, having no authority whatever to begin such work as such water master, could not draw pay as water master." Walker v. Elmore County, 16 Idaho 696, 102 Pac. Rep. 389.

See, also, Board of Commrs. v. Hider, 47 Colo. 443, 107 Pac. Rep. 1068, as to the rule in Colorado; Chapman v. Board of Commrs. of Phillips County, 17 Colo. App. 236, 68 Pac. Rep. 134; Fravert v. Board of Commrs. of Mesa County, 39 Colo. 71, 88 Pac. Rep. 873; Chew v. Board of Commrs. of Fremont County, 18 Colo. App. 162, 70 Pac. Rep. 764; Board of Commrs. of Clear Creek County v. McLean, 50 Colo. 602, 115 Pac. Rep. 525.

§ 1347. **The determination of existing rights.**—One of the features of the laws of State control, or State administrative laws, is the method provided for the statutory adjudication, or determination, in the first instance, of existing water rights. And in this respect there are two systems provided for this purpose in the respective States which have adopted these laws. These are: First, that method adopted by the statutes of Colorado, and the States largely following those statutes, provided for such adjudication in the first instance by actions brought in the courts having proper jurisdiction, either upon the instigation of private parties or by some public officer authorized by statute; and, second, that method adopted by the statutes of Wyoming, and the States largely following those statutes, providing for proceedings brought in the first instance before some public official—usually the State Engineer—or before some governing board or board of control, upon their own motion, with right of appeal from the decision of such officer or board to the courts.[1] These statutory actions or proceedings stand in a class by themselves, or are *sui generis*, and do not always follow the rules of equity procedure, but are entirely governed by the respective statutes of the States adopting the same. These actions and proceedings will be discussed in full when we come to the chapters upon the subject of the adjudication of existing rights.

§ 1348. **The distribution of the water according to the determination of rights.**—The States adopting the laws of State control and providing for the determination of the rights of the respective parties either by the State Engineer or governing board, or by the courts, also provide that the water shall be divided by the officers in charge of the distribution of the same, in accordance with the decision of the administrative officers, or in accordance with the decrees of the Court. As we have seen in a previous section,[1] the general supervision of the distribution comes under the duties of the State Engineer, and under him come the division engineers, who have the more direct supervision of the distribution of the waters in

1 For the statutory adjudication of water rights by courts, see Chaps. 78, 79.

For the determination of water rights by boards, see Chap. 80.

For the adjudication of water rights by actions in equity, see Chap. 78.

1 See Sec. 1347.

their respective divisions. But the officers who make the distribution are the water commissioners, water masters, under assistants, or supervisors, as they are at times termed under the respective laws.[2] The statutes of all of these States prescribe that the water shall be so distributed and used without waste. Therefore, large discretionary powers are vested in the officers in charge as to when to turn on the water and shut it off from any user. The interference with the gates by any party is made a misdemeanor, and the officer in charge is given the power to make arrests for any such violation of the law.

§ 1349. Proceedings to appropriate—Effect of application for permit—Notice—Relation.—The effect of the application to appropriate water filed with the State Engineer, or another official, prescribed by the statute does not alone constitute an appropriation any more than a notice of appropriation, under the old rule, constitutes one.[1] The ultimate end for which the appropriation is made must be attained, and the appropriation, under the laws of State control, as well as under the older laws of appropriation, can be finally consummated only by the application of the water to some beneficial use or purpose. It therefore follows that the effect of an application so filed is deemed in law as a mere notice of appropriation. This must be so or the very object of these laws of State control for the regulation and use of the waters of a State would be defeated, and one, by the mere filing of his application, could create a monopoly of the waters of certain streams, and hold them for future speculation.[2] Therefore, if the proposed appropriator is not able to complete and finally establish his appropriation by applying the water to and using it for the beneficial purpose for which it was proposed to be appropriated, either by himself or through the agency of some user, his appropriation fails. "He may not file his application, construct his works, and then hold the water and wait for something to happen."[3]

2 See Sec. 1346.

1 For the notice of appropriation, and effect, see Secs. 711-716; Coray v. Holbrook, —— Utah ——, 121 Pac. Rep. 572.

2 For the appropriation of water for speculation, see Sec. 705.

For the final consummation of an appropriation, see Secs. 725-728.

For the acts necessary under laws of State control, see Secs. 1350-1356.

3 Sowards v. Meagher, 34 Utah 212, 108 Pac. Rep. 1112, in which the Court also said: "But we think the

In most of the States it is required that duplicate maps must accompany the application as a part thereof. These maps must be drawn to a scale, and must show, as far as possible, all the details of the project.[4] In some of the States, however, these maps need not be filed until after the approval of the application.[5]

It is also provided in Colorado that the State Engineer shall approve the designs and plans for the construction and repair of all dams or reservoir embankments which are built within the State which equal or extend ten feet in vertical height.[6]

§ 1350. Proceedings to appropriate—Application for permit.—Having generally discussed the laws of State control in preceding sections of this chapter,[1] and for that purpose the subdivisions of the States into divisions and water districts, and the officers over each and their duties and powers,[2] we will now take up the question of the proceedings necessary to make a valid appropriation under these laws.

filing of the written application with the State Engineer, as required by the statute, is but declaring, or giving notice of, an intention to appropriate unappropriated water. The final step, and the most essential element to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be done, until the actual application of the water is made for a beneficial purpose, no valid appropriation has been effected. This was so before the statute, and it is still so under the statute. The filing of the application with the State Engineer, as required by the statute, does not establish an appropriation of water. It but takes the place of, and is the preliminary notice of intention to appropriate."

See, also, Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365, where it is held that the same rule holds good, even after a permit has been issued to appropriate water.

See, also, Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Toyano etc. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101; Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; United States v. Rickey, 164 Fed. Rep. 496; Rasmussen v. Blust, 83 Neb. 678, 120 N. W. Rep. 184; Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289.

4 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3181-3187; Revised Stat. Colo., 1908, Secs. 3181-3187.

5 For Nebraska, see Comp. Stat., 1911, Secs. 6437, 6470; Rev. Laws Nev., 1912, Sec. 4695; Nev. Stat., 1907, p. 30, Sec. 28; Utah Comp. Laws, 1907, Sec. 1288x15, as amended by Laws, 1909, p. 84.

6 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3323; Revised Stat. Colo., 1908, Sec. 3323.

1 See Secs. 1338-1349.

2 See Secs. 1342-1346.

The first step necessary for one desiring to appropriate water under this method is for the party to file with the proper officer, which is usually the State Engineer, but in some States with the governing board, an application for a permit to appropriate water. This rule, however, is subject to one exception. In the State of Colorado, where, within sixty days after the commencement of the work, the appropriator must file with the State Engineer two duplicate maps, in a form satisfactory to him, showing the essential facts.[3] The forms for these applications are furnished by the State Engineer, and can be had from him upon request.[4]

The essential facts necessary to be shown in the application are: The name and address of the person, corporation, or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water computed in the standard of measurement adopted by the State; the time during which it is to be used each year; the name of the stream or other source of supply from which the water is to be diverted; the place on the stream or other source of supply where the water is to be diverted; the dimensions, grade, shape, and nature of the proposed diverting channel; and such other facts as will fully define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application must show, in addition to the above required facts, the legal subdivisions of the land proposed to be irrigated, with the total area thereof, and the character of the soil. If the proposed use is for the development of power, the application must show, in addition to the above required facts, the number, size, and kind of waterwheels to be employed; the head under which each wheel is to be operated; the extent of the power to be produced, and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source. If the proposed use is for mining, the application shall show, in addition to the above required facts, the name of the mine and the mining district in which it is situated, the county wherein

[3] 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3181-3187; Rev. Stat., 1908, Secs. 3181-3187.

[4] NOTE.—Owing to the fact that these forms for applications, and others, are all furnished by the State Engineers of the respective States, and that they are subject to constant changes as the law and procedure is being developed, this work will not be encumbered with any forms.

the mine is situated, the nature of the material mined, the particular use to which the water is to be put, and the place where the water is to be returned to the natural stream or other source of supply. The place of the diversion and the place of the return of the water must be designated with reference to the United States land corners or mineral monuments when either the point of diversion or the point of return is situated within a certain distance fixed by the statute of the nearest United States land corner or mineral monument. Such in detail are the essential facts which are generally required to be set up in the application for a permit by the most of the States. Some of the requirements named may not be necessary in certain States while others must be stated. This can be readily ascertained by consulting the last statutes upon the subject.[5]

If the applications are defective in any way, permission is usually allowed to amend them.[6] Upon the applicant finally completing his appropriation, his rights under the doctrine of relation [7] relate back to the date of his filing of the original application.[8]

In Colorado an Act was passed by the legislature providing, among other things, for the filing of such applications. The law was declared void upon the constitutional ground that it contained more than one subject, which was not clearly expressed in the title. It was therefore held that all applications filed in pursuance to the Act were void.[9]

The nature of an application to the State Engineer for permission to appropriate public water, as held by the Supreme Court of Utah,[10] is merely notice of intent to appropriate, and does not establish an appropriation.

In all of the acts providing for the appropriation of water under the so-called laws of State control are to be found schedules of fees which are payable to the officers or to the State for services rendered or for the rights granted.

5 For the laws of the various States, see Part XIV.

6 See Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289.

7 For the doctrine of relation, see Secs. 742-755.

8 Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

9 Lamar C. Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261; Great Plains etc. Co. v. Lamar C. Co., 31 Colo. 96, 71 Pac. Rep. 1119; Mohl v. Lamar C. Co., 128 Fed. Rep. 776; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418.

10 Sowards v. Meagher, 34 Utah 212, 108 Pac. Rep. 1112.

§ 1351. Proceedings to appropriate—Action to be taken upon application—State Engineer must approve or reject.—Upon the receipt of an application by the State Engineer it is his duty to make an endorsement of its receipt, and to make a record of the same in a book kept in his office for that purpose. Many of the applications are imperfect in not setting forth all of the required facts. If this is so, it must be returned to the applicant for correction, and time is given for the refiling of the same. When the corrections are made it is refiled, and it takes priority as of the date of its original filing. If not corrected as required, no further proceedings shall be had on such application.

Some notice must be given to the public that the application is pending. The laws usually provide that when a valid application is filed with the State Engineer he shall at once, at the expense of the applicant, publish, in some newspaper having a general circulation within the boundaries of the water system from which the appropriation is to be made, a notice setting forth the essential facts of the application.[1]

It then devolves upon the State Engineer to examine the facts in the case and to pass upon the application. In the most of the States the power is granted to approve or to reject an application after he has made such an examination. Where the State Engineer finds that there is no unappropriated water in the proposed source of supply, or where the proposed use will conflict with the prior applications or with existing rights, it is made the duty of the engineer to reject such application. In some of the States it is also provided that the engineer may reject the application, when "its granting would be contrary to public policy," as is the case in Wyoming, or "if it is deemed detrimental to the public welfare," as is the case in Nebraska. In some of the States it is also required, as a condition of the approval of the application, that the applicant or his backers have the financial ability to carry out the proposed work, and that the application was made in good faith.

The feasibility of the project is also made a subject of investigation as to whether or not the permit should be granted.[2]

1 See statutes of the respective States, Part XIV.

2 See for the statutes of the various States upon the subject, Part XIV.

In a New Mexico case, decided in 1910,[3] it was held that where the Territorial Engineer was given the authority to deny an application if in his opinion the approval will be contrary to public interests, it does not give him the authority to reject a prior application for a project financed by outside capital and grant a permit to a subsequent application financed by local capital. The Court said: "We do not say this circumstance should have no weight in determining the question of public interest, but whether it should not outweigh the other considerations to which we have referred."

In another case it was said: "The question of feasibility is one of prime importance, of which there should be absolutely no doubt."[4]

In a recent Oregon statute, the State Engineer is given the power to reject all applications for water within the State for use outside of the State if the other State refuses diversions for use in Oregon.[5]

In some States, however, the State Engineer is required to approve all applications which are in proper form, thus relieving him of all responsibility of determining the rights of the adverse parties and leaving that to an adjudication by the courts. In some of the States provisions are made for the protesting of applications by interested parties, and the engineer is given judicial powers to take testimony and decide the controversy according to the evidence.[6] In some States an application may be contested upon the ground that it is not in the public interest, and that the contestant has a plan for the same project which is of larger scope or which is more in the nature of public interest.[7]

§ 1352. Proceedings to appropriate—Permit and effect of.—After an application has been once approved by the State Engineer, he must make a record of the same in his office, and issue to the applicant what is called a "permit" to make the appropriation ap-

[3] Young & Norton v. Hinderlider, 15 N. M. 666, 110 Pac. Rep. 1045.

[4] Turley v. Furman, —— N. M. ——, 114 Pac. Rep. 278.

See, also, Cookinham v. Lewis, 58 Ore. 584, 114 Pac. Rep. 88.

[5] See Oregon Stat., 1911, Chap. 224, p. 204.

[6] For the duties and powers of State Engineers, see Sec. 1344.

For the adjudication of water rights by State Engineer, see Chap. 80; see, also, Nevada, Chap. 93.

[7] Cookinham v. Lewis, 58 Ore. 584, 114 Pac. Rep. 88; Young & Norton v. Hinderlider, 15 N. M. 666, 110 Pac. Rep. 1045.

plied for. This permit usually consists of simply the endorsement of approval upon the duplicate application, which is returned to the applicant. The effect of such a permit is simply that of a license or permission upon the part of the State that the applicant may proceed with the construction of his works, the diversion of the water, and the final consummation of the appropriation. It is in no sense an appropriation or evidence of an appropriation, but it is simply the consent of the State given in the manner provided by the statute for the appropriator to proceed with the construction of his works and the other acts necessary under the law to perfect his right. The right given by such a permit may ripen into a completed appropriation, or it may be defeated by the failure of the holder thereof to comply with the requirements of the statute.[1]

Until the permit is granted the applicant can do nothing toward the further compliance with the laws. Therefore, an applicant for the appropriation of water for irrigation can not prosecute the work and condemn a right of way for his ditches and canals until he has a permit either from the State Engineer or the governing board, as the case may be.[2]

These permits are property, and may be sold and assigned by the original applicant to another party, who must proceed with the construction of the works and the other conditions required by the law to the final consummation of the appropriation; otherwise all rights thereunder will be forfeited.[3]

§ 1353. Proceedings to appropriate—Construction of works.—One of the most essential conditions required of the applicant, or the owner of a permit to appropriate water, under the laws of State

1 Under the provisions of the Act of March 11, 1903 (Laws, 1903, p. 223), the permit when granted as therein provided for, gives the applicant an inchoate right, which will ripen into a legal and complete appropriation only upon the completion of the works, and the application of the water to a beneficial use. Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365; Sowards v. Meagher, 34 Utah 212, 108 Pac. Rep. 1112.

See, also, Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; Ada County Farmers' Irr. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289.

2 Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690.

See, also, Rasmussen v. Blust, 83 Neb. 678, 120 N. W. Rep. 184.

3 Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

control, is that the construction of the works necessary to perfect the appropriation, as specified in the application, within a certain time fixed by the statute after the permit is granted, must be commenced. The only exception to this rule is in Colorado, where the proceedings are reversed, and the work must be commenced first and the maps or application must be filed with the State Engineer within sixty days thereafter.[1] The time after the approval of the application or the issuance of the permit within which the work must be commenced in the most of the States is six months, and a common provision found in most of the statutes is that the work of construction must be prosecuted with diligence and that at least one-fifth of the work must be completed within one-half of the time allowed by the statute for the full completion of the same. In Nevada the time for beginning the work is left to the discretion of the State Engineer.[2] In Wyoming the construction of the works must commence within a time fixed by the State Engineer, not to exceed six months from the approval of the application.[3] In Idaho works having a capacity of less than 25 cubic feet per second must be begun within sixty days from the approval of the application, and the holder of a permit for more than 25 cubic feet per second must, within sixty days of the issuance of the permit, file a bond, the amount of which is fixed by the State Engineer, not to exceed $10,000, and conditioned upon faithfully carrying to completion within the maximum time fixed by the statute the works specified in the permit.[4]

The statutes provide that if the work is not commenced within the time specified, and that if one-fifth of the work is not completed within one-half of the time allowed, all rights under the permit shall be forfeited. Citations are usually issued to the applicant, and proceedings had thereon to show cause why the rights under the permit should not be declared forfeited.

The statutes also provide the period within which the construction of the works must be fully completed. The usual period is five years from the date of the approval of the application or the issuance of the permit. A number of the statutes, however, give the State Engineer the power to fix a shorter time than the maximum

1 Colo. Stat. Ann., 1911, Morr. Ed., Secs. 3181-3187; Rev. Stat., 1908, Secs. 3181-3187.

2 Laws, 1907, p. 30, Sec. 26.

3 Comp. Stat. Wyo. 1910, Sec. 732.

4 Stat., 1903, p. 223, Secs. 2, 3, as amended, 1905, p. 357.

limit fixed by the statute. Where this is the case the statute also provides that, upon good cause shown, the State Engineer may extend the time originally fixed by him for the completion of the works to a longer period, but he must keep within the maximum limit as fixed by the statute.

The statutes also provide a maximum limit within which the works must be fully completed. This period is usually five years, although it is usually prescribed that the State Engineer may fix a shorter time.[5] Where this is the case it is held that where he has fixed a time for completing the works required to perfect the appropriation, and the work is commenced within the statutory time and prosecuted in good faith and with due diligence, the State Engineer may extend the time if not beyond the final limit fixed by the statute, although the application therefor was made after the time first fixed by him had expired.[6]

These laws also provide that proof of the completion of the works must also be made in the manner and within the time when it is prescribed therein. And here the State Engineer is given large discretion in the manner in which the proof shall be submitted. But in some of the States a detailed method is prescribed by the statute, and where this is the case the statutory rules must be followed.[7]

§ 1354. **Forfeiture of right and cancellation of permit.**—The statutes of all the States adopting the laws of State control provide that in case the applicant does not comply with the conditions of his application or permit that the State Engineer or board may declare a forfeiture of his rights and cancel the permit issued to him. As was said in a late Idaho case:[1] "Under the statute the permit is granted upon application setting forth certain facts. It may be canceled upon petition setting forth certain facts with proof by affidavit, and aided by the examination of the State Engineer. The power and duties of the engineer with reference to hearing the con-

[5] For the laws of the various States in this respect, see Part XIV.

[6] Pool v. Utah County etc. Co., 36 Utah 508, 105 Pac. Rep. 289; but it was stated by Mr. Justice Frick, in rendering the opinion, that: "We do not wish to be understood that the State Engineer may arbitrarily extend the time limits fixed by him at any time and under all circumstances."

[7] See laws of various States on subject, Part XIV.

[1] Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

test and canceling the permit are pure matters of administration. He is in no way authorized to decide or determine water rights, if any, the permit holder has acquired under the permit, or by virtue of any acts taken in connection with the construction of the works authorized by the permit, or the diversion or appropriation of water in connection therewith."

In some of the States the applicant is cited to appear before the engineer or the board and show cause why his permit should not be canceled for failure to comply with the terms of the same or the law upon the subject. This is the case in Utah under an Act of the legislature of 1911.[2]

By a recent Act in Idaho [3] it was enacted that one who fails to be on time with his works, proofs, etc., "shall be deemed to have abandoned all right under his permit."

In States where the law provides that at least one-fifth of the work must be completed in one-half of the time, it is held that the decision of the State Engineer canceling or refusing to cancel a permit is subject to review by the courts, and that an appeal taken from his decision must be considered as an original action, and where other essential facts exist is subject to removal to the Federal courts.[4]

§ 1355. **Proceedings to appropriate—Certificate of appropriation.**—When the final proof is made that the works are completed, a certificate of appropriation or a "certificate of completion" is issued by the State Engineer to the owner of the permit. This certificate must set forth the full details of the appropriation as originally applied for in the application for the same.[1] These certificates

2 See Laws, 1911, Chap. 3, p. 2, amending Compiled Laws of Utah, 1907, Sec. 1288x14.

3 See Revised Codes of Idaho, 1908, Sec. 3254, as amended by Laws, 1911, Chap. 64.

4 Waha etc. Co. v. Lewiston etc. Co. (Idaho), 158 Fed. Rep. 137.

See, also, upon the subject of the power of State control, relative to the completion of permits, Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289; Sowards v. Meagher, 34 Utah 212, 108 Pac. Rep. 1112; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

1 For the application, see Sec. 1350.

are numbered according to the date of the original application, and thus the priority of the appropriation is retained, which, by the doctrine of relation, is as of the date of the filing of the application.[2] Complete records are also kept of these certificates in the office of the State Engineer, and the owner of the certificate is required to file and have the same recorded in the office of the county recorder where the water is diverted, and usually with one or more other officials, such as the division superintendents or engineers, in order that a record may be had for the distribution of the water.[3] The details for the issuance of the certificate and the office where the same must be recorded vary somewhat in the different States.[4] In some of the States, however, the certificate of appropriation is not issued upon the mere completion of the works, but what is called a "certificate of completion" is issued at this stage, the "certificate of appropriation" being issued only when the water is actually applied to the beneficial purpose. We will discuss this in the next section.[5]

§ 1356. Proceedings to appropriate—Consummation of an appropriation—Effect of the certificate to appropriate.—Under the laws of State control, as is the case with the older method of appropriation, all of the water claimed under the appropriation must be applied to a beneficial use or purpose, economically and without waste.[1] In some of the States the completion of the works is considered the consummation of the appropriation, and the certificate of appropriation is issued forthwith upon the proof of their completion. Under the statutes providing for this mode of procedure the actual use of the water does not enter into the making of the appropriation as one of the essential elements. But the failure to use the water for a beneficial purpose thereafter is either treated as an abandonment of the quantity of the water not used or it is treated as a

2 For relation, see Secs. 742-756, 1358.

3 The word "certificate," as used in the Act of 1903 (Laws, 1903, p. 223, Rev. Codes, 1909, Secs. 3253 *et seq.*) relating to the appropriation of public waters, and regulating the issuance of a certificate and license after inspection by the State Engineer, applies to the paper to be issued upon proof of the completion of the works. Idaho Power etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

4 For the laws of the various States upon the subject, see Part XIV.

5 See Sec. 1356.

1 For the application of the water to a beneficial use, see Secs. 725, 877.

For the economical use and suppression of waste, see Secs. 874-916.

forfeiture of the right under some section of the statute, providing that in case of the failure to use the water claimed within a specified time the claimant shall be deemed to have forfeited the right to the use of the quantity not used.[2] But under this rule it has been ascertained that considerable time, and in some cases a number of years, have elapsed before the water was actually applied to a useful purpose. Therefore, in some of the more recent legislation upon the subject in some of the States, notably in Idaho, North Dakota, South Dakota, Oklahoma, and Utah, it is provided that the final certificate of appropriation shall not be issued when the works are completed, but shall only be issued upon proof of the actual application of the water to the use for which the application is made, which must be before a definite time fixed by the statute. And a failure to make proof of beneficial use on or before the date set therefor shall cause the postponement of the priority of the right from the date fixed theretofore to the date when the proof of beneficial use of the water is made, and applications subsequent in time shall have the benefit of such postponement of priority.[3] In other words, under this better rule the appropriation is not finally consummated until the water is actually applied to a beneficial purpose, upon which the final certificate of appropriation is issued.[4]

The legal effect of a certificate of appropriation is to give to the owner thereof, as long as the other conditions of the law are complied with, the right or license from the State to divert the quantity of water named therein, and to use the same for the purpose named.

[2] For abandonment, see Secs. 1100-1117.

For the forfeiture of rights, see Secs. 1118-1120.

[3] Laws, Utah, 1909, p. 89, Sec. 1288x16.

[4] Sowards v. Meagher, 34 Utah 212, 108 Pac. Rep. 1112, where Mr. Chief Justice Straup said: "He may not file his application, construct his works, and then hold the water and wait for something to happen. He can not withhold the water from the proposed beneficial use. He must not only be diligent in constructing the works, and in making the diversion, but he must also be reasonably diligent and expeditious in making application of the water to the beneficial use for which the appropriation was proposed, else he loses his inceptive right. His appropriation will be measured by the quantity of water actually used for the proposed beneficial purpose."

See, also, Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821, where the word "license," as used in the Act of March 11, 1903, p. 223, Secs. 8 and 9, applies to the paper to be issued upon proof of the application of the waters to a beneficial use.

The statutes also provide that the certificate of appropriation, issued in accordance with the provisions of the statute, shall be *prima facie* evidence of the appropriator's right to the use of the water in the quantity, for the purpose and during the time mentioned therein, and shall be evidence of such right.

The certificate of appropriation issued and recorded in accordance with the statute makes the final step necessary to be taken in the procedure for the appropriation of water under the laws of State control; and the duties of the State officials before whom these steps must be taken end, as far as the appropriation is concerned, but continue as to the distribution of the water under the terms of the appropriation.

§ 1357. Appropriation by actual diversion and use as affected by the laws of State control.—In a previous section, we showed how valid and permanent rights to the use of water might be acquired by parties who did not follow the older rules of the Arid Region Doctrine of appropriation as to notice, construction of works, etc., but that such rights might be acquired where the rights of others were not injured by the actual diversion of the water from the natural source of supply, followed by the application of the water to some beneficial purpose.[1] The question now arises, Can permanent rights to the use of water be acquired in this method in those States which have adopted the laws of State control, as discussed in the previous sections of this chapter?[2] In answer to this question, we will say that it depends entirely upon the facts of the particular case in which the right is claimed. The laws of no State prohibit in terms the appropriation by actual diversion and use. Again, there is no intention upon the part of the legislature of any State to defeat the honest attempt to acquire the right to the use of water for beneficial purposes, but, upon the contrary, this is encouraged in every way. The progress of many of the Western States depends largely upon the use of all of the available water for useful purposes, and every possible method for this use should be permitted. Therefore, where, before an application has been filed under the provisions of the statute, there has been an actual diversion and use of the water, we see no reason why the right should not be valid as against the later attempt to appropriate the same water

1 See Sec. 730. 2 See Secs. 1338-1356.

by the statutory method. In some of the States, such as Wyoming, Idaho, and Colorado, an appropriator by this method is fully protected by the constitutions. In Wyoming it is provided that "priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."[3] In all of the statutes of the various States are to be found statutes to the effect that the appropriation of water must be for some useful or beneficial purpose, and as between appropriators, the one first in time shall be first in right.[4] Therefore where an appropriation has been consummated by the method of diversion and use of the water, which do not in any way interfere with prior rights to the water, and which was prior in time to any steps taken under the statute of State control to appropriate the same water, we see no reason in the law or upon principle why the right thus acquired should not be considered a valid and permanent one. "These statutes were never intended to destroy the right of appropriation by methods other than those defined by them." In the Federal Court it was held that actual diversion and use is as much notice to later comers as the statutory notice or the application for a permit under the laws of State control.[5]

A very recent case decided by the Supreme Court of Idaho,[6] and after the above was written by us, decides the question as far as that State is concerned. In the opinion, the Court said: "It has never been the intention, so far as we are advised, of the legislature to cut off the right an appropriator and user of water may acquire

[3] For the constitutions of the various States, see Part XIV.

[4] For the statutes upon the subject, see Part XIV.

[5] Morris v. Bean, 146 Fed. Rep. 432; affirmed in 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703.

See, also, Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

"The State Engineer has no authority to deprive a prior appropriator of water from any streams in this State, and give it to another person." Lockwood v. Freeman, 15 Idaho, 395, 98 Pac. Rep. 295.

In a suit by settlers in Wyoming on a stream which rises in Colorado to restrain the diversion of water from such stream in Colorado, complainants need not aver or prove that they have conformed to the police regulations of the State of Wyoming regulating the distribution of water in that State. Hoge v. Eaton, 135 Fed. Rep. 411.

[6] Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488.

by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream. It is like a man being actually in possession of realty; indeed, a water right is realty in this State.[7] The legislature, however, has provided for a constructive notice, to those who avail themselves of the statute and with this notice there is given a certain period of time in which to commence the construction of diverting works and a further period of time in which to complete such works, and divert the water and apply it to the beneficial use for which the application was made. This is a protection to the claimant; but if he should actually divert the water and apply it to a beneficial use, before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired. He would then be in actual possession of the property to the extent of the diversion and use, and to that extent would need no protection from a constructive notice which a compliance with the statute affords."

§ 1358. Relation as applied to laws of State control.—In a previous chapter we saw that under the doctrine of relation, the rights of an appropriator to the use of water related back to the inception of the same, provided he had complied with all the laws upon the subject, toward consummating his rights.[1]

In general, we will say that the same rule is applicable under the laws of State control. The principal effect of a valid application upon an appropriation by this method, as is the case with the older rules of appropriation, is that it holds the priority of the right, provided, of course, that the applicant complies with all of the other requirements of the statute, and the rules and regulations promulgated by the State Engineer and the Governing Board within the time specified. In other words, the application protects the applicant in his inceptive or inchoate rights, while he is completing the construction of his works and until the appropriation is finally consummated by the application of the water to the beneficial use or

[7] Citing Sec. 3056, Rev. Codes; Ada County Farmers' Irr. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19.

[1] See Chap. 40, Secs. 742-756.

purpose for which the application is made.[2] One holding a permit will, by relation, have the better right over another who commenced work earlier without a permit.[3]

In all States, under the laws of State control, there is a system of numbering of certificates so as to correspond and show the priority or the date when the application was first filed.[4]

§ 1359. Officers under State Control have only ministerial, administrative, or judicial powers.—Although it is held by the Supreme Courts of all the States which have adopted the laws of State control that the State Engineer and the Governing Board have only ministerial, administrative, or executive powers under the law, these powers are judicial in character or at least quasi-judicial. In a recent case, decided in Idaho,[1] in defining the powers granted to the State Engineer, under the statute, the Court said: "By this statute, where a permit has been granted by the State Engineer, permission is also granted to any person holding a permit postdated to present facts showing that the holder of the permit has not complied with the law, and authorizes the State Engineer, if he finds that the law has not been complied with, to cancel such permit. This is purely a ministerial duty connected with the administration of the law as it is imposed upon the State Engineer.[2] . . . The procedure in this case as heretofore held is not judicial, and is not governed by the laws prescribing judicial procedure. This proceeding is purely administrative." A very exhaustive discussion of this question is to be found in the case of Farm Investment Co. v. Carpenter,[3] in which the Court upheld the constitutionality of the law and also held that the law conferred on the State Engineer and Board of Control only ministerial or administrative powers, having quasi-judicial functions.[4]

2 Sowards v. Meagher, 34 Utah 212, 108 Pac. Rep. 1112; Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

3 Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

4 For the statutes of the various States, see Part XIV.

1 Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

2 Citing Boise Irr. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325; Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

3 *Supra.*

4 Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; Willey

A recent Colorado case holds that the duties of the water officers are ministerial only, and that they can not settle the rights between owners.[5]

§ 1360. Effect of decisions of administrative officers—Not binding upon the courts.—As discussed in the preceding section, the officers under the laws of State control having but ministerial, administrative, or executive powers, it therefore follows that although they are at times given quasi-judicial powers, their decisions are not binding upon the courts.[1] And it may be said in general that their decisions may be attacked directly, collaterally, or by appeal, and when so attacked, the question is tried *de novo* by the courts. This question, however, relates more particularly to the question of the determination of existing rights by boards, and will be discussed in a subsequent chapter of this work.[2]

§ 1361. The right of appeal from decisions of officers.—In all the statutes of State control, it is provided that the right of appeal may be had from the decision of the State Engineer or the decision of the board to the courts.

Under the recent statute of Nevada, no right of appeal is pro-

v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37.

5 Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75.

1 Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

But see Crawford Co. v. Hathaway (Hall), 60 Neb. 754, 84 N. W. Rep. 271; *Id.*, 61 Neb. 317, 85 N. W. Rep. 304; *Id.*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650; *Id.*, 83 Neb. 678, 120 N. W. Rep. 184; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

2 See Chap. 80.

vided from the decisions of the State Engineer, but any party feeling aggrieved has one year within which to bring an action in the court to determine his rights.

Any party aggrieved by the action of the State Engineer is then given the right to either appeal from his decision to the governing board, and from its decision to the courts, or he may appeal direct to the courts, according to the terms of the statute. Or, again, he may bring an original action in the court for the determination of the questions involved in the proceedings before the State Engineer, and the court may decide the case regardless of any decision of the State Engineer.[1] The better rule, however, and the one most commonly adopted, is for the parties interested to bring their actions in court. In all jurisdictions, the State Engineer may make a personal investigation of the flow of the stream from which the water is to be taken, the lands to be irrigated, the proposed works, and all other facts in connection with the project, using all of the available data and records obtainable, and especially as to adjudicated water rights upon the same source of supply, and the affidavits of witnesses as to the facts under consideration.

§ 1362. **State control officers may be sued in their official capacity.**—In all the States where the law of State control has been adopted, a State official, alleged to have violated the duties of his office, may be sued in his official capacity, as may any other public official. An action for an injunction will lie against a Water Commissioner or officer to prohibit him from diverting water from the stream, claimed by another.[1]

An action in *mandamus* will lie against the State Engineer in case he refuses to issue a certificate where such issuance should have been

1 Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 268; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Trade Dollar etc. Co. v. Fraser, 146 Fed. Rep. 587, 79 C. C. A. 37; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

1 Squares v. Livesey, 35 Colo. 302, 85 Pac. Rep. 181; Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Farmers' etc. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. Rep. 556.

See, also, for injunctions, Chap. 81.

made under the law. Such a case arose recently in Idaho,[2] in which the Court said: "The issuance of the certificate is a ministerial duty, and, in case the State Engineer refuses to issue it after the proper fee has been tendered, he may be compelled by writ of mandate to issue it." But the Court in finally deciding the case denied the application for the writ upon the ground that the plaintiff had not paid the fees provided for by statute.

§ 1363. **Annual State license tax.**—All of the Acts providing for the appropriation and use of waters under the laws of State control also provide for a schedule of fees that must be paid from time to time, beginning with the application for a permit to the use of such waters.

One of the States has awakened to the fact that not only may it charge the fees as per the schedule for the acquisition of a right, but it may also charge an annual fee or annual license tax. The Act of 1909, adopting a water code for Oregon,[1] provided the following schedule for an annual license tax for the use of the water for irrigation: Fifteen cents per acre for from 1 to 100 acres; five cents per acre for from 100 to 1000 acres; one cent per acre for 1000 acres and over. The same Act provided for a schedule for an annual license tax for the use of water for power, but this schedule was amended by the Act of the legislature of 1911,[2] so that it now reads as follows: Ten cents for each and every theoretical horse-power from 1 to 100, inclusive; five cents from 100 to 1000, and one cent in excess of 1000.

The California Water Power Act of 1911[3] also provides that there shall be an annual license tax as follows: For the first 100 horse-power there shall be no charge, and for all above 100 horse-power, ten cents for each horse-power. This tax may be also increased or decreased by the Board of Control as it sees fit.

In a previous section we have also seen that the Federal Government also makes an annual license tax for the use of water and power upon National forests.[4]

2 Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

1 Laws, 1909, Chap. 216, p. 17.

2 Laws of Ore., 1911, Chap. 236, p. 418.

3 See Kerr's Bien. Supp., 1911, p. 1468; Stats. and Amdts., 1911, 813.

4 See Sec. 962.

§ 1364. **Place of diversion, how changed—Place of use, how changed.**—As has been seen in previous sections of this work, where the rights of others in the same stream or other source of supply are not materially injured, a change may be made by any owner of a water right in the point of diversion where the water is taken out.[1] However, it having been ascertained by experience that as the rights in a certain source of supply are more and more taken up as settlement progresses, that where the point of diversion is changed from one place to another, more often than otherwise, the rights of others on the same source are injured. Therefore, the statutes of State control in the various States provide just when such a change may or may not be made.[2] And these statutes also provide for special proceedings, upon notice to all interested parties, as to just how these changes may be effected. In the most of the States these proceedings are had before the State Engineer upon an application filed with him. Upon receiving such an application the engineer must, at the expense of the applicant, give notice thereof in some newspaper having general circulation within the boundaries of the water system; such notice must give the name of the applicant, the quantity of water involved, the stream or source from which the appropriation has been made, the point on the stream or source where the water is diverted, the point to which it is proposed to change the diversion of the water, the place, purpose, and extent of present use, and the place, purpose, and extent of the proposed use. Parties interested are then given the opportunity to protest against the granting of the application for the change. The engineer, after investigation, must approve or reject the application. The statutes then usually provide for an appeal from the decision of the State Engineer to the courts.[3] In Nebraska the application must be filed with and decided by the State Board of Irrigation; and the statute requiring the appropriator to obtain permission of the board before changing the place of diversion has been upheld by the court.[4]

[1] For change in point of diversion, see Secs. 857-859.

[2] See the laws of the various States on subject, Part XIV.

[3] See Laws Utah, 1909, p. 90, Sec. 1288x24.

See, also, for the statutes of the other States upon the subject, Part XIV.

[4] Farmers' etc. Co. v. Gothenberg etc. Co., 73 Neb. 223, 102 N. W. Rep. 487.

Similar proceedings are also provided for the change of the place of use. But it must be remembered that one who has once acquired a permanent right to the use of water has a property right therein, and he therefore has the right to change the place of use or sell the right to others, who may change the place of use of the water.[5]

In the State of Colorado a special proceeding for making the change in the point of diversion to be brought by a suit in the District Court is provided for.[6] This statute has been before the Supreme Court of the State in a number of cases, and its validity upheld even in cases where the right to change existed prior to the passage of the Act, upon the ground that it was remedial, and, therefore, the proceedings provided for must be followed in all cases.[7] In each case, if the change is made, a formal decree is rendered by the Court, and the appropriator has the right thereafter to begin and complete his works for the change.

§ 1365. Statutes for prorating in times of scarcity.—When there is a great danger of losing crops from continued drought in the State of Colorado, there is a statute which provides that the water actually received into and carried by any irrigating ditch, canal, or reservoir, to the consumers therefrom, may be prorated among all of such consumers. During these periods the statute temporarily disregards all priorities of rights as a matter of expediency so that all the consumers shall suffer proportionately from

[5] That a water right is not an inseparable appurtenance to land, see Secs. 1015, 1016.

[6] 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3227-3232; Revised Stat. Colo., 1908, Secs. 3227-3232.

[7] New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781; Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469; New Cache La Poudre etc. Co. v. Arthur Irr. Co., 37 Colo. 530, 87 Pac. Rep. 799; Ashenfelter v. Carpenter, 37 Colo. 534, 87 Pac. Rep. 800; Hallet v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317; Farmers' Independent D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Ft. Lyon C. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Wadsworth etc. D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Crippen v. Glascow, 38 Colo. 104, 87 Pac. Rep. 1073.

Sess. Laws, 1899, p. 235, Chap. 105, providing for the change of the point of diversion, is purely remedial, and one of its objects is to prevent a multiplicity of suits, and not to allow a change to be made until all persons who might be affected thereby are notified and given an opportunity to be heard. Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483.

the deficiency of water, and that at least a partial crop may be raised by all, rather than that those having the prior rights should have a full crop, while those who came later could raise nothing. The authority of the legislature to pass such a law has been upheld by the Supreme Court of the State, where they do not substantially affect constitutional or vested rights.[1] However, it is held that the consolidation of two canals having priorities of different dates, in the absence of any agreement to that effect, does not operate to place the rights of the consumers of the old canals upon an equality, and hence the prorating statute can only be applied to the individuals of the respective groups.[2] The same rule is also applied to cases of the subsequent enlargement of ditches and canals by later comers; the statute does not entitle them to prorate with those whose rights were secured through the original ditch or canal.[3]

In the State of Washington the statute also provides that at any time any ditch from which water is or shall be drawn for irrigation, shall not be entitled to the full supply of water, the water actually received into and carried by such ditch shall be divided among all the consumers of water from such ditch according to their *pro rata* share.[4]

In spite of the holdings of the Colorado courts as to the constitutionality of these laws for prorating water in times of scarcity, we have always doubted the correctness of their rulings. The Constitution, Article 16, Section 6, provides: "Priority of appropriation shall give the better right as between those using water for the same purpose." Based as a permanent right to the use of the water is, upon a priority of right, how can the taking away of the water from one who has a prior right at the very time when he needs

1 Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767, where Mr. Justice Helm said: "The prorating statute, which we are asked to declare unconstitutional, does not take away the consumer's right to the water; it simply regulates the use of this right."

See, also, for the statute, Mill's Ann. Stat., 1905, Sec. 2267.

The Act providing for prorating water actually carried by an irrigation ditch, among all the consumers therefrom, in times of scarcity, so that all such consumers shall suffer proportionately, does not interfere with priorities, or invalidate, as between the parties, contracts for prorating. Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

2 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

3 Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

4 2 Remington & Ballinger's Ann. Codes, 1910, Sec. 6341.

the water the most, and when it is the most scarce, be other than infringing upon his constitutional and vested rights without either due process of law or just compensation?

§ 1366. Vested rights can not be impaired by procedure under the laws of State control.—Where rights to the use of water have vested they can not be impaired by any procedure for the acquisition of water rights under the laws of State control by a party who has fully complied with the terms of the statute and has received a license from the State Engineer or governing board to appropriate the same water. Therefore, it was held in a recent Idaho case that when all the water of a stream has been appropriated and put to a beneficial use, the State Engineer can not legally deprive the prior appropriator of such water by granting another and subsequent applicant a license to use the same to the injury of the first appropriator.[1] And the United States Circuit Court of Appeals, in a case arising in Idaho, after referring to the power of the State Engineer, said: "We assume that that officer was authorized to grant the permits to the defendants if they did not interfere with any vested right of the appellant. If they did so interfere, then, manifestly, to the extent of such interference they were and are invalid and of no effect."[2]

[1] Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295, where the Court said: "The State Engineer has no authority to deprive a prior appropriator of the water from any streams in this State, and give it to any other person. Vested rights can not thus be taken away."

[2] Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 585, 79 C. C. A. 37, and holding that the prior appropriator was entitled to protection by injunction against a later appropriator.

See, also, Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed, 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74; Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488; Youngs v. Regon, 20 Idaho 275, 118 Pac. Rep. 499; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75; Cache La Poudre v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 665; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325; Farmers' etc. Co. v. Cozad etc. Co., 65 Neb. 3, 90 N. W. Rep. 951; Farmers' Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11

In a very late case decided by the Supreme Court of Idaho,[3] it was held that the State Engineer by granting a subsequent permit can not interfere in any manner with the vested rights of former permit holders, and upon this subject the Court said: "In Nielson v. Parker [4] this Court held that the State Engineer had no right, power, or authority to interfere with vested rights or to grant a permit for the appropriation and diversion of the waters of a stream where the same had already been appropriated. The State Engineer has no power or authority to interfere with vested rights under a permit granted by him for the appropriation of water, and thereafter grant a permit which would interfere with such vested rights. It is clear under the law that the rights granted to Peterson under his permits did not interfere with or absorb any of the rights granted to Gard under his permits. The appellants therefore took no title to the rights acquired by Gard through or by Peterson's permits." [5]

§ 1367. **Criticism of the laws of State control.**—The laws of State control are modeled somewhat after the laws of Italy and India governing the subject of waters.[1] They are unique in this that the State does not necessarily wait for controversies to arise between the claimants to water, but of its own motion steps in and ascertains just how much water is available for beneficial uses, who are the claimants to the water and their priorities, and then, knowing these fundamental facts, awards the use of the water to the persons entitled to the same; and if there is any water unappropriated provides in detail just how new rights to its use may be acquired. The State then employs its own agents to distribute the water to the parties entitled to the same.

From a study of these laws it is very apparent that the State Engineer and the governing board hold the most important offices in the State, so far as its agricultural interests are concerned, and by a wise and skillful exercise of the powers entrusted to them can bring about great changes for betterment in the development of the

Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567.

[3] Gard v. Thompson, —— Idaho ——, 123 Pac. Rep. 497.

[4] 19 Idaho, 727, 115 Pac. Rep. 488.

[5] Citing King v. Chamberlin, 20 Idaho 504, 118 Pac. Rep. 1099; Youngs v. Regan, 20 Idaho 275, 118 Pac. Rep. 499.

[1] For the laws of Italy, see Sec. 145. For the laws of India, see Secs. 113-117.

resources of their respective States. This is true not only as regards the acquisition of new rights since the laws were passed, and the distribution of the water to the respective claimants entitled thereto of all rights, but in some States also the determination or adjudication, in the first instance, of all unadjudicated existing water rights in their respective States. In some of the States the power of the State Engineer in this respect is almost absolute, and even in jurisdictions having governing boards he is made a member thereof and the executive officer of the board. In some of the States he is given also what are in effect judicial powers, and may, in the first instance, adjudicate all conflicting rights and render his decision thereon. In these jurisdictions, as far as the subject of water rights is concerned, there are two departments of the government vested in one individual—the judiciary and executive. He institutes proceedings which are tried before himself, and then he executes his own decrees. The question has often arisen as to whether or not, under our form of government, it is not too great a power to vest in one man or set of men. "In Wyoming charges of favoritism were made against the engineer, and the exercise of this authority has given him a great deal of trouble."[2] In other States where the State Engineer is given similar powers there are also complaints.[3]

[2] The State Engineer and His Relation to Irrigation, by R. P. Teele, Expert, in Irrigation Institutions, 1906, Bulletin No. 168, U. S. Dept. of Agriculture.

[3] See, also, for criticism of the adjudication features of the law of State control, Chap. 80.

CHAPTER 69.

STATE CONTROL OF WATER RATES.

§ 1368. Scope of chapter.
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§ 1370. The general right to fix water rates comes within the police powers of a State under the common law.
§ 1371. The history of the regulation of water rates—States have full control.
§ 1372. The judicial regulation of rates in the absence of constitutional or statutory provisions.
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§ 1380. The nature and effect of decisions by boards fixing rates—Judicial interference.
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§ 1382. Power of legislature to regulate water rates—Impairment of contracts.
§ 1383. Contracts for discriminatory rates.
§ 1384. Charges of "royalty" or "bonus" not permitted.
§ 1385. Terms of payment.

§ 1368. **Scope of chapter.**—In this chapter we will discuss all phases of the subject of the regulation by a State of the charges which may be made for water rights by parties or corporations where the right is originally acquired for sale or other disposal for the purpose of irrigation and other beneficial uses, with the exception of the right to fix water rates by city ordinance where the water is furnished to a municipality and its inhabitants. This subject we will discuss in another chapter.[1]

[1] For control by municipal corporations, see Chap. 71, Secs. 1433-1448. For right to fix water rates by city ordinance, see Sec. 1444.

§ 1369. **Excessive water rates—And their effect.**—From the experience of the past, beginning with the early history of the Arid Region Doctrine of appropriation, it has been ascertained that it was the tendency of many companies and corporations which had acquired water rights for the express purpose of selling or otherwise disposing of such rights for irrigation or for other beneficial purposes, to make excessive charges for the use of such water by the actual consumers. It has therefore been found necessary that the State take the matter up, and in some manner regulate the charges for the use of water which may be made.

The sole object of a company of individuals or a corporation that invests large sums of money in an irrigation project is to make as much money as it can by way of profits for the promoters and stockholders of the same. These companies are by no means eleemosynary concerns, but they go into these enterprises for what they can make out of it. The money is usually furnished by Eastern or foreign capitalists. These companies take up certain projects where there are available water and irrigable land, acquire the right to make the appropriation, construct their works largely upon borrowed money, for which they issue bonds secured by mortgages. They then wait for settlers to come and take up the land under their water system or to purchase the land from the company, should it own the same. Great inducements are held out to the settlers by the means of advertisements and agents as to the peculiar advantages of the particular project. By these means the settlers are prevailed upon to come and settle upon the lands under the project, and which are wholly dependent upon it for the water supply. Oftentimes these settlers are from the East, and know absolutely nothing about the cultivation of land by the means of irrigation, but who have all of these things to learn from experience. After a person has once settled upon these lands, constructed his house and the other necessary improvements, prepared his land for cultivation, including the construction of his ditches, it has been sometimes found that he was absolutely at the mercy of the company. And, although many companies have acted fairly in the matter, others have taken advantage of the absolute necessities of the settlers, and have exacted an unreasonable tribute by the way of annual cost, expenses for the maintenance of the works, and other unreasonable charges. This was true to the extent that the settler oftentimes

found out to his sorrow that, instead of building a home and acquiring property for himself and family, he was working solely for the company which furnished the water for his land, and which, instead of treating him fairly, had reduced him, by means of ever-increasing indebtedness, to the condition of abject slavery. And at times it has become the question whether the settler would give up all that he had acquired and move to some new place or to toil on, ever hoping that some time in the future, by some change in the turn of affairs, he would be enabled to get from under the clutches of the company and to save the property which he had made such great efforts to acquire. It is a serious matter for a settler to give up his home, after having lost his right to file on new land by his filing upon these, and to move to some new locality. Yet many a settler who had settled upon lands which were wholly dependent upon the water furnished by certain companies, has been face to face with this very proposition. "All is not gold that glitters." Neither are all advertisements nor the statements of agents concerning these projects absolutely truthful. The gold that glitters is only that which glitters in the coffers of some of these companies, or in those of their stockholders or promoters. The wise man will carefully investigate all of these matters before he exhausts his homestead or other rights and takes up land wholly dependent for its water upon these companies. It must be distinctly understood that these remarks do not apply to many of the companies in existence at the present time; but they do apply to some. Enterprises for the irrigation of lands present opportunities for large returns upon the capital invested, and this industry has been invaded by wild-cat propositions for that reason, as well as has the mining industry.

§ 1370. **The general right to fix water rates comes within the police powers of a State under the common law.**—As we have seen in a previous section, the right of a State to regulate the use, distribution, and to control all of the waters flowing within its boundaries comes within the police powers of the State.[1] So, also, the general right of a State to fix the maximum rate for the use of water which may be charged by irrigation or water companies against those who are furnished the water thereby comes under the police powers of the State. The laws of every State of the West permit the

[1] For police powers to regulate, see Secs. 1340, 1341.

acquisition of water rights for the sale and rental of the water.[2] Although water may be appropriated for this purpose by an individual, the usual method is by means of companies of individuals, or corporations. Where the object of these companies is for the sale or disposal of the water to others who are actual consumers thereof, these companies or corporations are considered in law as quasi-public, or, as sometimes referred to, "public service" companies or corporations.[3] This being so, each State has, at common law under its general police powers, the right to fix the maximum charge which may be made "for services rendered, accommodations furnished, and articles sold."[4] These powers "are nothing more or less than the powers of government inherent in every sovereignty—that is to say, the power of governing men and things."[5] This power of a State is applied where the property in question is strictly private, under the maxim, *Sic utere tuo ut alienum non laedas;*[6] therefore, to a much greater extent is it applicable to property which, although owned by private parties, has become clothed with a public interest, and when used in such a manner as to make it of public concern, and affect the community at large. As was said by Mr. Chief Justice Waite,[7] "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by dis-

[2] For the appropriation of water for sale, see Secs. 703, 1491, 1492.

[3] For the legal status of companies organized for the purpose of furnishing water, see Secs. 1493-1498.

That individuals and corporations engaged in the carrying of water for compensation are held to be common carriers or *quasi* common carriers, or *quasi* public companies, see, also, Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487; Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; Slosser v. Salt River Val. C. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Merrill v. Southside Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Northern Light & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896.

[4] Mr. Chief Justice Waite in Munn v. People of Illinois, 94 U. S. 113, 24 L. Ed. 77.

[5] Mr. Chief Justice Tawney in the License Cases, 5 How. 46 U. S. 573, 12 L. Ed. 287.

[6] See Secs. 1495, 1496.

[7] Munn v. People of Illinois, *supra.*

continuing the use, but so long as he maintains the use he must submit to the control." This is the general power under which a State fixes maximum water rates which may be charged consumers by public service corporations.[8] But the exercise of the police powers of a State is not confined to the fixing of water rates, and is not the outgrowth of the Arid Region Doctrine of appropriation, but is exercised in the fixing of rates of other articles of sale and of services rendered by these public service corporations. Under these general powers Congress in 1820 conferred upon the City of Washington the power to regulate the right of wharfage at private wharves, the sweeping of chimneys, and to fix the rates of fees therefor, and the weight and quality of bread.[9] Under these general powers the various States of the Union have enacted laws regulating rates which might be charged by these corporations for the furnish-

[8] Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, where the Court held that even under the common law a corporation of this nature "exists largely for the benefit of others, being engaged in the business of transporting for hire, water owned by the public, to the people owning the rights to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits and emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties, and subjected to a reasonable control."

See, also, Spring Valley W. Co. v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48, where the Court held that it was within the power of the State or municipality to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale; County of San Francisco v. Spring Valley W. Co., 48 Cal. 493; Spring Valley W. Co. v. City of San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703, 89 Fed. Rep. 274; San Diego etc. Co. v. City of National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; City of Indianapolis v. Navin, 151 Ind. 139, 47 N. E. Rep. 525; Freeport W. Co. v. City of Freeport, 186 Ill. 179, 57 N. E. Rep. 862, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493; Santa Ana W. Co. v. Town of Buena Ventura, 65 Fed. Rep. 323; City of Danville v. Danville W. Co., 178 Ill. 299, 53 N. E. Rep. 118; *Id.*, 69 Am. St. Rep. 304.

[9] 3 Stat. L. 587, Sec. 7.

ing of gas,[10] telephone services,[11] transportation services by railroads,[12] and what is a reasonable toll to be charged by a turnpike company.[13]

§ 1371. The history of the regulation of water rates—States have full control.—The history of the regulation of water rates throughout the Western States is as follows: First, the settlers unaided and alone fought the matter of excessive charges with their respective companies furnishing the water and making such charges, and, as far as the results were concerned, the odds were very much in favor of the companies; second, the courts began to take notice of these excessive rates, which resulted in some jurisdictions in judicial regulation of water rates which might be charged by irrigation companies in the absence of statutory provisions; [1] third, constitutional provisions providing for the regulation of water rates by the legislature, and legislative enactments in States whether there were constitutional provisions or not, either in and of themselves regulating the rates which might be charged consumers by companies, or the granting of the power to some public officer, or board, or to the Court, to make such regulations according to the facts in each particular case.[2]

As far as the United States is concerned the right is left to each State to regulate the charges for water from reservoirs or other works occupying rights of way over the public lands under the Act of March 3, 1891,[3] in the following language: "Provided, that the

[10] People v. Chicago Gas Trust, 130 Ill. 268, 22 N. E. Rep. 798; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979, 9 Sup. Ct. Rep. 553.

[11] City of St. Louis v. Bell Telephone Co., 96 Mo. 623, 10 S. W. Rep. 197; State v. Citizens' Telephone Co., 61 So. Car. 83, 39 S. E. Rep. 254, 85 Am. St. Rep. 870.

[12] Chicago, Milwaukee & St. Paul R. Co. v. Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. Rep. 336; Lake Shore & Mich. So. R. Co. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. Rep. 565, where it is held that a State by legislation may provide for maximum rates of charges for railroad companies, provided they are such as will admit of the carrier earning a compensation just to it and the public; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418.

[13] Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198.

See, also, Freund on Police Power, Secs. 372 *et seq.*

[1] See Sec. 1312.

[2] See Secs. 1373-1375.

[3] For the Act of March 3, 1891, see Secs. 937-949.

charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."[4]

The necessity for regulation of rates of water, and, in fact, all public service corporations, is becoming greater and greater. As was said by the Supreme Court of the United States:[5] "Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on."

§ 1372. **The judicial regulation of rates in the absence of constitutional or statutory provisions.**—In the absence of either constitutional or statutory provisions, it is within the power of the courts to inquire whether the rates charged and collected for water furnished consumers are reasonable or unreasonable in actions properly brought where the question of rates is involved.[1] Again, in the absence of such provisions the courts will enjoin the collection

[4] Act of Feb. 26, 1897, 7 Fed. Stat. Ann., 1905, p. 1098; 2 Comp. Stat. 1901, p. 1556; 29 Stat. L. 599.

[5] Knoxville v. Knoxville W. Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

[1] That the general right to fix rates comes within the police powers of a State at common law, see Sec. 1370.

Whether rates which have been charged for its services by a public corporation are unreasonable is a proper subject for judicial inquiry. Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

"Where the constitution and statute are absolutely silent as to the amount of the charge for transportation, and the time and manner of its collection, there would be strong legal ground for the position that the demands in these respects must be reasonable. The carrier voluntarily engages in the enterprise. It has in most instances, from the nature of things, a monopoly of the business along the line of its canal. Its vocation, together with the use of its property, are closely allied to the public interest. Its conduct in connection therewith materially affects the community at large. It is, I think, charged with what the decisions term a 'public duty or trust.' In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges; and an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and extortionate demands would lay the foundation for judicial interference." Mr. Justice Helm in Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, San Diego etc. Co. v. San

of charges made which are unreasonable and excessive,[2] or enjoin the company from preventing the water from flowing through the consumer's ditch, where a reasonable rate is tendered,[3] or by a writ of mandate compel the company to deliver the water to the consumer upon his tendering a reasonable rate therefor.[4] But the Court has no power to make a general rule prescribing the rates which may be charged in the future, either as applied to a particular company or in general to companies operating within its jurisdiction. This is a matter for the legislature. By analogy the same rule in this respect applies to the courts as is applied to the Interstate Commerce Commission. Under the Interstate Commerce Act the commission has no power to prescribe the tariff of rates which shall control railroads in the future. As was said by Mr. Justice Brewer, "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but entirely a different thing to prescribe rates which shall be prescribed in the future—that is a legislative act."[5] And as held in a later case by the same Court, in a water case directly in point, the Court will not fix the amount of water rates, even on holding that the rates formerly charged are unreasonable, but resort must first be had to the body designated by law to fix the proper rates, which, in California, is the Board of County Supervisors.[6]

Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

In an action by an irrigation company for water rents, whether the contract with the consumer was or was not a reasonable one is held to be a question for the jury. Colorado C. Co. v. McFarland, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435.

2 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

3 Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

4 Wheeler v. Northern Colo. Irr. Co., *supra;* Northern Colo. Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23; Slosser v. Salt River Valley C. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Gould v. Maricopa C. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

5 Interstate Com. Commission v. Cincinnati etc. Co., 167 U. S. 497, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896; see, also, cases cited.

See, also, Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, where the action was to recover an excessive rate paid, and the Court held that a recovery might be had.

6 Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

§ 1373. Constitutional provisions relative to water rates.—In a number of the Western States the tendency of water companies to make excessive charges for furnishing water to consumers was recognized, and at an early day in the formation of their constitutions provisions were therein inserted to the effect that the respective legislatures shall provide by law in the manner in which water rates shall be established.[1] In none of the constitutions, however, are the definite maximum rates therein fixed; they only provide that the legislature shall determine how they shall be fixed.

The Constitution of the State of Colorado provides that the legislature shall provide by law that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates *to be charged for the use of water,* whether furnished by individuals or corporations.[2]

In the original constitution of California there were no provisions upon this subject, but in the amended constitution adopted in 1879, and which went into effect on January 1, 1880, it was provided to the effect that: "The use of all water now appropriated, or hereafter to be appropriated, for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the State in the manner to be prescribed by law."[3] And the section further provides that the rates of compensation to be collected where the water was supplied "to any city or county, or city or town, or the inhabitants thereof," shall be fixed annually by the board of supervisors of the county, or by the governing board of the city or town, such rates to continue in force for one year and no longer. This latter provision applies exclusively to cases where the water is supplied to incorporated cities or towns.[4] And in Section 2 of the same article it is provided that the right to collect rates supplied to such cities or towns is a franchise, and can

1 For these constitutional provisions, see Part XIV.

2 Colo. Const., Art. 16, Sec. 5.

See Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, construing the phrase, "to be charged for the use of water," as meaning a charge for the carriage of water, and that "the ownership of the water should remain in the public, with a perpetual right to its use, free of charge, in the people."

3 Cal. Const., Art. 14, Sec. 1.

4 San Diego etc. Co. v. City of National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; People v. Stephens, 62 Cal. 209.

not be exercised except by the authority of and in the manner prescribed by law.[5] The first part of the section quoted above gives no authority for the fixing of rates where the water is furnished exclusively to stockholders of a corporation and not sold, rented, or distributed to the public generally.[6] These provisions of the constitution were evidently aimed at water monopolies, and, therefore, they were adopted in the fundamental law of the State as a safeguard also against future legislative action. As was held in an action decided in 1882,[7] "If the framers of the instrument had intended to leave the entire matter where it previously rested—in the hands of the legislature—they would have said so in appropriate language. But it is perfectly evident that there were some things that they were unwilling to trust to the legislature. It is not with the view of 'liberating the great public uses of water and gas from legislative control and making them independent of the State' that the changes were made, but, on the contrary, it was intended, in certain enumerated respects, to lay a stronger hand upon them than that of the legislature—to wit, the hand of the constitution itself." [8]

[5] See People v. Stephens, 62 Cal. 209; Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; San Joaquin etc. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. Rep. 285; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

[6] McFadden v. Board of Supervisors of Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397.

[7] People v. Stephens, 62 Cal. 209.

[8] Const., Art. 14, Sec. 1, providing for the regulation and control by the State of all water "appropriated for sale, rental, or distribution," applies to all water set apart for, or devoted to such purposes, whether taken from public streams, or acquired from other sources. Merrill v. South Side Irr. Co., 112 Cal. 426, 44 Pac. Rep. 720, and where it is said: "The evident purpose of the framers of our constitution was to strike a blow at the monopolies which had grown up out of the sale, rental, and distribution of water."

For the further construction of the California constitution, see Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Fresno C. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87, where it is said that where the maximum water rates were not fixed as by law provided, a contract whereby a water company undertook to furnish water was not forbidden by the provisions of Article 14, Section 1, of the constitution, and could be enforced.

See, also, San Diego Flume Co. v. Souther, 104 Fed. Rep. 706, 44 C. C. A. 143; *Id.*, 90 Fed. Rep. 164, 32 C. C. A. 548; Lanning v. Osborne, 76 Fed. Rep. 319.

See, also, San Joaquin etc. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. Rep. 285; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

The constitution of the State of Idaho provides that "the right to collect rates or compensation for the use of any water supplied to any county, city or town, or water district, or the inhabitants thereof, is a franchise and can not be exercised except by authority of and in the manner prescribed by law."

"The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose."[9] The Court has construed this section to mean that it commands the legislature to provide, by law, the manner in which these rates may be established, and by necessary implication prohibits the legislature from fixing such rates, and that an Act of the legislature attempting to fix an absolute maximum rate which might be charged is unconstitutional and void.[10] This was upon the theory that some canal companies can furnish water for much less than others, and still make a reasonable profit on their investment; but, that a rate which would make a reasonable profit on the investment of one canal would be confiscation for another, and that no State can deprive a person of his property without due process of law.

In some States by constitutional provisions, the power to fix water rates is conferred upon some public service commission. In California by the new constitutional provision adopted by the people of the State, October 10, 1911, it was provided by the amendment to Article 12, Section 23, that every private corporation and every individual or association of individuals owning, operating, managing, or controlling any canal, or pipe line plant for the production, generation, transmission, delivery, or furnishing of heat, light, water, or power was thereby declared to be a public utility subject to such control and regulation by the railroad commission, as may be provided by the legislature, "and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary, and to be unlimited by any provision of this constitution."

The new Arizona constitution, Article 15, Section 1, provides for the creation of a "Corporation Commission," and Sections 2 and 3 of the same article provide as follows: "Section 2. All corporations other than municipal engaged in carrying persons or

[9] Idaho Const., Art. 15, Secs. 2, 6.

[10] Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617.

property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages, or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

"Section 3. The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein," etc.

These provisions of the constitutions are declared by the courts to be merely declaratory of the common law principles discussed in previous sections of this chapter,[11] concerning the regulation by a State of the conduct of companies in the business of furnishing water to consumers, in the absence of constitutional or statutory provisions.[12]

§ 1374. Power of the legislature to provide for the regulation of water rates—Constitutional limitations.—The legislature of a State has the power, under the general police powers granted to a sovereignty, to enact statutory laws providing for the regulation of water rates, and to determine how the maximum rate, which may be lawfully charged by those in the business of furnishing water to others, may be fixed; and that, too, regardless of the fact as to whether or not there are provisions in the constitutions of the respective States authorizing the enactment of such laws. These statutory provisions are but the recognition of the common law principle that the persons, or corporations, who undertake to perform a public or quasi-public duty, must do so in a reasonable manner, and must charge only a reasonable amount for the services performed. These Acts are, therefore, held to be constitutional.[1]

11 See Secs. 1370-1372.

12 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; People v. Stephens, 62 Cal. 209; Price v. Riverside etc. Co., 56 Cal. 431, 433; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Munn v. People of Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. St. Rep. 690; Vincent v. Chicago & Alton R. Co., 49 Ill. 33.

1 Munn v. People of Illinois, 94 U. S. 113, 24 L. Ed. 77.

Therefore, no constitutional provision is necessary for either the legislature, or the courts, to protect the consumer of water against the extortionate charges which may be made by individuals, or companies, who are in the business of furnishing water for use by others.[2] And, upon the other hand, it requires no constitutional provision for either the legislature, or the courts, to protect the companies or individuals furnishing the water in their right to make such a charge for the water furnished as will give a reasonable return on their investment. Therefore, the legislatures of all these States have provided by law just how water rates may be fixed in order that they may be reasonable and just, both as regards the rights of the parties furnishing the water, and the rights of the parties consuming it.[3]

The only limitations imposed upon a State legislature in the matter of the regulation of water rates are those imposed by the Constitution of the United States and of the State where the regulation is sought to be made. An Act can not be passed which attempts to fix the rates so low that the individuals or companies can not realize a reasonable profit upon their investment, or which will amount to a confiscation of the property acquired by the ditch company.

See, also, for right to regulate under the common laws, Sec. 1372.

"To regulate or establish rates for which water will be supplied is, in its nature, the execution of one of the powers of the State, and the right of the State so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded." County of Stanislaus v. San Joaquin etc. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241.

The legislature, in the exercise of its police power, may regulate the rate to be charged by a corporation doing business affected with a public interest. Northern Light & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; San Francisco v. Spring Valley W. Co., 48 Cal. 493; Spring Valley Water Works v. San Francisco, 61 Cal. 3; *Id.*, 52 Cal. 111; Spring Valley Water Works Co. v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; San Diego W. Co. v. City of San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Santa Ana W. Co. v. Town of Buena Ventura, 65 Fed. Rep. 323; Boise etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Denver v. Denver Union W. Co., 41 Colo. 77, 91 Pac. Rep. 918; Spring Valley Water Co. v. San Francisco, 165 Fed. Rep. 676.

2 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

3 For the abstract of these Acts, see Sec. 1375.

See, also, for the laws of the various States fixing rates, Part XIV.

Such an Act would be the taking of private property without due process of law, and without just compensation, and contrary to the provisions of the constitutions.[4] However, as held by the Supreme Court of the United States, judicial interference should never occur with the collection of rates established under legislative sanction, unless the case presents clearly, and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the Court to say that the rates prescribed will necessarily have the effect to deny compensation for private property taken for a private use.[5]

Another limitation imposed by the constitution is that the legisla-

[4] Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617, where it is said: "The State can not compel canal owners to furnish water to consumers without some reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation or without due process of law."

See, also, San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703; see, also, *Id.*, 89 Fed. Rep. 274; San Diego etc. Co. v. City of National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; County of Stanislaus v. San Joaquin etc. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930, where the Court said: "It is not confiscation, nor a taking of property without due process of law, nor a denial of equal protection of the laws, to fix water rates so as to give an income of 6 per cent upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had, prior thereto, been allowed to fix rates that would secure to it 1½ per cent per month income upon the capital invested."

See, also, Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Santa Ana W. Co. v. San Buena Ventura, 65 Fed. Rep. 323; City of Denver v. Denver Union W. Co., 41 Colo. 77, 91 Pac. Rep. 918; Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Boise City etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; City of Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592, and note, 22 Sup. Ct. Rep. 410; Winchester etc. Rd. Co. v. Croxton, 98 Ky. 739, 34 S. W. Rep. 518, 33 L. R. A. 177, and note upon the general power of a legislature to fix rates.

[5] San Diego etc. Co. v. City of National City, *supra*.

The Court will not fix the amount of water rates on holding that the rates charged are unreasonable; but, under the California Act of 1885, resort must first be had to the body designated by law to fix the proper rates, which is the board of supervisors. Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

ture can not pass an Act which will tend to interfere with the validity of contracts by the company furnishing the water either with the consumers or with the State itself. We will discuss this subject in another section.[6]

§ 1375. **Statutes providing how rates shall be fixed.**—Pursuant to the powers granted either by the constitution of the State,[1] or under its general police powers at common law,[2] the legislatures of some of the Western States have provided by law how the rates, which may be charged by individuals, or corporations, for the water furnished consumers, may be fixed.[3] In general the power to actually fix the rates is delegated to some board designated by the Statute.[4]

In California it is provided that, whenever a petition of not less than twenty-five inhabitants who are taxpayers of any county of the State shall, in writing, petition the board of supervisors thereof to regulate and control the rates and compensation to be collected by any person, company, association, or corporation, for the sale, rental, or distribution of any appropriated water to any inhabitants of such county, the clerk of such board shall immediately cause such petition, together with the notice of the time and place of hearing, to be published and posted as therein provided. At the hearing of such petition the board shall estimate, as near as may be, the value of all the works, and all other property, actually used in the furnishing of the water of such company; and shall also estimate the annual and reasonable expenses connected therewith. The board must then fix the rates which may be charged by any company for any use, which rates shall not be less than six, nor more than eighteen per cent of the value of the works and other property actually used; such rates shall be equal, reasonable, and just, both to the companies and to the consumers. The said rates, when so fixed, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors. A similar method is then provided for

6 See Sec. 1382.

1 For the provisions in the State constitutions, see Sec. 1373.

For the constitutions of the various States, see Part XIV.

2 See Secs. 1370-1372.

3 For these laws, see Part XIV.

4 For the powers and duties of these boards, see Sec. 1376.

the changing of any rate theretofore fixed. The water must be furnished at the rates fixed to all persons by such a company, to the extent of the actual supply of its appropriated waters, and the penalty is fixed for excessive charges, by providing that the company shall be liable in an action by any person so aggrieved, to a recovery of the whole rate so collected, together with the actual damages sustained by such person.[5]

In Colorado, by the Acts of 1879 and 1887, it is provided that the board of county commissioners shall, at their January meeting, hear and consider all applications for the fixing of rates, which may be made by any party, or parties, interested in procuring water for irrigation from any company furnishing or selling water, and the board must fix a time when they will hear the testimony of the parties. The board is given full power to subpoena witnesses, and to compel their attendance, and also to require the production of books and papers required for evidence. In fixing the rates it must examine the value of the property of the company furnishing the water, and the cost of maintaining and operating the same, and fix a rate at which the water shall be furnished; which rate shall not be changed oftener than once in two years.[6]

[5] Act of March 12, 1885, as amended. See Gen. Laws of Cal., Henning, p. 601; Stats. and Amdts., 1885, p. 95; 2 Deering's Code, p. 272.

"It is believed that the foregoing Act fully supersedes Stat., 1880, 16, Chap. 21. McFadden v. Los Angeles County, 74 Cal. 571, 573, 16 Pac. Rep. 397; Crow v. San Joaquin etc. Irr. Co., 130 Cal. 309, 313, 62 Pac. Rep. 562, 1058; Fresno Canal etc. Co. v. Park, 129 Cal. 437, 446, 62 Pac. Rep. 87; Hildreth v. Montecito Creek W. Co., 139 Cal. 22, 28, 72 Pac. Rep. 395." Note from General Laws of California, Henning, 1905, p. 406.

[6] 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3262-3275; Revised Stat. of Colo., 1908, Secs. 3262-3275.

This Act was held constitutional in Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487.

It is not necessary that all the consumers using or seeking water from a particular ditch should join in an application to the county commissioners to fix the maximum price for which water will be furnished, nor is it necessary that the applicant or petitioner be a person who has theretofore used water from such canal, ditch, or reservoir, if the company has any surplus water. South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504.

Where defendant irrigation company was a party to a statutory proceeding before the county commissioners in which the rate for water was fixed, the adjudication of the board can not be collaterally attacked by it in mandamus, the decision of the commis-

By the Act of 1889, the State of Idaho adopted practically the Colorado law relative to the procedure for the fixing of water rates.[7] Prior to the enactment of this law, the District Court was authorized by statute to determine, under all circumstances, what was a reasonable compensation, and reasonable terms, for the use of water, either annually, or for a term of years.[8] Subsequent to this Act, however, and prior to the last Act mentioned above, the legislature, by the Act of 1897, attempted itself to absolutely fix the rates which might be charged for water. This Act was de clared to be unconstitutional upon the ground that the constitution granted the power to the legislature to determine how such rates might be fixed, but not itself to absolutely fix them.[9]

In Kansas, by statute, the power to fix water rates is conferred upon the "Board of Railroad Commissioners."[10] In Nebraska the power is conferred upon the "State Railroad Commission,"[11] so, too, in Nevada,[12] and Oregon.[13] In Washington, by statute, the power to fix rates is conferred upon the "Public Service Commission."[14]

§ 1376. Powers and duties of boards to fix rates.—As was seen in the preceding section,[1] the legislatures delegated the authority to fix the maximum rates which might be charged for the water furnished, or services rendered, by a company in furnishing water to consumers, to the board of county commissioners, or county supervisors, or to some public service board. The exercise of this power of the board was called in question, shortly after the passage of the California Act, and it was there held that the board can not fix such rates arbitrarily without any exercise of judgment, or discretion, but that when fixed after a full and fair investigation

sioners being conclusive until judicially overturned on direct attack. Northern Colo. Irr. Co. v. Poupprit, 44 Colo. 490, 108 Pac. Rep. 23.

7 See Idaho Code, 1901, Secs. 2599 *et seq.;* Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Jackson v. Indian Cr. etc. Co., 16 Idaho 430, 101 Pac. Rep. 814.

8 Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134.

9 Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617.

10 Gen. Stat. of Kan., 1909, Secs. 4477, 4478; amended by Laws, 1911, Chap. 238, p. 417.

11 Compiled Stat. Neb., 1911, Sec. 6475c.

12 Laws, 1911, Chap. 162.

13 Laws, 1911, Chap. 279, p. 483.

14 Laws, 1911, p. 538.

1 See Sec. 1375.

the reasonableness of the water rates can not be reviewed by the courts, unless there was actual fraud in fixing them, or they are so palpably and grossly unreasonable as to amount to the same thing. On this point, however, it is also held that the board of supervisors is not so far a part of the legislative department of the State as to be entirely independent of judicial control in the exercise of its constitutional duty to fix water rates.[2]

In Idaho the constitution provides that the legislature must provide for local boards to fix water rates. It is held that this does not confer the right of the legislature to fix such rates.[3] It is held by the Utah Supreme Court that a city could not authorize a water company to fix its own rates for water,[4] the Court saying: "The courts have frequently held that, as the fixing and regulating of rates is a governmental function which may not be delegated nor surrendered by an agency of the sovereign without express authority, no contractual rights can be granted or obtained with respect thereto." And it may be considered as the settled law that the courts may take into consideration the value of the plant and determine the reasonableness of the water rates fixed by the board.[5] But the Court will not fix the amount of water rates on holding that the rates charged are unreasonable, but resort must first be had to the body designated by the law to fix the proper rates, which is the board.[6]

As to the constitutionality of these laws delegating the power to boards to fix water rates, to this extent, they have been uniformly held to be constitutional.[7]

2 Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116.

See, also, San Diego W. Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; County of Stanislaus v. San Joaquin etc. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 90 Fed. Rep. 516; San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703, 89 Fed. Rep. 274.

3 Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617.

4 Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828.

5 San Diego etc. Co. v. Jasper, *supra*.

6 Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

7 See cases cited *supra*.

See, also, Spring Valley Waterworks

§ 1377. Proceedings must be had before the board before the courts will interfere.—Where the power to fix rates is conferred upon boards the general rule is that the courts will not interfere upon the complaint of the company furnishing water at too low a rate until it has made its showing before the board, and exhausted its remedies before the same. As was well said in a California case:[1] "It was the very purpose of Section 6 to permit a re-examination, or change, of previously established rates, to give any person, or corporation, against whom such established rates operated, an opportunity to obtain the very relief which plaintiff seeks to obtain in this action; and we think that, as the statute afforded it a remedy and redress by appeal to the board of supervisors at the time when this action was brought, and for many years previously, it should have exhausted this remedy before it was entitled to appeal to a court of equity to annul the order of the board. It is the general rule that a party must exhaust all his legal remedies before he is entitled to redress in a court of equity."[2]

§ 1378. Values upon what compensation may be based for a "fair return" to the company.—It is the well-settled law upon the subject that the compensation or fair return to the company furnishing the water is based upon the present valuation of its plant. Therefore, in order to determine the present value of the property, which is made by law the basis of rate which may be fixed, any evidence which tends to prove that value may be considered either by the board, or by the court in reviewing the action of the board. In other words, this valuation of the company's property is a question of fact to be proven, as are other questions of fact.

The present value of the property of the company actually used in furnishing the water may be proven by the books of the company,[1] the price the plant brought on a foreclosure sale, the value

v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Santa Ana W. Co. v. Town of San Buena Ventura, 65 Fed. Rep. 323; Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399.

1 San Joaquin etc. Co. v. County of Stanislaus, 155 Cal. 21, 99 Pac. Rep. 365.

2 See, also, San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

1 Testimony of expert witnesses as to the value of the property of a company is not admissible, at least in favor of the company, as against the

of the plant as fixed by the sworn statement of the officers of the company for the purpose of taxation, the depreciation of the value of the plant, due to the diminution of the water supply from long continued drought,[2] and also any other facts which are admissible under the rules of evidence tending to prove the actual present value of the plant.

The amount of taxes paid, also the interest on the bonded, or other indebtedness, "so far as that indebtedness represents money properly expended in or upon its property," the amount of dividends paid by the company, and the annual depreciation of the value of the plant, are held to be proper subjects for consideration by the board or court.[3]

The franchise of a company to collect water rates is property, and its value as a going concern may be considered in determining the value of the property of the company for rate-fixing purposes, but the burden of proving the value of such franchise rests upon the company; also the market value of the company's outstanding stocks and bonds may be properly considered.[4] The risk of the business in the particular locality at the current rates in similar enterprises may also be considered.[5]

The amount of depreciation in the future may also be taken into consideration.[6] The annual expenses of maintenance, taxes, re-

better evidence of its books. San Diego Water Co. v. City of San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

2 San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 702.

3 Contra Costa Water Co. v. City of Oakland, 165 Fed. Rep. 518.

4 Spring Valley W. Co. v. City of San Francisco, 165 Fed. Rep. 667.

5 Willcox v. Consolidated Gas Co., 212 U. S. 19, 52, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192. But where the Court also held that the assessed value of the franchise of a gas company furnishes no criterion by which to ascertain the value of the plant when testing the reasonableness of gas rates as fixed by the statute.

6 Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148, in which it is said: "The company is not bound to see its property gradually waste without making provisions out of its earnings for replacement."

See, also, Spring Valley W. Co. v. San Francisco, 165 Fed. Rep. 667; San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. Rep. 567; San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79.

pairs, managing, and operating may be considered.[7] A deduction for the depreciation of the value of the property from age and use must be made from the estimated cost of reproducing a water works plant when determining the present value of the tangible property for the purpose of testing the reasonableness of the rate fixed for water.[8]

There is a tendency upon the part of promoters and the managers of some of these corporations to inflate by "improper charges," and "by injudicious expenditures" the account for the construction of the works. Therefore, while the cost of the entire project may be considered, and will have more or less weight, according to the circumstances, they are by no means conclusive in investigations for the determination of the amount of rates which may be charged, either by the investigating board or the courts. Therefore, it is held by the Supreme Court of the United States, that the reasonable present value of the property, rather than its original cost, is to be taken as the basis of calculation in determining whether certain rates constitute a fair compensation for the water furnished, so that the owners of the project are not deprived of their property without due process of law.[9]

The question of the actual services rendered to the consumers must also be considered by the board or Court. The question

[7] San Diego etc. Co. v. National City, *supra;* San Diego etc. Co. v. Jasper, *supra;* Contra Costa etc. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668; *Id.*, 165 Fed. Rep. 518; County of Stanislaus v. San Joaquin, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241.

[8] Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

In ascertaining the value of large irrigation plants for the purpose of determining as to what are reasonable water rates, as fair a rule as can be formulated is to find the cost of reproduction as of the date of the use in question, and deduct therefrom the depreciation that has resulted from age and use. San Joaquin etc. Co. v. Stanislaus County, 163 Fed. Rep. 567.

[9] San Diego etc. Co. v. City of National City, *supra;* San Diego etc. Co. v. Jasper, *supra.*

"The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose intended." County of Stanislaus v. San Joaquin etc. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930.

See, also, the same case on reversal, 163 Fed. Rep. 567, where it is held that the distance of each county from the head of the canal, and the consequent loss of water from seepage and

whether or not more property had been acquired by the company furnishing the water than necessary or needful for the purpose intended may be considered.[10] So, also, the question as to whether or not the plant is furnishing water up to its full capacity, which question includes the quantity of land under the plant which may be and which is actually furnished with the water.[11]

If a company was permitted to charge a small proportion of the lands for which it was constructed to irrigate, with the whole amount which it would be entitled to charge; if it furnished water to all of the lands to its full capacity, carried to an extreme conclusion, for the sake of illustration, the company would be permitted to charge the whole amount for the furnishing one small farm with the water. Therefore, in other words, the value of the services rendered by the company to the consumers must also be considered in any proceeding for the determination of what rates may be charged.[12]

evaporation should be taken into account, and as between the respective counties the higher charge should be authorized by the one having the longest flow.

See, also, Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668; Spring Valley W. Co. v. San Francisco, 165 Fed. Rep. 698; Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Knoxville v. Knoxville W. Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148; San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. Rep. 567, where it was held that the right of the water company to divert water from the river is undoubtedly of value, but it may not be a value upon which ultimately the plaintiff may be given a right under the law, and is, therefore, property for the purpose of application for a preliminary injunction, but is reserved for future consideration.

In a late California case, it was also held that such a corporation having a monopoly is not entitled to an allowance for good will in determining the value of the property used in the business on which it is entitled to a return. Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

10 Stanislaus County v. San Joaquin etc. Co., *supra*.

11 "If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the constitution requires that, say, two-thirds of the contemplated number should pay a full return." San Diego etc. Co. v. Jasper, *supra*.

See, also, Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399.

12 Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

§ 1379. The determination as to what are reasonable rates.—The question now resolves itself into the inquiry as to what are reasonable rates for the furnishing of water to consumers by companies organized for that purpose, and how the rates charged, or to be charged in the future, are to be determined as reasonable or unreasonable.

A public corporation does not enjoy its franchise solely for the profit of its promoters or stockholders. While it uses the franchise there rests upon it a duty to render to the public, at a reasonable rate, or charge, the services for which it was created.[1] Therefore, in the determination as to what is a reasonable rate which may be charged for its services by a public service corporation of this nature, an examination must be made not only from the point of view of the corporation, but it must also be made from the standpoint of those who are served by it. A reasonable rate is, therefore, one which is as fair as possible to all whose interests are involved. And the effect of the rate upon the persons to whom services are rendered is as important a matter for consideration as is the effect upon stockholders, or bondholders.[2] And what a company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it furnishes the water for which the charges are made,[3] taking into

[1] Munn v. People of Illinois, 94 U. S. 113, 24 L. Ed. 77; Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117.

[2] "The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Covington etc. Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; San Joaquin etc. Co. v. Stanislaus County, 163 Fed. Rep. 567.

What is a reasonable charge for irrigation within the New Mexico laws of 1897, Chapter 49, regulating the use and distribution of water for irrigation and providing that the charges therefor shall be reasonable, "must depend largely upon the cost of constructing and operating the irrigation works." Young & Norton v. Hinderlider, 15 N. M. 666, 110 Pac. Rep. 104[illegible].

See, also, Cleveland v. Malden etc. Co., —— Wash. ——, 125 Pac. Rep. 769.

[3] San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 702; San Diego etc. Co. v. City of National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79.

See, also, as to what is a fair return or a reasonable rate, San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. Rep. 567; Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668; Stanislaus County v. San Joaquin etc. Co., 192 U. S. 201,

consideration also the value of the services rendered to the consumers.[4]

As was said by the Federal Court upon this subject in a well considered case,[5] the company "has the right to receive from water rates an income which will enable it to pay its actual operating expenses, its taxes, its interest on its bonded or other indebtedness, so far as that indebtedness represents money properly expended in or upon its property, and to pay a reasonable dividend on its stock, so far as the stock represents money actually received, and so invested, and in addition thereto to receive a sum sufficient to cover the annual depreciation of its plant." It was also held in the same case that the fact that interest rates generally had advanced does not give a company the right to charge a higher rate without the valuation of the property being readjusted.

It is held in Arizona,[6] that "what is a reasonable price is in such a suit a fact to be proven as other facts are proven."

§ 1380. **The nature and effect of decisions by boards fixing rates—Judicial interference.**—The nature of the right of a State to establish reasonable compensation for service rendered by a company or corporation is a legislative function, and that, too, regardless of the fact whether the power is exercised directly by the legislature, or by a subordinate, or administrative body.[1] As was held by the Supreme Court of the United States in a late case:[2] "It happens that in this particular case it is not an Act of the legislature that is attacked, but an ordinance of a municipality. Nevertheless, the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the

48 L. Ed. 406, 24 Sup. Ct. Rep. 241; Spring Valley Water Co. v. San Francisco, 165 Fed. Rep. 667; *Id.*, 164 Fed. Rep. 657; Spring Valley Waterworks v. San Francisco, 124 Fed. Rep. 574; San Joaquin etc. Co. v. County of Stanislaus, 155 Cal. 21, 99 Pac. Rep. 365; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

4 "In using the expression, 'value of the services rendered,' we must understand that the word 'value' means value to the person to whom the service is rendered." Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117.

5 Contra Costa W. Co. v. City of Oakland, 165 Fed. Rep. 518.

6 Salt River Valley etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117.

1 Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

2 Knoxville v. Knoxville W. Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

legislature itself, or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. . . . It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part."[3]

The effect of a decision fixing water rates by a board duly authorized by law to fix the same is to raise the presumption that the act of the board is valid, as is presumed as to any other legislative Act, until the contrary is clearly shown.[4] It is, therefore, held that the reasonableness of water rates fixed by a board of supervisors, after full and fair investigation, can not be reviewed by the courts unless there was actual fraud in fixing the rates, or they were so palpably and grossly unreasonable as to amount to the same thing, and to amount to the taking of private property without just compensation, or due process of law.[5] As was said by

[3] See, also, Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77; San Diego W. Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 333, 38 L. R. A. 460, 62 Am. St. Rep. 261; Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668; Spring Valley W. Co. v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; *Id.*, 110 Fed. Rep. 703.

[4] Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77.

[5] The reasonableness of water rates fixed by the board of supervisors after a full and fair investigation can not be reviewed by the courts unless there is actual fraud in fixing the rates or that they are so palpably and grossly unreasonable as to amount to the same thing. Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116. "To which conclusion we adhere." San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

See, also, Spring Valley Waterworks v. Bryant, 52 Cal. 132; Spring Valley Waterworks v. San Francisco, 52 Cal.

the Supreme Court of the United States,[6] "It should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents clearly, beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

But upon the other hand, in cases of actual fraud, or in cases where the rates fixed are confiscatory, a Court of equity will interfere.[7] As was said by Mr. Justice Moody in rendering the opinion of the Supreme Court of the United States, in a late case:[8] "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

In an action of this nature the simple question before the Court is whether or not the rate is so low as to deprive the company of a fair compensation or rate upon the present value of its property,[9] and thus, in effect, to take the property of the company without due process of law, or just compensation. As was said in a late California decision:[10] "The ultimate question in any

111; Spring Valley Waterworks v. Bartlett, 63 Cal. 245; Santa Ana W. Co. v. San Buena Ventura, 65 Fed. Rep. 323; Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

6 San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

7 Where the effect of a city ordinance fixing rates for water furnished by a corporation supplying the city is to deprive the corporation of a fair return on the valuation of its property, the ordinance is in violation of the State and Federal constitutional guaranties that no one shall be deprived of his property without just compensation, and the courts will hold the ordinance void, and this is the full extent of the power of the courts in such matter. Contra Costa Water Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

8 Knoxville v. Knoxville W. Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

9 As to the present value of such property, see Sec. 1378.

What is a fair return, see Secs. 1378, 1379.

10 Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

judicial proceeding of this character is whether the rates fixed are confiscatory." This, as we have seen in previous sections, depends upon the question of the actual present value of the property of the company, and the rate allowed by the board. Where the rate fixed by the county commissioners was such that the water company could make no profit, the enforcement of such rate was properly enjoined.[11]

The burden of proof to prove that certain rates fixed are confiscatory, and, therefore, in violation of the constitutional provisions, is upon the company. And the company must show that such rates are confiscatory beyond any reasonable or fair doubt.[12]

§ 1381. Right of companies to contract where rates are not fixed by law.—In those States which have no statutory provisions for fixing the maximum water rates, and also in those States which have such provisions, but where the rates have not been actually fixed in accordance with the law, the corporation furnishing the water and the consumers receiving it are left free to make such contracts as they may see fit, and such contracts will be sustained by the courts, provided that the rates fixed are reasonable and not extortionate and excessive.[1] The question now arises as to whether

11 Board of Commissioners of Montezuma County v. Montezuma County, 39 Colo. 166, 89 Pac. Rep. 794.

See, also, Covington etc. Co. v. Sanford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198; Contra Costa W. Co. v. City of Oakland, 165 Fed. Rep. 518; San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. Rep. 567.

See, also, cases cited *supra*.

12 Contra Costa Water Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668; Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192; Knoxville v. Knoxville W. Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148; Contra Costa Water Co. v. City of Oakland, 165 Fed. Rep. 518; Board of Commissioners of Montezuma County v. Montezuma County, 39 Colo. 167, 89 Pac. Rep. 794.

1 For the power of the courts to regulate water rates, see Secs. 1370-1372; Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 859, 15 L. R. A., N. S., 359; Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming 76 Fed. Rep. 319.

In Idaho such a contract was held valid, where the company, as a ground for the refusal to furnish the water under it, made the defense that the rate had not been fixed in the manner prescribed by the statute. Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533, 24 L. R. A., N. S., 425; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A.,

or not, after such contracts are made and during their life, in States where there are provisions for the regulation of such rates, the board may regulate the water rates as between the contracting parties. The great weight of authority seems to hold to the effect that where a valid contract has been made as to the rates or charges which shall be paid by the consumers to the parties furnishing the water, that the rates so fixed in the contracts can not afterwards be regulated by the board during the life of such contracts. As was said in a recent California case: "Under the present statute the contract rights prevail in all cases, the boards of supervisors being powerless to affect or interfere with them."[2]

N. S., 213; Boise etc. Co. v. Turner, 176 Fed. Rep. 373; Spring Valley W. Co. v. San Francisco, 165 Fed. Rep. 667; San Diego etc. Co. v. Souther, 104 Fed. Rep. 706, 44 C. C. A. 143; Fresno Canal Co. v. Rowell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112; Fresno Canal Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275; Fresno Canal Co. v. Hart, 152 Cal. 450, 92 Pac. Rep. 1010; Clague v. Tri-State etc. Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; Barstow Irr. Co. v. Cleghon, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; Sammons v. Kearney etc. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S. 404.

2 Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87.

"Until such rates are fixed in pursuance of law, the corporation furnishing the water, and the consumer receiving it, are left free to make such contracts as they may see fit to make, and their agreement will be sustained by the courts." San Diego etc. Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548; reaffirming same on rehearing, *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

See, also, San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703, 89 Fed. Rep. 274; Souther v. San Diego etc. Co., 112 Fed. Rep. 228; Boise Irr. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Boise etc. Co. v. Turner, 176 Fed. Rep. 373; Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87.

Where defendant agreed to pay a "reasonable rent" for water to be furnished him each year for irrigation purposes, there is no such ambiguity as to permit parol testimony that "reasonable rent" meant one-fifth of the crop. Old River Rice Irr. Co. v. Stubbs, —— Tex. Civ. App. ——, 137 S. W. Rep. 154.

See, however, Jack v. Village of Grangeville, 9 Idaho 291, 74 Pac. Rep. 969, where it was held that a contract may be made to continue for 30 years, except that rates may be established from time to time as the legislature may by law provide.

In Jackson v. Indian Cr. etc. Co., 16 Idaho 430, 101 Pac. Rep. 814, it was held that, under the statute parties had the right to contract as to water rates, but the Court said: "Whether that rate can afterward be abrogated by the fixing of such rates

However, where the charges of the company are excessive and unreasonable, water companies can not by contract evade their duties to the public. As was said in a recent Texas case: "Irrigation companies authorized to exercise the power of eminent domain are quasi-public corporations, and can not limit their liability to the public by contract."[3] And also held by the Supreme Court of the United States, the annual rates as first fixed are not made irrevocable by a contract for the sale of water rights, providing, in addition to the payment of the annual rates, for a fixed sum, to be fixed by the water company.[4]

Where valid contracts for rates have once been fixed and the irrigation or water plant has changed ownership, through a sale or foreclosure of the mortgage, it is held that the new owner has no authority to raise the rates to the detriment of the prior contracting consumers during the term of such contracts. As was said by the Federal Court for Idaho:[5] "Certainly it may be argued, as it has been, that the enforcement of these contracts is a hardship to the company, as well as to the other water users who may have to pay a higher rate, to make good to the company its losses on them. It is, however, presumed that when these contracts were made the predecessor in interest of this company received some consideration for making them, which is presumed to inure to the benefit of this company. At any rate, it bought with knowledge of them. If it made an improvident contract, it can hardly ask

under the statute by the board of county commissioners, we are not called upon to decide in this case, for the reason that it does not appear that such rates have ever been established by the board of county commissioners or in accordance with such statute." See *Id.*, 18 Idaho 513, 110 Pac. Rep. 251.

3 Colorado etc. Co. v. McFarland, —— Tex. Civ. App. ——, 94 S. W. Rep. 400; *Id.*, 50 Tex. Civ. App. 92, 109 S. W. Rep. 435; Salt River Valley C. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117.

4 Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

A contract concerning governmental functions, such as one which affects a city to regulate rates of a water company, must be strictly construed; and such functions can not be held to have been stipulated away by doubtful or ambiguous provisions. Rogers Park W. Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363.

5 Boise etc. Co. v. Turner, 176 Fed. Rep. 373.

the Court to correct that misfortune, which is not alleged to be the result of either fraud or mistake."[6]

§ 1382. **Power of legislature to regulate water rates—Impairment of contracts.**—As we have seen in other sections, a contract between a water company and the consumers for water rates, reasonable in all of its terms as to the rights of both parties, is binding upon the parties and valid,[1] and, in this connection, we will say that the courts have been called upon many times to decide the constitutionality of certain Acts of legislatures, and ordinances of municipalities, which seemingly tend to impair the obligation of contracts made prior to the enactment of such laws or ordinances. The rule may be stated that, where a contract provides for the unreasonable, exorbitant, and excessive charges for the furnishing of the water or the services performed, it is illegal and invalid as to those charges under any law; and that, too, whether the law, or ordinance, was enacted before, or after, the contract was entered into. And, therefore, such contracts do not come within the prohibition of the Federal Constitution against any State enacting laws impairing the validity of contracts,[2] but the rates and charges of the company furnishing the water are subject to the regulation by legislative enactment, or by ordinance of a municipality, or by the courts, and that, too, where they were enacted subsequent to the making of the contract.[3] As was well said by the Idaho Court

[6] See, also, Cline v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; Sammons v. Kerney etc. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213; Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 868; Nampa Irr. Dist. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Idaho Fruit Co. v. Great Western etc. Co., 17 Idaho 273, 105 Pac. Rep. 562; Clague v. Tri-State etc. Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; Almeria etc. Co. v. Tzschuck Canal Co., 67 Neb. 290, 93 N. W. Rep. 174.

[1] See Sec. 1381.

For ordinances fixing water rates affecting existing contracts, see Sec. 1446.

[2] See Fed. Const., Art. 1, Sec. 10.

[3] "In our judgment the language of the Act of 1862 did not amount to a contract that the rates for the use of water should never be lowered below the amount provided for in that Act. . . . We think that a mere reduction of rates, while still leaving reasonable, fair, or just compensation for the use of the property, is not pro-

in a case decided in 1912:[4] "He has no vested right to charge an unreasonable, or an unconscionable rate while exercising a franchise to serve a public use. To deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate, or unconscionable rate, deprives him of no right, natural or acquired, and can not be the impairment of a contract within the purview and meaning of Section 10, Article 1, of the Federal Constitution, nor is it depriving him of property without due process of law, in violation of the Fourteenth Amendment."[5]

hibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the Act of 1862, as provided for the fixing of rates as set forth in the Act of 1885." Mr. Justice Peckham, construing the California Act of 1885 fixing water rates at not less than 6 nor more than 18 per cent upon the value of the property, in County of Stanislaus v. San Joaquin etc. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930; *Id.*, 90 Fed. Rep. 516.

A change in the mode of fixing rates by a subsequent constitutional provision is not an interference with any of the vested rights of the company, or the impairment of its contract within the prohibition of the Federal Constitution. Spring Valley Waterworks v. San Francisco, 61 Cal. 3; *Id.*, 52 Cal. 111.

See, also, Souther v. San Diego etc. Co., 112 Fed. Rep. 228; *Id.*, 90 Fed. Rep. 164, 32 C. C. A. 548; Boise City Artesian etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319; Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828.

Where plaintiffs brought mandamus to compel defendant water company to furnish water at rates fixed by the county commissioners, defendants can not set up a contract with the plaintiff for a higher rate in defense of the proceeding, mandamus not being the proper remedy for the determination of contract rights. Northern Colo. Irr. Co. v. Pouppirt, 44 Colo. 490, 108 Pac. Rep. 23.

A charter specification of rates which shall be lawful for a turnpike company to charge, subject to certain increase or decrease if necessary to keep the company's dividends within certain limits, does not constitute an irrevocable contract between the State and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of the power to change the rates. Winchester etc. Co. v. Croxton, 98 Ky. 739, 34 S. W. Rep. 518, 33 L. R. A. 177 and note; South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504; McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397; Lanning v. Osborne, 76 Fed. Rep. 319; *Id.*, 82 Fed. Rep. 575.

4 City of Pocatello v. Murray, —— Idaho ——, 120 Pac. Rep. 812.

5 See, also, Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. Ed.

However, that a State, in matters of proprietary rights, may, by valid and reasonable contracts, exclude itself from the right to make regulations altering the terms of the same, or authorize municipal corporations to do so, has been too frequently declared to admit of doubt. Therefore, a contract with a water company for a limited period of time, fixing maximum rates to private consumers, in the absence of a showing of a charge of unreasonable rates so gross as to strongly suggest fraud, or corruption, is binding, and, as such, is protected against impairment by the contract clause of the Federal Constitution.[6]

By the Federal Court for Idaho[7] it was held that private contracts between an Idaho irrigation company and land owners renting water rights at fixed prices, made in good faith prior to the Act of the Idaho legislature of March 7, 1895,[8] were valid when made, and not affected by such Act, or subsequent legislation, and remain valid and enforceable, and the Court said upon the subject: "The only pretext the Court can adopt to annul these contracts would be that a change of facts and circumstances has rendered

170, 26 Sup. Ct. Rep. 23; aff'g *Id.*, 45 Fla. 600, 34 S. W. Rep. 631.

[6] A contract authorized by the existing State constitution as then construed by the highest court of the State can not be affected by subsequent change in the decisions of that court, or by the adoption of a new constitution. City of Los Angeles v. Los Angeles etc. Co., 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736; aff'g *Id.*, 88 Fed. Rep. 720; Walla Walla v. Walla Walla W. Co., 172 U. S. 1, 43 L. Ed. 331, 19 Sup. Ct. Rep. 77; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. Ed. 525, 6 Sup. Ct. Rep. 273; Freeport W. Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 679, 21 L. Ed. 686, 21 Sup. Ct. Rep. 493; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 L. Ed. 1155, 27 Sup. Ct. Rep. 762; Detroit v. Detroit Citizens St. R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 Sup. Ct. Rep. 410; City of Denver v. Denver Union W. Co., 41 Colo. 77, 91 Pac. Rep. 918; Danville W. Co. v. Danville, 180 U. S. 619, 45 L. Ed. 696, 21 Sup. Ct. Rep. 505; aff'g *Id.*, 186 Ill. 326, 57 N. E. Rep. 1129.

The obligation of contracts between a water company and private consumers by which the latter were to pay for the water in accordance with the rates "now or hereafter in force" is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates. Knoxville W. Co. v. Knoxville, 189 U. S. 434, 47 L. Ed. 887, 148 Sup. Ct. Rep. 29; aff'g *Id.*, 107 Tenn. 647, 64 S. W. Rep. 1075.

See, also, for the right to make contracts for water rates, where they have not been fixed under the statute, Sec. 1381.

[7] Boise etc. Co. v. Turner, 176 Fed. Rep. 373.

[8] Laws of Idaho, 1895, p. 174.

unconscionable what was once fair and reasonable. I would not feel justified in so doing."[9]

§ 1383. **Contracts for discriminatory rates.**—Under the laws of State control, a water company organized for the conveying, selling, or renting water to consumers, has no right to make discriminatory rates to its customers. But the rates which may be charged are fixed, as provided by law, and the water must be furnished to all consumers, in the order of their respective priorities, at the same charge, as long as the company has water left for disposal. In case of an additional charge, severe penalties are prescribed by the statutes, even to the extent of a forfeiture of the company's franchise and water works.[1] As to the charging of a less rate than that fixed, in accordance with law, to certain favored consumers, the supplying of any portion of the land under the system at anything less than the regularly established rate adds to the burden of the other land, which is thereby called upon to make good the "just compensation" for the use of the property.[2] Therefore, it was held by the Court of Appeals that, under the law of Idaho, a company has no right to make a distinction between the consumers which it furnishes with water, while supplying some with water at a low rate under a private agreement, and at the same time attack the validity of the maximum rates fixed by the county commissioners upon the ground that the rates so fixed will not give a reasonable return on the value of the property of the company, and therefore amounts to the taking of property without just compensation.[3]

Again, in States where there are no statutory laws for the fixing of maximum rates, upon principle, the rates charged should be

9 See, also, City of Pocatello v. Murray, 173 Fed. Rep. 382; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Stanislaus W. Co. v. Bachman, 152 Cal. 516, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

1 Cal. Stat. 1901, p. 331.

2 Boise City Irr. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399.

3 Boise City Irr. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399, the Court saying: "Where any distinction made between consumers of the waters in question is authorized to be made, we are unable to understand."

See, also, Nampa etc. Co. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993; Boise City etc. Co. v. Turner, 176 Fed. Rep. 373.

Again, if upon this basis the rates charged both classes of consumers did actually yield just compensation, it is proof that the rates fixed by the commissioners were too high.

uniform to all consumers, and the company should not be permitted to charge favored customers with a less rate than the maximum water rates charged to other consumers. That the water of a State is a public utility can not be questioned. That these corporations, organized for the express purpose of utilizing this public utility, and furnishing the water to actual consumers, are in law quasi-public in their nature is also unquestioned.[4] A public utility is so subject to the public use that it should have neither the power, nor the temptation, to create any difference in rates charged the consumers, whereby one could, in the field of competition, possibly obtain any advantage over another. The public owe a duty to the public utility, or to the corporation making the same available, not to pass such legislation by way of regulation which will be confiscatory. The public utility, or the quasi-public corporation, owes a duty to each and every constituent of the public, that no one shall derive, from the franchise it enjoys, an opportunity to take advantage of another. The same rule is applied to public carriers, or to companies furnishing gas, or electricity, or anything which is supplied by a public utility. So the rule should be applied to an irrigation company, where all users of water should be placed upon an absolute equality.[5] This was, in effect, the ruling of the California Court in a recent case, where it said: "All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate, and to abide by the reasonable rules of the company."[6]

[4] See Secs. 1493, 1494.

See, also, McCrary v. Beaudry, 67 Cal. 120, 121 Pac. Rep. 264; San Diego etc. Co. v. National City, 74 Fed. Rep. 79; aff'd 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 571; Lanning v. Osborne, 76 Fed. Rep. 319; Price v. Riverside etc. Co., 67 Cal. 120, 7 Pac. Rep. 264; Hildreth v. Montecito Cr. W. Co., 139 Cal. 22, 72 Pac. Rep. 395; McFadden v, County of Los Angeles, 74 Cal. 571, 16 Pac. Rep. 397.

See, also, Cleveland v. Malden etc. Co., —— Wash. ——, 125 Pac. Rep. 769.

[5] See Slosser v. Salt River Canal Co., 7 Ariz. 376, 65 Pac. Rep. 332; Gould v. Maricopa C. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Salt River Valley Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117.

But see State *ex rel.* Ferguson v. Birmingham W. Co., 164 Ala. 586, 51 So. Rep. 354, where the Court said: "But we do not see our way clear to a holding that whenever a water company makes a concession to a consumer it thereby fixes a new schedule of rates for all its consumers."

[6] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, where it was held that a water company having

§ 1384. Charges of "royalty" or "bonus" not permitted.—In those States where the laws provide for the regulation of water rates which may be charged consumers, there are also found provisions that, where the rates have been fixed, in accordance with the provisions of the statutes, no additional charge must be made for the furnishing of the water than the maximum rates so fixed. Severe penalties are prescribed for the violation of these provisions.[1] In the State of Colorado the "Anti-Royalty Act" of 1887,[2] makes it unlawful for any person owning, or controlling, any ditch, canal, or reservoir, to demand, accept, or receive, any royalty, bonus, or premium, as a prerequisite or condition precedent to the right or privilege of applying or bargaining for, or procuring water. The statute also provides that any violation of these provisions is punishable by fine and imprisonment, and that the corporate rights and privileges of any corporation violating the provisions of the Act may be forfeited upon *quo warranto* proceedings.[3]

In California it was also held that, as a condition precedent to the furnishing of water to consumers, a company could not make an additional charge as a bonus, even if a consumer had signed and agreed to a regulation of the company, "that no land will be supplied with water unless all dues and claims for previous supply on that land shall have been paid." The Court held that it was the duty of the company to furnish a consumer with water upon the tender of the established rate, and the regulation of the conditions on the consumer's right was void, and for the refusal of the company to furnish the water an action for damages would lie.[4]

water appropriated under the Constitution of 1879 for sale, rental, or distribution, the use of which is thereby declared to be a public use, can not confer any preferential right on one consumer over another to the use of any part of its water.

1 See for the statutes, Part XIV.

2 3 Colo. Stat. Ann. Morr. Edition, 1911, Secs. 3271-3275; Revised Stat. of Colo. 1908, Secs. 3271-3275.

3 In the case of Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, where, by contract, the company had required the consumer to "buy in advance the right to receive and use the water," and to pay therefor the sum of $10.00 per acre, and also that he pay annually, in the way of carriage rate, not less than $1.50 or more than $4.00 per acre, "as may be established from year to year" by the company, it was held that the contract was in violation of the Anti-Royalty Act.

See, also, Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423.

4 Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058.

Upon principle, we will add that there should be but one charge made by a company for furnishing water for use by consumers, and this charge should include all fees for furnishing the water, annual maintenance, and repairs. This charge should be reasonable, both as regards the rights of the company and those of the consumer. The system of making separate charges for different items of service should be abolished by statute. It has been too often used as a subterfuge for a charge of higher rates.

§ 1385. **Terms of payment.**—Where water rates have been once fixed, either by law or contract, the company furnishing the water may lawfully require the consumer to either pay the rates in advance, or may require security for such payment, as a condition precedent to the furnishing of the water,[1] but if any canal or ditch company fails to require such payment or security therefor, and does furnish the consumers with the water, and the consumer fails to pay for the same, the remedy is by a suit at law to enforce such payment, and the company can not, by rule, or regulation, refuse to furnish such consumer with water until such arrearages are paid. In cases of this nature it is held that the right of the company to declare a forfeiture is waived.[2]

See, also, San Diego etc. Co. v. National City, 74 Fed. Rep. 79; aff'd 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; Lanning v. Osborne, 76 Fed. Rep. 319; Boise City Irr. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; aff'g *Id.*, 76 Fed. Rep. 319.

1 Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222.

2 Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213.

For the duty to furnish water, see Secs. 1498-1502.

CHAPTER 70.

STATE IRRIGATION DISTRICT LAWS.

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§ 1430. Proceedings—Change of boundaries—Inclusion of lands.
§ 1431. Proceedings—Change of boundaries—Exclusion of lands.
§ 1432. Proceedings—Dissolution of districts.

§ 1386. **Scope of chapter.**—This chapter will contain a full description of the subject of State irrigation district laws, the organization of the irrigation district under the authority of these laws, and their powers and duties. These districts must be distinguished from irrigation or water districts, as described in some of the statutes of the laws of State control, and meaning simply water divisions.[1]

§ 1387. **The purpose and object of district laws.**—Primarily, it is designed by the laws providing for the organization of irrigation districts, to place both the management and the ownership of rights to the use of water in the hands of those most interested in its intelligent and economical use; and, secondly, to provide a method for acquiring the financial means for constructing systems of works necessary for the appropriation and use of water of considerable or great magnitude, and which are beyond the ability of the individual owner of lands to be irrigated, as well as beyond the ability of the average corporation. Incidentally, it may also be said, that the purpose was to get from under the necessity of private corporations, which are organized for the purpose of profit, and do not always work in harmony with the consumers of water, the land owners within such districts being enabled to obtain water at first cost, and through the means of their own district organization.[1] It must be remembered that, at the time the "Wright

[1] For the laws of State control, see Chap. 68, Secs. 1337-1367.

[1] "The whole object of the legislation authorizing the organization of irrigation districts is to enable the owners of lands susceptible of irrigation from a common source and by the same system of works, to form a district composed of such lands, which district when formed is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation thereof, thus enabling each one to have for his land in the district the benefit of a common system of irrigation, and

Law" was passed by the California legislature in 1887, which law was the pioneer law upon the subject, and upon which the laws of all the other States are modeled,[2] that the time had long since passed, when a single farmer, or one with the aid of his neighbors, in the thickly settled communities of that State, could make an individual appropriation, and by a simple dam and ditch, divert water from a natural stream and conduct it to his farm. The country had become thickly settled; and, correspondingly, the demand for water became greater and greater. The use of the waters of the surface streams had practically reached its maximum limit from the systems then in vogue; and, without the development of an additional supply, or the conservation of the waters of the flood periods, the amount of lands which might be irrigated and reclaimed had also reached the limit. To construct great works for the conservation of this water required a great amount of capital, which even the private corporations at this period were loth to furnish. And, if private corporations undertook to furnish the capital, and construct the works necessary, it was with the sole idea of making a profit upon the investment, all of which had to be paid by the consumer. So the idea originated with the framers of the bill to place the ownership, management, and control of the water with the consumers themselves; and, at the same time, to enable any irrigation district organized under the provisions of the Act, as a public corporation, to borrow money to construct these works, to issue bonds for the security of the amounts borrowed, and, by a system of taxation upon all of the lands within the district, raise the money for the annual expenses of the district, and for the payment of the bonds and their accrued interest. Therefore, the purpose of the Act, as well set forth in the title of the original "Wright Law," as introduced by Mr. Wright himself, in the California legislature, was: "An Act to provide for

bringing about the reclamation of the land of the district from aridity to a condition of suitability for cultivation. It was recognized that without such a common system the individual land owners might be unable to obtain water for the irrigation of their lands, and that a work which would be for the public benefit and general welfare, viz., the reclamation from aridity of large portions of the lands of the State, might never be accomplished if left to individual enterprise." Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62.

2 See. however, the early law of Utah, Sec. 1401.

the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes." [3]

§ 1388. **The general results of district laws.**—Taking into consideration that twenty-five years have elapsed since the passage of the original "Wright Law," and shortly after its passage in California similar laws were passed by the legislatures of other States, the net results of the operation of these laws have not been wholly to the good. The beneficial results of the operations of private corporations throughout these States, including where they were made in connection with the Carey Act,[1] have far exceeded those under the irrigation district Acts.[2] Although, in some of the districts where there was an ample water supply for the irrigable lands therein, and where every effort was made to preserve the district organizations, the results have been pre-eminently successful. This statement is true of the Turlock irrigation district, which has an area of 176,210 acres, and is the largest district in the State of California, and the Modesto irrigation district, having an area of 82,000 acres, both districts being organized in 1887, the same year that the "Wright Law" was enacted.

The reason that better results have not been obtained under the irrigation district laws is not so much the fault of the laws themselves as it is on account of the obstructions which have been placed in the way of their operation. In the first place, there were about fifteen years of litigation before the law could be considered settled in all its phases. It was nearly ten years after the law was enacted, in California, before its constitutionality was finally settled by the Supreme Court of the United States.[3] In fact, the early history of the operation of the law in California is a record of liti-

[3] Act of March 7, 1887, Cal. Stat. 1887, page 29; 5 Deering's Code, pp. 235-294.

[1] For the Carey Act. see Secs. 1312-1336.

[2] According to the 13th census for 1910, the area under actual irrigation in 1909 under irrigation districts was 533,142 acres. Under the Carey Act, the area is given as 288,553 acres; under co-operative enterprises, 4,646,039 acres; under commercial enterprises, 1,444,806 acres; under individual and partnership enterprises, 6,258,401 acres.

[3] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; rev'g *Id.*, 68 Fed. Rep. 948; Tregea v. Modesto Irr. Dist., 88 Cal. 334, 26 Pac. Rep. 237, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

gation and financial loss. This litigation, which was the retarding influence upon the irrigation development under the law, was originated within, and not from without, the districts. The litigants, upon the one hand, were the districts seeking to enforce their powers under the law, or the holders of district obligations seeking to enforce their claims; and upon the other hand were the protesting land owners, especially those owning large tracts of uncultivated land or town lots within the districts. This was due to the provision of the law that the owners of all the land within the districts must pay an annual tax for their maintenance, and, whether such owners used the water or not, they are compelled, under the law, to pay their annual assessment.

And, in the meantime, during this period of litigation, many of the districts which had organized under the law in California, had disincorporated under the later Act of 1893.[4] The consumers of the water furnished through the district organizations got tired waiting for a final and decisive ruling as to the validity of their water rights, and so took advantage of the disincorporation Act to disorganize the districts and obtain their water through some other medium. Again, during this period of what seemed almost interminable litigation the bondholders of these districts, which had borrowed money to acquire the rights to the water and to construct the necessary works, became frightened and refused, not only to purchase the bonds of these district, but also took steps to collect the amounts that had been advanced in their purchase. And, therefore, there was a period of time when irrigation bonds were a drug upon the market. This was especially true shortly after the decision of Judge Ross of the United States Circuit Court, in the Fallbrook case, holding that the Wright Act was unconstitutional upon a number of grounds, and before his decision was reversed by the Supreme Court of the United States.[5] Not being able to raise money upon their bonds, of course, the operations under these district organizations ceased.

Again, another retarding influence upon the operations of the law may be attributed to a defect of the original Act itself. The original Act did not sufficiently provide for the safeguards, after-

[4] See Cal. Stat. 1893, p. 520. For disincorporation Acts, see, also, Sec. 1432.

[5] Fallbrook v. Bradley, *supra*.

ward provided by some of the States,[6] for the examination and approval of projects by some competent State official, where districts were taking steps for organization. Every State adopting an irrigation district law should have a competent State administration to determine the feasibility of all district projects attempted to be organized. Some of the laws have this provision, notably Idaho and Wyoming.[7]

After the law in California was first enacted there was a great rush in the organization of these districts, and, unfortunately, the wild-cat operators got in their work. Districts were organized where the project was not feasible, in some cases where there was not an available supply of water for the irrigation of the lands included therein; other districts were organized without there being sufficient irrigable land. Under the statute, bonds were issued by these districts and sold, and the money realized therefrom expended in various ways. The first few interest installments were probably paid. Then matters ran along until the interest became delinquent, and, when the bondholders attempted to assert their rights, they found that they had very little security for their money. All this had the influence, for the time being, of placing irrigation district securities upon the black list, thus hindering and retarding the growth of legitimate enterprises of this nature.[8]

Since the decision by the Supreme Court of the United States, holding that irrigation district law based upon the "Wright Law" of California, was constitutional, there has been a revival in the

6 See Sec. 1411.

7 For the organization of irrigation districts, see Secs. 1410-1414.

8 See the case of Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047, where no estimate of the amount of the money necessary to be raised for the construction of the works was made as required by law, and in an appeal from a judgment confirming the bonds, the lower court was reversed, the Court saying: "It must be conceded, I think, that the provisions of both the Wright Act and the confirmation Act generally facilitate the organization of irrigation districts and the issuance and confirmation of bonds, and thus afford some excuse, if not justification, for the practical construction which seems to have been given them by the promoters of the Glendora district, and, perhaps, by other irrigation districts, to the effect that the principal object of those Acts is the issuance and confirmation of a liberal supply of bonds, and that a sufficient supply of water for irrigation is chiefly incidental."

See, also, Ahern v. Board of Directors of Highline Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963.

interest taken in these laws, and the operations thereunder. Quite a number of the States have passed laws similar to that of California upon the subject.[9] These States have all profited by the success and failures in California, and especially by the litigation which has arisen and been decided relative to these districts in that State. Something has been said about the failure of the district law in Utah, and its subsequent repeal, as indicating that the law was a failure in that State.[10] The fact of the matter is, that, as early as 1865, the legislature of the then Territory of Utah passed an Act providing for the organization of irrigation districts, which had some of the features of the Act afterwards passed in 1887 by the legislature of California, and known as the "Wright Law." The Utah Act was afterward repealed by reason of the fact that the law was crude, and, therefore, ineffectual.[11] It is for this reason that nothing was accomplished under it. But that no point can be made by reason of the fact of the repeal of this law, as indicating that Utah does not favor irrigation district laws, is the fact that the legislature of that State, in 1909, enacted a complete irrigation district law, and largely followed the provisions of the California Act.[12]

Our conclusions upon this subject as to why greater results have not been shown under the irrigation district laws, therefore are, that it is not so much the fault of the laws themselves, as it is of the obstructions placed against the operations under those laws. The laws themselves are constitutional and sound in principle, eminently practical, and where actually put to use, are of the most beneficial of irrigation laws, for the reason that they provide the machinery for the construction and operation of irrigation systems by the men who use them, and that, too, at practically first cost. With the legal questions settled as to their validity, we may look for better general results in the future.

§ 1389. **Some beneficial features of district laws.**—There are many beneficial features of the operations under the irrigation

[9] See Secs. 1391-1403.

[10] "The Act was repealed, having accomplished no results." Wiel, Water Rights in the Western States, p. 652. See, also, p. 653.

Bulletin 124, U. S. Dept. of Agriculture, p. 31.

[11] For the Utah law of 1865, see Comp. Laws of Utah, 1876, p. 219.

[12] See Utah Laws, 1909, Chap. 74, p. 144.

district laws, some of which we will mention here. In the first place, it is a decided advantage to have all of the rights in waters from a common source of supply, under one management and control, and that by one public corporation, whose officers are elected by the votes of the electors residing within the district. These officers are then directly responsible for their official acts to the people of the district, and any errors committed can usually be rectified at the polls. This increases the civic responsibility of the citizens of the district, and causes great interest to be taken in the management of the affairs of the district. By a very close analogy the public school districts are similar in many respects to the irrigation districts. The people of this country take great interest in the election of the officers of their respective school districts, in order that their children may be properly educated, and that the affairs of the district may be properly attended to. So, the citizens of these irrigation districts take great interest in the election of officers, for the reason that whatever tends toward the careful and prudent management of the district, tends toward the welfare of the whole community within the district.[1]

[1] Upon this subject we will quote from Mr. L. L. Dennett, attorney for the Modesto Irrigation District of California, writing in regard to the success of that district. "Another effect of the law has been to increase the feeling of civic responsibility. Ordinarily the functions of government are so far apart from individual activity that the average man misses the connection between his own political activity and the wise administration of public affairs. Here he comes into contact every day, in a matter vitally concerning his livelihood, with the necessity for a wise administration of the affairs of the district, and, it becoming necessary for him to consult frequently with other assessment payers in the district and with the officials thereof relative to the management of its affairs, he recognizes that he is an essential and effective part of the machinery of the district government. Intensive farming under any irrigation system makes for greater intelligence, but when there is added the necessity, which here exists, for aggressive participation in public affairs, a condition arises where all that is best in civic activity in large centers of population goes hand in hand with the cleaner and purer outdoor life, and it does not require any great degree of imagination to foresee the time when these communities will show the highest type of Anglo-Saxon civilization, combining the maximum degree of self government with the greatest freedom from domination of political demagogues. The law is the natural outgrowth of Anglo-Saxon institutions, and bids fair to be their most successful product." The Great West, Sacramento, Cal., Vol. 8, No. 9, pp. 20, 21.

Again, as all the property within a school district is taxed for the support of the district, whether the owner has any children attending school or not, so, also, in some jurisdictions, all of the lands within an irrigation district are assessed for its support, and that, too, whether the water furnished by the district is used upon the land or not. The land owner may then use the water, and it is free, the same as the tuition in the district schools is free for his children, should he have any. The tendency of this feature of the law is to cause every man to cultivate his land as far as possible, for the reason that he has to pay for the water in any event. And where a man pays for a thing, he is most apt to use it, so as to get its benefits. If he has more land than he can himself cultivate and care for, as was the case in many instances, when these districts were first organized, the tendency is that he will sell a portion of his holdings, or lease them to men who will cultivate them. This system, therefore, materially increases the rapidity with which land is brought under intensive cultivation. It does not pay to hold large tracts of unimproved land under this system. It is a fundamental principle, beginning to be recognized in this country, that no man should be permitted to own more land than he will cultivate and improve. This was recognized in the National Reclamation Act, and the more recent laws upon the subject by Congress. The irrigation district laws are a practical recognition of that principle; and, rather than pay annually the assessment upon unimproved and uncultivated land, the owner is bound, sooner or later, to dispose of portions of it to those who will. Thus additional homes are provided for.

Again, the increased value of the lands within the district must be considered. Lands, which before the organization of the district, would hardly sell for from $20.00 to $25.00 per acre, after the organization of the district found a ready sale at from $100.00 to $150.00 per acre. From that time to the present it has steadily increased in value. So, instead of it being a hardship upon the poor man, who had only one thousand acres within one of these districts, to be compelled to sell a portion of his holdings because he could not afford to pay the annual assessment on the uncultivated part, it has proven an actual benefit to him, for the reason that he could sell at advanced prices. So, also, instead of depriving owners of their land, or causing any laws, as claimed when the constitu-

tionality of the law was called into question by the large land owners, the law made many of them actually wealthy, both by raising the price, and creating a market for the land. Town lots in the town within a district are also assessed for the support of the district. This, however, is more than compensated for by the increase in actual value of the lots, caused by the growth of the towns and the general prosperity of the community.

The last, and by no means least, subject which we will touch upon, is the actual cost of these propositions to the actual consumers of the water, or the irrigators themselves. A portion of the cost and expense being borne by others, which is more than compensated for as set forth above, the cost to the actual consumer is thereby lessened. Again, there is no profit to any one under this system, and the works are constructed and maintained at actual cost, plus the interest on the outstanding bonds, should there be any. Some districts have no bonded indebtedness. But where there is, a sinking fund is provided for, with which to pay off the bonded indebtedness, after which the property of the district will then belong to the land owners thereof, free and clear of all incumbrances, and the only expense will be for the maintenance and management of the works and district affairs. In contradistinction to this, had the project been undertaken by a private corporation, in addition to all the costs and expenses incurred by the irrigation district, the company would expect and usually receive a large continuing profit upon the investment.

We have discussed this phase of the law from the premises that the affairs of the district were wisely and economically managed, and that all the physical conditions of the district were favorable to the project. Where the conditions of the district are all favorable, and the affairs of the district are wisely, economically, and carefully administered, in thickly settled communities, we consider the irrigation district laws, based upon those of the State of California, in theory, the acme of perfection of irrigation laws in this country.

§ 1390. **History of district laws—States adopting—California.**—To the legislature of the then Territory of Utah, by the Act approved January 20, 1865, belongs the credit of enacting the first

irrigation district law.[1] The next law to be enacted upon the subject was the now famous irrigation district law of California, familiarly known as the "Wright Law," enacted in 1887.[2] Mr. Wright, the author of the bill, was the Assemblyman from Stanislaus County, California, the county where, also, the most successful Modesto irrigation district was afterward organized. He was sent to the legislature for the express purpose of having such a law enacted. The original Wright Law was amended by the legislature at every session thereof, after the same was enacted, until the session of the legislature in 1897.[3] The Act of 1889,[4] relating to the confirmation of these organizations, and commonly designated as the "Confirmation Act," although entirely an Act supplemental to the original Wright Act, in law, forms no part of the original Act. It was an Act creating a special proceeding for the determination of the validity of the acts authorized by the statute to be performed.[5] In 1897 the original Act, and its amendments, were repealed, and a new and complete similar Act, sometimes called the "Bridgford Act," or the "Wright-Bridgford Act," substituted in its place.[6] The Act of 1897 has also been amended in some minor details,[7] and, with these amendments, constitute the law upon the subject in California.[8]

1 For the history of these laws in Utah, see Sec. 1401.

For cause of the repeal of early Utah law, see Sec. 1401.

The last law to be enacted upon this subject was enacted by the special session of the legislature of Arizona in 1912, and after the adoption of the constitution of that State. The Act largely follows the California law.

2 For the original Wright Law, see Stats. Cal., 1887, p. 29.

See, also, Vol. 5, Deering's Code, pp. 285-294.

3 The original Wright Act was amended as follows: Stats. and Amdts. Cal., 1889, pp. 15, 18, 21, 212; *Id.*, 1891, pp. 142, 147, 244; *Id.*, 1893, pp. 175, 276, 516, 520; *Id.*, 1895, p. 127.

4 Stats. and. Amdts. Cal. 1889, p. 212.

5 *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. Rep. 345.

6 Stats. and Amdts. Cal. 1897, p. 254; see, also, Gen. Laws, Cal., 1899, pp. 436-548.

See, also, Western Union Tel. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190.

7 See Stats. and Amdts. Cal., 1909, pp. 12, 46, 139, 415, 429, 461, 569, 998, 1062, 1075.

8 For complete statutes upon the subject, see Hen. Gen. Laws., Cal., 1905, pp. 559-601. And for the recent amendments see Stats. 1909, cited *supra*. See, also, Kerr's Biennial Supp., 1906-1909, pp. 1647-1655. See, also, Kerr's Biennial Supp., 1911, pp. 1124-1133.

For the complete abstract of the California irrigation district law, see Part XIV, under California.

Prior to the time that the original Wright Law was enacted, relating to irrigation districts, the legislature of California had passed a somewhat similar law relating to the reclamation of swamp lands. This law had been repeatedly held constitutional by the Supreme Court of the State, and afterward by the Supreme Court of the United States.[9] And afterwards, when the constitutionality of the Wright Law was attacked, this decision was one of the principal cases relied upon by those who contended that the law was constitutional.[10] The California irrigation district law has been held constitutional many times by the Supreme Court of the State, and also by the Supreme Court of the United States.[11]

Since the irrigation district law of California was enacted, it has been largely copied by the great majority of the other Western States, including the State of Wyoming, where it was originally contended that the law of State control was the only proper law for the regulation and control of waters.[12] We will make a short statement of the history of the laws of these States in their alphabetical order.

§ 1391. **History of district laws—Colorado.**—In Colorado "An Act to provide for the organization and government of irrigation districts" was first enacted in 1901.[1] The Act was afterward amended in 1903.[2] The law was again amended in 1907 and 1909.[3]

The constitutionality of the law has been upheld by the Supreme Court of the State.[4]

9 Hager v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945.

10 For the constitutionality of irrigation district laws, see Secs. 1405-1407.

11 See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; rev'g *Id.*, 68 Fed. Rep. 948, which held that the Act was unconstitutional.

12 For the laws of State control, see Chap. 69, Secs. 1368-1385.

1 Laws Colo. 1901, p. 198, Chap. 87.

2 Laws Colo. 1903, p. 267; see, also, Mill's Ann. Stat., 1905, Secs. 2309a *et seq.*

3 Laws Colo. 1907, p. 448.

For the complete statutes upon the subject, see Mill's Ann. Stat., 1905, Secs. 2309a-2309i2, as amended, Laws Colo. 1907, pp. 488-491, and Laws 1909, pp. 422-425, pp. 426-428, pp. 429-431.

For an abstract of the present law, see Part XIV, under Colorado.

See, also, 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3440-3494; Rev. Stats. Colo., 1908, Secs. 3440-3494.

4 Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313; Ahern v. Board of Directors of High-

§ 1392. **History of district laws—Idaho.**—The law upon the subject of irrigation districts was first enacted in the State of Idaho in 1895.[1] This Act was superseded by the Act of 1897,[2] which later Act was amended and re-enacted as amended by the Act of 1899;[3] the law was again repealed by the Act of 1903, and again re-enacted,[4] and the later law was amended in 1907.[5] The law was again amended in 1911.[6]

The Idaho law has also been repeatedly held by the Supreme Court of the State to be constitutional.[7] In general, the law follows that of California, and the Court in construing it follows the decisions of the Supreme Court of that State.

§ 1393. **History of district laws—Kansas.**—The legislature of the State of Kansas first provided for an irrigation district law in 1891.[1] The board of county commissioners were authorized to form into convenient districts such tracts of contiguous territory as might be conveniently irrigated from any given source of water supply. The general features of the law follow the law of California, as amended at that date. In 1901, the law was amended in several minor respects; so, too, in 1905.[2]

§ 1394. **History of district laws—Montana.**—The first irrigation district law in the State of Montana was enacted in 1907. This law is based largely upon the provisions of the California law as amended, but in some instances changed to conform to local conditions.[1] The law was repealed in 1909, and a new statute upon the

line Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963.

1 Laws Idaho, 1895, p. 183.

2 Laws, 1897, p. 146.

3 Laws Idaho, 1899, p. 408.

4 Laws Idaho, 1903, p. 150.

5 Laws Idaho, 1907, p. 484.

For complete statute upon the subject, see Idaho Rev. Laws, 1908, Secs. 2372-2442. For an abstract of the law, see Part XIV, Idaho.

6 See Laws 1911, Chap. 46, p. 102.

7 Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499; Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. Rep. 829; Pioneer Irr. Dist. v. Bradbury, 8 Idaho 310, 68 Pac. Rep. 295, 101 Am. St. Rep. 201; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904.

1 Laws Kansas, 1891, p. 243.

2 See Laws 1905, Chap. 277, Secs. 1 *et seq.*

For the complete statute upon the subject, see Gen. Stat. Kan. 1909, Secs. 4479-4505.

1 See Laws Mont. 1907., p. 135.

See, also, Rev. Code of Mont., 1907, Secs. 2309-2402.

subject enacted.[2] In the repealing clause, it was, however, provided that, where any irrigation district was then in the process of organization, under the provisions of the first Act, said organization might be completed under said provisions, but after such organization was completed, the district should be governed by the provisions of the later Act.

The Act has been declared constitutional in a very late case.[3]

§ 1395. History of district laws—Nebraska.—In this State provisions for irrigation districts were first enacted in 1895, known as the "Irrigation District Law."[1] The law was taken almost entirely from the California law, as it existed at that time, but changed to meet local conditions. The law has also been amended several times, especially in 1905.[2] The law has been repeatedly held constitutional by the State Supreme Court; and, in one of the first decisions upon the subject, it was remarked that, "the Act in question is, in all essential features, copied from the district irrigation law of California, in which State it had, by decisions hereafter cited, received a settled construction long before its adoption by us, and its enactment in this State must be construed as a legislative approval of the interpretation there given it."[3]

2 See Laws Mont., 1909, pp. 254-289.

For an abstract of this law, see Part XIV, under Montana.

3 O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

See, also, Billings Sugar Co. v. Fish, 40 Mont. 256, 106 Pac. Rep. 565, 26 L. R. A., N. S., 973, where it was held that a similar law relative to the organization of districts for drainage was constitutional.

1 Laws Neb. 1895, p. 269.

2 See Laws Neb. 1905, p. 694.

For the complete laws upon the subject, see Comp. Stats. of Neb., 1911, Secs. 6476-6542a.

For an abstract of the present law, see Part XIV, under Nebraska.

3 Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086.

See, also, Baltes v. Farmers Irr. Dist., 60 Neb. 310, 83 N. W. Rep. 83; Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336; Lincoln & Dawson Co. Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. Rep. 847; State v. Several Parcels of Land, 81 Neb. 770, 114 N. W. Rep. 282; Wyman v. Searle, — Neb. —, 128 N. W. Rep. 801; Sowerwine v. Central Irr. Dist., 85 Neb. 687, 124 N. W. Rep. 118; Farmers Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

§ 1396. **History of district laws—Nevada.**—The first law enacted in Nevada providing for irrigation districts, was that approved on March 23, 1891.[1] The Act was almost entirely copied from the California law, as originally passed, and included the amendments thereto of 1889.[2] Section 12 of the Act, as originally passed, however, after providing for the condemnation of lands for rights of way, had the following: "Provided, that nothing contained in this section shall authorize any interference with, or condemnation of, any canal, or water right, the right to which has vested prior to the organization of any district under the provisions of this Act."

By the Act approved March 20, 1911,[3] an entire new law was provided. In the last section of the Act, it was provided: "None of the provisions of this Act shall be construed as repealing, or in any wise modifying, the provisions of any other Act relating to the subject of irrigation, or water distribution."[4]

§ 1397. **History of district laws—New Mexico.**—Under the Acts approved March 18, 1909, a complete law for the organization of irrigation districts was provided for New Mexico,[1] and as yet has not been construed by the courts of New Mexico.

§ 1398. **History of district laws—Oregon.**—In Oregon the first Act upon the subject of irrigation districts was enacted in 1895.[1] The law is, in substance, a copy of the Wright Act of California, together with its amendments, which form the basis of the irrigation district laws of the most of the Western States.[2] The law has been held constitutional by the Supreme Court of the State.[3] The law was amended in 1909,[4] and again in 1911.[5]

1 Laws Nev. 1891, p. 106.

2 For the Cal. Amendments of 1889, see Laws Cal. 1889, p. 21 and p. 212.

3 See Laws 1911, Chap. 134, p. 248.

4 See, also, for the complete law as it exists today, Revised Laws Nevada, 1912, Secs. 4723-4790.

For an abstract of the irrigation district law of Nevada, see Chap. 93.

1 See Laws 1909, Chap. 109, p. 295; see, also, *Id.*, Chap. 140, p. 383.

1 See Laws Ore. 1895, p. 13.

2 See Bellinger and Cotton's Codes, 1902, Secs. 4700 *et seq.*

3 Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982.

See, also, Hall v. Hood River Irr. Dist., 57 Ore. 69, 110 Pac. Rep. 405.

4 Laws 1909, pp. 144-215, 364-369.

5 Laws 1911, Chap. 223, p. 378.

For complete laws upon the subject, see Lord's Oregon Laws, Secs. 6167-6217, as amended by the above Acts of 1911.

§ 1399. **History of district laws—South Dakota.**—As early as 1891, in South Dakota, there was enacted a law providing for the organization of irrigation districts, to conform with any township of the State. The purpose of the law, as described in the title, was: "An Act authorizing civil townships to sink artesian wells for public purposes, and to issue bonds therefor."[1] The law was afterward amended, in 1895.[2] The law has a few features of the California law, and, as it related to the development and use of subterranean waters alone, it is in a class by itself.[3]

§ 1400. **History of district laws—Texas.**—The legislature of Texas enacted an irrigation district law in 1905.[1] The law closely follows the California provisions, as they existed at that time, adapted to local conditions.

§ 1401. **History of district laws—Utah.**—To the legislature of the Territory of Utah, in the early year of 1865, belongs the credit of enacting the first irrigation district law.[1] This law, as amended from time to time, remained in full force and effect for about nineteen years, when it was repealed. In 1884 a new law was also enacted upon the subject,[2] and this later law remained in force until 1897, when it also was repealed.[3] It was provided, however, in the repealing Act, that the repeal should not affect existing districts.[4] Although a number of small districts were organized under this Act, and continued in operation as such, very little was accomplished under the law; the most of the districts were disincorporated. The failure of this law to accomplish better results

For an abstract of the Oregon district laws, see Chap. 97.

1 See Laws S. D. 1891, p. 196.

2 Laws S. D. 1895, p. 118.

See, also, Rev. Codes of S. D. 1903, Secs. 2680-2731.

3 In 1903 a similar law was enacted providing for districts to conform to counties.

Laws S. D. 1903, Chap. 109.

See, also, Rev. Code of S. D. 1903, Secs. 2648-2679.

1 Gen. Laws, Texas, 1905, p. 235.

See, also, Sayles' Civ. Stat. Texas, Supp. 1906, p. 269.

See, also, Rev. Civ. Stat., 1911, Arts. 5012-5107.

1 See Act approved Jan. 20, 1865, Comp. Laws of Utah, 1876, pp. 219-225.

2 See Comp. Stat. of Utah, 1888, Secs. 2408-2427.

3 Laws, Utah, 1897, p. 225; see, also Rev. Stat. of Utah, 1888, Sec. 1287.

4 Harris v. Tarbet, 19 Utah 325, 57 Pac. Rep. 33.

was due more to the crude provisions of the law itself than to the theory of irrigation district law. However, upon examination it will be seen that some of the principles of this law were adopted later by the California legislature in the district law enacted by it.

After the repeal of the early district law in 1887, as above stated, Utah had no irrigation district law until the Act approved March 22, 1909.[5] This law followed the California law, and included the most important amendments, which had, from experience, been found necessary in that State. The revenue laws of the State, for the assessments, levying and collecting of taxes on real estate for county purposes, except as modified in the Act itself, were made applicable for the purposes of the Act. Therefore, after the board of directors of the irrigation district has determined the amount of money necessary for the ensuing year, it is made the duty of the county assessor to assess all real estate, exclusive of improvements, lying within the district, in whole, or in part, in such county. The tax levy for the use of the district is then made by the county commissioners, and the county treasurer makes the collection of the amount assessed. The general revenue laws are also made applicable for the enforcement of penalties and forfeiture for delinquent assessments. This is one of the most complete irrigation district laws in existence. The Act is undoubtedly constitutional, and it has been so decided by the court. The law was amended in certain particulars in 1911.[6]

The law has been declared constitutional by the Supreme Court of the State.[7]

§ 1402. **History of district laws—Washington.**—In the State of Washington, on March 20, 1890, there was approved "An Act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom."[1] In general, the Act is nearly identical with the California district law of 1887, including the amendatory and supplemental Acts of 1889, with, of course, the necessary changes being substituted to conform to local conditions.

5 Laws, Utah, 1909, pp. 144-168.

6 See Laws 1911, Chap. 53, p. 70.

For complete laws upon the subject, see Compiled Laws of Utah, 1907, as amended as above set forth.

For an abstract of the Utah district laws, see Chap. 102.

7 Lundberg v. Green River Irr. Dist., — Utah —, 119 Pac. Rep. 1039.

1 Laws Wash. 1889-90, p. 671.

The Act has been amended a number of times in its minor details, especially in 1895.[2]

The law has been held constitutional a number of times by the Supreme Court.[3]

§ 1403. History of district laws—Wyoming.—In Wyoming, by the Act enacted in 1907, the irrigation district law was adopted in that State. The law was amended in 1911.[1] This Act also followed, in the main, the California law, with the most important amendments as they existed at that time. The Act provides that its provisions shall not in any way apply to, or affect, lands, or the owners thereof, which might theretofore be segregated by the State under the provisions of the Act of Congress, known as the "Carey Act," and the statutes of the State relative thereto, nor to lands, and the owners thereof, situated under, and susceptible of, irrigation, for which water right permits have been granted, or shall hereafter be granted, by the State Engineer; and every irrigation district organized under the provisions of the Act shall be subject to the provisions of the statutes of the State relative to the acquisition, appropriation, and distribution of water, and all rights thereto. These provisions make the law a combination of the irrigation district laws, and the laws of State control, a combination, the results of which are anxiously awaited. But in theory, a district law, subject to a strict State control, ought to place sufficient safeguards around irrigation projects that would be satisfactory to every one interested.[2]

§ 1404. Irrigation districts—Definition and corporate nature.—"Irrigation Districts," as the same are understood and discussed

2 See Laws Wash. 1895, p. 432.

For the complete laws upon the subject, see Rem. & Bal. Ann. Codes, 1910, Secs. 6416-6512; Pierce's Codes, 1905, Secs. 5736, 5881 *et seq.* See, also, Laws Wash. 1905, p. 353.

3 Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; State *ex rel.* Witherop v. Brown, 19 Wash. 383, 53 Pac. Rep. 548; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. Rep. 367; Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. Rep. 773; ~~Board of Directors v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995.~~

1 See Laws 1911, Chap. 31, p. 44; *Id.*, Chap. 99, p. 139; Laws Wyo. 1907, p. 103.

See, also, Rev. Stats. Wyo. 1910, Secs. 829-873.

2 For the laws of State control, see Secs. 1337-1367.

in this chapter, are those public corporations organized under the authority of the statute of a State, for the purpose of appropriating, regulating, controlling, and distributing water for irrigation, by the owners of the lands to be irrigated.[1] It is now well settled that such an irrigation district is a public corporation, organized under the general law of the State, enacted by the legislature for the purpose of promoting the general welfare, and that its officers are public officials charged with the duty of carrying out the provisions of the law.[2] "It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it."[3] These irrigation districts, especially

1 It must be noted here that these irrigation districts are not the same as the water districts provided for under the laws of State control in some of the States, as discussed in a previous chapter. See Secs. 1344, 1345.

2 "The formation of one of these districts amounts to the creation of a public corporation, and their officers are public officers." Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; rev'g *Id.*, 69 Fed. Rep. 948.

"The defendant is a public corporation, organized under the general law of the State enacted by the legislature for the purpose of promoting the general welfare." People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047; holding that such a district can not be dissolved at the suit of the people for the misuse or nonuser of its corporate rights and franchises in the absence of a legislative provision therefor.

For the disorganization and abandonment of irrigation districts, see Sec. 1432.

Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; Madera Irr. Dist., Bonds of, *In re*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Herring v. Modesto Irr. Dist. (Cal.), 95 Fed. Rep. 705; Lincoln and Dawson Co. Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. Rep. 847; Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86; Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62; Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. Rep. 40; Stimpson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496, 1034; Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 Pac. Rep. 1124.

An indictment charging defendant with having offered a bribe "to one G., a member of the board of directors of a corporation, to-wit, 'Alta Irrigation District,'" etc., and failing to allege that such a corporation is a public corporation, is fatally defective, as the section applies only to public and *quasi* public corporations. People v. Turnbull, 93 Cal. 630, 29 Pac. Rep. 224, and where it is said in the opinion: "An irrigation district organized under the 'Wright Act' is a public corporation."

3 Fallbrook Irr. Dist. v. Bradley, *supra*.

before their status was defined in the Fallbrook case,[4] have often been termed, by the courts and others, "municipal corporations," as being practically synonymous with the term, "public corporations."[5] Strictly speaking, this is incorrect, for the reason that in the usual and ordinary sense, the word "public" is a broader term than the word "municipal," and includes, not only municipal corporations, but others of a public character, which are not, in the ordinary sense, "municipal."[6]

As was well said in a late Idaho case:[7] "Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the State. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public."[8]

But it was not until the powers of these districts to incur bonded indebtedness was attacked that the proper distinction was made. And, in these cases, it was held that an irrigation district, although it is a public corporation, is not a municipal corporation within the meaning of the provisions of the constitution prohibiting the

4 Fallbrook Irr. Dist. v. Bradley, *supra*.

5 See Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705, 717; Madera Irr. Dist., Bonds of, *In re*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

6 Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995.

"A municipal corporation, in its strict and proper sense, is a body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof." Dillon's Municipal Corporations, 4th Ed., Sec. 19.

"All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus an incorporated school district, or county, as well as city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or public corporations are not, in the proper use of the language, municipal corporations." Dillon's Municipal Corporations, 4th Ed., Sec. 22.

7 Pioneer Irr. Dist. v. Walker, 20 Idaho 605, 119 Pac. Rep. 304.

8 See, also, City of Nampa v. Nampa & Meridan Irr. Dist., 19 Idaho 779, 115 Pac. Rep. 979; Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; Madera Irr. Dist., Bonds of, *In re*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

incurring of indebtedness beyond a certain limit by cities, towns, counties, and other municipal corporations. Again, under the laws of Nebraska irrigation districts are held to be public rather than municipal corporations, and their officers are public officers of the State; and, therefore, the statute giving county boards a share in their creation is not in violation of the Nebraska constitution,[9] on the ground that it authorizes the creation of municipal corporations by county boards, and confers legislative authority on such boards.[10]

It can thus be seen that the authorities hold that an irrigation district organized under these Acts is a public corporation in the broad sense of the term, both as distinguished from private corporations; and, also, that an irrigation district is not confined to the strict and more narrow limits of a "municipal corporation."

§ 1405. **Constitutionality of irrigation district Acts.**—The State irrigation district Acts have been attacked from every possible point, but have been uniformly held to be constitutional, both by the Supreme Courts of the respective States adopting the law and also by the Supreme Court of the United States. As this law originated in the State of California, that State was also the battle ground upon the question of the constitutionality of the law. And, in general, it may be said that, in the other States afterward adopting the law, based as it was, largely upon the provisions of the California law, their courts simply fell in line with the courts of that State, and hold that the law was adopted together with the construction placed upon its constitutionality by the Supreme Court of California.[1]

9 Art. 3, Sec. 1.

10 Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086.

1 "It should, as preliminary to an examination of the subject, be remarked that the Act in question is in all essential features copied from the district law of California, in which State it had, by decisions hereafter cited, received settled construction long before its adoption by us, and its enactment in this State must be construed as a legislative approval of the interpretation there given it." Board of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086.

In Colorado, after citing the California cases, the Court said: "It seems to us that all the objections urged upon this hearing under the head of 'due process of law,' so far, at least, as they affect the appellant, or are involved in, or bear upon, the issues raised in this special proceeding, have been met and sufficiently answered in the foregoing decisions, and to repeat the argument of the opinions would be

The original Wright Act was passed in California in 1887,[2] and as early as May 31, 1888, the Supreme Court of that State held that the provisions of the Act are in harmony with the constitution and State laws, and that the districts organized under the Act have all the constituents of public corporations formed to accomplish a public use and purpose.[3] The Supreme Court of the United States, in

a work of supererogation." Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313.

In Idaho: "In fact, the irrigation Act under consideration was adopted from California, and prior to its adoption by this State the supreme court of California had repeatedly held that law to be constitutional. The Wright law has been attacked from nearly every possible point of view, and the supreme court of that State has without deviation held it to be constitutional. See Kinney on Irrigation, Sec. 390. We hold that the district irrigation law of this State is not repugnant to any of the provisions of our State constitution." Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499.

In Oregon: "It is, in substance, a copy of the Wright Act of California, which forms the basis of the irrigation laws of the arid States. The constitutionality of such legislation has been assailed on different grounds, but it has been upheld by both State and Federal courts." Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982.

"The duty to determine the propriety of establishing irrigation districts, resting, as it does, upon public necessity, appertains exclusively to the law making body. So, also, the mode by which they may be organized must be determined by it. But the ascertainment of the necessity or utility of establishing a particular district, as well as the solution of the question whether the conditions precedent have been complied with, involve judicial functions, the exercise of which is properly left to the courts." O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

2 See Hist. of Law in California, Sec. 1390.

3 Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379.

For the construction of this statute, see, also, Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Tregea v. Owens, 94 Cal. 317, 29 Pac. Rep. 643; People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047; Woodward v. Fruitvale Irr. Dist., 99 Cal. 554, 34 Pac. Rep. 239; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. Rep. 291, 35 L. R. A. 33; Cooper v. Miller, 113 Cal. 238, 45 Pac. Rep. 325; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; Boehmer v. Big Rock Creek Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908; *In re* Central Irr. Dist., 117

a case appealed from the judgment of the Circuit Court of the United States for the Southern District of California, Judge Ross presiding, also held that the Act was constitutional upon all points.[4]

The Acts of the legislature of California amendatory and supplemental to the original Wright Act have also, in the main, been held

Cal. 282, 49 Pac. Rep. 354; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 589; Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. Rep. 40; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. Rep. 261; Escondido H. S. Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. Rep. 401; Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496; Baxter v. Vineland Irr. Dist., 136 Cal. 185, 68 Pac. Rep. 601; Nevada Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. Rep. 1056; People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. Rep. 381; Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. Rep. 937; Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. Rep. 290; Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62; Western Union Tel. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. Rep. 190, 9 Am. & Eng. Ann. Cas. 1190; Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. Rep. 316; Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 Pac. Rep. 1124; Commercial National Bank v. Schlitz, 6 Cal. App. 174, 91 Pac. Rep. 750; Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. Rep. 248; Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 Pac. Rep. 1124; Lindsay Irr. Dist. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Chinn v. Superior Court of San Joaquin County, 156 Cal. 478, 105 Pac. Rep. 580; Title etc. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. Rep. 356, 8 L. R. A., N. S., 682, 119 Am. St. Rep. 199; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86; Inglin v. Hoppin, 156 Cal. 483, 105 Pac. Rep. 582; Nevada Bank v. Board of Supervisors of Kern County, 5 Cal. App. 638, 91 Pac. Rep. 122; Hewell v. Hogin, 3 Cal. App. 248, 84 Pac. Rep. 1002; McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193; Palmdale Irr. Dist. v. Ratke, 19 Cal. 358, 27 Pac. Rep. 783; Decker v. Perry (Cal.), 35 Pac. Rep. 1017; People *ex rel.* Stone v. Jefferds, 126 Cal. 296, 58 Pac. Rep. 704; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. Rep. 261; Miller v. Perris Irr. Dist., 85 Fed. Rep. 693; *Id.*, 92 Fed. Rep. 263; Thompson v. Perris Irr. Dist., 116 Fed. Rep. 769; Shepard v. Tulare Irr. Dist., 94 Fed. Rep. 1; People v. Brown Valley Dist., 119 Fed. Rep. 538; Wright v. East Riverside Irr. Dist., 138 Fed. Rep. 313, 70 C. C. A. 603; Mara v. San Jacinto Irr. Dist., 131 Fed. Rep. 780; Lunberg v. Green River Irr. Dist., — Utah —, 119 Pac. Rep. 1039; Board of Supervisors v. Thompson, 122 Fed. Rep. 860, 59 C. C. A. 70.

See, also, for the construction of the irrigation district statutes, under the various States, Secs. 1391-1403.

[4] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

It will be noticed in this connection that this case was argued by some of the most eminent counsel of the country, ex-President Benjamin Harrison, Joseph H. Choate, and John F. Dillon.

valid and constitutional.[5] The first amendatory Act of 1889,[6] relating to the "Bond Fund" and amending Section 22 of the original Act, was construed;[7] so, too, with the second amendatory and supplemental Act of the same year,[8] relating to the exclusion of lands from irrigation districts of which they form a part.[9] The supplemental Act of 1889, known as the "Confirmation Act," has been repeatedly held as constitutional. But, owing to the importance of this branch of the subject, we will discuss it in a separate section.[10]

The amendatory Act of 1891,[11] relative to the eligibility of persons to sign a petition for the organization of a district, and changing the words "freeholders own lands" to "holders of title or evidence of title," and the lands to be included in such district, was construed in connection with the original Act.[12]

So, also, the further amendatory Act of 1891, amending Section 15 of the original Act, relative to the issuance of bonds of the district.[13] And, again, the further amendatory Act of 1891, amending Section 18 relative to the assessments of property.[14]

The amendatory statute of 1893,[15] amending Section 17 of the original Act, and attempting to empower the board of directors of an irrigation district to pledge by way of mortgage, trust deed, or otherwise, all property of the district as additional security for the payment of its bonds, was held to be unconstitutional and void, with-

5 For these amendatory and supplemental Acts, see Hist. Cal. Law, Sec. 1390.

6 Stats. and Amendts. Cal., 1889, p. 15.

7 Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 589.

8 Stats. and Amdts. Cal., 1889, p. 21.

9 Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

10 For the confirmation Act of California, see Stats. and Amdts., 1889, p. 212.

For discussion upon subject, see Secs. 1420, 1421.

11 Stats. and Amdts. 1891, p. 142.

12 Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793.

See, also, Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; *In re* Central Irr. Dist. 117 Cal. 382, 49 Pac. Rep. 354; People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. Rep. 381.

13 Stats. and Amdts., 1891, p. 147; Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 587; Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. Rep. 290.

14 Best v. Wohlford, 144 Cal. 733, 78 Pac. Rep. 293.

15 Stats. and Amdts., 1893, p. 175.

out affecting the original Section 17, or any other portion of the Act.[16]

The law, as we have stated, was re-enacted in 1897;[17] the new law has also been construed by the court, and, in the main, held constitutional: Sections 37, 38, 39, 71, and 72, relative to the assessment of improvements and the powers of the board of equalization; [18] Section 48, relative to the essentials of a tax deed; [19] Section 53, relative to the construction of the works, and power to contract;[20] and Section 39, relative to the levy and collection of taxes.[21]

As will be seen from a consultation of the cases cited in our notes, the California law upon the subject, in the main, has been upheld by the courts; and that, too, both as regards the original Act and the amendments thereto. The same may be said relative to the irrigation district laws of the other States adopting the same.[22]

In no State have the main features of the laws been declared unconstitutional. It is true that certain features of the laws have at times been declared unconstitutional; but these have usually been amended at subsequent sessions of the legislature. We will now take up the discussion of the grounds of attack upon the main features of the law.[23]

§ 1406. Constitutionality of Acts—Points upon which held constitutional.—Having shown in the previous section that the main features of the irrigation district laws in all jurisdictions where

16 Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. Rep. 937.

17 See Hist. of Law in Cal., Sec. 1390.

18 Lahman v. Hatch, 124 Cal. 1, 56 Pac. Rep. 621; Sections 39 and 69, relative to suits to determine the validity of assessments, and what assessment shall be adopted as the basis of assessment for the district; Western Union Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190.

19 Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98; Commercial Nat. Bank v. Schlitz, 6 Cal. App. 174, 91 Pac. Rep. 750.

20 Healey v. Anglo Cal. Bank, 5 Cal. App. 278, 90 Pac. Rep. 54.

21 Nevada Nat. Bank v. Board of Supervisors of Kern Co., 5 Cal. App. 638, 91 Pac. Rep. 122.

For general propositions, see Sec. 1406.

See, also, Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; Arroyo D. & W. Co. v. Bequette, 149 Cal. 543, 87 Pac. Rep. 10; Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 Pac. Rep. 1124.

22 For the constitutionality of the laws of the other States, see the sections upon the history of the laws, Nos. 1391-1403.

23 See Sec. 1406.

their constitutionality has been tested have been upheld as valid and constitutional,[1] in this section we will briefly discuss some of the grounds of the attack upon these laws, whereby it was sought to have them declared unconstitutional. The principal source of attack was from the owners of large tracts of cultivated land, or the owners of town lots which could not be irrigated within the boundaries of a district, who sought to evade the payment of the assessments imposed by the law and levied upon their lands.

It was therefore contended, that the statute, in violation of the Constitution of the United States and of the State, attempted to authorize the assessment and the taking of private property for a private use, and that a district formed under the Act was a private and not a public corporation. It has been repeatedly held by the courts that this contention was not well taken, and that: "The formation of one of these districts amounts to the creation of a public corporation, and their officers are public officers." It is therefore held by the courts that an irrigation district formed under these laws is a public corporation, and its object is the promotion of the general welfare, and the assessment of the property under the provisions of the law is not the "taking" of property for a private, but for a public, use.[2] It therefore also follows that property may be

1 See Sec. 1405.

2 The irrigation of lands under the California Act is a public purpose and the water thus used is put to a public use. Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

See, also, for the corporate nature of irrigation districts, Sec. 1404.

For the taking of private property by the power of eminent domain, see Secs. 1059-1098.

That the taking is for a public use, see *In re* bonds Madera Dist., 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Lincoln & Dawson County Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. Rep. 847; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; People v. Turnbull, 93 Cal. 630, 29 Pac. Rep. 224; People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047; Lindsay Irr. Dist. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705; Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514; Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499, where it was held that the Act is not repugnant to any of the provisions of the State of Idaho; Pioneer Irr. v. Bradley, 8 Idaho 310, 68 Pac. Rep. 295, 101 Am. St. Rep. 201; Tulare Irr. Dist. v. Shepard, 185

taken by a district by virtue of the power of eminent domain.[3] It is also held that the fact that the use of the water under the law is limited to the land owner, and is not given to every resident of the district, does not prevent the use being public; but that land which can be beneficially used without irrigation may be so much improved by the use of it upon other lands in the district, that such land may be properly within a district, and assessed for its benefit as a public improvement, and such use of the water is a public use.[4]

It was also contended that the law was unconstitutional because it authorized the taking of private property without due process of law. There were a number of phases of this branch of the question presented in the various cases, but the courts invariably held against them all, and held the law to be constitutional. It being held that, whenever a State law imposes a tax, assessment, servitude, or other burden upon property for a public use, either of the whole of the State or a limited portion thereof, and such law provides a mode of confirming or contesting such charge in the ordinary courts of justice, with due notice to the owner, the judgment in such proceedings does not deprive the owner of his property without due process of law.[5] The adoption of a method of assessment according to the

U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1; Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982.

3 "The provisions of the Act relative to the condemnation of private property, land, water, etc., for the uses prescribed therein, are in harmony with the constitution and State laws, and in strict consonance with the views of the Supreme Court in the case of Lux v. Haggin." (69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.) Turlock Irr. Co. v. Williams, 76 Cal. 360, 18 Pac. Rep. 397.

See, also, Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Lindsay Irr. Dist. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802.

4 Fallbrook Irr. Dist. v. Bradley, *supra*, where the question involved was an assessment levied upon non-irrigated land.

5 Fallbrook Irr. Dist. v. Bradley, *supra;* Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissing *Id.*, 88 Cal. 334, 26 Pac. Rep. 237.

See, also, cases cited in notes, *supra*.

"His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final." Madera Irr. Dist., *In re* Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

See, also, Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399.

value of all the real property within a district, or an *ad valorem* method, for the expenses of the improvements of the district, is not the taking of property without due process of law.[6] Again, these district laws are not unconstitutional on the ground that the power thereby conferred upon districts to levy taxes is without limitation.[7] And, again, the fact that the statute makes no provision for notice to the land owner that on a particular day the board of directors will assess benefits to the lands within the district will not render such statute unconstitutional, upon the ground of taking property without due process of law, where the statute does provide for notice to be given of the proceedings to organize such district, and notice for the hearing for the confirmation of the organization and the proceedings of such district, at which hearing the court is required to examine all proceedings for the organization of such district including the assessment of benefits.[8]

That the law was unconstitutional was also urged, upon the ground that it was a delegation to others of the legislative power to create a public corporation. But, as said in the Fallbrook case: "We do not think that there is any validity to the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the Act."[9]

In a recent California case,[10] it was also contended that under the

[6] Fallbrook Irr. Dist. v. Bradley, *supra; In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106, where it is held that assessments according to the value of the land, and not according to the amount of benefits received by each parcel to pay for a public improvement in an irrigation district, are not unconstitutional, as such assessments are included in the inherent power of taxation, which is not limited to the benefits received.

See, also, Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

See, also, upon the subject of the assessment and levying of taxes, Tregea v. Owens, 94 Cal. 317, 29 Pac. Rep. 643; Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98; Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. Rep. 290; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; Baxter v. Vineland Irr. Dist., 136 Cal. 185, 68 Pac. Rep. 601.

[7] Alfalfa Irr. Dist. v. Collins, *supra.*

[8] Oregon S. L. R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399.

[9] Fallbrook Irr. Dist. v. Bradley, *supra; In re* Madera Irr. Dist. Bonds, *supra.*

[10] Imperial Water Co. No. 1 v. Board of Supervisors of Imperial County, —— Cal. ——, 120 Pac. Rep. 780.

statute, as amended by the Act of 1911,[11] a lack of the signatures of all the petitioners to the petition vitiated the proceedings thereon upon the ground that it was in violation of the due process clause of the constitution. The Court, in deciding to the contrary, said: "We know of no authority to the effect that a signature to the published notice is a necessary part of such process, where the only notice given or required is a publication in a newspaper. The substantial thing is that such notice shall be given as, under the circumstances, would have a reasonable tendency to apprise the parties interested of the nature of the proceeding and the time and place of hearing. . . . The legislature is the sole judge of the propriety of the formation of such districts. The question of procedure is a matter of legislative policy. Conceding that a notice and hearing are required, under the authorities, it is nevertheless clear that the legislature may authorize the initiatory proposal to be made by such persons as it sees fit."

In a late case decided in Montana,[12] where the law provides that the petition shall be presented to the district court, and all proceedings for the organization of irrigation districts must be had by court, the law was attacked upon the ground that it conferred legislative and administrative duties on the court, beyond the power of the legislature to confer. The Court, however, upheld the constitutionality of the law and in the opinion said: "It is sufficient to sustain the law if the general power conferred is judicial, though it incidentally requires the performance of legislative and administrative duties."

The Acts have been attacked as being contrary to the constitution of a State requiring bills to contain but one subject, which shall be clearly expressed in the title. But the contention was held not good by the courts.[13]

It is also held in Colorado that the district law is not repugnant to the provisions of Article 16 of the State constitution, which declares the waters of natural streams to be the property of the public

11 Stats. and Amdts., 1911, p. 509.

12 O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

13 Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313; Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499; Pioneer Irr. Dist. v. Bradley, 8 Idaho 310, 68 Pac. Rep. 295.

and dedicates the same to the use of the people subject to appropriation.[14]

The Colorado law was also attacked upon the ground of non-compliance by the general assembly with Article 5, Section 22 of the Colorado Constitution, requiring the vote on the final passage of bills to be taken by ayes and noes, and the names of those voting to be entered on the journal of each house. It was held by the Court that one who questions the validity of a law upon this ground must present proper evidence showing the facts upon which he relies to show such non-compliance, and the Court will not consider the admissions of parties or stipulations of counsel as to the contents of legislative journals in impeachment of the validity of a law; and the judgment of the district court to the contrary was reversed, where it was based upon such a stipulation.[15]

The Act of the California legislature of 1889, known as the "Confirmation Act,"[16] and the provisions of the statutes of the other States relative to the same subject have also been held to be constitutional.[17]

The burden of proof is upon the district to prove its validity and the validity of the issuance of its bonds.[18]

14 Anderson v. Grand Valley Irr. Dist., *supra*.

15 Anderson v. Grand Valley Irr. Dist., *supra*.

16 Stats. and Amdts. Cal., 1889, p. 212.

17 People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep. 381; Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496, 1034; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. Rep. 316; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; Bd. of Directors Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; State v. Brown, 19 Wash. 383, 53 Pac. Rep. 548; Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499; Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313.

See, also, for proceedings for confirmation, Secs. 1420, 1421.

18 Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822.

§ 1407. Constitutionality of Acts—Jurisdiction—Federal questions.—The State courts have, of course, jurisdiction to determine the constitutionality of the irrigation district Acts, and all provisions thereof. The taking of private property without due process of law, contrary to the provisions of the Constitution of the United States, is also a Federal question. It therefore follows that actions involving this question may be brought in the first instance in, or removed or appealed to, the Federal Courts.[1]

Whether or not the taking of private property is for a public or a private use is not, strictly speaking, in and of itself, a Federal question, upon the ground that it is contrary to the Fifth Amendment of the Constitution of the United States, unless the taking is by the Federal Government.[2] The Fifth Amendment of the Constitution applies only to the taking by the Federal Government.[3] However, it is held by the Supreme Court of the United States that where it is claimed that a citizen is deprived of his property without due process of law, even if the taking be by or under State authority for any other than a public use, either under the guise of taxation, or by the assumption of the right of eminent domain, in that way

1 Where the defendant contended in the State Court that the operation of a State irrigation statute deprived him of property without due process of law, contrary to the Federal Constitution, and the Supreme Court of the State decided against such contention, a Federal question was presented. Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissing the case upon other grounds. For the same case below, see 88 Cal. 334, 26 Pac. Rep. 237.

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1; Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705.

Quo warranto brought by a State against an irrigation district is not a Federal question. People *ex rel.* Brady v. Brown's Valley, 119 Fed. Rep. 538.

2 The 5th amendment to the United States Constitution operates exclusively in restriction of Federal power, and has no application to the States. Thorington v. Montgomery, 147 U. S. 490, 37 L. Ed. 252, 13 Sup. Ct. Rep. 394.

3 "There is no specific prohibition in the Federal Constitution which acts upon the States in regard to their taking private property for any but a public use. The 5th amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal Government, as has been many times decided." Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. 5d. 369, 17 Sup. Ct. Rep. 56.

the question whether private property has been taken for any other than for a public use becomes material in the Federal Courts, as incidental to the main question of due process of law, even where the taking is under the authority of the State instead of the Federal Government.[4] And in the consideration of these questions, the decisions of the highest courts of the State where the suit originated, and the declaration of the people of the State in their constitution and statutes, that the State does not deprive the land owner of his property without due process of law, and that the use of the water for irrigation under the Act is a public use, are to be treated with very great respect by the Supreme Court of the United States, but they are not absolutely binding upon it as to what is due process of law and, as an incident thereto, what is a public use.[5]

The jurisdiction of the Federal Courts involving questions under the irrigation district laws, provided that the jurisdictional facts exist, as to diversity of citizenship, amount, etc., is the same as it is in other cases.[6]

§ 1408. **Organization of district can not be collaterally attacked.**—Irrigation districts organized under the Acts in question being public corporations,[1] and the laws under which they are organized being universally held constitutional by the courts,[2] as such public corporations, the validity and regularity of their organization can not be questioned collaterally.[3] it is held that *quo warranto* will

4 Fallbrook Irr. Dist. v. Bradley, *supra*.

5 Fallbrook Irr. Dist. v. Bradley, *supra*.

6 The fact that a plaintiff is given a different remedy in the State courts can not affect the jurisdiction of a Federal Court to entertain his action, where, by reason of his citizenship and amount involved, he has the right to sue in that court. Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705.

1 For corporate nature of districts, see Sec. 1404.

2 For the constitutionality of district laws, see Secs. 1405-1407.

3 People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86; Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514; Miller v. Perris Irr. Dist. (Cal.), 85 Fed. Rep. 693, 92 Fed. Rep. 263; Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. Rep. 773; Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. Rep. 866; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. Rep. 1038; Hamilton v. San Diego County, 108 Cal. 273, 41 Pac. Rep. 305; People *ex rel.* Stone v. Jefferds, 126 Cal. 296, 58 Pac. Rep. 704; Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904.

not lie after the confirmatory decree has been rendered, to declare a district organization invalid, for the reason that it is a collateral attack upon the former judgment.[4] The organization of an irrigation district can not be collaterally attacked in an action by land owners to enjoin the collection of an assessment by the officers of the district.[5] Again, such an attack can not be made in an action to recover possession of land sold for the non-payment of irrigation taxes or assessments.[6] Again, the sale of bonds can not be enjoined by a land owner who did not appear at the confirmation proceedings.[7] It is therefore generally held that where a reputed irrigation district is acting under the forms of law, unchallenged by the State, the validity of its organization can not be attacked, either directly or collaterally by a private individual. And, furthermore, it is held that where proceedings were duly brought, under the confirmation Act, to which the State might have made itself a party, and, not having appeared, a judgment validating the proceedings was *res judicata* against it; and, therefore, even the State itself could not thereafter question the validity of the organization of such district in *quo warranto* proceedings brought in the name of the people of the State by the attorney general.[8] This ruling we deem to be emi-

[4] See cases in the last note.

See, also, People v. Selma Irr. Dist., 98 Cal. 206, 42 Pac. Rep. 1047; People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep. 381; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86.

[5] Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514; Miller v. Perris Irr. Dist. (Cal.), 85 Fed. Rep. 693, 92 Fed. Rep. 263, where it is held that, where a reputed irrigation district is acting under forms of law, unchallenged by the State, the validity of its organization can not be attacked, either directly or collaterally, by a private individual.

[6] Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. Rep. 773.

[7] Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797.

[8] People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86, where the Court said: "If a proceeding in *quo warranto* by the State must be resorted to in order to test the *de jure* character of these corporations, the confirmatory Act would serve no purpose on the statute books, if the State be not bound by the judgment rendered in the proceeding. Indeed, it would seem, in the light of the above decisions of this Court, that this statute was enacted for the very object of binding the State."

That *quo warranto* proceedings brought by a State against an irrigation district is not a Federal question, see People *ex rel.* Brady v. Brown's Valley Irr. Dist., 119 Fed. Rep. 538.

nently correct. It would certainly be a strange condition of affairs, if, in the face of a judgment rendered by a duly authorized court confirming the proceedings for organization of one of these irrigation districts and validating its issued bonds, the State itself could maintain an action, in which a judgment might be rendered invalidating both the proceedings and the bonds issued.

§ 1409. **A district can not plead illegality of its own organization.**—As the validity of the proceedings for the organization of an irrigation district can not be collaterally attacked,[1] so, too, an irrigation district will not be permitted to plead the illegality of its own organization, and thus defeat the collection of its outstanding bonds or accrued interest thereon. As held by the Federal Court, such a defense can not be pleaded by the district itself for the purpose of defeating obligations which it incurred while acting as a *de facto* corporation.[2] As was said by Mr. Justice Peckham, in a case where a district had been duly organized under the law, and where the organization had been confirmed by the court, and bonds issued and also confirmed, and the bonds sold and the money realized therefrom had been used in the construction of the works, and in a suit for the collection of the accrued interest upon the bonds the district interposed the defense upon a technical point that the district was illegally organized: "In the case of Douglass Co. v. Bolles,[3] a case involving facts somewhat similar, this Court said: 'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by the lapse of time, and we think that it applies in its full strength to this case."[4]

§ 1410. **Proceedings under the laws—The petition for organization.**—The proceedings which must be taken for the organization of irrigation districts, the acquisition of property, issuance of bonds, and other subjects in the various States adopting these district laws are largely the same. We will therefore discuss these subjects together.[1] An irrigation district being a public corporation,

1 See Sec. 1408.

2 Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705, 717.

3 94 U. S. 104, 24 L. Ed. 46.

4 Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1.

1 For corporate nature of irrigation districts, see Sec. 1404.

its organization is instituted by the people owning lands within the boundaries of the proposed district. For the purpose of establishing such a district organization, a petition must be filed with the board of county commissioners, or county supervisors, as the case may be, of the county in which the lands, or the greatest portion thereof, are situated. The petition shall state that it is the purpose of the petitioners to organize an irrigation district, under the provisions of the law authorizing the same, a general description of the boundaries of such proposed district, the means proposed to supply water for the irrigation of the lands embraced therein, and praying that the said board define and establish the boundaries of said proposed district and submit the question of the final organization of the district to a vote of the land owners, or the qualified electors, as the case may be, within the proposed district. In Utah, which State has the most modern of these district laws and where the defects in the laws of the other States were sought to be corrected, the petition must be signed not only by a majority of the land owners within the proposed district, but also by those who are the owners in the aggregate of a majority of the whole number of acres belonging to the land owners within the proposed district.[2] But, to the original petition for organization, the most of the States do not require this majority to be the signers. The petition is but a preliminary matter and not prejudicial to the rights of any party.[3]

2 Laws Utah, 1909, p. 144, Sec. 2.

3 In California, the petition must be signed by a majority in number of the holders of title, or evidence of title, to lands within such proposed district, and representing the majority in value of said lands, according to the equalized county assessment roll or rolls for the year last preceding. Gen. Laws Cal., Henning, 1908, p. 559, Secs. 1, 2, as Sec. 2 was amended in 1909; Laws, 1909, p. 12; Kerr's Supp., 1906, 1909, p. 1647.

In Colorado, the petition must be signed by a majority of the resident freeholders within said proposed district, and who shall also be the owners in the aggregate of a majority of the whole number of acres belonging to the resident freeholders therein. Laws Colo., 1905, p. 246, Sec. 2.

In Idaho, it must be signed by 50 or a majority of the holders of title or evidences of title, to at least one-fourth part of the total area of land which will be assessable for the purposes of the district. Laws Idaho, 1903, p. 150, Secs. 1, 2.

See Gem Irr. Dist. v. Johnson, 18 Idaho 386, 109 Pac. Rep. 845, where it is held that "the holders of title or evidence of title," or entrymen "on lands under any law of the United States or of this State," are competent to sign the petition.

In Kansas, the petition must be signed by three-fifths of the resident land owners. See Laws Kan., 1891, p.

The petition in this respect must strictly comply with the statute of the State where the district is sought to be organized.[4]

In Montana the law provides that the proceedings for the organization of an irrigation district shall be initiated by filing with the clerk of the district court a petition signed by the requisite number of owners setting forth the general requisites of such petitions, as stated above. It also provides that the court or judge shall fix the time and place for the hearing of the petition and direct a notice to be given by the clerk for publication. Power is given the court to adjourn the hearing from time to time. At the hearing, the court is required to hear and determine whether all of the requirements of the statute have been complied with, and for that purpose shall hear all competent and relevant testimony. It must determine what lands shall be included and what lands excluded; the court making such changes in the boundary of the proposed district as may be necessary for that purpose. If it is found that the petition substantially complies with the requirements of the statute, an order must be made by the court (1) setting forth the findings and allowing the petition; (2) establishing the district; (3) giving accurate de-

243, Secs. 1, 2; Gen. Stat. of Kan., 1909, Sec. 4480.

In Nebraska, it must be signed by a majority of the resident freeholders who are qualified electors. Laws Neb., 1905, p. 694, Secs. 1, 2; Comp. Stat. of Neb., 1911, Sec. 6477.

In Nevada the petition must be signed by a majority of the tax payers within the proposed district. Laws Nev., 1891, p. 106, Secs. 1, 2; Revised Laws Nev., 1912, Secs. 7323, 7324.

In Washington, 50 or a majority of the land owners, whose property is susceptible of one mode of irrigation must sign the petition. Rem. & Bal. Ann. Codes, 1910, Sec. 6496.

See, also, Rothchilds Bros. v. Rollinger, 32 Wash. 307, 73 Pac. Rep. 367.

[4] Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; Fallbrook Irr. Dist. v. Abila, 106 Cal. 365, 39 Pac. Rep. 794; *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. Rep. 354, holding that owners of small lots in towns are not qualified signers of the petition.

As to the description of the lands in the petition, see Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

An attorney in fact, duly appointed in writing, has full power to sign such petition, and will bind the principal as fully and to all intents and purposes as if he had personally signed the same. Black Canyon Irr. Dist. v. Marple, 19 Idaho 176, 112 Pac. Rep. 766.

See, also, upon the general proposition, O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

scription of the lands included; (4) dividing the district into three divisions; and (5) appointing three competent persons as commissioners, one for each division, to conduct the affairs of the district. "This order is made conclusive upon all the owners of land in the district, and is 'final unless appealed from to the Supreme Court within sixty days from the date of the entry.'"[5] It will be noticed that this statute is unique in this, that it requires no election of the land owners or electors of the proposed district, but that the order of the court establishing such district is final and conclusive. The law has been upheld by the Supreme Court of the State.[6] Such petition must be published for the time and in the manner prescribed by the law, together with a notice signed by the petitioners, or a committee thereof, giving the time and the place of the presentation of the petition to the board of county commissioners.[7] No personal notice to the parties interested is necessary of the presentation of the petition or the hearing thereon.[8]

§ 1411. **Proceedings—Examination by State Engineer.**—For the protection of all parties interested in the proposed district, some of the States provide that accompanying the petition there must be maps and plats of the lands to be included showing the source of the water proposed to be used, and plans and estimates of the proposed works. Before the hearing by the county board, the maps and plats must have been submitted to the State Engineer, who must make a report as to the feasibility and practicability of the proposed irrigation system. In Idaho it is required that the petition of the land owners, maps, and plats and other papers shall be filed

[5] O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

[6] O'Neill v. Yellowstone Irr. Dist., *supra*.

[7] The organization of district held valid where the names of the petitioners were not published with the notice, in an action to collect interest on bonds. Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. R. A. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1.

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Ahern v. High Line Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963.

Upon the subject of notice, and that same need not be signed by all the petitioners, see Imperial Water Co. No. 1 v. Board of Supervisors of Imperial County, —— Cal. ——, 120 Pac. Rep. 780.

[8] Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797.

See, also, cases cited *supra*.

in the office of the State Engineer at least four weeks before the date set for the hearing. It is then made the duty of the State Engineer to examine such petition, maps, and other papers and, if he deems it necessary, to further examine the proposed district, the waters proposed to be acquired, and the location and plans of the works to be constructed. The State Engineer must then make a report upon the matter in such form as he deems advisable, and submit the same to the county board, at the meeting set for the hearing of the petition. Whenever the State Engineer shall report to the board against the organization of such district, the board must refuse the petition, unless requested in writing by three-fourths of the land owners in the proposed district. The statute then provides for the amendments of the plans and a resubmission of the matter to the county board.[1]

By these provisions there is a combination of the laws of State control[2] and the irrigation district laws. From the early experience in California, it has been found better that every State having the irrigation district law should also have a competent State administration as a protection not only to the bondholders but also to the farmers themselves.

§ 1412. Proceedings — Hearing on petition — Settlement of boundaries of district.—Upon the date fixed in the notice for the hearing on the petition, and it appearing that the petition and the notice of the hearing are regular and in accordance with the statute, the county commissioners must proceed with the hearing, which may be adjourned from time to time, not exceeding a time fixed by the statute.

No provision for a hearing of the land owners is necessary prior to the organization of an irrigation district which is a public corporation created by a vote of the electors at an election called by the

[1] See Idaho Codes, 1908, Sec. 2374. See, also, Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

In Wyoming, "said maps and plats must have first been submitted to the State Engineer for his examination, and must be accompanied by his report as to the feasibility, practicability, and probable cost of the proposed irrigation system." Wyo. Comp. Stat., 1910, Sec. 831.

[2] For the law of State control, see Secs. 1337-1367.

board of supervisors on a petition of freeholders.[1] The definite boundaries of the district must be fixed; lands may be excluded from the district by the board, provided that the board shall not modify the proposed boundaries described in the petition so as to change the objects of said petition, or so as to exempt from the operation of the law any lands within the boundaries proposed susceptible of irrigation by the same system of water works applicable to other lands in such proposed district.[2] It is also provided that at such hearing contiguous lands not described in the petition, which are susceptible from the same source of supply and system of works, may, upon application of the owner or owners, be included in such district. And upon this subject it is held that upon the question of fact as to what lands will or will not be benefited, the judgment of the board is conclusive upon the courts.[3] Therefore, the only way to overthrow such a decision is to show fraud or bad faith.[4] The fact that public lands are included in the irrigation district will not invalidate the organization of the district.[5] However, where lands belonging to the United States are included within the limits of a district, which lands were subsequently sold by the Government to third persons, neither the Government nor the pur-

1 *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948, where it is said: "The publication of the notice of the proposed presentation of the petition is sufficient notification to those interested in the question, and gives them an opportunity to be heard before the board."

2 See Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825.

3 Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 285; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

4 Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047, where it is said: "What the board did in this respect was within its discretionary power, and the only available objection to it would be abuse of power, or fraud."

5 Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

chaser having assented to the inclusion of the lands within the district, such lands are not only not liable under a judgment rendered against the district in an action on its bonds, but are also exempt from any assessment under the statute for the payment of the bonds.[6] The fact that some of the property within a district will receive no direct benefit from the irrigation of the same, or that all the property which will be benefited is not included within the taking district, will not render the proceedings for the formation of the district invalid.[7] Therefore an incorporated town may lawfully be included if the statute so provides, within the boundaries of an irrigation district and the town lots assessed for its benefit, upon the theory that although the town lots are incapable of irrigation they will be indirectly benefited and that they may therefore be assessed for a public improvement by the district.[8]

However, in those jurisdictions where the law excepts land, which, from some natural cause, can not be irrigated from the proposed system, the question is jurisdictional and is a question for the court to decide.[9] Provisions are also made in some of the States to exclude from the operation of the district all lands within the boundaries of districts which have an ample independent water right.[10]

When the boundaries of any proposed district shall have been duly examined and defined, the board shall forthwith make an order allowing the prayer of the petition, and define and establish the boundaries of the said district. Also the said commissioners shall, by a further order, call an election to determine whether or not the district shall be permanently organized and to elect its board of

6 Nevada Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. Rep. 1056.

7 *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Pioneer Irr. Dist. v. Bradbury, 8 Idaho 310, 68 Pac. Rep. 295; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379.

8 *In re* Madera Irr. Dist. Bonds, *supra;* Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; Nampa etc. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499.

9 Andrews v. Lillian Irr. Co., 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336; Sowerwine v. Central Irr. Dist., 85 Neb. 687, 124 N. W. Rep. 118.

10 State v. Several Parcels of Land, 81 Neb. 770, 114 N. W. Rep. 282; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

directors and the other officers provided by law. And for the purpose of such election the board must divide the district into divisions as provided by the law, which divisions shall constitute the election precincts. In the most of these Acts it is provided that, in the hearing of such petition, the board of county commissioners shall disregard any informality therein, and in case they deny or dismiss the same for any reason on account of the provisions of the Act not having been complied with, which are the only reasons upon which they shall have the right to refuse or dismiss the same, they shall state their reasons in detail, which shall be entered upon the records, and in case these reasons are not well founded, a writ of mandamus shall, upon proper application therefor, issue out of the district court of said county, compelling them to act in compliance with the law. In California, by Section 4 of the Act of 1897, the right of appeal from said order was attempted to be given to any party interested who is a party to the record. This provision, however, was held by the Supreme Court of the State to be "unconstitutional and void." [11]

§ 1413. **Proceedings — The election on organization.** — The county board, after the orders have been made as set forth in the preceding section, shall cause a notice [1] embodying said orders in substance to be published as prescribed by the law giving public notice of the election for the organization of the district, the time and places thereof, and the matters to be submittted to vote. Such notice shall require the voters to cast ballots which shall contain the words: "Irrigation District—Yes," or "Irrigation District—No," or words equivalent thereto.[2]

At the date set, the election must be held which shall finally determine whether or not the district is to be permanently organized. The first officers of the district, if the result is favorable to its organization, are also elected at this election. And thereafter they shall be elected at the time and in the manner provided by the law.

11 Chinn v. Superior Court, 156 Cal. 478, 105 Pac. Rep. 580.

See, also, Inglin v. Hoppin, 156 Cal. 483, 105 Pac. Rep. 582.

1 See Sec. 1412.

2 For the notice of election, see Central Irr. Co. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825.

Such elections shall be conducted as nearly as practicable in accordance with the general election laws of the State.[3]

The qualifications of the voters upon the question of the organization of the district differs in the different States, depending upon the laws, and as they are restricted and limited by the constitutions of the respective States. Also the majority of the votes necessary for the organization of the district varies in the different States. Upon the question of the eligibility of persons to vote upon the organization of a district, in California all persons are entitled to vote who possess all of the qualifications required of electors under the general election laws of the State.[4] But in those States whose constitutions permit a property qualification in order to vote upon this and similar subjects, the legislature may fix such a qualification. Therefore, in Utah it is provided that at all elections held under the provisions of the law all persons shall be entitled to vote who are owners of agricultural lands within said district and that, too, whether or not they are residents within the proposed district or not. Provided, that at all elections each elector shall be entitled to cast one vote for each acre of land or fraction thereof owned by such elector, and shall sign the ballot and indicate opposite his or her name the number of acres owned by the elector casting the ballot.[5] In Colorado, at said election, and all elections held under the provisions of the law, all persons who are qualified electors within the proposed district and are resident freeholders and shall have paid a property tax in said proposed district during the year preceding such election shall be entitled to vote and none others.[6]

[3] Central Irr. Co. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. Rep. 381.

It is held in Idaho that in the elections the district is governed by the general election laws of the State, which provide for a secret ballot. Pioneer Irr. Dist. v. Walker, 20 Idaho 605, 119 Pac. Rep. 302.

[4] Gen. Laws Cal., Hen., 1908, p. 561, Sec. 8.

The fact that those who have no interest in the lands affected may by their votes make the necessary majority in favor of creating an irrigation district, or even that the owners of land may be non-residents, and have no voice in the matter, does not make the statute invalid. *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

[5] Laws Utah, 1909, p. 146, Sec. 4.

[6] Laws Colo., 1905, p. 249, Sec. 4; Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3443.

The laws of some of the other States also require similar property qualifications.

The laws also provide that upon a date fixed the county board must canvass the votes cast at such election for organization. And upon the subject of the requisite majority necessary for that purpose the statutes of the various States differ. In Colorado, Nebraska, and Utah a majority is sufficient; but in California, Idaho, Nevada, and Washington, there must be at least two-thirds of all the votes cast in favor of organization, and in Kansas three-fifths, in order to declare the district duly organized. And the persons receiving the highest number of votes are duly elected as its officers. The said board is then required to make an order entered upon their minutes, declaring such territory duly organized as an irrigation district, under the name and style theretofore designated and shall declare the persons receiving respectively the highest number of votes for such several offices duly elected to such offices. The said board shall then cause a copy of such order, and in some cases a plat of said district, duly certified, to be immediately filed for record in the office named of each county in which any portion of the lands are situated, and no county board of any county, including any portion of such district, shall after the date of the organization of such district, allow another district to be formed including any of the land of such district. And from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying according to law, and shall hold their offices, respectively, until their successors are elected and qualified.

The most of the laws provide that the validity of the election may be contested; but whether it is so provided in the statute or not they may be, but in all such contests the provisions of the law are to be liberally construed.[7]

The irrigation district now being formally organized, it is deemed in law a public corporation;[8] its organization can not be collaterally

[7] Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. Rep. 354; Hertle v. Ball, 9 Idaho 193, 72 Pac. Rep. 953.

[8] For corporate nature of irrigation districts, see Sec. 1404.

attacked;[9] and the district itself can not plead the illegality of its own organization in suits against it.[10] In most of the laws it is provided that judicial notice shall be taken in all actions, suits, and judicial proceedings in any court of the State where organized, of the organization and existence of any irrigation district of the State; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit, or proceeding whether brought under the provisions of the Act or otherwise.[11]

§ 1414. Proceedings—Duties and powers of boards of directors.—The laws provide that the directors, having been elected and having qualified, shall organize as a board and elect their president and other officers. Some of the statutes also provide that the directors shall divide themselves into classes by lot; the terms of office of each class to expire at different times. By this means some of the old members are always on the board. Regular meetings of the board are also provided for. The board is also given the power, and it is made their duty, to adopt a seal, manage, and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers, and employees as may be required, and prescribe their duties, establish equitable rules and regulations for the distribution and use of the water among the owners of the land within the district, and generally to perform all such acts as shall be necessary to fully carry out the purposes of the law.[1] The diverting, storing, carrying, or other works of the district must also be constructed under the supervision of the board.

§ 1415. District may sue and be sued.—The laws also provide that the board of directors of a district is authorized and empowered to institute and maintain any and all actions and proceedings, suits at law or in equity necessary and proper to fully carry out the provisions of the law; or to enforce, maintain, protect, or preserve

[9] See Sec. 1408.

[10] See Sec. 1409.

[11] See Laws Utah, 1909, p. 153, Sec. 15.

[1] Under the old district law of Utah (see Hist. Law in Utah, Sec. 1401), it was held that it was the duty of the board to assume jurisdiction over the whole district; that they can not assume the management of a part of the district and neglect another part; and that, where this is attempted, mandamus will lie to compel the board to perform its duty under the law. Harris v. Tarbet, 19 Utah 325, 57 Pac. Rep. 33.

any and all rights, privileges, and immunities created by the law or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear, and defend in person or by attorneys and in the name of such irrigation district.[1]

An action will lie for damages against an irrigation district.[2] Irrigation districts in a proper cause may be enjoined from doing or performing certain acts.[3] An action for mandamus will also lie against an irrigation district, compelling it to deliver water to the consumers thereunder;[4] to enforce the district to pay its bonds;[5] and also to compel a district to keep its works in repair.[6] In fact, any action which will lie against any municipal or public corporation will lie against an irrigation district.

§ 1416. Proceedings—Power of board—The acquisition of property.—The board is also given the power to enter upon the lands to make surveys. They may locate the necessary diverting works and canals upon any lands deemed by them best for the purpose for conducting the water to the places of use. They are also given the power to acquire lands in order to carry out the purposes of the law by purchase or condemnation; and in some instances water rights may also be acquired by condemnation.[1] The title to all the property acquired under the provisions of the law immediately vests in such irrigation district, in its corporate name, and is held by

1 Boehmer v. Big Rock Creek Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908; Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 56 Pac. Rep. 893, where it was held that a district was liable for failure to furnish water under a contract.

2 McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193.

See, also, action for damages, Chap. 83.

3 Teeter v. Nampa & Meridan Irr. Dist., 19 Idaho 355, 114 Pac. Rep. 8.

4 Gerber v. Nampa & Meridan Irr. Dist., 16 Idaho 1, 116 Pac. Rep. 104.

5 Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. Rep. 1002.

See, also, Sec. 1419.

See, also, for mandamus, Chap. 82.

6 McPherson v. Alta Irr. Dist., 14 Cal. App. 303, 112 Pac. Rep. 193.

1 For right to acquire lands by condemnation, see Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Andrews v. Lillian Irr. Co., 66 Neb. 458, 97 N. W. Rep. 336, 92 N. W. Rep. 612.

See, also, Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496, 1034; Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. Rep. 937.

such district in trust for "the uses and purposes set forth in the Act."[2] Neither the irrigation district nor its board of directors has any power to transfer, sell, or otherwise dispose of the property of the district, within and under its jurisdiction.[3]

In the payment for the property acquired by the board, the majority of the statutes provide that it may be paid for in cash or by the bonds of such district at their par value without the previous offer of such bonds for sale.[4] But the board has no powers in this respect except those which are expressly conferred by the statute or are implied as necessary to carry out the main purposes of the Act. Therefore bonds issued in payment for certain certificates of another company, entitling the holder to a certain amount of water, are held void.[5] But for the direct purchase of water rights, as we view the law, they may be paid for either in cash or in bonds. Again, where the irrigation district has purchased the property of an irrigation company including its water right, it may, as a part consideration therefor, agree to deliver water to previous purchasers from the company, and an action will lie against the district for its failure to so deliver the water, even though the lands lie outside the district.[6]

As to whether or not a district, in the contract for purchase of water rights from the owners of the same where such water was used upon lands within the district, can agree that such lands shall be exempt from assessment as a part consideration of the purchase price and that the lands shall be furnished water by the district, we are of the opinion that such a contract would be *ultra vires* upon the part of the board of directors attempting to make such a contract. The statutes expressly provide how water rights may be acquired by a district and that they may be acquired by condemnation if it is necessary; and, again, the statutes also expressly provide how

[2] Laws Utah, 1909, p. 152, Sec. 13; Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62.

[3] Thompson v. McFarland, 29 Utah 455, 82 Pac. Rep. 478.

[4] Laws Colo., 1905, p. 253, Sec. 11; Laws Utah, 1909, p. 150, Sec. 11.

The original Wright Law, Section 12, provides that, in case of a purchase of land, the directors may pay for the same with the bonds of the district issued under the Act at their par value. Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120.

[5] Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496, 1034; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120.

[6] Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 56 Pac. Rep. 893.

assessments may be levied and collected upon the lands within the district. There are no provisions in any of the statutes for the exemption of any lands properly included within a district from the assessments levied by the district, or for any rebates for such assessments on any account. The board has no power to make any contracts except those which are expressly conferred by the statute, or are implied as necessary to carry out the main purposes of the Act. And such a contract as this would at least be unnecessary. However, there seem to be no cases adjudicating this express point.

In a late case in Idaho, however, it was held that where a grant conveyed to an irrigation district a free and unincumbered right and title in and to the waters of a canal, it carried with it an unqualified right to the extent of the water conveyed in the appropriation itself and the right to have the water flow through the canal, and the grantor perpetually abandoned the right to ever thereafter charge, collect, or realize any profit or rental for the use of the water conveyed.[7]

The board of directors is also given the power to construct all works necessary for the district. Under the terms of the Acts the payment of all contracts should be in cash and not in bonds. However, it is held that where an irrigation district in order to pay for the work of constructing a ditch issued bonds and a person contracted to purchase the issue at a certain sum, but being unable to carry out his agreement they were given to the contractor for the work, a contention that the bonds were issued without consideration was of no moment; and it was therefore held that no provision of the statute was violated and neither could the district complain.[8]

§ 1417. **Proceedings—The issuance of bonds.**—The Acts all provide in effect that for the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water rights, canals, ditches, and other works and otherwise carrying out the provisions of the Acts; and also whenever the construction fund has been exhausted by expenditures authorized under the provisions of the Acts and when it is necessary to raise additional money for said purposes, that the board of directors may estimate and determine the amount

[7] Nampa & Meridan Irr. Dist. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993.

[8] Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399.

of money necessary to be raised for such purposes, and call a special election, at which election there shall be submitted to the land owners or electors, as the case may be, of the district whether or not the bonds of the said district shall be issued in the amount so determined. But prior to the calling of such an election, the directors must make an estimate of the probable amount of the money needed; and where the money to be realized is for the construction of works, an estimate must be made of their probable cost, based upon some definite plan.[1]

In Idaho, before such special election can be called, all surveys, examinations, plans, maps, proper field notes, and estimates are required to be made under the direction of a competent irrigation engineer and must be certified to by him and filed with the board, and the board must submit the same to the State Engineer for examination and report. The State Engineer is then required to examine the same and make a written report on the whole subject to the board. Upon receiving such report the board of directors is then required to determine the amount of money necessary to be raised, and then may call the special election at which the question must be submitted to the electors of the district.[2]

1 Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; Willow Sprs. Irr. Dist. v. Wilson, 74 Neb. 269, 104 N. W. Rep. 165.

The action of the board is not invalid because taken at an adjourned session of a regular meeting of the board. Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793.

Under the California law, such bonds can only be issued to acquire property and for the construction of an irrigation system, and bonds issued in payment for certificates of another irrigation company entitling the holders to a certain amount of water are void. Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496, 1034;

See, also, Hall v. Hood River Irr. Dist., 57 Ore. 69, 110 Pac. Rep. 405; Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. Rep. 248; Haese v. Heitzeg, 159 Cal. 569, 114 Pac. Rep. 816; Russell v. Irish, 20 Idaho 194, 118 Pac. Rep. 501; Bissett v. Pioneer Irr. Dist., —— Idaho ——, 120 Pac. Rep. 461; O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

See, also, *In re* Bonds of South San Joaquin Irr. Dist., —— Cal. ——, 119 Pac. Rep. 198.

2 See Idaho Rev. Laws, 1909, Secs. 2396-2398, 2399, as amended by Laws, 1911, p. 199.

See, also, Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

In Idaho it is held that under the provisions of Article 1, Section 20, of the constitution, the legislature has the power and authority to prescribe a proper qualification for any person to vote at an election creating an indebtedness; but the Court held that by the adoption of Section 2396 of the

The notices of such election must be given as prescribed by the respective statutes. Such notice shall specify the time of holding the election, the amount of the bonds proposed to be issued; and such election must be held and the result thereof determined and declared as provided by the respective Acts; and in many of the statutes it is provided that it shall be held as nearly as practicable in conformity with the provisions of the Acts governing the election of officers; provided, that no informalities in conducting such election shall invalidate the same, if the election shall have been otherwise fairly conducted.[3] At such election the ballots shall contain the words "Bonds—Yes," or "Bonds—No," or words equivalent thereto. After the election the board of directors must canvass the votes; and upon the question of the necessary majority in order to carry such an election, the statutes also differ. In California and Colorado it is a majority of the votes cast; but in other States it varies, and in Utah it is two-thirds. If the necessary majority of the votes cast are in favor of the issuance of the bonds, the board of directors shall cause the bonds in the said amount to be issued from time to time as needed.[4]

The statutes of the States also prescribe the series in which the bonds shall be issued, their form, denomination, and when the

Revised Codes, such a qualification was not provided for in voting at an election held for the purpose of issuance of bonds of an irrigation district, and no such qualification has been required by the legislature. Bissett v. Pioneer Irr. Dist., —— Idaho ——, 120 Pac. Rep. 461.

[3] Where the California law required that in elections called to vote upon the issue of bonds the polls shall be opened at sunrise and close at sunset, an election for such purpose, held the 28th day of November, at which the polls were kept open until 5 o'clock, was void. Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793.

But see Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. Rep. 83, where it was held that, where it affirmatively appears that an election was fairly conducted, the failure to keep the polls open for the entire time required by the statute was a harmless irregularity.

See, also, upon the subject of these elections, Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120.

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

[4] Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. Rep. 261, where it is held that the Wright Irrigation Act contemplates that bonds voted by an irrigation district shall be issued by the board from time to time as needed.

principal and interest are payable. Therefore, the power of these public corporations to issue bonds is to be exercised in the manner prescribed by the statute.[5] It is also provided that when the money realized from the sale of one issue of bonds has become exhausted by the expenditures authorized therefor, and it becomes necessary to raise additional money for such purposes, that additional bonds may be issued by submitting the question at another special election in the manner as prescribed above; provided, also, the lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue.[6] Where an election for bonds has been carried, their issuance may be compelled by mandamus proceedings.[7]

§ 1418. **Proceedings—The sale of bonds.**—The statutes provide that the county board may sell the bonds issued, as set forth in the previous section,[1] from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction or the purchase of the canals or other works, or other property, for which they were issued. Before making any sale, the board is required at a meeting, by resolution, to declare its intention to sell a specified amount of the bonds so authorized, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes. Notice of the sale must then be published in accordance with the provisions of the statute. The notice must state that sealed proposals will be received by the board at their office for the purchase of the bonds till the day and hour named in the resolution. At the time appointed the board must open the proposals and award the purchase of the bonds to the highest responsible bidder, and may reject all bids. In some States the board can not sell the bonds for less than the par value thereof;[2] in other States, however, the board may accept a percentage less than the

5 Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. Rep. 248; Anthony v. County of Jasper, 101 U. S. 693, 25 L. Ed. 1005; Wright v. East Riverside Irr. Dist., 138 Fed. Rep. 313, 70 C. C. A. 603.

6 See Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. Rep. 328.

7 Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825.

1 See Sec. 1417.

2 Gen. Stat. Cal., Henning, 1908, p. 569, Sec. 32.

par value as fixed by the statute.[3] The bonds can be disposed of only in the manner provided by the statute.[4]

Bona fide purchasers of bonds issued by these irrigation districts must take notice of the law under which they are issued and sold, and they can not recover thereon if the bonds show on their face that they were not issued in conformity with the statute,[5] or if they were purchased with the knowledge of the purchaser that they were sold not in accordance with the provisions of the statute.[6] The fact that a holder of bonds purchased them from the president of the district does not impeach the *bona fides* of his ownership where there is no law prohibiting the president of a district from purchasing or owning them.[7]

§ 1419. Proceedings—The payment of bonds.—The statutes provide that the bonds issued and sold as set forth in the preceding sections,[1] and the interest thereon, shall be paid by the revenue derived from the annual assessment upon the real property of the

[3] In Utah and Colorado the board may accept 95 per cent of their face value.

[4] Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. Rep. 354, where it is held that, where the bonds of a district have been sold before the institution of confirmation proceedings, and the judgment rendered therein, that the district was duly organized, is reversed on appeal, the question touching the regularity of the sale will be left to be determined in an action by the bond holders against the district.

See, also, Stimson v. Alessandro Irr. Dist., 135 Cal. 189, 67 Pac. Rep. 496; Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 Pac. Rep. 24; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Tregea v. Modesto Irr. Dist., 164 Cal. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissing *Id.*, 88 Cal. 334, 26 Pac. Rep. 237; Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. Rep. 248; Miller v. Perris Irr. Dist., 99 Fed. Rep. 143; Wright v. East Riverside Irr. Dist., 138 Fed. Rep. 313, 70 C. C. A. 603; Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. Rep. 829.

See, also, Rodgers v. Thomas, 193 Fed. Rep. 952.

[5] Wright v. East Riverside Irr. Dist., 138 Fed. Rep. 313, 70 C. C. A. 603.

See, also, Anthony v. County of Jasper, 101 U. S. 693, 25 L. Ed. 1005.

[6] Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120.

[7] Perris Irr. Dist. v. Thompson, 116 Fed. Rep. 836, 54 C. C. A. 336.

[1] See Secs. 1417, 1418.

district, and the real property of the district shall be and remain liable to be assessed for such payments as provided by the Acts.[2]

Every treasurer of a district is required to keep a bond fund account. Out of this fund he is required to pay, when due, the interest and principal of the bonds of the district, and at the time and place specified in said bonds. In California it is also provided for the redemption of the bonds before they are due.[3]

An action in mandamus will lie by the bondholders of an irrigation district to enforce the payment of bonds.[4] The fact that a plaintiff owns less than the entire issue of a series of the bonds of a district can not affect his right to maintain an action for their enforcement.[5]

§ 1420. Proceedings—Confirmation of bonds and organization of district.—The original Irrigation District Act of California of 1887 [1] was added to by the supplemental statute of 1889, known as the "Confirmation Act." [2]

In the statutes of the other States the confirmatory provisions contained in this Act will be found embodied in the original Acts themselves as parts thereof. The statutes upon this subject provide that after the organization of an irrigation district special proceedings may be brought in the court having jurisdiction for the confirmation of the organization of the district and of the issue and sale

2 See San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. Rep. 291, 35 L. R. A. 33; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047.

Section 17 of the original Wright Act, as amended by the Act of March 11, 1893, Stats. and Amdts. Cal., 1893, p. 175, attempted to provide for additional security for the bonds sold, by providing that the board of directors should have the power to pledge, by mortgage, trust deed, or otherwise, all property of the district. This was held by the Court to be unconstitutional. Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. Rep. 937.

3 Gen. Stat. Cal., Henning, 1908, p. 575, Sec. 52.

For the special proceedings for funding bonds in California, see Gen. Laws Cal., Henning, 1908, pp. 593-596.

4 Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. Rep. 1002; Thompson v. Perris Irr. Dist., 116 Fed. Rep. 769; Marra v. San Jacinto etc. Irr. Dist., 131 Fed. Rep. 780; Board of Supervisors of Riverside County v. Thompson, 122 Fed. Rep. 860, 59 C. C. A. 70.

5 Perris Irr. Dist. v. Thompson, 116 Fed. Rep. 836, 54 C. C. A. 336.

1 For the history of law in California, see Sec. 1390.

2 See Cal. Stats. and Amdts., 1889, p. 212.

of bonds.[3] And upon such proceedings being had, the Court must by decree declare the validity or invalidity of the proceedings from the organization of the district, "and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof." The objects of these provisions are to provide a security for investors, prevent fraud, and to promote the advantage of the irrigation districts by enabling them to secure a decree as to the validity of issued bonds, which will be binding upon all the world. It has also been found from experience that bonds will sell for a much better price where their validity has been confirmed by the Court.[4] The confirmation proceeding is dominated in

[3] The fifth section of the California Act provided: "Upon the hearing of such special proceeding the Court shall have the power and jurisdiction to examine and determine the legality and validity of and approve and confirm each and all of the proceedings for the organization of said district under the provisions of the said Act (Wright Act), from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof." Stats. and Amdts., 1889, p. 212.

The latest statute upon the subject, that of Utah, approved March 22, 1909, provides as follows: "Sec. 54. Upon the hearing of such special proceeding the Court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner and in the Act prescribed, and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all the proceedings for the organization of said district under the provisions of said Act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof. The Court, in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceedings; and the Court may by decree approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other or subsequent parts of the proceedings." Laws Utah, 1909, p. 167, Sec. 54.

[4] "The object of the proceeding is, of course, to compel every person interested in the district, and whose property is bound for the payment of its debts, to come into court, and within the time limited present and submit to judicial investigation any and all objections he may have to the regularity of the organization of the district, and all other matters affecting the validity of the bonds, so that it may be finally and conclusively determined by a judgment, which neither he nor his successors in interest can thereafter question, whether such bonds are legal and valid, or not." Tregea v. Modesto Irr. Dist., 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S.

the Acts as a special proceeding, and it is clearly in the nature of an action *in rem*, the object being to determine the status of the district, and its power to issue valid bonds.[5]

When such an action is brought, the Court must fix the time for the hearing, and a notice of the same must be published in accordance with the statute. Such notice shall state the time and place fixed for the hearing and the prayer of the petitioners, and that any person interested in the organization of such district, or in the proceedings for the issue and sale of the bonds, may, on or before the day fixed for the hearing of said petition, demur or answer the said petition. These confirmation proceedings being *in rem*, the land owners are bound thereby, if there has been a due publication of the notice thereof in accordance with the terms of the statute, notwithstanding there has been no personal service upon them.[6] Any person interested in the district or in the issue and sale of the bonds may demur or answer the said petition; and the

179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

See, also, Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 575, 27 Am. St. Rep. 106; Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499.

The legality of the formation of an irrigation district, and the proposed issue of bonds of said district are not affected by the fact that the canal system of said district may water lands outside of said district. Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. Rep. 829.

5 Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; Ahern v. High Line Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963; Gem Irr. Dist. v. Johnson, 20 Idaho 29, 115 Pac. Rep. 924; Emmett Irr. Dist. v. Schane, 19 Idaho 332, 113 Pac. Rep. 444; Progressive Irr. Dist. v. Anderson, 19 Idaho 504, 114 Pac. Rep. 16; *In re* Bonds of South San Joaquin Irr. Dist., —— Cal. ——, 119 Pac. Rep. 198; Sunnyside Irr. Dist. v. Stephens, —— Idaho ——, 120 Pac. Rep. 169; Black Canyon Irr. Dist. v. Fallon, —— Idaho ——, 122 Pac. Rep. 850.

6 Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399, where it is said, "Not personal service of the notice is required"; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. Rep. 316; Palmdale Irr. Dist. v. Ratke, 19 Cal. 358, 27 Pac. Rep. 783.

person so demurring or answering the petition shall be the defendant to the special proceedings, and the board of directors shall be the plaintiff. Upon the hearing of such special proceeding, the Court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner as prescribed by the Act, and shall have the power and jurisdiction to examine and determine the legality and validity of and approve and confirm each and all of the proceedings for the organization of said district under the provisions of the Act from and including the petition for the organization of said district, and all other proceedings which may affect the legality or validity of the bonds and the order of sale and the sale thereof. The Court, in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceedings. And in the hearing the burden of proof of the validity of the proceedings to support a proposed issue of bonds by an irrigation district is upon the district itself.[7]

§ 1421. **Proceedings for confirmation—Effect of judgment.**—As a judgment in these proceedings the Court must render a decree, and thereby may approve and confirm such proceedings in part or disapprove and declare illegal or invalid other or subsequent parts of the proceedings. The effect of such a decree of confirmation entered in such a proceeding as to the proper compliance with all the provisions of the Act, is not only conclusive upon all the land owners within the district, whether they appear or do not appear at the confirmation proceedings, but also upon the whole world. Therefore, the State itself is bound by such a decree.[1] Even in a case

7 Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

1 People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86, where it is said: "If the construction of this confirmatory Act heretofore given by this Court be the correct construction; if the judgment rendered under that Act be a judicial decision, possessing the scope, effect, dignity, and efficacy of the usual and ordinary judgment of courts of general jurisdiction; if it be not only such a judgment, but a judgment *in rem*—then the State, like an ordinary individual, is estopped from questioning it. Such a judgment is binding on the whole world, and the State comes within that territory."

See, also, Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237;

where there was fraud in the organization of the district, a confirmatory decree having once been obtained, is binding, and furnishes a barrier against subsequent attacks upon the ground of such frauds, and thereby to protect its bondholders.[2] Therefore, where confirmation proceedings are had in the proper court, as provided by the respective Acts, which give the said Court power to determine the legality and validity of each and all the proceedings for the organization of an irrigation district, the decree rendered thereon declaring such district to have been duly and legally organized, is *res judicata* upon the subject, and is conclusive against any

dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 882, 1047; *In re* Madera Irr. Dist. Bonds, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047; People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep. 381; *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. Rep. 354; Miller v. Perris Irr. Dist., 85 Fed. Rep. 693; *Id.*, 92 Fed. Rep. 263; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499; Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313; Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; People v. City of Los Angeles, 133 Cal. 338, 65 Pac. Rep. 749; Title & Document Res. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. Rep. 356, 8 L. R. A., N. S., 682, 119 Am. St. Rep. 199; Fogg v. Perris Irr. Dist., 142 Cal. 18, 76 Pac. Rep. 1126, 154 Cal. 209, 97 Pac. Rep. 316; Oregon S. L. R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904; Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. Rep. 829; Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; Purdin v. Washington Assn., 41 Wash. 394, 83 Pac. Rep. 773.

2 "The purpose of the Act of 1889, in providing for an adjudication as to the validity of the district, was to furnish a barrier against subsequent attacks upon the ground of such frauds in the organization of the district, and thereby to protect its bond holders. It could not have been contemplated or intended that the existence of such fraud would always be open to inquiry, notwithstanding such adjudication, nor that, if subsequently shown, it would prove that the Court in the confirmation proceedings had no jurisdiction to act at all, and that its decree was void." Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. Rep. 316.

But see People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. Rep. 381; Fogg v. Perris Irr. Dist., 142 Cal. 18, 76 Pac. Rep. 1126, where it was held that a confirmatory decree may be opened in a direct attack on the ground of fraud.

collateral attack for fraud or illegality in any of the proceedings for such organization.[3]

As was said in a recent Idaho case:[4] "All parties are bound by the decree of confirmation. In the Linda Vista case it is held that the confirmation statute was enacted for the very object of binding the State, as well as all others, and an attempted *quo warranto* proceeding after the confirmation proceedings is a collateral attack upon the decree, and would not be permitted."[5]

In the opinion of the Supreme Court of the United States, in the Tregea case,[6] Mr. Justice Brewer seemed to doubt the validity of the confirmation Acts, and said: "It may well be doubted whether the adjudication really binds anybody." This expression may be regarded as dictum, as the appeal was dismissed for lack of jurisdiction, and was not decided upon its merits. But even if it was a decision upon the validity of these proceedings, it need not, nor has it been followed by the State courts; in fact, in some decisions it has been directly repudiated, upon the theory that a State court of last resort is not bound by the judgment of the United States Supreme Court construing a State statute, but is entitled to construe the same according to its own judgment.[7]

One effect of a judgment confirming the proceedings up to and including the issue and sale of the district bonds is to declare the validity of these bonds in the hands of innocent purchasers.[8] There was considerable loss to the purchasers of these bonds during the formative period of these laws; but as the laws upon this subject may be considered settled in this respect by the almost unanimous

[3] Miller v. Perris Irr. Dist., 85 Fed. Rep. 693; *Id.*, 92 Fed. Rep. 263.

[4] Progressive Irr. Dist. v. Anderson, 19 Idaho 504, 114 Pac. Rep. 16.

[5] See, also, Hease v. Heitzeg, 159 Cal. 569, 114 Pac. Rep. 816; Russell v. Irish, 20 Idaho 194, 118 Pac. Rep. 501.

[6] Tregea v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissed, *Id.*, 88 Cal. 334, 26 Pac. Rep. 237.

[7] People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86; Title & Document Res. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. Rep. 356, 8 L. R. A., N. S., 682, 119 Am. St. Rep. 199, where it is said: "But even the acceptance of the views of Justice Brewer would not require us to hold that the proceeding here involved was not judicial."

[8] Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1.

decisions of the courts, these irrigation bonds, where issued in conformity with the proceedings set forth in the statutes of the respective States, and where their issue and sale have been duly confirmed by the Court, are now among the most marketable securities of the country. At least, they rank with those of other public corporations.

§ 1422. **Proceedings—General annual assessments.**—Under the Acts it is made the duty of the board of directors of an irrigation district, on or before a certain date fixed of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the proper officers named in the Act under which the assessment is being made, the said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred.

All real estate, exclusive of improvements, or with the improvements, within any irrigation district must then be assessed by the officer named in the Act and for the valuation and within the manner and time prescribed in the Act under which the assessment is made. The Acts differ greatly in this respect. In some of the States the assessment is made by the county assessor, as is the case in Colorado and Utah; in California it is made by the assessor of the district. In some of the States the assessment for these purposes is made of all real estate exclusive of improvements; in others improvements are assessed. In some States the property is assessed at a fair cash valuation or an *ad valorem* assessment; in others it is provided that: "All lands within the district for the purpose of taxation under this Act shall be valued by the assessor at the same rate per acre; provided, that in no case shall any land be taxed for irrigation purposes under this Act which from any natural cause can not be irrigated, or is incapable of cultivation." [1]

In California the *ad valorem* assessment was adopted,[2] and such an assessment was held valid by the Supreme Court of the United

[1] See Laws Utah, 1909, p. 156, Sec. 19; Laws Colo., 1905, p. 259, Sec. 19; Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3458; Rev. Stat. Colo., 1908, Sec. 3458.

[2] Gen. Laws Cal., Hen., 1908, p. 570, Sec. 35.

States.[3] So, also, it is held that an assessment made by acreage is valid.[4]

The value of the assessable property being ascertained and the amount necessary for the use of the district, upon receipt of the certificate of the board of directors certifying the total amount required to be raised, the county commissioners in most cases are required to fix the rate of levy necessary to provide the amount of money required. In California, where the use of the regular county revenue officers are not embodied as a feature of the law, the rate of the levy is fixed by the board of directors of the irrigation districts, except in cases where the board of directors refuse to act.[5]

Mandamus will lie to compel the proper officers to levy the assessment.[6]

3 Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

See, also, Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; *In re* Madera Irr. Dist. Bonds, 92 Cal. 299, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Lahman v. Hatch, 124 Cal. 1, 56 Pac. Rep. 621.

The poles, wires, etc., of a telegraph company are not real property within the meaning of the irrigation law of California, and are therefore not assessable for the revenue purposes of a district. Western Union etc. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190.

4 Pioneer Irr. Dist. v. Bradley, 8 Idaho 310, 68 Pac. Rep. 295; Oregon S. L. R. Co. v. Pioneer Irr. Dist., —— Idaho ——, 102 Pac. Rep. 904; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81, where upon rehearing it was held that, where a party owns his own water right and would not receive any benefit from the organization of the district, he may, upon proper showing, have his land excluded from the district and from assessment; but under the facts in the case, where he failed to appear and make such a showing, he is bound by the action of the board.

5 See Gen. Laws Cal., Hen., 1898, p. 571, Sec. 39.

6 State v. Brown, 19 Wash. 383, 53 Pac. Rep. 548; Nevada Nat. Bank v. Board of Supervisors of Kern County, 5 Cal. App. 638, 91 Pac. Rep. 122; State *ex rel.* Witherop v. Brown, 19 Wash. 383, 53 Pac. Rep. 548; Thompson v. Perris Irr. Dist., 116 Fed. Rep. 760; Marra v. San Jacinto etc. Irr. Dist., 131 Fed. Rep. 780.

Upon the question of the power and duty to levy an annual assessment, see Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514; San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. Rep. 291, 35 L. R. A. 33; Decker v. Perry, 101 Cal. 17, 35 Pac. Rep. 1017; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; Lahman v. Hatch, 124 Cal. 1, 56 Pac. Rep. 621; Tregea v. Owens, 94 Cal. 317, 29 Pac. Rep. 643; Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. Rep. 290; Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98; Nevada Nat. Bank v. Board Suprs.

The laws also provide that such assessment shall be a lien against the property so assessed until such assessments are paid or the property sold for the payment thereof.[7]

In a number of the States the county treasurer is made *ex officio* the district treasurer of any district within the county,[8] whose duty it is to collect and receipt for all taxes levied as provided in the Acts in the same manner and at the same time as is required under the revenue laws of the State for the collection of taxes upon real estate for county purposes. In California, however, the collection of the assessments is made by the collector of the district in the manner as provided by the statute.[9]

Relative to the publication of delinquent notices for the failure to pay the assessments so levied, the sale for delinquent taxes and the redemption of property sold for the same, the laws of many of the States provide that the general revenue laws of the State shall be applicable for the purposes of the Irrigation District Act, "including the enforcement of penalties and forfeiture for delinquent taxes."[10] In California, however, special proceedings for these purposes are provided by the Act itself.[11] Property which has been legally assessed may be sold for the non-payment of the assessments

Kern County, 5 Cal. App. 638, 91 Pac. Rep. 122; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; Escondido High School Dist. v. Escondido Sem. of Univ., 130 Cal. 128, 62 Pac. Rep. 401; Oregon S. L. R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904; Cooper v. Miller, 113 Cal. 238, 45 Pac. Rep. 325; Commercial Nat. Bank v. Schlitz, 6 Cal. App. 174, 91 Pac. Rep. 750; Pioneer Irr. Dist. v. Bradley, 8 Idaho 310, 68 Pac. Rep. 295; Western Union Tel. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190; City of Nampa v. Nampa & Meridan Irr. Dist., 19 Idaho 779, 115 Pac. Rep. 979.

[7] A court of equity has no jurisdiction to adjudge that bonds issued by an irrigation district constitute a lien upon the lands within the district, nor to decree the enforcement of such lien, since, if it exists, it is by virtue of the statute under which the bonds were issued, and be enforced by the levy and collection of a tax in the mode therein provided. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. Rep. 290.

[8] Laws Utah, 1909, p. 157, Sec. 21; Laws Colo., 1905, p. 260, Sec. 21.

[9] Gen. Laws Cal., Henning, 1908, p. 572, Sec. 41.

The collector of a district in California is paid a salary and is not entitled to offset his claim against the sum in his hands belonging to the district. Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. Rep. 40.

[10] Laws Utah, 1909, p. 158, Sec. 22; Laws Colo., 1905, p. 262, Sec. 22; Colo. Stat. Ann., Morr. Ed., 1911, 3461; Rev. Stat., 1908, Sec. 3461.

[11] Gen. Laws Cal., Henning, 1908, pp. 572-575, Secs. 41-53; Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98.

and redeemed from such sale in the manner provided by the respective statutes.[12]

§ 1423. **Proceedings—Special assessments.**—The laws of some of the States, particularly California, in addition to the regular annual assessments discussed in the preceding section, authorize the levy and collection of special assessments in certain emergencies. Such assessments are authorized under the California law, in case the money raised by the sale of bonds is insufficient or in case the bonds be unavailable for the completion of the works authorized.[1] Or, whenever in the judgment of the board of directors of the district it is deemed advisable to raise money to be applied to any purposes of the Act, a special assessment may be levied and collected in the manner prescribed by the Act.[2] In order to levy and collect such special assessments, the board of directors of the district must call a special election and submit to the qualified electors of the district the question whether or not a special assessment shall be levied. Such an election must be called upon the notice prescribed, and the same shall be held in all respects in conformity with the provisions of the law upon the question of elections for voting for bonds of a district. The notice must specify the amount of money proposed to be raised and the purpose for which it is intended to be used. At such elections the ballots shall contain the words "Assessment—Yes," or "Assessment—No." And in case of an assessment to complete the works, if a majority of the votes cast are "Assessment—Yes," the board of directors shall cause an assessment in the amount named to be levied. In all other special assess-

12 Lahman v. Hatch, 124 Cal. 1, 56 Pac. Rep. 621; Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98; Escondido High School Dist. v. Escondido Sem. of Univ., 130 Cal. 128, 62 Pac. Rep. 401; Cooper v. Miller, 113 Cal. 238, 45 Pac. Rep. 325; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. Rep. 773.

A tax sale can not be assailed for inadequacy of price. Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. Rep. 367.

Neither can it be assailed for the fact that the sale was made on two separate assessments, and the amount of each not separately stated. Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98.

As to the validity of assessment and sale, see, also, Hease v. Heitzeg, 159 Cal. 569, 114 Pac. Rep. 816.

1 Gen. Laws Cal., Henning, 1908, p. 569, Sec. 34.

2 Gen. Laws Cal., Henning, 1908, p. 577, Sec. 59.

ments there must be two-thirds or more of the votes cast for the assessment in order to make the levy. The special assessments so levied shall be computed and entered on the assessment roll by the secretary of the board, and collected at the same time and in the same manner as provided for the annual assessments.

Under these provisions a special assessment can not be lawfully levied by the directors of a district without a previous authorization by a vote of the electors of the district.[3] But where they have been so authorized they may be levied, collected, or the property sold for the payment of the same;[4] and the burden of proving the illegality of such an assessment is on the party alleging it.[5]

In some of the other States special assessments may be levied and collected without the holding of an election upon the subject, notably Colorado and Utah.[6] The statutes in these States provide that: "In case the money raised by the sale of bonds be insufficient, and in case bonds be unavailable for the completion of the plans of works adopted, it shall be the duty of the board of directors to provide for the completion of said plans by levy of an assessment therefor in the same manner in which levy of assessments is made for the other purposes provided for in this Act." And these Acts do not require for the general annual assessments an election authorizing them.

§ 1424. Proceedings—Construction of works.—After adopting a plan for the construction of canals, reservoirs, and other works, the board of directors must give notice, by publication as provided by the Act under which they are working, calling for bids for the

[3] Tregea v. Owens, 94 Cal. 317, 29 Pac. Rep. 643; Woodruff v. Perry, 103 Cal. 611, 37 Pac. Rep. 526.

[4] Where the notice of sale gave the aggregate of the amount due on a certain piece of property of both the annual and special assessments, it was held that the fact that the sale was made on two separate assessments, and the amount of each was not separately stated in either the notice of sale, certificate of sale, or deed, did not invalidate the proceedings. Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98; Carter v. Tilghman, 119 Cal. 104, 51 Pac. Rep. 34; City of Nampa v. Nampa & Meridan Irr. Dist., 19 Idaho 779, 115 Pac. Rep. 979; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Cooper v. Miller, 113 Cal. 238, 45 Pac. Rep. 325.

[5] Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601.

[6] Laws Colo., 1905, p. 263, Sec. 25; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3464; Rev. Stat. Colo., 1908, Sec. 3464; Laws Utah, 1909, p. 159, Sec. 25.

construction of said work or any portion thereof. At the time and place stated in the notice the board must open the bids in public, and as soon as convenient thereafter the board shall let the said work, either in portions or as a whole, to the lowest responsible bidder, or they may reject any and all bids and may readvertise for proposals, or they may proceed to construct the work under their own superintendence.[1] Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to the district for its use, for not less than the percentage of the amount of the contract price named in the Act, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge and be approved by the board.[2]

An irrigation district may contract with a competent engineer to survey and furnish plans for the construction of the proposed works, and from which the board of directors may estimate the cost.[3]

§ 1425. Proceedings—Payment for claims for construction.—No claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president, and countersigned by the secretary of the district, which warrants shall state the date authorized by the board and for what purpose. In some of the States it is provided that if the

1 Under these provisions, the work should be advertised for by public notice, and the bid or bids received under such notice, either accepted or rejected, before the board is authorized to proceed with the construction work, under its own superintendence, with the labor of the residents of the district. Lincoln etc. Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. Rep. 847.

2 Gen. Stat. Cal., Henning, 1908, p. 575, Sec. 53; Laws Colo., 1905, p. 262, Sec. 23; Laws Utah, 1909, p. 158, Sec. 23.

The work for which bids are called for described in the notice must conform substantially with the work described in the plans and specifications, otherwise an attempted acceptance and award to a bidder is void. Healey v. Anglo-California Bank, 5 Cal. App. 278, 90 Pac. Rep. 54.

"The board has no other powers except those which are expressly given or are implied as necessary to carry out the main purpose of the Act." Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496, 1034.

3 Willow Springs Irr. Dist. v. Wilson, 74 Neb. 269, 104 N. W. Rep. 333.

district treasurer has not sufficient money on hand to pay a warrant when it is presented for payment, he shall endorse thereon "Not paid for want of funds; this warrant draws interest from date at six per cent per annum," and endorse thereon the date when so presented, over his signature, and for the time of such presentation such warrant shall draw interest at the rate of six per cent per annum: *Provided,* when there is the sum of $100 or more in the hands of the treasurer it shall be applied upon such warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in the State. The district treasurer is required to keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to claimant or bearer, the same as county warrants.[1]

The costs and expenses of purchasing and acquiring property and the construction of works and improvements must be wholly paid out of the "construction fund" or "the general fund," and the bond fund can not be drawn upon for this purpose, this latter fund being for the payment of the interest and principal of outstanding bonds when due.[2]

§ 1426. Proceedings—Construction of works across the property of others.—The board of directors is given the power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of the canal or canals may intersect or cross; and if the owner of the thing or franchise so to be crossed can not agree as to the amount to be paid therefor, or the points or the manner of said crossing, the same shall be ascertained and determined in all re-

1 Laws Colo., 1905, p. 262, Sec. 24; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3463; Rev. Stat., 1908, Sec. 3463; Laws Utah, 1909, p. 159, Sec. 24; Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. Rep. 40.

2 For the payment of bonds, see Sec. 1419.

See Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 589; Carter v. Tilghman, 119 Cal. 104, 51 Pac. Rep. 34; Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; State *ex rel.* Rush v. St. John, 30 Wash. 630, 71 Pac. Rep. 192.

spects as is provided in respect to the taking of land for public use. A right of way is also given, dedicated, and set apart, to locate, construct, and maintain the said works or reservoirs over, through, or upon any of the lands which are now or may be the property of the State where the proceedings are being had.[1] In California there is also given, dedicated, and set apart, for the uses and purposes of the Act, all waters and water rights belonging to the State within the district.[2]

When ditches or canals are constructed across an existing road or highway, it is the duty of the district to construct a proper bridge across such ditch or canal.[3]

§ 1427. **Proceedings—Compensation of officers—Board not to be interested in contracts.**—The Acts all provide for compensation of the members of the board of directors upon a *per diem* basis for the actual time while engaged in the business of the district. The compensation of the other officers is also fixed by the allowance of a salary. In California it is provided that a special election may be held to fix a schedule of salaries and fees to be paid by the district.[1] It is also provided that no director or any officer named in the Acts shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in any profits to be derived therefrom; and, in some States, "nor shall he receive any bonds, gratuity, or bribe." For the violation of these provisions any such officer shall be deemed guilty of a felony;[2] in California for the violation of the provisions as to contracts he shall be deemed guilty of a misdemeanor.

§ 1428. **Proceedings—Limit to indebtedness.**—The board of directors or other officers of a district are prohibited from incurring

1 Colo. Laws, 1905, p. 264, Sec. 26; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3465; Rev. Stat. Colo., 1908, Sec. 3465; Laws Utah, 1909, p. 160, Sec. 26.

2 Gen. Laws Cal., Hen., 1908, p. 576, Sec. 56.

3 MacCammelly v. Pioneer Irr. Dist., 17 Idaho 415, 105 Pac. Rep. 1076.

1 Gen. Laws Cal., Hen., 1908, p. 577, Sec. 57, as amended by Act of April 22, 1909, Stats. and Amdts., 1909, p. 1062; Kerr's Bien. Supp., 1908-1909, p. 1651.

For payment of salaries, see Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. Rep. 40; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 589.

2 Laws Colo., 1905, p. 264, Sec. 27; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3466; Rev. Stat. Colo., 1908, Sec. 3466; Laws Utah, 1909, p. 160, Sec. 27.

any debt or liability whatever either by issuing bonds or otherwise, in excess of the express provisions of the Act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void.[1] In California, for the purposes of the organization of a district, the board of directors may, before the collection of the first assessment, incur an indebtedness not exceeding the sum of $2000, and may cause warrants of the district to be issued therefor, bearing interest at the rate of seven per cent per annum.[2]

§ 1429. **Proceedings—Governing the use of water.**—In case the volume of the water in any canal, reservoir, or other works in any district shall not be sufficient to supply the continual wants of the entire district susceptible of irrigation therefrom, it is made the duty of the board of directors to distribute all available water as they may, in their judgment, think best for the interests of all parties concerned, and with due regard to the legal and equitable right of all.[1] And in California it is made the duty of the board of directors to keep the water flowing through the ditches under their control to the full capacity of such ditches in times of high water.[2] It is also provided that navigation shall never in anywise be impaired by the operation of the Act; nor shall any vested interest in or to any mining water rights or ditches, or in or to any water or water rights, or works used in connection with the mining industry, ever be affected by or taken under the provisions of the Act, save and except rights of way may be acquired over the same.[3]

The California law also provides that whenever any irrigation

[1] Laws Colo., 1905, p. 264, Sec. 28; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3467; Laws Utah, 1909, p. 160, Sec. 28.

[2] Gen. Laws Cal., Henning, 1908, p. 578, Sec. 61; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 589; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. Rep. 261.

[1] Laws Colo., 1905, p. 264, Sec. 29; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3468; Laws Utah, 1909, p. 160, Sec. 29; Gen. Laws Cal., Henning, 1908, p. 578, Sec. 62.

The fact that a land owner for five years had used water beyond the limits of a district and under a claim of right to do so, and with the knowledge of the district, gave him no right to continue such unwarranted use, where he claimed the right under the law governing such district. Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62.

[2] Gen. Laws Cal., Henning, 1908, p. 578, Sec. 63.

[3] Gen. Laws Cal., Henning, 1908, p. 578, Sec. 64.

district, in the development of its works as by law provided, may have an opportunity, without increased expenditure, to utilize the water by it owned or controlled for mechanical purposes, the board of directors may lease the same, as in the Act provided.[4]

The Acts all provide in effect that nothing therein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal, or reservoir of any person or persons having a prior right to such waters, unless previous compensation be ascertained and paid therefor, under the laws of the State authorizing the taking of private property for public use.[5] After the purchase of the water rights from a water company the manner of the delivery of the water to the land owners who had contracted with the old company will be presumed to be the same as that practiced by the old company.[6]

The board of directors have the power to enact a code of by-laws to regulate the distribution of the water controlled by the district. But the authority vested in the board of directors to make necessary and needed by-laws for the distribution of water among the owners of the lands, and do other lawful acts necessary to be done that sufficient water may be furnished each land owner, is for the purpose of carrying out the powers granted to the corporation by law, and does not vest it with the supervision or control of water rights belonging to private individuals.[7] In a recent case in Idaho [8] it was said, relative to the statute authorizing the distribution of water: "The statute is merely administrative, and is the declaration of a policy in the administration of the distribution of water by irrigation companies which the legislature deems proper and just, and which is to be followed by the canal company in the absence of a judgment of a court of competent jurisdiction directing such matters."

4 For the right and proceedings for leasing, see Gen. Laws Cal., Henning, 1908, p. 586, Secs. 100-105.

5 Laws Colo., 1905, p. 265, Sec. 30; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3469; Rev. Stat., 1908, Sec. 3469; Laws Utah, 1909, p. 160, Sec. 30; Gen. Laws Cal., Henning, 1908, p. 578, Sec. 65.

6 Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 56 Pac. Rep. 893.

7 Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982. See, also, Gerber v. Nampa etc. Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

8 Brose v. Nampa & Meridan Irr. Dist., 20 Idaho 281, 118 Pac. Rep. 504.

Mandamus will lie to compel an irrigation district to furnish water to those entitled thereto.[9] The assignment of the right to the use of the water controlled by an irrigation district conferred by the Acts on a land owner is limited by the whole policy of the statute to an assignment for the irrigation of lands within the district.[10]

§ 1430. Proceedings — Change of boundaries — Inclusion of lands.—The statutes provide that the boundaries now or hereafter organized may be changed in the manner therein prescribed, but such change shall not impair or affect its organization or its rights in and to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it was or might become liable or chargeable had such change of its boundaries not been made.[1]

The boundaries of a district may be changed by the inclusion of new lands. The holders or owners of title, or evidence of title, representing a majority of the acreage of any land adjacent to or situated within the boundaries of any irrigation district, may file with the board of directors of the district a petition in writing, describing such lands, and praying that such land be included in such district. A notice must then be published, as prescribed by the statute, giving notice to all persons interested to appear at the office of said board at a time named in the notice and show cause, in writing, if any they have, why the petition should not be granted. The board of directors, at the time and place mentioned in said notice, or at such time or times to which the hearing of such petitions may have been adjourned, shall proceed to hear such petition and all objections thereto. The failure of any person interested to show cause, in writing, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in the petition. The board of directors may require as a condition precedent to the granting of the petition that the petitioners shall

[9] Harris v. Tarbet, 19 Utah 325, 57 Pac. Rep. 33.

[10] Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62.

[1] Gen. Stat. Cal., Henning, 1908, p. 580, Sec. 74; Laws Colo., 1905, p. 265, Sec. 31; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3470; Rev. Stat. Colo., 1908, Sec. 3470; Laws Utah, 1909, p. 161, Sec. 31.

severally pay to the district such respective sums, as nearly as the same can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments for the payment of its *pro rata* share of all bonds and interest thereon which may have been previously issued by said district had such lands been included in the district at the time the same was originally formed or when said bonds were so issued. The board, if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the petition; but if they deem it for the best interests of the district that the said lands be included, the board may order that the district be so changed as to include the lands mentioned in the petition. In some of the States the order of the board is final,[2] but in California the question must be submitted, after the decision of the board in its favor, to the electors of the district at a special election called for that purpose.[3]

§ 1431. Proceedings — Change of boundaries — Exclusion of lands.—The boundaries of a district may also be changed by the exclusion of lands originally included within the same; but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it would or might become liable or chargeable had such land not been excluded from the district. The proceedings upon the exclusion of lands must be upon a petition of the owners of the lands, and are similar to the proceeding had for the inclusion of land described above. The board of directors, if they deem it not for the best interest of the district that the lands mentioned in the petition, or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the said lands,

2 Laws Colo., 1905, p. 265, Secs. 32-40; 3 Colo. Stat. Ann., Morr. Ed., Secs. 3471-3479; Rev. Stat., 1908, Secs. 3471-3479; Laws Utah, 1909, p. 161, Secs. 32-40.

3 Gen. Laws Cal., Henning, 1908, p. 583, Secs. 85-97.

For the effect of the change of boundaries as to the identification of the district, see Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. Rep. 316.

or some portion thereof, be excluded from the district, and if there be no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be excluded from the district.[1] In California, however, it is provided that if there be outstanding bonds at the time of the filing of the petition for exclusion, the holders of such outstanding bonds may give their assent in writing to the exclusion of such lands, and such lands may thereupon be excluded. But it is also provided in the California law that nothing shall in any manner operate to release any of the lands so excluded from any obligations to pay, or any lien thereon, of any valid outstanding bonds or other indebtedness of said district at the time of filing the petition, and that such liens may be enforced and such indebtedness collected in the usual manner; but the lands so excluded shall not be held answerable or chargeable for any obligation of any nature or kind whatever incurred after the filing of the said petition for exclusion; provided, that these provisions shall not apply to any outstanding bonds the holders of which have assented to the exclusion of such lands from the said district, as in the Act provided.[2] It is held as to these provisions that where the land attempted to be excluded from a district can be irrigated from the system of works of the district, that the decision of the board as to whether this land may or may not be excluded from the district is conclusive, and a court of equity will not interfere with its decision.[3] So, too, where a party owns his own

1 Laws Colo., 1905, p. 268, Secs. 41-46; 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3480-3485; Rev. Stat. Colo., 1908, Secs. 3480-3485; Laws Utah, 1909, p. 163, Secs. 41-46.

2 Gen. Laws Cal., Henning, 1908, p. 580, Secs. 74-84.

The exclusion of lands from an irrigation district after its organization under the provisions of the California statute can not affect the validity of bonds issued by the district. Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705.

The fact that, after the original organization of a district, changes were made in its boundaries, did not render the mere name of the district insufficient as an identification, since, if the proceedings to change the boundaries were regular and valid on their face, they were matters of record which could be ascertained by examination. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. Rep. 316.

No exclusion can be made without the consent of the bond holders. Modesto Irr. Dist. v. Treges, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

3 Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336.

water right, and would not receive any benefit from the organization of the district, he may, upon proper showing, have his land excluded from the district and from assessment; but where such an opportunity having been given to a land owner to show that his lands would receive no benefits, but he having failed to appear and make such showing, he is bound by the action of the board.[4] But where the statute provides in effect that in no case shall any land be held by any irrigation district or taxed for irrigation purposes which can not, from any natural cause, be irrigated thereby, as is the case in Colorado, Nebraska, Utah, and some of the other States, the question goes to the jurisdiction of the board, and may be raised at any time in a proper case, because this provision expressly denies the jurisdiction of the board to include such land in an irrigation district or to tax it for irrigation purposes, and its inclusion would be a violation of the plain provision of the statute.[5]

§ 1432. Proceedings—Dissolution of districts. — The original Wright irrigation district law of California, enacted in 1887, made no provisions for the dissolution of such districts. Therefore, it was held by the Court that an action could not be maintained to dissolve such corporation in the absence of such statute specially conferring the right.[1] Later, however, special statutes were enacted in California granting the right to these districts to dissolve their corporate existence, when certain conditions exist and upon the compliance with the terms of the statute. In the laws of all the other States there are also provisions for the dissolution of these irrigation districts.

The proceedings for the dissolution of irrigation districts in effect are as follows: Whenever a majority of the resident land owners,

[4] Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

[5] Andrews v. Lillian Irr. Dist., 66 Neb. 458; on rehearing, 97 N. W. Rep. 336.

Where the owner of land proceeds in equity to have the same detached from an irrigation district, in order to defeat the jurisdiction of the county board, it must be clearly shown, and in like manner found by the Court, that the land embraced within the district is in fact such that from some natural cause it is non-irrigable, or is expressly exempt by the statute from the operation of the law providing for the organization of irrigation districts and taxing of lands within the boundary of such districts for irrigation purposes. Sowerwine v. Central Irr. Dist., 85 Neb. 687, 124 N. W. Rep. 118.

[1] People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047.

representing a majority of the number of acres of irrigable land, or a majority of the value of said property, as the case may be, in any organized irrigation district shall petition the board of directors to call a special election for the purpose of submitting to the land owners of said irrigation district a proposition to vote on the dissolution of the said irrigation district. In the majority of the States no district can be dissolved unless the petition for dissolution shows that all bills and claims of every nature whatsoever have been fully satisfied and paid. If the board of directors are so satisfied that all bills and claims have been fully satisfied, it is made their duty to call an election, by the publication of notice for the same, as provided by the statute, and to hold the election for that purpose. If the majority of the ballots cast at such election shall contain the words, "For Dissolution—Yes," then it shall be the duty of said board of directors to declare said district to be disorganized and shall certify the same to the county clerk of the respective counties in which the said district is situated.[2]

In California the proceeding after the canvass of the votes is somewhat different. If two-thirds of the votes cast at such election shall be "Dissolution of the district—Yes," the board of directors shall file a petition in the Superior Court of the proper county to determine the validity of the proceedings had and of the proposed plan for dissolution. Such action shall be in the nature of a proceeding *in rem*, and jurisdiction of all parties interested may be had by publication of a notice of the pendency of the action as provided by the statute. The Court in its decree is given the power to make orders necessary to carry out the said proposition for the discharge of the indebtedness and distribution of the property of the district, including the right to apportion any indebtedness found due, and to declare said portions liens upon the various parcels and lots of land within the district, and may decree a sale of its assets in such a manner as may effectuate said proposition and as the Court may judge best. Provisions are also made for the collection of assessments due the district. Whenever all the property of such district shall have been disposed of, and all indebtedness and obligations

2 Laws Colo., 1905, p. 270, Secs. 48, 49; 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3787, 3788; Rev. Stat., 1908, Secs. 3487, 3488; Laws Utah, 1909, p. 165, Secs. 48, 49.

See Thompson v. McFarland, 29 Utah 455, 82 Pac. Rep. 478.

thereof, if any there be, shall have been discharged, the balance of the money of said district shall be distributed to the assessment payers in said district upon the last assessment roll in the proportion in which each has contributed to the total amount of said assessment, and the Court shall enter a final decree declaring said district to be dissolved.[3] Where an irrigation district is disincorporated it can not affect the validity of the bonds it had previously issued and sold.[4]

[3] Gen. Laws Cal., Henning, 1908, pp. 590-593.

[4] Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705.

CHAPTER 71.

CONTROL BY MUNICIPAL CORPORATIONS.

§ 1433. Scope of chapter.
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§ 1435. General power of municipal corporation to own and control its own water rights and plants.
§ 1436. The appropriation of water by municipal corporations.
§ 1437. Purchase of water rights and waterworks by municipal corporations.
§ 1438. Acquisition of water rights and waterworks by condemnation.
§ 1439. Rights of municipalities succeeding to Spanish-Mexican pueblo rights.
§ 1440. Appropriations by others than the municipality for municipal purposes.
§ 1441. The alienation of its water rights by a municipality.
§ 1442. Construction of franchises granted to companies to furnish water to municipalities.
§ 1443. Duty to furnish water to the inhabitants of municipalities.
§ 1444. Right to fix water rates by city ordinance in the absence of contract.
§ 1445. The power of a municipality to fix water rates by contract with a water company.
§ 1446. Ordinances fixing water rates affecting existing contracts.
§ 1447. Regulation and control of irrigation ditches within a municipality—Where owned by municipality.
§ 1448. Regulation and control of irrigation ditches within a municipality—Where owned by other parties.

§ 1433. Scope of chapter.—It is not the intent of this work to go into all the features of the laws and city ordinances regulating the control and distribution of waters by a city or town. In this chapter we will therefore confine our discussion more particularly to the subject of water rights acquired by municipal corporations under the Western Doctrine of appropriation of water.

§ 1434. Municipal corporations—Corporate nature.—A municipal corporation, in its strict and proper sense, is defined as a body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government

thereof.[1] While municipal corporations constitute one class of public corporation, all public corporations are not municipal corporations, although the terms are sometimes used as synonymous. Take, for example, irrigation districts; they have often been referred to as municipal corporations, while, strictly speaking, they are not municipal corporations, but public corporations.[2] Municipal corporations must also be distinguished from private corporations, although the latter are at times public service or quasi-public in their nature.[3]

§ 1435. General power of municipal corporation to own and control its own water rights and plants.—A municipal corporation always has the power under its charter to own water rights and the distributing plant connected therewith.[1] The city may acquire its water rights by appropriation,[2] by purchase, and by condemnation. It may also construct, at its own expense, or borrow money for the purpose of constructing the storing and distributing plant in order to utilize the water so acquired.

The use of water by the residents of municipal corporations for domestic, drinking, and culinary purposes, and, also, the use of water by a municipality itself, such as for sprinkling streets, flushing sewers, and protection against fires, being beneficial uses or purposes in the highest sense of the term, it therefore follows that under the Arid Region Doctrine of appropriation[3] a valid appropriation of water may be made for these purposes.[4] The essential acts of the appropriation may be performed by individuals or private corpora-

1 Dillon's Municipal Corporations, 4th Ed., Sec. 19.

2 For the distinction between public and municipal corporations, see irrigation districts—definition and corporate nature, Sec. 1404.

See, also, Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; Dillon's Municipal Corporations, 4th Ed., Sec. 22; *In re* Bonds of the Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086.

3 For private water corporations, see Chaps. 72-77, Secs. 1449-1529.

1 See Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137.

See, also, South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Aylmore v. City of Seattle, 40 Wash. 42, 92 Pac. Rep. 932.

2 See Secs. 684, 696, 1436.

3 For the Arid Region Doctrine, see Chap. 31, Secs. 585-594.

4 For the appropriation of water for municipal purposes, see Sec. 696.

tions for the express purpose of the sale or rental of the water, or the water rights, to a municipality or to its residents;[5] or these acts may be performed by a city or town in its municipal capacity, and such municipality may thus acquire a perfect title to the water rights for such purposes. In the performance of these essential acts necessary to constitute a valid appropriation there is no difference, as far as the law is concerned, between those which must be performed by a municipal corporation and those which must be performed by an individual or a private corporation. The law of the State wherein the appropriation is made must be complied with in either case. And as far as the power of a municipal corporation is concerned to make the appropriation, it has an equal standing with an individual or a private corporation, no more and no less. The mere fact that the appropriator is a city or town, other things being equal, does not give it any better or greater right under the law to make the appropriation than is given an individual or private corporation. The priority of the appropriation also gives the better right both as between different municipal corporations, or as between a municipal corporation and an individual or a private corporation.[6]

As we have seen, also, in previous sections, a municipality may, under certain conditions, be also a riparian proprietor.[7]

§ 1436. The appropriation of water by municipal corporations.—The statutes of the various States authorize municipal corporations to acquire all water rights necessary to supply the inhabitants of the same with water, as well as to acquire water for the use of the municipalities. Therefore, in those jurisdictions where the acquisition of such rights by appropriation is recognized, it is generally conceded that municipal corporations in their corporate capacity may make appropriations. Therefore, a city or town being given the power to use all reasonable means to supply the people within its borders with water for all useful and beneficial purposes, and to that end to acquire all necessary water rights by appropria-

[5] For the acts necessary to make a valid appropriation, see Secs. 710-728.

For the rights of private corporations to make appropriation of water for the purpose of sale or rental, see Secs. 703, 1470.

[6] For the rights of prior and subsequent appropriators, see Secs. 776-786.

[7] For a municipality as a riparian proprietor, see Sec. 482.

tion or other lawful ways, and to make and enforce reasonable rules and regulations to control the same, it is the duty of the municipal corporation to exercise that power, so far as the health, safety, convenience, and good of its inhabitants demand.[1] But the appropriation of water by a city or town from a natural stream or other source of water supply stands in law, as respects the rights of others who have acquired rights to the waters of the same stream, the same as though the appropriation was made by an individual or by a company. If the municipal corporation is first in time, it has the superior right to the use of the water to the full extent of the appropriation. If, however, the rights acquired by the municipality are subsequent in time to the rights acquired by others, they are subject to the rights of the prior appropriators. The Arid Region Doctrine of appropriation that he who is first in time has the superior right to the full extent of his appropriation, applies in full force where the appropriator is a municipality; and the mere fact that the appropriator is a municipal corporation gives it no better right to make the appropriation than though the appropriator was an individual or a private corporation.[2] As was well said in a recent Ore-

[1] City of Springville v. Fulmer, 7 Utah 450, 27 Pac. Rep. 577, where it is said: "And, having the power, it was the duty of the plaintiff to use it, so far as the health, safety, convenience, and good of its inhabitants demanded. In addition to the powers expressly conferred by its charter, the law added such implied powers as might become necessary to give effect to them."

A municipal corporation may acquire all the rights to the waters of a stream, by the appropriation thereof, and having its claim recognized by the riparian owners along the stream, although for a considerable time it does not consume all of the water claimed. Feliz v. Los Angeles, 58 Cal. 73.

See, also, Elms v. Los Angeles, 58 Cal. 80; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Crawford Company v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. Rep. 706; Lone Tree D. Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W. Rep. 650; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. Rep. 151; Carlson v. City of Helena, 43 Mont. 1, 110 Pac. Rep. 114; *Id.*, 39 Mont. 82, 102 Pac. Rep. 39; Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 Pac. Rep. 727, 97 Pac. Rep. 838.

[2] City of Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. Rep. 151; Junction Creek etc. Co. v. City of Durango, 21 Colo. 194, 40 Pac. Rep. 356; City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120.

Where water has been appropriated and used for 30 years, the dominion

gon case:[3] "The power to provide a water system is not governmental nor legislative in its character, but strictly proprietary, and the city, when engaged in prosecuting such an improvement, is clothed with the same authority and subject to the same liabilities as a private citizen."[4]

Again, in order for a municipality to have the right to the water for all of the uses for which it claims, there must be an appropriation covering such uses. Therefore, it is held that a municipality itself can not, under an appropriation for domestic purposes allowed by the statute as a preference right, appropriate all of the water of a stream for "domestic purposes" and use the same for general municipal purposes, including water for the sprinkling of streets

and right to the use and diversion thereof for beneficial purposes is vested in the appropriator, who can not be deprived of such right by a municipal corporation, except by the voluntary act of the appropriator, by forfeiture, or by operation of law. Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520.

See, also, Springville v. Fullmer, 7 Utah 450, 27 Pac. Rep. 577; Holman v. City of Pleasant Grove, 8 Utah 78, 30 Pac. Rep. 72.

A city which has become a riparian owner on a navigable lake and on its navigable natural outlet has no right to divert the water of the lake for municipal purposes, and thus lessen the natural flowage of the water in such outlet, to the injury of a lower riparian owner and prior appropriator, without compensating him therefor. City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190.

See City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348, where it was held that where the complainant alleged an appropriation of water by a city, interference with which was sought to be enjoined, but the proof showed that any rights of the city to the use of the water were not based on an appropriation, but on a contract, there was substantial and fatal variance, and the plaintiff could not recover.

[3] Tone v. Tillamook City, 58 Ore. 382, 114 Pac. Rep. 938.

[4] "The right of a city to divert water for the use of its inhabitants is not superior to the right of an individual or a farming community to divert water for domestic or other purposes, in the sense that the city may take water for that purpose from those who have previously appropriated it for the same, or some other beneficial use, without compensating the senior appropriators." Town of Sterling v. Pawnee Extension Ditch Co., 42 Colo. 421, 94 Pac. Rep. 339.

See, also, Montrose Canal Co. v. Loutsenheizer, 23 Colo. 233, 48 Pac. Rep. 532.

Rights acquired to the use of water for irrigation by a private party can not be taken by a city for domestic use by its inhabitants without just compensation. Strickler v. Colo. Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

and to furnish power for a lighting plant.[5] But in order to acquire this right the city must exercise the power of eminent domain.[6]

§ 1437. Purchase of water rights and water works by municipal corporations.—Not only may a municipal corporation appropriate water and construct the necessary system of water works in its corporate capacity,[1] but also under its general powers it may purchase water rights, where there has been a valid appropriation of the water previously made by others, and it may also purchase the system of water works where constructed and owned by others. In fact, it is the duty of municipal corporations, under the general welfare clause contained in their charter to supply itself and its inhabitants with a sufficient supply of pure water, and that, too, whether this be by appropriation, purchase, or by the granting of franchises to private corporations for this purpose.[2]

5 Crawford Company v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, the appropriation of water for domestic purposes, Sec. 692.

The fact that a city, in violation of its charter, has, from time immemorial, continuously diverted water from a stream, and sold it to consumers without its limits for extra municipal use, does not constitute an appropriation thereof, as against a lower riparian owner. Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

6 Montpelier Mill Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

1 For the appropriation of water by municipal corporations, see Secs. 696, 1436.

2 "One of those powers, necessarily implied by the general welfare clauses of the charter, is to supply the city with water." City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083.

A mere grant of power to a city to provide and supply water to its inhabitants gives power to acquire for that purpose water supplies without the city. City of South Pasadena v. Pasadena etc. Co., 152 Cal. 390, 93 Pac. Rep. 490.

The making and filing of a plan laying out the townsite upon a desert entry will not dedicate to the public the water used upon the streets and alleys of said townsite under a water right subsequently located and acquired. Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86.

See, also, Cherryvale W. Co. v. Cherryvale, 65 Kan. 219, 69 Pac. Rep. 176; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Lidgerwood Park Waterworks Co. v. City of Spokane, 19 Wash. 365, 53 Pac. Rep. 352; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; City of South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; City of Los Angeles v. Los Angeles etc. Co.,

As we have discussed in previous sections, a change of the use of the water may be made from irrigation to municipal uses, provided that others are not injured thereby.[3]

It is held that the duty of a city in this respect is limited to the city uses and the use of its inhabitants, and that it is not a city purpose to furnish water to the board of education of a city for the use of its public schools.[4] Water rights may not only be purchased by a corporation, but where a city owns a water right of such impure quality that it is unfit for domestic purposes, it may exchange such rights with farmers for irrigation use for pure water owned by such farmers for city use. So, where a contract between a city and certain farmers entitled to water for irrigation for an exchange of water provided that in case the city made default in furnishing the farmers the exchange water from its canal, they reserved the right to use the water they agreed to exchange only during the time the city's default continued, unless the failure of the city continued for a period of six months, when it should be optional with the farmers to terminate the contract, and the city's ability to perpetually furnish the farmers the required amount in exchange was conceded, such contract provision was a condition subsequent, and did not prevent the city from acquiring an absolute right to the farmers' water within the Utah Constitution, Article 14, Section 4.[5]

But in the purchase of water rights by a city, the property rights

124 Cal. 368, 57 Pac. Rep. 211, 571; Water-Supply Co. v. City of Albuquerque, 9 N. M. 441, 54 Pac. Rep. 969; City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A., 190; City of Leavenworth v. Leavenworth etc. Co., 69 Kan. 82, 76 Pac. Rep. 451; State *ex rel.* Hungate v. City of Topeka, 68 Kan. 177, 74 Pac. Rep. 647; Carlson v. City of Helena, 39 Mont. 82, 102 Pac. Rep. 39; Griffin v. City of Tacoma, 49 Wash. 524, 95 Pac. Rep. 1107.

3 Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

For changes that may be made of use, see Secs. 869-873.

4 Water-Supply Co. v. City of Albuquerque, 9 N. M. 441, 54 Pac. Rep. 969.

See, also, National Waterworks Co. v. School Dist. of Kansas City, 23 Mo. App. 227.

5 *State ex rel.* Ellerbeck v. Salt Lake City, 29 Utah 361, 81 Pac. Rep. 273.

of others must be respected not only as to the water rights,[6] but also as to the system of water works.[7]

Again, when a city acquires the water system and rights from a corporation engaged in the supplying of water for a public use, it assumes the burden of supplying water to those entitled to the use of the water from its grantor, to which it was subject at the time of the purchase.[8]

Oftentimes where a private corporation is furnishing water to a municipality under a franchise granted by it, it is provided in the franchise itself that the city or town, at the expiration of such franchise, or a certain period of time fixed therein, may exercise the right to purchase the water rights and systems of water works from the company upon a valuation of the property at the time of the purchase, to be determined in some method prescribed in the franchise. And a usual method prescribed for the valuation of the property is by arbitration.[9]

[6] The owner making the first appropriation can not deprive the other owners of the water from a stream by selling his rights to supply the inhabitants of a city. Creek v. Bozeman Waterworks Co., 15 Mont. 121, 38 Pac. Rep. 459.

See, also, Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190.

[7] The owner of a system of waterworks, erected and maintained under a valid city ordinance granting a franchise therefor for 20 years, may enjoin the city from taking the plant in an unlawful manner, notwithstanding the expiration of such period. City of Leavenworth v. Leavenworth City etc. Co., 69 Kan. 82, 76 Pac. Rep. 451.

A city without power to take possession of a waterworks plant rightfully may be enjoined from doing so forcibly. City of Los Angeles v. Los Angeles etc. Co., 124 Cal. 368, 57 Pac. Rep. 211, 571.

See, also, State *ex rel.* Dunbar v. Galena W. Co., 63 Kan. 317, 65 Pac. Rep. 257.

[8] Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; City of South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Fellows v. City of Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; City of Los Angeles v. Los Angeles etc. Co., 124 Cal. 368, 57 Pac. Rep. 211, 571.

See, also, for duty to furnish water, Sec. 1443.

[9] A provision for arbitration in a contract for the sale of waterworks to a city is not void by reason of a stipulation that the finding of the arbitrators should be approved by the city council to be binding on the city. Lidgerwood etc. Co. v. City of Spokane, 19 Wash. 365, 53 Pac. Rep. 352.

§ 1438. **Acquisition of water rights and water works by condemnation.**—Water rights, lands, and systems of water works may be acquired by a municipal corporation by virtue of the power of eminent domain in an action for the condemnation of the same. Such a use is unquestionably a public use, for which such actions will lie.[1] But it is held in Colorado that the right to enlarge a private ditch can not be acquired by condemnation proceedings brought by a city for that purpose where the statute only recognized such a right in persons seeking to acquire a right of way for the purpose of conducting the water for use upon their own lands.[2] The subject of the acquisition of such rights by virtue of the power of eminent domain has been discussed in previous portions of this work.[3]

§ 1439. **Rights of municipalities succeeding to Spanish-Mexican pueblo rights.**—As we have seen in a previous portion of this work, that in Mexico in the foundation of pueblos or agricultural villages it was the custom to set aside for the use of the pueblo and its inhabitants a certain area of land, and also to grant certain rights to the waters flowing to and through the pueblo. Under the plan adopted for the foundation of the pueblo of Pictic, in the State of Sonora, the area of land so set aside was sixteen square leagues, and certain rights were also granted to the pueblo and its inhabit-

1 "All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. . . . That the supply of water to a city is a public purpose can not be doubted, and hence the condemnation of a water-supply system must be recognized as within the constitutional limits of the power of eminent domain. It matters not to whom the water-supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation." Mr. Justice Brewer in Long Island Water-Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718.

Los Angeles v. Pomeroy, 124 Cal. 597, 57 L. Ed. 585; Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; City of Santa Barbara v. Gould, 143 Cal. 421, 77 Pac. Rep. 151.

2 Junction Creek etc. v. City of Durango, 21 Colo. 194, 40 Pac. Rep. 356.

3 For the condemnation of water rights, see Secs. 1087, 1088.

For the condemnation of rights of way, see Secs. 1065-1086.

See, also, Salt Lake City v. East Jordan Irr. Co., —— Utah ——, 121 Pac. Rep. 592.

ants to the waters flowing through and to the pueblo.[1] Many of the cities and towns in the southwestern portion of the United States, notably in California, Arizona, New Mexico, and Texas, were originally founded as Spanish-Mexican pueblos, and, therefore, acquired certain rights to the lands set apart either by special or general ordinance promulgated, either by the King of Spain, under Spanish rule, or by the Government of Mexico, as the successor thereof. Upon the acquisition of this territory by the United States under the Treaty of Guadalupe Hidalgo,[2] and the Gadsden Purchase,[3] it was provided by the Acts of Congress[4] in effect that within a certain period of time individuals and cities and towns claiming under the old Spanish-Mexican land grants, or pueblo grants, might prove up their claims before the commissioners appointed under the provisions of the Acts, and upon due proof thereof an award defining the same would be made by the commissioners and thereafterward a patent would be issued from the United States to the city or town or to the individual, as the case might be. A municipality, therefore, founded upon one of these old Spanish-Mexican pueblo grants, having proven its claim, succeeded to all the rights both in the land and waters that were formerly owned by the old pueblo.[5] And as it was held under the Spanish-Mexican law that a community right in and to waters was paramount and superior to the rights of individuals, where the same came in conflict,[6] therefore a pueblo, as a quasi-public corporation and representing a community, acquired rights in and to the waters flowing to and through the boundaries of the pueblo, which rights were paramount and superior to the claims of individuals in and to the same waters. And hence it follows that the city or town of the United States which is the successor of one of these old pueblos, is also the successor to all the rights in and to the waters flowing to or through the pueblo lands, which rights are paramount and superior to rights of individuals. And when the right of the pueblo

1 For the Plan of Pictic, see Sec. 581.

For the Spanish-Mexican laws governing waters, see Chap. 30, Secs. 576-583.

2 For the acquisition of territory by the Treaty of Guadalupe Hidalgo, see Sec. 399.

3 See Sec. 399.

4 For Act of March 3, 1851, see 9 Stat. L. 631, Chap. 41.

5 For the rights of pueblos to waters, see Secs. 581, 582.

6 For the Spanish-Mexican laws, see Chap. 30, Secs. 570-584.

was prior, this is also recognized as an element giving a superior right. It therefore follows that a city succeeding to the rights of a pueblo has a preference or prior right to consume the waters of a natural stream and its tributaries, even as against an upper riparian proprietor to the full extent as may be necessary for its inhabitants and for general municipal purposes. So, in a case involving the water rights of the city of Los Angeles as successor to the rights of the pueblo of Nuestra Senora Reina de Los Angeles, where it was stipulated by the parties that: "Under the laws of the Kingdom of Spain said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right claimed by the plaintiff (the city) in the complaint herein to use all the water of the river, and such paramount right continued to exist under that government and under the Mexican government until the acquisition of California by the United States," it was held by the Supreme Court of California that the city of Los Angeles also succeeded to the rights in full of the old pueblo as against any claims which might be made by upper riparian owners also claiming under a Mexican grant.[7] And upon appeal to the Supreme Court of the United States it was held that the decision of the State Court upon the question was decisive.[8]

[7] Los Angeles Milling Co. v. Los Angeles, 152 Cal. 645, 93 Pac. Rep. 869, where it was held that, under the Mexican law, a pueblo, as a quasi-public corporation, had power to distribute to the common lands and to its inhabitants the waters of an unnavigable river on which the pueblo was situated, and a riparian owner could not appropriate the water so as to interfere with the common use or destiny which a pueblo on the stream had given to the water, and a city which is the successor of the pueblo holds the lands and water rights of its predecessor in trust for its inhabitants. This case was appealed to the Supreme Court of the United States, and there dismissed for want of jurisdiction, the Court holding "That the extent of the riparian rights belonging to pueblos or persons receiving patients are matters of local or general law." 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452.

[8] See, also, Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; dismissed, *sub nom.* Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; Feliz v. Los Angeles, 58 Cal. 73; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; Devine v. Los Angeles, 202 U. S. 313, 50 L. Ed. 1046, 26 Sup. Ct. Rep. 652; Crystal Springs etc. Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720, 20 Sup. Ct. Rep. 573.

As to the extent of the right to which the municipal corporation succeeded, the California cases seem to hold that as long as the city uses the water for municipal purposes and for supplying its inhabitants, for which the right was dedicated, that such an amount of water may be used from the stream as the necessities of the case demand, even to the use of all the water of the stream. And, further, it is held that if the needs of the pueblo increased in the future, the right will expand to include them, and this, too, although the population of the city is not confined to its original limits.[9] But, upon the other hand, the water so claimed by a city as the successor to an old pueblo right must be used by the municipality for the purposes for which it was originally dedicated. And, again, the rights of the city from this source can not exceed the rights of the pueblo itself. Hence it follows that such a city has no right to divert the water of a stream running through its boundaries for the purpose of selling it to persons for irrigating lands outside of the city limits.[10]

It therefore seems to us that title to water rights based upon the old Spanish-Mexican pueblo right, under the authorities cited and quoted in our notes, is one of the strongest of titles that a municipality may have. It is not only a right absolute in itself to the extent of the water used for municipal purposes and for supplying its inhabitants with the necessary water, but under the case of Los Angeles v. Pomeroy, as the city increases in size and population, it is an expanding right, which is paramount and superior to the claims of others until the city eventually lays claim to all the water which the stream supplies.

§ 1440. Appropriations by others than the municipality for municipal purposes.—Not only may water be appropriated by a mu-

[9] The pueblo right to water of a stream includes the right to take all the water that is reasonably necessary to give an ample supply for the use of the inhabitants, and for all municipal purposes for which the city may require water, including sewers, artificial lakes, irrigation of public parks, etc. This right is measured by the necessity, and, if the needs increase in the future, the right will expand to include them; and this, though the population of the city is not confined to the original pueblo limits. Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; dismissed, *sub nom.* Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471.

[10] Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

nicipality for its own use and the use of its inhabitants, but also it may be appropriated by individuals or private corporations for the express purpose of furnishing water for such purposes for profit or hire.[1] Even in the absence of statutory power a municipality, as an incident to its organization, has the right to give a franchise for the purpose of supplying itself with water.[2] But these appro-

[1] For right of corporations to appropriate water, see Secs. 1470, 1492.

[2] City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083; Brenham v. Brenham Water Co., 67 Tex. 524, 4 S. W. Rep. 143.

It is within the power of a city to make a contract with another city to furnish it with water, where it will not interfere with the supply of water to its own inhabitants, since the making of such a contract is not an exercise of its legislative or governmental powers, but is for the private advantage of the city and its inhabitants. City of Colorado Springs v. Colorado City, 42 Colo. 75, 94 Pac. Rep. 316.

But see for power of a city to dispose of its water rights, Sec. 1441.

Where two corporations were formed for the purpose, among other things, of furnishing the city of San Diego and its inhabitants with water, and one owned the water supply and pipes to conduct it to the limits of the city, and the other corporation owned a system of distributing pipes in the city, it was held that a contract between the two companies to unite in furnishing the city with water, whereby the proceeds of the sales, after deducting operating expenses, were to be divided between the two companies, was not void as creating a monopoly. San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495.

Under a contract between a city and a water company, by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen, whose property has been destroyed by fire through the alleged neglect of the water company in complying with the terms of the contract, has no right of action against the company upon the ground that there was no privity of contract between them. Bush v. Artesian etc. Co., 4 Idaho 618, 43 Pac. Rep. 69; see, also, cases cited.

See, also, San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075, where by legislative grant three persons and their assigns were given the exclusive right for 25 years to supply the inhabitants of a town with water, and it was held that a corporation might purchase and hold the franchise previously granted to the persons, and have the exclusive right during the period named to furnish such supply.

A city in contracting for waterworks to supply itself and inhabitants with water exercises its business or proprietary powers, as distinguished from its legislative powers; and hence the fact that the contract is to run for a long term of years does not render it void, as restricting the future legislative powers of the city. State *ex rel.* Great Falls etc. Co. v. Mayor etc. of Great Falls, 19 Mont. 518, 49 Pac. Rep. 15.

One who contracts with a town is charged with notice of the statutes

priations, as is the case where the municipality is the appropriator, stand upon the same footing as the appropriation of private individuals. Where a private corporation appropriated certain water for supplying a certain city in California, the Court said: "We do not see that this fact in and of itself could give the company a right to anything in excess of the 40 inches" (the amount appropriated). And the Court held that the supply could not be increased with the growth of the city for emergency use, as against the rights of the other appropriators.[3] The supplying of pure

limiting the power of the town to fulfill such contracts. Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. Rep. 898.

The action of a city in authorizing a private corporation to erect waterworks for the purpose of supplying the city, without exclusive rights, does not deprive a city of the statutory right to erect water works of its own. Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. Rep. 665.

See, also, North Springs W. Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. Rep. 773, 47 L. R. A. 214.

Where a city repudiates a contract with a water company providing for the payment of hydrant rentals semi-annually, but still uses the water furnished by the company, and insists that the water supply be continued regardless of the contract, a command in a writ of mandamus that the city levy sufficient taxes to pay, not only the six months' water rentals already due, but also those due for the remaining six months of the year, is proper. State *ex rel.* v. Mayor etc. of City of Great Falls, 19 Mont. 518, 49 Pac. Rep. 15.

But that a town is not authorized to levy a special tax for this purpose, see Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. Rep. 898.

See, also, State *ex rel.* Milsted v. Butte City W. Co., 18 Mont. 199, 44 Pac. Rep. 966; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Crawford Company v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Lone Tree D. Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W. Rep. 650; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533; Pocatello W. Co. v. Standley, 7 Idaho 155, 61 Pac. Rep. 518; Reno W. Co. v. Leete, 17 Nev. 203, 30 Pac. Rep. 702; City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083; Los Angeles v. Los Angeles City W. Co., 124 Cal. 368, 57 Pac. Rep. 210; Town of Ukiah City v. Ukiah etc. Co., 142 Cal. 173, 75 Pac. Rep. 773, 100 Am. St. Rep. 107; People *ex rel.* Ricks Water Co. v. Elk River etc. Co., 107 Cal. 221, 40 Pac. Rep. 521, 48 Am. St. Rep. 125; Grand Junction W. Co. v. City of Grand Junction, 14 Colo. App. 425, 60 Pac. Rep. 196; Asher v. Hutchinson etc. Co., 66 Kan. 496, 71 Pac. Rep. 813, 61 L. R. A. 52.

3 Duckworth v. Watsonville etc. Co., 150 Cal. 520, 110 Pac. Rep. 927; *Id.*, 158 Cal. 206, 89 Pac. Rep. 338.

A land owner may enjoin a well constructed by a grantee of the city

water by a private corporation to the inhabitants of a city, town, or other municipality is a public use, for which the right of eminent domain may be exercised.[4]

Unfortunately, every city and town does not own its own water rights and system of water works. In fact, it is a very common thing throughout the West, and, indeed, throughout the whole country, for the water rights and systems of water works used in supplying municipalities and their inhabitants with water to be owned by individuals or private corporations, who or which, operating under a franchise granted by the municipalities, construct the systems of water works and sell or rent the use of the water furnished to the cities or towns and to their inhabitants. Usually as far as the strict municipal needs are concerned, the consideration for the granting of the franchise pays for all or a portion of the water furnished for municipal purposes. All profit to the private corporation for furnishing the water must, therefore, come out of the individual users. These corporations have not been at all backward in fixing as high a rate for the use of the water as it is possible. From experience it has been proven that such corporations, unless their powers are limited and enforced by law, ordinances, or the specific terms of their franchise, are liable to become engines of oppression, dealing, as they do, with one of the elements of Nature most necessary to the welfare and prosperity of man. The extortionate water rates charged in many cases and the arbitrarily shutting off of the water of individual users for the failure to pay such rates, have probably caused as much misery as any one thing next to hunger and cold. And another unfortunate thing is that these franchises are usually granted at an early period of the history of the city or town, are exclusive in their nature, and are granted for long periods of time. Again, these franchises oftentimes themselves provide that the company may charge such a sum for the use of the water at what, at a later period, at least, may be deemed excessive rates. The franchises containing such provisions being deemed in the nature of contracts, generally can not afterward be impaired by subsequent leg-

upon the highway adjacent to the owner's well on his new land, where the new well would injure the rights of the land owner. Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118.

[4] State *ex rel.* Stropshire v. Superior Court of Pacific County, 51 Wash. 386, 99 Pac. Rep. 3.

islation attempting to lower the rates provided for. It has oftentimes been put up to the municipality to either buy out the water rights and the system of water works owned by such a company, in every instance, for at least all that it is worth, and in many instances many times more than it is worth, or to condemn the property of the corporation, which is nearly as bad a predicament. And for the payment of such property, in either case, the municipality is compelled to issue bonds, the principal and interest of which has eventually to be paid by the taxpayers of the municipality. The writer has in mind two vivid examples illustrating this subject, and these are in the cities of Salt Lake and Denver. The city of Salt Lake owns its own water rights and its system of water works, and the charges for the use of water are kept down to the amount necessary for the operation of the system. The water rights and the system of water works of Denver are owned by a private corporation operating under a franchise granted for a long period of time, which has just expired. The charges for the use of water in Denver have not only been sufficient to maintain and operate the system, but also sufficient to pay a large profit to the stockholders of the private corporation. And at this writing the city of Denver, having refused to extend the franchise or to grant a new one, is in the throes of endeavoring to purchase the water rights and the system of water works from the private corporation, and the company asking for its rights many times what they are actually worth. Many other examples might be mentioned, but this is sufficient. These examples go to show that, especially in the West, where the waters of the natural streams and other sources of supply may be appropriated, or the rights to the use of the same may be purchased after the appropriation has once been made, had those in charge of the city governments at an early day exercised a slight degree of intelligence or common honesty the municipalities would not be confronted by such propositions.

§ 1441. **The alienation of its water rights by a municipality.**—It is the general rule of law that a city having once acquired a title to water rights or other property, and having dedicated them to public use, has no power, without special authority conferred by statute, to sell, lease, or otherwise dispose of such rights to others. So, in a case arising in Utah, where, under a charter of a city con-

taining the provision authorizing a city to "purchase, receive, hold, sell, lease, convey, and dispose of property, real and personal, for the benefit of the city," it was held that no authority was expressly or by necessary implication given to convey or otherwise transfer "property used by the public—dedicated to a public use. The control and management of property dedicated to the use of the people of a city is given for their benefit, not for the individual benefit of the public authorities. A public corporation is not a legal entity or person whose interests can be considered separate and apart from its people. It is but an instrumentality created and perpetuated for their benefit."[1] Afterward, in a case between the same parties, where the water works system of a city was in such a condition that it was almost worthless, it was held that the city has the authority to lease its water right to another in consideration of his erecting and maintaining a water works system for the furnishing of a proper supply to the city. And where the city had so contracted for the building of a water works system, and it permitted the construction of the water works, and for more than six years availed itself of the benefits of the system and assessed and collected an annual tax thereon, the city was estopped to thereafter question the validity of the contract.[2] The contract in question in this case was made prior to the adoption of the State constitution, which directly prohibits municipal corporations from selling, leasing, or otherwise disposing of their water rights or water works; but it provides that nothing therein contained should be construed to prevent any municipal corporation from exchanging water rights or sources of water supply for other water rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants.[3] Under this authority Salt Lake City,

1 Ogden City v. Bear Lake etc. Co., 16 Utah 440, 52 Pac. Rep. 697.

See, also, Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 62 N. W. Rep. 976, 30 L. R. A. 848, 58 Am. St. Rep. 817.

2 Ogden City v. Bear Lake etc. Co., 28 Utah 25, 76 Pac. Rep. 1069.

3 Utah Const., Art. 11, Sec. 6.

It is held that the provisions of this section do not prohibit the acquisition of a secondary water right against a municipality, or forbid the acquisition by a power company of the right to connect its flume with the water canal of a city for the purpose of discharging water therein. Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1067, 61 L. R. A. 648.

owing a right to the use of water which came from Utah Lake, and which was unfit for culinary and domestic purposes on account of the large amount of silt which it carried, but on that very account being more valuable for irrigation, made an exchange with certain farmers for their rights to the pure mountain water taken from Big Cottonwood Creek, which takes source in the Wasatch Mountains, to the southeast of the city. This exchange of water has been upheld by the Supreme Court.[4]

A municipal corporation, the same as an individual or a private corporation, can lose its water rights by abandonment[5] or by adverse possession and user by another amounting to prescription.[6]

§ 1442. **Construction of franchises granted to companies to furnish water to municipalities.**—A franchise granted within its powers by a city or town to a private corporation to construct therein a system of water works and to furnish the municipality and its inhabitants with water, is a contract between the municipality and the company. And as to the construction of such franchises, as is the case with other contracts where their terms are clear and unambiguous as to the true intent of the parties, the expressed terms must govern the rights of the parties.[1] But it is a rule of construction of franchises that if the terms of the franchise are doubtful and ambiguous as to the true intent of the parties thereto, the Court may consider the other facts and circumstances surrounding each particular case in its interpretation,[2] and that such a franchise is to be construed strictly against the grantee and liberally in favor of the municipality or the public. What is not unequivocally granted is withheld, and nothing passes to the private corporation by implication, except what is necessary to carry into effect the obvious intent of the grant.[3] A municipal corporation has no author-

4 State *ex rel.* Ellerbeck v. Salt Lake City, 29 Utah 361, 81 Pac. Rep. 273.

5 For abandonment, see Secs. 1099-1117.

6 For title by prescription, see Secs. 1033-1058.

1 For the construction of contracts, see Sec. 1513.

For contracts with corporations, see Chap. 77, Secs. 1509-1529.

2 For the interpretation of ambiguous contracts, see Sec. 1513.

3 Water, Light & Gas Co. v. City of Hutchinson, 207 U. S. 385, 52 L. Ed. 257, 28 Sup. Ct. Rep. 135; Birmingham etc. Co. v. Birmingham St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615; City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083; Pocatello W. Co.

ity to grant a perpetual franchise to a water company to furnish water to the city and its inhabitants, and, therefore, such a franchise, where there was an attempt to make such a contract in perpetuity, is void,[4] and the Court can not make a new contract between the parties for a limited period.[5] Neither has a municipal corporation the power to grant exclusive franchises for such purposes unless such power is conferred by law in explicit terms.[6] And the terms of the franchise itself must not grant such an exclusive right. It is therefore held that without such power to grant such a franchise, or without such limitation in the franchise itself, a franchise granting to a private corporation for a limited period the right to operate a water system is not such a contract, the obligation of which is impaired by the city afterward establishing a competing system for itself [7] or the granting another franchise to another competing company.[8]

v. Standley, 7 Idaho 155, 61 Pac. Rep. 518; Hatch v. Consumers' Co., 17 Idaho 204, 104 Pac. Rep. 670; Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533; Mitchell v. Tulsa Water etc. Co., 21 Okla. 243, 95 Pac. Rep. 961, where it is said: "If an ordinance is silent about any power, it does not exist, and if a reasonable doubt on a fair reading of such an instrument arises as to the proper interpretation to be given to it, this doubt is to be resolved in favor of the public."

See, also, Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. Ed. 245, 25 Sup. Ct. Rep. 40; Stein v. Bienville Water Supply Co., 141 U. S. 67, 35 L. Ed. 622, 11 Sup. Ct. Rep. 892.

4 Westminster W. Co. v. Westminster, 98 Md. 551, 56 Atl. Rep. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424; City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083.

5 City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864; Cedar Rapids W. Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. Rep. 1081; Brenham v. Brenham Water Co., 67 Tex. 524, 4 S. W. Rep. 143.

6 Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. Ed. 257, 28 Sup. Ct. Rep. 135; affirming 144 Fed. Rep. 256; Freeport W. Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 688, 21 Sup. Ct. Rep. 493.

7 North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. Rep. 773, 47 L. R. A. 214, where it was held that empowering a city to construct waterworks, or authorize the construction of the same by others, in the absence of words of limitation or exclusion, is not a grant in the alternative; and the city, by electing private parties to do it, does not estop itself from afterward entering the field as a competitor.

"It is elementary that, unless such right is expressly made exclusive, it is not to be construed so, except under unavoidable implication arising from the terms of the grant. As well expressed sometimes, if it is in doubt,

§ 1443. Duty to furnish water to the inhabitants of municipalities.—It is a well-settled doctrine of law that where a private water company is organized for the purpose of furnishing water to the inhabitants of a community or neighborhood, whether inside or outside of a city or town, for profit or hire, that it is a public service or quasi-public company or corporation.[1] Such a company is not only under the duty and obligation to supply the water in proper proportions to the persons composing the class for which the use was created and without discrimination,[2] but, further, that if the company, upon proper demand and a payment of the established rates, refuses to furnish the water to such applicant, an action in mandamus will lie to compel the service,[3] or, in case the company threatens to cut off the supply formerly enjoyed by the consumer, an injunction will be issued to prevent the deprivation thereof;[4] and, again, in case injuries have been sustained by the consumer caused by the company failing to furnish the water when it was its duty to do so, the consumer in an action at law may recover damages for the actual injuries suffered by him from such a cause.[5] This rule of law, as applying to public service or quasi-public corporations organized for the purpose of furnishing water to consumers for irrigation, will be discussed more thoroughly under the subject of the duties and rights of private corporations;[6] but the rule ap-

the grant fails." Mr. Justice Frick in Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828.

See, also, Thompson Huston Electric Co. v. City of Newton, 42 Fed. Rep. 723; Long Island Water-Supply Co. v. City of Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718; Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. Rep. 665; Syracuse W. Co. v. Syracuse, 116 N. Y. 167, 22 N. E. Rep. 381, 5 L. R. A. 546; Stein v. Bienville Water-Supply Co., 34 Fed. Rep. 145; Carlson v. City of Helena, 39 Mont. 82, 102 Pac. Rep. 39.

[3] Rockland W. Co. v. Camden etc. Co., 80 Me. 544, 15 Atl. Rep. 785, 1 L. R. A. 388; Watuppa Res. Co. v. Fall River, 147 Mass. 548, 18 N. E. Rep. 465, 1 L. R. A. 466; Freeport W. Co. v. Praeger, 129 Pa. 605; Syracuse W. Co. v. Syracuse, 116 N. Y. 167, 22 N. E. Rep. 381, 5 L. R. A. 546; Twitchell v. City of Spokane, 55 Wash. 86, 104 Pac. Rep. 150, 24 L. R. A., N. S., 290, 33 Am. St. Rep. 1021; Madera Water Co. v. City of Madera, 185 Fed. Rep. 281.

[1] For public service corporations, see Secs. 1493, 1494.

[2] For the duty to furnish water, see Secs. 1498-1500.

[3] For compulsory service of water, see Sec. 1506.

[4] See Sec. 1506.

[5] For damages for the failure to furnish water, see Sec. 1507.

See, also, Chap. 83.

[6] See Chap. 76, Secs. 1490-1508.

plies with equal force to corporations organized for the purpose of furnishing a municipality and its inhabitants with water. Therefore, a corporation receiving a franchise from a municipality authorizing it to supply the inhabitants with water, by accepting such franchise and attempting to operate thereunder, enters into an implied contract to serve all the inhabitants of such municipality without distinction or discrimination upon such persons paying the established rates and complying with the reasonable rules and regulations of the company.[7] Again, it may be said that the same duty is imposed upon the municipality itself, where it has acquired the ownership of the water rights and the system of water works. So it is held that where a city has acquired the water system of a quasi-public corporation engaged in supplying water for a public use it does so as a corporation engaged in supplying a public use, and on its refusal to furnish those with water who are entitled thereto, an action in mandamus will lie to compel the furnishing of the water.[8]

§ 1444. Right to fix water rates by city ordinance in the absence of contract.—Where a municipality owns its own water rights and its system of water works, there is no question as to its

[7] As was said in a recent Idaho case: "It is not permitted like a private party to charge whatever it pleases or to serve those only whom it may choose to serve. It must, on the contrary, serve the inhabitants of the municipality from which it receives a franchise for a reasonable uniform compensation to be established in conformity with law, and it must serve all persons without distinction or discrimination who pay the rate established and comply with the reasonable rules and regulations of the company." Hatch v. Consumers' Co., 17 Idaho 204, 104 Pac. Rep. 670.

See, also, Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533; Pocatello Water Co. v. Standley, 7 Idaho 155, 61 Pac. Rep. 518; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; Long Branch Commission v. Tintern Manor W. Co., 70 N. J. Eq. 71, 62 Atl. Rep. 474; affirmed, 71 N. J. Eq. 790, 71 Atl. Rep. 1143; Mahoney v. American Land etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Haugen v. Albina etc. Co., 21 Ore. 411, 28 Pac. Rep. 244, 14 L. R. A. 424; Watauga W. Co. v. Wolfe, 99 Tenn. 429, 41 S. W. Rep. 1060, 63 Am. St. Rep. 841; American W. Co. v. State, 46 Neb. 194, 64 N. W. Rep. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610.

But see State *ex rel.* Foley v. Hillyard W. Co., 49 Wash. 232, 94 Pac. Rep. 1080.

[8] Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; City of South Pasadena v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 490; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137.

power to fix the rates which it shall charge to its inhabitants for the use of the water. Such rates must, however, be reasonable and without discrimination as between the persons furnished. Therefore an ordinance which prohibits consumers from taking from its mains any water except such as shall have been measured by means of a water meter, and that meters of the kind and make ordered by the mayor and council shall be furnished, or the expense thereof borne by the consumers severally, also reserving to the city the right to stop the supply of water for a violation of the regulation, is held not to be unreasonable, but to be valid.[1]

Again, where the municipality and its inhabitants are supplied with water by a private corporation or other parties operating under a franchise granted to it, or them, unless the municipality is so bound down by a contract with the private corporation for a definite period of time in respect to the rates which may be charged that an attempted reduction of those rates by city ordinance would be in effect the impairment of the contract, and therefore, within the constitutional inhibition, the city may by ordinance fix the water rates which the company may charge its consumers.[2] Such rates so fixed must be reasonable both as far as the consumers' rights are concerned and also with due regard to the right of the company to make a reasonable profit upon its investment.[3]

1 Cooper v. City of Goodland, 80 Kan. 121, 102 Pac. Rep. 244.

But see Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; Albert v. Davis, 49 Neb. 579, 68 N. W. Rep. 945; Twitchell v. City of Spokane, 55 Wash. 86, 104 Pac. Rep. 150, 24 L. R. A., N. S., 290, 33 Am. St. Rep. 1021; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Contra Costa W. Co. v. City of Oakland, 157 Cal. 323, 113 Pac. Rep. 668.

2 For the impairment of contracts by city ordinances, see Sec. 1446; Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828, where it is said: "That the fixing and regulating of water rates is a governmental function and can not be surrendered nor suspended by the city council is agreed by all concerned in this action."

See, also, San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

3 Where the water rates, as fixed by ordinance of a city council, produced a revenue of $65,788.65 for the year, and it appeared that the actual operating expenses of the water company were $40,000 for the year, and that the actual cost of the works was $750,000, such rates were held to be wholly insufficient to allow the company the compensation to which it was legally entitled; and it was therefore the duty of the court, under Constitution, Article 14, construed with Ar-

Again, in the absence of the fixing of the water rates by law which a private company may charge to the inhabitants of a municipality, or by contract, ordinance, or in the franchise itself under which the company operates the company may by its own regulations fix reasonable water rates; and as to what are reasonable rates depend upon the facts of each particular case.[4]

§ 1445. **The power of a municipality to fix water rates by contract with a water company.**—The question of the power of a municipality to fix the water rates which a private corporation engaged in the furnishing of a city and its inhabitants with water may charge for the use of the water furnished, either by direct contract, by ordinance, or by way of the franchise under which the corporation operates, has arisen in many cases. The rule of law upon this subject is that while the fixing and the regulating of water rates is a governmental function, which can not be surrendered or suspended by a city council, the city may enter into such a contract which fixes thereby the temporary rates which the company may charge its consumers for the water furnished by it.[1] But, upon the other hand, it is held that a municipality has no power to enter into such a con-

ticle 1, Section 14, to declare such ordinance void. San Diego W. Co. v. City of San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

See, also, Spring Valley Waterworks v. City of San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; Redlands etc. Co. v. City of Redlands, 121 Cal. 365, 53 Pac. Rep. 843, holding that on an issue as to the reasonableness of water rates established by ordinance, the items of necessary expenditure by the water company should not include the interest on the company's indebtedness, nor the sum the plant will depreciate annually aside from the sum requisite for its maintenance and repairs.

See, also, Hatch v. Consumers' Co., 17 Idaho 204, 104 Pac. Rep. 670; San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

4 "Water rates are established in order to compensate the company for its investment, and it can not be allowed, in addition to these rates, to require a citizen to pay for a part of its system before supplying him with water." Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533; Pocatello W. Co. v. Standley, 7 Idaho 155, 61 Pac. Rep. 518; Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

See, also, for State control of water rates, Chap. 69, Secs. 1368-1385.

1 Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 823; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363.

tract for long periods of time or for the entire period of the life of the franchise granted to the company; and that, should it appear that the water rates charged in accordance with the terms of such contract or franchise at any time during its life under the then existing conditions are excessive, both the city and its taxpayers may sue to enforce reasonable rates.[2] It is also held that the water company itself may sue to prevent confiscatory rates.[3]

§ 1446. Ordinances fixing water rates affecting existing contracts.—Having seen in the previous sections that the power of a municipal corporation to fix water rates is a governmental function which can not be contracted away or suspended by the municipality covering long periods of time,[1] we now come to the question of the power of a city council to fix water rates by ordinance which directly affect the rights claimed by a water company operating under the franchise or contract granted by the municipality, and the terms of which franchise purported to fix such water rates for a definite period of time. In other words, has the municipality the power to change the water rates purported to have been fixed by the franchise or contract to the detriment of the water company during the time for which the rates were fixed by the terms of the contract? The answer to this question must depend, first, upon the question of law as to the power of the municipality to make such a binding contract, and, second, upon the question of fact as to whether or not the water rates so fixed in the contract are reasonable, both as far as the rights of the consumers and the rights of the company are concerned. And upon the first of these propositions the authorities hold that if the municipality did not have the power conferred upon it by constitutional or legislative provisions to make such a contract covering a considerable portion of time, that an ordinance passed during the

2 Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363; Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828; Flynn v. Little Falls etc. Co., 74 Minn. 180, 77 N. W. Rep. 38, 78 N. W. Rep. 106; City of Brenham v. Brenham Water Co., 67 Tex. 524, 4 S. W. Rep. 143; Edwards County v. Jennings, 89 Tex. 618, 35 S. W. Rep. 1053.

3 Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828; Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

See, also, for the power of the State to fix water rates, Chap. 69, Secs. 1368-1385.

1 See Sec. 1442.

life of the contract altering the rates therein fixed was not such an impairment of a contract as to come within the constitutional inhibition.[2] The right to fix water rates comes within the police powers of the municipality. And, as said in a Minnesota case, "In short, while a municipality can not impair the obligation of its contract under the guise of exercising its police power, yet it can not surrender or barter away its police powers under the guise of making a contract."[3] Where, however, the city had the power to make such a contract with a water company that existing water rates to private consumers should not be reduced during the life of the contract, such a contract can not be impaired by an ordinance attempting to reduce the water rates where such rates may be considered within the bounds of reason.[4]

Upon the second phase of the question, in all cases the water rates under the existing circumstances must be reasonable, both as far as the company is concerned and the consumers which it supplies. And where under an existing contract the rates charged by a private corporation are clearly excessive and unreasonable, it is also held that a city council by ordinance may so regulate such rates as to bring them within the limits of what, under the circumstances of the case, are deemed reasonable.[5] As was said by the Supreme Court of the

2 A contract giving a water company the right to charge certain rates for 30 years without interference by new ordinances changing rates was held to be not authorized. Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493; affirming *Id.*, 186 Ill. 179, 57 N. E. Rep. 862.

See, also, Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363; Danville Water Co. v. Danville, 180 U. S. 619, 45 L. Ed. 696, 21 Sup. Ct. Rep. 505; affirming *Id.*, 186 Ill. 326, 57 N. E. Rep. 1129; Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828.

3 State v. St. Paul etc. R. Co., 78 Minn. 331, 81 N. W. Rep. 200.

4 Los Angeles v. Los Angeles City W. Co., 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736; affirming *Id.*, 88 Fed. Rep. 720.

5 County of Stanislaus v. San Joaquin etc. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930; *Id.*, 90 Fed. Rep. 516; Boise City etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Leadville W. Co. v. City of Leadville, 22 Colo. 297, 45 Pac. Rep. 362; City of Denver v. Denver Union W. Co., 41 Colo. 77, 91 Pac. Rep. 918.

See, also, power of the legislature to regulate water rates, impairment of contracts, Secs. 1347-1382.

United States: "A reasonable rate the law assured, and assured even against governmental regulation."[6] But to this extent only does the power of a city council go. They can not so regulate water rates in the face of an existing contract as to make them unreasonably low as far as the rights of the company are concerned. It can not fix a rate so low that it is in effect confiscatory and the taking of private property without just compensation.[7]

§ 1447. Regulation and control of irrigation ditches within a municipality—Where owned by municipality.—The soil within a city or town located in the West is as dry and arid as is that of the country outside of its limits, yet many of the Western cities and towns are noted for their beautiful gardens and shade trees. This is due to the fact that water is supplied for irrigation within the city limits either from water rights owned by the municipalities or from those owned by private individuals or corporations. One of the most remarkable features of Salt Lake City, and one of everlasting curiosity to the summer tourists, is the fact that during the hot summer months pure water runs on each side of every street in the city. This is due to the fact that the city not only owns its own water rights and water works for municipal purposes and for supplying its inhabitants with ample water for culinary and domestic purposes, but it also owns sufficient water rights to supply the entire city and those of its inhabitants who choose to avail themselves of it, with irrigation water for the trees and gardens. Again, in many instances, where the limits of the city have been extended, they have taken in farming communities and lands which were supplied with irrigation water from some source. Of course, where a city owns its own water rights and ditches and canals conveying the water, it is always given the power to pass such ordinances as it may see fit,

6 Rogers Park W. Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363.

See, also, Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828.

7 Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. Rep. 531; *Id.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148; San Diego W. Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 62 Am. St. Rep. 261; Des Moines v. Des Moines Waterworks Co., 95 Iowa 348, 64 N. W. Rep. 269; Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399; Spring Valley Waterworks Co. v. San Francisco, 124 Fed. Rep. 574.

regulating the use and distribution of irrigation water within the city limits, and the care and maintenance of the ditches and canals. Usually in such cases there is a separate branch of the water department, over which there is a superintendent of irrigation, who, and his subordinates, constitute the executive officers of this branch and attend to the distribution of the water and the enforcement of the ordinances relative thereto.[1]

§ 1448. **Regulation and control of irrigation ditches within a municipality—Where owned by other parties.**—Where the water rights and the ditches and canals used in connection therewith and running within the limits of a municipality are owned by parties other than by the city or town itself, the question has often arisen as to the power of the municipality to pass ordinances regulating and controlling such rights and ditches and canals tending to restrict the original rights and privileges of the owners. A large, open irrigation canal running through the heart of a city may be dangerous at times to the life and property of the inhabitants. Oftentimes children, and sometimes older persons, fall in and are drowned. Their waters sometimes overflow or seep through their banks and the neighboring property is flooded and injured; or, again, the waters become stagnant with the accumulation of rubbish and breed disease. It is therefore necessary that there should be some control over such ditches and canals passing within the limits of municipalities so as to prevent, as far as possible, the interference with the rights and property of the municipality itself and the danger to the lives, health, and property of its inhabitants. This regulation and control may come from two sources: First, direct statutory enactment under the police power of the State; and, second, by the way of municipal ordinances under the powers granted by the constitution and statutes of the State. By direct statutory enactment the legislature may require the owners of such ditches and canals operating within municipal limits to do certain things and perform certain duties for the protection of the public.[1] And,

[1] Levy v. Salt Lake City, 5 Utah 302, 16 Pac. Rep. 598; affirming *Id.*, 3 Utah 63, 1 Pac. Rep. 160; Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 28 S. W. Rep. 702; Boulder v. Fowler, 11 Colo. 396, 18 Pac. Rep. 337.

[1] So, a statute which required the owners of such canals operating within the limits of municipal corporations to construct certain devices such

again, by municipal ordinance the owners may be required, under the police powers of the city, to do practically the same things and to perform the same duties toward the public; provided, that in so doing the city council keeps within the limitation of the powers granted to the municipality by either special or general enactments of the legislature and does not thereby seriously interfere with the vested property rights of the owners.[2]

as lattice work and slats at the head of flumes to prevent persons and animals from being drawn through the flumes, was held to be valid as a proper exercise of the police power of the State; and, further, that the failure to perform such statutory duty specifically imposed was negligence *per se*, and in the absence of contributory negligence, a recovery may be had for an injury thereby occasioned. Platte etc. Co. v. Dowell, 17 Colo. 376, 30 Pac. Rep. 68.

See, also, Platte etc. Co. v. Lee, 2 Colo. App. 184, 29 Pac. Rep. 1036; Platte etc. Co. v. Anderson, 8 Colo. 131, 6 Pac. Rep. 515.

"The council of Baker City are empowered by the charter now in force to make such reasonable regulations by ordinance for conducting water along the streets as may be prescribed, and when this has been done, the plaintiff must accede thereto." Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

The city has the power to destroy an irrigation ditch in lawfully changing the grade of its streets, but it is not a destruction of the ditch owner's easement or right of way in the streets. City of Nampa v. Nampa & Meridan Irr. Dist., 19 Idaho 779, 115 Pac. Rep. 979.

2 So, it is held that a city, under its police power, can not require a ditch which was constructed through lands embraced within the public domain of the United States prior to such lands being taken in the city limits, to be so confined and reconstructed, by boxing and fluming, or otherwise, as to prevent the further washing and cutting away of the property along the line of such ditch, and the Court enjoined the city from prosecuting the owner of such ditch for the violation of such invalid ordinance. Platte etc. Co. v. Lee, 2 Colo. App. 184, 29 Pac. Rep. 1036.

An injunction will lie restraining a city from interference with the use of ditch property which has not been lawfully ascertained and declared to be a nuisance. City of Denver v. Mullen, 7 Colo. 345, 3 Pac. Rep. 693.

See, also, Fresno v. Fresno etc. Co., 98 Cal. 179, 32 Pac. Rep. 943; Platte etc. D. Co. v. Anderson, 8 Colo. 131, 6 Pac. Rep. 515.

The right of a municipality to the exclusive control and regulation of water within its limits, to which others have acquired a paramount right, prior to the incorporation of the municipality, is based upon the acquiescence of such owners. Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520.

In a late case in Oregon it was held that a delay of two months in suing to enjoin the interference with a company's ditches during the construction of improvements by the city under an ordinance did not equitably estop the company from maintaining an injune-

And it is further held that where ditches and canals run through a city and the water is used therefrom by the inhabitants for irrigation, although both the water rights and the ditches and canals may be owned by others, the municipality has the power to assume the control and management of the ditches and canals and the method of distribution of the water within the city limits. And having once acquired the right to control and to regulate the distribution of the waters, and such authority having been given to be exercised for the benefit of the people, this duty becomes obligatory upon the municipality.[3] And where a city with the consent of the original appropriators took control of such waters and distributed them to the inhabitants of the city, the right to exercise such control vested in the city, and it was therefore held that it was not only the right of the city, but also its duty, to employ such remedies as the law or rules of equity authorized to defend and maintain such right to control the use of such waters by the people.[4] And where a municipality has once assumed control of such waters, it does so in its ministerial capacity, and is therefore bound to manage the control and distribution with reasonable care so as to prevent the overflow or seepage of the water from such ditches to the injury of adjacent land owners; and it is held that a city is liable for an injury occurring through its negligence from water overflowing a ditch constructed over private property.[5]

tion against the city. Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

"It will be conceded that there is no statute of this State which compels ditch companies to construct bridges over highways in cases where the highway was not laid out or dedicated to the public prior to the construction of the ditch." Boise City v. Boise City etc. Co., 19 Idaho 717, 115 Pac. Rep. 505.

See, also, MacCammelly v. Pioneer Irr. Dist., 17 Idaho 415, 105 Pac. Rep. 1076.

[3] Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 28 S. W. Rep. 702; Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Springville v. Fulmer, 7 Utah 450, 27 Pac. Rep. 577.

[4] Springville v. Fulmer, 7 Utah 450, 27 Pac. Rep. 577.

[5] Levy v. Salt Lake City, 5 Utah 302, 16 Pac. Rep. 598; affirming *Id.*, 3 Utah 63, 1 Pac. Rep. 160.

A municipality, the same as an individual, has no right to divert surface water from the channel in which it flows in the street, whether natural or artificial, and however it may have come into the street, and throw it onto the land of another. Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. Rep. 143.

PART XII.

CONTROL BY PRIVATE WATER COMPANIES.

CHAPTER 72.

SUBJECT IN GENERAL AND CLASSIFICATION OF PRIVATE WATER COMPANIES.

§ 1449. Contents of part.
§ 1450. The subject in general.
§ 1451. "Public use" and "public service" distinguished.
§ 1452. Classification of companies.

§ 1449. **Contents of part.**—During the past thirty years the growth and importance of irrigation, and, in fact, all the uses of water, based upon the Arid Region Doctrine of appropriation, are evidenced by the vast number of private water companies which have been organized and are now operating in all the States of the arid and semi-arid portions of this country. The scope of this chapter is to discuss, in all their phases, the organization and nature of these water companies, their powers and duties, and their relations to the State, to other companies, to their stockholders and joint owners, and to the consumers who are furnished with water by these companies. The companies treated in this part of our work are what are known as private companies or corporations, as distinguished from public corporations or irrigation districts,[1] or municipal corporations,[2] treated in other chapters of our work.

Actions involving corporations as parties thereto will be discussed in the next part.[3]

§ 1450. **The subject in general.**—These private water companies are designated and called by many names, such as "irrigation com-

[1] For irrigation districts, see Chap. 70, Secs. 1386-1432.

[2] For municipal corporations, see Chap. 71, Secs. 1433-1448.

[3] See Chaps. 78-83.

panies," "ditch and canal companies," "reservoir companies," "ditch companies," "canal companies," and the like. But whatever they may be called, their ultimate object is usually the same, which is the furnishing of water to their stockholders, or co-owners, or for the furnishing of water to consumers, who may or may not be stockholders or co-owners in the company, either for the purpose of irrigation or for some other useful or beneficial purpose. The object of their organization is for the combination of capital or the combination of its equivalent in labor, in order that greater results may be obtained. As time has gone on and the West has become more and more settled up, the available irrigable lands were found to be further and further back from the streams or other water supply. Larger diverting works and larger and longer ditches and canals are required to be constructed in order to conduct the water to these lands than were required by the early settlers, who usually located their farms upon lands near the streams, where with but little expense and labor the water might be diverted and conducted to their lands. Again, the waters of the smaller streams all having been appropriated, resort had to be made to the waters of the larger streams, reservoirs for the storage of water had to be constructed, and other expenses had to be incurred which were unheard of in the early days. All this required a large amount of capital, oftentimes far beyond the means of any individual or of any community of individuals. Then, again, there would be no community of individuals until the works were constructed and the water available for use. In many sections of the West, which are now thickly settled, the settlers would not come until the water was available for the lands, for the reason that the land was in its wild condition, arid and barren, and in order that it be successfully cultivated it was absolutely necessary that it should be irrigated. This, therefore, required a large investment of capital in the advance of all settlement. It therefore follows that these private corporations operating throughout the entire arid and semi-arid West have been of the greatest influence in the settlement and development of this part of our country. The necessity of these water companies or corporations has been recognized by the statutes of the respective States and Territories, and their formation has been encouraged.

The results of irrigation companies and private corporations far exceed at the present time the results of all other enterprises put

together. Under the Thirteenth Census, for 1910, it is reported that at the end of the year 1909, under co-operative enterprises, there were 4,646,039 acres under actual cultivation; under the commercial enterprises, 1,444,806; under individual and partnership enterprises, 6,258,401 acres. There are also reported under the Carey Act, which enterprises are operated by private corporations in connection with National Government and State, 288,553 acres under actual cultivation in 1909.

§ 1451. **"Public use" and "public service" distinguished.**—As far as the use of the water appropriated and controlled by private water companies is concerned, whether they are incorporated, or unincorporated, under the later authorities, a distinction must be observed between the terms "public use," and "public service." An individual may alone be engaged in the conducting of water from a natural source of supply solely for the purpose of irrigating his own tract of land, and such a use of the water is deemed a public use, for the utilization of which he may condemn a right of way over the private lands of others,[1] yet it could not be contended for an instant that this person was engaged in a public service, as the term is used in connection with public service companies.[2] Again, to carry our illustration further, a group of individuals owning lands in the same immediate neighborhood, and each owning a water right, which he used to irrigate his own particular tract, may band themselves together and organize a water company, either incorporated, or unincorporated, for the purpose of furnishing water to others, and the use to which the water is put is a public use,[3] yet this company, where the distribution of the water is exclusively to its shareholders, is not a public service company, or comes within the restrictions imposed by the statutes regulating

1 Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

See, also, for the acquisition of rights of way by power of eminent domain, Secs. 1059-1098.

2 For public service corporations, see Secs. 1493-1508.

3 See voluntary unincorporated associations, Secs. 1453-1463.

See mutual corporations, Secs. 1479-1489.

See, also, Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Hildreth v. Montecito etc. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395.

such companies.[4] "Public service" or "quasi-public" water companies, may be defined as those companies, either incorporated, or unincorporated, which are engaged in the business of furnishing or carrying water for hire, to all consumers who can be provided with water under their systems, and who may apply for the same, up to the full capacity of such systems. Such a company is, therefore, a public agency, and the use to which the water is put is also a public use. As was said by the Supreme Court of the United States, in a case arising in New Mexico, "As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public, and the appellee is, therefore, a public agency."[5] Such companies are subject to all the rules of law regulating and controlling public service companies, more fully discussed in subsequent sections of this part.[6]

§ 1452. Classification of companies.—There are but two main classes of these private water companies, and these are unincorporated water companies,[1] and those which are duly incorporated under the laws of some State or Territory.[2] These companies, either unincorporated, or incorporated, may be organized solely for the purpose of furnishing and conveying water to others for hire, or they may be organized, by associations of landowners, for the purpose of constructing the necessary works and conveying the water to their own lands and not for hire. These latter may be either unincorporated, or incorporated, and are usually termed "mutual companies."

Unincorporated water companies are also divided into two classes: First, tenancies in common;[3] and, second, partnerships.[4]

[4] McFadden v. Board of Supvrs. of Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397; Shorb v. Beaudry, 56 Cal. 446.

See Secs. 1479-1489.

[5] Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; and citing Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

[6] See Secs. 1491-1508.

See, also, for the regulation of water rates, Chap. 69, Secs. 1368-1385.

[1] See Secs. 1453-1463.

[2] For incorporated companies, see Secs. 1464-1508.

[3] See Secs. 1454-1459.

[4] See Secs. 1460-1462.

For the purpose of this work, corporations duly organized under the laws of some State, or Territory, will be divided into two classes: Corporations organized solely for the mutual benefit of the shareholders,[5] and corporations organized for the purpose of profit or hire.[6]

It must be noted that certain corporations organized originally for profit may, upon the happening of a certain contingency, be afterward absorbed by the water consumers, and thereafter become corporations for mutual benefit of shareholders.[7]

It must be also noted here that corporations organized for the purpose of furnishing water to the general public, or to consumers, other than the shareholders of mutual corporations, are sometimes designated as public service, or quasi-public, corporations.[8]

[5] For mutual corporations, see Chap. 75, Secs. 1479-1489.

[6] For corporations for profit, see Chap. 76, Secs. 1490-1508.

[7] For corporations organized to turn the control over to its consumers, see Secs. 1516-1518.

[8] For public service or quasi-public corporations, see Secs. 1493-1508.

CHAPTER 73.

UNINCORPORATED COMPANIES.

§ 1453. Scope of chapter.
§ 1454. Tenants in common—Who are.
§ 1455. Tenants in common—Rights as between each other.
§ 1456. Tenants in common—Right of partition.
§ 1457. Tenants in common—Contribution for necessary expenses.
§ 1458. Tenants in common—Rights as against third parties.
§ 1459. Mutual water associations—Voluntary associations.
§ 1460. Partnerships.
§ 1461. Analogous to mining partnerships.
§ 1462. Right of majority in interest to control.
§ 1463. Authority of individual members.

§ 1453. Scope of chapter.—In this chapter we will discuss the subject of unincorporated water or ditch companies, including tenants in common, partnerships, and voluntary or community associations, also the rights of the respective owners therein.

§ 1454. Tenants in common—Who are.—Tenants in common are such as hold lands and tenements by several and distinct titles, and not by joint title, but occupy in common, the only unity recognized between them being that of possession.[1]

It has oftentimes happened that the owners of several neighboring farms have together constructed the ditches and diverting works, and have made the appropriation of the water necessary for the irrigation of all their lands, and that, too, without the formal organization of any company. Where a ditch through which water is appropriated and applied to any beneficial purpose is owned by several proprietors, and their relation is not defined by special agreement to the contrary, they are to be regarded as tenants in common of the ditch, and their rights are to be determined and governed by the rules of law governing tenancy in common.[2] So,

1 Bouvier, Law Dict., Sub., Tenant; 2 Bla. Comm. 191.

2 Crowder v. McDonnell, 21 Mont. 367, 54 Pac. Rep. 43; Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. Rep. 996; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341,

too, where several persons join in making an appropriation of water, and where no special, or other agreement exists among joint users of the waters of the ditch as to their proprietary interests, their rights are to be governed by the rules of law relating to tenants in common,[3] but as each ditch may have a number of priorities, ap-

110 Am. St. Rep. 986; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283, all citing and quoting Kinney on Irr., 1st Ed., Sec. 301.

See, also, Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Jones v. Parsons, 25 Cal. 100; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Carpenter v. Webster, 27 Cal. 524; Duryea v. Burt, 28 Cal. 569; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Decker v. Howell, 42 Cal. 636; McConnell v. Denver, 35 Cal. 365, 95 Am. Dec. 107; Campell v. Shivers, 1 Ariz. 161, 25 Pac. Rep. 540; Carns v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170.

The dam and ditch of an unincorporated irrigating ditch association is held by its members as tenants in common. Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

Owners of a ditch, constructed for the purpose of dividing the waters diverted through it, are tenants in common. Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, Abel v. Love, 17 Cal. 233, 11 Morr. Min. Rep. 350; Lytle Creek etc. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426; Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743.

[3] For appropriation of water by tenants in common, see Sec. 862.

See, also, Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Abel v. Love, 17 Cal. 233, 11 Morr. Min. Rep. 350; Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838; Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732; *Id.*, 4 Pac. Rep. 426: "It is said that the waters are appropriated severally by those who did appropriate them. Concede this to be so and we can not perceive that it makes any difference. If they are tenants in common of the water and each of them are tenants seized *per my* and not *per tout* and entitled to the possession of the whole. This must be so, because no one of them can certainly state which part of them is his own. They hold by unity of possession, though their titles are distinct"; and holding that where different persons separately appropriate the waters of a stream, and are severally using the same under certain regulations as to time and manner of such use, they are tenants in common, and each of them may maintain an action to enjoin a trespasser from diverting any portion of the water thus appropriated.

When parties claim their rights through the same diversion and from the same ditch, through which the appropriation was originally made by them or by their predecessors in interest, they are tenants in common. Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

propriators of different dates may be tenants in common in the dam and ditch or other works, without losing their priority of appropriation, and, too, without there being any tenancy in common in the water rights.[4] Tenants in common may also agree among themselves as to how and when the water appropriated by all may be used by the respective co-tenants.[5]

Where both the construction of the diverting works, and the works necessary to conduct the water to the place of use are constructed and owned by several persons acting together, they are tenants in common, both in the works and in the water rights, and their respective rights in each are to be determined according to the law of tenancy in common.[6]

But where two persons join in an appropriation and diversion of water, and conduct the same through a common ditch for a certain distance, with the understanding that each was entitled to one-half of the water, and the water was turned from the common ditch to be used on each one's separate and individual land, it was held under "these circumstances, the right of unity of possession necessary to constitute a tenancy in common did not extend to the right of user, which was essential to the existence of such a tenancy in a water right."[7]

There is a conflict of authority as to whether or not riparian owners are tenants in common in the use of the waters of the same

[4] Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Romminger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213.

It was held in a late California case that though a conveyance created a tenancy in common between the parties as to the ditch with a right to the grantee to extend it, it only gave the grantee, as a subsequent appropriator, a right to the excess water not used on the land of the grantor. Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

[5] "Such an agreement between several persons who have appropriated water as tenants in common does not seem to be objectionable in itself." Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

[6] See cases cited *supra*.

See, also, Shilling v. Rominger, 4 Colo. 100; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494; Rodgers v. Pitt, 129 Fed. Rep. 932, 89 Fed. Rep. 420.

[7] City of Telluride v. Davis, 33 Colo. 355, 80 Pac. Rep. 1051, 108 Am. St. Rep. 101.

To constitute a tenancy in common in a water right, there must be a right to unity of user of the water, and, if such right was destroyed, the common

stream, flowing by their lands. It was said in a recent Oregon case:[8] "One of the distinctions between appropriation of water and use by a riparian proprietor is that the former contemplates tenancy in severalty, while the latter is essentially a tenancy in common with all other riparian proprietors on the same stream,"[9] but the English authorities hold that the law of tenancy in common has no application.[10]

§ 1455. Tenants in common—Rights as between each other.—Where the title to a water right is in tenants in common, the right of one to the use of the water as against his co-tenants will be protected by the courts. The law may be considered as well settled that, where any one of two or more co-tenants in the use of the water of a stream, which has been appropriated by them for a beneficial purpose, diverts for his own use a greater quantity of the water than of right belongs to him, and to the extent to diminish the quantity to which the others are entitled, in consequence of which they are damaged, and their rights violated, such parties are entitled to an injunction enjoining the wrong-doer from diverting the water to their injury.[1] One tenant in common may change the

tenancy ceases to exist. Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059.

See, also, Crowder v. McDonald, 21 Mont. 367, 54 Pac. Rep. 43.

8 Caviness v. Le Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

9 See, also, Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Pratt v. Lamson, 2 Allen (Mass.) 287; Roberts v. Claremont etc. Co., 74 N. H. 217, 66 Atl. Rep. 485, 24 Am. St. Rep. 962.

10 See Shury v. Piggott, 339 Poph. 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280.

1 Lorenz v. Jacobs, 63 Cal. 73; McGillivary v. Evans, 27 Cal. 92, 11 Morr. Min. Rep. 209; City of Salem Co. v. Salem Flouring Mills Co., 12 Ore. 374, 7 Pac. Rep. 497; Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661, where it was held that in the absence of direct proof to the contrary, that it was evidence of a tacit agreement between them that each should be entitled to enjoy an equal share of the flow of the stream, which a court of equity in a proper case would enforce

In a division of the water, seepage and evaporation must be considered, where the diversion is not at the same place. Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Carns v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170, where it is held that a tenant in common in an irrigation ditch or water right may sue for unlawful interference therein by another tenant.

A court of equity has the power to ascertain and determine the extent of the rights of property flowing in a

beneficial use of the water from that to which it was originally applied to some other use, provided that the rights of his co-tenants, or those of others, are not seriously injured thereby.[2] As the possession of the right by a part of the co-tenants is the possession of the rights of all, the mere non-user by one for a period of time does not affect his right to resume the use, even where all of the water was used during the interval by the other co-tenants.[3] It, therefore, must follow that there is no element of hostility in such possession, and that such a holding will not operate to acquire the right by prescription, or even set the statute of limitations running toward that end, until there has been an actual ouster and notice to, or knowledge of, the co-tenant out of possession of the hostile intention upon the part of his co-tenants.[4] To show an ouster of one tenant in common by his co-tenant requires much stronger and more convincing evidence than is necessary to sustain an ordinary claim of adverse possession. As was said in a recent case decided by the Supreme Court of Washington:[5] "We recognize the well-established rule that, when adverse possession is relied upon as an ouster, either the tenant out of possession must have actual notice

natural water course, acquired by persons who hold and are entitled to them, and to regulate, between or among them, the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property. Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838.

See, also, Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Campell v. Shivers, 1 Ariz. 161, 25 Pac. Rep. 540; Lytle Creek v. Perdew, 65 Cal. 447; *Id.*, 2 Pac. Rep. 732, 4 Pac. Rep. 426; Rodgers v. Pitt, 129 Fed. Rep. 932, 89 Fed. Rep. 420.

2 For the change of the use of water, see Secs. 869-871.

A tenant in common in certain water rights for mining purposes, its use for mining having been abandoned, may recapture and use his proportion of the water for irrigation or other lawful purposes. Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451.

3 Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283, where it is said: "The possession of one tenant in common is the possession of all his co-tenants."

See, also, Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717.

4 For the acquisition of rights by prescription, see Secs. 1033-1058; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Colman v. Clements, 23 Cal. 245; Morrill v. Morrill, 20 Ore. 96, 25 Pac. Rep. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; Wheeler v. Taylor, 32 Ore. 421, 52 Pac. Rep. 183, 67 Am. St. Rep. 540; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223.

5 Church v. State, —— Wash. ——, 117 Pac. Rep. 711.

of the adverse holding, or the hostile character of the possession must be so manifest, open, and notorious that notice on his part will be presumed."

One of the incidents of tenancy in common is that each member has the right to sell or assign his interest, or any portion thereof, as he sees fit, with or without the consent of the other co-tenants, and the purchaser of such interest, or interests, succeeds to all the rights of the vendor,[6] but one co-tenant, in the absence of special authority, can not transfer any greater interest than that owned by him.[7]

It is within the general powers of a court of equity to settle by proper decree all disputes between tenants in common as to the diversion and use of the water, and to appoint a commissioner to distribute the water. In some of the States special proceedings are provided for when two or more joint owners are unable to agree as to the relative distribution of the water appropriated by both. But it is held that this special proceeding does not exclude a joint owner from obtaining relief by the ordinary legal and equitable remedies in an action for damages, or for an injunction.[8] Again, a tenant in common of a water ditch, and the water right used through the same, where they are in the possession of his co-tenants who are selling the water rights, may maintain an action

[6] Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 Pac. Rep. 494, where it is said: "One of the incidents of tenancy in common is that a change in its membership does not affect the relations of the tenants, and that each tenant may sell or encumber his interest at pleasure, without regard to the knowledge, consent, or wish of his co-tenant."

A water right may be sold in parts and the purchasers with them become tenants in common. Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334.

[7] Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504.

[8] Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193; *Id.*, 73 Pac. Rep. 548.

The distributor of water in an irrigation ditch, appointed as provided by Rev. Stat., 1899, Secs. 908, 916, as amended by the laws of 1903, p. 122, Chap. 93, acts officially by virtue of his appointment, and has exclusive control of the ditch for the purpose of dividing and distributing the water received into the same until he is removed from office. Mau v. Stoner, 14 Wyo. 183, 83 Pac. Rep. 218, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466.

to recover his share of the rents and profits against his co-tenants in possession, and collecting the same.[9]

§ 1456. Tenants in common—Right of partition.—Although the ditch, dam, and other works for diverting and conveying the water to the place of use are real property,[1] there is one peculiarity which arises from the very nature of such real property, and that is, that it is not subject to a suit in partition. Such works can not be cut up into several portions, and so divided among the respective owners thereof. Neither could the Court decree, with any justice, where two persons were the owners, that one should have one end of the ditch, and the other person the other end. Neither could the ditch be divided between them horizontally in the middle, and one person be decreed the owner of one side, and the other the other side,[2] but water rights under certain circumstances may be divided in a partition suit, especially where such a division will not injure the rights of the respective owners. This may be done by a suit in equity by either apportioning the time and extent of the use, or by a sale of the rights and a division of the proceeds.[3]

§ 1457. Tenants in common—Contribution for necessary expenses.—Each tenant in common is individually bound to keep the ditch or other works in repair. Those making such repairs may compel a contribution upon the part of those who failed to bear

9 Abel v. Love, 17 Cal. 233, 11 Morr. Min. Rep. 350.

1 See Secs. 833, 834.

2 McGillivray v. Evans, 27 Cal. 92, 11 Morr. Min. Rep. 209; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441; Lenfers v. Henke, 73 Ill. 405, 24 Am. St. Rep. 263; Allard v. Carleton, 64 N. H. 24, 3 Atl. Rep. 313; Brown v. Cooper, 98 Iowa 444, 67 N. W. Rep. 378, 33 L. R. A. 61, 60 Am. St. Rep. 190.

3 Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441, where it is said: "Water rights held in common, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds." Citing Smith v. Smith, 10 Paige 470; De Witt v. Harvey, 4 Gray 486; McGillivray v. Evans, 27 Cal. 92; Lorenz v. Jacobs, 59 Cal. 262; Brown v. Cooper, 98 Iowa 444, 67 N. W. Rep. 378, 33 L. R. A. 61; Warren v. Westbrook Mfg. Co., 86 Me. 32, 29 Atl. Rep. 927, 26 L. R. A. 284.

That riparian rights to the use of water may be apportioned between the riparian owners, see Chap. 78, Sec. 1538.

their share of the expense, or labor. So, where plaintiff and defendants were tenants in common of a ditch, and the plaintiff neglected to repair his portion of the same, and the defendant stopped up the ditch, and thereby prevented the water from flowing to the plaintiff's lands, it was held that the defendant had no right to stop up the ditch, for the reason that, being a tenant in common, he was equally bound to make the repairs, and that he was liable in damages for his act.[1]

But where the expenses have been borne by a portion of the co-tenants, in the most of the States there are statutory provisions for a contribution of these expenses between co-tenants or co-owners of a ditch, or other works, for the necessary repairs, from those who have failed in the first instance to bear their proportion. But it is held that the work done for which the money or labor was expended, must be necessary, and be of some actual benefit to the co-owner, in order to make him liable for his share.[2] These necessary expenses may include the expenses of collection, including attorneys' fees, of the proportion from the parties who have refused to pay their share of the necessary expenses of maintenance.[3]

1 Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666.

The fact that a person entitled to the use of one-half of the water of an irrigation ditch is denied such right by the other owner is no defense to an action by the latter for damage caused by the former digging another trench and appropriating all the water. Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

See, also, Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Carns v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170, holding that the defaulting owner is liable for his *pro rata* of the necessary expenses.

Fillmore City v. Fillmore Roller Mill Co., 36 Utah 339, 103 Pac. Rep. 967, where it was held that a co-tenant can not be compelled to contribute for the expenses in replacing a dam or reconstructing a ditch where the original ones had been washed out at a point other than where they were previously located, unless it be shown that the new works answered the same purpose and gave the co-tenant the same rights as he previously had.

See, also, Rogers v. West Riverside etc. Co., —— Cal. App. ——, 124 Pac. Rep. 447.

2 Arroyo etc. Co. v. Bequette, 149 Cal. 543, 87 Pac. Rep. 10, where it is held that a co-tenant can be compelled to contribute his share of the expenses for repairs made above his point of diversion, but not for those made below that point.

3 Where the expenses of maintaining and repairing an irrigating canal is to be borne ratably by the parties entitled to convey water through the same in proportion to the amount of water used, the expenses of collecting their ratable proportion from the par-

§ 1458. Tenants in common—Rights as against third parties.—As co-tenants of a water right, they are entitled to use all of the water appropriated by them. Therefore, when an outsider wrongfully diverts from them, or one of them, he is injuring each and all of them. He may be doing more injury to the one who is entitled to the use of the water at the time he is diverting it than to the other co-tenants; but, he is at all times, when he is so wrongfully diverting the water, guilty of a trespass on the right of each and every one of the co-tenants. It therefore follows that each co-tenant has the right to have the preventive powers of the court put a stop to the illegal acts of a trespasser, and that, too, without joining in the suit all of the other co-tenants as parties plaintiff.[1] So, too, whether they are joint appropriators, holding the estate as joint tenants, or as tenants in common, the right is the same as against the common enemy. Each has the right, without joining the others,

ties who have refused to pay is a part of the necessary expenses of maintenance, since, unless the rate due from such parties is collected, there would be no fund for maintenance and repair. Rogers v. Riverside etc. Co., 132 Cal. 9, 64 Pac. Rep. 95.

1 That one tenant in common may preserve the common estate for the benefit of his co-tenants, see Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525, where it is said: "One tenant in common may preserve the entire estate held in common. This doctrine is applicable where the common estate is a water right, so long as the tenant in common has both the necessity for use, and actually uses the water for a beneficial purpose."

See, also, Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666; Union Consol. M. Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541, 5 Morr. Min. Rep. 323; Clymer v. Dawkins, 44 U. S. 3 How. 674, 11 L. Ed. 778; Vanwinkle v. Curtis, 3 N. J. Eq. 2 Green Ch. 422; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Union M. & M. Co. v. Danberg, 81 Fed. Rep. 73; Miller & Lux v. Rickey, 127 Fed. Rep. 573; Lytle Creek etc. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; Rodgers v. Pitt, 129 Fed. Rep. 932, 89 Fed. Rep. 420.

When parties claim their rights through the same diversion and from the same works through which the appropriation was originally made by them or by their predecessors in interest, they are tenants in common; and it is held by the Oregon Court that where, in a suit with others on the stream involving rights thereon, no issues are framed between such tenants in common, their relative rights may be left undetermined and only the rights as against other parties to the suit will be decreed in the action. Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

to protect the whole estate against the acts of a trespasser,[2] and, where, in a suit against others on the stream involving the rights thereon no issues are framed between tenants in common, their relative rights may be left undetermined, and only their rights as a whole as against the other parties of the suit will be decreed.[3]

§ 1459. Mutual water associations—Voluntary associations.—It has oftentimes happened throughout the West that a number of landowners, living in the same community, and along the same source of water supply, for the purpose of better protecting their rights, and the division of the water of the stream between the respective owners, without formally incorporating, have banded themselves together into voluntary associations. These associations are sometimes called "community associations," or "mutual associations," and the ditches and canals are referred to as "community ditches, or canals." These associations are organized for the purpose of constructing the necessary works for the diversion of the water, and to conduct it only to the lands of the members of the association, and not for hire. The only distinctions between these voluntary associations, and mutual corporations, is that the latter are formally incorporated under the laws of some State or Territory, while the former are not.[1] The title to the water rights remains in the individual members, and is not in the association. These associations are oftentimes organized with a considerable degree of formality, officers being elected, and by-laws, rules, and regulations being adopted for the government of the respective rights of its members, and of the general affairs of the association.[2]

By associating themselves together in this manner the water users become tenants in common of all of the waters which all of the members of the association own, or control, and also of the diverting works, ditches, and canals, used in connection with the same; and each landowner of such association is entitled to his distributive share of the water, according to his rights. The title

2 Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426, 2 Pac. Rep. 732; Carpenter v. Webster, 27 Cal. 524; Williams v. Sutton, 43 Cal. 71.

3 Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

1 For mutual corporations, see Secs. 1479-1489.

Helm, C. J., in Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

2 Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

to the water rights not being in the association, as is the case where there is a corporation, but in the individual members of the association, according to each one's respective share,[3] and, as evidencing the share of water to which each member is entitled, sometimes a certificate is issued to him by the association, duly executed by the officers thereof, which certificate is somewhat similar to stock certificates issued by corporations. But whether the shares of an individual members of these associations are represented by certificates, or not, as is the case of other tenants in common, he has the right to sell, or assign his interest, or any portion thereof, as he sees fit, with or without the consent of the other members of the association, and the purchaser of such interest or interests succeeds to all the rights of the vendor.[4] A person joining such a voluntary association does not vest in the majority the power to injure the rights of such person. So, by entering into such a community enterprise, the minority does not vest in the majority the power to change the course of the ditch constructed by the association to the injury of the rights of the minority, and an injunction against such a change will be granted by the Court.[5] The associations thus created are not endowed with the general powers pertaining to corporations. They have only the powers expressly, or by necessary implication, granted to them by the Acts creating them, and no more.[6]

In some jurisdictions the status of these voluntary associations

[3] "By associating together under the irrigation laws of 1876, Rolfson and his associates became tenants in common of the waters of that stream, and each land owner of such district was equally entitled to the use of the water brought into such district, according to their rights, by paying their proportionate share of the expense." Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Hildreth v. Montecito Cr. W. Co., 139 Cal. 22, 72 Pac. Rep. 395; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589.

[4] Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494, where it is held that certificates issued by an unincorporated voluntary association to its members, and treated by them as evidence of the right to control its property, and to appropriate water by means of a common ditch, must be construed as water right contracts, and a sale thereof by the holder is, in effect, a conveyance of his interests in the property.

[5] Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589.

For the right of the majority to control in voluntary associations, see Sec. 1462.

[6] See Elmore v. Drainage Commissioners, 135 Ill. 269, 25 N. E. Rep. 1010, 25 Am. St. Rep. 363.

is defined by statute. This is especially true in Arizona and New Mexico, where the community ditch, or "public acequia," was the usual and ordinary means for the diversion and distribution of the water. Each village or group of farmers constructed its own common ditch. The management and control of this ditch was regulated by law, and not by the agreements and contracts of the consumers of the water diverted by it. Hence, every landowner under such a ditch, whether he used the water or not, was required to contribute his quota of labor, or money, required in the maintenance and preservation of the ditch. Such ditches are recognized and treated as public property, in much the same way that a public road under our laws is regarded. In these jurisdictions it is provided that all community ditches, or acequias, or rather the communities using them, shall be considered as corporations, or bodies corporate, with power to sue or be sued as such.[7] In this respect, the old Spanish and Mexican laws were closely followed in the early statutes of these Territories.[8]

§ 1460. **Partnerships.**—There is no doubt but that diverting works, ditches, canals, and water rights, may be owned and controlled as partnership property, as is the case with any other property; and, when so held, for the purpose of changing the partnership relations, or settling the partnership affairs, such property will be subject in equity to all the incidents of other partnership property. And oftentimes the determination of the respective rights in controversy regarding interests in ditch and canal properties, together with the water rights, in the Western States depends upon the question whether such property was held as partnership property, in the strict sense in which this term was used, or was held in the more common mode of holding such property in common. So, where three persons became the equal owners in two ditches, and they formed a partnership, the ditches forming the main part of the partnership property, and they owed partnership debts, and one of the partners mortgaged his interest in the property to se-

7 Comp. Laws N. M., 1887, Sec. 8; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Comp. Laws. Ariz., Chap. 55, Secs. 1, 3, 7; Slosser v. Salt River Val. C. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

8 For the Mexican and Spanish laws regulating water rights, see Chap. 30, Secs. 570-584.

cure his individual debt, it was held in an early California case that the mortgagee acquired only the mortgagor's interest in the surplus after the payment of the partnership debts; and, if these debts equaled, or exceeded the value of the property, and it was afterwards sold by the partners to pay the partnership debts, the mortgagee, as against the purchaser, held no interest in the property, liable to be sold, and the mortgage could not be foreclosed.[1] Again, such was the case where decedent posted notices of appropriation of water, intending to acquire a partly completed irrigation canal, and use it in distributing the water appropriated. Being without sufficient means, he interested two other persons, it being agreed that a corporation should be formed to carry on the enterprise. Decedent conveyed all his rights to the other parties in trust, to be conveyed by them to the corporation on its formation. Afterward one of these parties obtained, individually, a lease on the canal, and posted notices of appropriation substantially covering the water claimed under the previous notices. Upon a suit to establish a constructive trust in the enterprise, it was held that the decedent and the defendants were partners in the enterprise until the formation of the corporation, and that the defendants were trustees of the partnership, holding, as such, the rights conveyed by the decedent.[2] So, again, where the owner of the legal title to a canal and water right entered into a partnership, and retained the legal title at all times to such canal and water right, and the partnership was thereafter dissolved, and a partnership settlement had, a subsequent deed, by the outgoing partner, to any interest he might formerly have had in such canal and water right, passed no title.[3]

In the ownership and control of water rights and other property incident thereto, oftentimes the relations of the several owners have some of the incidents of both tenancy in common and a co-

1 Jones v. Parsons, 25 Cal. 100; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Lytle Cr. W. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389.

2 Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. Rep. 867.

See, also, Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198, where it was held that no partnership existed.

One partner in a water right acquired by appropriation can not sell and convey the interest of his co-partner. Henderson v. Nichols, 67 Cal. 152, 7 Pac. Rep. 412.

3 Briggs v. Murray, 29 Wash. 245, 69 Pac. Rep. 765.

partnership. As, for example, there may be a tenancy in common in the ownership of the ditch, and a strict partnership between the owners thereof for the purpose of diverting the water and selling it to consumers. The rule that applies to mining claims also applies to ditch property and water rights. The title to the claims may be held by the parties as tenants in common, while upon the other hand, there may be a strict business partnership for the purpose of working the claims and selling the ore produced therefrom; or there may be a partnership, both in the ownership of the mining property, and in the working of the same. Whether the relationship of the owners is one or the other, must depend upon the facts in each particular case.[4] So, where two corporations entered into an agreement that the proceeds from the sales of water, after deducting operating expenses, including the necessary extension of pipes, were to be divided between the two companies, and two trustees were named in the contract, one appointed by each corporation, who were given general charge under the contract, it was held that no partnership was created between the two corporations, for the reason that the contract did not cover all of the business of either party, though the whole of the business of each corporation related to the sale of water.[5]

As is the case with a tenancy in common, so it is with a partnership; some of the statutes of the States provide that in case of a dispute as to the division of the water between the respective partners, a distributor, or a commissioner, will be appointed to divide the water between the owners thereof.[6]

[4] Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Duryea v. Burt, 28 Cal. 569; Henderson v. Nichols, 67 Cal. 152, 7 Pac. Rep. 412; O'Connor v. North Truckee D. Co., 17 Nev. 245, 30 Pac. Rep. 882.

"A mere joint ownership or community of interest in property does not necessarily constitute a partnership, though the income from it may be divided." Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

[5] San Diego W. Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839.

[6] The jurisdiction of the District Court to appoint a distributor of water flowing in a partnership irrigation ditch, authorized by Rev. Stat., 1899, Secs. 908, 916, as amended by Laws, 1903, p. 122, Chap. 93, does not depend on the consent of the parties, but on the filing of a verified petition alleging joint ownership of the ditch, that the parties can not agree on a distribution of the water, and praying for the appointment of a distributor. Mau v. Stoner, 15 Wyo. 109, 87 Pac. Rep. 434; *Id.*, 14 Wyo. 183, 83 Pac. Rep. 218.

§ 1461. **Analogous to mining partnerships.**—Unless otherwise defined by specific agreements between them, the relations between the owners of ditch and canal property, and the water rights used in connection therewith, where they are defined as a co-partnership, are more in the nature of what are known in the West as mining partnerships than those of the ordinary trading partnerships. This undoubtedly grew out of the fact that the water rights first appropriated under the Arid Region Doctrine of appropriation were first used for the purpose of working the mining claims in California.[1] As was said by Mr. Justice Field, in an opinion rendered in the Supreme Court of the United States,[2] "Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all communities; indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." In an ordinary partnership one can not buy in, or sell out, an interest. Such an act would of itself work a dissolution of the partnership and necessitate its final settlement and closing out. Upon the other hand, in a mining partnership, this very thing can be done, and that, too, without a dissolution of the partnership.[3]

See, also, Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193, 73 Pac. Rep. 548.

1 For the history of the doctrine, see Secs. 595-626.

2 Kahn v. Central Smelting Co., 102 U. S. 641, 26 L. Ed. 266.

3 Bissel v. Foss, 114 U. S. 252, 29 L. Ed. 126, 5 Sup. Ct. Rep. 851, where it is said: "This case settles two propositions: First, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and, second, that the sale and assignment by one of the associates, of his interest, does not dissolve the mining partnership. It follows from these propositions that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such sale injures no right or property of the other associates. Much less does the purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger or one of the associates of his share in the property and business of the association."

See, also, Duryea v. Burt, 28 Cal. 569; Settembre v. Putnam, 30 Cal. 490; Taylor v. Castle, 42 Cal. 367; Montgomery v. Harrington, 58 Cal. 270; McConnell v. Denver, 35 Cal. 365; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96.

§ 1462. Right of majority in interest to control.—Whether the status of the parties of an unincorporated water company be that of tenants in common, or partners,[1] as to the general policy which shall govern the affairs of the company, the general rule of law is that the majority in interest has the right to control. As from the nature of this kind of property it oftentimes happens that it can only be used in its entirety, it is at times indispensable to the successful conduct of the business that those owning the major portion of the property should have the power to control the policy of the company in cases where all can not agree, otherwise the operations might be wholly discontinued, or worked to a disadvantage. "A majority of such tenants in common have the right to control the affairs of the ditch. . . . Neither law nor equity will aid a stubborn minority in preventing the majority from doing an act for the manifest good of the whole community, where no one is injured, but all are benefited."[2] The proposition contained in the above quotation must be conceded, whereby the policy adopted by the majority does not materially injure the vested rights of the minority. But to go still further, as held in the majority opinion of the same case, while under the original community plan, no power was vested in the majority to change at will the location of the main ditch, so as to injuriously affect the rights of the minority, except by the consent of such minority, where the maintenance of the ditch becomes a practical impossibility this rule does not obtain, and such main ditch may, under such circumstances named, be changed to an extent sufficient to avoid such insuperable obstacle, and that, too, without the consent of the minority to the change.[3]

1 For tenants in common, see Secs. 1455-1458.

For partnerships, see Secs. 1460-1462.

2 Mills, C. J., in dissenting opinion, Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589, citing Kinney on Irr., 1st Ed., Sec. 304; Abel v. Love, 17 Cal. 233, 11 Morr. Min. Rep. 350; Bartholomew v. Fayette Irr. Co., 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912; affirmed in 31 Utah 220, 87 Pac. Rep. 707.

3 Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589, but where an injunction against such a change was affirmed for the reason that the right to have the original community ditch run through or near the lands of the plaintiffs upon its ancient course was a property right in the plaintiffs, secured by the original mutual agreement by which the ditch was constructed upon such course, and "where it would take away, to a certain extent, the value of property which has been improved in reliance upon that agreement."

Therefore, it may be stated as a general proposition that, notwithstanding the danger at times of the abuse of power in such cases, what may be necessary and proper for the carrying on of the business of voluntary associations, and mining partnerships, for the joint benefit of all interested should be determined by those holding in the aggregate the major part of the property, especially where the rights of the minority owners are not materially injured. And, if the powers which are thus attempted to be exercised are not necessary and proper for the general success of the enterprise, those whose interests are materially injured thereby, have a right to resort to the courts for redress, either by way of an action for damages, or for injunctive relief.[4]

Neither has such an association composed of the majority of the water users from a certain stream a right or the power to interfere with, or regulate, the use of the water of the minority owners who did not join the association. As was said in a Utah case: "Assuming now, that a majority of the tenants in common, in a meeting where all are entitled to representation and to participate in the proceedings, have power to control the minority with respect to the regulation and distribution of the water when no vested right of the minority is impaired by the exercise of such power, still a majority of such co-tenants may not control the minority at a meeting or proceeding in which they have no right of representation nor voice in the action taken."[5]

§ 1463. **Authority of individual members.**—The power of the individual members of an unincorporated water company to bind the company, or his associates, also depends upon the status of the company. If it is a strict business partnership one member has this power; but, upon the other hand, if the company is a mere tenancy in common, one member can neither bind his co-tenants, nor the association, without direct authority granted to him for

[4] Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Elmore v. Drainage Commissioners, 135 Ill. 269, 25 N. E. Rep. 1010, 25 Am. St. Rep. 363; Abel v. Love, 17 Cal. 233, 11 Morr. Min. Rep. 350; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116; Duryea v. Burt, 28 Cal. 569.

[5] Bartholomew v. Fayette etc. Co., 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912; *Id.*, 31 Utah 220, 87 Pac. Rep. 707; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520.

that purpose. In a partnership, each partner has the authority to represent all the partners, and to bind them by his acts so far as they relate to the partnership business.[1]

But, where the company, or association, is founded upon a tenancy in common, a member of such association has no general authority by virtue of such membership to bind either the association or his co-tenants by his contracts. The same proposition is true as to mining partnerships. One mining partner has not the power to bind his associates by engagements with third persons to the same extent that an individual partner of an ordinary trading concern is competent to bind the firm of which he is a member.[2] Although a tenancy in common may have some of the incidents of a partnership, the powers of the several members are different from those of the members of the commercial partnerships. They are not formed from the *delectus personae*, from which principle the rights and obligations of ordinary trading partnerships are derived. They are founded upon a union of property of the individual owners. Therefore, the power of one member of such an association is limited to what is directly granted him by his co-tenants. However, full power may be granted to one co-tenant to bind them. So, if an unincorporated ditch company duly authorizes its superintendent to give the company notes for materials purchased by the company, all members of the association are bound thereby, whether they were such members at the time when the materials were purchased or not.[3]

1 San Diego W. Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839; Duryea v. Burt, 28 Cal. 569; Jones v. Clark, 42 Cal. 180.

2 For mining partnerships, see Sec. 1461; McConnell v. Denver, 35 Cal. 365; Jones v. Clark, 42 Cal. 180; Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96 Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Settembre v. Putnam, 30 Cal. 490.

3 McConnell v. Denver, 35 Cal. 365.

CHAPTER 74.

ORGANIZATION AND POWERS OF CORPORATIONS.

§ 1464. Incorporated water companies—In general.
§ 1465. Objects of incorporation.
§ 1466. Organization of water corporations.
§ 1467. Organization of water companies—Incorporation by legislative enactment.
§ 1468. General powers of water corporations.
§ 1469. The purposes of a corporation must be determined from its articles.
§ 1470. Power of acquiring water rights by appropriation.
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§ 1475. Relation to consumers—Title to the water rights.
§ 1476. Relation to consumers—Where the company is deemed merely the carrier—Colorado rule.
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§ 1478. The exemption from taxation.

§ 1464. Incorporated water companies—In general.—Incorporated water companies are those which are duly organized under the corporate laws of some State, or Territory. For the purposes of this work we have divided these corporations into two classes:[1] First, corporations which are organized solely for the mutual benefit of its stockholders;[2] second, corporations organized solely for the purpose of furnishing water to others than to its stockholders, and for the express purpose of profit.[3]

There are certain rules of law which appertain to all corporations regardless of the above classifications. In this chapter we will discuss the steps necessary to be taken for the organization of corporations, their general powers, and the relation of corporations to consumers.

[1] For the classification of water companies, see Sec. 1452.

[2] For mutual corporations, see Secs. 1479-1489.

[3] For corporations for profit, see Secs. 1490-1508.

§ 1465. Objects of incorporating.—The principal objects for the organization of water corporations is to secure in the aggregate a larger amount of working capital, in order that larger, better, and more permanent diverting works, larger and longer ditches may be constructed, and thereby a greater area of land may be brought under cultivation by means of the same works, thereby insuring a greater economy in the use of water, and at a smaller cost, than though the same area of land was brought under irrigation and cultivation through many works constructed by individual effort. Then, again, the difficulties arising where the ownership and control of the ditch property and the water rights used in connection therewith are in two or more individuals, either as tenants in common,[1] or as partners with their different ideas for the management and operation of the property, and especially of those of "an obstinate minority," and the troubles occasioned in securing the contribution from the co-owners for the necessary expenses of maintenance,[2] compel, at times, the organization of a corporation in order that the affairs of the company and the operation of the common property may be governed by one distinct policy, and under a definite and single management. As was said in an Arizona case:[3] "The great cost of constructing dams, and canals, and the maintenance of these when constructed, and the advantages in the way of conservation and saving of water which result on the erection and maintenance of large and permanent dams and canals, preclude the policy of restricting the ownership and control of such dams and ditches to actual appropriators. The difficulties arising from the ownership and control of such means of diversion by one or more individuals as tenants in common are such as to make it necessary, almost, that corporations be organized for this purpose. Such corporations have been organized, and their rights to the ownership and control of their property have been recognized, in all the arid States and Territories."[4] And, therefore, the

1 For tenants in common, see Secs. 1454-1458.

2 For contribution of expenses, see Sec. 1457.

3 Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 Pac. Rep. 332.

4 "But it is only by the outlay of large sums of money in constructing and maintaining canals or ditches that the business of agriculture, in portions of the State, can be successfully carried on. The average farmer is often too poor to make the expenditure necessary in owning and operating a main ditch of his own. Besides, it is almost always a matter of economy to

recognition of the necessity for these water corporations has been both by statutory law,[5] and by the decisions of the courts in every State and Territory of the arid and semi-arid West, including that of the Supreme Court of the United States,[6] and their formation has been encouraged, and their conduct and operations regulated.[7]

§ 1466. Organization of water corporations.—As private corporations exist only by virtue of the laws of the State, or Territory, under which they are organized, the statutes of the State, or Territory, must be strictly followed in respect to the requisites required in its articles of incorporation. Although the general corporation laws usually apply, in most of the States of the arid and semi-arid West, there are special provisions of the statutes governing the organization and operations of water companies, especially when they are organized for the purpose of the irrigation and reclamation of lands.[1] These special statutes also regulate

convey water long distances through a single large main, and there distribute it to the consumers by means of small laterals.'' Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142.

5 For statutes relating to water corporations of the various States, see Part XIV.

6 Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

''Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. They may provide that their several interests in such enterprise shall be represented by shares of stock.'' Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

See, also, Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Thorpe v. Tenem D. Co., 1 Wash. 566, 20 Pac. Rep. 588; McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397.

7 See for the regulation of the water rates which may be charged, Chap. 69, Secs. 1368-1385.

For the regulation of corporations, see the following sections.

1 For special statutes governing such corporations, see Part XIV.

A corporation organized under the laws of a Territory have the same rights in this respect as those organized under the laws of a State. Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

Prima facie proof of the existence of a corporation is made by the introduction by its original articles of incorporation, and the extension or renewal thereof. Reno v. Reno Juchem D. Co., —— Colo. ——, 119 Pac. Rep. 473.

these corporations respecting their powers of securing water rights and rights of way, the protection of these rights, and the duties of such corporations and their liabilities.

The provisions of the statutes relative to the filing of the articles of incorporation of the State where the corporation is organized must also be strictly complied with. And, where the corporation is organized under the laws of one State, or Territory, and its operations are carried on in another, the statutes relative to the filing of the articles in the latter must also be complied with. There must also be an acceptance of the constitution and laws of the State where the operations are to be carried on.[2] If a foreign corporation is not willing to subject itself to the burden imposed by the constitution and laws of the State wherein it is to carry on its operations, relative to the appropriation, distribution, and sale of waters, it should not go into that State, and avail itself of the rights of appropriation conferred by the same constitution and laws. Taking those benefits, it assumes the corresponding burden, and will not thereafter be heard to assert the one and repudiate the other. It is, therefore, held that, if a foreign corporation does not comply with the laws of the State where its operations are proposed to be carried on, it has no power to acquire water right by appropriation under the laws of such State.[3] It therefore follows that the stat-

2 A foreign corporation coming into California and acquiring water and water rights under the provisions of the State constitution (Const., 1879, Art. 14, Sec. 1), which declares that the use of water appropriated for sale, rent, or distribution is a public use, subject to the regulation and control by the State, and that the rates of compensation shall be fixed annually by cities, counties, and towns, will not be heard to assert that the constitution and laws under which it has acquired such rights are in contravention of the Constitution of the United States. Such corporation may, however, question the reasonableness of the rates established by any municipality. San Diego Land & Town Co. v. City of National City, 74 Fed. Rep. 79; affirmed, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

3 "The appellant corporation did not comply with the laws of this State (Utah), and has no power to engage in its business of mining, or to acquire any water rights under the laws of this State. . . . The appellant corporation never filed with the Secretary of State of the State of Utah a copy of its articles of incorporation, by either name under which it was incorporated, and never accepted the laws or the constitution of Utah, nor has it appointed any agent or fixed any place of business within the State as required by law. The defendant corporation, therefore, is not entitled to the benefit of the laws of this State with reference to corporations." Tel-

utes of both the States where the corporation is organized and where its operations are proposed to be carried on, must be strictly complied with. And, where the statute requires that the articles of incorporation must be filed in the county where the property of the company is located and its operations carried on, this provision must also be complied with.[4]

§ 1467. Organization of water companies—Incorporation by legislative enactment.—Although the most of the States of the Union have general corporation laws under which all private corporations must be organized, in some, however, the power of incorporation lies only with the legislature itself. Therefore, in order to incorporate a company in one of these States, its promoters must have presented to that body a bill to that effect, which must be passed the same as any other bill, before it becomes a law; and, upon its passage, a charter is issued by the State to such corporation, granting the powers therein set forth. However, the authority granted by the legislature to corporations so organized, to acquire water rights, does not confer the water rights themselves. Water rights can only be acquired in the manner prescribed by the law of the State where such rights are sought to be acquired, whether it is by a corporation, or by a private individual,[1] and a corporation organized by legislative enactment stands on no bet-

luride Pr. Trans. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; see same case below, 23 Utah 22, 63 Pac. Rep. 995.

See, also, State v. Southern P. R. Co., 52 La. Ann. 1822, 28 So. Rep. 372; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 32 L. Ed. 837, 9 Sup. Ct. Rep. 409; Barse Live Stock Co. v. Range Valley Cattle Co., 16 Utah 59, 50 Pac. Rep. 630.

[4] Emigrant D. Co. v. Webber, 108 Cal. 88, 40 Pac. Rep. 1061.

[1] Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711, where it was contended by the appellant, that by its charter from the Territory of Kansas, confirmed by the Territory of Colorado, it acquired the exclusive right to all the waters of the South Platte River, and the exclusive privilege of using the same for mechanical, agricultural, mining, and city purposes; and where the Court held that there was no law or decision of either Kansas or Colorado which declares that a party may secure a legislative grant to the exclusive use of waters of a natural stream, which would allow the same to remain in abeyance for a long series of years without making use of the exclusive privilege so granted; and that, from the earliest times, rights to the bene-

ter footing in this respect than corporations organized under general laws, or than private individuals; although some of the legislatures, at an early day, attempted to confer upon certain corporations and individuals certain special rights.[2] This was attempted by the Territory of Utah, and it was undoubtedly these illegal Acts which prompted Mr. Justice Boreman in rendering the opinion in the case of Munroe v. Ivie,[3] to say: "Water is something that the appellants could not control in any other way than by appropriation. They could not go and dig ditches and bring

ficial use of water from natural streams have been acquired by diversion, through prior appropriation, rather than by grant.

2 See for example the early Act of the legislature of the State of Deseret (now Utah), approved Jan. 9, 1850, wherein it was provided: "Be it ordained by the General Assembly of the State of Deseret: That Brigham Young have the sole control of City Creek and Canyon; and that he pay into the public treasury the sum of five hundred dollars therefor." Comp. Laws Utah Territory, 1855, p. 63.

And again the Act approved Jan. 9, 1851, wherein it is provided: "Sec. 1. Be it ordained by the General Assembly of the State of Deseret: That Heber C. Kimball have the exclusive privilege of conveying the waters of North Mill Creek Canyon, and the waters of the canyon next north, to wit: about half a mile distant, to some convenient point below the mouth of the two canyons, and of appropriating the same to the use of a saw mill, grist mill, and other machinery.

"Sec. 2. Nothing herein contained shall prevent the waters aforesaid from being used, whenever and wherever it is necessary for irrigating." Comp. Laws Utah Territory, 1855, p. 64.

See, also, the Act to incorporate the Provo Canal and Irrigation Company, approved Jan. 17, 1853, where in Section 2 it is provided that: "The aforesaid company shall have the right and privilege, and the same are hereby conferred, to take out one-half of the waters of the Provo River, at or near the mouth of the canyon." Comp. Laws of Utah, 1855, p. 233.

Many other examples of a similar character might be cited. The illegality of these Acts need not be commented upon. And, with a quotation from another illegal Act attempting to legalize the above and other illegal Acts, we will leave the subject without comment. The Act referred to was that approved Jan. 14, 1854, Section 1 of which provides as follows: "Sec. 1. Be it enacted by the Governor and Legislative Assembly of the Territory of Utah: That all questions of law, and the admissibility of testimony, shall be decided by the Court; and no laws nor parts of laws shall be read, argued, cited, or adopted in any court, during any trial, except those enacted by the Governor and Legislative Assembly of this Territory, and those passed by the Congress of the United States, when applicable; and no report, decision, or doings of any court shall be read, argued, cited, or adopted as precedent in any other trial." Comp. Laws of Utah, 1855, p. 260.

3 2 Utah, 535.

water down and let it run to waste. If they failed to appropriate it, any stranger could appropriate it, and it was not necessary that such stranger should be a member of the irrigating company, nor could such company injure, or trample upon his rights. This is a free country and the lands are open to all, and the appropriation of the water is open to all and the legislature can not pass any law that will put it into the power of an irrigating company to control and manage the waters of any part of the Territory, regardless of the rights of parties. Nor will the Court allow irrigating companies to become engines of oppression."

For an example of incorporation by legislative enactment, see the case where the Willamette Woolen Manufacturing Company was incorporated by an Act of the Territorial legislature of Oregon, on the 17th day of December, 1856, and thereby had conferred upon it "power to bring water from the Santiam River to any place near Salem," and Section 6 of the Act providing: "Said corporation shall have the exclusive right to the hydraulic powers and privileges created by the water which is taken from the Santiam River, and may use, rent, and sell the same, or any portion thereof, as it may deem expedient."[4]

§ 1468. General powers of water corporations.—The general powers of private incorporated water companies, although limited by their articles of incorporation, and the laws of the respective States under which they are incorporated, and where their operations are carried on,[1] are still many and varied. They have the power to make direct appropriations of the water of the natural streams and other sources of water supply, either for the purpose of applying such waters themselves to some beneficial uses or purposes, or for the express purpose of selling the rights to others who will so apply them.[2] They may also acquire the title to water rights by purchase;[3] and, in some of the States, by condemnation proceedings. Among the powers granted to these corporations is

4 Willamette etc. Co. v. Bank of British Columbia, 119 U. S. 191, 30 L. Ed. 384, 7 Sup. Ct. Rep. 187; see, also, the case of Salem Capital Flour Mills v. Stayton etc. Co., 33 Fed. Rep. 146, involving the same facts.

1 See Sec. 1469.

2 Right of corporations to appropriate water, see Secs. 684, 1470.

3 For the sale of water rights, see Chap. 53, Secs. 994-1032.

the right to acquire rights of way for their diverting works, ditches, and canals, either by purchase, or by the right of eminent domain.[4] They also have the power of taking advantage of the various right of way Acts of Congress.[5] They have the power to construct the necessary diverting works, ditches, canals, and the other works necessary to divert the waters from the natural sources of supply, and to conduct them to the place of use. They may also sell the water rights to the water appropriated to others than to the stockholders of the corporation.[6] They may also limit, by their articles of incorporation, the power to furnish water only to the stockholders of the corporations, who must then be land owners, or in the position to apply the water to some beneficial use, or purpose.[7] They may be specially organized to work in co-operation with the National Government in irrigation projects constructed and operated under the National Reclamation Act.[8] And, again, they may be organized to work in co-operation with both the National Government and a State, as is the case where such private corporations are organized to take advantage of the Carey Act.[9]

They may be given the power to raise money for their operations by the mortgaging of their property for security of the payment of the money so borrowed.[10] They may also raise money for the sale of water rights,[11] or by assessments levied upon the outstanding stock of the corporation.[12]

4 For the sale of ditches and canals, see Sec. 1003.

For rights of way over the public lands, see Secs. 927-971.

For rights of way over private lands, see Secs. 972-993.

5 See Chap. 51, Secs. 927-971.

6 For the power of corporations to sell water rights, see Sec. 1492.

It must be noted, however, that in those States which regard the consumer as the appropriator of the water, and, therefore, the owner of the water right, and the water company as merely the carrier of the water for hire, that it is held that the terms "selling" and "renting" water or water rights is a misapplication of those terms. See Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

See, also, for the relation of company to consumers, Secs. 1475-1477.

7 For mutual corporations, see Secs. 1479-1489.

8 See water users' associations, Secs. 1281-1286.

9 For the Carey Act, see Chap. 67, Secs. 1312-1336.

10 See Secs. 1019-1022.

11 See Secs. 703, 1492-1507.

12 For assessments, see Sec. 1489.

The statutes of the various States of the arid and semi-arid West encourage the organization of these corporations and their operations. They protect the property rights of these companies and provide severe penalties for their injury and destruction. In a number of the States, owing to the fact that the operations of ditch and canal companies so increase the value of the taxable property in the neighborhood, the irrigation works of the companies are made exempt from taxation, either for a certain number of years after their organization or perpetually. In most of the States, there are statutory provisions providing for the fixing of maximum rates for water rights which may be charged for the sale of water by these companies; and, when the rate is fixed, according to the statute, the companies affected thereby must comply with it.[13] These corporations are made liable in damages for all injuries to the property of others which may be caused by their negligence.[14]

These subjects have already been discussed in this work, or will be discussed in the succeeding sections.

§ 1469. The purposes of a corporation must be determined from its articles.—The purposes for which a corporation is organized are limited to such as are expressly defined in its articles of incorporation, except such as are expressly incidental to such purposes.[1] The articles of incorporation under the general corporate laws of a State, with the provisions defining their effect, constitute the charter of a corporation; and from them the purposes of a corporation, and the uses to which its property may be put, must be ascertained and limited.[2] So, in a case decided in Utah, where the object and business of a canal company, as expressed in its articles of incorporation, were "to construct (the canal described) for the purpose of diverting a portion of the Jordan River from its present channel, and causing it to flow into" Great Salt Lake at a point named, "thereby preventing the western portion of Salt Lake City and

13 For water rates, see Chap. 69, Secs. 1368-1385.

14 See Chap. 83.

1 Davis v. Flagstaff M. Co., 2 Utah 74; 4 Thomp. Corp., Sec. 5638.

2 "Conceding that the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers and that the enumeration of these powers implies the exclusion of all others." Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950.

the lands along the Jordan River from being submerged in times of high water, and making practicable the draining, irrigating, and cultivating of large tracts of land hitherto unavailable for agricultural purposes; and to this end the association may construct and maintain all necessary dams, headgates, flumes, and other means which may be necessary to control, regulate, and distribute said water for the purposes herein indicated," it was held, that the purpose of the canal, and the powers the corporation was authorized to exercise, must be determined from its articles of incorporation, and not from the opinions of witnesses. It was also held that the two purposes enumerated in the articles were, first, the diversion of a portion of the water of the river to prevent overflow of adjacent lands; and, second, the irrigation and cultivation of lands. And that the enumeration of these two purposes implies the exclusion of all others, and forbids the use of the canal for drainage to the exclusion of its use for irrigation, or for irrigation to the exclusion of its use for drainage; and, further, that the use of the canal for the drainage of water unfit for irrigation excludes the use of its waters for irrigation or domestic purposes. Therefore, the drainage of water through it, unfit for irrigation, is excluded.[3] Again, it was held by the same Court, that a corporation, the object of which is "to construct, manage, and control the number of canals and ditches hereinafter described, taken from Huntington creek," followed by the number and description of each canal and ditch,

[3] North Point Consol. Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

The words "other purposes" in a charter giving a company the right to furnish water "for the extinguishment of fires and for domestic, sanitary, and other purposes" must be considered, in determining the right of eminent domain, to mean "other like purposes," or "other like public purposes," and did not include the furnishing power for running small motors for light manufacturing, for which water could be taken to the detriment of mill owners on the stream. *In re* Barre Water Co., 62 Vt. 27, 20 Atl. Rep. 109, 9 L. R. A. 195.

See, also, Gould v. Maricopa C. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Diana Shooting Club v. Lamereaux, 114 Wis. 44, 89 N. W. Rep. 880, 91 Am. Dec. 898.

"The powers of a corporation are defined and limited by its articles. Especially as against a stranger, it can not go beyond them." Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

See, also, Just v. Idaho Canal & Imp. Co., 16 Idaho 639, 102 Pac. Rep. 381.

"for the purpose of diverting the waters of said creek" through the canals, or ditches, for irrigation, and which is empowered to construct all the necessary works to "control, regulate, and distribute the said waters for the purposes herein mentioned," is not authorized to construct reservoirs for storing water; and, hence, an assessment on the capital stock for the construction of such reservoirs was void.[4] But in a Colorado case, where it was contended that, by the declared objects of a corporation, it was a mutual company, that it was not organized for the purpose of carrying water for hire; and that its only obligation in the matter of carrying water was to supply its stockholders, it was held by the Court that there was nothing in the articles to indicate that it might not be the legitimate business of the corporation to carry and supply water for irrigation generally to those owning lands within the vicinity of the ditch, and, therefore, mandamus would lie to compel the delivery of the water to others than to its stockholders.[5]

Should, however, the original articles of incorporation not meet the requirements, they may be amended, under the conditions imposed by the statutes of the respective States.[6]

The powers of a corporation being limited to those contained in its articles of incorporation and as granted by the constitution and laws of the State where it is organized, it follows that a corporation organized under the laws of one State can not bring into another State, where its operations are proposed to be carried on, more or greater powers than those with which it was endowed by its charter in the State where organized.[7]

It is held in Montana that a certificate of incorporation issued by the Secretary of State shall be *prima facie* evidence of the corporate character of the company, but this does not refer to a corpora-

4 Seeley v. Huntington etc. Assn., 27 Utah 179, 75 Pac. Rep. 367.

5 Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

6 McDermont v. Anaheim etc. W. Co., 124 Cal. 112, 56 Pac. Rep. 779.

7 "A corporation of Colorado coming into this State (Utah) can not bring with it powers with which it is not endowed in Colorado. It can only have existence under the express laws of the State where it is created, and can exercise no power which is not granted by its charter or some legislative Act." Telluride Power Trans. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; see same case below, 23 Utah 22, 63 Pac. Rep. 995.

tion organized prior to 1895, since up to that time there was no provision for the issuance of certificates of incorporation.[8]

§ 1470. Power of acquiring water rights by appropriation.—These private water corporations have the power of acquiring exclusive rights to the waters of the natural streams and other sources of water supply, the same as any individual, or group of individuals.[1] There are several methods by which these rights to water may be acquired, and one is by the direct appropriation of the water by the corporation and in the corporate name, under the rules of law as embodied in the Arid Region Doctrine of appropriation.[2] And, for this purpose, a corporation organized and existing under the laws of one of the States of the Union, and operating in the same State, or a corporation duly organized under the laws of one State and operating in another State, having complied fully with the laws of the latter, are to be considered citizens within the law for this purpose.[3] Upon the same theory it is decided by the Supreme Court of the United States, that a corporation created under the laws of one of the States of the Union, all of whose members are citizens of the United States, is competent to locate, or join in the location of a mining claim upon the public lands of the United States, in like manner as individual citizens.[4] So it is held that a corporation, in its corporate name, can both appropriate mining lands upon the public domain, by complying with the mining laws relative to the location of the same, and that it can also appropriate, in its corporate name, the water necessary for the operations to be carried on upon those lands, by complying with the rules of law of the Arid Region Doctrine of the appropriation of waters. In fact, it is now well settled in all the Western States that a corporation's title to water rights by appropriation

8 Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

1 For who may make appropriations of water, see Chap. 36, Secs. 678-689.

See, also, tenants in common, Secs. 1454-1458.

Partnerships, Secs. 1461-1463.

2 For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the appropriation of water, see Chap. 38, Secs. 706-732.

3 North Noonday Min. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522.

4 McKinley v. Wheeler, 130 U. S. 630, 32 L. Ed. 1048, 9 Sup. Ct. Rep. 638.

See, also, Thomas v. Chisholm, 13 Colo. 105, 21 Pac. Rep. 1019.

is recognized and upheld, and that, too, regardless of the fact as to whether the corporation itself applies the water to some beneficial use or purpose, or rents or sells it to others who so apply it.[5]

The appropriation of water by corporations follows the general rule of the Arid Region Doctrine as to the priority of right, as though the appropriation was made by individuals. If the appropriation is prior in time it has the superior right. But, upon the other hand, if other rights have vested in and to the use of the waters of a certain stream, or other source of water supply, prior to those of the company, its appropriation is subsequent and subject to those rights. Identically the same rules govern in this respect as govern appropriations between private individuals.[6] As was held by the Supreme Court of Colorado, individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. They may provide that their several interests in such enterprise shall be represented by shares of stock. But neither the company itself, nor any stockholder of the company, can thus withhold the water from beneficial use, nor reserve it for future use of junior appropriators to the prejudice of prior appropriators, nor to the exclusion of those, who, in the meantime, may undertake in good faith to make a valid appropriation thereof.[7]

[5] "In this State a corporation's title to water either by appropriation or prescription has been recognized and upheld from the earliest day." Montecito Valley W. Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Slosser v. Salt River Valley C. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Bear River etc. Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Heyneman v. Blake, 19 Cal. 579; Stein Canal Co. v. Kern Island etc. Co., 53 Cal. 563; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; South Yuba W. Co. v. Rosa, 80 Cal. 333, 22 Pac. Rep. 222; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598.

[6] For the rights of the prior and subsequent appropriators, see Secs. 776-786.

[7] Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Farmers' High Line C. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Wheeler v. Northern Colo. Irr. Co., 10

§ 1471. Power of acquiring water rights by purchase—Prescription.—One of the powers usually granted to private water corporations by their charters is to purchase water rights, and this power has often been exercised.[1] The subject of the sale of water rights has been treated in a previous portion of this work, and but a short discussion here is necessary. The fact that a corporation is the purchasing party involves no new principle relative to the sale or transfer of water rights, provided that the articles of incorporation give it the power to make such purchases. As a general rule, one corporation has the power to purchase water rights, either from the individuals owning the same, or it may purchase such rights from another corporation.[2] But the corporation can not purchase more than its grantor has to sell. Therefore, where a corporation succeeded to the rights of a former company and the rights of other individual owners, it took only the property of the latter, which the former owned, subject to any rights of an individual in the water rights of the old company not surrendered by him to the new company.[3]

Water rights may also be acquired by private incorporated water companies by adverse user sufficient to amount to title by prescription. No new or different rules of law are prescribed for the acquisition of water rights by corporations by this means than are prescribed for their acquisition by the same means by individuals.

Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989.

1 For the sale of water rights, see Secs. 995-1024.

2 The right of a company, incorporated "to obtain an additional water supply for those then owning rights in a certain ditch," to purchase from another company, composed of the same stockholders, the existing rights in such ditch can be questioned only by the State. Water-Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505.

See, also, State *ex rel.* Bradford v. Western Irr. C. Co., 40 Kan. 96, 19 Pac. Rep. 349, 10 Am. St. Rep. 166; North Point Consol. Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Doyle v. San Diego etc. Co., 46 Fed. Rep. 709; Bliss v. Kaweah Canal & Irr. Co., 65 Cal. 502, 4 Pac. Rep. 507.

Evidence that a corporation is in possession of certain works, and that it had for several years collected water rates, and had increased the extent of its works during such possession, shows a presumption of ownership. Reno W. Co. v. Leete, 17 Nev. 203, 30 Pac. Rep. 702.

3 Beck v. Pasadena etc. Co., 130 Cal. 50, 59 Pac. Rep. 387, 62 Pac. Rep. 219.

This subject has been sufficiently discussed in a previous chapter.[4] But an officer of a corporation occupies such a fiduciary relation to the company that, during his term of office, he can not acquire any interest by adverse user in the water rights, or other property owned by the corporation.[5]

§ 1472. **Power of acquiring water rights by condemnation.**—In certain cases corporations in the exercise of the powers granted to them to acquire water rights may also acquire such rights by condemnation proceedings by virtue of the power of eminent domain, but this power is to be exercised only for a public use, and upon the payment of just compensation. In fact, it may be said that the right to exercise the power of eminent domain by means of condemnation proceedings for the acquisition of water rights is limited to private corporations of a quasi-public nature,[1] to public corporations,[2] and to municipal corporations.[3] The author has no case in mind where a private corporation was held to have the right to condemn a water right for its own private use, and the same is not allowed by law. And, in this respect the law governing condemnation proceedings differs from the law where the action is brought to condemn a right of way over the lands of others. Under the more modern authorities, including late cases decided by the Supreme Court of the United States, it is held that one person may condemn, under the power of eminent domain, a right of way over the lands of others for a ditch or canal and that, too, where it was to be used only for the purpose of conducting water to the private lands of the condemner.[4] The general subject of eminent domain has been discussed sufficiently in another chapter of this work.[5]

4 See Chap. 54, Secs. 1033-1058.

5 Center Creek etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

A corporation is not estopped from challenging the validity of a contract made on behalf of its directors, interested therein adversely to the corporation, by laches on the part of such directors in not causing the contract to be set aside, but allowing the other party to expend money on the strength of the contract. Goodell v. Verdugo etc. Co., 138 Cal. 308, 71 Pac. Rep. 354.

1 See Secs. 1059-1098.

2 See irrigation districts, Secs. 1386-1432.

3 For municipal corporations, see Secs. 1433-1448.

For the acquisition of water rights by the power of eminent domain, see Chap. 55, Secs. 1059-1098.

4 Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

5 See Chap. 55, Secs. 1059-1098.

§ 1473. Power of acquiring water rights by purchase of other entire systems and rights.—Not only may a corporation purchase from individuals or other corporations certain portions of their property and rights,[1] but an incorporated water company has the power to purchase from another corporation, and the latter corporation has the power, with the assent of the requisite number of stockholders required by the law, to legally sell and convey to another corporation all of its property, including its water rights, rights of way, diverting, and carrying works, franchises, and business, and all other personal and real property of whatsoever kind or nature, if the same is done in good faith, and not for the purpose of delaying or defrauding creditors.[2] Again, an officer who is the owner of all of the stock of a corporation may dispose of its property with the consent of the nominal directors.[3]

But the rights of consumers which vested under the operations of the selling corporation are not affected by the transfer to another company, but they have the right to have the water supply "continued by whomsoever may be in control thereof."[4]

1 See Sec. 1471.

2 "With the consent of the stockholders thereof, holding of record at least two-thirds of its issued capital stock (expressed in the prescribed manner), any corporation in this State may make a valid sale, lease, assignment, transfer, or conveyance of its business, franchises, and property, as a whole." South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490.

"If the corporation could convey a part, it could convey all, if its stockholders assented, and its creditors, if it had any, did not interfere or object. . . . It had absolute *jus disponendi.*" State *ex rel.* Bradford v. Western etc. Co., 40 Kan. 96, 19 Pac. Rep. 319, 10 Am. St. Rep. 166.

See, also, The Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Hildreth v. Montecito etc. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497.

A stockholder of a quasi-public corporation, engaged in supplying water for a public use, is bound by the action of two-thirds of the stockholders and the directors, consenting to a transfer of the property, franchise, and business of the corporation. Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498.

3 Toyaho Creek Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101.

4 South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Hildreth v. Montecito etc. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Stanislaus W. Co. v. Bachman,

§ 1474. Acquisition of rights of way — Purchase — Prescription—Condemnation.—Private incorporated water companies are universally granted the right to acquire rights of way for their diverting works, ditches, and canals over the lands of others. This is true, regardless of the fact as to whether the lands are owned by the United States, and, therefore, are a part of the public domain,[1] whether they are owned by a State,[2] by another corporation or company, or by private individuals.[3] These rights of way may be acquired by all of the methods known to law for the acquisition of such property. Rights of way may be acquired by purchase,[4] by the adverse user, amounting to prescription,[5] by condemnation proceedings, by virtue of the power of eminent domain,[6] by lease,[7] or by license.[8]

These subjects have also been discussed in previous portions of this work, and no further discussion here is necessary.

§ 1475. Relation to consumers—Title to the water rights.—In order to make a valid appropriation of water, there must not only be a diversion of the water from the natural streams, or other source of water supply, but there must also be an actual application of the water, within a reasonable time, to some beneficial use or purpose.[1] It therefore follows that, where the company is not itself the consumer, but simply furnishes and distributes the water to others, in order to perfect the appropriation, it takes the joint action of both the corporation and the consumers. Therefore, where the water is furnished and distributed to consumers by incorporated companies, there has arisen in the different States a considerable divergence of opinion between the authorities, as to the ownership of the title of the water rights. In Colorado, and in some of the other States following its rule, it is held that the title to the

152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058.

1 For rights of way over the public lands, see Chap. 51, Secs. 927-970.

2 For rights of way over State lands, see Sec. 971.

3 For rights of way over private lands, see Chap. 52, Secs. 972-993.

4 See Secs. 1003, 1004.

5 See Secs. 1044, 1045.

6 See Secs. 1059-1098.

7 See Secs. 1003, 1004.

8 See Secs. 981-985.

1 For the appropriation of water, see Chap. 38, Secs. 706-732.

water rights is in the consumer, and that the company is merely the carrier of the water.[2] While in other States, it is held that the consumers' relation to the company is that of contract only; and that such consumers have no proprietary right in either the water rights, or in the works necessary for the utilization of the same.[3]

As to strictly mutual water corporations, or those corporations organized by several land owners, and themselves the consumers of the water, for the better protection of their rights, and also for the better distribution of the water between them, and to whom only the corporation furnishes water, it must be conceded that the equitable title to the water rights, and to the works, is in the consumers, even though as former owners of the rights such shareholders have made a conveyance of the same to the corporation. Such a conveyance must be considered to be one in trust, and that the corporation as the trustee for all of its shareholders, holds the legal title, both to the water rights and to the system of diverting and carrying works, merely for the purpose of protecting the rights of all its shareholders, and of better distributing the water to them, according to the respective holdings of each in the corporation.[4]

2 For water companies as carriers merely, see Sec. 1476.

3 For water companies as owners of the water rights, see Sec. 1477.

4 For mutual water corporations, see Secs. 1479-1489.

See the case of Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060, where the Court held that a stockholder of a mutual ditch corporation had the right to withdraw his portion of the water from the entire water diverted by the company, and to change the point of diversion of such water, so long as the rights of others are not thereby injuriously affected.

Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. Rep. 354, where the corporation was organized for the purpose of developing and distributing water to its stockholders for irrigation and domestic uses, it is said: "The stockholders *were and are the owners of the water of said canyon*, which was developed and controlled by the company for the benefit of the stockholders by a system of pipes and other facilities for its distribution, and ever since its organization it has continued to distribute said water for the benefit of its stockholders, including plaintiff, pursuant to and in accordance with the rules and regulations established by it for that purpose."

See, also, Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586; Rocky Ford C. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Montrose Canal Co. v. Loutsenheiser D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Center Creek v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559;

It therefore follows that it is only where corporations are organized for the purpose of furnishing water to others than to its stockholders for profit or hire, that the question arises as to which holds the title to the water rights, the consumer or the corporation.[5] But as to these latter corporations, regardless of the question as to whether they are deemed to hold the title to the water rights and sell or rent the use of the water, according to the terms of their contracts with consumers, or whether they are regarded merely as the carrier of the water for the consumers, who are deemed to hold the title, they are regarded as public service or quasi-public corporations,[6] and are subject, under its police powers, to the same reasonable regulations imposed by the State where their operations are carried on.[7] So it seems to us that there has been a whole lot of useless discussion by the courts, and others, as to who was the owner of the title to the water rights.

§ 1476. Relation to consumers—Where the company is deemed merely the carrier—Colorado rule.—The courts of Colorado were the first to advance the theory that an incorporated company, organized for the purpose of furnishing water to others than to its stockholders, for profit or hire, was merely the carrier of the water, sometimes analogous to what is known in law as a common carrier, and that the consumers of the water, or the persons to whom the company sold or rented the rights to the use of the water, and who actually applied the same to the beneficial use or purpose, were the appropriators of the water, in whom the title to the water rights was vested. This was due to a somewhat

Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. Rep. 98; Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754.

See, also, for the relation of mutual corporations to their shareholders, Sec. 1482.

[5] For corporations for profit, see Secs. 1490-1508.

[6] See Sec. 1493.

[7] For public service or quasi-public corporations, see Secs. 1492-1508.

For State regulations, see Secs. 1495, 1508.

For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

"The status of the defendant company could in no aspect affect these rights. Its duty to these plaintiffs would be the same whether that duty was to furnish water under their contracts as proprietor or carrier of water." Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

strained construction of the Colorado constitution, which, among other things, provides: "The water of every natural stream not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State." "The right to divert the unappropriated water of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose." "All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, and canals, for the purpose of conveying water" for beneficial uses.[1] However, the Supreme Court of Colorado has been consistent in this holding, and it may therefore be considered as the settled law in that State.[2]

In fact, as far as Colorado is concerned, there seems to be but one case decided by its appellate courts which held to the contrary to the above doctrine. This was a decision by the Court of Appeals,[3] wherein it was held that the liability of a corporation for failing to supply a certain amount of water to the holders of water

[1] Colo. Const., Art 16, Secs. 5-7. See Part XIV.

[2] "The constitution unquestionably contemplates and sanctions the business of transporting water, for hire, from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes, and decisions) necessarily give the carrier of water an exceptional status; a status differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. . . . But, giving these rights all due significance, I can not consent to the proposition that the carrier becomes a 'proprietor' of the water diverted." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Farmers' High Line etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290; Standart v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Wyatt v. Larimer etc. Co., 18 Colo. 289, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906; Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; Northern Colorado etc. Co. v. Pouprit, 47 Colo. 490, 108 Pac. Rep. 23.

[3] Wyatt v. Larimer etc. Co., 1 Colo. App. 480, 29 Pac. Rep. 906.

rights, according to contract, could not be determined upon the theory that the company was a common carrier,[4] but this case was again appealed to the Supreme Court of the State, and while deciding the case upon other grounds, the Court, in reversing the Court of Appeals,[5] said: "But, inasmuch as the views expressed in that opinion are so at variance with numerous decisions of this Court, we feel impelled to express our disapproval thereof, and our adherence to the doctrine heretofore announced by this Court in relation to the status of canal companies organized for the purpose of carrying water for general purposes of irrigation. We ad-

[4] Mr. Justice Reed in delivering the opinion of the Court upon the subject in question said: "In a case like the present the facts and conditions stated in the complaint divest the appellee of every legal element necessary to constitute it a common carrier. Take the earliest definition of a 'common carrier' and we have, 'to render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out as ready to engage in the transportation of goods for him as a business.' Coggs v. Bernard, 1 Salk 26, 2 Ld. Raym. 909, 92 Eng. Rep., F. R., 107; Ingate v. Christie, 3 Car. & K. 61; Chit. Carr. 15. Adopted and recognized as correct in 1 Kent, Com., p. 498, Sec. 40; Story Bailm., Sec. 495; Satterlee v. Groat, 1 Wend. 272; Citizens Bank v. Nantucket Steamboat Co., 2 Story 161, Fed. Cas. No. 2730; and generally in all subsequent American decisions. Anderson's Law. Dict., 'Common Carrier: One who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.' See Dwight v. Brewster, 1 Pick. 50: 'If the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carrier.' Redf. Car., Sec. 19. These definitions are so elementary that they would not be stated except for purposes of illustration, to show that in the case presented the corporation is not brought within the definition in any respect of either a 'common' or 'private' carrier, coming nearer the definition of private than 'common' carrier, but lacking several indispensable elements of either. In order to constitute a carrier of either class (1) the goods or thing to be carried must be the property of the bailor; (2) The thing must be delivered by the bailor to the carrier to be transported; (3) the carrier must transport and deliver to the consignee the identical goods delivered to him for transportation; (4) a person who contracts to transfer and deliver to another, at a given place, a certain portion of a common lot of material, to be separated from it at the place of the consumer, to which the consumer had no title prior to transportation and delivery, is in no legal sense a carrier, but a vendor of the commodity."

[5] Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

here to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that it must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners."

The Colorado rule of treating the consumer as the appropriator, and the owner of the water rights, and the corporation merely as the carrier of the water, has been followed in other jurisdictions, which do not have the same constitutional provisions as Colorado, and, therefore, upon other grounds. Take, for example, Arizona, where it is held that a corporation, not the owner or possessor of arable and irrigable land, though it may lawfully construct a dam, canal, or other conduit of water, and divert water from a stream for irrigation purposes, does not thereby become the appropriator, or owner of the water so diverted, for the reason that in that State the ownership and possession of arable and irrigable land are essential to the acquisition of the right of appropriation of water from a natural stream for the purposes of irrigation.[6] In Kansas it is held that irrigation companies authorized to carry water for hire are quasi-public carriers, and as such, are under the same rules as to the regulation of rates as other public carriers.[7] And Nebraska [8] and New Mexico adhere to the same rule.[9]

§ 1477. Relation to consumers—Where the company is deemed the appropriator and owner of the rights.—In other jurisdictions of the West, than those mentioned in the preceding section,[1] the status of a water corporation, organized for profit, is regarded as

6 Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; *Id.*, 9 Ariz. 104, 96 Pac. Rep. 1117; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400; Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. Rep. 376; Montezuma Canal Co. v. Smithville Canal Co., 11 Ariz. 99, 89 Pac. Rep. 512; Marlar v. Maricopa etc. Co., 9 Ariz. 102, 96 Pac. Rep. 1116; Salt River Valley etc. Co. v. Slosser, 9 Ariz. 102, 76 Pac. Rep. 1125.

7 Lake Koen etc. Co. v. Klein, 63 Kan. 884, 65 Pac. Rep. 684.

8 Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

9 Albuquerque etc. Co. v. Gutierres, 10 N. M. 177, 61 Pac. Rep. 357; affirmed, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; Farmers' etc. Co. v. Brumbaugh, 81 Neb. 641, 116 N. W. Rep. 512.

1 See Sec. 1476.

something more than that of merely the carrier of water for consumers, and as the appropriator and owner of the water rights; and that the consumer has no proprietary right, either in the water rights, or the system of works, aside from the rights given under the contract with the water company. But, as there can not be a valid or, at least, a subsisting appropriation of water, unless there be an actual application of the water to some beneficial use or purpose,[2] and as the company itself is not a consumer of the water, or so applies it, the question has arisen as to how a valid appropriation might be effected by such a corporation. And, for this purpose, it is held that the company is enabled to finally consummate its appropriation through the agency of its consumers. It therefore follows that the situation of the company and the consumer, under this holding, is exactly reversed from the situation of the same parties, where the company is considered merely the carrier of the water, and discussed in the previous section.[3] And, instead of the company being regarded as the "intermediate agency existing for the purpose of aiding consumers," who are regarded as the owners of the water rights,[4] the consumers are regarded as the agents of the company in the consummation of the appropriation by the company, which is considered the owner of the water rights.[5] How-

2 For the appropriation of water, see Chap. 38, Secs. 706-732.

3 See Sec. 1476.

4 Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

5 "Irrigation companies construct ditches and canals, and divert water by means thereof, for the purpose of irrigating lands lying under their distributing works, but their property is valueless without consumers." Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

"Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user." Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

"The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters, does not belong to the water users, but rather to the company." Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

See, also, Souther v. San Diego etc. Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561.

In an action brought by a user of water against an irrigation company, based upon a contract between such company and such user, in which the user seeks to have his rights to the use of the water determined in accordance with the contract, it is error for the trial court to render a decree in favor of such user, as an appropriator of water, not based on such contract. Jackson v. Indian Creek

ever, it is held that the title to the water rights having been once perfected in the company, by appropriation through the joint actions of the company and consumers, and the right to the use of the water having been once sold to a consumer, it becomes a perpetual right of that consumer, "subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use." [6]

It is, therefore, held in a recent case in Idaho that a purchaser of a perpetual water right from an irrigation company, with the right to receive the water so purchased from the company's canal, carries with it such a right in the appropriation itself, and such an easement or servitude in the canal system as to authorize and enable the purchaser himself to go upon the property and protect the appropriation, and maintain the diversion and repair the canal, and carry the water through the canal system to the extent of the purchaser's water right, in the event the company fails, neglects, or refuses to do so.[7]

§ 1478. **The exemption from taxation.**—In order to induce the organization and operation of irrigation corporations, the constitutions and statutes of a number of States provide that their property, and systems of works shall be exempt from taxation, or shall be exempt from taxation for a certain period after their organization.[1] This is upon the theory that the State will be recompensed from the added assessable value of the lands upon which the water is used.[2] In some of the States, however, this exemption extends only to those companies where the ditches and other works are owned and used

etc. Co., 16 Idaho 430, 101 Pac. Rep. 814.

6 Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

"This right is perpetual, if the owner of the rights keeps up his annual payments." Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Creer v. Bancroft W. Co., 13 Idaho 407, 90 Pac. Rep. 228; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Bardsly v. Boise Irr. etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409.

7 Idaho Fruit Land Co. v. Great Western Beet Sugar Co., 18 Idaho 1, 107 Pac. Rep. 989.

1 For the statutes of the various States, see Part XIV.

2 See Statutes of the States, Part XIV.

by the individuals and corporations for irrigating lands owned by such individuals and corporations, or the individual members thereof. In other words, the works must be owned by mutual companies, or corporations, in order to be exempt from taxation. This is the case in Colorado, and a number of the other States.[3] And, therefore, the property of all corporations organized for the purpose of profit from the sale of water rights, or for the carriage of water for hire, is not exempt from taxation.[4] And in California it is held that, where a corporation was authorized to acquire property, appropriate and distribute water, construct canals, and establish, collect, and receive rates, water rents, and was authorized to exercise the right of eminent domain, the actual exercise of such powers by the construction of canals in a county other than that in which the corporation's principal place of business was located, constituted the use of a franchise by the corporation in such county which was there subject to taxation.[5]

[3] Empire etc. Co. v. Rio Grande County, 21 Colo. 244, 40 Pac. Rep. 449; reversing 1 Colo. App. 205, 28 Pac. Rep. 482.

See, also, Haiku Sugar Co. v. Fornander, 6 Hawn. 532; Alexander v. Fornander, 6 Hawn. 322; *In re* Assessment of Taxes, C. W. Booth, 15 Hawn. 516.

For mutual unincorporated companies, see Secs. 1453-1463.

For mutual incorporated companies, see Secs. 1479-1489.

For irrigation districts, see Secs. 1386-1432.

[4] Murray v. Montrose County, 28 Colo. 427, 65 Pac. Rep. 26.

[5] San Joaquin etc. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. Rep. 285.

CHAPTER 75.

MUTUAL WATER CORPORATIONS.

§ 1479. Scope of chapter.
§ 1480. Definition and objects.
§ 1481. Title to water rights.
§ 1482. Relation between corporation or its officers and the shareholders.
§ 1483. Shares of stock in mutual corporations represent water rights.
§ 1484. Rights represented by shares of stock as appurtenances.
§ 1485. The sale and transfer of shares in mutual corporations.
§ 1486. Duties and liabilities of such a company.
§ 1487. Rights of stockholders.
§ 1488. Power of corporations to make rules and regulations.
§ 1489. Power of mutual water corporations to levy and enforce assessments.

§ 1479. Scope of chapter.—Having discussed the organization of private water corporations,[1] and the general powers with which they are all endowed by their articles of incorporation, or charter, and under the constitution and laws of the State under which they are organized, and where their operations are carried on, regardless of any classification, we will now take up the particular kinds of these corporations, as classified by us in a previous section,[2] and the first of which we have designated as "mutual water corporations." In this chapter we will discuss the subject as particularly relating to this class of corporations.

§ 1480. Definition and objects.—Mutual water corporations may be defined as those private corporations which are organized for the express purpose of furnishing water only to the shareholders thereof, and not for profit, or hire.[1] Their main purpose is the same as that for the organization of mutual, or voluntary associations, discussed in a previous section of this chapter.[2] Such cor-

1 See Secs. 1464-1478.

2 See Sec. 1452.

1 "By the phrase, 'mutual ditch companies,' I mean associations formed by consumers for the purpose of conveying water solely to irrigate their own lands, and not for hire. These associations may or may not be incorporated." Helm, C. J., in Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

2 See Sec. 1453.

porations can not be deemed "public service," or "quasi-public" corporations, as they are not organized for the purpose of either furnishing, or carrying water to all whose lands are so situated that they may be irrigated from the system of works of the corporation.[3] In fact, it has many times happened that the co-owners, as tenants in common, or as owners, in those voluntary associations, or "community associations," who together own the ditches, canals, and other works, and the water rights used in connection therewith, have duly incorporated their company under the law of some State, or Territory, and have conveyed their respective rights to the corporation, in order to more effectively manage and control the distribution of the water between themselves, and for the self-protection of the invasion of others against those others. Oftentimes

[3] See distinction between "public use" and "public service," Sec. 1451.

See, also, for public service or quasi-public corporations, Sec. 1493.

A corporation organized as a mutual company is held to be under the duty to furnish others than its shareholders with water when it has a surplus amount of water. Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

A corporation organized for the purpose of supplying water for the use of the owners and occupants of the land within a certain particular district may adopt by-laws limiting the right to the use of the water of the corporation exclusively to its own stockholders, and as such the board of supervisors of a county have no power to fix the rate at which water shall be sold, rented, or distributed. McFadden v. Board of Suprs. of Los Angeles Co., 74 Cal. 571, 16 Pac. Rep. 397.

For the fixing of water rates, see Secs. 1368-1385.

See, also, Cache La Poudre Irr. Co. v. Larimer & Weld etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525, where such a corporation, organized by tenants in common, is called a "mutual ditch company."

There is no presumption of law that a corporation organized to furnish water is one organized for profit. "It would be entirely legal for an irrigating canal and ditch company to be incorporated to distribute water gratuitously." Applegarth v. McQuiddy, 77 Cal. 408, 19 Pac. Rep. 692.

See, also, Barton v. Riverside etc. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331; Hildreth v. Montecito etc. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Shorb v. Beaudry, 56 Cal. 446; McDermont v. Anaheim etc. Co., 124 Cal. 114, 56 Pac. Rep. 779; Swanger v. Porter, 87 Neb. 764, 128 N. W. Rep. 516, in which mutual irrigation companies are defined.

See, also, Garrison v. North Pasadena etc. Co., —— Cal. ——, 124 Pac. Rep. 1009.

See, also, cases cited in the following sections.

the scope of the corporation is limited to the owners of rights taken from the stream through a single ditch or canal. Again, it has often happened that the rights of all parties who take the water from a certain stream, or other source of water supply, are incorporated into one company.[4] Of course, one can not be compelled to go into one of these corporations, and merge his vested rights, either to the water, or to the diverting and conveying works, unless he sees fit. Therefore, many of these corporations only include the rights of a part of the co-owners of the same ditch or the common source of supply, leaving the other co-owners, whose rights are in nowise changed by the action of the others, to fight it out alone.[5] However, owing to the many advantages of having the operation and distribution of the water controlled by one organization having authority, and the many disadvantages to each of the co-owners in endeavoring to run their affairs either alone, or by the means of voluntary associations, the tendency has been, during the recent years, toward the merging of interests into corporations. As was well stated in an Arizona case: "The difficulties arising from the ownership and control of such means of diversion by one or more individuals as tenants in common are such as to make it necessary, almost, that corporations be organized for this purpose."[6]

§ 1481. Title to water rights.—In the formation of mutual water or irrigation corporations it is the usual mode of procedure for the owners of the original rights to deed to the corporation their water rights and rights in the works, and then to take shares of stock for the same in the exact proportion as the value of the individual rights granted bears to the whole value of the property granted by all. It therefore follows that, where this is done, the

[4] See, for water users' associations, Secs. 1281-1286.

[5] Where a corporation is formed by a combination of some of the land owners or private appropriators, it has no right to control or regulate the use of the owners who did not come in the corporation, although those in the corporation are a majority of all the water users from the stream. Bartholomew v. Fayette Irr. Co., 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912; affirmed in 31 Utah 220, 87 Pac. Rep. 707; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Arroyo D. Co. v. Dorman, 137 Cal. 611, 70 Pac. Rep. 737; Fuller v. Azusa Irr. Co., 138 Cal. 204, 71 Pac. Rep. 98.

[6] Slosser v. Salt River Valley etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

See, also, McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397.

legal title to these rights is in the corporation, while the equitable title remains in the original owners, or their grantees. In other words, the company holds the legal title to the property in trust for its respective shareholders, the terms of the trust to be governed by the articles of incorporation, or the by-laws of the same.[1]

A mutual irrigation corporation may dissolve, in which case the water rights revert to the shareholders in proportion to their holdings in the corporation. Upon this subject the California code provides: "Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts upon its dissolution, or the expiration of its terms of existence."[2]

§ 1482. Relation between corporation, or its officers, and the shareholders.—The relations between private incorporated water companies, whether organized as mutual corporations,[1] or as corporations for profit or hire,[2] is that of contract, and the rights and duties of both parties grow out of the contract implied in a subscription for stock, and construed by the provisions of their charters, or articles of incorporation.[3] From this contract springs a trust relation between the company and its stockholders or shareholders, with which the corporation is charged to conduct the common business in the interests of the stockholders,[4] and, furthermore, the corporation being a trustee for its stockholders, it is bound to protect their interests.[5] It therefore follows that, not only may

1 Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. Rep. 98; Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38; Rocky Ford etc. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638; Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

2 2 Kerr's Cyc. Codes, Sec. 309; see, also, *Id.*, Sec. 361a.

See, also, South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490.

See, also, the next section, No. 1482, and authorities cited.

1 For mutual corporations, see Sec. 1480.

2 For corporations for profit, see Secs. 1490-1508.

3 Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

4 Rocky Ford Canal Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638; Miller v. Imperial etc. Co. No. 8, 159 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

5 "The corporation is a trustee for its stockholders, and is bound to protect their interests." Supply Ditch

such a corporation, but the law imposes the duty upon a corporation to maintain an action, in its corporate name, to secure or protect its water rights, or other property, as representing its stockholders, without joining them as parties in the action.[6]

The officers, managers, or governing board, also hold trust relations, both to the corporation, and to its stockholders. And, therefore, the validity of a contract illegally entered into by the board of directors, who were personally interested in the same, may be challenged by the stockholders.[7] Neither can the officers of a corporation, on account of this trust relation, acquire rights or property, by adverse user amounting to prescription, during their terms of office.[8] However, where the interests do not conflict, officers and directors of a corporation taking water from a certain stream, may make separate and distinct appropriations from the same stream.[9]

§ 1483. Shares of stock in mutual corporations represent water rights.—As in the case with other corporations, mutual water corporations issue to their shareholders shares of stock, which shares represent the proportionate ownership of each in the corporate property. And, while these corporations may, or may not, have a capital stock, as is the case where the corporation is organized for profit,[1] the basis for the division of the total property of the cor-

Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

"A corporation owning and operating a ditch becomes a trustee for its stockholders and is bound to protect their interests." Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, reversing *Id.*, 3 Colo. App. Cas. 255, 32 Pac. Rep. 722.

6 Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532, wherein it is said: "The ditch company is the proper party to maintain the action, it being trustee for its stockholders and consumers."

See, also, Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. Cas. 255, 32 Pac. Rep. 722; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586; Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. Rep. 588.

7 Goodell v. Verdugo etc. Co., 138 Cal. 308, 71 Pac. Rep. 354; Butterfield v. O'Neill, 19 Colo. App. 7, 72 Pac. Rep. 807.

8 Center Creek v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

9 Farm Inv. Co. v. Alta etc. Co., 28 Colo. 408, 65 Pac. Rep. 22.

For the relation between corporations for profit and the consumers, see Secs. 1475-1477.

1 For corporations for profit, see Secs. 1490-1508.

See Wannamaker v. Pendleton, ——

poration and the issuance of the shares of stock to those entitled thereto, is usually different. The total number of the shares of stock issued by these mutual companies is usually based upon the total quantity of the water which the corporation owns or controls. This is stated in a number of different ways. It may be based upon the total number of cubic feet per second of time which the corporation owns or controls; and, therefore, each shareholder owns such an interest in the corporation, as the number of cubic feet which his shares represent bear to the total number of cubic feet owned by the corporation.[2] It may also be based upon some other standard of measurement, as the acre-foot,[3] or upon the flow as represented by the "miner's inch."[4] Again, it may be based upon the total number of acres irrigated by the water furnished by the company, and each shareholder owning such an interest in the corporation as the number of acres irrigated by him bears to the total number of acres irrigated by the water furnished by the corporation. Where this is the case, each share usually represents the water which will irrigate one acre of land, the shares being oftentimes referred to as so many "acres of water."[5]

Colo. App. ——, 121 Pac. Rep. 108, where the capital stock of a corporation was $30,000, divided into 100 shares of $300 each.

2 In La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50, as to what was a water right was defined as follows: "That is to say, the right to the use of water flowing through the canal of said first party, each water right representing 1.44 cubic feet of water flowing under a weir per second."

3 For standard of acre-foot, see Sec. 894.

4 For the miner's inch, see Secs. 889-891.

See O'Connor v. North Truckee D. Co., 17 Nev. 245, 30 Pac. Rep. 882, where the basis was made one inch of water to each share of stock; Hall v. Eagle Rock etc. Co., 5 Idaho 551, 51 Pac. Rep. 110, where the basis was made five inches of water to each share of stock; Supply D. Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 391, 3 Am. St. Rep. 586, where it was made ten inches of water for each share of stock; Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754.

5 "In some instances such companies have issued what are termed 'water rights' to land owners, which give to the latter, on certain terms and conditions, a permanent right to the service of such companies through their canals of water for the irrigation of their lands. In other instances the practice has been to recognize the right of a stockholder to this service by virtue of his holding shares of stock." Slosser v. Salt River Valley C. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

Where each share of stock represents so much water, the delivery of such water to the shareholder is analogous to the payment of a cash dividend in corporations organized for profit, discussed in a future chapter of this part.[6] Again, before incorporation, where, by agreement, all the owners of the waters of the creek were each entitled to receive in his regular turn all the water from the creek for a "run" of a certain number of hours, according to the area of land irrigated by him, until all of the owners had had one turn, when the course of delivery was repeated in the same order, for convenience the stock of the corporation was issued upon the same basis. It was divided into a number of shares equal to the aggregate number of hours' use of the water necessary to give one turn to each of the shareholders, and each share of stock was made to represent one hour's run of water.[7] In one case which has come to the writer's notice, that of the Brown & Sanford Ditch Company, incorporated at an early day, the stockholders of which, prior to incorporation, owned a certain amount of the flow of Big Cottonwood Creek, in Salt Lake County, Utah, the basis of incorporation was made the total number of rods that the main ditch was in length; each shareholder owning the proportion of the water carried therein as the number of rods, which he himself constructed, bears to the total number of rods that the ditch was long; the shares being referred to as so many "rods of water."[8]

But whatever may be the basis of incorporation of these mutual companies, in the absence of anything to the contrary in the articles of incorporation or by-laws, each share of stock is made the exact equivalent to any other share; and each shareholder in such company is entitled to that proportion of the water carried through its ditch or canal, that the amount of his shares or stock bears to the whole amount of the shares or stock of the corporation.[9]

But, in order to have the stock of value, the water represented

[6] For corporations organized for profit, see Chap. 76.

[7] *In re* Thomas Estate, 147 Cal. 236, 81 Pac. Rep. 539.

[8] See Rept. of State Engineer of Utah for year 1899.

[9] "Each share of stock, in respect to the benefits to which it entitles its holder, is equal to every other share. The defendant company having been organized to supply water for irrigating purposes to its stockholders, the interest of each stockholder in the water carried was in exact proportion to the amount of his stock." Rocky Ford etc. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638.

"The stock is mere evidence of the

thereby must be applied to a beneficial use or purpose. The mere holding of shares or stock in such a corporation, representing certain water rights, without use, can not prevent later comers from making a valid appropriation of the water represented thereby. As was said in a Colorado case: "But neither the company, nor any stockholder of the company, can thus withhold the water from beneficial use, nor reserve it for future use of junior appropriators to the prejudice of prior appropriators, nor to the exclusion of those who in the meantime may undertake, in good faith, to make a valid appropriation thereof." [10]

An action for an injunction will lie against a mutual water corporation, brought by stockholders thereof, to enjoin the issuance of additional stock, upon the showing that all of the water owned, or controlled by the corporation is needed by the original stockholders thereof.[11]

§ 1484. Rights represented by shares of stock as appurtenances.—We have discussed the subject of water rights as appurtenances to land in another chapter of this work.[1] We there held that, although under certain conditions, water rights might be deemed to be appurtenant to certain tracts of land, and would pass to the grantee with a sale and transfer of the land, they could not be made an inseparable appurtenance, so that they could not be sold and transferred separate and apart from the land, for the reason that water rights are but a species of property, and a person has the right to

holder's title to a certain amount of water." George v. Robinson, 23 Utah 79, 63 Pac. Rep. 819.

See, also, Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754; Rocky Ford etc. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638; O'Connor v. North Truckee D. Co., 17 Nev. 245, 30 Pac. Rep. 882; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

10 Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. Rep. 1032, 65 L. R. A. 940; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

11 In a suit by stockholders of a mutual water company to enjoin the issue of additional shares of stock, it is error to strike from the complaint allegations that plaintiffs' land required all the water to which they were entitled, and that at all times all of the water controlled by the company was necessary to supply the original stockholders. McDermont v. Anaheim Union W. Co., 124 Cal. 112, 56 Pac. Rep. 779.

1 See Chap. 53, Secs. 1005-1016.

sell all, or any portion, of the property with which he may be vested.[2]

The question as to whether or not water rights represented by shares of stock in mutual corporations were appurtenant to certain tracts of land, and, therefore, whether or not the title to the same passed with a sale of the land, without there being a formal transfer of the stock on the books of the company has arisen in a number of cases. The general rule of law in this regard is that such water rights represented by shares of stock are not appurtenant to the land of the owner of the shares, and a conveyance of the land only, does not carry with it such shares of stock.[3] The corporation laws of all the States provide that the title to stock in a corporation can only pass by a transfer of the same on the books of the company. It therefore follows that, when the land is sold, together with the water right represented by stock in such a corporation, that the stock should also be transferred to the grantee.[4]

Many attempts have been made by corporations, either in their articles or by-laws, to make the water rights represented by shares therein inseparable appurtenances to certain specific tracts of land.[5] But these attempts are sometimes frustrated by the operations of the corporations under their powers. So, where the by-laws of a corporation provided that: "Shares of stock in this company shall not be transferable except with the land for which it is issued, and a conveyance of the land shall legalize a transfer of the stock to the purchaser," and the company assessed the stock, and sold some of the same for delinquent assessment, to others than to the owners of

2 That water rights can not be made an inseparable appurtenance to land, see Secs. 1015, 1016.

3 Shares of stock owned by an execution defendant in an irrigation corporation are not appurtenant to the lands owned by him, although he irrigates such lands with water from a canal owned by such corporation. Wells v. Price, 6 Idaho 490, 56 Pac. Rep. 266.

See, also, Struby-Estabrook etc. Co. v. Davis, 18 Colo. 93, 31 Pac. Rep. 495; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91; Combs v. Agricultural D. Co., 17 Utah 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313; Eaton v. Larimer & Weld Irr. Co., 35 Colo. 16, 83 Pac. Rep. 627; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; George v. Robinson, 23 Utah 79, 63 Pac. Rep. 819.

4 See Supply D. Co. v. Elliott, 10 Colo. 237, 15 Pac. Rep. 961, 3 Am. St. Rep. 586.

5 See water users' associations under the National Reclamation Act, Secs. 1281-1286.

the land for which the stock was issued, it was held that a purchaser of the stock was entitled to certificates, without special indorsement, as to the lands upon which the water must be used, and in such form as to admit of their free assignment; and that the by-law related only to voluntary transfers by shareholders, and had no application to a transfer effected by the corporation itself.[6]

However, it was held in a California case that the conveyance by the original owner of a water right, which was appurtenant to a certain tract of land,[7] to a mutual water corporation, for the better management and distribution of the water, did not segregate the water from the land as such appurtenance, but merely changed its form; and, hence, under the Civil Code, Section 1311, providing that every devise of land conveys all the estate of the devisor, and, therefore, that a devise of land carried with it the shares of stock in the company, as appurtenant to the land; and, therefore, it was entirely proper for the trial court to direct a transfer of the certificates of stock to the devisee.[8] So, again, where a tract of land is conveyed, "with the water right appurtenant thereto," or a similar expression used in the deed, and the shares of stock representing the water right were not assigned to the purchaser, such a conveyance must be deemed in law an assignment, and the purchaser can compel a transfer of the stock and delivery to him of all water which was actually appurtenant to the land at the time of the transfer.[9]

It was held in a late case in California that the contract as embodied in the articles of incorporation may restrict the use of water in a mutual irrigation company to land devoted exclusively to the use of each stockholder.[10]

The Civil Code of California also provides: "Any incorporation organized for or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes, or for domestic use, may in its by-laws provide that water shall only be so sold, distributed, supplied, or delivered to owners of its capital stock,

6 Spurgeon v. Santa Ana Valley Irr. Co., 120 Cal. 71, 52 Pac. Rep. 140, 39 L. R. A. 701.

7 For what are in fact appurtenances, see Secs. 1011, 1012.

8 *In re* Thomas Estate, 147 Cal. 236, 81 Pac. Rep. 539.

9 Booth v. Chapman, 59 Cal. 149.

10 Miller v. Imperial W. Co., 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with such lands, and shall pass as an appurtenance thereto." [11]

§ 1485. The sale and transfer of shares in mutual corporations.—As we have seen in the preceding sections, shares of stock in these mutual water corporations represent some definite and specific water right, and usually also represent a corresponding interest in the ditch, canal, or other works, used in utilizing such water right. Where this is the case, a different rule appertains when it comes to the sale and transfer of these water rights so represented by shares of stock in a corporation, than that which usually governs the sale and transfer of independent water rights. The general rule for the sale and transfer of independent water rights, not represented by shares of stock in some corporation, is that it must be made by deed executed and delivered with all the formalities required by the laws of the State where the same is made, for the sale and transfer of the title to other real property.[1] But, where the title to water rights, and the ditch, canal, and other works, is in one of these mutual corporations, which issues shares of stock representing both the water rights and the works by the means of which the water rights are used, such shares are considered in law personal property, and a sale and transfer of these shares operate as a sale and transfer of both the water rights and the interest in the works. In other words, the right to the use of the water follows the shares of stock.[2]

11 2 Kerr's Cyc. Code, Sec. 324.

1 For the sale and transfer of water rights, see Chap. 53, Secs. 994-1032.

2 Where water rights, and the ditch through which they are enjoyed, are owned by tenants in common, who form a corporation, which issues shares of stock representing both the water rights and the ditch, a transfer of its shares operates as a transfer of both the water rights and the ditch. Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123.

"The stock of such a corporation is mere personal property, and may be sold and transferred independent of any land; and the sale carries with it the right to the use of water on any land or for any purpose the new owner may choose. The stock is

And in such cases a transfer upon the books of the corporation is sufficient to pass the title to the water right.[3] But the transferee has no right to take the water until the proper transfer of the stock is made on the books of the corporation.[4] But where a transfer has not been properly made, a suit in equity may be maintained to quiet title to stock and to the water right.[5] A sale and proper transfer of certificate may be made without a sale of the land upon which the water was formerly applied.[6] So, where stock in an

merely evidence of the holder's title to a certain amount of water." George v. Robinson, 23 Utah 79, 63 Pac. Rep. 819.

See, also, Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91; Brockman v. Grand Canal Co., 8 Ariz. 541, 76 Pac. Rep. 602; Struby etc. Co. v. Davis, 18 Colo. 93, 31 Pac. Rep. 495, 36 Am. St. Rep. 266; Oligarchy etc. Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. Rep. 443; Grand Valley etc. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Owen v. Pomona etc. Co., 131 Cal. 530, 64 Pac. Rep. 253; McFadden v. Board of Supervisors of Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397; Eaton v. Larimer etc. Co., 35 Colo. 16, 83 Pac. Rep. 627; Thomas Estate, 147 Cal. 236, 81 Pac. Rep. 539; True v. Rocky Ford etc. Co., 36 Colo. 43, 85 Pac. Rep. 842; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416; Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754; Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. Rep. 98; Swanger v. Porter, 87 Neb. 764, 128 N. W. Rep. 516; Wannamaker v. Pendleton, —— Colo. App. ——, 121 Pac. Rep. 108.

Where the land of an owner of stock in a mutual irrigation company was sold under a deed of trust, but the stock was not transferred, the grantor in the deed of trust and the present owner of the stock are necessary parties to an action by the purchaser under the deed of trust to enforce the rights formerly held by the grantor as a stockholder in the irrigation company. Oligarchy Ditch Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. Rep. 443.

Shares of stock in a water corporation can only be subjected to debt by seizure under attachment or execution in the manner prescribed by the statute. Wells v. Price, 6 Idaho 490, 56 Pac. Rep. 266.

[3] Talcott v. Mastin, 20 Colo. App. 488, 78 Pac. Rep. 973; Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; George v. Robinson, 23 Utah 79, 63 Pac. Rep. 819; Spurgeon v. Santa Ana etc. Co., 120 Cal. 71, 52 Pac. Rep. 140, 39 L. R. A. 701.

See, also, cases cited *supra*.

[4] Supply Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

[5] Wannamaker v. Pendleton, —— Colo. App. ——, 121 Pac. Rep. 108.

[6] Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Cache La Poudre etc. Co. v. Larimer etc. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; Oligarchy etc. Co. v. Farm Investment Co., 40 Colo.

irrigation company was transferred on the books of the company to a trustee under a deed of trust, no further transfer was necessary.[7] Again, the certificates of stock evidencing the water right may be pledged to secure the payment of a debt; and, upon a default in the payment of the debt the stock may be sold in accordance with the law governing such sales, and the purchaser thereof may thereby secure a good title to the water right.[8] And the assignment of a certificate of stock estops the transferer from claiming any further title in the stock as against subsequent *bona fide* transferees, although such assignment be not registered.[9] But where stock is pledged, the pledgee has no right to enforce the payment of the debt secured thereby by withholding the water from the pledger's land, until the lien on the stock has been foreclosed according to law, although the stock stands in the name of the pledgee upon the books of the company.[10] And, where the pledgee of water stock is compelled to pay assessments to the company in order to save the stock and water right from sale, he has the right to demand repayment thereof from the pledger and equitable owner.[11] And, again, where an assessment by the corporation is invalid, a pledgee of corporate stock may maintain an action to have it so declared.[12]

§ 1486. Duties and liabilities of such a company.—The relation between a mutual water corporation and its members is one of contract. The members convey their property interests, which they formerly held as individuals, tenants in common, or copartners, to the corporation for the express purposes which are defined in their

291, 88 Pac. Rep. 443; Grand Valley etc. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44.

7 Oligarchy D. Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. Rep. 443; Richardson v. Longmont etc. Co., 19 Colo. App. 483, 76 Pac. Rep. 546.

8 Where certain stock certificates were issued by a corporation to a trustee to secure a debt of a certain stockholder, and on foreclosure of the pledge the stock was purchased by the creditor, a transfer of the stock by the trustee by deed was effectual to pass the equitable title in the shares to the grantee. Richardson v. Longmont etc. Co., 19 Colo. App. 483, 76 Pac. Rep. 546.

9 Richardson v. Longmont etc. Co., *supra;* Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91; Oligarchy D. Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. Rep. 443.

10 Mabb v. Stewart, 133 Cal. 556, 81 Pac. Rep. 1073, 65 Pac. Rep. 1085.

11 Mabb v. Stewart, *supra.*

12 Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063.

articles of incorporation, or charter, and the corporation undertakes to faithfully carry out these purposes. This is a contract which the law implies; and from it arises the trust with which the corporation is charged to conduct the common business in the interests of the shareholders. And as each share of stock is equal to every other share, the owners thereof are entitled to such benefit therefrom, by way of water dividends, as the holding of each bears to the whole amount of stock of the corporation. It therefore follows that it is the duty of a mutual water corporation organized to furnish water exclusively to its stockholders to furnish such a proportion of water to each of its shareholders as the number of shares of each bear to the whole number of shares of the stock of the company. As was well said in a late California case:[1] "In the case at bar the stockholder's rights to have water furnished on his land is not based on any special contract entered into by him with the corporation, but is an inseparable adjunct of his membership, and it is a plain duty resting on the corporation in the exercise of its corporate functions to furnish him such water." And where such a corporation fails to so furnish the proper proportion of water to one of its shareholders, it is liable for the damages resulting from such failure.[2] There is no duty imposed by the law on corporations, organized strictly for the purpose only of furnishing water to its own shareholders, to furnish water to others than its shareholders.[3]

1 Miller v. Imperial W. Co., 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 327.

2 Rocky Ford etc. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638.

"It must necessarily follow that, from any neglect or failure to properly discharge its duty in this respect, it would be liable to the stockholder who is injured thereby to the extent of the damages suffered by him." O'Connor v. North Truckee D. Co., 17 Nev. 245, 30 Pac. Rep. 882.

In an action to recover for wrongfully diverting water from plaintiff's land, defendant requested a charge that if, prior to the diversion of the water, plaintiff knew that there were assessments due and unpaid, and refused to pay them, and disclaimed the ownership of the stock, and that the defendant, acting on such disclaimer of ownership, directed the company to divert the water, then plaintiff can not recover. Held erroneously refused. Mabb v. Stewart, 133 Cal. 556, 65 Pac. Rep. 1085.

3 "Had the defendant company confined its diversion and carriage of water to the extent of supplying its shareholders who are the owners or possessors of arable and irrigable land, to the extent of their needs, as mere agent of such appropriators, it

It is also made the duty of these corporations of keeping its ditch, canal, or other works in repair, although necessarily involving expense, which may be covered by the levying of the necessary assessments upon the stock of the shareholders. This is so not only that the property may be utilized as far as present needs are concerned, but in order to preserve the property and prevent its future destruction.[4] A corporation which is organized merely to facilitate distribution of water among individual appropriators, though they do not surrender their rights to it, is yet in such a privity of estate with them as to enable it to defend in behalf of the stockholders any litigation affecting their rights to the use of water.[5]

§ 1487. **Rights of stockholders.**—The stockholders in mutual water corporations have certain individual rights which are not released by the conveyance of their water interests to such a corporation, and which they may exercise, provided that the rights of the other shareholders, or of the corporation, are not injured thereby. It therefore follows that a shareholder has the right to change the point of diversion if others are not injured.[1] So a stockholder

would have remained a mere private ditch company, and would have owed no duty to others than its shareholders." Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; McFadden v. Board of Suprs. Los Angeles Co., 74 Cal. 571, 16 Pac. Rep. 397; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

It is held in a late case in California that whether or not the acts of a mutual corporation in distributing the water are *ultra vires*, the question can not be raised by a stranger diverting water above on the same stream. Arroyo D. & W. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874.

See, also, Secs. 1482, 1483.

For the duty of public service corporations to furnish water, see Secs. 1497-1502.

See State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039, where a corporation was organized by the stockholders to take over the water rights, works, etc., of the old corporation, and to operate and hold the same in trust for the settlers and land owners within said project, and where it is held that, although such corporation was not organized for profit, but was organized for the purpose of carrying out the provisions of the contract, and to perform a public duty, and in case of refusal to perform such duty, mandamus would lie to compel it to do so.

4 Hall v. Eagle Rock etc. Co., 5 Idaho 551, 51 Pac. Rep. 110; Iowa etc. Co. v. Temescal Water Co., 95 Fed. Rep. 320.

See, also, for assessments, Sec. —.

5 Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

1 A stockholder in a mutual ditch company has the right to change the

has the right, under the same conditions, that others are not injured thereby, to either himself change the place of the use of the water furnished by such a company or to sell the shares to others who may make such a change.[2] So, also, the shareholders in a mutual ditch company may enjoin the company from disposing of any of the water diverted to any other persons than to *bona fide* shareholders in the corporation, where the effect of this would be to deprive such shareholders of some of the water to which they were entitled.[3]

A stockholder has the right of mandamus to restore his rights in a mutual water company of which he has been wrongfully deprived. As was said in a late California case:[4] "Nothing is more thoroughly established than the rule that mandamus will lie to restore to his corporate rights a member of a corporation who has been improperly disfranchised or irregularly removed from his connection with the corporation, and yet his right in this regard generally rests wholly on his contract of membership. The same rule appears to us to be applicable where the member is being excluded from participation in the benefits afforded by the corporation to its members, and there is no other adequate remedy."

§ 1488. Power of corporations to make rules and regulations.—As is the case with other water corporations, mutual corporations may also adopt such rules and regulations not in violation of law governing the distribution and use of the water furnished among

point of diversion of his water, so long as the rights of others are not injuriously affected thereby. Wadsworth Ditch Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060, and where the Court said: "We know of no reason why discrimination should be made against the right claimed, when the one who asserts it is under a mutual ditch."

See, also, Knowles v. Clear Creek Co., 18 Colo. 209, 32 Pac. Rep. 279; Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060.

For right to change point of diversion, see Secs. 857-859.

2 Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123.

For the right to change the place of use, see Secs. 867, 868.

3 McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. Rep. 779.

See, also, La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; Blakely v. Ft. Lyon etc. Co., 31 Colo. 224, 73 Pac. Rep. 249.

4 Miller v. Imperial W. Co., 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

their shareholders as are equitable and reasonable under the circumstances of the case.[1] In fact, a strictly mutual corporation may go even to a greater extent than corporations organized for profit or hire in limiting its duties to furnish water only to its own shareholders by rules and regulations. Such a corporation owes no duty in this respect to others than its shareholders.[2] And, therefore, it may legally adopt a by-law limiting the furnishing of the water owned or controlled by it to its own shareholders only.[3] But a by-law of such a corporation limiting the right of its shareholders as provided by law to change their point of diversion has no effect, unless authorized by the charter or articles of incorporation or assented to by the stockholders whose rights are affected.[4]

The statutes of California provide that the by-laws of a water company may restrict the use of the water to the lands of the shareholders so that the stock and right to the use of the water shall only be transferred with the lands upon which the water was used, provided the by-law is recorded in the office of the county recorder.[5]

§ 1489. **Power of mutual water corporations to levy and enforce assessments.**—One of the main objects of the incorporation of these mutual companies is to obviate the difficulties arising in enforcing the *pro rata* contributions of the co-owners of the water rights for the maintenance of the works and other necessary expenses, as is usually the case where the owners are tenants in common, or voluntary unincorporated associations.[1] In every community there are always some who refuse or fail from some reason or

1 For rules and regulations of corporations for profit, see Sec. 1505.

"But these mutual rights to the use of water were subject to rules and regulations and to assessments to cover expenses, which, by common consent, seem to have been enforced through a zanjero or superintendent." Fuller v. Azusa Irr. Co., 138 Cal. 204, 71 Pac. Rep. 98.

See, also, McFadden v. Board of Suprs. of Los Angeles Co., 74 Cal. 571, 16 Pac. Rep. 397.

2 Slosser v. Salt River Valley etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

3 McFadden v. Board of Suprs. of Los Angeles Co., 74 Cal. 571, 16 Pac. Rep. 397.

4 Knowles v. Clear Creek etc. Co., 18 Colo. 209, 32 Pac. Rep. 279.

5 Laws Cal., 1907, p. 854.

See, also, 2 Kerr's Cyc. Codes, p. 348, Sec. 324.

1 For the contribution of necessary expenses, see Sec. 1457.

are slow in paying their proportion of the necessary expenses for the running of their own affairs. The truth of this statement appears oftener where the burden can be shifted upon others who are joined with them in a common enterprise, as is the case where parties are associated together under the loose methods of a tenancy in common, or voluntary unincorporated associations.[2] By merging the rights into a corporation this difficulty is almost entirely obviated, and each shareholder may be compelled to contribute his proportion of all necessary expenses or forfeit his right to the use of the water. The corporate laws of all the States provide for the levying of assessments necessary for carrying on the affairs of the company, and of paying the expenses of maintenance and repairs, which are a continual cause of expenditure of all water companies. Therefore, by becoming a stockholder in one of these mutual water corporations, one by implication enters into a contract with the company to pay all assessments upon his stock, levied pursuant to the governing statute of the State, articles of incorporation, and by-laws of the company of which such person will be presumed to have had notice.[3] And, furthermore, it makes no difference in this regard whether the stock is fully paid or not. For it often happens that "unless the paid-up stock of the corporation can be assessed to meet the expenses of keeping its property in repair the utility of the property is lost, the purposes for which the corporation was organized is defeated, and the destruction of its property is only a question of a very short time."[4] Of course, in order to render such assessment valid, the purpose for which it is levied must come within the purposes of the corporation as set

2 See Secs. 1453-1463.

3 Callahan v. Chilcott Ditch Co., 37 Colo. 331, 86 Pac. Rep. 123.

4 Hall v. Eagle Rock etc. Co., 5 Idaho 551, 51 Pac. Rep. 110, where it was held that, where a corporation organized for the purpose of constructing a canal to be used for the distribution of water for irrigation purposes upon the lands of the stockholders in such corporation, whose articles of incorporation provide for the assessment of paid up stock, when authorized by three-fourths vote of all the stockholders, it is proper and legal for such an assessment to be made, and the collection thereof enforced under the provisions of the statute.

See, also, Mabb v. Stewart, 133 Cal. 556, 65 Pac. Rep. 1085; *Id.*, 147 Cal. 413, 81 Pac. Rep. 1073; Spurgeon v. Santa Ana Val. Irr. Co., 120 Cal. 71, 52 Pac. Rep. 140, 39 L. R. A. 701; Curtin v. Arroyo etc. Co., 147 Cal. 337, 81 Pac. Rep. 982.

forth in the articles of incorporation, or charter; and, also, the procedure as prescribed by the statute of the State governing the same, and as set forth in the articles or by-laws of the corporation, must be strictly followed. So, where the articles prescribed that the purposes of the corporation were "to construct, manage, and control" the ditches described, "for the purpose of diverting the waters of said creek," and "to control, regulate and distribute the said waters for the purposes mentioned herein," it was held in a Utah case that such a corporation had no power to build reservoirs for the purpose of storing water, and that an assessment levied for that purpose was "unauthorized, and, therefore, null and void."[5] In Nebraska it is held that in the absence of statutory authority or power given by the articles of incorporation there can be no assessment against or on paid-up stock of a corporation.[6] Again, it is held that upon the consideration of the transfer of certain rights to a corporation, where a written contract required the corporation to convey certain water rights, free from all assessments, until the grantee should use the rights, or should sell them to other parties, and in lieu of such conveyance the corporation issued shares of stock representing the water rights, a pledgee of the stock did not thereby become a purchaser in the sense that the stock became subject to assessment, and such an assessment was held to be void, and that the Court could also grant further relief by ordering the corporation to transfer the stock on the books of the company so as to effectuate its decree.[7]

In ordinary corporations for profit assessments levied are liens only upon the shares of stock of the owner, which shares may be

[5] Seeley v. Huntington etc. Assn., 27 Utah 179, 75 Pac. Rep. 367.

[6] Enterprise D. Co. v. Moffit, 58 Neb. 642, 79 N. W. Rep. 560, 45 L. R. A. 647, 76 Am. St. Rep. 122.

[7] Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063.

Where a corporation sold some of its stock for non-payment of assessments, and bid the same in, in which the stockholder acquiesced, it can not on its own motion treat the sale as invalid, and reinstate the stockholder, so as to render him liable for the assessment. Patterson v. Brown & Champion D. Co., 3 Colo. App. 511, 34 Pac. Rep. 769.

The enforcement of an assessment will not be enjoined until the defendant's claim for unliquidated damages on account of the company's alleged failure to furnish the water can be judicially determined and applied to the assessment as a counter claim thereto. Iowa etc. Co. v. Temescal Water Co., 95 Fed. Rep. 320.

sold in accordance with law to pay such lien. In mutual corporations an assessment is a lien, both upon the shares of stock and the water rights represented thereby. In the Water Users' Associations organized under the respective States, for operation in connection with the Government under the National Reclamation Act, the by-laws provide that assessments are a lien upon the shares of the stockholders, the water represented thereby, and upon the lands where the water is used.[8] It may be stated in this connection that in such associations the assessments are levied not only to pay for the maintenance of the works and other necessary expenses, but also to pay for the water rights furnished by the Government under the National Reclamation Act, and according to law and to the rules and regulations prescribed by the Secretary of the Interior.[9]

[8] For water users' associations, see Secs. 1281-1286.

[9] For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

CHAPTER 76.

CORPORATIONS FOR PROFIT.

§ 1490. Scope of chapter.
§ 1491. Corporations organized for profit—In general.
§ 1492. Right to organize for the purpose of profit.
§ 1493. Corporations for profit—Public service or quasi public corporations.
§ 1494. Public service—Charges which may be made.
§ 1495. Power of state to regulate—At common law.
§ 1496. Power of state to regulate—By constitutional provisions—By legislative enactment.
§ 1497. State regulations—Duty to furnish water.
§ 1498. Duty to furnish water without unreasonable conditions.
§ 1499. Duty to furnish water—Without discrimination or preference.
§ 1500. Duty to furnish water—Order of priority.
§ 1501. Duty to have adequate works and to keep them in repair.
§ 1502. Duty to furnish water—Order of priority—Rule as to prorating in times of scarcity.
§ 1503. Power to make rules and regulations for furnishing water.
§ 1504. Rules governing the collection of water rates.
§ 1505. Rules for the regulation of use of water by consumers.
§ 1506. Duty to furnish water—Compulsory service.
§ 1507. Duty to furnish water—Damages for failure.
§ 1508. State regulations—For protection of rights of company.

§ 1490. Scope of chapter.—In this chapter we will discuss the law relative to the powers of water corporations organized for profit, the power of the State to regulate, and their duty, as public service, or quasi-public corporations, to furnish water to consumers; how such duty may be enforced, and the liabilities of a company for violating such duty.

Under the chapter relating to water rights we have discussed how the State may control the rates to be charged by irrigation and water companies.[1]

§ 1491. Corporations organized for profit—In general.—The second class of incorporated water companies under our classification[1] are those organized for the construction of the necessary ditches, canals, and other diverting, and carrying works, and for

1 See Chap. 69, Secs. 1368-1385.

1 See Sec. 1452.

the purpose of furnishing water to others than to its stockholders, either by selling the rights to use the water, or by renting the same, and for the further express purpose of making a profit thereby for the stockholders of the corporation. There are no material differences between corporations organized for this purpose and other ordinary business corporations. Strictly speaking, they are private corporations,[2] as distinguished from public,[3] or municipal corporations,[4] although as far as their duties are concerned, and their regulation and control by the State, they are sometimes termed "public service," or "quasi-public" corporations.[5] They are organized under the laws of some State,[6] and, in order to operate in some other State, they must comply with the laws of the latter, relative to the filing of their articles, and comply with the other general provisions required to enable a corporation of one State to do business in another.[7] They are given such powers as may be prescribed by their articles of incorporation, and the laws of the State where organized, and they are subject to all the limitations and restrictions of those laws, and also of the laws of the State where their operations are carried on.[8] They may appropriate water,[9] construct the necessary works for the diversion, and for conducting the water to the place of use. And, for this purpose, they may acquire rights of way over the public lands of the United States, or those of a State;[10] and they may also acquire rights of way over the private lands of others, either by purchase, prescription, or condemnation proceedings.[11] They may sell, rent, or otherwise dispose of the water rights acquired under the restrictions imposed by the law of the State relative to the rates which may be charged,[12] and they may make contracts, not in violation of such laws, regulating the sale and distribution of the water.[13]

2 San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

3 See irrigation districts, Chap. 70, Secs. 1386-1432.

4 See Chap. 71, Secs. 1433-1448.

5 See Secs. 1492, 1493.

6 For the organization of corporations, see Secs. 1466, 1467.

7 See Secs. 1466, 1467.

8 For the powers of corporations, see Secs. 1470-1473.

9 See Secs. 684, 1470.

10 For rights of way over public lands, see Chap. 51, Secs. 927-971.

11 For the acquisition of rights of way over private lands, see Chap. 52, Secs. 972, 973.

12 For water rates, see Chap. 69, Secs. 1368-1385.

13 For contracts, see Secs. 1500-1529.

In those States, however, where the water company is regarded merely as the carrier of the water for hire, it is held that the terms "selling" and "renting" water are a misapplication of those terms, and that the company has no water which it can "sell," or "rent," and that the only remuneration which the company can collect is a reasonable compensation for its services for diverting and carrying the water to the place of use.[14] They may protect their rights acquired by suits at law and in equity in the corporate name.[15] There is also one material difference between these corporations and mutual water companies discussed in the previous chapter,[16] and that is, they may declare dividends in cash upon their capital stock, and pay the same to their stockholders, while mutual corporations pay their dividends in water to the shareholders, who use the same upon their lands.[17]

§ 1492. **Right to organize for the purpose of profit.**—It is well settled by the laws of all the States that private water corporations may be lawfully organized for the appropriation of water from the natural streams, or other sources of water supply, for the express purpose of selling of water rights to consumers, or for the purpose of conveying water for hire; and, that too, for the sole purpose of making a profit for their stockholders. Not only has this right been recognized and protected, but the organization and operation of such corporations has been encouraged, both by the statutory laws of all the States and Territories included within the arid and semi-arid

14 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, where it is said: "A cursory reading of the statute might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water, and the constitutional phrase (Art. 16, Sec. 8), 'to be charged for the use of water,' relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such use. But construing all the provisions of that instrument bearing upon the subject *in pari materia*, the correctness of both these inferences must be denied. . . . It requires no citation of authority to show that the words 'purchase' and 'sale,' together with other words of like import, used in this connection by the legislature, must receive a corresponding interpretation."

See, also, Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

See, also, for relation of company to consumer, Secs. 1475-1477.

15 For parties to actions, see Chaps. 78-83.

16 See Chap. 75, Sec. 1479.

17 See Sec. 1483.

West, but also by Congressional laws. As was said by the Supreme Court of the United States, upon this subject: "Irrigation corporations are recognized in the legislation of Congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land."[1]

It was held by the Supreme Court of the United States that a corporation organized under a Territory has the same right to make appropriations of water as one organized under a State.[2]

A very common method of the organization of these corporations for profit is through the efforts of promoters. Generally speaking, promoters of corporations are regarded as trustees, and the utmost good faith required of them. As was said in a late case in Washington:[3] "The courts generally deal with promoters as trustees, and require them to act with the utmost good faith. They can not be permitted to reap a harvest of secret profits for themselves at the expense of existing stockholders whose funds have provided financial support for the corporate enterprise. If, without the knowledge or consent of such stockholders, the promoters cause funds of the corporation to be so disbursed as to secure undisclosed profits for themselves, they may be called to account."

§ 1493. Corporations for profit—Public service, or quasi-public corporations.—All water corporations organized for the purpose of furnishing or carrying water to consumers, either for sale or hire, in order to make a profit for the stockholders, come strictly within the class of corporations known as "public service," or

1 Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

See Slosser v. Salt River Valley Canal Co., 7 Ariz. 367, 65 Pac. Rep. 332; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

In New Mexico it is held that a corporation has the right to make an appropriation of water from a natural stream and distribute it to those who may require it for purposes of irrigation, and that, too, whether such corporation has land connected with such irrigation system or not. Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

See, also, for corporations operating under the Carey Act, Secs. 1312-1336.

2 Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

3 Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. Rep. 173.

"quasi-public" corporations, which we have defined as those companies engaged in the business of furnishing or carrying water for hire, to all consumers who can be provided with water under its system, and who apply for the same, up to the full capacity of such system.[1] And, regardless of the question, as to whether such corporation is considered the appropriator, and therefore the owner of the water rights, or is regarded simply as the carrier of the water for the consumers, who are deemed the appropriators and the owners of the rights,[2] such corporation is charged with a public duty, or trust, and is subject to all the general rules of law regulating and controlling these and other public service, or quasi-public corporations.[3]

Under the constitution and laws of all the States, such corporations are at least quasi-public servants, or agents. They do not stand in the attitude of private individuals contracting for the sale or use of their own private property. Neither do they stand in the same position before the law as groups of individuals who have associated themselves together, either as voluntary associations,[4] or even as mutual corporations, for the purpose of better managing and controlling the property of all, and of distributing the water only to their own shareholders, who are also the consumers of the

1 For the distinction of "public use" and "public service," see Sec. 1451.

2 For the distinction as to the ownership of the water rights, see Secs. 1475-1477.

3 For the police powers of a State to regulate and control public service corporations, see Secs. 1495, 1496.

For the regulation of water rates, see Secs. 1368-1385, 1494.

That such a corporation is a public service or quasi-public corporation, and therefore a public agency, see Price v. Riverside etc. Co., 56 Cal. 431; McCreary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Hanes v. Idaho Irr. Co., —— Idaho ——, 122 Pac. Rep. 859.

A mutual corporation furnishing water generally for irrigation only, when there is a surplus in its ditch over and above the requirements of its shareholders, is impressed with a public character and holds its property subject to an exercise of the police power of the State to a greater degree than does a private person. Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

See, also, Garrison v. North Pasadena etc. Co., —— Cal. ——, 124 Pac. Rep. 1009.

4 See Secs. 1453-1463.

water.[5] These corporations, organized primarily for profit to their stockholders, exist largely for the benefit of others. They are permitted to acquire water rights, which, in order to hold, must be applied by others to a beneficial use or purpose and which, when so applied, the law protects as against others subsequently diverting waters from the same natural stream, or other source of water supply.[6] They may exercise the power of eminent domain, both for the condemnation of rights of way,[7] and, in certain instances, water rights.[8] Their business is affirmatively sanctioned by the constitutions and laws of the respective States and the laws of Congress; and they are granted charters by the States, enabling them, in their corporate right, to transact such business. Reasonable profits, or emoluments, are permitted to their stockholders, but they have other duties to perform than to declare excessive dividends upon their stock, or to charge such rates for the use of water as will be too great a burden to the consumers.[9] Therefore, as well stated by the Colorado Court, in an early case, such a corporation, "in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control."[10]

5 See Secs. 1479-1489.

6 For rights of corporations to appropriate water, see Secs. 684, 1470.

7 See Secs. 1059-1098.

8 See Secs. 1087, 1088.

9 For the regulation of water rates, see Secs. 1368-1385.

10 Mr. Justice Helm, in Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

"As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public, and appellee is therefore a public agency, whose right to divert the water and whose continued existence is dependent upon the application by it within a reasonable time to a beneficial use." Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

"One of the obligations the company assumed was to sell water at reasonable prices." Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.

See, also, for the regulation of water rates, Chap. 69, Secs. 1368-1385.

"It was, therefore, the duty of the defendant under the law, as established in this State, to furnish the plaintiff water upon tender of established rates." Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058.

For the duty of a corporation to furnish water, see Secs. 1497-1502.

The power of a corporation to contract with consumers for the delivery of water is limited by the ability of the company to supply and deliver the water. Wyatt v. Larimer & Weld

As to whether or not a corporation organized for the furnishing and distribution of water is one organized for profit, and thus a public service, or quasi-public corporation, is a question of fact, and depends upon the facts and circumstances of each particular case. There is no presumption of law that a corporation organized

Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

For limitation of power to contract, see Secs. 1500-1529.

That canal corporations are quasi-public servants, charged with certain duties and subject to reasonable control, see, also, Lanning v. Osborne, 76 Fed. Rep. 319; Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39; *Id.*, 79 Fed. Rep. 501; *Id.*, 86 Fed. Rep. 975; San Joaquin etc. Co. v. Stanislaus County, 90 Fed. Rep. 516; Boise etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Junction Creek etc. Co. v. City of Durango, 21 Colo. 194, 40 Pac. Rep 356; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Sammons v. Kearney Pr. & Irr. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; dismissed, 195 U. S. 639, 49 L. Ed. 356, 25 Sup. Ct. Rep. 792; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944; Colorado Canal Co. v. McFarland & Southwell, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435; Souther v. San Diego etc. Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; Price v. Riverside etc. Co., 56 Cal. 431; Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; People v. Stephens, 62 Cal. 209; Hildreth v. Montecito W. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; Colorado Canal Co. v. McFarland, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Lowe v. Yolo County etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 397; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; State *ex rel.* Crawford v. Minnesota etc. Co., 20 Mont. 198, 50 Pac. Rep. 420; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Farmers' etc. Co. v. Brambaugh, 81 Neb. 641, 116 N. W. Rep. 512.

for this purpose is one organized for profit.[11] The same may be said as to what constitutes a public use.[12] As was said in a late California case:[13] "The term 'public use,' is a term of indefinite signification. The statute authorizes the right of eminent domain in behalf of certain public uses, among which are included 'electric power lines.' While what is a public use is a judicial question, yet in a doubtful case, the legislative declaration is of great persuasive force."[14]

§ 1494. Public service—Charges which may be made.—A sale and transfer of all property rights may be made by one public service corporation to another corporation, but the title to the use of the water sold consumers by the vendor can not be affected by such transfer. Even the foreclosure and sale under a mortgage can not affect their rights.[1] The purchaser under any sale must assume the obligations of the vendor, and is under the same public duties.[2]

A change may also be made in the nature of a corporation. It may change from a mutual corporation, or one organized for the express purposes of distributing water to its own shareholders only, to a public service corporation, by offering water to the general public for sale, rental, or distribution.[3]

11 Applegarth v. McQuiddy, 77 Cal. 408, 19 Pac. Rep. 692.

See, also, for mutual corporations, Secs. 1479-1489.

12 For public use, see the chapters upon eminent domain, Secs. 1065-1074, and irrigation districts, Secs. 1405-1407.

13 Tuolumne W. Co. v. Frederick, 13 Cal. App. 498, 110 Pac. Rep. 134.

14 Citing Lindsay I. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Walker v. Shasta Pr. Co., 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725.

See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Northern Lt. & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896.

1 Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296, holding that the title to the use of water can never be affected in any way by any subsequent transfer of the canal or ditch company, or by any subsequent foreclosure of any bond, mortgage, or other lien.

2 South Pasadena v. Pasadena Land & Water Co., 152 Cal. 590, 93 Pac. Rep. 490; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Graham v. Pasadena Land & Water Co., 152 Cal. 596, 93 Pac. Rep. 498; Orcutt v. Pasadena Land & Water Co., 152 Cal. 599, 93 Pac. Rep. 497; Farmers' etc. Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063; Clague v. Tri-State etc. Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637.

3 Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31

But a corporation can not change its nature from a public service corporation to a mutual, or exclusive corporation, having once entered the class of public service corporations for profit. Such a corporation must furnish the water to all applicants who may legally apply therefor, without discrimination.[4]

The question never seems to have arisen as to whether a public service corporation could voluntarily abandon all service and cease to do business as such corporation, although in a recent case decided in California, the Court intimates that such might be done. But the Court held that such a corporation must either comply with the law of public service, or permit the use of its property and plant in previous use and necessary for the service of the consumers.[5]

The usual changes, relative to point of diversion, place of use, and the use of the water itself, by the consumers furnished with the

Pac. Rep. 275; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

[4] Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

See, however, Jackson v. Indian etc. Co., 18 Idaho 513, 110 Pac. Rep. 251.

[5] Fellows v. Los Angeles, 151 Cal. 52, 90 Cal. 137, in which it is said: "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted, or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or, it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty. These questions are not now involved, and we express no opinion concerning them. But in such a case it can not continue in absolute control of the water and waterworks appropriated to the public service. If a proper demand, by a person entitled, is made upon it for the continuance of the service, it must either comply or permit the use of the property and plant in previous use and necessary for the service by the demandant, or by the persons beneficially interested, to the end that he, or they, may continue to devote the property to the public service to which it is dedicated."

See Spring Valley Water Co. v. San Francisco, 165 Fed. Rep. 667, in which it is said: "But once enlisted in the public service the company can not withdraw."

See, also, Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. Rep. 236; Laighton v. City of Carthage, 175 Fed. Rep. 145.

water from public service corporations, may also be made, provided that the rights of others are not injured by such change.[6]

§ 1495. Power of State to regulate—At common law.—The classification of incorporated water corporations as public service, or quasi-public corporations, is not dependent upon any new principle of law; neither is it peculiar to corporations organized for the purpose of appropriating, carrying, and distributing water to consumers; nor is it peculiar to those States wherein the Arid Region Doctrine of appropriation is in vogue. This classification is applied to all corporations organized for profit and which depend upon the general public for their subsistence, and for the accumulation of that profit; it is applied in every State of the Union, both by their statutory laws and the decisions of their courts. It probably has been applied to railroad corporations oftener than to any others; and more often to the subject matter of the charges which these companies may make for their services to the public.[1] But it has also been applied to public warehouses,[2] to water companies engaged in furnishing water to municipalities and the inhabitants thereof,[3] to companies engaged in the furnishing of gas,[4] to telephone companies,[5] and to all other private corporations rendering services to the general public, thus making them quasi-public in their nature, and which depend upon the public for their continued operations, and from the payment of whose services to the public they derive the profits for their stockholders. Neither does this depend upon the na-

6 For changes which may be made, see Secs. 856-873.

See, also, Knowles v. Clear Creek etc. Co., 18 Colo. 209, 32 Pac. Rep. 279; Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598.

But see Redwater Land & Canal Co. v. Jones, —— S. D. ——, 130 N. W. Rep. 85, where the Court held that where the defendant was entitled to take water from the plaintiff corporation's ditch for irrigation purposes, it was immaterial at what point upon the ditch defendant chose to divert the water, though, if he selected one point for diverting it, he could not thereafter select another point.

1 Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. St. Rep. 690; Vincent v. Chicago etc. R. Co., 49 Ill. 33.

2 Munn v. People of Illinois, 94 U. S. 113, 24 L. Ed. 77.

3 City of Danville v. Danville W. Co., 178 Ill. 299, 53 N. E. Rep. 118, 69 Am. St. Rep. 304; Wood v. City of Auburn, 87 Me. 287, 32 Atl. Rep. 906, 29 L. R. A. 376.

4 Shepard v. Milwaukee Gas Co., 6 Wis. 539, 70 Am. Dec. 479.

5 State v. Kinloch, 93 Mo. App. 349, 67 S. W. Rep. 684.

ture of the title with which such a corporation holds to the property. This title may be in absolute fee simple, or it may be held only upon sufferance, as is the case with water rights, which can be held only so long as the water is applied to some beneficial use, or purpose. Neither does this classification depend upon any statutory law fixing the status of such corporations, but their status may be fixed by decisions of the courts of a State, under the common law, and their operations and charges, in a measure, may be thus regulated. At least the courts, without specific statute, may determine what acts of such a corporation are illegal, and what charges for services are illegal and extortionate.[6]

This power to govern and regulate these quasi-public corporations rests in the general police powers granted to a sovereign State, which powers are defined by the Supreme Court of the United States, as "nothing more, or less, than the powers of government inherent in every sovereignty, that is to say, the power to govern men and things."[7] This power of a State to govern and regulate such companies is not based upon the right of ownership, but upon the right of sovereignty.[8] Nor does such right of the State depend upon the contract.[9]

§ 1496. Power of State to regulate—By constitutional provisions—By legislative enactment.—In many of the States there are to be found constitutional provisions and legislative enactments providing for the regulation and control of public service corpora-

6 "In the absence of legislation on the subject, it would, for these reasons, be held at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, Price v. Riverside W. Co., 56 Cal. 431; People v. Stephens, 62 Cal. 209; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Spring Valley etc. Co. v. San Francisco, 165 Fed. Rep. 667; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; State *ex rel.* Shropshire v. Superior Court of Pacific County, 51 Wash. 386, 99 Pac. Rep. 3.

7 License Cases, 46 U. S. 5 How. 583, 12 L. Ed. 504; Munn v. People of Illinois, 94 U. S. 113, 24 L. Ed. 77.

8 See Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418, a leading case upon the question, distinguishing between the rights of the Government as a proprietor and as a sovereign.

9 "These things are not of contract; they appertain to the sovereignty of the State and can not be bargained away." Spring Valley W. Co. v. San Francisco, 61 Cal. 3.

tions, and especially those appropriating, or carrying water for distribution to consumers. These provisions have been discussed to a great extent in our chapter upon the subject of the dedication of water rights by a State,[1] and also in the chapter upon the subject of the right of a State to control water rights.[2] They will also be further discussed in Part XIV, in which we abstract the laws of the various States, and therefore no further extended discussion of these provisions need be made here. These powers have been and may be exercised by the States, by the means of legislative enactments, which is the more usual method, or they may be exercised by the courts even without any constitutional provisions, or legislative enactments. As was said in an early case upon the subject:[3] "The duty exists without any express statutory words imposing it, wherever the public use appears"; and as was also said in an Indiana case,[4] and quoted with approval in a late California case:[5] "'No statute has been deemed necessary to aid the courts in holding that, when a person, or company, undertakes to supply a demand which is affected by a public interest, it must supply all alike who are like situated, and not discriminate in favor of, nor against any.' It therefore follows that, although the constitutional provisions and statutory laws must be strictly followed, relative to the regulation and control of these companies, the courts without such provisions and laws have full power to make such regulations upon their own responsibility."[6]

§ 1497. **State regulations—Duty to furnish water.**—Private water corporations, organized for the purpose of profit or hire, whether they are deemed the appropriators of the water and, therefore, the owners of the water rights, or whether they are considered merely the carriers of the water,[1] are required, as public service, or quasi-public, corporations,[2] to treat the general public, or such a portion of the public as wish to take advantage of the water service of the company, as nearly on equal terms, and without discrimi-

1 See Chap. 18, Secs. 372-389.

2 See Chap. 69, Secs. 1368-1385.

3 Price v. Riverside W. Co., 56 Cal. 443.

4 State *ex rel.* Wood v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. Rep. 674, 55 L. R. A. 245.

5 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

6 See power to regulate corporations at common law, Sec. 1495.

1 For the relation of company to consumers, see Secs. 1475-1477.

2 See Secs. 1493-1495.

nation, having due regard to priorities,[3] as it is possible, up to the full extent of the capacity of their respective systems, and to the full amount of the water appropriated or controlled by such a company. This is one of the regulations required in every State of the West, where such corporations are in operation, both as regards the furnishing or carrying of the water to the consumers, and also as to the rates which may be charged for such services, which subject has been discussed in a previous chapter of this work.[4] As was said by the United States Supreme Court: "As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly a public use."[5] Without such regulations by the State, one of the principal natural resources thereof would be controlled and monopolized by these corporations, in total disregard of the rights of the consumers, who are necessary by their actual use of the water to perfect the appropriation;[6] and, such corporations, instead of being "the intermediate agency existing for the purpose of aiding consumers,"[7] might become, and likely would become, engines of oppression, both of the consumers and against the general welfare of the State. Therefore, under the constitutions of some of the States,[8] and under the statutes and decisions of all, it is made the duty of such a corporation to sell, rent, or distribute the water upon the demand of any consumer, and the tender by him of the established rates. In other words, whenever water is appropriated for distribution, or sale, the public has a right to use it. Water appropriated for distribution and sale by a private corporation to others is, *ipso*

3 For the priority of rights of consumers taking their water from public service corporations, see Sec. 1500.

4 For water rates, see Chap. 69, Sec. 1368.

5 Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

6 "The appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without the water consumers." Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

See, also, Hard v. Boise City Irr. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

See, also, for the relation of the company to the consumers, Secs. 1475-1477.

7 Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

8 For the State constitutions, see Part XIV.

facto, devoted to a public use.[9] And, although the relations between the corporation and consumer may depend somewhat upon contract,[10] the statutory right of the consumer to have the water furnished is not modified, or destroyed, by the fact that he has maintained contract relations with the company.[11] Therefore, each member of the community who desires to become an actual and *bona fide* consumer, upon making application to the company therefor, and by paying or tendering the rate fixed for supplying it, has a right to the use of a reasonable quantity of the water in a reasonable manner sufficient for the beneficial use or purpose to which he wishes to apply it;[12] provided, of course, that the company still has water under its control which has not theretofore been disposed of to others.[13] As was said in a leading Colorado case upon the subject: "A refusal to supply water by the carrier, to be justifiable, must rest upon something more substantial than the mere will of the carrier."[14] And the duty of the company is the same, whether that duty is to furnish water as proprietor of the water rights, or the mere carrier of the water for the consumers, who are the owners of the water rights.[15] And the fact that consumers of water have

[9] McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264.

See, also, People v. Stephens, 62 Cal. 209; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Price v. Riverside W. Co., 56 Cal. 433; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

[10] For contracts with water companies, see Secs. 1500-1529.

[11] San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; affirming *Id.*, 89 Fed. Rep. 295.

[12] For the economical use of water, see Secs. 875-885.

[13] That a company can not contract in excess of its capacity, see Sec. 1511.

[14] Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

[15] Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing 1 Colo. App. 480, 29 Pac. Rep. 906.

A corporation which is incorporated for various purposes, among which is that of furnishing water to consumers, can not escape the public duty assumed by it as such corporation under a statute authorizing the organization of water companies, of furnishing water to all those who come within the class or community for whose benefit it was created, by the assertion of a right as another sort of a corporation to apply all the water to its own use or to that of its grantees. Price v. Riverside etc. Co., 56 Cal. 433.

See, also, the case of Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275, where the contention was that the cor-

poration was a mutual corporation and organized to supply only its own stockholders.

It is the well settled doctrine of this State that a water company engaged in the administration of the public use of distributing water to the inhabitants of a community or neighborhood, whether inside or outside of a city or town, is under the duty and obligation to supply the water in proper proportion to the persons composing the class for which the use was created. Fellows v. City of Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137.

The mere failure of the owner of a water right to go to the company each year and pay the stipulated price for carrying his water does not entitle the company to enter into a contract with another person for the carrying of such water. Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

That it is the duty of such companies to furnish water, see, also, Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; South Boulder D. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504; People *ex rel.* Standard v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Lanning v. Osborne, 76 Fed. Rep. 319; Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Colorado Canal Co. v. McFarland, 50 Tex. Civ. App. 92, 109 S. W. Rep. 435; Lowe v. Yolo County etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 379; Downey v. Twin Lakes etc. Co., 41 Colo. 385, 92 Pac. Rep. 946; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944; Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, 16 Am. & Eng. Ann. Cas. 796; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; People v. Stephens, 62 Cal. 209; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Junction Creek etc. Co. v. Durango, 21 Colo. 194, 40 Pac. Rep. 356; Farmers' Independent D. Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369; Northern Colo. Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Boise etc. Co. v. Boise City, 19 Idaho 717, 115 Pac. Rep. 505; Gerber v. Nampa Irr. Co., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Knowles v. New Sweden Irr. Co., 16 Idaho 217, 101 Pac. Rep. 81; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Farmers' Irr. Dis. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Sammons v. Kearney Pr. & Irr. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 494; Gutierres

abused, or exceeded, their right by taking more water than they were entitled to, does not deprive them of the right to insist on receiving the amount of water which they are entitled to take.[16]

A distinction, however, must be made between the duty of corporations organized for profit to furnish water upon application therefor, and purely mutual corporations organized for the express purpose of furnishing water to their own shareholders, discussed in previous sections of this part.[17] No such duty devolves upon mutual corporations; and a corporation which confines its services to acting as the private agent of its shareholders can not be compelled to render its services to others.[18] But where a company is organized ostensibly for the purpose of furnishing water only to its own shareholders, but under its articles of incorporation the power is given to furnish water to others, and it has the water to spare such a company may be compelled to furnish water to others.[19] The mere change of the ownership of the irrigating system does not devest the applicant of such right.[20] But the purchasing company is under the same duty to furnish the water as the company selling.

§ 1498. Duty to furnish water without unreasonable conditions.—Although a corporation has the right to make all reasonable rules and regulations relative to furnishing the consumers under its system with water,[1] it can not, as a condition precedent to the furnishing of the water, require the applicant for water to comply with

v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Miller v. Mount Nebo etc. Co., 37 Utah 1, 106 Pac. Rep. 504; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Hewitt v. Great Western Beet Sugar Irr. Co., 20 Idaho 235, 118 Pac. Rep. 296.

16 Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

17 See Secs. 1479-1489.

18 Slosser v. Salt River Valley etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397.

19 Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

20 Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Hildreth v. Montecito etc. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858; South Pasadena W. Co. v. Pasadena, 152 Cal. 590, 93 Pac. Rep. 490.

1 For rules and regulations by companies, see Secs. 1503-1505.

unreasonable regulations,[2] or demand an extra fee, or bonus, over and above the established rates, or what would be a reasonable rate under the circumstances.[3] In many of the States it is made a criminal offense for a corporation to demand or accept a bonus or royalty, over and above the legal rate fixed for the supply of water.[4] Neither can the corporation compel the applicant to comply with any other unreasonable condition precedent to its furnishing the water.[5] Therefore, the company can not compel the applicant to

2 The prior purchaser of water, who has complied with the provisions of the statute relative to the continuance of the right, can not be required, as a condition precedent to the exercise of his right, to acknowledge the equity of all rules adopted by the company. Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142.

A company has no right to insist upon the repayment of the damages the plaintiff received in condemnation proceedings for a right of way over plaintiff's land as a condition precedent to the furnishing of the plaintiff with water, where a legal demand was made, and at the same time a tender of the water rates. Lowe v. Yolo etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 379.

3 For the regulation of water rates, see Secs. 1368-1385; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369; People v. Palermo W. Co., 4 Cal. App. 717, 89 Pac. Rep. 723; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Lanning v. Osborne, 76 Fed. Rep. 319; San Diego etc. Co. v. National City, 74 Fed. Rep. 79; affirming 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

4 For these statutes, see Part XIV, under criminal statutes.

See, also, Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369; People v. Palermo W. Co., 4 Cal. App. 717, 89 Pac. Rep. 723; Crow v. San Joaquin Irr. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Lowe v. Yolo W. Co., 157 Cal. 503, 108 Pac. Rep. 297; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 279; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450; Mandell v. San Diego etc. Co., 89 Fed. Rep. 295; Souther v. San Diego etc. Co., 112 Fed. Rep. 228.

See, also, for the right of a State to control water rates, Chap. 69, Secs. 1368-1385.

5 So, where it was required by the company that the applicant must either purchase another half water right, or have some other person who owned at least a half water right draw his water from the same headgate, before the company would permit the water to be taken through a certain headgate, and the applicant was unable to purchase the additional water right, and was likewise unable to find any person who was willing to draw his water through the same headgate, it was held to be the duty of the company to furnish the water, and to put

sign a contract containing unreasonable terms as a condition precedent to his receiving the water.[6] It can not demand that the consumer pay all back dues and arrears for water previously received by him.[7] Neither can a company demand that before the consumer receive the water that he buy a certain number of shares of the company's stock.[8] Neither can the company demand an advance payment for a perpetual water right,[9] nor can a company require a user to sign a contract at the beginning of each irrigation season to the effect that his use of the water from the company's canal for the season should give him no claim to the use of the water in the future, and that he thereby waives any right which he might have by virtue of any statute, custom, or law, to the use of the water, after the expiration of the period limited by the contract, for the reason that the user was entitled by law to such water and to compulsory service of the same by the company in case they failed to furnish it.[10] As was said in a recent Idaho case:[11] "When one enters into a contract by reason of compulsion, or threats, there is nothing but the form of a contract, without its substance. When a party is entitled to water from a ditch company and does all that the laws of the State require him to do in order to get that water, the company is bound to deliver the water, and can not legally require the party making the application to sign a special contract binding him to do things which the law does not require him to do. And a contract like the one in question, executed under the circumstances alleged in the answer, is in contravention of the laws of this State, and is voidable, if not void."

in the headgate at the expense of the company. Downey v. Twin Lakes etc. Co., 41 Colo. 385, 92 Pac. Rep. 946.

6 Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450.

7 The remedy of the company in such a case is a suit to recover the arrears. Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Kimball v. Northern Colorado Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222.

8 Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Baker etc. Co. v. Baker City, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

9 Wheeler v. Northern Colorado Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

10 Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; San Diego Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220.

11 Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450.

§ 1499. Duty to furnish water—Without discrimination or preference.—Water corporations organized for profit, being public service, or quasi-public corporations,[1] to the full extent of their capacity are bound to furnish water from their system of works to all persons desiring to use it, on equal terms and without discrimination. In this respect they stand upon the same footing as railroad companies. Neither have the right nor power to place themselves in a position where they can not serve every person on equal terms with every other person.[2] A corporation has no more right to discriminate as to the personnel of its consumers, than it has to discriminate as to the rates for which it will furnish them the water. Therefore, it must follow that such a corporation must, in the first instance, furnish the water to its consumers, without discrimination, in the order of the legal applications for the same and the tender of the established rates, until the full capacity of its system and the water supply which it owns, or controls, is exhausted. And any attempted discrimination in this respect will be looked upon with disfavor by the courts, and any clause in a contract which, if enforced, would render the company unable to serve the public on those terms, or to carry out its main purpose for which such public service corporation was organized, is illegal and void.[3]

1 See Sec. 1493.

2 Sammons v. Kearney etc. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404.

3 Where there was an attempt upon the part of a company to give a single party an exclusive right for a term of years to use its entire supply of water, which, under the law, the irrigation company was bound to furnish to the public on equal terms, such a contract is contrary to public policy and illegal. Sammons v. Kearney etc. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; Souther v. San Diego etc. Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

That the service must be without discrimination, see Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Sammons v. Kearney Irr. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Lanning v. Osborne, 76 Fed. Rep. 319; San Diego Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; Erp v. Raywood Canal & Mill Co., —— Tex. Civ. App. ——, 130 S. W. Rep. 897.

See, also, for State control of water rates, Chap. 69, Secs. 1368-1385.

§ 1500. **Duty to furnish water—Order of priority.**—Although the rule is that a public service corporation must furnish the water in the first instance without discrimination between its customers,[1] where a consumer has once established a right to the use of the water for one year, it is made the duty of the company, in the succeeding years to continue to furnish him the water in preference to the later applicants, provided, of course, he still desires the water and has in no way forfeited his right to the use of the same. It must be remembered that in cases of this nature the capacity of the works of these public service corporations is limited; then, again, the water which it owns or controls is of a limited quantity. And, under these conditions, it may be impossible for the company to furnish it to all persons who may desire it; and, therefore, the company has the right, and it is made the duty to discriminate between the applicants to this extent only, that it may give the preference right to its old customers rather than to new, or later ones. Under the conditions existing, this is the only just and equitable rule which can be adopted. A settler who has been induced by one of these companies to settle upon a tract of land under its system, upon the representations that the company will furnish him the water, should have reasonable assurance that the water will be furnished subsequently to the first year of his settlement. This the law provides by declaring in those States where the consumer is the appropriator, that he has a priority of appropriation to the extent of his use; and, therefore, he has the right to require the company to furnish him the water in preference to later applicants.[2] And, in those States

1 See previous section, No. 1499.

2 For the relation of company to consumers, see Secs. 1475-1477.

"If applications for water be made during any season in excess of the capacity of the canal to furnish it, the canal company would have the right, and, indeed, it would be the duty, to limit the contracts for the season to its capacity and to those appropriators possessing the older rights of appropriation." Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598.

"It is clear that the water had been applied to respondent's lands during at least a part of one previous year, and a part, if not a whole, of another year, under rental rate, and the use thereof resulted in a dedication of the waters under the provisions of Section 4 of Article 16 of the constitution, and the canal company could no longer deny him the right for such waters as had been supplied so long as he continued to pay the rental charges." Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

Indians having assisted in the construction of a canal, and used the

which hold that the company is the appropriator and the owner of the water rights, it is governed by special statutes, regulating such distribution of the water by such corporations.[3]

Where a company has but a limited supply of water, new consumers taking water from its works can insist only on the use of such surplus as there may be, and only at such times as there is such a surplus.[4]

§ 1501. Duty to have adequate works and to keep them in repair.—The law also makes it the duty of all water corporations organized for profit, and therefore public service, or quasi-public corporations, to have adequate works for the delivery of water to all

water therefrom for a number of years, are entitled to a continuation of the use upon their bearing their proportion of the maintenance of the ditch. Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494; Atlantic Trust Co. v. Woodbridge etc. Co., 79 Pac. Rep. 39; *Id.*, 79 Fed. Rep. 501, 86 Fed. Rep. 975; Hard v. Boise City etc. Co., 9 Idaho 598, 76 Pac. Rep. 331, 65 L. R. A. 407; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400; Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; affirming *Id.*, 89 Fed. Rep. 295; Mandell v. San Diego etc. Co., 89 Fed. Rep. 295; Western etc. Co. v. Chapman, 8 Kan App. 778, 59 Pac. Rep. 1098; Gerber v. Nampa etc. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104.

3 Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134, where it is held that when such waters are used for one year, or a term of years, the right to such use becomes perpetual, unless limited by contract.

See, also, Hard v. Boise City etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; affirming *Id.*, 89 Fed. Rep. 295; Mandell v. San Diego etc. Co., 89 Fed. Rep. 295.

For the rule as to prorating in times of scarcity of water, see Sec. 1502.

4 Gerber v. Nampa Irr. Co., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254, wherein it is held that under the constitutional provisions of the State of Idaho, priority of appropriation gives the better right as between those using water furnished by an irrigation company.

consumers whose lands lie under the system, and which, with reasonable effort upon the part of the corporation, might be furnished with water therefrom. It is, therefore, made the duty of such a company to turn the water for the consumer out of its main canal, or lateral, at such a place as will be most convenient for the consumer, and will cause less waste of the water by seepage and evaporation. And, for this purpose, it is the duty of the corporation to construct such headgates, laterals, or other works, as will best meet the reasonable requirements of the consumers and of the law.[1] And, furthermore, it is made the duty of such water companies to keep their ditches, canals, and other works in such repair as to be able to carry the water to the several consumers along the lines thereof, even if in certain instances the cost of such repairs exceeds the rental charges paid by the consumers.[2]

§ 1502. Duty to furnish water—Order of priority—Rule as to prorating in times of scarcity.—But there is another phase of this question which has presented itself a number of times to the courts upon the subject of priority of rights between consumers furnished water by the same corporation, and that is as to what amount of

[1] That it is the duty of the company to construct the necessary headgates, at points where the water can be best used by the consumer, see Downey v. Twin Lakes etc. Co., 41 Colo. 385, 92 Pac. Rep. 946; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; International etc. Co. v. City of El Paso, 51 Tex. Civ. App. 321, 112 S. W. Rep. 816; Sisk v. Gravity Canal Co., —— Tex. Civ. App. ——, 113 S. W. Rep. 195; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Tarpey v. Lynch, 155 Cal. 407, 101 Pac. Rep. 10; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Gerber v. Nampa Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450.

[2] "The further contention is made in this connection that to keep this lateral in sufficient repair to deliver water to respondent's lands will entail such an enormous cost as will greatly exceed the rental charges paid by the respondent. This is not a sufficient reason for refusing to deliver the water. We do not apprehend that rental charges for the use of water from irrigating canals are based upon the actual expenses of carriage and delivery to each individual customer. . . . This is not the theory on which water rates are established." Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

See, also, Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533, 24 L. R. A., N. S., 425; Pocatello Water Co. v. Standley, 7 Idaho 155, 61 Pac. Rep. 518.

water consumers are entitled to in times of great scarcity, and when, on that account, the corporation is not able to furnish all the water which the old consumers need, and which they had used in previous years. The rule of law upon this subject differs in the different States, according as to whether the corporation is considered the mere carrier of the water, and "as an intermediate agency existing for the purpose of aiding consumers in the exercise of their rights,"[1] or whether it is regarded as the appropriator of the water and the owner of the water rights.[2] In the States holding to the former rule, led off by Colorado, the consumers are held to be the appropriators in the order of their respective priorities; and, therefore, they must be furnished the water by the company in the order of their respective priorities, and the last comers must bear the burden of the shortage alone. It is also held that they can not be compelled to prorate with those having later priorities, either by the by-laws of the corporation, or by a statute enacted for that purpose.[3] But in these jurisdictions contracts between the consumers and the company, or between the consumers themselves, to prorate the water in times of scarcity will be enforced by the courts.[4]

But in those States which hold that the water corporation is the appropriator of the water and the owner of the water rights, the consumers taking the water from the same system are considered on an equality, regardless of the time that each began the use. And, therefore, in times of scarcity, it is the duty of the company to prorate the water, according to the respective rights of each, and the

1 Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep, 280; reversing 1 Colo. App. 480, 29 Pac. Rep. 906; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

2 For relation of company to consumers, see Secs. 1475-1477.

3 "It therefore may be considered as *stare decisis* in this jurisdiction that there may be circumstances in which water consumers from the same ditch may not be compelled to prorate with each other." Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 415.

See, also, Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

4 O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849.

See, also, Jackson v. Indian Creek etc. Co., 16 Idaho 430, 101 Pac. Rep. 814.

For duty to furnish water under contract, see Sec. 1498.

burden of the shortage rests upon all of the consumers, and not upon those who took the water last.[5]

§ 1503. Power to make rules and regulations for furnishing water.—As is the case with mutual corporations organized for the purpose of furnishing water only to their own shareholders,[1] so it is with all water corporations organized for the purpose of furnishing water to others for profit, they are empowered to make such reasonable rules and regulations to govern their own operations, and their dealings with the consumers of the water furnished by them as they see fit.[2] A company may limit the amount of water that it will furnish to so much as may be necessary for the purposes for which it is used.[3] These rules and regulations may be embodied in the articles of incorporation, or they may be in the form of by-laws or resolutions formally adopted by the stockholders or directors of the corporation; or, again, they may be contained in contracts between the company and its consumers.[4] Such rules and

[5] Souther v. San Diego etc. Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754, where it is held that in the absence of a provision to the contrary in the certificates of stock, or in the resolutions, by-laws, or charter authorizing their issue, or other writing, the consumers must be regarded as being equal in right.

See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

[1] Power of mutual corporations to make rules and regulations, see Sec. 1488.

[2] Shelby v. Farmers' Co-op. D. Co., 10 Idaho 723, 80 Pac. Rep. 222; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142, where it is said: "It is conceded by counsel in argument that the ditch owner may make reasonable rules, to be observed both by himself and the consumer, in the sale and distribution of water from his ditch."

The company may make reasonable rules as to the apportionment of the water in times of scarcity, in States where the company is considered the appropriator and the owner of the water rights. Souther v. San Diego Flume Co., 121 Fed. Rep. 347, 57 C. C. A. 561; affirming 112 Fed. Rep. 228.

See, also, Wright v. Platte etc. Co., 27 Colo. 322, 61 Pac. Rep. 603; Highland D. Co. v. Mumford, 5 Colo. 325; Cozzens v. North Fork Ditch Co., 2 Cal. App. 404, 84 Pac. Rep. 342.

[3] Wright v. Platte Val. Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603.

[4] For contracts with water companies, see Secs. 1509-1529.

The law regulating water rights, being in the exercise of the police powers of the State, is paramount to a private contract, though such contract antedates the passage of the law, and the rights given by the contract must yield where they are in contravention of the provisions of the

regulations, however, must not conflict with the constitutional rights of the consumers to receive the water.[5] The company can not require, as a condition precedent to its furnishing the water, that consumers comply with rules which are clearly unreasonable in their nature. So, whether there is any express constitutional or legislative declaration on the subject or not, all unreasonable rules, regulations, or demands upon the part of the company which operate to withhold or prevent the exercise of the constitutional or statutory right of the consumers to receive the water, must be held illegal and void.[6] And, as to whether rules and regulations adopted by a company are reasonable, or unreasonable, in their nature, outside of the question as to whether they conflict with some constitutional, or statutory provision, depends upon the facts of each particular case. But a corporation can not by a rule require a prior purchaser, who has complied with all the provisions of the law and is entitled to the water, as a condition precedent to the furnishing

statute. White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; affirming 5 Colo. App. 1, 31 Pac. Rep. 345.

Since the obligations of a private corporation organized to sell arid lands and to furnish water for their irrigation are quasi-public, such company can not impose arbitrary restrictions upon the supply of water under the guise of regulations. Shafford v. White Bluffs Land & Irr. Co., 63 Wash. 10, 114 Pac. Rep. 883.

5 "A ditch company diverting water from a natural stream for general purposes of irrigation can not, by provision or declaration of its by-laws, exempt itself or its stockholders from the operation of the State constitution." Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

6 So, where the carrier demanded $10 per acre, in advance, in addition to the yearly rental fixed by it, it was said by the Court: "But the legislature itself can not establish the unreasonable rule which we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them, the right secured to them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Slosser v. Salt River etc. Co., 7 Ariz. 376, 56 Pac. Rep. 332; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; Downey v. Twin Lakes etc. Co., 41 Colo. 385, 92 Pac. Rep. 946; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Colorado Canal Co. v. Mayes, 38 Tex. Civ. App. 271, 85 S. W. Rep. 448.

of the water, to acknowledge the equity of all rules adopted by the company.[7] A public service corporation can not, by rules and regulations, refuse to furnish water to consumers to whom it has previously furnished the water, and, at will, change the water to other consumers. If this were so, the owners of irrigated lands would be "at the mercy of the corporation, who may ruthlessly destroy the crops of the season, or, in the case of orchards and vineyards, the result of many seasons' industry by refusing to continue the supply of water."[8] So, a by-law of a company which provides that "any person who shall for two successive years fail to pay for water . . . shall be deemed to have forfeited his right thereto," can not have the effect of vesting title to the water right in the company, or of vesting title thereto in another, if the company delivers the same amount of water to the other consumer.[9] So, where such a corporation has by rule fixed a time limit within which applications for water must be filed with it, it is held that notwithstanding an application was not made within the time set, nevertheless, if the company has any water undisposed of, the statutory right to such water is not forfeited by such rule.[10] In fact, no water corporation which is organized for the purpose of furnishing water to others for profit, or which, by a reasonable construction of their articles of incorporation may be permitted to do so, can adopt such rules or regulations as will exempt itself from the duty of furnishing water to all applicants who have complied with the statutory requirements and are entitled to the use of the water, or to discriminate against, or give any preference to any applicant, or class of applicants, other than in regard to the priority of rights of consumers to the use of the water, so long as the company owns or controls water which it might furnish.[11] As to the corporation or-

[7] Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142.

[8] Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720.

See, also, for the priority of rights of applicants, Sec. 1502.

Plaintiff, the first to buy and the first to use water of an irrigation company, under a contract by which it agrees to sell him, for all time, water sufficient to irrigate 160 acres, may not be subjected to the same rules of distribution as those who subsequently purchase rights. Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400.

[9] Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

[10] Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

[11] That prior applicants are entitled to the water first, see Sec. 1502.

ganized only to furnish water to its own shareholders, or strictly mutual corporations, the rule is different.[12]

§ 1504. **Rules governing the collection of water rates.**—A water corporation engaged in the business of furnishing water to others may, by rules and regulations, require the claimants of water from it to pay, or secure to be paid, in advance before such company can be required to furnish any water to the applicants for the same.[1] But the right of a company to enforce such a rule for payment in advance applies only to the current year for which the water is required, and that, too, even though the applicant be in arrears for previous years. Where the company has waived its right in this respect to collect the legal rates in advance, and has furnished the water which was not paid for, any rule, or regulation of the company which requires the payment of arrearages, as a condition precedent to the company furnishing the water for the current year is void. And, under this condition of affairs, the consumer may compel the company by an action in mandamus to furnish the water.[2]

That a company must give preference to old customers, see Sec. 1502.

Where the by-laws of a company provided, "No water shall be sold from the company's ditch except to stockholders," the Court held that in spite of the by-law, the articles of incorporation provided that water might be furnished to others, and that it was the duty of the company to so furnish it. Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Eaton v. Larimer & Weld Irr. Co., 35 Colo. 16, 83 Pac. Rep. 627.

12 For rules and regulations of mutual corporations, see Sec. 1488.

For the distinction between the rights of mutual corporations and public service corporations as to the adoption of rules limiting the right to furnish water, see Slosser v. Salt River etc. Co., 7 Ariz. 376, 56 Pac. Rep. 332; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

1 Shelby v. Farmers etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

"The right of a party, therefore, to water for each year, depends upon the users complying with the statute as to payment of compensation, or tender of security therefor; and until such compensation, or security therefor, is actually tendered to the owner of such irrigation canal or works, no action has accrued (mandamus) of which the courts will take cognizance." Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428.

2 So where the rule was, "No land will be supplied with water unless all dues and claims for previous supply on that land shall have been paid," it was said by the Court: "If this

The remedy of the company is by a suit at law to enforce such payments of arrearages, and not by rule or regulation refusing to furnish water until such arrearages are paid.[3] And, again, the company can not enforce a rule requiring the payment for the water for years in advance.[4]

§ 1505. Rules for the regulation of use of water by consumers.—As to how far a water corporation organized for profit can go by rules and regulations to regulate the actual use of the water by the consumers after the water has been delivered to them by the company involves a number of questions, some of which have been discussed under other heads. As a general proposition, however, where water has been once delivered to a consumer, or to a ditch from which a number of consumers take their water, he or they may apply the water in any manner that they see fit. In California it is provided by statute that: "No person, company, or corporation selling water for irrigation shall be permitted to exercise any control as to the use of water after the delivery to the purchaser."[1] It is also held, in a recent case in Idaho, that the times and order of use and the application of the water by several land owners under

could be considered as a contract binding upon the user of the water for all future time, it would be without consideration; for it was the duty of the defendant company to furnish the plaintiff with the water, whether he agreed to the regulations or not." Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058.

[3] Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Kimball v. Northern etc. Co., 42 Colo. 412, 94 Pac. Rep. 333; Equitable Securities Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Sheward v. Citizens' W. Co., 90 Cal. 635, 27 Pac. Rep. 439; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Hatch v. Consumers' Co., 17 Idaho 204, 104 Pac. Rep. 670.

[4] "A further consideration worthy of mention in passing, bearing, at least, upon the unreasonableness of the view urged upon us, is the position of the consumer who pays the charges for 20 years in advance. What assurance has he that the carrier can or will keep his engagement during that period? Its business is attended with considerable hazard, and requires large and continuing expenditures of money. The consumer may find himself without water, and dependent for the recovery of his large advancement upon the doubtful experiment of suit against an insolvent company." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

[1] See laws Cal., 1880, p. 16; 2 Deering's Code 271.

the same lateral are matters of no concern to the company furnishing the water, and that where several land owners under the same lateral by agreement among themselves distribute and use the water at the times and in the manner agreeable to themselves, the company has no duty, but that the requisite quantity of water for all flows through the headgate into the lateral. And, therefore, any rule of the company limiting the rights of such consumers to the rotation of the use between the consumers would be void.[2] In those States where the company is deemed the appropriator of the water and the owner of the water rights,[3] the company may adopt reasonable rules, whereby, in times of scarcity of water, the water may be prorated among the consumers during these periods, so that all may receive a portion of the water.[4] But in those States where the consumer is considered the appropriator and the owner of the water rights, a corporation can not, by the adoption of by-laws, rules, or regulations, force their consumers to prorate the water in times of scarcity.[5] However, a contract between the consumers and the company in this respect will be enforced by the courts.[6] A company may also by contract, or rule, limit the amount of the water which it will furnish consumers to that reasonably necessary for the use to which it is applied.[7] It is also held that a company can not by rule prevent a consumer from changing his place of use, or restrict the use to a specific tract of land, or prevent him from reselling the water.[8]

2 Helphery v. Perault, 12 Idaho 451, 86 Pac. Rep. 417.

3 For the relation of the corporation to consumers, see Secs. 1475-1477.

4 Souther v. San Diego etc. Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561, holding that in times of scarcity, consumers must share ratably, and that the company has no right to prefer some consumers over others.

See, also, Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754.

For right to priority among consumers, see Secs. 1500, 1502.

5 Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416.

6 O'Neil v. Fort Lyon etc. Co., 39 Colo. 487, 90 Pac. Rep. 849.

7 Wright v. Platte Val. Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603.

For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

8 Calkins v. Sorosis etc. Co., 150 Cal. 426, 88 Pac. Rep. 1094; Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858; Johnson v. Little Horse Creek etc. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

See, also, that a water right can not be made an inseparable appurtenance to land, Secs. 1015, 1016.

§ 1506. Duty to furnish water—Compulsory service.—The State regulations of all the Western States not only make it the duty of all public service, or quasi-public water corporations[1] to furnish water to all *bona fide* consumers and applicants therefor, up to the full extent of their capacity, but also provide that, upon a failure of such a company to so furnish the water, such service may be compelled. This may be done by mandamus, or injunction proceedings. And the law may be considered as well settled that, if such a company, upon proper demand by a *bona fide* consumer, and the payment or tender of the established rates for such service, and the compliance by the applicant of all reasonable conditions and regulations made by the company, refuses to furnish the water, a proceeding in mandamus may be maintained to compel the service, provided, of course, that the company has the water under its control which it might furnish to the applicant.[2] And, again, where

[1] For public service corporations, see Sec. 1493.

[2] For actions for mandamus, see Secs. 1506, 1649.

"Every person, company, or corporation engaged in the sale, rental, or distribution of water may be compelled to furnish water to all who require it, to the full extent of the supply of water under the control of such person, company, or corporation. This is a duty specially enjoined by law, and mandate will lie to enforce it." Cozzens v. North Fork Ditch Co., 2 Cal. App. 404, 84 Pac. Rep. 342; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; South Boulder D. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; State *ex rel.* Crawford v. Minnesota etc. Co., 20 Mont. 198, 50 Pac. Rep. 420; People *ex rel.* Standart v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; South Pasadena v. Pasadena etc. Co., 152 Cal. 579, 93 Pac. Rep. 490; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Helphery v. Perault, 12 Idaho 451, 86 Pac. Rep. 417; State *ex rel.* Krutz v. Washington Irr. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019; Perrin v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Bardsly v. Boise Irr. Co., 8 Idaho 155, 67 Pac. Rep. 428; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Miller v. Imperial W. Co., 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

the company had previously furnished the water to a *bona fide* consumer, and might still continue to do so, but refuses to further furnish it and cuts off the supply, an action for an injunction will lie against the company by the consumer to prevent him from being deprived of the water.[3]

But an action in ejectment will not lie for frequently cutting off plaintiff's water by the placing of a pressure board therein.[4]

Upon the one hand as the company can not require, as a condition precedent to the furnishing of water, the compliance by the applicant with an unreasonable rule or demand,[5] so upon the other hand, the State can not compel such companies to furnish the water to consumers without a reasonable compensation; "neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law."[6] Nor will the Court compel the company to furnish water by mandamus, in the absence of a specific preliminary demand there-

[3] For actions for injunction, see Sec. 1506.

It is the settled doctrine of this State, that "if such a company, upon proper demand and tender of the established rates, refuses to furnish the water, or threatens to cut off the supply, a proceeding in mandamus may be maintained or an injunction issued, to compel the service, or prevent the deprivation thereof." Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137.

"In case of the establishment of a water system of this character, all persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued by whomsoever may be in control thereof." South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490.

See, also, Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1098; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; Price v. Riverside etc. Co., 56 Cal. 431; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39; *Id.*, 79 Fed. Rep. 501; *Id.*, 86 Fed. Rep. 975; Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336.

But a perpetual mandatory injunction requiring a company to supply water to a consumer for the irrigation of his land will not be granted where such consumer had no right to the water other than that which existed by virtue of a contract for a single season. Fulton Irr. Co. v. Twombly etc. Co., 6 Colo. App. 554, 42 Pac. Rep. 253.

See, also, Townsend v. Fulton etc. Co., 17 Colo. 142, 29 Pac. Rep. 453; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497.

[4] Tibbitts v. Bakewell, — Cal. ——, 35 Pac. Rep. 1007.

[5] See for rules and regulations by a company, Sec. 1505.

[6] Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617.

for by the person claiming the right to be so supplied,[7] and payment or a tender of the fixed rate, or a reasonable rate.[8] Nor would the Court require the company to furnish water against impossible conditions;[9] nor when the water already furnished to consumers is up to the full maximum capacity of the works of the company, or the water rights which it owns or controls.[10]

It is therefore held that by its articles or by-laws, a corporation has the right to limit its service to particular tracts of land, especially where its supply of water is sufficient only to irrigate such lands. It is the universal complaint of all these corporations that their supply of water is not sufficient to irrigate all of the lands under the project. Therefore, such a corporation has not only the power, but it is its duty to furnish water only to those entitled

7 Price v. Riverside etc. Co., 56 Cal. 431.

8 For State control of water rates, see Chap. 69, Secs. 1368-1385.

See, also, Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Wheeler v. Northern Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; San Diego etc. Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, 16 Am. & Eng. Ann. Cas. 796; Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617; Hoover v. Deffenbaugh, 83 Neb. 476, 119 N. W. Rep. 1130; San Joaquin etc. Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. Rep. 365; Lanning v. Osborne, 76 Fed. Rep. 319; City of Pocatello v. Murray, 173 Fed. Rep. 382.

9 "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or, it may conclude, without reason which the law would consider sufficient, that it will not continue. In cases of a natural person it might become physically impossible. We do not declare that in any such case mandatory process would be issued to compel the personal performance of the duty. . . . But in such a case, *it can not continue in absolute control of the water and waterworks appropriated to the public service.*" Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137.

10 A petition for mandamus to compel a company to furnish water which fails to allege that the company had water in sufficient quantity not only to supply the plaintiff, but to supply all of the water takers, in compliance with the legal duty imposed upon it, is demurrable. Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342.

See, also, Price v. Riverside etc. Co., 56 Cal. 431.

thereto within its capacity and water supply. As was held in a late California case,[11] it is not in derogation of Section 1 of Article 14 of the constitution for a water company in possession of a limited amount of water to fix the limits of the territory to the irrigation of which it shall be devoted and agree to supply the water first to such lands, and then to supply the surplus only to outsiders. But, upon the other hand, it is held that should such a company undertake to supply parties beyond their capacity, or more water than the company owns or controls, any consumer whose rights might be injured thereby, may secure an injunction against such action upon the part of the company.[12]

§ 1507. Duty to furnish water—Damages for failure.—But not only may a consumer of water bring an action in equity to compel a corporation for profit having or controlling unsold water,[1] to furnish the water, upon proper demand and the tender of established rates, but also, under the statutory duty of the corporation to furnish the water,[2] in an action for damages brought by the consumer against the corporation, such damages may be recovered as are the direct result of the failure to furnish the water.[3] However, as the

11 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

12 Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Souther v. San Diego Co., 112 Fed. Rep. 228; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Gerber v. Nampa Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. Rep. 779; Lanning v. Osborne, 76 Fed. Rep. 319; Blakely v. Ft. Lyon etc. Co., 31 Colo. 224, 73 Pac. Rep. 249; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; New La Junta etc. Co. v. Kreybill, 17 Colo. App. 26, 67 Pac. Rep. 1026.

1 See Sec. 1506.

2 For duty to furnish water, see Secs. 1498-1502.

3 For actions for damages, see Secs. 1560 *et seq.*; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Pawnee etc. Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. Rep. 381; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1098; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Lowe v. Yolo County etc. Co., 8 Cal. App. 167, 96 Pac. Rep. 379; affirmed, 157 Cal. 503, 108 Pac. Rep. 297.

See, also, Dalton v. Kelsey, 58 Ore. 244, 114 Pac. Rep. 464.

Where a buyer of an irrigation

consumer's right dates only from the time of the lawful demand and the tender of the rate, in an action for damages for the failure to furnish the water, the defendant company is liable only for the loss sustained after such demand and tender.[4] Not only may actual damages be recovered for the failure of a company to furnish water, but where the company has been guilty of oppression, fraud, or malice, exemplary or punitive damages may be recovered.[5] The company is not liable, however, in the absence of contract where, without fault, the supply of water ran short and for that reason it was unable to deliver the water.[6]

The burden of proof is upon the corporation where it has failed to supply consumers with water, to show good cause for not doing so.[7]

§ 1508. **State regulations—For protection of rights of company.**—Not only may a State provide laws for the protection of the rights of the consumers of the water furnished by public service or quasi-public corporations,[1] and prescribe the various duties of such corporations organized for profit, as discussed in the previous sections,[2] but it may also provide laws for the protection of the various rights acquired by those corporations. These private water corporations,

plant accepted the plant when completed, and stated in writing that it was erected according to the contract, and he procured an extension of the note for the price, based on his waiver of all damages, he could not recover damages for the sellers' failure to deliver the plant in time. Fairbanks etc. Co. v. Stites, —— Tex. Civ. App. ——, 125 S. W. Rep. 636.

For actions for damages for failure to furnish water, see Chap. 83.

See, also, for damages for the failure to furnish water under contract, Sec. 1507.

4 Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098.

5 Lowe v. Yolo County etc. Co., 8 Cal. App. 167, 96 Pac. Rep. 379; affirmed, 157 Cal. 503, 108 Pac. Rep. 297.

But see Mabb v. Stewart, 133 Cal. 556, 65 Pac. Rep. 1085, where, under the facts, it was held error to not instruct that punitive damages could not be allowed.

6 Lassen Irr. Co. v. Long, 157 Cal. 54, 106 Pac. Rep. 409; Niehaus Bros. v. Contra Costa W. Co., 159 Cal. 305, 113 Pac. Rep. 375.

7 Gerber v. Nampa Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; Miller v. Mount Nebo etc. Co., 37 Utah 1, 106 Pac. Rep. 504.

See, also, for actions for damages, Chap. 83.

1 That they are public service corporations, see Sec. 1493.

2 For the State regulation of the duties of corporations, see Secs. 1495-1497.

organized for the express purpose of profit by furnishing or carrying water for others, are expressly recognized by the constitutions, statutes, and decisions, not only as legitimate, but as necessary organizations.[3] And, as it takes the joint actions of the corporation and the consumers to make or maintain a valid appropriation—the one to divert and carry the water to the place of use, and the others to actually apply the water to some beneficial use or purpose—for the successful cultivation of the arid region, both the company and the consumers are therefore equally indispensable. It therefore follows that such corporations are entitled to an equal protection under the law, as are those who are the actual consumers of the water furnished by them.[4] Therefore, not only will the law protect such corporations in their right to acquire property necessary for their successful operations, such as water rights, rights of way, and other real and personal property,[5] but it will also protect them in such rights and property after they have been once acquired. Therefore, such a corporation may maintain in its corporate name an action to protect its rights and those of its consumers, without making either its stockholders or consumers parties, and that, too, regardless of the question whether the status of the corporation is regarded as the appropriator of the water, and, therefore, the owner of the water rights, or whether it is regarded as the mere carrier of the water for the consumers, who are regarded as the appropriators

[3] For the right to organize water corporations for the purpose of profit, see Sec. 1491.

[4] "To the successful cultivation of that region, the carrier and consumer are therefore equally indispensable. Hence a wise legislative policy, and an intelligent judicial construction require a careful consideration of the privileges, powers, and duties of the carrier, as well as the rights and obligations of the consumer. The courts should protect the consumer in the full enjoyment of his constitutional and statutory rights; but they should also jealously guard the rights of the carrier, and so deal with it (the constitution and statutes permitting) as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

[5] For the appropriation of water by corporations, see Secs. 684, 1470.

For rights of way over public lands, see Chap. 51, Secs. 927-971.

For rights of way over private lands, see Chap. 52, Secs. 972-993.

and the owners of the water rights.[6] So, too, regardless of this status, such corporations are also entitled to a reasonable compensation for the furnishing of the water from the consumers of the same, whether they are considered as the owners of the water rights and such furnishing is by way of the sale or rental of the same, or merely have a right to compensation for their services for carrying the water to the place of use by its consumers. The State authorities can not fix such a low rate for the water or for the services of the company that it may not be able to realize for its stockholders a reasonable profit for their investment, or which would be confiscatory in its nature.[7] So, again, the law protects such corporations in the right to make all reasonable contracts with the consumers of the water furnished through their system of works, and the validity of all such legal contracts can not be impaired by subsequent legislation, or by decisions of the courts.[8] Again, they are protected in the right to make all reasonable rules and regulations governing the distribution of the water to the respective consumers, and the use made thereof by such consumers.[9] In fact, as to all phases of the subject and as to all questions which may be involved, the rights of such corporations are equally protected by the constitutions, statutes, and the decisions of the courts, as are the rights of the actual consumers of the water.

[6] For the relation of such corporations to their consumers, see Secs. 1475-1477.

Therefore, a corporation may itself maintain an action to protect the rights of its stockholders and consumers against another company, without making either its stockholders and consumers or those of the other company parties, or setting out the individual rights of its consumers. Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing 3 Colo. App. 255, 32 Pac. Rep. 722.

[7] For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

[8] For contracts with corporations, see Secs. 1509-1529.

For the impairment of contracts affecting water rates, see Secs. 1381-1383.

[9] For rules and regulations by corporations, see Secs. 1488, 1505.

CHAPTER 77.

CONTRACTS WITH COMPANIES.

§ 1509. Scope of chapter.
§ 1510. Corporations for profit—Power to contract.
§ 1511. Contracts bad as against statute or public policy.
§ 1512. Contracts—Form and execution.
§ 1513. Contracts—Construction.
§ 1514. The extent of rights conferred by contracts.
§ 1515. Extent of rights—Contracts that run with the land.
§ 1516. Contracts to turn control of companies over to the consumers—General scheme and results.
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§ 1518. Contracts to turn control over to consumers—Liability on contracts for the sale of excess rights.
§ 1519. Performance of contracts.
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§ 1526. Breach of contracts.
§ 1527. Breach of contracts—Act of God as excuse for failure to perform.
§ 1528. Breach of contracts—Forfeiture of rights.
§ 1529. Breach of contracts—Damages.

§ 1509. Scope of chapter.—We have discussed the subject of contracts relating to water rights between individuals in another chapter.[1] In this chapter, we will confine our discussion, in the main, to the subject of contracts between corporations, organized for the purpose of furnishing water to others, and individual consumers of the water so furnished.

§ 1510. Corporations for profit—Power to contract.—One of the general powers granted to water corporations organized for the purpose of profit is the power to make contracts with their consumers for the furnishing of water, and for other purposes, and the condi-

[1] See Chap. 50, Secs. 917-926.

tions upon which the water will be furnished. The time has practically passed in this country when a person can settle upon a tract of land, and, by his independent action, or even associated with his neighbors, appropriate and divert water for the irrigation of his land from some natural stream, or other natural source of water supply. Practically all of the water of the smaller sources of supply has already been appropriated; and, in order to obtain water for new lands, it is necessary to take it from the larger streams, and to convey it to a considerable distance. All of this requires large amounts of capital in order to construct the necessary diverting and conveying works. This work of construction has been, and is now being performed by large companies, oftentimes before there is a single settler upon the land. After these companies are ready to furnish the water, and sometimes before, they induce settlers to take up the lands under their systems of works, and agree to furnish them with water sufficient for the proper irrigation of their lands.[1] And, therefore, the most common method is for these water companies to furnish the water to consumers under written contracts. And, although these corporations are regarded as public service or quasi-public corporations,[2] therefore subject to the regulation and control of the legislature and the courts of the State where their operations are carried on, and are duty bound to furnish the water to all applicants to the full extent of their capacity, such contracts, where not in violation of law,[3] or against public policy, are regarded as "ordinary contracts between private individuals," and, without regard to the question of public use, are enforceable as such.[4] But, as all its powers come from the State,

1 See, also, Secs. 1498-1503.

For contracts under the Carey Act, see Secs. 1330, 1333.

For power to fix water rates by contract, see Secs. 1381-1385.

2 See Sec. 1493.

3 See Secs. 1513, 1514.

4 In a leading case in California, it is held that where the board of supervisors had not fixed the water rates, a contract whereby a water company undertook to furnish water for irrigation purposes was not forbidden by the provisions of the constitution, and could be enforced against the defendants. And the Court said: "It is left to the legislature the power and discretion of regulating the sale of water outside of municipalities if the time should come when, in its wisdom, it thought such regulation was called for, or to allow the people to continue to freely contract on the subject as they had been accustomed continuously to do since before the State was organized as a government. . . . Our conclusion is that the contract involved in the case at bar is not made

such a corporation can only contract in the way allowed by law. And, therefore, its powers and obligations, except those which grow out of contracts lawfully made, depend alone upon the statute, and such alterations and amendments thereof as may, from time to time, be made by the proper authority.[5] But contracts between such a corporation and its consumers are not annulled or rendered invalid merely by constitutional provisions or statutory enactments looking merely to the public supervision or the State control of water companies, or to the regulation and control of the water supply within the jurisdiction of a certain State.[6] And, so, until there has been some definite law passed relating to a particular subject, or some definite action by the authority in power regulating the subject, contracts which would not otherwise be invalid will be enforced.[7]

invalid by the provisions of the constitution invoked by appellants." Fresno Canal & Irr. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87.

See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Souther v. San Diego Flume Co., 112 Fed. Rep. 228; aff'd, 121 Fed. Rep. 347, 57 C. C. A. 561, holding that a contract with the company to prorate the water in times of scarcity could be enforced. So, where the plaintiff company had contracted with various parties to supply them with water, it was held that this would not destroy the public use. "It would rather tend to show use by many, and thus establish the use for the public benefit." Pontantico Waterworks Co. v. Bird, 130 N. Y. 259, 29 N. E. Rep. 246.

"None of the rights to the waters of a running stream, under the constitution and statutes of the State, which may be acquired by user, can in any manner affect the obligations or relations of the contracting parties. The company was the owner of the fee in the land on which the lake was situated and had an absolute title to the water, with the right and privilege of sale, according to their own pleasure." Rockwell v. Highland D. Co., 1 Colo. App. 396, 29 Pac. Rep. 285.

[5] Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.

[6] For the laws of State control, see Chap. 68, Secs. 1337-1367.

For State control of water rates, see Chap. 69, Secs. 1368-1385.

[7] So, neither the provision of the California constitution that water appropriated for irrigation is for a public use, nor the statutory enactment that the county commissioners may fix the water rates which may be charged consumers by a company, affects the right of the company to contract upon this subject, until such rates are actually fixed in pursuance to the law. San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

See, also, Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

§ 1511. Contracts bad as against statute or public policy.—But, as we have discussed in previous sections, a corporation formed for the purpose of supplying water to consumers is a public service or quasi-public corporation, and as such is bound to serve the public without unjust discrimination. It therefore follows that such a corporation has no right or power to bind itself by a contract which, if enforced, would render it unable to serve the public on those terms, and, therefore, to render it unable to carry out its main purpose for which it was organized. In other words, such a corporation, owing a duty to the public, can not make a valid contract to exempt itself from the performance of such duty.[1]

A contract requiring a consumer, in advance of being furnished water, to surrender his public right to the delivery of water is illegal *per se* and void.[2]

Although water companies have the power to make all reasonable contracts with the consumers furnished with water which are not in conflict with the constitution and statutes of the State where their operations are carried on, they have no power to make contracts which do conflict with the constitutions or statutes, or those which are so unreasonable in their terms as to be against public pol-

1 Sammons v. Kearney Irr. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404, where it was held that it can not bind itself to serve one person to the exclusion of all others. Chicago Gaslight Co. v. People's Gaslight Co., 121 Ill. 530, 13 N. E. Rep. 169, 2 Am. St. Rep. 124; Barstow Irr. Co. v. Cleghon, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; Colorado etc. Co. v. McFarland, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435; Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, 16 Am. & Eng. Ann. Cas. 796; Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Wheeler v. Northern Colorado Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Lowe v. Yolo etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; aff'g *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 397.

Irrigation companies authorized to exercise the power of eminent domain are quasi-public corporations and can not limit their liability to the public by contract. Colorado etc. Co. v. McFarland, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435.

2 San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450.

One maintaining an irrigation canal under the statute can not impose unjust or unreasonable terms by contract upon water users; any such terms being void. Granger v. Kishi, —— Tex. Civ. App. ——, 139 S. W. Rep. 1002.

icy, and such contracts will not be enforced by the courts. There is nothing in this principle peculiar to contracts with water companies, but it applies to all contracts. We will, however, cite some instances where such contracts have been held void, where made between a water company and its consumers.

Where in a contract it was provided that: "If the said ditch company . . . shall at any time wilfully or malignantly fail or refuse to comply with the terms of the indenture as to the furnishing of said water, . . . it shall be lawful for the party so entitled to such water to draw from and take all such water as he may be entitled to," the clause was held void by the Supreme Court of Colorado, upon the ground that "the right claimed by the consumer is a right, the exercise of which is positively prohibited by the statute of this State," as being in contravention to the provisions thereof, regulating the taking and distribution of water from natural streams.[3] In this case the Supreme Court affirmed the ruling of the Court of Appeals, which also held the contract void, but upon different ground: First, "It is a right incompatible with the right of control incident to the ownership of property"; and, second, "It is against public policy, as tending to confusion and a breach of the peace in allowing parties to take whatever water they required, regardless of the rights of others having the same right." The Supreme Court termed its ruling "a safer and better reason."[4]

Any contract providing for the payment of a bonus, or an initiation fee, as a condition precedent to the company furnishing the water, and over and above the legal rates which the company might charge for the water, is void as against the statute, if there is one,[5] and as against public policy, if there is no such statute.[6]

[3] White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828.

[4] Farmers' etc. Co. v. White, 5 Colo. App. 1, 31 Pac. Rep. 345, 348.

[5] Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369. But see Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87, where, construing the contract involved in the case, the Court said: "Our conclusion is that the contract involved in the case is not made invalid by the provision of the constitution invoked by appellants." See, also, the case of Souther v. San Diego etc. Co., 112 Fed. Rep. 228; aff'd 121 Fed. Rep. 347, 57 C. C. A. 561, wherein Mr. Justice Ross criticized the ruling in the Park case for the reason that the language therein used did not inhibit contracts which were discriminatory or were unreasonable to the consumers.

[6] Where a lawful demand was made for the water and the manager of the company showed and read to the applicant the contract and said that the company could not furnish the water

So, also, a contract requiring as a condition precedent to the company furnishing the water, that all dues and charges for the water previously furnished to the land, or to the individual, should be paid, is void, both as against the statutory duty of the company to furnish water, and also void for the want of consideration.[7]

A parol contract to furnish water "at all times" is void under the statute of frauds, as a contract not to be performed within one year.[8] Contracts whereby the water company agrees to furnish more water than it owns or controls, or more than the capacity of its works will furnish, are void, and the company will be enjoined from furnishing the water to the parties contracting after its rights or capacity has been exhausted, at the instance of the consumers who had acquired prior rights within the capacity of the company to furnish the water.[9]

at that rate unless the applicant paid a bonus, it was held that the refusal of the water was unwarranted, and the Court said: "That the exaction by the company of a royalty or bonus as a condition precedent to furnishing water to consumers under its ditch is unlawful, is too well settled to admit of discussion." Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Crow v. San Joaquin etc. Co. 130 Cal. 309, 62 Pac. Rep. 562, 1058; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

See, also, Sec. 1384.

[7] Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058.

See, also, for the duty of companies to furnish water, Secs. 1498-1502.

A corporation is not bound by an agreement of one of its stockholders with third parties. Lanham v. Wenatchee etc. Co., 48 Wash. 337, 93 Pac. Rep. 522.

[8] Metropolitan etc. Co. v. Topeka etc. Co. (Kan.), 132 Fed. Rep. 702.

[9] So, a contract whereby certain stockholders in a ditch company sold their stock to a reservoir company, the vendors to continue in possession of their certificates, and to divert water for the use of their land to the same extent theretofore enjoyed, and the reservoir company to have the right to divert for storage and direct irrigation the difference between the quantity of water actually needed by the vendors and the maximum represented by the certificates in the priorities of the ditch, was held invalid as requiring the water rights evidenced by the shares of stock to do double duty. Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Farmers' Highline etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Lanning v. Osborne, 76 Fed. Rep. 319; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; rev'g 1 Colo. App. 480, 29 Pac. Rep. 906; McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. Rep. 779; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

See, also, for duty to furnish water-compulsory service, Sec. 1506.

As is the case with other contracts, these contracts must be freely and voluntarily entered into. Therefore, a contract entered into under duress is voidable. So, where a party is entitled to water from a ditch company, and does everything that the constitution and laws of the State require of him to do in order to get it, the water company is bound to deliver him the water, and can not require him to sign a special contract, binding him to do certain things, which the law does not require him to do. Such a contract "is voidable, if not void."[10] A contract by which a director obtains from a corporation its property or an advantage to himself is voidable only at the instance of the corporation, or its stockholders.[11]

It may be stated as a general rule of law upon this subject that a contract made by a public service corporation with a consumer in and of itself is not in violation of State law or the provisions of the constitution of the State where it is to be enforced. The validity of each and every contract depends upon its special terms as to whether or not, in effect, it comes within the question of being reasonable or otherwise, as to all of its provisions, and whether or not such a contract is reasonable is a question of fact, and depends upon each particular case.

§ 1512. **Contracts—Form and execution.**—The usual and better form of water contracts is to have them in writing. However, an oral contract for the perpetual use of water sufficient to irrigate 160 acres of land, based upon the consideration of the consumer aiding in the construction of the canal of the company, which was performed by both parties, and followed by the possession and use of the water for several years, is held sufficient to maintain an action for specific performance and to enforce the right thus acquired, and not within the statute of frauds.[1] But where there is no such consideration

10 "Where one enters into a contract by reason of compulsion or threats, there is nothing but the form of a contract without its substance." Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450.

A contract signed under duress, oppression, or compulsion is void. See Sec. 920.

See Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; San Diego v. City of National City, 74 Fed. Rep. 79; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Lowe v. Yolo etc. Co., 8 Cal. App. 204, 96 Pac. Rep. 379.

11 Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024; Goodell v. Verdugo etc. Co., 138 Cal. 308, 71 Pac. Rep. 354.

1 McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058.

as above, a water company whose business is to furnish water to consumers, under a parol agreement, which it was contemplated should be reduced to writing, but which was not so reduced, it was held that a recovery could not be had upon the contract, but that the company could only recover on a *quantum meruit*.[2]

As is the case with other contracts, contracts with a water company must be duly executed by the parties thereto. Otherwise it can not be regarded that the minds of the parties have met, and there is, therefore, no binding contract between them.[3] Such contracts may be executed by an agent upon the part of the company, where he has been duly authorized to act in such behalf. In fact, this is a very common method for the execution of such contracts. But, where so executed, the contracts are subject to the general rule, that the agent must not be interested in the contract adversely to the rights of the company. Neither can the directors, making a contract in behalf of a company, be interested in the same adversely to the interests of the corporation, or the remainder of the stockholders who are not so interested.[4] "The existence of an agent's authority is a question of fact to be ascertained by the jury, but what the agent may do under the power conferred is a question of law to be determined by the Court."[5]

But it is held that a parol contract to furnish water "at all times" is void under the statute of frauds as a contract not to be performed within one year. Metropolitan etc. Co. v. Topeka etc. Co., 132 Fed. Rep. 702.

See, also, for the sale of water rights by parol executed contracts, Secs. 998-1000.

[2] Ferre Canal Co. v. Burgin, 106 La. 309, 30 So. Rep. 863.

[3] Ferre Canal Co. v. Burgin, 106 La. 309, 30 So. Rep. 863.

[4] Goodell v. Verdugo etc. Co., 138 Cal. 308, 71 Pac. Rep. 354, where it was held that a corporation is not estopped from challenging the validity of a contract made on its behalf by its directory, interested therein adversely to the corporation, by laches on the part of such directors in not causing the contract to be set aside, but allowing the other party to expend money on the strength of the contract.

A principal is bound by the contract of his agent within the ostensible scope of the agent's authority. Bay City Irr. Co. v. Sweeney, —— Tex. Civ. App. ——, 81 S. W. Rep. 545.

Where an agent makes a contract on behalf of his principal in excess of his authority, he is personally liable thereon, under an implied warranty of authority, even though he made no false representations concerning his authority. Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

[5] Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

§ 1513. **Contracts—Construction.**—The construction of contracts made with water companies for the furnishing of water to consumers, or upon other phases of the subject, are held to be subject to the usual rules of construction as are other contracts. In the construction of such a contract, its true intent and the meaning of the intentions of the parties thereto must be first determined from the terms of the instrument itself. And, therefore, rights of the respective parties under such a contract are also to be governed by its express terms.[1]

1 "We need not stop to inquire what are the rights of the separate appropriators of the water in the absence of a contract. We are dealing with those which grew out of this contract, bearing in mind that all rights are reserved to the appellee which are not in terms granted to the appellant." Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

Under the Revised Codes of Montana, Section 5025, the intention of the parties must be ascertained in the first instance by reference to the language used in the contracts, and, where the words used are clear and unambiguous, interpretation need not be resorted to. Quirk v. Rich, 40 Mont. 552, 107 Pac. Rep. 821.

A contract perfectly clear in its terms, parol evidence of prior conversations between the parties, and of what was understood respecting the consideration, was properly rejected. Bryan v. Idaho etc. Co., 73 Cal. 249, 14 Pac. Rep. 859.

"The vendors in an action for damages for failure to comply with a contract can not show by oral evidence that they were not required to furnish the amount of water specified in the contract." Babcock-Cornish Co. v. Urquart, 53 Wash. 168, 101 Pac. Rep. 713.

A prospectus containing statements as to the character and nature of contracts proposed to be made and entered into by a company issuing the prospectus, standing alone, is not sufficient to found a cause of action. Where the action is based upon a written contract entered into in pursuance of the statements contained in such prospectus, the presumption is the entire contract was embodied in the writing, and the writing itself is the best evidence of its contents and the rights conferred thereunder. Idaho etc. Co. v. Great Western Beet Sugar Co., 18 Idaho 1, 107 Pac. Rep. 989.

"In the construction of a written contract, if there is room for doubt as to its true meaning, the facts and circumstances out of which such contract arose should be considered and the contract construed in the light of such facts and circumstances. It is the universal rule in the construction of contracts that the intention of the parties to the contract should be ascertained, if possible, and given effect." State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039.

See, also, for the construction of contracts, Wyoming Cent. Irr. Co. v. Burroughs, —— Wyo. ——, 115 Pac. Rep. 434; Platte Land & Water Co. v. Arnett, 88 Neb. 821, 130 N. W. Rep. 752; Wingard v. Copeland, 64 Wash.

If, however, from the terms of the contract itself, the meaning is ambiguous and the true intent of the parties thereto is not disclosed by the language therein employed, then competent evidence bearing on the construction of the instrument by the parties themselves,[2] also as to the circumstances surrounding the parties at the time of its execution, the subject matter of the contract, and the purposes and objects to be accomplished, and other facts and circumstances surrounding each particular case, may be considered for the purpose of ascertaining the true intent of the contract and the understanding of the parties as to its terms. And if it is possible to give such a construction of the contract that will render it valid, it is the duty of the Court to render such a construction.[3] Local

214, 116 Pac. Rep. 670; Abbott v. 76 Land & Water Co., —— Cal. ——, 118 Pac. Rep. 425; Jones v. Van Nuys, —— Cal. ——, 118 Pac. Rep. 541; Lombard v. Schlotfeldt, —— Wash. ——, 123 Pac. Rep. 787; Continental & Commercial Trust & Savings Bank v. McCarty, 188 Fed. Rep. 273, 110 C. C. A. 251; Spokane Canal Co. v. Coffman, 54 Wash. 646, 103 Pac. Rep. 1106; Evans v. Prosser Falls Land & Pr. Co., 62 Wash. 178, 113 Pac. Rep. 271.

[2] Tilton v. Sterling Coal Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

The construction placed upon a contract by the parties thereto is important only where the express language of the contract is doubtful. Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323.

[3] Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280, where it is said: "If the terms of the contract admit of two meanings, one of which would render the contract unlawful, and the other lawful, the latter construction must be adopted."

"Taking the two papers together, and having in view the circumstances under which the contract was entered into, the meaning and intention of the parties can be understood with sufficient clearness. The contract should receive a reasonable interpretation, and such that would give it effect, instead of that which would make it void." Sample v. Fresno etc. Co., 129 Cal. 222, 61 Pac. Rep. 1085.

"The least that can be said of this provision of the contract is that it is ambiguous and doubtful. Such being the case, the practical construction placed upon it by the parties must control." Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68.

"As a guide to a correct interpretation, the law permits the subject-matter of a contract, the situation of the parties at the time of the execution, and all the surrounding facts and circumstances to be taken into consideration." True v. Rocky Ford etc. Co., 36 Colo. 143, 85 Pac. Rep. 842.

See, also, Animas etc. Co. v. Smallwood, —— Colo. ——, 125 Pac. Rep. 594; Bonslett v. Butte County C. Co., —— Cal. App. ——, 122 Pac. Rep. 821.

See, also, Farmers' Pawnee Canal

customs, when reasonable, uninterrupted, and uniform, in a locality or district, and not contrary to public policy, may be considered by the Court in the construction of contracts, and may affect their interpretation, by raising the presumption that such contracts were made with respect to such custom.[4] The custom or usage must also be alleged and proven as any other fact.[5] It is the general custom of these water companies in contracts for the furnishing of water

Co. v. Henderson, 46 Cal. 37, 102 Pac. Rep. 1063; Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 25 Utah 441, 67 Pac. Rep. 672, 71 Pac. Rep. 1069, 61 L. R. A. 648; Brighton v. Little Co., 14 Utah 42, 46 Pac. Rep. 268; Los Angeles v. Los Angeles City W. Co., 124 Cal. 368, 57 Pac. Rep. 211, 571; North Point etc. Co. v. Utah etc. Co., 14 Utah 155, 46 Pac. Rep. 824; Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689; Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829; Ellerbeck v. Salt Lake City, —— Utah ——, 81 Pac. Rep. 273; Twin Falls etc. Co. v. Lind, 14 Idaho 348, 94 Pac. Rep. 164; Great Western Sugar Co. v. White, 47 Colo. 547, 108 Pac. Rep. 156.

See, also, cases cited under Sec. 919.

See, also, as to the construction of contracts, Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275; San Diego Flume Co. v. Chase, 87 Cal. 561, 25 Pac. Rep. 756, 26 Pac. Rep. 825; Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366; Russ Lumber Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186; Hewitt v. San Jacinto etc. Dist., 124 Cal. 186, 56 Pac. Rep. 893; Giddings v. Seventy-Six Land & Water Co., 109 Cal. 116, 41 Pac. Rep. 788; San Diego Flume Co. v. Souther, 90 Fed. Rep. 164; Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400; Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603; Brighton etc. Co. v. Little, 14 Utah 42, 46 Pac. Rep. 268; Rockwell v. Highland D. Co., 1 Colo. 396, 29 Pac. Rep. 285; Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Moore-Cortes C. Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S. W. Rep. 350; Riverside etc. Co. v. Riverside etc. Co., 148 Cal. 457, 83 Pac. Rep. 1003; Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301; Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063; Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 Pac. Rep. 522; Gravity Canal Co. v. Sisk, 43 Tex. Civ. App. 194, 95 S. W. Rep. 724; Miller & Lux v. California etc. Co., 163 Fed. Rep. 462, 90 C. C. A. 8.

In an action by tenants against their landlords for breach of the landlords' agreement to furnish water, a contract between the landlords and an irrigation company to which the tenants were not parties, by which the company agreed to furnish water to the landlords, was inadmissible as *res inter alios acta*. Stockton v. Brown, ——Tex. Civ. App. ——, 106 S. W. Rep. 423.

4 Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829.

5 Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293.

to have them prepared on printed forms. Where this is the case, it must be considered that the words therein selected were chosen by the company, and, if of doubtful import, they must be construed most strongly against it.[6] Contracts between a company and the consumers requiring them to prorate the available supply in times of scarcity are valid, and will be enforced by the courts, even in those States which hold that the consumer is the appropriator of the water and therefore the owner of the water rights.[7]

Contracts may be made between the company and individuals, or between the company and groups of individuals. Where the contract is to furnish all the consumers from a certain ditch or lateral with water, whether the contract is joint or several is a question of construction. Generally where a certain amount of water is to be furnished to a group of individuals taking their water from the same ditch or lateral, the contract is joint, and the consumers are to apportion the water among themselves according to their respective rights, and it is only the duty of the company to deliver the amount of water for all, according to the quantity and at the point named in the contract. Where, however, the language of the contract requires the company to account to each of the consumers, respectively, or, by use of any words, imports a separate right of action, the contract is several, and each consumer may sue thereon for damages caused by the failure of the company to furnish him with the quantity of water named in the contract.[8]

The decisions of the State courts as to the validity of contracts made between water companies and the consumers, are binding upon the Federal Courts.[9]

6 "Doubtful words and provisions are to be taken most strongly against the grantor, he being supposed to select the words which are used in the instrument." Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151.

See, also, Noonan v. Bradley, 76 U. S. 9 Wall. 394, 19 L. Ed. 757; People v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

7 For the relation of the company to the consumers, see Secs. 1475-1477.

For pro-rating the water in times of scarcity, see Sec. 1502; O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849; Jackson v. Indian Creek etc. Co., 16 Idaho 430, 101 Pac. Rep. 814; *Id.*, 18 Idaho 513, 110 Pac. Rep. 251; Souther v. San Diego Flume Co., 121 Fed. Rep. 347, 57 C. C. A. 561; affirming *Id.*, 112 Fed. Rep. 228.

8 Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

9 San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

§ 1514. The extent of rights conferred by contracts.—Where a water company enters into a contract to furnish water to a consumer, the extent of the rights of such consumer is limited by the terms of the contract. The consumer only acquires such rights as he bargained for and no more. A contract with a company to deliver to the consumer so much water as may be necessary to irrigate a certain specified tract of land, is construed to limit the right of the consumer to the amount of water necessary to irrigate such tract.[1] Where the company agrees to furnish water sufficient to irrigate a certain number of acres, the consumer only acquires the right to have so much water furnished and for such lengths of time, as the land, in its existing condition requires. So, where a consumer admitted that he irrigated another tract of land from the surplus after watering the tract described, he admitted the violation of the contract, even though he was not using more water than the maximum amount provided for in the contract.[2] And, where the terms of the written contract are ambiguous and uncertain, in the determination of the extent of the rights which a consumer has under it, the Court may resort to the usual rules for the interpretation of the contract.[3] The extent of the right of consumers to the use of water in times of scarcity may be limited by contract to a prorate amount of the available supply. This is true even in those jurisdictions that hold that the consumer is the appropriator of the water and therefore the owner of the water right, as is the case in Colorado.[4]

1 Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603.

See, also, Pallett v. Murphey, 131 Cal. 192, 63 Pac. Rep. 366; Richter v. Union etc. Co., 129 Cal. 367, 62 Pac. Rep. 39; Ferrea v. Cabot, 121 Cal. 233, 53 Pac. Rep. 689; Mayberry v. Alhambra etc. Co., 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68; Quirk v. Rich, 40 Mont. 552, 107 Pac. Rep. 821.

See, also, for the extent of rights limited by contract, Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

2 Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603.

3 For the construction of contracts, see Secs. 919, 1513.

4 "In the case at bar, however, the contracts provide for pro-rating water in times of scarcity, and are binding between the parties." Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

See, also, Souther v. San Diego Flume Co., 112 Fed. Rep. 228; affirmed, 121 Fed. Rep. 347, 57 C. C. A. 561; O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849; Great Western Sugar Co. v. White, 47 Colo. 547, 108 Pac. Rep. 156;

§ 1515. Extent of rights—Contracts that run with the land.—Valid contracts between water companies and their consumers for the furnishing of water may be expressed in such terms that they "run with the land." This is true not only as far as the land of the consumer is concerned, in creating a lien in favor of the company for the payment of the water furnished by the company,[1] but also running with the water rights, works, and other property of the company, in favor of the consumers, and having the effect of securing a permanent supply of water to such consumers, and as against the company or its grantees. In other words, such a contract has the effect of giving the consumer a proprietary estate or interest in the water rights of the company, its system of works, and other property, for the performance of the obligations to furnish the water to the consumer as provided for in the contract. By some courts this proprietary interest of the consumer is deemed an easement in the ditch. This is the holding in those jurisdictions where the consumer is considered to be the appropriator of the water and the owner of the water right, and the company merely the carrier of the water.[2]

But in jurisdictions where it is considered that the company is the appropriator, and, therefore, the owner of the water rights, this proprietary interest is considered a lien on the water rights and other property of the company, or a covenant running with the land, in favor of the consumer for the performance of the act of furnishing the water as agreed.[3] But whatever it may be termed, such

Shafford v. White Bluffs Land & Irr. Co., 63 Wash. 10, 114 Pac. Rep. 883.

See, also, for the relation of the company to the consumer, Secs. 1475-1477.

For act of God as excuse of failure to perform, see Sec. 1527.

1 For the recovery on contracts for water furnished where a lien on the land, see Sec. 1522.

2 For the relation of the carrier to consumers, see Secs. 1475-1477.

"It hardly seems necessary to again state, as this Court has so often stated, that the perpetual right to have water carried by a ditch constitutes an easement in the ditch. Such an easement is real estate—a freehold estate." Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 46, 92 Pac. Rep. 290.

See, also, Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; People *ex rel.* Standard v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44.

3 "If it had been provided that the agreement to furnish the water should bind the canal of the company, there would have been created thereby a lien for the performance of the act of furnishing the water as agreed."

a contract gives a property right to the consumer in the property of the company to have the company or its successors continue to furnish the water in accordance with the conditions thereof. Such an agreement upon the part of the company to furnish the necessary water from its canal from year to year, during the time specified, and to deliver it to the land of the consumer for the irrigation thereof, for an agreed price, is in substance and effect, an agreement for the sale of real property of the company.[4]

In a late case[5] the California Court repudiated the doctrine as above set forth, and especially as decided in Stanislaus W. Co. v. Bachman,[6] and the other cases cited above, and upon this subject said: "If, by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself. Nakedly stated, it amounts to this: That a corporation which has appropriated water which the Constitution has declared shall forever be devoted to a public use, may contract with A, B, and C to supply them in per-

Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858.

The covenant for the delivery of the water was a covenant running with the land. Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777.

4 "The agreement to furnish the necessary water from the canal from year to year, during the time specified, and deliver it upon the Thelfall lands for the irrigation thereof, for an agreed price, was in substance and effect an agreement for the sale of real property of the canal company." Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858.

Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290, holding that such a contract created an easement and covenants running with the land, binding upon the owners of the ditch.

Where a quasi-public corporation engaged in supplying water to the inhabitants of a municipality transfers its property, franchises, and business to a city, the city acquires the property subject to the obligation to furnish water to the inhabitants of the municipality, which obligation it must perform. South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490.

See, also, Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 868; San Diego etc. Co. v. Sharpe, 97 Fed. Rep. 394, 38 C. C. A. 220; Mandell v. San Diego etc. Co., 89 Fed. Rep. 295; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 590, 93 Pac. Rep. 490.

5 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

6 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

petuity with a given quantity of this water, and then, by assigning in turn to A, B, and C its rights under these contracts, confer upon A, B, and C a private right superior to and destructive of the public use. If this can be done with one, it may be done with many, and water which has thus been appropriated for public rental, distribution, and sale may, by this legerdemain of the law, be transferred into private ownership and use. This may not be done."[7]

We are not in accord with the statement made by the Court in the above opinion. Again, this statement was entirely unnecessary in deciding the actual points involved in the case. A public service corporation may be organized with the express purpose, upon the sale of a certain number of its shares of stock and water rights, of turning over the management and control to the stockholders so purchasing or to a corporation organized by them for that purpose. No matter who is the owner or manager of such a corporation, it is still impressed with the public duty of furnishing water to all consumers who may apply, provided, of course, it has the water to spare. This very thing is done in other States, as we shall show in the following sections.[8] And upon this subject, as was said by a late Idaho case:[9] "The canal corporation is not one organized for profit, but is one organized really for the purpose of performing a public duty. The stock of that corporation represents the right to the water, and a refusal to deliver the stock amounts to a refusal to deliver water and a refusal to perform the public duty for which the corporation was organized. Mandamus is therefore a proper remedy."

§ 1516. Contracts to turn control of companies over to the consumers—General scheme and results.—In the formation of many irrigation companies, organized for the purpose of profit to its stockholders, it has been provided that perpetual water rights should be sold to the consumers, and that when water rights to the extent of the estimated capacity of the works of the corporation shall have been sold, the full management and control of the corporation should also be turned over to the consumers, or that the water rights, diverting and conveying works, and other property of the original cor-

[7] See, also, Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409.

[8] See Secs. 1516-1518.

[9] State v. Twin Falls Canal Co., — Idaho ——, 121 Pac. Rep. 1039.

poration should be conveyed to some new corporation organized by such consumers. This scheme originated in Colorado, and, although it was evidently with the view of avoiding the Anti-Royalty Act of that State,[1] it has resulted in much good, both as far as the original company and its consumers are concerned. The plan has also been followed by other corporations operating in other States, and has also been adopted by the Government in the National Reclamation Act, as far as the management and operation are concerned,[2] Section 6 of which Act provides that when the payments required by the Act are made for the major portion of the lands irrigated from the waters of any of the works therein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. However, in this case it is provided that the title to the property shall remain in the Government until otherwise provided by Congress.[3]

As far as private corporations are concerned, this plan enables its stockholders to get quicker and larger returns for the money invested; and as far as the consumers of the water are concerned, it secures to them perpetual water rights, and not only that, but it enables them to operate and control the rights and works through their own organization, either as a mutual corporation or otherwise, as they see fit. The general plan is a good one, as far as all parties are concerned, but in certain instances it has been abused, as has been the case where the company has sold perpetual water rights far beyond either the capacity of the works or of the supply of water owned or controlled by the company. But in these cases the courts have always stepped in and protected the rights of the consumers.[4] There are two general modes of operation by companies which have adopted this plan: First, that with the perpetual water rights which are sold a certain proportion of the stock in the original corporation is also issued to each purchaser, and when a certain amount

1 For the Anti-Royalty Act, see Sec. 1584.

2 For the National Reclamation Act, see Secs. 1235-1286.

3 For water users' associations under the Reclamation Act, see Secs. 1282-1286.

4 For these contract rights, see Sec. 1511.

of the stock has been passed to the purchasers of water rights the control of the original company is turned over to such purchasers;[5] and, second, upon the happening of a certain contingency, such as the sale of water rights to the extent of the capacity of the works of the company or of all the rights for water owned or controlled by the company, it is provided in the deeds of conveyance to the consumers that the original corporation will deed and convey all of its property rights either to the holders of the deeds or to some new corporation organized by the consumers for the purpose of owning, managing, and controlling the same.[6]

Under the provisions of a contract it was held by the Idaho Court that the Twin Falls Canal Co. was organized under the laws of that State for the purpose and object of taking over and holding the title to the canal system of the Twin Falls Land & Water Co. and the water rights connected therewith, and to hold the same in trust for the settlers and land owners within said project, and that each owner of a water right has proportionate interest in the entire irrigation works.[7]

§ 1517. Contracts to turn control over to consumers—The enforcement of such contracts.—The courts, while generally upholding the validity of such contracts by a corporation, that upon the happening of a certain contingency it will turn the ownership and

[5] See Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing 1 Colo. App. 480, 29 Pac. Rep. 906, where the agreement provided that upon the happening of the contingency, to wit, the disposition of a certain amount of water rights, the company should issue to the consumers a certain number of shares in the corporation, which would be evidence of their right to the control and management of the property.

See, also, Eaton v. Larimer & Weld Irr. Co., 35 Colo. 16, 83 Pac. Rep. 627.

[6] See La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, 31 Colo. 1, 71 Pac. Rep. 415, where it was stipulated that when the company should have sold, and have outstanding, a number of "water rights" equal to the estimated capacity of the company to furnish water, and two-thirds of those rights should have been fully paid for according to the terms of the contract, then the title to the canal and the other works should pass to the holders of the deeds.

See, also, Jackson v. Indian Creek etc. Co., 16 Idaho 430, 101 Pac. Rep. 814; *Id.*, 18 Idaho 513, 110 Pac. Rep. 251; Nampa Irr. Co. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993.

[7] State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039.

control of its property rights over to the consumers of the water furnished by it,[1] they have been inclined to protect the consumers to the full extent of the rights granted by the corporation. Therefore, where the deeds to the water rights provided that when the water company had sold a number of "water rights" equal to its estimated capacity, and two-thirds of those rights had been paid for, the title to the canal and other works should pass to the grantees or to some new corporation organized for that purpose, it was held that the Court would specifically enforce such covenants in the deeds.[2] The question at just what point the companies would be compelled to make the proper transfer under these contracts has led to the construction of the term "estimated capacity." And it is held in this connection that a company can not prolong its control by increasing its capacity to furnish water after executing its contract in such deeds.[3] The expression, "estimated capacity," has been construed to mean not only the physical capacity of the works of the contracting company, but also as having reference to the water supply owned or controlled by the company at the time of making the contracts, and that, too, without resorting to prorating or rotation by the consumers, although it might provide in the contracts that in times of scarcity of the water the consumers should prorate the available water supply.[4] And although contracts to prorate water by consumers in times of scarcity will be enforced,[5] this provision can not be resorted to as a subterfuge to prolong its control by a company under contract with its consumers to turn over the property to them upon the full happening of a certain contingency also provided for in their deeds.[6]

1 See, for such contracts in general, Sec. 1516.

For the cancellation or annulment of contracts for the sale of excess rights, see Sec. 1518.

2 La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, 31 Colo. 1, 71 Pac. Rep. 415.

See, also, Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249; Patterson v. Ft. Lyon Canal Co., 36 Colo. 175, 84 Pac. Rep. 807.

3 La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415.

4 Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

5 See Sec. 1502.

6 The estimated capacity of an irrigation canal means the ability of the canal to supply water, based on its physical capacity and the probability of obtaining water from the stream, supplying it under normal conditions during the season of irrigation.

§ 1518. Contracts to turn control over to consumers—Liability of contracts for the sale of excess rights.—But, in a number of instances, corporations organized under this plan sold water rights far in excess of their estimated capacity to furnish the water. This proceeding upon the part of the company, in a proper action, upon behalf of those who have purchased rights within the capacity of the company, will be enjoined by the courts.[1] Purchasers of water rights under deeds providing that when the estimated capacity of the company is sold the title shall pass to the purchasers, are put on inquiry as to whether the prior sales have reached that limit.[2] The question has then arisen as to which company was liable to the purchasers of these supposed rights. And in this connection it is held that the consumers' company or the vendees of the water rights assumed no obligations arising from the obligations of the original company in attempting to sell that which they had no right to dispose of, and which was already vested in others; and, therefore, it is not liable either for the purchase price paid for these excess rights or for damages in refusing to furnish water beyond its capacity.[3]

Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249.

See, also, for "estimated capacity," Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Water Supply Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Patterson v. Ft. Lyon Canal Co., 36 Colo. 175, 84 Pac. Rep. 807; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415.

1 See duty to furnish water—compulsory service, Sec. 1506.

It is held that, when the original company has sold rights up to the full extent of its capacity, it has nothing more to sell, and that the purchasers of excess rights take nothing by their purchase; and, in a proper action brought by the consumers company, these contracts will be annulled by the Court. Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249; New La Junta etc. Co., v. Kreybill, 17 Colo. App. 26, 67 Pac. Rep 1026; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415; Patterson v. Ft. Lyon Canal Co., 36 Colo. 175, 84 Pac. Rep. 807.

2 Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249.

3 "The vendees of water rights assumed no obligations arising from the action of their vendors in attempting to sell that which they had no right to dispose of, and which had already vested in others." Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249.

See, however, La Junta etc. Co. v. Hess, 31 Colo. 1, 71 Pac. Rep. 415, holding that debts incurred by a receiver in the management of the property during litigation should have been paid by the new company.

§ 1519. **Performance of contracts.**—Water contracts must be performed according to a reasonable construction of their terms. Here, again, there is nothing peculiar to contracts relating to water rights in regard to their performance. The general rules of law governing the performance of contracts also govern here. Neither is there anything peculiar to the performance of such contracts as between a water company and a consumer, to those made between two individuals. Therefore, the performance of such contracts, the breach, enforcement, and kindred subjects will be discussed together in this chapter, and that, too, regardless of the question as to whether the contracts in question are between a water company and consumers or between individuals.[1]

A contract by a water company to furnish water from a particular source of supply is fulfilled by furnishing the water of an equal quality from another source, since the amount of the water and not the source of supply is considered as the gist of the contract.[2] Where time is not made the essence of the contract, or there has been a waiver of the right to insist that time was the essence, a reasonable time will be allowed to perform any act required by it before a contract can be considered as violated or rescinded.[3] Where there has been an exchange made by a city of certain lake water to farmers for the water from mountain streams, so long as the city does that which it will be its legal duty to do, and which the farmers, in case of default, could by judicial proceedings compel it to do if there was no forfeiture clause in the contract of exchange, there can be no forfeiture of the water thus acquired by the city, and its title to the same will be as clear and indefensible as though the exchange were absolute and unconditional.[4] The performance of a contract to convey "a good and sufficient water right" for the irrigation of a certain tract of land was sufficiently tendered upon the part of the vendor by an offer of water certificates issued by an irrigation corporation guaranteeing the holder a flow of water of the quantity specified in the contract.[5] Where a contract pro-

1 See, however, for contracts relating to water rights, also, Secs. 917-926.

2 Houston River Canal Co. v. Kopke, 106 La. 609, 31 So. Rep. 156.

But see Lewis v. Fox, 122 Cal. 244, 54 Pac. Rep. 823.

3 Daly v. Ruddell, 137 Cal. 671, 70 Pac. Rep. 784.

4 State *ex rel.* Ellerbeck v. Salt Lake City, 29 Utah 361, 81 Pac. Rep. 273.

5 Fairbanks v. Rollins, 121 Cal. 17, 54 Pac. Rep. 79.

vides for the performance of certain labor and the payment of the purchase price by the other party, and the acts can not be concurrently performed, the question as to which act is to be performed first must be determined from the nature of the contract and the character of the subject matter.[6]

§ 1520. Contracts—The enforcement of performance.—Where a valid contract has been duly entered into, either between a corporation and individuals, for the conveyance of a definite water right and has been fully performed upon the part of one party and the other party defaults in its performance, and it is physically possible that the contract can be performed upon the part of the latter, equity will enforce the performance by the defaulting party. The usual form of action which may be brought for this purpose is a bill in equity by the party who seeks to protect his rights against the defaulting party for a specific performance of the contract. And where nothing remains to be performed by the plaintiff under the contract, equity will protect the right so acquired and decree a specific performance.[1] So, if the owner of land enters into a

[6] Gagnon v. Molden, 15 Idaho 727, 99 Pac. Rep. 965; Russ Lumber etc. Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

[1] Perrin v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293; Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 686.

See, also, Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Gelwicks v. Todd, 24 Colo. 494, 52 Pac. Rep. 788; Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255; San Diego W. Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839; Giddings v. Seventy-Six etc. Co., 109 Cal. 116, 41 Pac. Rep. 788.

For actions for specific performance, see, also, Sec. 1650.

If, before a suit for breach of a condition in a contract, plaintiff makes a default in the performance of a subsequent condition, all unperformed conditions must be treated as concurrent, since plaintiff can not enforce performance while he himself is in default. Russ etc. Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

See, also, State *ex rel.* Krutz v. Washington Irr. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019, holding that mandamus would not lie to enforce a private contract.

Creer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228, holding that the action would not lie because of misjoinder of parties plaintiff.

A contract for the use of water for a valuable consideration with a corporation organized for the purpose of supplying water for irrigating

covenant concerning his land relative to its uses and subjecting it to easements or personal servitudes and the like, and the land is afterward conveyed or sold to one who has notice of such covenants, the grantee or purchaser will take the land bound by the contract and will be compelled in equity either to specifically execute it or will be restrained from violating it.[2] As treated elsewhere in this work, equity will decree specific performance of parol agreements for a water right given for a valuable consideration and where there has been a performance of the conditions of the contract by the one seeking the right.[3] Where there still remains something to be performed upon the part of the one seeking to enforce the contract, an action for specific performance will not lie.[4] Again, where under the facts it does not appear that a party is not fully able to perform the contract on his part, the party seeking to enforce it can not enforce a part specific performance.[5] Again, a court of equity will not decree the performance of a contract where such performance would be a vain and useless thing, and it is a physical impossibility for the defaulting party to perform. But a consumer having a contract with a water company whereby the company engages to furnish the consumer with a continual supply of water, may by injunction compel the corporation to retain its ability to perform the contract with him and prevent the corporation from contracting with other parties and later comers than himself for furnishing them with water beyond the capacity of the canal company, which contracts, if performed, would lessen the company's ability to supply the amount of water called for under the first consumer's contract.[6] However, consumers under contract with a water company

lands, which contract when made did not contravene the laws or policy of the State, may, as between the parties or their successors in interest, be enforced, subject to all reasonable regulations, provided that the rights of other water users are not thereby unlawfully curtailed. Clague v. Tri-State Land Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637.

2 Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 686; Pomeroy Eq. Juris., 2d Ed., Secs. 688, 689.

3 For the performance of parol executed contracts, see Secs. 997-1000. See, also, for the conveyance of water rights, Secs. 994-1032.

4 Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454.

5 Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216.

6 Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528; Merrill v. South Side Irr. Co., 112 Cal. 433,

can not complain of any use of the water granted by its owner or acquired by operation of law not interfering with their rights.[7]

Where the contract is for the furnishing of a continual supply of water made between a water company and the consumers the authorities differ somewhat as to the proper mode of procedure for its enforcement. And in this connection a distinction must be noted between the duty of a corporation to furnish water to consumers under the statute and as public service and quasi-public corporations, and the duty of the same company to furnish water in accordance with the terms of a contract with consumers. As we have seen, to compel the performance of the statutory duty to the public, the remedy is by mandamus or mandatory injunction.[8] The general rule of law is that the action of mandamus will not lie to enforce the performance of a private contract. In other words, the writ of mandamus will lie only to compel the performance of an act which the law specially enjoins. It is therefore held by this line of authorities that a company contracting to furnish water to consumers can not be compelled to comply with the terms of the contract in this respect in an action for mandamus.[9] But it is held that a manda-

44 Pac. Rep. 720; Eaton v. Larimer etc. Co., 35 Colo. 16, 83 Pac. Rep. 627.

7 Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965.

See, also, Animas etc. Co. v. Smallwood, —— Colo. ——, 125 Pac. Rep. 594.

8 For the compulsory service of water as a public duty, see Sec. 1506.

9 Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293, holding that an action for mandamus would not lie.

A person having a contract with an irrigation company, binding it to furnish water for the irrigation of his lands, has an adequate remedy at law for the company's refusal to comply with the contract, though it be conceded that the company is a common carrier of water, and mandamus does not lie to compel it to comply with the contract. State *ex rel.* Krutz v. Washington Irr. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

In Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720, although the rights of the parties were originally based on a contract, and the defendant having supplied the plaintiff with water for irrigation thereunder, the mandamus was granted upon the theory that it was the statutory duty of the defendant to continue the supply, and that the defendant was not at liberty, without good cause, to refuse to supply the plaintiff, while she, on her part, was ready and willing to pay the established price for the water.

See, also, Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 Pac. Rep. 522.

tory injunction will be granted to enforce the specific performance of the contract.[10] However, as all corporations organized for the purpose of furnishing consumers with water for profit are considered in all jurisdictions public service or quasi-public corporations, there is another line of authorities which hold, as it seems to us, to the better rule, that, regardless of the contract, the company may be compelled to furnish the water to consumers by an action for mandamus. In other words, these authorities treat the contract as merely incidental and descriptive of the right of the consumer, and that the writ may be granted under the public duty of the company to furnish the water. As was said in a Colorado case: "While the right recognized in these cases was one conferred by statute, which the relator, upon the performance of certain conditions precedent, was entitled to enjoy, we are unable to perceive any reason why the same right, when conferred by contract, is not equally susceptible of enforcement in this manner, when clearly established, as in this case, and the consequence of its denial are the same."[11] "The consumer is entitled to compel performance of the contract by mandamus."[12] Under this line of authorities, therefore, it makes no difference in an action for mandamus whether the plaintiff's right comes under the terms of a private contract or grows out of the statutory duty of the company to furnish the water.[13] The petition for a writ of mandate must, of course, state all the facts necessary to the granting of the relief sought for.[14] Upon the other hand, a

10 One who has prepared his land and planted a crop, relying on a contract whereby a water company agreed to furnish him water, is entitled to an injunction compelling the specific performance of the contract. Bay City Irr. Co., v. Sweeney, —— Tex. Civ. App. ——, 81 S. W. Rep. 545.

See, also, New Iberia etc. Co. v. Romero, 105 La. 439, 29 So. Rep. 876.

11 People *ex rel.* Standard v. aFrmers' High Line etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543, the latter holding that an action for mandamus would not lie.

12 Farnham on Waters, p. 1924.

13 Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; People *ex rel.* Standard v. Farmers' High Line etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134.

See, also, Cozzens v. North Fork etc. Co., 2 Cal. App. 404, 84 Pac. Rep. 342.

14 Appellant's application "shown that she holds a private contract whereby the respondent obligated itself to furnish water. She can resort to the ordinary remedies upon

contract made in violation of law or discriminatory can not be enforced by either party thereto.[15]

§ 1521. Recovery on contracts for water furnished.—Where a contract of a water company for the furnishing water is valid in all respects, a recovery may be had by the company against the consumers for the rental or sale of the water rights or for its services as the carrier of water. And the measure of the recovery is the amount fixed in the contract.[1] Of course, as is the case with other contracts, a water company can not recover for water claimed to have been furnished to a consumer unless it proves the contract and a full compliance with its terms. So, a company is not entitled to a *pro tanto* recovery based upon a partial fulfillment of the contract unless it may be apportioned to definitely established benefits derived by the consumer contracting for the water over and above the amount of damages resulting from the failure of the company to furnish the full quantity of water provided for under the contract.[2]

that contract, as in the case of any private contract. . . . We think appellant has an adequate remedy upon her contract, and that mandamus does not lie." State *ex rel.* Krutz v. Washington Irr. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

See, also, Fulton Irr. Co. v. Twombly, 6 Colo. App. 554, 42 Pac. Rep. 253, holding that the equitable remedy of a mandatory injunction will not be granted to compel the delivery of water under a contract without the allegation of the insolvency of the defendant, or other ground for equitable relief; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

15 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Nampa Irr. Co. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993.

1 Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359, that this rule holds, even in States where the law provides for the regulation of water rates, but where the rates have not been so regulated.

Where the terms for the furnishing the water were agreed upon, and it was contemplated that the agreement should be reduced to writing, but it was not so reduced, it was held that the company could not recover on the contract, and could recover only on a *quantum meruit.* Ferre Canal Co. v. Burgin, 106 La. 309, 30 So. Rep. 863.

See, also, Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504.

For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

2 Houston River C. Co. v. Kopke, 106 La. 609, 31 So. Rep. 156; Landers

The water company is entitled to recover for the water from the time it is prepared to furnish it. So, it is held that when the company had complied with its contract to bring the water through its main ditch and to construct a box or gate through which to pass the water into a ditch to be constructed by the consumer, as provided in the contract, it had done all that was necessary to be done on its part, and the defendant could not avoid a recovery by the failure on his part to construct the ditch agreed to be constructed by him.[3] In an action to set aside the contract and for damages for failure of the company to perform, and wherein the company set up a counterclaim for the water rent, and where the facts were that there was a refusal upon the part of the company to furnish the water, which was retracted within a few days, and before any damages had been caused, it was held that there was not such a non-performance of the contract which could be availed of by the consumer and that the company could recover.[4]

§ 1522. Recovery on contracts for water furnished where a lien on the land.—In a number of the Western States it is provided by statute to the effect that the contract amount, or the amount that may be provided for in accordance with law,[1] to be paid to water companies by the consumers furnished with water shall be a first lien upon the land for the irrigation of which the water is furnished and delivered.[2] But whether this right is provided for by statute or not, we take it that a corporation has the power to make such a contract with its consumers, and that the lien so provided for may

v. Garland Canal Co., 52 La. 1465, 27 So. Rep. 717.

Where the contract provided that the consumer was to pay $2 per acre "for the use of water on the above described land," it was held that he was to pay $2 per acre only for the number of acres on which the water was used, and not on the entire number of acres in the tract. Purser v. Baker, 129 Cal. 607, 62 Pac. Rep. 109.

See, also, Granger v. Kishi, —— Tex. Civ. App. —— 139 S. W. Rep. 1002.

3 Fresno etc. Co., v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275.

4 Perkins v. Frazer, 107 La. 390, 31 So. Rep. 773.

1 For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

2 See Rev. Codes Idaho, 1908, Sec. 3288.

See, also, for statutes of other States, Part XIV; Jackson v. Indian Creek etc. Co., 16 Idaho 430, 101 Pac. Rep. 814; *Id.*, 18 Idaho 513, 110 Pac. Rep. 251; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87.

be enforced.[3] Therefore, where a land owner contracted with a water company that he and his successors in interest should take the water from the company at a certain price, payable annually, and that the contract and covenants therein contained should "run with and bind the land," it was held that such contract created a lien on the land for the water furnished, which was binding on the land owner's successors with notice thereof, but that no personal judgment against the purchaser of the land can be given where he was not a party to the contract and never bound himself personally for its performance.[4] But in order to create the lien on the land the language used in the contract must be definite and specific, and must be a direct declaration that such a lien is created by its terms. Therefore, in a recent case in California where the language in a contract was as follows: "The parties agree to and with each other that this contract shall have the force and effect of a covenant running to and with the said land," it was held that the language used did not create a lien for the reason that there was no direct declaration of lien which would bind either the consumer or the company. But it was held in the same case, in making a somewhat technical distinction, that a lien was created by the agreement to furnish the necessary water from the canal from year to year during the times specified for the irrigation of certain lands for the agreed price upon the theory that such an agreement was in effect for the sale of real property and thus created a lien therefor, and where performed by the company could be enforced, both as against the original owner of the land and as against his grantee with notice.[5]

But in order to give constructive notice to subsequent purchasers of a lien of a water company for the furnishing of water, the contract should be duly executed, acknowledged, and recorded.[6]

[3] "A lien may be created on property by contract." Fresno etc. Co. v. Powell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112, citing Cal. Civ. Code, Secs. 2881-2884.

[4] Fresno etc. Co. v. Rowell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112; Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275.

[5] Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359, where it is said: "Such an agreement, with all its terms, is binding, not only upon the maker, but upon all persons who subsequently acquire the maker's title to the property."

[6] Fresno etc. Co. v. Powell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112; Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275.

The usual method of procedure for enforcing such contracts where the payment of the water rates is neglected or refused is by a foreclosure and sale of the lien.[7] And the fact that the defendant did not use the water if the company complied with the contract is immaterial. The land is bound whether the water was used or not.[8]

§ 1523. **Reformation of contracts.**—Where the contract, by mistake or otherwise, does not express the true intent of the parties it may be reformed in a proper case for that purpose by a court of equity. So, in a suit on a written contract for furnishing water, in which contract the date when the first payment was due was left blank, it was held that under the evidence the defendant could have it reformed so as to show that the first payment was not due until he should acquire and use water in irrigating his lands.[1] Where a defective deed, given to convey a certain water right, was executed in 1890, and the water was used by the grantee until 1898, without any claim of right being made by the grantor, the statute of limitations will not prevent the grantee from maintaining a suit to reform the instrument at any time within the period prescribed by the statute after the assertion of the adverse claim, as the statute does not begin to run until such assertion.[2] But, "In order to grant relief the mistake must not only be mutual, but all the parties to the deed who are affected, immediately or consequently, by the mistake should be made parties, as they are entitled to be heard upon any matter that might affect their rights under the decree."[3]

§ 1524. **Rescission of contracts.**—Where a party has been induced to enter into a contract by the fraudulent representations of the other party, the party defrauded may, as soon as he discovers the facts, rescind the contract and bring a suit for the cancellation of the same, and a court of equity will decree the rescission thereof. But in order to rescind a contract entered into upon the ground of fraudulent representations, the evidence that such representations

7 See cases *supra*.

8 Fresno Canal Co. v. Hart, 152 Cal. 450, 92 Pac. Rep. 1010; Fresno Canal etc. Co. v. Rowell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112.

1 Fresno etc. Co. v. Hart, 152 Cal. 450, 92 Pac. Rep. 1010; State v. Lorenz, 22 Wash. 289, 60 Pac. Rep. 644.

2 State v. Lorenz, 22 Wash. 289, 60 Pac. Rep. 644.

3 Center Creek W. & Irr. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

were fraudulent must be clear and convincing.[1] Again, where there has been no fraud or other special legal reason, one can not rescind a contract entered into at pleasure, and especially is this true where there has been part performance and the party seeking to rescind still retains the benefits received under the contract.[2] Neither will a court of equity interfere to decree the cancellation of a contract to furnish water unless the facts as alleged in the bill show the necessity of equitable interference.[3] A contract to supply water "year after year, so long as he shall pay the annual rental therefor," is held in Colorado to be one which may be terminated by the consumer at the end of any year.[4] The general rule of law is that before a suit can be maintained for the recovery of the consideration paid under a contract there must be first a formal rescission of the contract.[5] Where, however, a water company under the terms of a contract agreed to deliver water to a consumer and there was a total failure of the company to deliver any water, the purchaser can recover not only what he paid under the contract, but also his damages for the breach; and, furthermore, such failure of consideration being total, no formal rescission is necessary before bringing the suit.[6]

1 Owen v. Pomona Land & W. Co., 131 Cal. 530, 63 Pac. Rep. 850; *Id.*, 64 Pac. Rep. 253; Perkins v. Frazer, 107 La. 390, 31 So. Rep. 773.

2 Bowman v. Ayers, 2 Idaho 465, 21 Pac. Rep. 405.

3 San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

4 South Boulder etc. Co. v. Marfell, 15 Colo. 307, 25 Pac. Rep. 504; San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220.

See, also, for rescission of contract, Lombard v. Schlotfeldt, —— Wash. ——, 123 Pac. Rep. 787; Peterson v. North Yakima etc. Irr. Co., 63 Wash. 636, 116 Pac. Rep. 279.

5 Owen v. Pomona etc. Co., 131 Cal. 530, 63 Pac. Rep. 850, 64 Pac. Rep. 253; Kelley v. Owens, 120 Cal. 502, 47 Pac. Rep. 369, 52 Pac. Rep. 797.

6 Richter v. Union etc. Co., 129 Cal. 367, 62 Pac. Rep. 39.

Where there has been a total failure of consideration of a contract induced by fraudulent representations of plaintiff, and plaintiff is unable to perform, no notice of rescission is required to enable the defendant to plead failure of consideration as a defense to a suit on the contract. Russ etc. Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

Where a contract provided that it might be canceled on 30 days' notice if the purchaser should default in payment, and the purchasers being eight months in default, they could not complain of the vendor's failure to furnish water under the contract, and if a new contract was not made or the past due payments waived, the vendor was entitled to rescission of the

§ 1525. The cancellation or annulment of contracts.—The Court in a proper action in equity, and upon a proper showing, may cancel or annul certain contracts for water rights, where the exercise of such rights would interfere with the vested rights of others. So, where a company has sold certain perpetual water rights and in the deeds of conveyance it is provided that upon the fulfillment of the contingency of the sale of all its rights up to the extent of the estimated capacity of the company to furnish water, the property of the corporation would be turned over to the purchasing consumers or to a company organized by them, and the company continued to sell supposed rights in excess of its capacity, an action by the consumers who purchased rights within the capacity of the selling company or by the corporation organized by them to take over the property, will be maintained to cancel or annul the outstanding contracts for the excess rights. This is upon the theory that the purchasers of these supposed rights took their deeds containing such a provision with notice that when the rights to the extent of the estimated capacity of the company to furnish water was sold, the property would be turned over to the consumer grantees, and they were therefore put upon inquiry as to whether, by sales prior to their own. the company had reached that limit, and if the prior sales had reached such limit, the company had no rights which it could thereafterward sell, and the purchasers of such supposed rights took nothing by their purchase, and it was held that the Court would annul such contracts.[1]

Contracts may also be annulled by action of the parties thereto. So, where one of the parties to a contract has by purchase or otherwise acquired the rights of both the contracting parties granting a

contract and possession of the land sold with the water right therefor. Spokane Canal Co. v. Coffman, 54 Wash. 645, 103 Pac. Rep. 1106.

1 Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249, holding that persons against whom an action is brought to cancel such rights can not complain that the action is not also maintained against others having no better rights.

See, also, New La Junta etc. Co. v. Kreybill, 17 Colo. App. 26, 67 Pac. Rep. 1026; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415; Patterson v. Ft. Lyon Canal Co., 36 Colo. 175, 84 Pac. Rep. 807, holding that the right of action to cancel such contracts accrued immediately after the contracts conveying such excess rights were issued, and was barred after five years thereafter.

See, also, for contracts to turn control over to consumers, Secs. 1515-1518.

perpetual water right, it results in an extinguishment of the contract.[2] And even when the contract has expired by the limitation of time, the consumer can not be deprived of the water where his right originated under the contract and where he has made valuable improvements upon his land, but may claim the water under the statutory duty of the company to furnish the water.[3]

§ 1526. **Breach of contracts.**—Contracts relative to the rights in question are often broken, as well as is the case with other contracts. And for the breach of these contracts the respective parties have their remedies, according to the general law of contracts.[1]

One of the most common classes of cases involving the breach of a contract is where there is a total or part failure of consideration; as, for example, where a certain amount of water is paid for and the same is not delivered. And it is held in cases of this nature that where a contract provides for the delivery of a certain amount of water, the failure to deliver any water constituted a failure of consideration, and the purchaser is entitled to recover the money paid under the contract, and was not confined to an action for damages, and that, too, without any formal rescission of the contract before his bringing suit.[2] The fact that the company is prevented from fur-

2 "This condition, it seems to us, might result in an extinguishment of the contract, or rather a merger of the duty on the one hand to comply with the contract, and the privileges acquired on the other hand under the contract, and that the result would be an extinguishment of the contract." Jackson v. Indian Creek etc. Co., on second appeal, 18 Idaho 513, 110 Pac. Rep. 251; see *Id.*, 16 Idaho 430, 101 Pac. Rep. 814.

3 San Diego etc. Co. v. Sharpe, 97 Fed. Rep. 394, 38 C. C. A. 220; *Id.*, 89 Fed. Rep. 295; South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504.

For statutory duty to furnish water, see Secs. 1496, 1497.

1 For actions on contracts, see Sec. 1529.

2 Richter v. Union Land etc. Co., 129 Cal. 367, 62 Pac. Rep. 39, where it is said: "Nor, where the failure of consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid."

See, also, Russ etc. Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

Where there was a partial breach of contract for the failure to furnish sufficient water for irrigation for a certain year, and no demand was made for the rental, and the same parties entered into another contract for an-

nishing the water by a writ of injunction sued out by a third party is not a legal excuse for the failure to furnish the water according to the contract, although the injunction may deprive the company of the means of the performance.[3] The rule is otherwise where the company is prevented from furnishing the water by the consumer himself, or where the consumer fails to avail himself of the water furnished by the company, or where he negligently contributes to the injury. In such cases the consumer can not hold the company liable.[4]

In an action by a consumer against a water company for the failure to furnish the water according to a contract, and where the contract was proven and also the breach of the same by the company in failing to furnish the water, it devolves upon the company to explain such failure, and the sufficiency of the explanation is a question of fact for the jury to determine.[5]

§ 1527. **Breach of contracts—Act of God as excuse for failure to perform.**—Under certain circumstances, a corporation or person contracting to do a certain thing will be excused from performing through an act of God or *vis major*. It is a well-recognized principle that when it is apparent that the parties have contracted on the basis of the continued existence of a given thing, then, on performance becoming due, if, without the fault of the obligor, the thing has ceased to exist, the case has become one of mutual mistake and the duty to perform no longer exists.[1] So, where a water com-

other year, and afterward a demand for payment was made for the first year, it was held that the previous debt for rent was presumed to have entered into the contract for the latter year. Perkins v. Fraizer, 107 La. 390, 31 So. Rep. 773.

See, also, Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Beaumont Irr. Co. v. Gregory, —— Tex. Civ. App. ——, 136 S. W. Rep. 545; Luitweiler Pumping Engine Co. v. Ukiah W. & Imp. Co., 16 Cal. App. 198, 116 Pac. Rep. 707; Abbott v. Seventy-Six Land & W. Co., — —Cal. ——, 118 Pac. Rep. 425; Just v. Idaho Canal & Imp. Co., 16 Idaho 639, 102 Pac. Rep. 381, 133 Am. St. Rep. 140.

3 Sample v. Fresno etc. Co., 129 Cal. 222, 61 Pac. Rep. 1085.

4 Carr v. Miller-Morris etc. Co., 105 La. 239, 29 So. Rep. 715; Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275.

5 Rocky Ford Canal Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638.

1 Bishop on Contracts, Sec. 588; Chitty on Contracts, 1070.

pany by contract agrees to furnish its consumers a certain amount of water during the irrigating season, and it is impossible for the company to perform this part of the contract without any fault upon its part either in the making of such a contract, through some inevitable accident, such as some extraordinary and unprecedented flood, which ordinary prudence might not have anticipated, the company may be excused from performing the contract. But whether or not such an excuse will avail depends upon the facts and circumstances of each particular case. The subject will be more thoroughly discussed when we come to the subject of defenses to actions for damages for act of God or inevitable accident.[2]

§ 1528. **Breach of contracts—Forfeiture of rights.**—Where the proper forfeiture clause is made in the contract, one result of the breach of the contract is a forfeiture of all rights acquired under it. As held in a very recent case in Colorado that, under a contract whereby defendant granted water rights to plaintiff, such rights to be forfeited on plaintiff's failure to complete certain work within a stated time, the fact that the plaintiff expended in the work large sums for which it could obtain no equivalent in case of forfeiture was not ground for relieving against the same, the defendant not being in fault and its damages being difficult to estimate.[1] But where the provisions in a written contract relative to the forfeiture of the consumer's right have been waived, the company can not thereafterward insist on the right, and a forfeiture can not be enforced.[2] Forfeitures, under the well-known rule of law, are not favored, and such contracts will be strictly construed against the company, especially where the consumer has the right of compulsory

2 See Secs. 1691, 1692.

1 Farmers' etc. Co. v. Pawnee etc. Co., 47 Colo. 239, 107 Pac. Rep. 286.

2 Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

Where the written contract provided that the consumers must furnish a written notice or application within a certain time if they wanted the water for a certain year, but the company continually furnished the water when verbally requested to do so, and the officers told the consumers that such written notice was not necessary, it was held that the company was estopped to deny a waiver of the provisions of the written contract, and to thereafter require the written notice. Colorado Canal Co. v. McFarland, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435.

service.[3] But it is held that where a water company tenders water to a consumer first at the rate fixed by law and next at the rate fixed by a contract, and the consumer refuses to pay anything, this amounts to a repudiation, by which his rights under the contract are ended.[4]

It was held in Washington that a promoter of an irrigation corporation who acquired a right to purchase land through one who had a contract to purchase at $5 per acre can not recover damages from the corporation on the ground of fraud, because on forfeiture of the contract the corporation bought the same land at about $5 per acre, where the promoter sought without actual investment of money to make a large profit from the corporation by a sale of the land to the same at $30 per acre.[5]

The forfeiture of a consumer's right to the use of the water, where he has been once served by the company, involves more than the mere terms of the contract under which the forfeiture is claimed. The contract right to be furnished with water by the company may, by apt terms therein, be forfeited. But the right of the consumer under the law, if he complies with its provisions, to have the company continue to furnish him with the water, can not be forfeited by any breach upon his part of a contract. As we have discussed in previous sections of this chapter, all companies organized for the purpose of furnishing water to consumers for profit are under the duty imposed by the law, because of their quasi-public character, to furnish water to consumers each year without discrimination, except as to their respective priority of rights,[6] upon the payment or tender for the current year of the water rate mutually agreed upon by the parties, or, in lieu thereof, upon the payment or tender of such sum as may be fixed in accordance with law,[7] and that, too, wholly irrespective of the nature of the rights of the consumers as to whether they are under a contract or under the statute, and that an action for mandamus will lie to compel the company to furnish the water.[8] However, it has been claimed a number of times that,

3 Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

4 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

5 Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. Rep. 173.

6 For priority of rights to be furnished with water, see Secs. 1500, 1502.

7 For the regulation of water rates, see Secs. 1368-1385.

8 See Sec. 1506.

because of the failure of a consumer to pay the water rates charged by the company for previous years, under the terms of the contract under which the water was furnished, such consumer had forfeited his right to the use of the water for the subsequent years. The courts, however, hold to the contrary, and hold that it is the duty of the company to furnish the water to a consumer for the current year where he has defaulted in his payments of the water rates for previous years, upon the payment or tender of the legal rates for that year; and that the remedy of the company for furnishing the water for which payment was not made was by an action by the company against the consumer for debt. Therefore, a contract by which a company agrees to furnish a consumer with a certain amount of water "year after year, so long as he shall pay the annual rental therefor," is held to be a mere option, which may be terminated by the consumer at the end of the first year; and when the consumer causes the county commissioners to fix the water rate for water from the company's ditch, and declines to pay more than such rate, or the rate fixed in the contract, it is a termination of such contract, though the contract itself is not returned or canceled. The company, however, must continue to furnish the consumer with the water under its statutory duty.[9]

So, also, where a contract provides that upon failure to pay the annual rental the consumer "forfeits and relinquishes all rights and claims whatsoever in and to the use of said water from said ditch," it is held to apply only to the consumer's rights under his contract, and not to apply to the statutory right to have the company furnish him with the water at the rate fixed by law.[10]

9 South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504.

See, also, for contracts to furnish a certain amount of water, Sefton v. Prentice, 103 Cal. 670, 37 Pac. Rep. 641; San Diego Flume Co. v. Chase, 87 Cal. 561, 25 Pac. Rep. 756, 26 Pac. Rep. 825; Hewitt v. San Jacinto etc. Co., 124 Cal. 186, 56 Pac. Rep. 893; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39.

For the statutory duty to furnish water, see Secs. 1495-1497.

For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

10 South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504.

Contracts providing for forfeitures, even when not invalid as unreasonable, will be strictly construed. Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

See, also, Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; *Id.*, 89 Fed. Rep. 295.

§ 1529. Breach of contracts—Damages.—The most common remedy for the breach of a contract is an action at law for damages.[1] This is true where there has been a partial or total breach of a contract to furnish water or for the sale of water rights.[2]

The subject of actions for damages for the failure to furnish water under contract, and also the measure of damages which may be recovered in such actions will be more thoroughly discussed when we come to the chapter upon actions for damages.[3]

1 For the enforcement of contracts at equity, see Secs. 1520, 1650.

2 For contracts for the sale of water rights, see Secs. 1511-1513.

3 For the right to damages for breach of contract to furnish water, see Sec. 1529.

For the measure of damages for the failure to furnish water, see Secs. 1696-1700.

PART XIII.

ADJUDICATION AND PROTECTION OF RIGHTS—INJURIES TO RIGHTS AND REMEDIES THEREFOR.

CHAPTER 78.

THE ADJUDICATION OF WATER RIGHTS IN EQUITY.

§ 1530. Scope of part and chapter.
§ 1531. Necessity of adjudication or legal determination of water rights.
§ 1532. The general power of courts to adjudicate water rights.
§ 1533. The jurisdiction of courts—Definition—Venue.
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§ 1535. Actions to quiet title.
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§ 1540. Actions to determine the rights as between appropriators and riparian owners.
§ 1541. Actions to adjudicate and quiet title to ditches and canals and easements therefor.
§ 1542. Parties to action to adjudicate rights—The rights of strangers not before the court.
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§ 1550. Pleadings—Demurrer—Answer—And cross-complaint or bill.
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§ 1553. Practice and procedure—Submission of questions of fact to a jury.
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§ 1556. The findings of fact and conclusions of law.
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§ 1558. The decrees and judgments—On rights by appropriation—Quantity of water.
§ 1559. Decrees and judgments—Apportioning the water between riparian proprietors.
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§ 1562. Decrees and judgments—For costs.
§ 1563. The decrees and judgments—As res judicata—Rights by appropriation, etc.
§ 1564. The decrees and judgments—As res judicata—As to riparian rights.
§ 1565. Appeal from judgments and decrees.
§ 1566. The enforcement of judgments and decrees.

§ 1530. Scope of part and chapter.—In this part of our work we will discuss the adjudication and protection of all rights, the injuries to rights, and the remedies therefor. And where the pleadings and practice differ in any respect from the pleadings and practice in other actions, these subjects will also be discussed under the respective heads.

In the present chapter we will discuss the adjudication of water rights by courts under their general equity powers, leaving the discussion of the determination and adjudication of water rights under special statutory proceedings, both by the courts and by administrative officers, to other chapters.[1]

§ 1531. Necessity of adjudication or legal determination of water rights.—Although a person may make a valid prior appropriation of the water of a natural stream or other source of natural water supply,[1] he may record his notice in accordance with the law,[2] he may apply the water to some beneficial use or purpose for many years, he may lay claim to his rights adversely to all the

1 See Chaps. 79, 80, Secs. 1567-1597.

1 For the appropriation of water, see Chap. 38, Secs. 706-732.

2 For the recording of notices, see Sec. 713.

world, and yet this is not deemed a sufficient determination of his rights, for the reason that there may be many others who have made like appropriations from the same source of supply, and whose claims are bound in time in some manner to conflict with the claims of the prior appropriator. Simply because a person lays claim to certain rights, although he does it by means of notice to all the world, and while it may put others on their guard, is no proof of the validity of his claim. As regards water rights, as shown from the history of water right litigation, persons are inclined to claim, at times, many times more than they have any valid right to. This is especially true as to all the older water rights in all States where the appropriations were made before the adoption of the newer method of the acquisition of water rights under the laws of State control, discussed in a previous chapter of this work, and which method in and of itself somewhat checks the avaricious claims of some appropriators.[3] As was well said in a late South Dakota case:[4] "Perhaps there is in all water right cases some mysterious relation between the quantity of water and the quantity of language—a law of supply and demand, which required that the volume of language shall increase in direct ratio to the deficiency in volume of water."

However, be this as it may, the title to a water right is not perfect in any claimant until there has been an adjudication or legal determination of the same and the title thereto adjudged to be in the claimant as against all the world, either by the judgment or decree in a proper action brought in a court of competent jurisdiction or the award or determination as the result of a proceeding before some board or administrative officers under a special statute authorizing such proceeding,[5] and such final decree or determination designating the owner of the right and defining the nature and extent of the same and making a permanent record thereof.

§ 1532. The general power of courts to adjudicate water rights.—The adjudication of the ownership, nature, and extent of a water right, or water rights, as the term indicates, is a matter for the

[3] For the laws of State control, see Chap. 68, Secs. 1337-1367.

[4] Redwater etc. Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702.

[5] For the determination of water rights by administrative officers, see Chap. 80, Secs. 1585-1595.

courts; and unless there are statutes prescribing special proceedings therefor, such an action is subject to the ordinary rules of pleading and procedure as are other civil actions. Even in those States which have statutes providing for the determination of water rights, in the first instance, by special boards of control or administrative officers, there are always provisions for a final resort to the courts by appeal by any party dissatisfied with the determination of the board or officers.[1] But without any special statutes upon the subject, under the practice in all the States a court of equity has the power in all proper actions to ascertain and determine, and by appropriate judgment or decree, to definitely fix the ownership and the nature and extent of the respective rights of all appropriators and users of water taken from the same stream or other source of natural water supply. It is held that in order to avoid a multiplicity of suits, where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian rights, appropriations, prescription, or otherwise, a suit in equity is the proper proceeding to determine such rights and to enjoin the infringement thereof.[2]

1 For the determination of water rights by boards or officers, see Chap. 80, Secs. 1585-1595.

2 Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Woodruff v. North Bloomfield Gravel M. Co., 8 Sawy. 628, 16 Fed. Rep. 25, 9 Sawy. 441, 18 Fed. Rep. 753; Farmers' etc. Irr. Co. v. Cozad Irr. Co., 65 Neb. 3, 90 N. W. Rep. 951; Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336; McCook v. Crews, 70 Neb. 109, 96 N. W. Rep. 996.

See, also, Frey v. Louden, 70 Cal. 550, 11 Pac. Rep. 838; Lorenz v. Jacobs, 63 Cal. 73; Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Alhambra etc. Co. v. Richardson W. Co., 95 Cal. 490, 30 Pac. Rep. 577; Barrows v. Fox, 98 Cal. 63, 30 Pac. Rep. 768, 32 Pac. Rep. 811; City of Salem Co. v. Salem etc. Co., 12 Ore. 374, 7 Pac. Rep. 497; Schilling v. Romminger, 4 Colo. 100; Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Miller v. Dondero, 139 Cal. 643, 73 Pac. Rep. 583; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Guthiel Park Inv. Co. v. Town of Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Haggin v. Saile, 23 Mont. 375, 59 Pac. Rep. 154; Hayes v. Burard, 31 Mont. 74, 77 Pac. Rep. 423; South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032; Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1142; Becker v. Marble Creek Irr.

It is within the power of the Court to fix the dates of the respective appropriations.[3] In the determination of the rights of the respective parties, where the Court has jurisdiction of the parties and the subject matter of the suit, a court of equity has the power to prescribe the method to be used in measuring the water, and to locate a measuring box for the distribution of the water.[4] And in apportioning the water it is within the power of the Court to apportion the flow to which each party is entitled by periods of time rather than by a division of the quantity when such apportionment would best secure the rights of the parties.[5] And having the power to make such a judgment or decree, the Court also has the power to enforce it, and to so regulate the use of the water by the respective owners as to protect the rights of each from infringement or impairment by others.[6] This may be by way of an injunction issued in the same suit determining the rights.[7]

Courts of equity have the discretion to consolidate causes, the exercise of which right will not be reviewed on appeal, except for

Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; Harris v. Shontz, 1 Mont. 212; Nephi Irr. Co. v. Jenkins, 8 Utah 369, 31 Pac. Rep. 986; Gill v. Malan, 29 Utah 431, 82 Pac. Rep. 471; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752.

3 See, also, judgments and decrees, Secs. 1557-1564.

It is no objection that the date fixed was arbitrarily selected so long as the priority was not affected. McDonald v. Lannan, 19 Mont. 78, 47 Pac. Rep. 648.

4 Elliott v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461; Tolman v. Casey, 15 Ore. 83, 13 Pac. Rep. 669; Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119.

But see McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020, where in an action to settle water rights of various parties upon a stream, the District Court, after establishing the priorities of the various appropriators, proceeded to decree the time and quantity which each appropriator was permitted to use such waters. Held error, upon the ground that it was not in the province of the Court to dictate how or when the right acquired by the appropriators should be exercised so long as such use was within the limits of their appropriation.

5 For the appropriation of water by periods of time, see Sec. 786.

For judgments and decrees, see Secs. 1557-1564; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

6 For the enforcement of judgment or decrees, see Secs. 1566, 1646.

For the protection of the right by injunction, see Secs. 1596-1647.

7 Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Frost v. Alturas W. Co., 11 Idaho 294, 81 Pac. Rep. 996.

For the enforcement of judgments and decrees, see Secs. 1566, 1646.

abuse of discretion. So, where two or more suits involving the adjudication of certain water rights could have been joined in the same complaint, and were between the same parties and with reference to the same subject-matter, the ditches in controversy only being different, it is held that they were properly consolidated.[8]

§ 1533. The jurisdiction of courts—Definition—Venue.—"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the Court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be, in substance and effect, within the issue."[1] The above definition was adopted by the Supreme Court of Montana in an action to determine and adjudge water rights and to quiet title to the same.[2]

The State Courts have full and complete jurisdiction over actions brought to adjudicate the water rights claimed within their respective jurisdictions from a stream or other source of natural water supply. It is held by the Supreme Court of the United States that the question of the priority of possession of a water right and of the conformity to local customs, laws, and decisions do not constitute Federal questions under Section 2339, United States Revised Statutes, and, therefore, findings of fact or questions of local law upon which depend a party's right under the section to the protection of a vested water right are not reviewable in the Supreme Court of the United States on writ of error to a State Court.[3] And the con-

8 Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139; Peterson v. Dillon, 27 Wash. 78, 85, 67 Pac. Rep. 397; Wolff v. Pomponia, —— Colo. ——, 120 Pac. Rep. 142.

1 Munday v. Vail, 34 N. J. Law 418.

2 Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855.

3 For the construction of Acts of 1866 and 1870, see Secs. 611-619; Telluride Power Trans. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; dismissing writ of error to the Supreme Court of Utah, 16 Utah 125, 51 Pac. Rep. 146; *Id.*, on second appeal, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; dismissing writ of error to Supreme Court of Utah, 23 Utah 22, 63 Pac. Rep. 995.

A suit to establish and quiet title to water rights connected with lands included in a grant from the Mexican government, which rights are claimed to be within the protection of the treaty with Mexico involves no Federal question for the purpose of giving jurisdiction to the Federal courts. Crystal Springs etc. Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed.

struction placed by the highest court of a State upon a State statute regulating the use and diversion of water is controlling and conclusive upon the Federal courts where jurisdiction is acquired by the Federal courts to hear and determine cases involving such rights.[4]

Where there is a diversity of citizenship and the jurisdictional amount, or a Federal question is involved, parties have the same right to originally bring the action or to remove the same to the Federal courts as they have in other actions.[5]

Where the controversy is over interstate waters and between two sovereign States of the Union, the sole and original jurisdiction to

720, 20 Sup. Ct. Rep. 573; affirming *Id.*, 82 Fed. Rep. 114, 76 Fed. Rep. 114, 76 Fed. Rep. 148; Los Angeles v. Los Angeles etc. Co., 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; writ of error to the Supreme Court of California dismissed for want of jurisdiction; for same case below see 152 Cal. 645, 93 Pac. Rep. 869, 1135; Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; Crystal Springs etc. Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720, 20 Sup. Ct. Rep. 573; Boquillas etc. Co. v. Curtis, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493.

See, also, Miller & Lux v. East Side etc. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111; Pacific Gas Imp. Co. v. Ellert, 64 Fed. Rep. 421; Mohl v. Lamar Canal Co., 128 Fed. Rep. 776.

4 Hawes v. Contra Costa W. Co., 5 Sawy. 287, Fed. Cas. No. 6235; San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56, rev'g *Id.*, 68 Fed. Rep. 948; Mohl v. Lamar etc. Co., 128 Fed. Rep. 776.

5 Anderson v. Bassman, 140 Fed. Rep. 10, 140 Fed. Rep. 14.

But a corporation can not be collusively organized for the purpose of creating a diversity of citizenship and thus giving the Federal courts jurisdiction. Miller & Lux v. East Side etc. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111.

An appeal from a decision of the State Engineer to a State Court is removable to the Federal Court. Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137.

See, also, Rickey etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 547; Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705; Hagge v. Kansas City etc. R. Co., 104 Fed. Rep. 391; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423; Eaton v. Hoge, 141 Fed. Rep. 64, 72 C. C. A. 74.

An allegation in a bill that complainant is a corporation organized under an Act of Congress makes the case as arising under the laws of the United States, and confers jurisdiction upon a Federal Court. United States etc. Co. v. Gallegos, 89 Fed. Rep. 769.

try and determine the cause is vested in the Supreme Court of the United States.[6]

Where, however, the controversy is over interstate waters and between the citizens of different States, or the citizens of the same State, the State courts where the diversion is made have full and complete jurisdiction to determine all questions, with the exception of the right to quiet title to the use of the water where a stream rises in one State and flows into another State and is there diverted and used for irrigation. In such cases the courts of the former State have no jurisdiction to try and determine the right to the use of the water in the latter State.[7] So, also, where there is a diversity of citizenship the action may be originally brought in or removed to the Federal Court.[8]

An action to quiet title to water rights must be prosecuted and maintained in the jurisdiction in which the *res* or subject-matter is situated. Where, therefore, the rights to be settled are wholly within one county the action should be brought in the court having jurisdiction in such county.[9] So, an action brought by a riparian proprietor to quiet title to his right to the use of the water flowing by his land must be commenced in the county where the land or some part of it is situated.[10] Where the controversy is over water flowing through different counties of the same State, or where they are diverted in one county and conducted by a canal to another

6 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

See for jurisdiction of courts over interstate waters, Secs. 1233, 1234.

7 Conant v. Deep Creek Irr. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

8 See, also, for the jurisdiction of courts over interstate waters, Secs. 1233-1533; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423; Howell v. Johnson, 89 Fed. Rep. 556; Rickey etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207.

9 Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535; Pacific Yacht Club v. Sausalito Bay W. Co., 98 Cal. 487, 33 Pac. Rep. 322; Fritts v. Camp, 94 Cal. 393, 29 Pac. Rep. 867.

10 Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Lux v. Haggin, 69 Cal. 255, 9 Pac. Rep. 919, 10 Pac. Rep. 674.

county for use there, the Court of either county has jurisdiction to try and determine the case.[11]

In those States where the statutes provide for State boards and give them jurisdiction to determine existing water rights, with right of appeal to the courts from the decision of the boards, the court will generally refuse to take jurisdiction of a case where a hearing has not been first had by the board.[12] But in Nebraska it is held that notwithstanding the authority of an administrative board to determine controversies over water rights,[13] whenever a controversy arises over the substance of the rights of the various parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of.[14]

Where the jurisdiction of a court of equity is properly invoked upon one branch of a case, the Court has jurisdiction to settle all the rights of the parties in that action.[15] Where a party to an action fails to object to the jurisdiction of the Court, but acquiesces in the

11 Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628; Lower Kings River etc. Co. v. Kings River etc. Co., 60 Cal. 408; Last Chance etc. Co. v. Emigrant etc. Co., 129 Cal. 277, 61 Pac. Rep. 960.

12 For the laws of State control, see Chap. 68, Secs. 1337-1367.

13 For the adjudication of water rights by administrative boards, see Chap. 80, Secs. 1585-1595.

14 "The courts can not administer the statute nor regulate the use of the streams, but they can and should adjudicate disputes based on the rights of parties acquired under the statutes." Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; modifying Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. Rep. 271; *Id.*, 61 Neb. 317, 85 N. W. Rep. 303.

See, also, Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

15 "It may be possibly true that the interference was so slight and inconsequential that plaintiff might have been relegated to its remedy at law, but, since jurisdiction in equity was properly invoked at least upon one branch of the case, the trial court should have retained jurisdiction to settle all the rights of the parties in one action, and it ought not to require the plaintiff to bring another to have determined the relative rights of the parties in and to this strip of land." Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192; Gutheil Park Inv. Co. v. Town of Montclair, 32 Colo. 420, 76 Pac. Rep. 1050.

The rights of the owners to the waters of a ditch and the right to change the point of diversion may be determined in one action. Hallett v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317.

decree for a number of years, and enjoys the benefit thereof, he is estopped from subsequently attacking the decree collaterally.[16] Where the question of jurisdiction is not waived, it is the duty of the Court to dismiss the action whenever during the trial want of jurisdiction appears.[17]

§ 1534. The nature of the action—Suit to quiet title.—The nature of an action to determine ownership, description, and extent of a water right, if not technically one to quiet title, is closely analogous thereto. Strictly speaking, an action to quiet title is one *in personam*, but by the statutes of a number of the States there has been given to it an additional effect *in rem* as far as the adjudication of water rights is concerned. Such actions at times may be regarded as strictly *in personam*, as is the case where they are brought to settle the individual and several rights of the different appropriators, and these respective parties are enjoined from interfering with the other parties, as set forth by the terms of the decree. But the action may be brought to settle the rights of certain ditches as against the rights of other ditches or for the awarding of a certain amount of water to a definite tract of land where the action might be deemed to be strictly *in rem* or quasi *in rem*. But, again, there may be mixed actions *in rem* and *in personam*, as is illustrated by the many cases where not only the rights of the individual appropriators but also the rights of certain ditches and canals are determined and adjudicated. But as far as any set form of action is concerned, such actions brought for the determination and adjudication of water rights are more analogous to actions to quiet title than to any other. They are, therefore, commonly referred to as actions to quiet title.[1] And, as said by the Supreme Court of Ore-

16 Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Boulder & Weld etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Otero Canal Co. v. Fosdick, 20 Colo. 522, 39 Pac. Rep. 332.

An objection to the jurisdiction of the Court can not be raised for the first time on appeal. Elliott v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

The District Court, being a Superior Court of general jurisdiction, want of jurisdiction must affirmatively appear, to overthrow the presumption that the Court had jurisdiction of the subject matter of the action. Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106.

17 Union Light etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044.

1 A suit to quiet title to a water right for irrigation purposes, and to determine the land owner's right to

gon: "Water suits are in many respects *sui generis*, by reason of which courts are sometimes confronted with the dilemma of either exercising their discretion in matters of practice coming before them or of making an exception to that well-known maxim, 'Equity will not suffer a right to be without a remedy.'"[2]

An action for the partition of a water right as between appropriators will not lie for the reason that the title to the water in the stream does not vest in the appropriator, but he is merely given the right to divert and use the water for beneficial purposes; and, again, partition can not be had of property which is not owned jointly by two or more.[3]

But it is held that a perpetual right to the use of water is not the proper subject-matter of adjudication by mandamus.[4]

§ 1535. Actions to quiet title.—As discussed in a previous section, an action to determine and adjudicate water rights between the claimants to the same, where the water is taken by all from a common source of supply, while not technically so is more in the nature of an action to quiet title [1] than any other form of action, and that by the courts and others such actions are commonly referred to as actions to quiet title, we will discuss more at length the nature and scope of these actions. A water right, or the right to the use of water, being in its nature real property,[2] an action by the owner thereof can be maintained to quiet the title thereto in practically

divert waters from a stream for such purposes, is in the nature of an action to quiet title to real estate. Rickey Land etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 574.

See, also, Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535; Conant v. Deep Creek etc. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721.

For the nature of statutory actions, see Sec. 1569.

An action to set aside a decree fraudulently substituted for another in a proceeding for the determination of priority of water rights is not an action to determine such priority of rights, but an action for relief on the ground of fraud. Peck etc. Co. v. Pella etc. Co., 19 Colo. 222, 34 Pac. Rep. 988.

2 Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396, quoting from Mr. Justice King in Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

3 Crippen v. White, 28 Colo. 298, 64 Pac. Rep. 184.

4 Northern Colo. Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23.

For the protection of rights by mandamus, see Secs. 1506, 1649.

1 See Sec. 1534.

2 See Secs. 768-771.

the same manner as is the case with other classes of real property. In fact, such an action, wherein the rights of the respective parties to the use of the water are determined, and by judicial decree the title to the same quieted in those found to be the owners thereof, is the most common form of actions brought for the purpose of settling those rights, for the reason that it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply.[3] It is therefore held that a bill in equity will lie to quiet the title to water rights, and that, too, regardless as to how those rights were acquired.[4]

There need not be an actual interference with plaintiff's right before an action may be brought. The assertion of an adverse claim is sufficient.[5] It would be impossible to cite all the cases where

[3] For jurisdiction of courts, see Sec. 1533.

For parties to actions to adjudicate water rights, see Secs. 1542-1546.

[4] "In several cases this Court has recognized that such an action will lie." Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333, citing Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Gutheil etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Rickey Land etc. Co. v. Miller & Lux, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 574; Rickey Land etc. Co. v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; affirming *Id.*, 146 Fed. Rep. 574; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334; Salazar v. Smart, 12 Mont. 395, 30 Pac. Rep. 675; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

[5] Peregoy v. Sellick, 79 Cal. 568, 21 Pac. Rep. 966; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

"It is also argued that since the defendant concedes the plaintiff's prior right, and manifests no intention of continuing the interruption, the suit can not be maintained. But it is clearly established that he did insist upon the right to deplete the flow in the manner complained of, and in his answer prays that his rights therein be adjudicated, under which circumstances it is fully settled that a suit is maintainable." Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170.

See, also, Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Pacific

suits to quiet water rights have been allowed under this section. However, they will be found under the various heads of this discussion.

A water right being real estate, upon the death of the owner thereof its title passes to his heirs. It is therefore held that an action to quiet title in such a case can not be maintained by an administrator, but that he may sue for the rents due the estate for the use of such water right.[6]

In Colorado, the rights and priorities as between ditches, canals, and reservoirs, must be determined under the statutory proceedings enacted for that purpose.[7] But the rights of the respective consumers as between themselves, or as between themselves and the ditch owners, can not be adjudicated in these special statutory proceedings.[8] However, the rights of the respective consumers under any of the works above named, after the award in the special pro-

Yacht Club v. Sausalito etc. Co., 98 Cal. 487, 33 Pac. Rep. 322; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; Drake v. Russian River etc. Co., 10 Cal. 654, 103 Pac. Rep. 167; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Foss v. Johnstone, 158 Cal. 119, 110 Pac. Rep. 294; King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Standart v. Round Valley etc. Co., 77 Cal. 399, 19 Pac. Rep. 689.

"It may be regarded as well settled in this State that it is only necessary to the maintenance of suits of this character, either that it appear the defendants claim adversely to the moving party, or, if not asserting a hostile claim, that those made defendants are necessary to a complete determination of the controversy. Applying this rule here, this suit is maintainable, and each of the defendants are proper parties." Whitehead v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396, citing Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

6 Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020.

7 For the statutory adjudication of water rights, see Chap. 79, Secs. 1567-1584.

8 "The question of the title of the sundry owners and users of the water covered by the priorities awarded to the same ditch can not be litigated or settled in the adjudication proceedings is well settled in this State." Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406.

See, also, Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Hallett v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317; Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149; O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

ceedings has been made to it, may be determined and adjudicated in an ordinary action in equity brought to quiet title.[9] This, as can be readily seen, necessitates two actions before the individual rights as between the consumers under any ditch can be determined and adjudicated.[10]

An action will also lie to quiet title to stock in a mutual corporation, which stock represents water rights used for the purpose of irrigation of land.[11]

§ 1536. Actions to quiet title and injunctions in the same suits. A court of equity having once acquired jurisdiction of the subject matter of the action and of the parties thereto,[1] acquires jurisdiction for all purposes of the suit;[2] and, therefore, it may grant all proper equitable relief prayed for in the complaint or the cross-complaint, or the bill or cross-bill, as the case may be.[3]

One of the most common reliefs granted by the Court, after the rights have been determined and adjudicated, and the title to the water rights quieted in the one declared to be the owner thereof, is, in the same action, to grant an injunction against the interference of the water rights the title to which was so quieted, by the other parties to the action. It was held in an early Montana case, that one owning a certain water right for which he was entitled to

9 See statutory adjudications, jurisdiction of subject matter, Sec. 1572.

See, also, Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Gutheil etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Bowman v. Berdin, 40 Colo. 247, 90 Pac. Rep. 506; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416.

10 See Secs. 1572, 1573.

11 Wanamaker v. Pendleton, —— Colo. ——, 121 Pac. Rep. 108.

1 For jurisdiction of courts, see Sec. 1533.

For parties to the action, see Secs. 1542-1546.

2 See Sec. 1533.

3 For pleadings in suits to quiet title, see Secs. 1547-1552.

See, also, Cottonwood Ditch Co. v. Thom, 39 Mont. 115, 121, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

a decree to quiet his title thereto, was also entitled to a perpetual injunction restraining a diversion of the water to which he was declared entitled, by the other parties to the action.[4] In such an action it is not necessary that the causes of action be separately stated in different counts.[5] And, again, where the principal object of the suit is to enjoin the defendants from interfering with the plaintiff's use of the water rights, the equitable jurisdiction of the Court is invoked, and it can decide all questions involved, and grant appropriate relief, such as the quieting of the title to the water rights.[6]

§ 1537. Actions to quiet title and damages in the same suits.—Although it is a somewhat uncommon practice, an action may be brought to quiet the title to a water right, ditch or canal, and also for damages suffered by the plaintiff for the wrongful diversion of the water, or for the wrongful obstruction of the ditch or canal.[1] Where such a mixed action is permitted the question of damages

4 Harris v. Shontz, 1 Mont. 212.

See, also, Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; King v. Ackroyd, 28 Colo. 488, 66 Pac. Rep. 906; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338; Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 281; South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Hulsman v. Todd, 96 Cal. 228, 31 Pac. Rep. 39; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; The Salton Sea Cases, 172 Fed. Rep. 820, 97 C. C. A. 242; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. Rep. 432.

5 Patterson v. Mills, 138 Cal. 276, 71 Pac. Rep. 177; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191.

6 Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543; Burr v. Maclay Rancho W. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347.

An action for an injunction to protect water rights, upon the evidence considered, was held sufficient to establish prior appropriation by plaintiffs. Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

See, also, actions for injunction for the protection of the right, Secs. 1596-1647.

1 Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185; Hartson v. Dill, 151 Cal. 137, 90 Pac. Rep. 530; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Anderson v. Cook, 25 Mont. 330,

should be submitted to a jury, where a proper demand for the same has been made by either party. However, where the jury is waived, the question of damages may be tried by the Court.[2] The rule as to the procedure in such cases is for the Court to first try the equitable part of the action; and, afterwards, if a jury is demanded to try the issue of damages, submitting that question to the jury. After the verdict of the jury, the Court must make its findings of fact and conclusions of law, and enter judgment accordingly.[3]

§ 1538. **Actions to apportion the use of water among riparian proprietors.**—In those States which adhere to the modified form of the common law doctrine of riparian rights,[1] an action in equity will lie to adjudicate the right of each riparian proprietor upon a stream to his use of the water, and to apportion the use of all of the water of the stream among all of the riparian proprietors, where, of course, the right to the use of such water is all in riparian proprietors.[2] This rule is firmly settled in California, and in all the Western States which recognize the common law of riparian rights, as one of its rules of law governing the waters flowing within its boundaries. However, this rule is not peculiar to the Western common law States; but it is taken from the decisions of the Eastern States, where the only rule governing waters is the common law.[3] In an early case in California, it was said that riparian rights in the use of the waters of a stream, "being held in common, it is well settled that in a controversy between such owners as to their rights, it is the duty of a court of equity to determine the respective rights of the parties so as to give to each the just proportion to which he may be entitled, and, if necessary, regulate the use between them according to their rights."[4]

64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Hulsman v. Todd, 96 Cal. 228, 31 Pac. Rep. 39.

For injunctions and damages in the same action, see Sec. 1599.

For the submission of questions of fact to a jury in equity cases, see Sec. 1553.

2 For actions for damages, see Secs. 1660 *et seq.*

3 Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891.

1 For the modified doctrine of riparian rights, see Secs. 508-512.

2 For the adjudication of water rights as between riparian owners and appropriators, see Sec. 1540.

3 For the common law doctrine of riparian rights, see Chaps. 21-28, Secs. 450-551.

4 Mr. Justice McKee in Anaheim W. Co. v. Semitropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623; citing: Lyon v. McLaughlin, 32 Vt. 423; Arthur v. Case,

An action to adjudicate and apportion the use of water as between riparian owners, or on behalf of riparian owners as against appropriators, will not lie in a State which has abrogated the common law of riparian rights.[5]

Having determined the quantity of water which each riparian proprietor is entitled to use, the Court will quiet the title thereto in him and grant an injunction in the same action against the other owners on the same stream and parties to the action, enjoining the interference with the respective rights awarded.[6]

§ 1539. Actions to apportion subterranean waters among the owners of the lands under which they flow.—Under the more modern rule of the correlative rights of land owners to the waters of subterranean basins, streams, or water-bearing strata, over which their lands overlie in common, as adopted in the case of Katz v. Walkinshaw,[1] an action will lie to determine the extent of the rights of each land owner to the use of such water. The paramount right to the use of such waters is in the owners of the land overlying the water-bearing strata. And, where there is not sufficient water for

1 Paige 447; Belknap v. Trimble, 3 Paige 577; Webber v. Gage, 39 N. H. 182; Bardwell v. Ames, 22 Pick. 353; Ballou v. Hopkinton, 4 Gray 324; Roath v. Driscoll, 20 Conn. 535, 52 Am. Dec. 352; Brown v. Ashley, 16 Nev. 311.

See, also, Warren v. Westbrook Mfg. Co., 86 Me. 32, 29 Atl. Rep. 927, 26 L. R. A. 284, and note; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 115 Cal. 496, 47 Pac. Rep. 454; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Rianda v. Watsonville etc. Co., 152 Cal. 523, 93 Pac. Rep. 79; Gutierrez v. Wege, 151 Cal. 587, 91 Pac. Rep. 395; McCook etc. Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996; Rose v. Messmer, 142 Cal. 322, 75 Pac. Rep. 905; Filippine v. Hewlett, — Cal. —, 121 Pac. Rep. 376; Caviness v. La Grande Irr. Co., — Ore. —, 119 Pac. Rep. 731.

For decrees apportioning the water between riparian proprietors, see Sec. 1559.

5 Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

6 For decrees as to riparian rights, see Sec. 1559.

For decrees apportioning water between riparian owners as *res judicata*, see Sec. 1564.

1 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, for the rights to subterranean waters, Secs. 1148-1211.

For the correlative rights to subterranean waters, see Secs. 1173-1178, 1198-1200.

the use of all such owners, each land owner is entitled to a fair and just proportion, based upon the correlative rights of all of the land owners.[2] But, as it is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to use the water, to prevent another from using it while he himself does not desire to do so, or can not do so, the surplus subterranean water, over and above the amount actually needed by the land owners whose lands overlie common water-bearing strata, may be awarded to an appropriator for use upon distant lands not overlying such strata.[3] But where there is no surplus over and above the amount needed by such land owners, an appropriator of such waters can not carry them beyond the watershed for commercial purposes, to the injury of the owners of the land overlying the common water-bearing strata.[4] An action will also lie to quiet the title to the waters of springs.[5]

§ 1540. Actions to determine the rights as between appropriators and riparian owners.—In those States which have both the Arid Region Doctrine of appropriation and the common law of riparian rights, an action in equity will lie to determine and adjudicate the respective rights as between appropriators and of riparian owners, who take the water from the same stream or other source of water supply.[1] And, the rights having been determined, a decree will be made by the Court quieting the title to the same in the respective owners, and enjoining the other parties to the action

2 Katz v. Walkinshaw, *supra*.

The right of a land owner to a quantity of percolating water necessary for use on the tract of land overlying such water is paramount to that of an adjoining land owner to take the water to distant land. Burr v. Maclay Rancho W. Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715.

See, also, for decrees in actions to adjudicate rights to subterranean waters, Sec. 1561.

3 Burr v. Maclay, 154 Cal. 428, 98 Pac. Rep. 260.

4 Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A. 772.

5 Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76.

1 For rights as between appropriators and riparian owners, see Secs. 810-823.

from interfering with such rights.[2] As far as possible the courts of these jurisdictions will reconcile the rights both of the appropriators of the water for beneficial uses and the rights of riparian owners. Under the modified rule of the common law of riparian rights, riparian owners have the right to the use of water flowing by their lands to practically the same extent as have appropriators of the water for beneficial purposes. Neither can use more water than is necessary for the purpose for which the water is diverted from the streams. It is, therefore, within the power of a Court of equity in cases where these relative rights are contested to determine and adjudicate by proper decree the rights of the respective owners of the water, and that, too, whether they claim under one doctrine or the other.

§ 1541. **Actions to adjudicate and quiet title to ditches and canals and easements therefor.**—An equitable action will also lie to determine the rights of various parties in and the title to ditches and canals, constructed for the purpose of conducting the water to the place of use, also the rights in and title to easements for ditches and canals.[1] An action will lie to quiet title to an easement for a

2 Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Gallagher v. Montecito Valley W. Co., 101 Cal. 245, 35 Pac. Rep. 770; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Arroyo etc. Co. v. Dorman, 137 Cal. 611, 70 Pac. Rep. 737; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338; People's Ditch Co. v. Fresno etc. Co., 152 Cal. 87, 92 Pac. Rep. 77.

1 For rights of way over public lands, see Secs. 927-971.

For rights of way over private lands, see Secs. 972-993.

Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092; Swank v. Sweetwater Irr. & Pr. Co., 15 Idaho 583, 98 Pac. Rep. 297; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38; Bowen v. Webb, 37 Mont. 479, 97 Pac. Rep. 839; Cottonwood D. Co. v. Thom, 39 Mont. 115, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

See, also, Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. Rep. 224; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185; Riverside etc. Co. v. Jansen, 66 Cal. 300, 5 Pac. Rep. 486.

ditch or canal.[2] A ditch or canal being real property,[3] an action to quiet title to the same must be brought in the county where it is situated.[4] Again, in the same action the title to both the water rights and to the ditch or canal through which it flows may be adjudicated, and a decree made by the Court quieting the title in the respective owners of both.[5] As was held by the Colorado Court, where the trial Court only decided the rights as to the water, "The trial Court should have retained jurisdiction to settle all the rights of the parties in one action, and it ought not to require the plaintiff to bring another to have determined the relative rights of the parties in and to this strip of land."[6] In the pleadings, however, the separate causes of action must be separately stated.[7]

§ 1542. Parties to action to adjudicate rights—The rights of strangers not before the Court.—It is a fundamental principle of law that no person is bound by a judgment or decree who has not had his day in court. In other words, to bind a person to a judgment or decree, he must either be a plaintiff or a party to the action, and be served with summons or process, according to the law of the State wherein the action is brought. He must be given full and complete opportunity, as the law of the jurisdiction allows, to answer to the complaint and set up his claim. And, it may be said to be a well-settled proposition of law that a judgment or decree is only binding between the actual parties to the action, and their privies, and in no way affects the rights of those who are not parties to the action. So where the lower Court rendered a decree "although general in form, and broad enough in language to include the whole world," it was held by the Supreme Court that it could have no such effect, and the Court said: "They are binding on the

2 Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050.

3 See Sec. 834.

4 Pacific Yacht Club v. Sausalito Bay etc. Co., 98 Cal. 487, 33 Pac. Rep. 322.

5 Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024.

6 Smith Canal etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

See, also, Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142.

See, also, for decrees in actions to quiet title to ditches and canals, Sec. 1560.

7 Nevada etc. Co. v. Kidd, 37 Cal. 282; Bear River etc. Co. v. Boles, 24 Cal. 354.

parties to the action and their privies, but upon no one else. As to strangers claiming rights in the waters of the lake the decrees in no manner affect them. The decrees are not even evidence of adverse rights. Strangers may proceed as if the decree had never been entered."[1] It therefore must follow that in order to bind by a decree or judgment any persons interested in the subject matter of the action must be made parties to the action, legally served with process, and given an opportunity to answer and set up their claims.

As no one is bound by the judgment or decree unless they are made parties to the action, so also the rights of a person not a party to the waters of a stream can not be raised by a party to the action upon the ground that the stranger has a superior right to that of his opponent. In other words, the Court must determine the action as between the rights of the persons actually made parties and before it. In a leading case upon this subject it is said:[2] "Neither do we think that the trial Court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of water below the mouth of the proposed canal of appellee would be injured by the construction of the canal. The rights of such persons will not, of course, be injuriously affected by the decree in this cause, and *non constat* but that they may yet intervene for their own protection, if they deem that the construction of the canal will be an invasion of their rights, or that they may be willing to forego objection to the construction of the canal."[3] However, upon

1 State *ex rel.* McConihe v. Steiner, 58 Wash. 578, 109 Pac. Rep. 57.

See, also, Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; State *ex rel.* Pew v. District Court, 34 Mont. 233, 85 Pac. Rep. 525; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

See, also, for decrees as *res judicata*, Secs. 1563, 1564.

2 Gutterries v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

3 See, also, Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Seven Lakes etc. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75; Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965; Humphreys v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347; Crippen v. Glasgow, 38 Colo. 104, 87 Pac. Rep. 1073; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. Rep. 868; Lower Latham etc. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. Rep. 483; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Clark v. Ashley, 34 Colo. 285, 82

suggestion or a showing to the Court that other persons are interested in the waters, which are the subject-matter of the action, as we shall see, it is the common practice for the Court to make an order that such persons be made parties and duly served with process.[4]

We will discuss in the following sections who may be parties plaintiff or defendant.

§ 1543. Parties to actions to adjudicate rights—Where there are several on the same source of supply.—But where there are a number of appropriators and claimants of the water from the same source of supply, the rights to the use of the water can not be adjudicated in an action between a single plaintiff as against the rights of a single defendant. A decree attempting to adjudicate and settle the rights as between two appropriators or claimants in an action between themselves only as parties would not bind in any way the other appropriators and users of the water from the same source, and not made parties to the action. Then, again, if this was the rule, the litigation and the multiplicity of suits in attempting to settle and determine the rights of all claimants to the waters from the common source of supply would be interminable, and such suits would end just where they began without there having been a final settlement or adjustment of the rights. So, the statutes of the various States provide to the effect that, in the adjudication of the water rights between claimants to the same from a common source of supply, all claimants who are not made parties plaintiff,[1] must be made parties defendant. And the courts are inclined to protect the interests of persons interested and not made parties to the suit; and, when it is discovered during the progress of the case that there are other parties interested in the waters who have valid claims thereto, it is the usual practice for the Court to make an order to make them parties to the action, and they are then served with process and are permitted to come in and defend and set up their rights.[2] And, in this connection, necessary parties to such an action

Pac. Rep. 588; Burkhart v. Meiberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 119 Am. St. Rep. 279; Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; United States v. Lee, 15 N. M. 382, 110 Pac. Rep. 607.

4 See Secs. 1543-1546.

1 See Sec. 1544.

2 For the statutes of the various States as to parties in suits for the adjudication of water rights, see Part XIV.

See, also, as to parties in actions in statutory adjudications, Sec. 1573.

are all those who have an interest in the subject and object of the action, and all persons against whom relief must be obtained to accomplish the object of the suit.[3] So, in all cases where there are several appropriators and claimants of the waters from the same stream or other source of natural water supply, or who take water from the same ditch, canal, or reservoir, in order to permanently adjudicate the rights to all the water, all parties having a valid claim thereto must be made parties to the action.[4] The same rule is applied

3 McLean v. Farmers' Highline etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

In an action to determine the priority of rights, all parties claiming rights of appropriation should be made either parties plaintiff or defendant; but the failure to make all such persons who claim a right of appropriation parties to such an action will not affect the rights and interests as adjudicated between the parties to such action and determined by the court. Frost v. Idaho Irr. Co., 19 Idaho 372, 114 Pac. Rep. 38.

4 "If there are other persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory, and the court must cause such persons to be brought in." Pomeroy's Remedies and Remedial Rights, Sec. 419.

"It is also a well and reasonably established rule in equity that, if the defendants actually before the court may be subject to undue inconvenience or danger of loss, or to future litigation, or to a liability under the decree more extensive and direct than if the absent parties were before the court, that, of itself, will furnish sufficient grounds to enforce the rule of making absent persons parties to the action." Story, Eq. Pl., 9th Ed., Sec. 338.

In Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231, after citing Sec. 3039 of the Gen. Stat. of Nevada, the Court said: "It will be observed that this statute practically adopts the rules of equity requiring all persons materially interested, either legally or beneficially, in the subject-matter of the suit, to be made parties to the suit, when their rights will be affected by the final decree."

"In a water suit, an appropriator from a certain stream would have to bring an action against each other appropriator from the same stream before he could have his rights finally adjudicated as to all such appropriators. His bringing a suit against one appropriator would not settle his rights. It would leave him with other litigation to settle them, and for that reason he is permitted to join as plaintiff or defendant every other appropriator of water from the stream." Creer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228.

See, also, Frost v. Alturas etc. Co., 11 Idaho 294, 81 Pac. Rep. 996; Rickey v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

where the water is claimed by riparian owners by virtue of their riparian rights.[5] In either case the respective parties having proven their rights, the Court must then make specific findings as to the amount of water to which each party is entitled, and upon which the decree must be based.[6] And, in making this adjustment of the rights, "a Court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but, where a complete determination of the controversy can not be had without the presence of other parties, it may dismiss the complaint, or cause them to be brought in, as the exigencies of the case may require. The better practice in the Circuit Courts is to order the necessary parties to be brought in, and that should always be done under ordinary circumstances."[7]

[5] Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Smith v. Hawkins, 127 Cal. 119, 59 Pac. Rep. 295.

[6] Lakeside etc. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338.

For the decrees and judgments in the adjudication of water rights, see Secs. 1557-1564.

[7] Beasley v. Shively, 20 Ore. 508, 26 Pac. Rep. 846; citing Russell v. Clark's Exr., 11 U. S. 7 Cranch 69, 3 L. Ed. 271; Young v. Cushing, 4 Biss. 456.

See, also, Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1032, 102 Pac. Rep. 728, where it is said: "It is consonant with public policy, and public interests require, that when in the determination of conflicting claims to the right to the use of public streams, for irrigation, manufacturing, or other useful purposes, it appears that many suits must eventually be brought to determine the various rights of persons whose property is to be affected by such use, it should be within the sound discretion of the trial court to require all, or any, of the persons interested to be made parties, as was done here, in order that the rights of each may be adjudicated and finally determined in one proceeding. This course should be permitted, and is obviously contemplated by the statute, not only with the view to economy in litigation, but that the respective interests of all affected may be justly, peaceably, and permanently ascertained and settled during the lifetime of those cognizant of the facts upon which the adjudications must be had. It is obvious that it is not only impracticable to determine such rights in many instances without adopting such course, but that if left to separate suits to be brought from year to year as disputes may arise, not only

And in this connection we will add that it makes very little difference as far as the settlement and adjudication of water rights are concerned as to who are made plaintiffs or defendants in the action, or whether parties interested are permitted to come in the action as intervenors. Of course, somebody has got to bring the suit as the plaintiff. But the Court having acquired jurisdiction over the subject matter and the parties will settle and adjudicate the rights of all, and that, too, whether it be as between the plaintiffs as against the defendants or intervenors, or any converse of the proposition, or as between the plaintiffs, defendants, or intervenors themselves.[8] In some jurisdictions, notably Colorado, the rights may be adjudicated as between the ditches and canals owned by different parties or corporations. In such cases the only necessary parties to the action are the parties or corporations owning such ditches and canals; and the rights of the consumers under those ditches and canals are left to a separate determination and adjudication. In which case all the consumers under any one ditch or canal must be made parties to the action.[9]

will most valuable evidence pass beyond the reach of all, but such course, if pursued, must necessarily result in years of litigation and turmoil, and, in many instances, in a complete denial of justice. We are of the opinion, therefore, that no error was committed by the Court in requiring the appearance of all the defendants."

8 Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Rickey etc. Co. v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. Rep. 166; Barham v. Hostetter, 67 Cal. 272, 7 Pac. Rep. 685; Deseret etc. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628; United States v. Conrad Investment Co., 156 Fed. Rep. 123; Norton v. Colusa, 167 Fed. Rep. 202; Churchill v. Lauer, 84 Cal. 233, 24 Pac. Rep. 107; Forman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94; Miller v. Highland etc. Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; Greer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228; Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. Rep. 570.

9 For the adjudication of water rights in Colorado, see Chap. 87.

"But in this case the rights of the stockholders, as among themselves, are directly involved, and their relative rights can not be finally settled and their respective claims judicially determined in their absence. They are therefore necessary parties and should have been made defendants." Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

See, also, parties defendant, Sec. 1545.

See, also, Montezuma Canal Co. v. Smithville Canal Co., 11 Ariz. 99, 89 Pac. Rep. 512; Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334.

The *pro rata* interests of the owners

§ 1544. Who may bring the action—Parties plaintiff.—An action to settle and adjudicate the water rights from a certain source of natural supply may be maintained by anyone who has an actual right in or legal claim to the use of the water, and the natlre and extent of whose rights are contested by other parties.[1] Where the plaintiff is a corporation, it is immaterial whether the company owns the water right in question, or merely distributes the water to its shareholders or to others.[2] And, where a number of land owners own tracts in severalty, and make several appropriations of the water from the common source of supply, they may join as parties plaintiff in a suit in equity to have their several rights adjudicated as between themselves and as against the claims of others.[3] In fact, the statutes of the various States provide to the effect that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as parties plaintiff.[4] A

of a mutual ditch using the water severally and the right to change the point of diversion may be determined in one proceeding. Hallett v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317.

See, also, Southside Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107.

1 McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Custer Consol. Mines Co. v. Helena, — Mont. —, 122 Pac. Rep. 567; Merritt v. Los Angeles, — Cal. —, 120 Pac. Rep. 1064; Inyo Consol. W. Co. v. Jess, — Cal. —, 119 Pac. Rep. 934.

2 Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874.

See, also, for control by corporations, Secs. 1464-1529.

3 So, in an action, where it was sought to obtain a decree declaring that the rights of the plaintiffs to the water of a certain stream were prior and superior to the claim of the defendant, and to settle and adjudicate the relative priorities among the plaintiffs themselves, and to perpetually enjoin the defendant from diverting any of the waters of a tributary of the stream, it was held that a number of land owners in severalty of divers tracts of land might join in the bringing of the action and maintain the same as parties plaintiff. Beach v. Spokane Ranch etc. Co., 25 Mont. 367, 65 Pac. Rep. 106.

Settlers along a stream, who own lands under such stream and have acquired the right to appropriate and use water from such stream as the common source of supply, each owning his separate land and water right in his individual capacity, have such a common interest in having the rights of the respective appropriators determined and quieted, and a decree enjoining interference therewith, as to entitle them to join as parties plaintiff. Frost v. Alturas Water Co., 11 Idaho 294, 81 Pac. Rep. 996.

4 Daly v. Ruddell, 137 Cal. 671, 676, 70 Pac. Rep. 784.

See, also, Brown v. Farmers' Highline etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Egan v. Estrada, 6 Ariz. 428, 56 Pac. 721; Daly v. Ruddell, 137 Cal.

water right being real estate, it is held in Colorado, where the administrator is not entitled to the possession of the decedent's estate, that an action to quiet title to a water right can not be maintained by such administrator.[5] However, persons whose rights are divided from and subordinate to those of the plaintiffs in a suit over the waters of a stream need not be joined as parties, even though they are tenants in common of the water with the plaintiffs.[6] So, also, where the water rights are owned by a corporation organized for the purpose of distributing water to consumers, the consumers need not be joined as parties.[7] Both a mutual corporation, and a corporation organized for the purpose of profit have the right to bring an action for the adjudication and protection of the rights of their shareholders and consumers.[8]

But a person who has no legal or equitable title or right to the use of water, but has merely posted notice of his intent to appropriate water, without following it up with the other essentials necessary to make a valid appropriation, can not maintain such an action.[9] As was said by the Circuit Court for the Southern District of California: "It is obvious that a person who intends to become an appropriator under these sections,[10] can not acquire the exclusive right to the use of the water he intends appropriating, nor maintain any suit, either at law or in equity, for its diversion, until all the steps requisite to an appropriation have been made."[11] It is

671, 676, 70 Pac. Rep. 784; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416; Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628; Stetham v. Skinner, 11 Idaho 374, 82 Pac. Rep. 451.

5 Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 Pac. Rep. 1020.

6 Spanish Fork City v. Hopper, 7 Utah 235, 26 Pac. Rep. 293.

7 Farmers' Co-operative D. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761; Town of Sterling v. Pawnee D. Ex. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

8 For the rights of mutual corporations, see Secs. 1479-1489.

For the rights of corporations for profit, see Secs. 1490-1508.

See, also, Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. Rep. 588; Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67.

An irrigation district has no such interest in the water or water rights as entitles it to maintain a suit in equity to determine the rights of land owners in the distribution of waters. Little Walla Walla Irr. Dist. v. Preston, 45 Ore. 6, 78 Pac. Rep. 982.

9 For the appropriation of water, see Secs. 706-732.

10 Secs. 1415-1418, Civ. Code of Cal.

11 Rincon etc. Co. v. Anaheim Union Water Co., 115 Fed. Rep. 543, quoting

also held by the Supreme Court of Oregon that equity will not adjudge a question of priority of title of a corporation to rights and franchises for irrigation purposes in order to enable it to issue bonds to continue and complete the work on a presumption of a possible intent of defendants to disturb the same, there having been no overt act or disturbance, the corporation not having diverted the water nor done any work, comparatively, of construction.[12] When, however, all the requirements of the law have been finally complied with, and, therefore, the right has fully vested by its final consummation, the action to adjudicate the right may be maintained, and the date of its priority, by the doctrine of relation, will be determined as of the date of the posting of the notice, or other inception of the right.[13]

It is held that under the police power of a State the legislature can not authorize a public officer to bring a suit to settle private rights to the use of water or the priority of such rights.[14]

§ 1545. Parties defendants—Right to affirmative relief.—Having seen in a previous section that, where the suit is for the adjudication of water rights between several claimants to the water taken from the same source of supply, all parties having a valid claim

Kinney on Irr., 1st Ed., Sec. 167; Nevada etc. Co. v. Kidd, 37 Cal. 282; Bear River etc. Co. v. Boles, 24 Cal. 354; Brown v. Smith, 10 Cal. 508; Harvey v. Chilton, 11 Cal. 114; Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Weaver v. Conger, 10 Cal. 234, 6 Morr. Min. Rep. 203.

12 Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. Rep. 30, where it is said: "The plaintiff may never construct a ditch or flume, and if it did, and is entitled to the water, it is not to be presumed or intended that the defendants would violate the plaintiff's rights. . . . The plaintiff has failed to bring itself within any principle of equity jurisdiction, which would enable a court of equity to consider or pass upon the supposed rights alleged in its complaint, and the counter claims pleaded by several of the defendants must fail for the same reason. Within what we conceive to be the well-established doctrine of equity, neither party has as yet done anything to invite or justify equitable interposition."

See, also, Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. Rep. 167.

13 For the doctrine of relation, see Secs. 742-756.

For the appropriation by diversion and actual use, see Secs. 730, 751.

For the judgment or decree, see Secs. 1557-1564.

14 Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

thereto must be made either parties plaintiff or parties defendant,[1] before the question can be finally adjudicated, it therefore follows that all persons who are not made parties plaintiff should be made defendants in the action. And in this connection, we will say that it makes little difference who bring the action as plaintiffs or who are made the defendants, as far as the adjudication of their respective rights are concerned,[2] and as long as the Court has jurisdiction over all of the parties interested in the water of any common source of supply. Where an action is brought and all the parties interested are not originally made parties plaintiff or parties defendant, the better practice in the trial Court is for it to order the necessary parties brought in, and, under ordinary circumstances, that should always be done. And, in doing this they are usually made parties defendant.[3]

In the absence of statute requiring all parties interested in the waters of a certain stream to be joined as parties to adjudicate the same, the Court must proceed to determine the rights of the persons within its jurisdiction who have been properly brought before it where their rights can be determined without bringing in other parties.[4] As was held in a recent California case in a suit by a city claiming a paramount right to the entire waters of a stream to quiet title thereto, as against the defendants, the Court being able to fully determine the controversy as between the parties to the ac-

1 See Sec. 1544.

2 For parties to the action, see Sec. 1542.

3 Beasley v. Shively, 20 Ore. 508, 26 Pac. Rep. 846; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Buckers etc. Co. v. Farmers' Ind. D. Co., 31 Colo. 62, 72 Pac. Rep. 49; Squires v. Livesey, 36 Colo. 302, 85 Pac. Rep. 181; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454.

The district court has the power and jurisdiction to set aside and vacate an order inadvertently made, bringing in new parties as defendants, and to strike from the files the answer and cross-complaint of such defendant, where no right has been acquired by such defendant except the right to file such answer. Frost v. Idaho Irr. Co., 19 Idaho 372, 114 Pac. Rep. 38.

4 Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Carns v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Frost v. Idaho Irr. Co., 19 Idaho 372, 114 Pac. Rep. 38; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855.

tion, others similarly situated to those, who were defendants in the action, were not necessary parties.[5] The authority for the joinder of all persons as defendants, and for the settlement of the rights of all the parties by one decree applies only to equitable actions.[6] The misjoinder of two persons defendant can not be raised by joint demurrer.[7]

Parties having been made defendants in an action have the right to answer the complaint of the plaintiffs, and to set up by way of cross-complaint, or cross-bill, their own claims, praying for affirmative relief, to the effect that their own rights be determined and adjudicated.[8] In fact, it is necessary that they do so in order that their rights be protected by the Court. Otherwise, a default may be entered against them for the failure to answer, and their rights may be awarded to others. The rights of the defendants are not subject to adjudication by the Court as against the rights of the plaintiffs, unless in the cross-complaints pleaded by such defendants it is set up that the interests of the defendants are hostile to those of the plaintiffs.[9]

Neither are the rights of the defendants as between themselves subject to determination or adjudication, except so far as, *inter se*, the pleadings contain an issue to that effect. In other words, they must join issue between themselves.[10]

5 City of Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755, the court holding that the city was entitled to the entire flow of the stream.

6 Miles v. Du Bey, 15 Mont. 340, 39 Pac. Rep. 313.

7 Empire etc. Co. v. Board of Commrs. of Rio Grande County, 21 Colo. 244, 40 Pac. Rep. 449.

When the jurisdiction of a Court is questioned on the ground that the action is really against the State, the Court will look behind the nominal parties to the record to ascertain the real parties to the controversy, dismissing the action if it is really against the State, and retaining jurisdiction if it is not. Salem Flouring Mills Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832.

8 Rickey v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. Rep. 166.

9 Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. Rep. 30.

10 Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

It is error to adjudicate relative rights of defendants as to each other,

§ 1546. Parties to actions—Intervenors.—Prior appropriators and claimants of a certain quantity of water from a stream have such an interest in the matter in litigation, in an action between other parties to determine the respective rights of the parties to the waters of the stream, as to entitle them to intervene in the action, and to have their rights also determined and adjudicated in the same action.[1]

§ 1547. Pleadings—Complaint or bill in action to quiet title by appropriators.—In an action to quiet title to a water right in the complaint or bill, it is sufficient to clearly and distinctly allege: First, the ownership and possession of the right;[1] second, the invasion and injury to the right,[2] and, third, to call upon the defendant or defendants to set up any adverse interest he or they may

where no issue was made or attempted to be framed between them, and all the parties were not ordered brought in. Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

1 West Point Irr. Co. v. Moroni etc. Co., 14 Utah 127, 46 Pac. Rep. 762; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317, holding that the purpose of the Civil Code, Sec. 22, Mills' Ann. Code, allowing persons to intervene in an action who have an interest in the matter in litigation in the success of either party, or an interest against both, is that one really interested in the result of the action may intervene and be made a party, so that the whole controversy shall be ended in one action and by a single judgment, the true test being whether the ultimate issue to be decided remains the same.

1 Merritt v. Los Angeles, —— Cal. ——, 120 Pac. Rep. 1064; Inyo Consol. W. Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 935.

2 Where the complaint conceded defendant's superior right to the use of the water, except as to the transfer of the place of use, and the lawful use of defendant's superior right would necessarily interfere with the exercise of the plaintiff's inferior right, and there was no allegation that defendant had made or threatened any improper use of their right, or that such use as proposed would cause needless injury to the plaintiff, it was held that there was no issue authorizing the Court to impose restrictions on the defendant's superior use. Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 Pac. Rep. 518.

See, also, Peregoy v. Sellick, 79 Cal. 568, 21 Pac. Rep. 966; Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. Rep. 30; Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. Rep. 167; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58, where both the complaint and answer held insufficient to adjudicate rights.

have or claim. And, although it is sometimes done, it is not necessary to allege how the plaintiff became the owner of the water right, the title to which he seeks to quiet, whether it was by appropriation,[3] adverse user amounting to prescription,[4] or purchase, except where the plaintiff claims as a riparian owner, in which case he must plead that he claims the rights by virtue of such riparian ownership.[5] Neither is it necessary to allege that the defendant had no right to use the water, as this is a matter for defense.[6] Again, it is not necessary to state that the plaintiff's right is not lost by non-user.[7]

[3] For the appropriation of water, see Chap. 38, Secs. 706-732.

[4] For the acquisition of water rights by prescription, see Chap. 54, Secs. 1033-1058.

Where the plaintiff relies upon prescription, that in the complaint or bill a general allegation of ownership of the right suffices, see Gillespie v. Jones, 47 Cal. 259; Sullivan v. Dumphy, 4 Mont. 505; Montecito etc. Co. v. Santa Barbara, 144 Cal. 494, 77 Pac. Rep. 1113, where it is said: "Title by prescriptive right can be proved under the general allegation of ownership."

But see for pleading rights by prescription, Sec. 1552.

[5] For complaint to quiet title to riparian rights, see latter part of this section.

For the purchase of water rights, see Secs. 994-1032.

See, also, for corporations, Secs. 1464-1529.

"Unlike an action where plaintiff seeks to restrain a defendant from unlawfully interfering with his prior appropriation, it is not necessary in a complaint to quiet title specifically to set forth the facts constituting a valid appropriation. In so far as this particular question of pleading is concerned, the established practice in this State in an action to quiet title is that a complaint may properly allege general ownership and possession, and call upon defendant to set up any adverse interest he may have or claim." Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333.

A cause of action is stated by alleging clearly and distinctly ownership, invasion of right, and injury, without distinct allegations of how plaintiff became the owner of the water right, whether by appropriation, adverse user, or purchase. Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

In an action to quiet title to a certain tract of land and a water right used for the irrigation of the same, the complaint alleged the plaintiff to be the owner of the water right, and referred to the tract of land and the right as "the said premises," and prayed that the defendants have no estate or interest in "the said land and premises," and the answer made no distinction between the land and the water right, it was held that the ownership of the water right was in issue. Brothers v. Brothers, 29 Colo. 69, 66 Pac. Rep. 901.

[6] Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

[7] Corea v. Higuera, 153 Cal. 451, 95 Pac. Rep. 882, 17 L. R. A., N. S., 1018.

The nature and place of the use of the water should be alleged.[8] Again, if the plaintiff relies upon a former decree, he must particularly plead the same.[9] More than one right may be set up by separate counts in the same complaint.[10] The complaint should state that the plaintiff is the owner of the right and entitled to the use of the water, and not that he is the owner of the water.[11] The original complaint, if defective, may be amended, so as to show that an appropriation was made in compliance with the statute of the State.[12] But a complaint failing to show that the cause of action had accrued when the action was brought can not be aided by a supplemental complaint setting up facts showing that such cause of action has subsequently accrued.[13] Only the ultimate facts, and not evidence, need be pleaded. It is, therefore, the rule that the title of the plaintiff need not be historically deraigned in his complaint or bill to quiet title. Such facts are matters of proof under the general allegation of ownership.[14]

8 Miller & Lux v. Rickey, 127 Fed. Rep. 573.

But see Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543.

9 Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

10 Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

11 Smith v. Green, 109 Cal. 228, 41 Pac. Rep. 1022.

But where the complaint alleged that the plaintiffs were the owners in fee simple and in possession of the first right to divert, for irrigation, stock, and domestic purposes, from a certain creek, in a certain county, a certain number of inches, miner's measurement, under a six-inch pressure, it was held sufficient. Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. Rep. 996.

12 Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137.

See, also, Driskill v. Rebbe, 22 S. D. 242, 117 N. W. Rep. 135.

13 Lewis v. Fox, 122 Cal. 244, 54 Pac. Rep. 823.

14 Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634, where it is held that, where the allegations of a complaint in a suit to determine the plaintiff's right to the use of water of a stream state, in general terms, a cause of action by alleging clearly and distinctly ownership, invasion of rights, and injury, without distinct allegations of how the plaintiff became the owner of the water right, whether by appropriation, adverse user, or purchase, plaintiff's title can be shown.

It is not necessary for the plaintiff to state how or from whom he acquired the superior right to the use of the water. Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336.

"We think it is of no moment that the appellant did not in his pleading expressly claim any right to these waters as an appropriator. He denied the claim of respondent to either

Where, however, the right is claimed by pleading prior appropriation, it is held in Colorado that a complaint is insufficient without a statement of the facts showing plaintiff's appropriation and priority.[15] The description of the right of the plaintiff should be pleaded with great particularity. The full extent of the right should be stated, the purpose for which the water is used, and the amount necessary for that purpose. Where the water is used for

the necessity for, or continuous actual use of all of them, and set up a general right of ownership in himself to a use of a portion of them, and it is conceded that until enjoined he was actually diverting a portion and applying it for beneficial purposes upon his land." Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

See, also, Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 594, 77 Pac. Rep. 1113; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1032, 102 Pac. Rep. 728; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Murry v. Nixon, 10 Idaho 608, 79 Pac. Rep. 643; Eaton v. Larimer etc. Co., 35 Colo. 16, 83 Pac. Rep. 627; Hutchinson v. Mt. Vernon etc. Co., 49 Wash. 469, 95 Pac. Rep. 1023; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722.

In an action by a purchaser at sheriff's sale to quiet title to a water right alleged to have been appurtenant to the land, whether the defendant has more water than is actually needed for the irrigation of his land is entirely immaterial to the issue raised. Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

"It is not only unnecessary, but it would have been surplusage, for plaintiff to have pleaded the historical deraignment of its title and the varying methods of its use." Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362.

[15] Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

See, also, Carroll v. Vance, 39 Colo. 216, 88 Pac. Rep. 1069; Farmers' etc. Canal v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Crippen v. White, 28 Colo. 298, 64 Pac. Rep. 184; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395.

But see Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, where Mr. Justice Hayt said: "Courts will never sanction a practice which imposes an impossible, or even an unreasonable, requirement upon litigants."

See, also, Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333, holding that general allegations of ownership are sufficient.

See, also, Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

irrigation, the area of land to which it is applied should be stated.[16] The quantity of water claimed should be stated in cubic feet, acre feet, inches, or gallons, or in some other definite measurement of water.[17] It is not sufficient to merely state the dimensions of the ditch through which it is carried, or the amount that it is stated will flow through a particular ditch.[18] Or, the claim to the water may be stated as being the entire flow of the stream,[19] or the quantity may be stated as being a certain proportion of all the water

16 Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238, where it is held that a complaint to quiet title to appropriations of water claimed to have been made for domestic and irrigation purposes should allege what volume of water reaches the consumers under the ditch, how many consumers there are, the distance the water is carried, the area of land to which it is applied, when applied, and what volume is actually consumed for domestic and irrigation purposes.

A complaint to determine the priority of irrigation water rights is insufficient where it does not definitely describe plaintiff's lands, and does not show that any particular tract needed irrigation, does not specify the amount of water diverted nor the amount needed to the acre, or for any specific land, and does not show how much plaintiff's grantors acquired a right to use. Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393.

The name and character of the pleading must be determined by the facts alleged, and the relief asked by the pleader. Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

It is necessary to plead the amount of the water claimed. McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058.

17 For the measurement of water, see Secs. 888-900; Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. Rep. 996; Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

Although the cubic foot is prescribed by statute as the basis for the measurement of water for irrigation purposes, it does not prevent the expression of the quantity needed for a particular tract in inches, if the pressure and method of measurement are given. Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308.

For the measurement of water, see Secs. 888-900.

18 Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Dougherty v. Haggin, 61 Cal. 305; *Id.*, 56 Cal. 522; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395.

19 One who has appropriated all of the water in a stream for the purposes of irrigation may sue persons who afterward acquire vacant land above the plaintiff's tract, and divert part of the stream to irrigate their crops, to quiet title to the full flow of the stream. Peregoy v. Sellick, 79 Cal. 568, 21 Pac. Rep. 966.

See, also, Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Pacific Yacht Club v. Sausalito Bay W. Co., 98 Cal. 487, 33 Pac. Rep. 322; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541.

But an allegation that plaintiff was entitled to all the water of a creek during the dry season was held to be too indefinite, where it did not show

flowing in a stream at all times, or, again, it may be stated as the entire flow of the stream for certain periods of time. And, again, the complaint may claim water sufficient for the irrigation of a certain number of acres of land.[20] In fact, in order to enable the Court to make a decree quieting the title to a water right, which will be definite and certain, it must have before it specific allegations as to the nature and extent of the water right claimed, which, of course, must be sustained by the proof.[21]

Owing to the fact that the rules of appropriation have everywhere in the Western portion of this country now passed into statute or judicial decisions, or both, thereby superseding the original customs on which the decisions and statutes are originally based, it is held to be unnecessary to plead or prove the customs of the early miners and appropriators of water, especially as specified in the Act of 1866.[22]

§ 1548. Pleadings—Complaint or bill in actions to quiet title by riparian owners.—In an action in equity by riparian proprietors to adjudicate the rights, apportion the use of the water, and quiet the title to the same in the respective owners, the complaint or bill must contain a description of the lands which are riparian to the stream, or other natural body of water supply, the amount of such lands which are irrigable, and the amount of water which is reasonably necessary for his use upon such lands, that he claims such rights as the riparian owner, the invasion of the right by the defendants, and a call upon the defendants to set up any adverse interest which they may have or claim.[1] As we have discussed in a previous sec-

the amount of acres irrigated by the water, and the amount that was needed for that purpose. Porter v. Pettengill, 57 Ore. 247, 110 Pac. Rep. 393.

20 McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058.

21 For the proof of claims, see Sec. 1554.

For decrees quieting title to water rights, see Secs. 1557-1564.

22 For the Act of 1866, see Sec. 611.

See, also, Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Parkersville etc. Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

For the customs of the early miners, see also, Secs. 598, 599.

1 "Moreover, considering Pogue's claim as resting upon his riparian ownership, he nowhere properly pleads his riparian rights, nor the amount of his irrigable lands, nor the amount of water reasonably necessary for his use upon

tion of this work, a person who happens to be a riparian owner may have certain riparian rights to the use of the water flowing by his lands as such, and, again, he may acquire other rights as a prior appropriator.[2] It therefore follows that, as such riparian proprietor or appropriator, under the law governing actions to quiet title, he may bring an action to quiet the title to either one or both of such rights, respectively; and, upon the proper pleading setting up the necessary allegations, followed up by the proof of both of his claims, the Court will render a decree settling and adjudicating his rights both as a riparian proprietor and as a prior appropriator. And, although as far as the pleadings are concerned, a plaintiff in different counts may set up his claim to the same use of the water

such lands." Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362.

The allegations of the petition being consistent with the lawful use of the water by the defendant by appropriation, the petition of a riparian owner will be so construed against the pleader. Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

A bill by a riparian owner on a stream against persons who, by virtue of alleged prior appropriations, claim the right to use all of the waters of the stream, is not multifarious because complainant claims portions of the water in different rights, where it is alleged that all of such claims and rights are alike affected by the rights and claims of defendants, and the question in controversy is the extent of the rights. Rincon etc. Co. v. Anaheim Water Co., 115 Fed. Rep. 543.

A complaint alleging that plaintiff is the owner in fee of lands through which there is a stream, that he is seized and possessed of the right to divert the flow of the stream; that defendant claims a right to, and threatens to divert some of the water, and praying that plaintiff be adjudged the owner of the right to the use of the water, and that defendant be declared to have no right thereto, and be enjoined from diverting it, states facts sufficient to constitute a cause of action to quiet plaintiff's title, as a riparian owner, to the water. Shurtleff v. Bracken, —— Cal. ——, 124 Pac. Rep. 724.

See, also, Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Sander v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757.

That a bill for apportionment is distinct from one simply for an injunction, see Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

2 For riparian proprietor and appropriator at the same time, see Secs. 519, 681.

both as riparian owner, and as prior appropriator,[3] in actions where the right to the same use of the water is so set up, the better practice is for the Court to compel the plaintiff to elect upon which count he will stand, and this is generally done.[4]

As the complaint based upon an appropriation must contain allegations distinct and different from those in a complaint based upon riparian ownership,[5] a riparian owner who bases his complaint upon an appropriation of the water can not recover as a riparian proprietor.[6] And, again, such an owner who bases his right upon his riparian ownership can not recover as an appropriator. "The plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs."[7] In a suit for the partition of land to which there

[3] Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

[4] "While the doctrine of prior appropriation and riparian rights are not so antagonistic that they may not exist in the same locality, a settler upon a non-navigable stream has an election either to rely upon his rights as a riparian proprietor, or to make an appropriation of the water if it is free and subject to appropriation, and claim as an appropriator, but he can not do both." Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

Where a complaint asserted a right to a certain quantity of water from a stream by prior appropriation, and the reply of the plaintiff to the defendant's cross-complaint set up a claim to the entire flow by reason of riparian proprietorship, there was a departure, since a claim to the same right to the use both by prior appropriation and by riparian proprietorship are incompatible. Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

See, also, Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

But see Hutchinson v. Mt. Vernon etc. Co., 49 Wash. 469, 95 Pac. Rep. 1023, where, in an action to establish plaintiffs' right to the waters of a spring, plaintiffs claimed the water as riparian owners, as appropriators, and also under contract with the defendants, the cause of action was held to be single and indivisible, so that plaintiffs were not required to separately state a cause of action based on each ground, and to elect on which they intended to rely.

[5] For complaints based upon appropriation, see Sec. 1547.

[6] Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288.

[7] Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802, quoting from Mondran v. Goux, 51 Cal. 151.

But see Hutchinson v. Mount Vernon W. Co., 49 Wash. 469, 95 Pac. Rep. 1023.

were attached riparian rights to water for irrigation, it is unnecessary to mention such rights in the complaint, as they are a part of the land.[8]

§ 1549. Pleadings—Complaint or bill in actions to quiet title to ditch or canal.—A complaint or bill in an action to quiet title to a ditch or canal, should describe the ditch or canal with sufficient certainty, the interest claimed by the plaintiff, and the wrongful interference with the plaintiff's rights by the defendant, and should pray that the respective rights of the parties be adjudicated and determined and that the defendant be enjoined from further interference with the plaintiff's rights.[1] Though, in a suit to quiet title to an irrigation ditch, the complaint alleged plaintiff to be the owner of the ditch in fee, it did not preclude the Court from finding a right or ownership in the nature of an easement.[2]

§ 1550. Pleadings—Demurrer—Answer—And cross-complaint or bill.—The defendant, or defendants, upon being served with process are entitled to file a demurrer, either general or special, to

8 Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905, where it is said: "Being parcel of the land itself, the description of the land included the water."

1 Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185; Miller & Lux v. Kern etc. Co., 154 Cal. 785, 99 Pac. Rep. 179; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024, holding that defects in a complaint not going to the gist of the action may be cured by the judgment; San Jose etc. Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. Rep. 269; Smith Canal Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192; Arroyo Ditch Co. v. Dorman, 137 Cal. 611, 70 Pac. Rep. 737; Schirmer v. Drexler, 134 Cal. 134, 66 Pac. Rep. 180.

For actions to quiet title to ditch, see Sec. 1541.

An allegation of a "right" to maintain a ditch admits proof of an easement as well as a bare parol license. Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092.

2 Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553.

In a proceeding for the appointment of a distributor of water in a partnership ditch, a denial of joint ownership would not, of itself, oust the Court of jurisdiction, nor will its determination adjudicate the titles and interests of the parties in and to the ditch. Mau v. Stoner, 14 Wyo. 183, 83 Pac. Rep. 218; *Id.*, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466.

the allegations set forth in the complaint. However, a general demurrer to the whole complaint can not be sustained, if the complaint states facts, although imperfectly, showing that the plaintiff is entitled to either legal or equitable relief.[1] If the demurrer is sustained leave is always granted to amend the complaint; if, however, it is overruled, the defendant is granted time in which to answer.[2]

The answer should contain a sufficient denial of the allegations set forth in the complaint of the plaintiff so as to raise an issue by the pleadings of the rights in controversy. But an allegation in an answer that "defendant is informed and believes" that certain facts exist, without further alleging on information and belief that such facts do exist, is not a sufficient allegation of any issuable fact.[3] And, although such denials may be made upon information and belief, a denial that defendant can not obtain sufficient information on which to base a belief tenders no issue.[4]

1 Hulsman v. Todd, 96 Cal. 228, 31 Pac. Rep. 39; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185.

For demurrers to the complaint, see Farmers' etc. Co. v. Southworth, 13 Colo. 111, 117, 21 Pac. Rep. 1028, 4 L. R. A. 767; Church v. Stillwell, 12 Colo. App. 43, 54 Pac. Rep. 395.

2 Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185.

3 Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297; Grand Val. Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; North Powder Milling Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Fifield v. Spring Valley Waterworks, 130 Cal. 552, 62 Pac. Rep. 1054; Wellington v. Beck, 30 Colo. 409, 70 Pac. Rep. 687; Oglivy etc. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. Rep. 598; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; Norman v. Corbley, 32 Mont. 159, 79 Pac. Rep. 1059; Miller & Lux v. Rickey, 127 Fed. Rep. 573; Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

Where, in a suit to enjoin defendant from interfering with the flow of water in plaintiff's ditch, defendant by answer made no claim to any water nor title to any land, and the plaintiffs made no claim to a definite quantity of water, and did not prove the amount to which they were entitled, a decree attempting to establish plaintiff's title to a definite amount of water was erroneous. Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58.

Where the defendant demurred to a bill on the ground that an action to quiet title to a mere easement did not lie, but, after the demurrer had been overruled, filed an answer setting up an estate and title to such easement, and asked that the same be quieted in the same action, it thereby waived its objection to the form of the action. Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050.

4 Grand Val. Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44.

See, also, Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

An allegation that "defendant is

In the cross-complaint, or cross-bill, a defendant should state clearly and concisely the facts constituting his cause of action against the plaintiff, and pray for affirmative relief. This is so in order that the affirmative relief prayed for, if granted, may be decreed in accordance therewith, or in accordance with what the Court shall find to be just and equitable under all the facts and circumstances of the case.[5] Where the defendant bases his right to the use of the water upon an appropriation, adverse user, or purchase, the same essentials must be set out in the cross-complaint as are required to set out in the complaint or plaintiff's acquiring their right to the use of the water by this means.[6] The cross-complaint should allege facts relating to or depending upon those upon which the action is brought, or affecting the property to which the action re-

informed and believes" that certain things occurred by inadvertence, did not constitute any grounds of defense. Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

A general denial puts in issue all the material allegations of a verified complaint. Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

A refusal to allow the defendant to amend his answer, so as to assert a greater right than asserted in his original answer is immaterial where he acquiesced in the findings of a less right than asserted in his original answer. Stevenson v. San Joaquin etc. Co., —— Cal. ——, 121 Pac. Rep. 398.

5 Center Creek Irr. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338.

The trial court has no power or right to dismiss an action over the objection of the defendant who has filed an answer and cross-complaint seeking affirmative relief. Frost v. Idaho Irr. Co., 19 Idaho 372, 114 Pac. Rep. 38.

A defendant seeking specific relief in a suit in chancery must do so by cross-bill, and must state the grounds upon which he relies for affirmative relief with the same strictness required of the plaintiff in the original bill. Bessemer Irr. D. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91.

An answer consisting of denials of plaintiff's allegations, and containing no element of a cross-complaint, it was held error to award affirmative relief. Hungarian etc. Co. v. Moses, 58 Cal. 168.

See, also, Islais etc. Co. v. Allen, 132 Cal. 432, 64 Pac. Rep. 713; Frost v. Idaho Irr. Co., 19 Idaho 372, 114 Pac. Rep. 38; Custer Consol. Mines Co. v. Helena, —— Mont. ——, 122 Pac. Rep. 567.

6 For complaint or bill in actions to quiet title, see Sec. 1547; Rickey etc. Co. v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Buckers etc. Co. v. Platte Valley Irr. Co., 28 Colo. 187, 63 Pac. Rep. 305; Hector Min. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. Rep. 205; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. Rep. 166.

lates.[7] And, again, where the defendant claims his rights as a riparian owner, in those jurisdictions where such rights are allowed by law, he must properly plead his rights as such riparian owner.[8]

It is held in the later cases that in an action in equity to apportion the waters of a stream between riparian owners thereon, the parties must plead the amount of their irrigable lands and the amount of water reasonably necessary for the use upon such lands.[9]

[7] Lewis v. Fox, 122 Cal. 244, 54 Pac. Rep. 823.

Where, however, in the prayer of the complaint, the plaintiff asks that the defendants might be required to set forth their alleged adverse claim and that the court might decree it to be null and void, and the defendants set up their agreement upon which they based their rights to the water, and pray that their rights as shown by their allegation in their answer may be decreed to them, the Court may grant to the defendants an affirmative decree, without a formal cross-complaint having been filed. Brighton etc. Co. v. Little, 14 Utah 42, 46 Pac. Rep. 268.

See, also, Miller v. Dondero, 139 Cal. 643, 73 Pac. Rep. 583; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

[8] For complaint or bill in actions to quiet title by riparian owners, see Sec. 1548.

An answer simply alleging the ownership of land through which a stream flowed, and that it would be susceptible of, and would be benefited by irrigation, is insufficient to raise any issue as to the right of defendant to take the water by virtue of his riparian ownership, in the absence of an allegation that he was entitled as riparian owner to any definite amount of water, or what portion of the stream he could exhaust for irrigating his land, nor whether his land was located above or below the point of plaintiff's diversion. Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889.

To authorize an award to defendant of the right to take water from a stream as a riparian owner, in an action to determine the rights of the parties to the use of the waters of the stream, defendant must properly plead his riparian rights, the amount of his irrigable lands, and the amount of water reasonably necessary for his use thereon. Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362.

See, also, Sander v. Wilsons, 34 Wash. 659, 76 Pac. Rep. 280; Northport Brewing Co. v. Perrott, 22 Wash. 243, 60 Pac. Rep. 403; Bauers v. Bull, 46 Ore. 60, 76 Pac. Rep. 757.

See, also, Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288; Smith v. Hawkins, 127 Cal. 119, 59 Pac. Rep. 295.

[9] Riverside Water Co. v. Gage, 89 Cal. 420, 27 Pac. Rep. 889; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 149; Wiggins v. Muscupiabe etc. Co., 113 Cal.

And, again, in an action by a riparian proprietor against a defendant appropriator the latter may set up his claim by cross-complaint.[10]

In a suit in equity to determine water rights, as the rights of all parties to the action may be adjudicated in the same action, defendants are entitled to set up their claims *inter se* in their answers, and have the same adjudicated on such notice as the law and the Court may prescribe.[11]

In Hawaii, it is held that a decree is binding as between co-defendants, when their claims are adverse, and when the water rights as against each other are adjudicated, whether there are cross-pleadings between them or not.[12]

§ 1551. Pleadings—The replication or reply.—In those jurisdictions which permit the filing of a reply to the cross-complaint or cross-bill of the defendants the plaintiff should file his reply answering the allegations of the cross-complaint. The reply should contain a sufficient denial of the rights claimed by the defendant in his cross-complaint so as to raise an issue by the pleadings of the rights in controversy.[1] The allegations contained in the reply, of course, should be consistent with the allegations of the complaint. Therefore, where a complaint set up the right to the use of a certain quantity of water by prior appropriation, and the reply set up the claim to the use of the same amount of water by reason of riparian ownership, it was held that there was a departure in the pleading, since the rights by prior appropriation and by riparian ownership are incompatible.[2]

194, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; San Luis v. Estrada, 117 Cal. 182, 48 Pac. Rep. 1075.

10 Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308.

11 Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855.

12 Hawaiian etc. Co. v. Wailuku Sugar Co., 14 Hawn. 50; *Id.*, 15 Hawn. 675.

1 State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338; Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477.

2 Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193, citing Kinney on Irr., 1st Ed., Sec. 272.

See, also, Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288.

A departure in a pleading is waived

Where the complaint to establish the right to use the entire waters of a stream was met by denials raising the general issue, and also an allegation that the plaintiff was entitled to a certain number of inches, but no more, the latter allegation did not require a reply, and hence evidence that plaintiff was entitled to all the waters of the stream was admissible.[3]

§ 1552. Pleadings—Where the claim to the right is made by prescription.—As the effect of a right acquired by prescription is to vest the title to the same in the claimant as completely as if it had been conveyed to him by the original owner,[1] therefore, where a claimant relies on a title to the right by prescription, upon principle, both the plaintiff and defendant should be permitted to prove their claim under a general allegation of ownership. This rule is followed in some jurisdictions, but in others it has been modified by statute and by court decisions. Upon this subject the general rule of law is that in a suit in equity to adjudicate and quiet the title to a water right or to an easement used in connection therewith, the plaintiff in his complaint or bill may prove his rights under the general allegation of ownership, as discussed in a previous section.[2]

by voluntarily going to trial without raising the question. Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477.

3 Arnold v. Passavant, 19 Mont. 575, 49 Pac. Rep. 400.

See, also, Wixson v. Devine, 67 Cal. 341, 7 Pac. Rep. 776; Brossard v. Morgan, 7 Idaho 215, 61 Pac. Rep. 1031.

1 For the effect of adverse user amounting to prescription, see Sec. 1057.

For the proof necessary to prove title by adverse possession, see Secs. 1055, 1555.

2 See Secs. 1055, 1547.

"Plaintiff pleaded ownership, and the Court in terms found ownership in the plaintiff. Defendant's further objection that there is no finding of ownership by prescription is untenable. The Court finds ownership and continuous use and occupation for beneficial purposes for the full prescriptive period. This finding of ownership includes all probative facts. Title by prescriptive right can be proved under the general allegation of ownership." Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113, citing Cooper v. Miller, 113 Cal. 238, 45 Pac. Rep. 325; Adams v. Crawford, 116 Cal. 495, 48 Pac. Rep. 488; Gillespie v. Jones, 47 Cal. 259.

A complaint which clearly sets forth the facts constituting the basis of the claims of the parties to the waters of a stream and the right to have the same pass through the ditch is sufficient, though it is uncertain whether the parties are entitled to the waters as riparian proprietors or by adverse use. Strong v. Baldwin, 154 Cal. 150,

Where, however, the plaintiff chooses to set up his claim as having been acquired by adverse user sufficient to amount to a prescriptive right, it is necessary that he plead all of the essentials necessary for the acquisition of the right by that manner, or as prescribed by the statutes for pleadings in such cases.[3]

Where, however, in answer to the claims set forth by the plaintiff, the defendant relies upon adverse user amounting to prescription, he is held to a much stricter rule in his pleading than is the plaintiff. The weight of authority holds that it is not sufficient to simply set up a general allegation of ownership of the right, but that he must plead his adverse user with all the particularity required for such pleadings in the jurisdiction where the action is pending. The defendant may plead the statute, by reference to the appropriate section thereof;[4] or, if he chooses, he may plead the facts constituting the limitation or prescriptive right. In doing the latter, however, it is incumbent upon him to plead all the elements entering into a prescriptive right.[5] Where adverse user is properly pleaded by the

97 Pac. Rep. 178, 129 Am. St. Rep. 141.

See, also, Sullivan v. Dumphy, 4 Mont. 505; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

[3] For the essentials for the acquisition of a right by prescription, see Secs. 1048-1054.

An allegation that plaintiff enjoyed the use of the water for a certain period, coupled with the allegations that the defendant, during all such period, was proprietor of such canal, does not constitute a plea of adverse possession. Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713.

See, also, Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Schirmer v. Drexler, 134 Cal. 134, 66 Pac. Rep. 180; Brossard v. Morgan, 7 Idaho 215, 61 Pac. Rep. 1031; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334; Davies v. Angelo, 8 Cal. App. 305, 96 Pac. Rep. 909; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142; Rominger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213.

[4] But an answer which merely alleges that an action for the taking and diverting of water was barred by the statute of limitations is not a good plea of that statute, as it does not state the section of the statute relied on as required by Comp. Laws Utah, Sec. 3244, nor set out the facts constituting the defense. Spanish Fork City v. Hopper, 7 Utah 235, 26 Pac. Rep. 293.

See, also, Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Alhambra etc. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Partridge v. Shepard, 71 Cal. 70, 12 Pac. Rep. 480.

[5] "Defendant could have pleaded the statute, as provided in Section 458, Code Civil Procedure, by reference to the appropriate section. He did not do this, but chose to plead the facts

defendant and affirmative relief is prayed for thereon it necessitates a reply by the plaintiff in those jurisdictions whose statutes provide for such a pleading.[6] In addition to the plea of adverse possession and user, the defendant by a different count may also plead the right of prior appropriation.[7] Again, he may also plead his right as riparian owner.[8] One pleading a claim based upon adverse possession and user need not plead the payment of taxes. But the pay-

constituting the limitation or prescriptive right. In doing this it was incumbent on him to plead all the elements entering into a prescriptive right." Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052, holding that a plea in an action for the diversion of water, that defendant has for 11 years openly, notoriously, peaceably, adversely, uninterruptedly, and under a claim of right, used a certain amount of the water, is insufficient as a plea of prescriptive right to authorize the admission of evidence thereof, as it fails to allege that the use was adverse to the plaintiff, or that the plaintiff had notice of the occupancy, or facts sufficient to charge him with notice thereof.

For the elements of prescriptive right, see Secs. 1048-1054.

See, also, State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Spanish Fork City v. Hopper, 7 Utah 235, 26 Pac. Rep. 293; Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Authers v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; American W. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Mathew v. Ferrea, 45 Cal. 51.

[6] For necessity of a reply, see Sec. 1551.

Where plaintiff by his complaint claimed all the waters of a certain creek, "being about 60 inches," and the defendant alleged that he had appropriated "all of the water in said creek, being about 50 inches," and that he had acquired the right by adverse user to "the whole of the waters of said creek," plaintiff, by failing to reply to the latter allegation, admitted defendant's right, and it was proper for the Court to render judgment on the pleadings without proof. State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

[7] See, also, Sec. 1550.

Adverse possession and prior appropriation are not inconsistent defenses, and both may be asserted in the same pleading. Hough v. Porter, 51 Ore. 318, 372, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

[8] In a suit to restrain the use of water claims by the defendants, as riparian owners, and by adverse user, are not inconsistent. Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

See, also, Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

ment of taxes may be proven under the general allegations of adverse possession.[9]

§ 1553. Practice and procedure—Submission of questions of fact to a jury.—The parties defendant to an action to quiet title to water rights must be served with legal process, or notice of the pendency of the action as provided by the statutes of the State where the action is brought.[1] In Oregon, a defendant desiring an adjudication of his claim against his codefendants, may cause summons to be issued under the original title of the action and have the same served on his codefendants with a copy of his answer, or he may serve a copy of the order of the court, requiring his codefendants to appear and respond to the affirmative matter in the answer within the time therein specified.[2] In the other jurisdictions a similar proceeding is followed.[3] The pleadings of the respective parties having been filed and the case being at issue, or the time for answering having expired and defaults having been entered against non-answering defendants, a hearing must be had by the court and the case tried. The rights of the parties must be adjudicated under the existing laws of the jurisdiction where the action is pending, regardless of the previous allegiance of the parties.[4] As

9 Ball v. Nichols, 73 Cal. 193, 14 Pac. Rep. 831.

For proof necessary to sustain a title by adverse possession, see Secs. 1055, 1555.

1 For process or notice under statutory adjudications, see Secs. 1567-1584.

"That a Court can not go outside of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities." Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79.

2 Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

3 For the pleadings necessary to adjudicate rights between codefendants, see Sec. 1550.

4 "These laws must govern wherein they differ from the treaty provisions, and, wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protection of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights are adequate, also." Albuquerque etc. Co. v. Gutierres, 10 N. M. 177, 61 Pac.

to the general practice and procedure in actions of this nature, they must conform to that prescribed by the statutes of the jurisdiction where the action is pending, and which are in existence at the time any proceeding is had. No person has any vested right to any particular mode of procedure for the adjudication, enforcement, or defense of his rights, and if, before the trial of a cause, a new law as to procedure goes into effect, it will from that time govern and regulate the proceedings, unless the statute provides to the contrary.[5]

These actions usually requiring a great amount of time to be tried, owing to the fact of the great number of the parties and their respective rights, in most jurisdictions a court of equity has the power to appoint a referee or commissioner to take the testimony. The referee or commissioner then hears the evidence in the case, has the same transcribed, and reports the same to the court. In some jurisdictions he is given the power to report, also, his findings of fact and conclusions of law. The case is then submitted to the court, which may by its decree confirm the findings and conclusions so found by the referee or commissioner, or the court on the evidence may find new findings of fact and conclusions of law and base its decree thereon.[6] After the decree and judgment in the case has been rendered, the court, upon a sufficient showing as required by the statute, may set aside the decree and judgment and grant a new trial; upon which a new trial may be had.[7]

In order for the trial judge to become familiar with the situation surrounding the parties to the action, it is the common practice for him to make a personal examination of the premises and to use the information thus acquired in rendering his findings and decree. This practice is allowed by the statutes of some of the States, and in all it seems to be permitted, even where there is no such statute.[8]

Rep. 357; affirmed, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

[5] Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

[6] For the practice in Colorado, see Sec. 1576.

[7] For decree and judgment, see Secs. 1557-1564.

But a case will not be reopened for a new trial because petitioner was compelled to change counsel, even if his case was inadequately presented; and the fact that the petitioner received more than his share of the water in controversy, while others were deprived of their share, would, of itself, prevent the reopening of the case in his behalf. Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397.

[8] The findings of the trial court, based upon conflicting testimony, and

In the majority of the States, in equity cases certain questions of fact may be submitted to a jury. This practice is often followed in actions involving the rights of parties to the use of water and the adjudication of their respective rights. Where this is done the determination of the court as to what interrogatories should be submitted to the jury can not be disturbed.[9] In such cases where the issues are submitted to the jury, its verdict is merely advisory and the court may adopt its findings in whole or in part, or, in lieu of those not adopted, the court may make findings of its own.[10] Or the court may entirely disregard the verdict of the jury and make its own

aided by a personal inspection of the subject of the controversy, will not be disturbed on appeal. Winter v. Fulstone, 20 Nev. 260, 21 Pac. Rep. 201.

See, also, Promotory Ranch Co. v. Argile, 28 Utah 398, 79 Pac. Rep. 47; Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Leonard v. Shatzer, 11 Mont. 422, 28 Pac. Rep. 457.

See, also, Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756.

9 Buckers etc. Co. v. Farmers' Ind. D. Co., 31 Colo. 62, 72 Pac. Rep. 49; Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866.

For the procedure in mixed equitable and law actions, see actions to quiet title and damages in same suit, Sec. 1537, and actions for injunction and damages in same suit, Secs. 1538, 1599.

10 "If the remedy sought be equitable, the Court is not bound to call a jury, and if it does call one, it is merely for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law must proceed from its own judgment respecting them, and not from the judgment of others." Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

The jury in such cases are the exclusive judges of the credibility of the witnesses and the weight of their testimony. Bowen v. Webb, 37 Mont. 479, 97 Pac. Rep. 839.

Error can not be predicated on the refusal of the court in a suit in equity to submit to the jury requested interrogatories, the jury being merely advisory, and the questions to be submitted within the discretion of the trial court. Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866; Buckers etc. Co. v. Farmers' Ind. D. Co., 31 Colo. 62, 72 Pac. Rep. 49; Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Haggin v. Saile, 23 Mont. 375, 59 Pac. Rep. 154; Berry v. Equitable Gold M. Co., 29 Nev. 451, 91 Pac. Rep. 537; Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Bowen v. Webb, 37 Mont. 479, 97 Pac. Rep. 839; Kimpton v. Jubilee etc. Co., 16 Mont. 379, 41 Pac. Rep. 137, 42 Mont. 102; Pealer v. Gray's etc. Co., 54 Wash. 415, 103 Pac. Rep. 451; Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866.

findings.[11] In an Idaho case [12] the growing tendency in purely equitable actions to submit questions of fact to a jury is deplored as placing the responsibility on the jury instead of the court accepting the full responsibility for the decisions in such cases.[13]

§ 1554. **Proof of claims—Burden of proof.**—In actions to adjudicate water rights, the evidence must disclose the amount of water to which each party is entitled and without this evidence the decree can not establish their titles to any definite quantity of water or settle the relative rights of plaintiffs and defendants.[1]

Upon the one asserting a claim of the right to the use of water, regardless upon what he bases his right, rests the burden of proving his claim as set up in his pleadings by a preponderance of all of the evidence admitted in the case on the point in question.[2] And, al-

11 Findings on issues of fact submitted to a jury in equity cases will not bind the chancellor. Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

12 Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045.

13 "It was within the sound discretion of the Court to put to the jury such questions as it saw fit. It was neither compelled to call a jury at the demand of the plaintiffs, nor to put to them any question of fact for their determination." Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866.

1 Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Rodgers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107.

2 See, also, Sec. 1640.

In a suit to determine rights to waters from a stream, the burden is upon the plaintiffs to prove all the elements essential to their rights claimed under prior appropriation. Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

See, also, Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Hilgar v. Zabel, 38 Mont. 93, 98 Pac. Rep. 881; Farmers' etc. Co. v. Riverside Irr. Co., 16 Idaho 525, 102 Pac. Rep. 481; Hague v. Nephi etc. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Wellington v. Beck, 43 Colo. 70, 95 Pac. Rep. 297; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Farmers' etc. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

Where plaintiff bases his claim to a water right on prior appropriation and adverse user, and the evidence establishes the right by prior appropriation only, a finding for the plaintiff as to adverse use is not reversible error.

though a plaintiff under a claim of general ownership may prove his title to the right by appropriation, adverse possession and user, or purchase,[3] all the essential elements of the acquisition of his right must be proven according to the nature of the claim which he makes to it. Therefore, if the theory of his claim is that of prior appropriation he must prove all of the elements which are necessary to make a prior appropriation, including the beneficial use of all of the water claimed.[4] Parol proof of the use and possession of the water right for irrigation is held to be *prima facie* evidence of title.[5] If he bases his claim upon a purchase from an appropriator, he must not only prove a valid appropriation by his grantor, but he must also prove his right to his claim by proving the purchase.[6] And, again, if he claims his right by adverse possession and user as against others, he must establish by a preponderance of the evidence all of the elements necessary to establish such a claim.[7] Of course, where either the plaintiff or the defendant sets forth in his pleadings the nature of

San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075.

A stipulation as to the respective appropriations of the parties to the action will control, and not the evidence showing a contrary state of facts. Water Supply etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386; reversing 7 Colo. App. 225, 42 Pac. Rep. 1020.

A non-suit should not be granted if enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, although other allegations are not proven. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

For the elimination of the testimony of a witness, whose inconsistencies would justify the same, see Bowen v. Webb, 37 Mont. 479, 97 Pac. Rep. 839.

Testimony given at a former trial by a decedent not involving the same subject is inadmissible. Nevada etc. Co. v. Canyon etc. Co., 58 Ore. 517, 114 Pac. Rep. 86.

For proof where the claim is by adverse possession and user, see Secs. 1055, 1555.

3 For pleadings, complaint, or bill of plaintiff, see Sec. 1548.

See, also, Hague v. Nephi etc. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

4 For the essential elements of a prior appropriation, see Secs. 706-732.

5 Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

Upon the subject of judicial notice without proof, see Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Prescott v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

6 For the sale of water rights, see Secs. 994-1032.

7 For the necessary elements of a prescriptive right, see Secs. 1048-1054.

his claim to the right, the proof must conform to his pleadings and he must establish his claim to the right upon the theory which he pleads; otherwise, there will be a fatal variance between the pleading and the proof, and a recovery can not be had.[8] So, where the claim set up is that of a riparian owner, in order to recover, riparian ownership must be proven and a recovery can not be had where the proof is of an appropriation.[9] And, in order to establish a right to the use of the water by virtue of riparian ownership, the claimant thereto must also furnish proof as to the volume of the stream, the character of the soil, the amount necessary for the irrigation of the same, the number of other riparian proprietors upon the stream, the amount of water needed and used by them, and all other facts and circumstances surrounding each particular case, from which the court may determine the question of the reasonableness of the claim set up, both in respect to itself and as to a like reasonable use of the water by all of the other riparian owners.[10] Again, where the

For the proof of adverse user necessary to establish a right by prescription, see Secs. 1055, 1555.

8 Where the complaint alleges an appropriation of water by plaintiffs, but the proof shows that any rights of plaintiffs to the use of the water are not based on an appropriation, but on a contract, there is a substantial and fatal variance. City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348.

Where the claim is by prescription, evidence is inadmissible that the plaintiff acquired the right by permission. Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802.

See, also, Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. Rep. 996.

9 Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935.

10 Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Boehmer v. Big Rock Creek Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908; Coleman v. La Franc, 137 Cal. 214, 69 Pac. Rep. 1011; Cave v. Tyler, 133 Cal. 566, 65 Pac. Rep. 1089; Riverside etc. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; *Id.*, 151 Cal. 587, 91 Pac. Rep. 395; Duckworth v. Watsonville, 150 Cal. 520, 89 Pac. Rep. 338; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 112 Pac. Rep. 728, where it was held that where the testimony before the appellate court was not sufficient for the determination of the quantity necessary to supply the requirements of the riparian proprietors, the Court may determine the other points upon which the testimony is adequate and remand the cause to the Court below with permission to take further evidence upon points in question.

Where the evidence was not sufficient to enable the Court to determine the relative rights of the parties to the

claim is that of an appropriation, the plaintiff can not recover upon proof that he is a riparian owner.[11]

As the available water supply in this Western country becomes each year more scarce, there is one element of proof of claims to the use of water, regardless of the basis of the right upon which it is claimed, which the courts are requiring more and more to be specifically and definitely proven, and that is the amount of the water which is reasonably necessary for the useful and beneficial purpose for which it is claimed. This subject has been discussed in a previous chapter of this work.[12] As we shall discuss when we come to the subject of decrees and judgments,[13] if more water is claimed by any party to the action than is reasonably necessary for the purpose to which it is applied, a court of equity has the power and it is its duty by its decree to limit the amount of the water to such a quantity as is reasonably necessary for that purpose. Therefore, it devolves upon the party setting up a claim to water, in these actions, to prove the amount of water that is necessary for his purpose. In proving the quantity of water needed, where the appropriation is for irrigation, the party should prove the number of acres for which he claims the water and the quantity of water needed to properly irrigate the same.[14] Upon this subject expert testimony may be introduced.[15] And although the courts have at times doubted the value of expert testimony upon this subject, if admissible at all, it should have the same weight as such testimony has in other cases.[16]

waters of the stream, the Court did not err in refusing to determine the quantity of water the respective parties were entitled to use as riparian owners. Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

11 Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288.

12 For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

13 See Secs. 1557-1564.

14 Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932.

15 Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Robertson v. Wilmoth, 40 Colo. 74, 90 Pac. Rep. 95; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579.

16 Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1027; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927.

§ 1555. Proof necessary to establish a right by prescription—Burden of proof.—The burden of proof, in cases where one is claiming a water right or an easement by adverse possession and user that there has been present all the essential elements for the full period of time required by the law, to amount to a prescriptive right in his favor, and to presume a grant to him therefor, including proof of its hostile character, is upon the party making the claim, and his evidence must be clear and convincing.[1] But where there is proof of

1 "The burden of proving all the essential elements, including its hostile character, is upon the party relying upon it. . . . If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190.

"The burden of proving an uninterrupted user, with knowledge of the owner, is on the party claiming by prescription." Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780; Morris v. Bean, 140 Fed. Rep. 433; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; Higuera v. Del Ponte, 4 Cal. App. 13, 88 Pac. Rep. 808; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Gurnsey v. Antelope Creek etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Franz v. Mendonca, 131 Cal. 205, 63 Pac. Rep. 362; Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297; Davis v. Angelo, 8 Cal. App. 305, 96 Pac. Rep. 909; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; Watkins v. Clements, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; Lick v. Diaz, 30 Cal. 75; Garwood v. Hastings, 38 Cal. 216; DeFrieze v. Quint, 94 Cal. 653, 30 Pac. Rep. 1, 28 Am. St. Rep. 151; Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. Rep. 699, 9 L. R. A., N. S., 960; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Edson & Foulke Co. v. Windell, 160 Cal. 783, 118 Pac. Rep. 243.

"If there is substantial evidence of every element of adverse use, the finding of the Court below is controlling." Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326, citing Thomas v. England, 71 Cal. 456, 12 Pac. Rep. 491; Humphreys v. Blasingame, 104 Cal. 40, 37 Pac. Rep. 804; Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60; Franz v. Mendonca, 146 Cal. 640, 80 Pac. Rep. 1078.

A stipulation may be entered into

an open, notorious, continuous, and adverse use of the water or easement under a claim of right for the period of time prescribed by the statute there is a presumption of a grant.[2] It is then incumbent upon the party against whom the right is sought, by sufficient affirmative evidence, to rebut such presumption; otherwise, the presumption stands as sufficient proof and establishes the right by prescription.[3] And a *prima facie* showing of adverse user having been

between the parties to introduce or show title or right in and to any part of the waters of the stream by adverse use as fully as though pleaded. Hansen v. Larsen, 44 Mont. 350, 120 Pac. Rep. 229.

As to the value of evidence of posting a notice of appropriation claiming the water, see Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Frederick v. Dickey, 91 Cal. 360, 27 Pac. Rep. 742; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Gardiner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286, where it is said: "The testimony showing the open use of the water under notices posted, growing crops, and general knowledge thereof in the vicinity, while not sufficient to establish ownership, was clearly competent as evidence for the purpose of establishing claim of ownership as well as to indicate open and adverse possession under this defense." Citing Rowland v. Williams, 23 Ore. 515, 32 Pac. Rep. 402; Petrain v. Kiernan, 23 Ore. 455, 32 Pac. Rep. 158; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Eastern Oregon Land Co. v. Cole (Ore.) 92 Fed. Rep. 949; Fitzgerald v. Brewster, 31 Neb. 51, 47 N. W. Rep. 475; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 38 L. Ed. 279, 14 Sup. Ct. Rep. 458.

Evidence of the statements made by the holder of an unrecorded deed, that certain water rights were appurtenant to certain lands was admissible, although such facts were not pleaded. Shurtleff v. Bracken, —— Cal. ——, 124 Pac. Rep. 724.

2 "And if there has been the use of an easement for 20 years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." Washb. Easements, 4th Ed., p. 156.

See, also, Franz v. Mendonca, 131 Cal. 205, 63 Pac. Rep. 361; *Id.*, 146 Cal. 640, 80 Pac. Rep. 1078; Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908; Cox v. Forrest, 60 Md. 79; Knight v. Cohen, 7 Cal. App. 43, 93 Pac. Rep. 396; Ricard v. Williams, 20 U. S. 7 Wheat. 105, 5 L. Ed. 398; Kripp v. Curtis, 71 Cal. 66, 11 Pac. Rep. 879.

See, also, Jones on Easements, Sec. 186; 14 Cyc. 1147.

3 Open, visible, continuous, and unmolested use of a way is sufficient to raise a presumption that the use was under an adverse claim of right sufficient to establish a *prima facie* title by prescription, and the burden of proof is on the party alleging that the use was permissive to prove such fact by affirmative evidence. Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep.

made by the claimant, the burden of showing that the user was not a substantial interference with the rights of the party against whom the claim is made, or that the user was by his permission is shifted to the latter party.[4] But before adverse claimants can avail themselves of this rule they must show, in the first instance, that their claim embodies all of the essential elements necessary to acquire the right by prescription.[5] This includes the payment of taxes assessed against the property during the prescriptive period.[6] There is but one exception to this rule, and that is upon the question of taxes. If no taxes upon the property are to be found assessed, it need not be found that the party claiming by adverse possession has paid the taxes, "and the burden of showing that none have been assessed is not upon the claimant by possession."[7]

§ 1556. The findings of fact and conclusions of law.—From the evidence admitted in the case the trial court must make findings of

908; Jones on Easements, Sec. 186; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Franz v. Mendonca, 131 Cal. 305, 63 Pac. Rep. 361; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

[4] "Having established these facts, he made a *prima facie* showing of adverse user; and, this having been established, the burden of showing that such user was not a substantial interference with the rights of others was thereby shifted to the parties questioning such claim." Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

"The burden is in the first instance upon the plaintiff to prove his title by prescription. After showing the continuous occupancy and use of the water as though he were the owner, for more than five years, he establishes a *prima facie* case. It then devolves upon the defendant to show that the use was permissive or without the knowledge of said defendant." Gurnsey v. Antelope Cr. etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

See, also, Goodwin v. Scheerer, 106 Cal. 695, 40 Pac. Rep. 18; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908; Rowland v. Williams, 23 Ore. 515, 32 Pac. Rep. 402; Anaheim Union W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; Horbach v. Boyd, 64 Neb. 129, 89 N. W. Rep. 644; Law v. McDonald, 9 Hun, 23; Knight v. Cohn, 7 Cal. App. 43, 93 Pac. Rep. 396.

[5] Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

[6] Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

[7] Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; Heilbron v. Last Chance D. Co., 75 Cal. 117, 17 Pac. Rep. 65; Ball v. Nichols, 73 Cal. 193, 14 Pac. Rep. 831; Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

fact, and from which it must draw its conclusions of law. As the decree as to the respective rights of the parties to the action is based upon the findings of fact, they should be made as definite and certain as possible.[1] The Court must make specific findings both as to the priority of right of the respective parties and of the quantity of water to which each party is entitled. As to the quantity of water to which each party is entitled, it should be based upon some standard recognized for the measurement of water,[2] and must be definite and certain both as to the quantity of water to which each party is entitled, and also as to the time or times when he is entitled to its use.[3] The findings of fact must be consistent with themselves. That is to say, some particular finding must not be antagonistic with some other upon the same subject.[4] The Court should not confuse

1 For decrees in actions adjudicating water rights, see Secs. 1557-1564.

2 For the measurement of water, see Secs. 888-900.

3 Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Kimpton v. Jubilee etc. Co., 16 Mont. 379, 41 Pac. Rep. 137, 42 Mont. 102; Miller & Lux v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. Rep. 439.

A judgment based upon indefinite findings is invalid. Wallace v. Farmers' D. Co., 130 Cal. 578, 62 Pac. Rep. 1078.

See, also, Elliot v. Whitmore, 8 Utah 253, 30 Pac. Rep. 984.

A finding that one riparian owner was entitled to the use of the water for two weeks in June, while vague and indefinite, was held not to be the subject of complaint by that owner, for its definiteness or lack of it can not affect his rights. Featherman v. Hennessy, 43 Mont. 310, 115 Pac. Rep. 983.

Where there are no findings upon the main questions that can not be finally determined, nothing remains for the Supreme Court to do but to reverse the judgment and to remand the case for a new trial. Patterson v. Ryan, 37 Utah 410, 108 Pac. Rep. 1118.

4 Authers v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439; Johnson v. Bielenberg, 14 Mont. 506, 37 Pac. Rep. 12; Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. Rep. 704.

But see Mesnager v. Engelhardt, 108 Cal. 68, 41 Pac. Rep. 20.

Findings of fact by the trial court should be construed together, so that all will sustain the decree, but where that is impossible, general findings inconsistent with specific findings must be rejected. Featherman v. Hennessy, 43 Mont. 310, 115 Pac. Rep. 983.

See, also, Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866; Goon v. Proctor, 27 Mont. 526, 71 Pac. Rep. 1003;

its findings of fact with its conclusions of law. And where a finding of fact is stated under the head of "conclusions of law," it will be treated by the Court on appeal as a finding of fact, although it may be misplaced.[5]

From the reported cases it seems that the trial courts have at times had considerable difficulty in formulating their findings and in rendering their decree adjudicating the water rights among the respective parties to the action. In some instances this duty has been shirked by the Court, which left the rights undetermined and subject to future litigation. This action by the trial courts has been criticised by the Supreme Courts on appeal, which hold that, however great their intrinsic difficulties, the trial courts must deal with them in accordance with the law and the evidence, and make its findings of fact, upon which it must base its decree.[6] Findings by the trial court supported by the evidence are conclusive on appeal.[7] But where not supported by the evidence the findings and the judgment based thereon will be set aside and reversed, and either a new trial granted or a mandatory judgment ordered.[8]

§ 1557. The decrees and judgments—On rights by appropriation.—The decree and judgment of the Court must be rendered in an action to adjudicate water rights, and must be based upon the

Buckers Irr. etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Lost Creek Irr. Co. v. Rex, 26 Utah 485, 73 Pac. Rep. 660; Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905; Beaverhead Canal Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880.

5 Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168.

6 Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552.

See, also, opinion of Mr. Justice Shaw, in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

The word "about," when used in a finding of statements of courses or distances, is discarded as without significance, if there are no other words necessary to retain it. Featherman v. Hennessy, 43 Mont. 310, 115 Pac. Rep. 983.

See, also, for decrees apportioning subterranean waters, Sec. 1561.

7 Cache La Poudre etc. Co. v. Windsor etc. Co., 25 Colo. 53, 52 Pac. Rep. 1104; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Boyd v. Huffine, — Mont. —, 120 Pac. Rep. 228; McDonell v. Huffine, — Mont. —, 120 Pac. Rep. 792; Wolff v. Pomponia, — Mont. —, 120 Pac. Rep. 142.

8 Munsee v. McKellar, — Utah —, 116 Pac. Rep. 1024.

findings of fact and conclusions of law found by the Court.[1] As the main purpose of such an action to quiet title is to determine the respective rights of the parties to the use of the water, or their rights in a ditch or canal,[2] the decree should definitely award the respective rights to the parties to the action. Therefore, in order to have a decree conclusive upon the subject by its future construction, it must be sufficiently definite and certain as to the parties, the order of their respective priorities, the quantity of water which each is entitled to use, the times when they are entitled to use the water, and any other subject which the evidence in each particular case may develop.[3] A decree attempting to adjudicate the rights between the parties which is uncertain and indefinite in fixing those rights, leaves the controversy between the parties unsettled and unadjudicated, their respective rights undetermined, and subject to future litigation, or reversal or modification upon appeal.[4] Therefore, the rendition of such a decree and judgment, unless corrected upon appeal, defeats the very purpose for which the action was brought.[5] A decree and judgment must be sufficiently certain to constitute an estoppel between the parties and to be enforced by the Court.[6]

1 For findings of fact and conclusions of law, see Sec. 1556; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

2 For decrees and judgments in actions to quiet title to a ditch or canal, see Sec. 1560.

3 For decree and judgment as *res judicata*, see Secs. 1563, 1564.

"A practical view ought to be taken of all the conditions, surroundings, and situations. The rights of all parties must be protected by the decree. The difficulty of enforcing it without the necessity of bringing independent suits should be avoided if possible. Certainty in its terms, positiveness in its requirements, justice in its conclusions, will materially aid in the accomplishment of such a purpose." Judge Hawley in Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73.

4 For appeal in actions to quiet title, see Sec. 1565.

Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892.

5 See, also, decrees as to the quantity of water awarded, Sec. 1558.

A decree establishing the rights of an appropriator of water, which limits the use of the water until the appropriator establishes a right to connect with a canal of a former appropriator, is not void on the ground that it is dependent on a contingency. Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

6 Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Stein-

In the first place the decree must state the names of the parties who are entitled to the use of the water, and as between them their respective priorities.[7] In all cases the decree should be within the pleadings and the issues joined thereunder.[8] In fact, in the future construction of decrees resort may be had to the pleadings and the issues joined in order to obtain a true interpretation of the decree,[9] although the general rule as to the construction of decrees and judgments is that the language of the same is conclusive.[10] As is the

berger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483.

7 It is no objection that the date fixed was arbitrarily selected so long as the priority was not affected. McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648.

The court must determine the date and amount of each appropriation, and from these facts determine the priority of right as between the parties, as declared by section 3159 of the Revised Statutes of Idaho of 1887, to wit: "As between appropriators, the one first in time is first in right." Geertson v. Barrack, 2 Idaho 1066, 3 Idaho 344, 29 Pac. Rep. 42.

See, also, Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

A decree inconsistent with the finding of ownership is erroneous. Arroyo etc. Co. v. Dorman, 137 Cal. 611, 70 Pac. Rep. 737.

A judgment may award the use of water to Indians, according to rights acquired by prescription, on condition that they pay their *pro rata* share of the expenses of the maintenance of a common ditch. Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

Riverside etc. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560.

8 Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. Rep. 704; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Miller v. Dondero, 139 Cal. 643, 73 Pac. Rep. 583; Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205.

Where, by decree, the court attempted to establish plaintiff's title to a definite amount of water, and to settle the rights of the parties, where no claim was made to the water by the pleadings, the decree is erroneous. Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58.

See, also, Drake v. Russian River L. Co., 10 Cal. App. 654, 103 Pac. Rep. 167.

9 Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881.

A judgment and decree adjudicating rights and priorities to the use of waters of a stream carries with it and adjudicates and decrees the rights and priorities of the waters of the tributaries to such stream above the points of diversion. Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568.

10 In an action involving the construction of a decree, evidence as to what the parties to the decree understood its scope to be is inadmissible; the decree itself determining that matter. Hartson v. Dill, 151 Cal. 137, 90 Pac. Rep. 530.

See, also, Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

Where a decree adjudicating water

case in other actions, where the issues are not properly drawn, or any of the pleadings admit certain rights of the adverse parties, a decree and judgment may be rendered on the pleadings.[11] But where by the pleadings of the respective parties material questions of fact are in issue which have to be determined from evidence before judgment can be rendered, a motion for a judgment on the pleadings is properly denied.[12]

Judgment may also be rendered on default for the failure to answer after the service of process within the time allowed by the statute. And ordinarily a judgment by default will not be disturbed.[13] But it is held in a recent Oregon case that water suits being *sui generis*, the Court may exercise its discretion and set them aside, especially where it was apparent that the quantity of water awarded the plaintiff was far greater than necessary for his use.[14]

Again, a decree and judgment may be entered by consent of the parties to the suit.[15]

The relative priorities of the respective parties having been established by the Court, the beneficial use of the water, as well as the quantity of water to the use of which each party to the action is

rights is susceptible of different meanings, one of which is in accordance with the law by recognizing a valid appropriation only on the application of the water to a beneficial use, and the other would disregard the law in that respect, the former interpretation must be adopted. Crawford etc. Co. v. Needle Rock etc. Co., 50 Colo. 176, 114 Pac. Rep. 655.

See, also, Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748.

11 State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

12 Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317.

See, also, Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059.

13 The failure on the part of some of the defendants affirmatively to assert their rights can not affect the interest of others in the proceeding, but will preclude those in default from subsequently asserting their claims as to matters in controversy against the rights there determined. Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

Where the plaintiff asks for a dismissal of the action after the defendant has filed his answer and cross-complaint, the court has no right to dismiss such action, but is required to enter judgment upon the merits of the issue presented by the cross-complaint. Frost v. Idaho Irr. Co., 19 Idaho 372, 114 Pac. Rep. 38.

See, also, Islais etc. Co. v. Allen, 132 Cal. 432, 64 Pac. Rep. 713.

14 Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

See, also, State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

15 People's Ditch Co. v. Fresno etc. Co., 152 Cal. 87, 92 Pac. Rep. 77.

entitled, the functions of the Court have reached their limit; and it is therefore held not to be within the province of the Court to dictate how or when the right acquired by appropriation should be exercised so long as such use is within the limits of the appropriation.[16] A decree adjudicating a water right does not in and of itself adjudicate the rights to a ditch or canal, and *vice versa*.[17] A decree may also be rendered giving a party an inchoate or contingent right to the use of water and enjoin adverse claims injurious thereto, but the judgment should not declare that the plaintiff was absolutely entitled to the water.[18]

§ 1558. The decrees and judgments—On rights by appropriation—Quantity of water.—After the Court has decided what parties are entitled to water rights, the next principal question to be decided by the Court is the quantity of water to which each party is entitled. And in this respect the decree should be made as definite and certain as the use of language can make it.[1] Where a standard of measurement has been adopted by the statutes of the State and the evidence before the Court is sufficient for the Court to render a decree in that standard, the decree should state the quantity of water awarded to each party in that standard. However, where the evidence is not sufficient for the Court to adopt such a standard in its decree, but is sufficient for the rendition of the decree upon some other basis or standard of measurement, the Court may render its decree in such other basis or standard.[2] The principal object of

16 McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Sloan v. Byers, 37 Mont. 305, 97 Pac. Rep. 855; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

For decrees as to the quantity of water, see Sec. 1558.

17 Park v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045; Nevada etc. Co. v. Kidd, 37 Cal. 282.

18 Merritt v. Los Angeles, — Cal. —, 120 Pac. Rep. 1064.

1 Authers v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439.

2 A decree finding that a land owner is entitled to enough water to irrigate a certain number of acres of land should specify, as nearly as may be approximated, the amount of water necessary for that purpose by an approved mode of measurement. Holman v. Pleasant Grove City, 8 Utah 78, 30 Pac. Rep. 72.

"Rev. Codes, Sec. 3241, prescribes the measurement of water as 'a cubic foot of water per second of time shall be the legal standard for the measurement of water in this State.' This statute is the measurement of water which should be recognized by the

the Court in this respect is that the decree be so definite and certain as to the quantity of water awarded to each party that the matter may be deemed finally settled and adjudicated, and that each party may know exactly what quantity or what proportion of the stream he is entitled to.[3]

A decree so indefinite and uncertain that it is impossible to determine the quantity or proportion of water attempted to be awarded is fatally defective.[4] In awarding the quantity of water to

court in entering a decree of distribution; and in this case the court should have found the date of the appropriation of the respective parties to this suit and the quantity appropriated and beneficially used by each of such parties, and determined such questions by the measurement provided by the statute." Lee v. Hanford, — Idaho —, 121 Pac. Rep. 558.

3 "The decisions of this court establish that in cases like the present the findings and judgment must fix the extent of the superior right, viz., the quantity of water to be allowed to the party whose claim is paramount; otherwise, the judgment fails to attain the certainty necessary to an estoppel upon the main subject of the litigation." Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560.

"Indeed, as the judgment now stands, it can only serve the single purpose of furnishing the groundwork for future litigation, and plaintiff is certainly entitled to something more. He is entitled to a plain and explicit adjudication declaring what his rights are to these waters, and what defendants' rights are to the waters, if they have any." Steinberger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483.

4 A decree that defendant have the use of "one good irrigation stream of water" for a certain length of time is fatally defective, for uncertainty in the quantity of water to which the defendant is entitled. Smith v. Phillips, 6 Utah 376, 23 Pac. Rep. 932.

So, a decree that the defendant is entitled to maintain said ditch, and to run therein at all seasons of the year sufficient of the waters of said stream for his culinary and domestic purposes, and that the plaintiff is the owner and entitled to the use of the waters of said stream, subject to the rights of the defendant, was held to be uncertain, and that the same should be modified by finding the quantity of water, in second-feet, or the fractional part of the stream in question, that defendant is entitled to for his culinary and domestic purposes, and decreeing the same to him. Nephi Irr. Co. v. Vickers, 15 Utah 374, 49 Pac. Rep. 301.

So a decree, without any definite finding of the amount appropriated, but only that plaintiffs had appropriated enough to irrigate certain portions of their lands, is too indefinite to be sustained. Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

So, also, a decree giving "sufficient water for household purposes" is indefinite. Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595.

See, also, Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989.

See, also, Authers v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439; Nephi Irr. Co. v. Jenkins, 8 Utah 369, 31

the respective parties, the Court is not required to attain mathematical exactness in measuring the flow of the water. But it should be determined by a reasonable approximation to substantial accuracy.[5] And with the modern scientific methods of measuring water this can be readily attained.

It therefore follows, as well stated by the Nevada Court, "No subject is perhaps so prolific of controversies as the use of water by different claimants for irrigation purposes, and a decree concerning it should be as certain as the use of language can make it."[6]

Pac. Rep. 986; *In re* Huntley, 85 Fed. Rep. 889, 29 C. C. A. 468; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76; Dougherty v. Haggin, 56 Cal. 522; *Id.*, 61 Cal. 305; Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; Springville v. Holley, 6 Utah 378, 23 Pac. Rep. 933; Johnson v. Bielenberg, 14 Mont. 506, 37 Pac. Rep. 12; Alhambra W. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108; Stewart v. Taylor, 68 Cal. 75, 8 Pac. Rep. 605; Wallace v. Farmers' D. Co., 130 Cal. 578, 62 Pac. Rep. 1078; Welsh v. Bardshar, 137 Cal. 154, 69 Pac. Rep. 977; Lost Creek Irr. Co. v. Rex, 26 Utah 485, 73 Pac. Rep. 660; Loo Chit Suim v. Wong Kim, 5 Hawn. 130, 200; Hawaiian etc. Co. v. Wailuku Sugar Co., 14 Hawn. 50; *Id.*, 15 Hawn. 677; Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595; Patterson v. Ryan, 37 Utah 410, 108 Pac. Rep. 1118; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Tanner v. Provo Bench etc. Co., —— Utah ——, 121 Pac. Rep. 584.

[5] Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Neil v. Tolman, 12 Ore. 289, 7 Pac. Rep. 103.

See, also, for the measurement of water, Secs. 888-900.

[6] Authers v. Bryant, 22 Nev. 242, 38 Pac. Rep. 439.

See, also, Gurnsey v. Antelope Creek etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Stethem v. Skinner, 11 Idaho 374, 82 Pac. Rep. 451; White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053; Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205.

See, also, Bennett v. Nourse, —— Idaho ——, 125 Pac. Rep. 1038.

"The point is made that the decree should have permitted the defendants to divert the water, on condition that they returned it to the river above plaintiffs' lands, no less diminished than it would have been in its natural flow to the point of return. It may be that a decree so limited would have been proper if the evidence had shown that the defendants were able and willing to make

A decree based merely upon findings as to the width, depth, and grade of a ditch, or upon the capacity of the ditch to carry water, is erroneous. The quantity of water should be stated in some definite standard of measurement, and where not so stated the decree will be set aside. The capacity of ditches and canals is too liable to change, both from natural and human agencies, to be made a standard for the measurement of water.[7] However, a decree has been upheld, where water was awarded sufficient to irrigate a certain number of acres, and where from the data given in the decree the quantity of water might be measured by taking into consideration the width, depth, and length of the ditch, although the statute required the measurement of the water to be given in cubic feet.[8]

In all cases the Court by its decrees should limit the rights of the respective parties to the quantity of water which is reasonably necessary for the beneficial use or purpose to which it is applied. Therefore, no greater quantity of water should be awarded to any party than is needed for the purpose for which the appropriation was made. Under no method for the adjudication of water rights, especially in these later days, when practically all of the water supply is needed and claimed by various parties, will waste be tolerated by the Court by its awarding to one party more water than he needs.

such return of the water." Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; citing Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

The decree may limit the use of the water to the irrigation season. Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289.

Or, "during the dry season of the year." Daly v. Ruddell, 137 Cal. 671, 70 Pac. Rep. 784.

The *pro rata* interests of the owners of a mutual ditch using the water in severalty and the right to change a point of diversion may be decreed in the same action. Hallett v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317.

7 Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Minnie Maud etc. Co. v. Grames, 29 Utah 225, 81 Pac. Rep. 893; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76.

See, also, Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Hufford v. Dye, —— Cal. ——, 121 Pac. Rep. 400.

8 Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Holman v. Pleasant Grove City, 8 Utah 78, 30 Pac. Rep. 72; McLure v. Koen, 25 Colo. 284, 53 Pac. Rep. 1058; Posachane W. Co. v. Standart, 97 Cal. 476, 32 Pac. Rep. 532; Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

And such a decree is subject to modification by limiting the quantity of water to the amount actually needed.[9] Or, as sometimes held,

[9] For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

Though defendants' ditch when a decree was entered would carry 3.2 cubic feet per second, and their land if irrigated would require that amount, if they brought a less amount of land under irrigation so as to require only 1.6 feet per second, a decree adjudicating to them the right to apply the greater amount was voidable on proper attack. Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748.

"Alexander Twaddle testified that there were times during the summer, evidently short periods after the land had been irrigated, when it was not necessary to use as much water as the upper ditch full. On such occasions, and whenever it was not needed by the plaintiffs, it should be turned to the defendants, if they have any beneficial use for it, and not permitted to waste. It may be implied by the law; but it is better to have the decrees specify, and especially so in this case, in view of the testimony stated and of the perpetual injunction that the award of water is limited to a beneficial use at such times as it is needed." Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289.

No waste of water should be countenanced by the courts, and decrees for its use should be withheld in the absence of evidence showing, *inter alia*, with reasonable certainty, the quantity continuously applied to some beneficial use. X. Y. Irr.-Ditch Co. v. Buffalo Creek Irr. Co., 25 Colo. 529, 55 Pac. Rep. 720; aff'g *Id.*, 9 Colo. App. 436, 49 Pac. Rep. 264.

See, also, Lost Creek Irr. Co. v. Rex, 26 Utah 485, 73 Pac. Rep. 660; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053; Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Hall v. Carter, 33 Tex. Civ. App. 230, 77 S. W. Rep. 19; Nevada D. Co. v. Canyon etc. Co., 58 Ore. 517, 114 Pac. Rep. 86, where it was held that an allowance of one inch an acre for irrigation in adjusting priorities will not be increased to allow for seepage and evaporation; that amount being intended to include such loss.

See, also, Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Gerber v. Nampa & Meridan Irr. Co., 19 Idaho 765, 116 Pac. Rep. 104.

See, also, Medano v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8.

If a decree adjudicating water rights was subject to two constructions, one of which would recognize a valid appropriation only upon a beneficial user of the water, as required by law, and the other of which would not, equity and public policy would demand the former construction. Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748.

"There is a great conflict in the testimony as to the duty of water on this land, namely, the actual amount needed for the use to which it is to be applied, and this is the limit to which a party is entitled, regardless of the fact that he may have actually diverted much more water for a long period of time." Little Walla Walla Irr. Union v. Finis Irr. Co., —— Ore. ——, 124 Pac. Rep. 666.

since a right to the use of water is limited in time and volume to the extent of the needs of the party in whose favor such right is established for the purpose named, the law reads this limitation into decrees establishing such rights.[10] It is even held in a recent case that where a quantity of water was awarded to the plaintiff, as against non-answering defendant, far greater than was necessary for his use, the decree will be modified by reducing the quantity of water originally awarded.[11] In rendering its decree as to the quantity of water, the Court should take into consideration all the facts and circumstances bearing upon the rights of the parties of each particular case. No fixed rule can be laid down as to the quantity of water necessary to any beneficial use or purpose or the amount and kind of evidence necessary to support a decree for the adjudication of water rights, but each decree must depend for its support upon the evidence admitted in that particular case.[12] In any event, the most that ditch owners are entitled to have awarded at any time is that the amounts to which they are respectively entitled shall flow to the head of their ditches.[13]

10 White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

11 Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

12 X. Y. Irr. Ditch Co. v. Buffalo Creek Irr. Co., 25 Colo. 529, 55 Pac. Rep. 720; affirming *Id.*, 9 Colo. App. 438, 49 Pac. Rep. 264.

See, also, Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Geertson v. Barrack, 2 Idaho 1066, 3 Idaho 344, 29 Pac. Rep. 42; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 28 L. R. A. 181.

Where the decree does not comply with the record in the case the Supreme Court may modify the decree so as to make it comply with the record. Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119.

See, also, appeal in actions adjudicating water rights, Sec. 1565.

13 Kelly v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785; Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389; Featherman v. Hennessy, 42 Mont. 535, 113 Pac. Rep. 751.

A decree which does not designate the point of measurement is imperfect and may, upon application, be modified in that particular. Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. Rep. 189.

But see Riverside Heights W. Co. v. Riverside Trust Co., 148 Cal. 457, 83 Pac. Rep. 1003, where it is held that a judgment fixing the rights of users of water from an irrigation canal with reference to the amount of water flowing in the canal is not indefinite for failure to fix the place of measurement of the water, but means the amount received at its head for use below.

However, a decree that a party was

A decree was sustained where it was found that the plaintiffs were entitled to all the water of a small stream, which was much less than the amount claimed; and the claim being in inches, a failure to find under what pressure the water was measured was not prejudicial to the defendant, who claimed as a riparian owner in a State where riparian rights were not recognized.[14]

A judgment and decree adjudicating the rights of priorities to the use of the waters of the main stream carries with it and adjudicates the same as to the waters of the tributaries of such stream above the respective places and points of diversion.[15]

In the absence of both statute and contract, where an economy in the use of water may be made, the Court may decree the rotation of water among the several users, and also in cases involving prior and subsequent appropriations.[16] Where by the data given in the decree the water for a certain number of acres is incapable of being approximately ascertained, such decree will be reversed on appeal.[17] Again, as the law favors periodical appropriations,[18] a decree may also award a certain amount of water to be used during certain periods of time, as for so many days or hours during a week,[19] or

entitled to "150 inches, statutory measurement," was held void for uncertainty, where it nowhere appeared what statutory measurement was referred to, and the term inch being indefinite. *In re* Huntley, 85 Fed. Rep. 889, 29 C. C. A. 468.

And, for the same reason, a verdict and judgment that the plaintiff was entitled to "forty inches, miner's measurement." Dougherty v. Haggin, 56 Cal. 522, *Id.*, 61 Cal. 305.

See, also, Elmer v. McCune, 29 Utah 320, 81 Pac. Rep. 159; Driskill v. Rebbe, 22 S. D. 242, 117 N. W. Rep. 135.

But see Miller v. Dondero, 139 Cal. 643, 73 Pac. Rep. 583, where a decree in inches measured under a four-inch pressure was upheld.

See, also, Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397; Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838; Alhambra etc. Co. v. Richardson, 95 Cal. 490, 30 Pac. Rep. 577; Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469.

For the miner's inch as a standard of measurement, see Secs. 889-891.

14 Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541.

15 Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568.

16 McCoy v. Huntley, — Ore. —, 119 Pac. Rep. 481.

See, also, Hufford v. Dye, — Cal. —, 121 Pac. Rep. 400.

See, also, for rotation of water as a matter of economy, Secs. 909, 910.

17 Nephi Irr. Co. v. Vickers, 15 Utah 374, 49 Pac. Rep. 301; Smith v. Phillips, 6 Utah 376, 23 Pac. Rep. 932.

18 For periodical appropriations, see Sec. 786.

19 Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Cave v. Crafts, 53 Cal. 135; Rodgers

during certain months of the year,[20] or during certain hours of the day.[21]

§ 1559. Decrees and judgments—Apportioning the water between riparian proprietors.—As we have seen in previous sections of this chapter, in those States which adhere to the common law doctrine of riparian rights, an action in equity will lie to adjudicate the right to use the water and to apportion the same between the owners of lands through which or adjoining which the natural streams flow.[1] Where it has been determined by the Court that certain parties by virtue of their riparian ownership are entitled to the use of water, the Court must make its findings to that effect and render a decree apportioning the use of the water among the respective owners on the same stream. And, as is the case with other decrees in actions of this nature,[2] a decree apportioning the rights to the use of the water among the respective riparian owners must depend upon the facts and circumstances developed by the evidence of each particular case, and must be definite and certain as to the quantity of water awarded to each of the parties.[3] In addition to

v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; McGillivray v. Evans, 27 Cal. 92, 11 Morr. Min. Rep. 209.

Sunday water and night water may be designated in a decree. Hawaiian etc. Co. v. Wailuku Sugar Co., 15 Hawn. 675; *Id.*, 14 Hawn. 50.

20 Town of Suisun v. De Freitas, 142 Cal. 350, 75 Pac. Rep. 1092.

21 Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762; Frey v. Lowden, 70 Cal. 550, 11 Pac. Rep. 838; Steinberger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483; Miller v. Thompson, 139 Cal. 643, 73 Pac. Rep. 583; Rose v. Mesmer, 142 Cal. 322, 75 Pac. Rep. 905; Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397.

1 See actions to apportion the use of waters among riparian proprietors, Sec. 1538.

For actions to determine the rights as between appropriators and riparian proprietors, see Sec. 1540.

For pleadings by riparian proprietors, see Sec. 1548.

2 See Secs. 1558, 1559, 1560, 1564.

3 Where a judgment was held uncertain, see Steinberger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483; Wallace v. Farmers' D. Co., 130 Cal. 578, 62 Pac. Rep. 1078; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Caviness v. La Grande Irr. Co. —— Ore. ——, 119 Pac. Rep. 731.

A party in a suit between lower and upper riparian proprietors to determine their rights to the waters of a stream can not complain of a judgment because it gives him no more than the law allows, independent of

this, decrees in these actions must be rendered with a view to the adjustment of the relative rights of all the riparian owners upon the same stream where those rights would be affected by a decree. It is the duty of the Court of equity to determine the respective rights of the parties so as to give to each the just proportion to which he may be entitled.[4] Where the water awarded to each party is stated as a certain quantity of the water flowing in the stream, it should be stated definitely in some recognized standard for the measurement of water, as in cubic feet per second of time, or acre feet, or inches, where the pressure is named.[5] But other standards for the apportionment of waters are also recognized. The decree may award a certain proportion of the entire flow of the stream during all of the time.[6] Or, as is the case with appropriators, the Court may apportion the water of the stream among the respective riparian owners thereon, by decreeing that each use all of the water of the stream during different and definite periods of time. This is the more common practice where the stream is small and to divide it would injure the rights of all.[7] So, where two riparian owners owned land upon a very small stream, where the flow could not be divided so that

the judgment. Filippini v. Hewlett, —— Cal. ——, 121 Pac. Rep. 376.

4 Anaheim W. Co. v. Semitropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

5 For the measurement of water, see Secs. 888-900.

Lone Tree Ditch Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280.

6 Verdugo W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195.

7 Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762; Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

The extent of a riparian owner's right to use water for irrigation is indefinite, uncertain, and subject to fluctuation, as it must always be dependent on the future like needs of other riparian owners; there is no priority of right between them, and no riparian ownership of a definite amount of water, as against other riparian owners. Hence, no definite amount can be decreed for the use of any one riparian owner. Little Walla Walla Irr. Union v. Finis Irr. Co., —— Ore. ——, 124 Pac. Rep. 666.

either owner could receive any material benefit, the Court held that the only way to preserve the rights and to render them beneficial, was to decree to the parties the use of the full flow of the stream during alternating periods of time.[8] It is held in an Oregon case that for the protection of the rights of the several riparian proprietors that a Court of equity may apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may be just and equitable under the circumstances.[9] As we have discussed in a previous portion of this work, riparian proprietors, as between themselves, have a right to a reasonable quantity of water flowing by their lands, with reference to the same rights of all the other proprietors upon the stream.[10] Therefore, a Court of equity in making the apportionment of the use of the water must follow this rule, and so apportion the water as will give a reasonable use of the water to each proprietor, as the facts and circumstances of the case will warrant.[11]

8 Harris v. Harrison, 93 Cal. 676, 29 Pac. Rep. 325.

See, also, Gutierrez v. Wege, 151 Cal. 587, 91 Pac. Rep. 395; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Metcalf v. Faucher, —— Tex. Civ. App. —, 99 S. W. Rep. 1038; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762; Anderson v. Bassman, 140 Fed. Rep. 14, 140 Fed. Rep. 10; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; San Luis W. Co. v. Estrada, 117 Cal. 182, 48 Pac. Rep. 1075; Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

9 Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

10 For the rights of riparian proprietors as between each other, see Secs. 490-495, 508-513.

11 Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 360, 87 Am. St. Rep. 634; Montecito etc. Co. v. Santa Barbara, 151 Cal. 377, 90 Pac. Rep. 935; Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

However, where the pleadings were not drawn with the object of determining the rights between the parties, and there was no evidence before the court from which it could have adjudged the respective rights of the

§ 1560. Decrees and judgments—In actions to quiet title to ditches and canals.—When in actions to quiet title to ditches and canals or easements therefor, the Court has determined from the evidence in the case that certain parties have rights in such property it should, by proper decree, set forth specifically the respective rights of such parties; and, in the same action, it may enjoin the interference with those rights by the other parties to the action.[1] And, although the right to a ditch or canal and a water right are separate species of property,[2] and a decree awarding certain rights to the use of water does not in itself concern those in a ditch or canal, or the reverse,[3] where the pleadings are properly drawn to that effect, the Court may, in the same action, adjudicate both the water rights and the right to the ditch or canal used in connection therewith, and render a decree quieting the title in the respective owners to both.[4]

parties, it is not error for the court not to have determined their respective riparian rights. Coleman v. Le Franc, 137 Cal. 214, 69 Pac. Rep. 1011.

In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate, the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land. Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

1 For actions to quiet title to ditches and canals, see Sec. 1541.

Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584; Crawford v. Minnesota etc. Co., 15 Mont. 153, 38 Pac. Rep. 713.

One's right to an irrigation ditch can not be adjudicated in a suit to which he is not a party. Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38.

2 See Secs. 764, 834.

3 Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045; Nevada etc. Co. v. Kidd, 37 Cal. 282.

4 Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024; Smith v. Hawkins, 127 Cal. 119, 59 Pac. Rep. 295; San Jose etc. Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. Rep. 269; Village of Hailey v. Riley, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142; Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139; *Id.* 54 Wash. 653, 104 Pac. Rep. 141; Smith Canal or Ditch Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192; Arroyo Ditch Co. v. Dorman, 137 Cal. 611, 70 Pac. Rep. 737; Board of Regents v. Hutchinson, 46 Ore. 57, 78 Pac. Rep. 1028; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142; Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469.

For decrees quieting title to water rights, see Secs. 1557, 1558.

In its decree quieting the title to ditches and canals, the Court should be as definite and certain in the description as to the rights awarded to the respective parties as is possible. The ditch and canal should be described with sufficient certainty, the lands over which it runs, and the particular rights awarded to each of the parties.[5]

§ 1561. Decrees and judgments—Apportioning the subterranean waters among the owners of the land.—As we have seen in other sections of this work, the right to the use of water flowing or percolating through subterranean water-bearing strata is first in the land owners of the lands through which such waters flow or percolate, for use on such lands;[1] and, second, should there be a surplus of water over and above the needs of such land owners on their lands, others may appropriate such waters and conduct them to distant lands.[2] But as between the land owners themselves, as was said upon the rehearing of the case of Katz v. Walkinshaw,[3] "Disputes between overlying land owners, concerning water for use on the land, to which they have an equal right, in cases where the supply is not sufficient for all, are to be settled by giving to each a fair and just proportion." This rule is based upon the analogous rule adopted by the courts for the apportionment of waters of a stream among the various riparian owners on the same stream.[4] And, in a suit to adjudicate such rights, it is held that the Court by decree may make reasonable regulations for the use of the water by the parties to the action, fixing the time when each may take it, and the quantity to be taken, provided that such decree be adequate to protect the land owner having a paramount right to the use of the water, and to prevent the destruction of that right.[5]

5 See cases cited *supra*.

1 For rights to subterranean waters, see Secs. 1148-1211.

For actions to apportion such waters, see Sec. 1539.

See, also, Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

2 Burr v. Maclay Rancho W. Co., 154 Cal. 428, 98 Pac. Rep. 260.

3 *Supra*.

4 For decrees apportioning waters among riparian owners, see Sec. 1559.

For the correlative rights of land owners, see Secs. 1198-1200.

5 Burr v. Maclay Rancho W. Co., 154 Cal. 428, 98 Pac. Rep. 260, where it is held that a judgment, fixing the rights of adjoining land owners to take percolating water from a common underlying basin, should be so framed as to prevent a depletion of the basin, limiting the amount taken

From the reported cases it seems that the trial courts have had considerable difficulty in making their findings upon which to base their decrees in cases involving the rights of the respective parties to subterranean waters percolating or flowing through underground strata. This is due to the fact that, as said by Mr. Justice Brewer, in the case of Kansas v. Colorado: "The underground movement of water will always be a problem of uncertainty."[6] In some cases the trial Court shirked the duty of making its findings and by decree apportioned the water among those who were entitled to its use.[7] By this action the very purpose of the action is defeated, and subjects the parties to future litigation in order to determine their respective rights. It is the duty of the Court in these cases to make its findings, upon which it must make its awards of the quantity of water each party is entitled to use, and not shirk this duty, however great the intrinsic difficulty. And, as said by Mr. Justice Shaw, in Katz v. Walkinshaw:[8] "The objection that this rule of correlative rights will throw upon the Court a duty impossible of performance—that of apportioning an insufficient supply of water among a large number of users—is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but, if the rule is the only just one—as we think has been shown—the difficulty in its application in extreme cases is not a sufficient reason for abandoning it, and leaving property without any protection of the law."

§ 1562. **Decrees and judgments—For costs.**—Upon the subject of judgment for costs in cases for the adjudication of water rights, the general rule, as in other cases, is that the party ultimately defeated is liable for the costs in the action, so far as they are legiti-

by all the consumers to a quantity, as near as may be, equal to the average constant supply from the rainfall.

See, also, Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. Rep. 47; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415, 22 L. R. A., N. S., 76.

6 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

7 Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

8 *Supra.*

mate and properly taxed.[1] In these equitable actions, however, especially where there is a large number of parties, the assessment of costs is left largely to the discretion of the Court. Therefore, oftentimes, the costs of such actions are prorated between the parties according to their respective rights as awarded in the action.[2] Again, in a recent Oregon case, it was held that, where the parties were numerous and it would be difficult, if not impracticable, to equitably adjust the costs in the lower court, and all the parties were materially benefited by having their rights definitely determined, costs were properly denied to all parties.[3] Again, the actual costs incurred by the Court are sometimes prorated by the Court equitably between the respective parties, and the individual costs of each party must be paid by the party incurring them.[4] And, where both plaintiff and defendants failed to make a case, it is held that each should pay his own costs.[5] But, as the majority of these cases require considerable time of the Court, and a great deal of testimony must be introduced, a portion of which must be based upon surveys of the premises and the measurement of the water, there are always certain legitimate expenses which must be paid by some one. As was said in an Idaho case: "Every person who appropriates water under the laws of this State must remember that it is sure to cost something for the adjudication of such rights, and that they

1 Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

2 Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569.

The trial court having discretionary power in taxing costs, a decree in respect thereto will not be disturbed unless the discretion is abused. Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286.

3 Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, Rutherford v. Lucerne etc. Co., 12 Wyo. 299, 75 Pac. Rep. 445; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; Southside Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107.

4 Hunning v. Porter, 6 Ariz. 171, 54 Pac. Rep. 584; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

5 Patterson v. Nurnberg, 17 Colo. App. 223, 68 Pac. Rep. 134.

See, also, Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535.

must pay the costs."[6] Therefore, a number of the States have provided by special statutes as to what expenses connected with the trial of these cases may be assessed as legitimate costs, and by whom they must be paid. Upon the question of the assessment of expenses incurred for surveys of the premises and for the measurements of water, the rule is that, where such surveys and measurements are made under an order of the trial Court, the expenses therefor may be properly taxed as costs against the appropriators and claimants of the water who are parties to the action.[7] Where, however, in an action to quiet title, the surveys and maps were prepared by experts, by direction of one of the parties alone, and not by order of the Court, it is held error to assess the expenses for the same as costs.[8]

§ 1563. The decree and judgment—As res judicata—Rights by appropriation, etc.—As we have discussed in previous sections,[1] the decrees and judgments in actions to determine and settle water rights, and to quiet title thereto in the parties to whom such rights are awarded by the Court, should be so definite and certain as to the exact rights of each party as to constitute an estoppel between the parties,[2] and to be a full, complete, and definite adjudication of the entire subject matter, as between the parties to the action. In other words, it must be *res judicata*, or the subject must be fully adjudicated, so as to leave the subject in such a condition of settlement that another action can not be maintained between the same parties concerning the same rights.

6 Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

The legislature has no authority to compel a county to pay the costs, disbursements, and attorney's fees in an action to settle the right to the use of water, when such county is not a proper party to such action. Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

7 And this may be done even though the maps, plats, etc., be not introduced in evidence. Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481, 14 Idaho 450, 94 Pac. Rep. 761; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

8 Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563.

1 For decrees and judgments, see Secs. 1557-1562.

2 Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

In order to constitute such a decree and judgment *res judicata*, and, on that account, to bar a subsequent action, there must be a concurrence of the three conditions following, namely: First, the identity of the rights sued for; second, the identity of the cause of action; and, third, the identity of the persons and parties to the action. Therefore, where these conditions are present, former decrees which are final and unreversed are *res judicata* of the subject matter of the suits as then decided between the parties thereto and their successors in interest, and that, too, whether the Court based its decree upon a correct or erroneous view either of the law or of the facts. As was held in a recent case decided by the Supreme Court of the United States, a decree determining the rights of an irrigation canal company in the water of a river, as against the owners of other irrigation canals taking water from the same river, and against all persons claiming under them, is *res judicata* as to such canal owners and the water users under such canals in a subsequent controversy over the respective rights of the appropriators of the waters of such river.[3] A judgment and decree may also become conclusive by lapse of time, although it might have been subject to modification and correction, if proceedings had been promptly taken in time for that purpose.[4] They are not conclusive as to matters which might have been decided therein, but only as to such matters

3 Montezuma C. Co. v. Smithville Canal Co., 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67; aff'g *Id.*, 11 Ariz. 99, 89 Pac. Rep. 512; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Neil v. Tolman, 12 Ore. 289, 7 Pac. Rep. 103; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Hartson v. Dill, 151 Cal. 137, 90 Pac. Rep. 530; Farmers' Union D. Co. v. Rio Grande Canal Co., 37 Colo. 512, 86 Pac. Rep. 1042; Campbell v. Flannery, 32 Mont. 119, 79 Pac. Rep. 702, 80 Pac. Rep. 240; Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Spring Hill Irr. Co. v. Lake Irr. Co., 42 Wash. 379, 85 Pac. Rep. 6; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Hawaiian etc. Co. v. Wailuku Sugar Co., 14 Hawn. 50, *Id.*, 15 Hawn. 675.

4 Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Louden Irr. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792.

which were in fact decided.[5] A decree and judgment is not *res judicata* as to the persons who were not made parties to the action, or as to their rights.[6] Neither is it binding on persons who were made parties to the action, but who were not served with legal process, and who did not appear in the action; such adjudication being as to them without due process of law.[7] As to the subject matter of the action, the judgment and decree will be deemed *res judicata* only to the extent of the matters definitely decided by it. And, as to these matters thus determined, "the judgment is, as a plea in bar or as evidence, conclusive between the same parties, upon the same matter, everywhere."[8] But it can not be regarded as ad-

[5] Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

Where, upon appeal, the decree of the trial court is reversed, and the cause is remanded for further proceedings upon amended pleadings, nothing has become *res judicata*, or the law of the case, except that the pleadings and evidence on the first appeal did not authorize the decree. Johnson v. Sherman etc. Co., 71 Neb. 452, 98 N. W. Rep. 1096.

See, also, Burr v. Maclay Rancho Co., 160 Cal. 268, 116 Pac. Rep. 715.

[6] One not a party to a suit to determine contract rights in an irrigation ditch is not bound by the decree rendered therein, and his rights must be determined as if such suit had not been instituted. Carns v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170.

All who are neither parties to the judgment nor privies to such parties are not bound by such judgment. Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891.

See, also, Burr v. Maclay Rancho Co., 160 Cal. 268, 116 Pac. Rep. 715; State *ex rel.* McConihe v. Steiner, 58 Wash. 578, 109 Pac. Rep. 57; Community Ditch or Acequia of Tularosa Townsite v. Tularosa Community Ditch, 16 N. M. 200, 114 Pac. Rep. 285.

See, also, Lower Latham D. Co. v. Louden Irr. C. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Hackett v. Larimer & Weld Res. Co., 48 Colo. 178, 109 Pac. Rep. 965.

[7] Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

See, also, Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

The remedy by due course of law guaranteed by both the Federal and State constitutions requires, before there is a judicial determination affecting the right to life, liberty, or property, that process to obtain jurisdiction must be issued and personally served when practicable; constructive service can only be made effective when actual service is impracticable. Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

See, also, for process in statutory adjudications, Secs. 1574-1580.

[8] Wixson v. Devine, 67 Cal. 341, 7 Pac. Rep. 776.

judicating rights by implication, unless they were necessarily included in the subject matter actually decided. So, where the Court found that the defendant had acquired a right to divert sufficient water to fill a ditch without specifying the number of feet which might be diverted or the capacity of the ditch, it was held that this was not an adjudication.[9] So, also, a judgment or decree is not *res judicata* as to the rights purchased by one of the parties to the action, subsequent to the decree from a stranger to the suit.[10] Again, where a decree was based upon the riparian right of the plaintiff, it was held that it would not protect him in any rights based on prior appropriation.[11] And, again, the fact that a stipulation for the dismissal of a cause provided that each party should pay his own costs does not make the judgment entered thereon one upon the merits of the case, which will conclude the parties.[12] But a judgment which adjudicates the rights and priorities in and to the waters of a stream is held to also adjudicate the rights and priorities to its tributaries above the point of diversion of those awarded the rights to the use of the water.[13] In order for a party to avail himself of a former decree he must plead the former decree; it being in the nature of an estoppel.[14] A judgment and de-

See, also, Ryan v. Quinlan, —— Mont. ——, 124 Pac. Rep. 512.

But see Flannery v. Campbell, 30 Mont. 172, 75 Pac. Rep. 1109.

9 Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108.

That the decree must be definite and certain as to the quantity of water, see Secs. 1558, 1559.

See, also, Stafford v. Hornbuckle, 3 Mont. 485; Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Buckers Irr. etc. Co. v. Platte Valley Irr. Co., 28 Colo. 187, 63 Pac. Rep. 305; Water Supply etc. Co. v. Larimer & W. Res. Co., 25 Colo. 87, 53 Pac. Rep. 386; rev'g 7 Colo. App. 225, 42 Pac. Rep. 1020; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Colorado etc. Co. v. Larimer & W. etc. Co., 26 Colo. 47, 56 Pac. Rep. 185; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Larimer & W. etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142; Neil v. Tolman, 12 Ore. 289, 7 Pac. Rep. 103.

10 Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568.

11 Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

12 Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543.

13 Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568.

14 Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Spring Hill Irr. Co. v. Lake Irr. Co., 42 Wash. 379, 85 Pac. Rep. 6.

cree finally adjudicating the rights between the parties thereto is not subject to collateral attack;[15] neither can it be attacked by one who has had the benefit of it for a number of years.[16]

§ 1564. The decree and judgment—As res judicata—As to riparian rights.—The doctrine of appropriation may be deemed a doctrine of fixed rights, and decrees and judgments rendered in actions to adjudicate water rights may award a definite and certain quantity of water to the respective parties, and such decrees are deemed *res judicata* as finally settling the rights between such parties.[1] The common law of riparian rights as to the use of the water by riparian owners is not a doctrine of fixed rights, but depends upon the relative or correlative rights of all the riparian owners upon the same stream.[2] Therefore, a different proposition confronts the Court, when it comes to the construction of judgments and decrees in cases where they apportion the rights to use the water among the riparian owners on a stream, in those jurisdictions which adhere to the modified common law rule of riparian rights. Such judgments and decrees can be regarded, except in very exceptional cases, as *res judicata* only so long as the conditions upon which they were rendered remain the same. And, as the rights of all of the riparian proprietors are equal, regardless of the date of acquiring title or their location on the stream, and no proprietor can use the water for irrigation to the injury of the correlative rights of the other proprietors above or below him on the stream, these conditions are continually changing, owing to the rights of new owners, or the extended use by the old owners. As was said in an Oregon case: "It necessarily follows, therefore, that the nature and extent of the right of a riparian proprietor to the water of a stream can not be measured by any definite or fixed rule, nor can the amount of water to which he is entitled to use for that purpose

[15] Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047.

[16] Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540.

[1] For judgments and decrees based upon appropriation, see Secs. 1557, 1558.

For such judgments as *res judicata*, see Sec. 1563.

[2] For riparian rights, see Secs. 450-551.

For decrees in actions to apportion the water between riparian owners, see Sec. 1559.

ordinarily be definitely ascertained or determined."[3] And, therefore, as held in a California case: "In ordinary controversies between parties claiming only as riparian proprietors on the same stream of water, a judgment determining that at a given time the parties are entitled to appropriate the waters in certain proportions is not necessarily conclusive in a subsequent action."[4]

A decree based on riparian rights will not protect any rights based on prior appropriation afterward claimed by the plaintiff against the defendant.[5]

§ 1565. **Appeal from judgment and decrees.**—Appeals taken from judgments and decrees in cases adjudicating and settling water rights do not differ materially from appeals taken in other cases. The right of appeal from judgments rendered in the district or trial courts to the Supreme Court of the State is given in all jurisdictions to any of the parties to the action, who may feel that their rights were not properly adjudicated by the trial Court.[1] But it is held that the decision of the Supreme Court of the State is controlling, and that in actions simply adjudicating these rights between the respective parties, no appeal will lie from the State Supreme Court to the Supreme Court of the Unitted States, upon the ground that it is a matter for the States to settle, and the subject involves no Federal question.[2] Where the action is

3 Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

See, also, Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

4 Los Angeles v. Baldwin, 53 Cal. 469.

See, also, Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

5 Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

1 In an action by several defendants to determine priorities in the use of water, where separate judgments are asked, the plaintiffs bring a writ of error to review a judgment for one of the defendants, the others need not be made parties. Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721.

See, also, Randall v. Rocky Ford D. Co., 29 Colo. 430, 68 Pac. Rep. 240, holding that where an appeal of the owner of the right was ineffectual, an appeal could not be maintained by a consumer under the ditch.

2 For jurisdiction of courts, see Sec. 1533.

See, also, Telluride Power Trans. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245, dismissing writ of error to the Supreme Court of Utah, 16 Utah 125, 51 Pac. Rep. 146; *Id.*, on second appeal, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; dismissing writ of error to Supreme Court of Utah,

originally brought in, or removed to, the Federal Court from a State Court, a right of appeal lies to the Circuit Court of Appeals, or to the Supreme Court of the United States, or to both, as the case may be.

The provisions of the statutes of the respective States, and the rules adopted by its Supreme Court, govern the proceedings in taking the appeals, where the same are taken from the trial Court to the State Supreme Court. And these statutes and rules are mandatory in this respect; and, if they are not strictly followed, the appeal may be dismissed.[3] In cases of appeal from the United States District or Circuit Courts, or from the Supreme Court of a State, to the Circuit Court of Appeals, or to the Supreme Court of the United States, the statutes of the United States, and the rules of procedure of those respective courts, must govern the procedure in taking the appeal.[4] Again, the questions

23 Utah 22, 63 Pac. Rep. 995; Crystal Springs etc. Co. v. Los Angeles, 177 U. S. 169, 44 L. Ed. 720, 20 Sup. Ct. Rep. 573; affirming *Id.*, 82 Fed. Rep. 114, 76 Fed. Rep. 114, 76 Fed. Rep. 148; Los Angeles v. Los Angeles etc. Co., 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452, 152 Cal. 645, 93 Pac. Rep. 869, 1135; Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; Miller & Lux v. East Side etc. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

[3] Needle Rock D. Co. v. Crawford etc. Co., 32 Colo. 209, 75 Pac. Rep. 424; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Foss v. Johnstone, 158 Cal. 119, 110 Pac. Rep. 294; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Randall v. Rocky Ford D. Co., 29 Colo. 430, 68 Pac. Rep. 240; Hess v. La Junta etc. Co., 6 Colo. App. 497, 42 Pac. Rep. 50; *Id.*, 25 Colo. 515, 55 Pac. Rep. 728; Baer Bros. etc. Co. v. Wilson, 32 Colo. 500, 77 Pac. Rep. 245; Frost v. Alturas W. Co., 11 Idaho 294, 81 Pac. Rep. 996.

On appeal the opinion of the trial court has no place in the record. Phillips v. Coburn, 28 Mont. 45, 72 Pac. Rep. 291.

A transcript once filed within time may be withdrawn to perfect the record. Baer Bros. etc. Co. v. Wilson, 32 Colo. 500, 77 Pac. Rep. 245.

Where the record on appeal is insufficient, but the counsel for the defendants in error announce that they prefer to have the case decided on the merits and not on technicalities, the objection will not be noticed. Wellington v. Beck, 43 Colo. 70, 95 Pac. Rep. 297.

See, also, South Side Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107.

[4] A judgment of the Circuit Court of Appeals, adjudging that defendant had acquired a valid right to the waters of a non-navigable stream, wholly

which the Appellate Court may consider in these actions do not differ materially from the questions which may be considered in other equity cases. The same general and well settled rules of law govern as in other equity cases. It is a general rule of practice that the Supreme Court, in equity cases, may consider the evidence taken by the trial Court, and upon which it based its findings and decree.[5] And, upon this subject, we are confronted with another well settled rule of law that, where the evidence is conflicting, and the finding of the lower Court is sustained by sufficient legal evidence, it will not be disturbed by the Appellate Court upon an appeal of the case.[6] And a finding of fact by the trial Court will not be dis-

on the public domain, as against the plaintiff, subject to the appropriation thereof by a military reservation, and remanding the cause to the lower court for further proceedings, is not a final judgment from which an appeal may be taken to the Supreme Court of the United States. United States v. Krall, 174 U. S. 385, 43 L. Ed. 1017, 19 Sup. Ct. Rep. 712; for the same case below, see 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351.

5 For findings of fact, see Sec. 1556. For decrees, see Secs. 1557-1564.

6 Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301.

Where the evidence on a particular finding is conflicting, and there is some evidence to support the finding by the trial court, it can not be disturbed on appeal, though the preponderance of the evidence is against it. Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. Rep. 224.

A finding of fact, based on conflicting inferences reasonably deducible from the evidence, is as conclusive as where the conflict arises directly from the evidence. Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

Where the evidence is conflicting, but does not clearly preponderate against the conclusions reached by the trial court, the findings will not be disregarded or set aside. Kelly v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785.

See, also, Cave v. Tyler, 147 Cal. 454, 82 Pac. Rep. 64; Davis v. Angelo, 8 Cal. App. 305, 96 Pac. Rep. 909; City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Van Camp v. Emery, 13 Idaho 202, 89 Pac. Rep. 752; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Miller & Lux v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. Rep. 439; West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. Rep. 185; Ripley v. Park Center etc. Co., 40 Colo. 129, 90 Pac. Rep. 75; Winter v. Fulstone, 20 Nev. 260, 21 Pac. Rep. 201; Cardelli v. Comstock Tun. Co., 26 Nev. 284, 66 Pac. Rep. 950; Patterson v.

turbed on appeal unless it is clearly against the preponderance of the evidence and is manifestly against justice and right.[7] Where the evidence is not before the Court on appeal, it is concluded by the findings of the trial Court.[8] Where, however, the evidence is too indefinite to support the findings of the trial Court, the cause will be remanded to the trial Court to take further testimony and the findings will be set aside.[9] An issue raised for the first time in the Appellate Court will not be considered;[10] neither will objections not raised in the trial Court.[11] Again, where the parties

Mills, 138 Cal. 276, 71 Pac. Rep. 177; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Boyd v. Huffine, —— Mont. ——, 120 Pac. Rep. 228; McDonnell v. Huffine, —— Mont. ——, 120 Pac. Rep. 792; Wolff v. Pomponia, —— Colo. ——, 120 Pac. Rep. 142; Donnelly v. Cunha, —— Ore. ——, 119 Pac. Rep. 331; Mellen v. Great Western Beet Sugar Co., —— Idaho ——, 122 Pac. Rep. 30; Kenck v. Deegan, —— Mont. ——, 122 Pac. Rep. 746.

See, also, for findings of fact, Sec. 1556.

7 Promontory Ranch Co. v. Argile, 28 Utah 398, 79 Pac. Rep. 47; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142; Farmers' etc. Co. v. Riverside Irr. Co., 16 Idaho 525, 102 Pac. Rep. 481; Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Murray v. Nixon, 10 Idaho 608, 79 Pac. Rep. 643; X. Y. Irr. D. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. Rep. 720; Purser v. Baker, 129 Cal 607, 62 Pac. Rep. 190; Mesnager v. Engelhardt, 108 Cal. 68, 41 Pac. Rep. 20; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106; Great Plains W. Co. v. Lamar C. Co., 31 Colo. 96, 71 Pac. Rep. 1119; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Cache La Poudre Res. Co. v. Windsor Res. Co., 25 Colo. 53, 52 Pac. Rep. 1104; Edson & Foulke Co. v. Winsell, 160 Cal. 783, 118 Pac. Rep. 243.

8 Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Beatty v. Murray Placer Co., 15 Mont. 314, 39 Pac. Rep. 82; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

9 Elliot v. Whitmore, 8 Utah 253, 30 Pac. Rep. 984.

10 McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193; Murray v. Nixon, 10 Idaho 608, 79 Pac. Rep. 643; Cache La Poudre Res. Co. v. Windsor etc. Co., 25 Colo. 53, 52 Pac. Rep. 1104; Coray v. Holbrook, —— Utah ——, 121 Pac. Rep. 572.

11 Farmers' etc. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761; Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Smith v. Cucamonga W. Co., 160 Cal. 611, 117 Pac. Rep. 764.

go to trial, without objection, on a particular theory of their cases, a different theory will not be considered by the Appellate Court.[12] And, where the appeal is taken on the judgment roll alone, the question of the sufficiency of the evidence to support the findings can not be raised in the Appellate Court.[13] The Appellate Court must consider the pleadings in the action, and render its decision within the rights asserted therein.[14] A decree is presumed to be satisfactory on appeal to those parties not appealing.[15]

In deciding the case on appeal the Appellate Court may affirm the judgment of the trial Court; it may reverse it and send it back for a new trial;[16] or, in most jurisdictions, the Appellate Court may reverse the judgment of the Court below with directions to enter a new judgment in accordance with its decision;[17] or, the Court may modify the judgment of the trial Court in certain particulars.[18] Or, the Appellate Court may, upon a proper showing,

12 Durning v. Walz, 42 Ore. 109, 71 Pac. Rep. 662; Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

13 Miller & Lux v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. Rep. 439; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Montezuma C. Co. v. Smithville C. Co., 11 Ariz. 99, 89 Pac. Rep. 512.

Whether the use of a certain amount of water was excessive can not be determined by the appellate court when the evidence is not before the Court. Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352.

14 Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Montezuma C. Co. v. Smithville C. Co., 11 Ariz. 99, 89 Pac. Rep. 512; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

15 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Seaweard v. Duncan, 47 Ore. 640, 84 Pac. Rep. 1043.

16 Where the various questions submitted in a suit and adjudicated by the decree therein were so interwoven that it was impossible to separate them so as to sustain such decree on any one or more of such questions, the decree will be reversed in its entirety. New Cache La Poudre Irr. Co. v. Water Supply Co., 29 Colo. 469, 68 Pac. Rep. 781.

The appellate court may reverse the judgment with leave to amend the pleadings and bring in new parties. McCook Irr. Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996.

17 Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 Pac. Rep. 518; Munsee v. McKellar, —— Utah ——, 116 Pac. Rep. 1024.

18 Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; Stewart v. Austin, 50 Colo. 248, 115 Pac. Rep. 516; Bielenberg v. Eyre, 44 Mont. 397, 120 Pac. Rep. 243; Sulloway v. Sulloway, 160 Cal. 508, 117 Pac. Rep. 522.

grant a rehearing of the appeal.[19] The Supreme Court has full power to review all questions of law and fact in equity cases, and to set aside the judgment of the lower Court, if, in the opinion of the Supreme Court, such judgment is not supported by the evidence.[20]

§ 1566. **The enforcement of judgments and decrees.**—The rights of the parties having been finally settled and adjudicated by a Court of equity, the Court has ample power to enforce its decrees. It has the power, if necessary, to prescribe the method to be used by the parties to correctly measure the water.[1] It likewise has the authority and jurisdiction to make such orders and to issue such writs as may be necessary and essential to carry the decree into effect and render it binding and operative.[2] The permanent injunction usually issued in such decrees is made merely in aid of the enforcement of that portion of the decree awarding the rights to the respective parties; and it will operate against any of the parties who may undertake or attempt to divert or use any of the water to the injury of any of the rights of the other parties, as settled and established by the decree.[3] For a violation of the injunction,

[19] Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632.

[20] Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Small v. Harrington, 10 Idaho 499, 79 Pac. Rep. 461; La Jara etc. Co. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644.

In equity cases, all improper testimony admitted by the trial court will be disregarded by the appellate court. Winsor v. Hanson, 40 Wash. 423, 82 Pac. Rep. 710.

[1] Tolman v. Casey, 15 Ore. 83, 13 Pac. Rep. 669; Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020.

See, also, Porter v. Small, —— Ore. ——, 120 Pac. Rep. 393.

Owing to the difficulties usually encountered in the enforcement of decrees, where there are many conflicting interests, in water suits, the trial court has the power, when deemed advisable, to enter such supplemental decree, not inconsistent with the decree of the appellate court, as may be necessary to make the decree of the appellate court effective. Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1093, 102 Pac. Rep. 728.

[2] Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535; Burr v. Maclay Rancho Co., 154 Cal. 428, 98 Pac. Rep. 260; Hough v. Porter, 51 Ore. 218, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396.

[3] Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

the Court has the power to punish for contempt,[4] and the party whose rights are materially injured has his action at law for damages.[5] And, where the decree is clear upon its face as to the stream from which the diversion and distribution are to be made, and the

[4] *In re* Whitmore, 9 Utah 441, 35 Pac. Rep. 524, where it is held that a Court has power to imprison a person for breach of an injunction until he complies therewith, when it is within his power to do so, and he refuses to do so.

See, also, State *ex rel.* Flynn v. Dist. Court, 33 Mont. 115, 82 Pac. Rep. 540.

See, also, for the protection of rights, injunctions, Secs. 1596-1647.

[5] Where a decree has been entered, settling and adjusting the rights of the various parties to the waters of a stream, and enjoining the use or appropriation of said waters otherwise than provided in such decree, the remedy for the violation of the provisions of such decree, where neither a change of parties, conditions, nor interests appear, is not by a bill to enforce the decree, but by an action at law. Raft River etc. v. Langford, 5 Idaho 62, 46 Pac. Rep. 1024.

See, also, for protection of rights, actions for damages, Secs. 1660 *et seq.*

Where the rights adjudicated in the action are many and varied, and, as a consequence thereof, the accurate division of the water among the parties to whom the rights have been awarded is difficult and requires considerable skill and technical knowledge in the measurement of water, it is within the power of the Court to appoint a person familiar with this subject, as a water commissioner, or a water master, to make this division, and thus aid in the enforcement of the decree. The appointment of such a commissioner is a common practice, and is a proper choice of method to carry the decree into effect, and the power given him by the Court is to exercise an administrative, and not a judicial, discretion.

The bounds of judicial authority are not transcended by the appointment by a Court of a water commissioner charged with the duty of distributing the waters of a river among the various irrigation canals, according to the adjudged priorities and imposing upon the parties a *pro rata* liability for his salary. Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67; reversing *Id.*, 11 Ariz. 99, 89 Pac. Rep. 512.

See, also, Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648, where the Court decreed to the parties to the suit a certain portion of the water flowing in the stream, and appointed a commissioner at a monthly salary to superintend and direct the measurement and division of the water in accordance with the decree, also giving him authority to direct, supervise, and inspect all means and appliances for the diversion, conveyance, and use of the water, and to report to the Court from time to time any violations of the provisions of the decree, the Court retaining original jurisdiction of the case for the purpose of making all necessary orders and decrees to make effectual the rights awarded.

respective rights of the parties, as to the quantity of water and place of delivery, the water master or commissioner will not be required to look beyond the decree for his authority.[6]

[6] Stethem v. Skinner, 11 Idaho 374, 82 Pac. Rep. 451.

CHAPTER 79.

STATUTORY ADJUDICATION OF WATER RIGHTS.

§ 1567. Scope of chapter.
§ 1568. Special statutory proceedings for the adjudication of water rights.
§ 1569. The nature of such statutory actions.
§ 1570. The constitutionality of Acts.
§ 1571. The jurisdiction of courts—Venue.
§ 1572. The jurisdiction of courts—Subject matter and parties.
§ 1573. Parties to such actions.
§ 1574. The pleadings or statements of claims.
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§ 1576. The proceedings on the hearing—Referees.
§ 1577. The form and substance of decrees.
§ 1578. Decrees as to inchoate rights.
§ 1579. Construction and effect of decree.
§ 1580. The review and modification of decrees—On petition of parties to the action.
§ 1581. Modification of decrees—On independent action by those not parties to the action.
§ 1582. Appeals from judgments and decrees.
§ 1583. The decree as res judicata.
§ 1584. The enforcement of decrees and judgments.

§ 1567. Scope of chapter.—Having discussed the subject of the adjudication of water rights by the courts under their general equity powers in the previous chapter,[1] in this chapter we will discuss the adjudication, or determination of water rights under special statutory proceedings, enacted in several of the States for this purpose, as to where these proceedings are had by the courts.[2]

§ 1568. Special statutory proceedings for the adjudication of water rights.—As the population of the Western States increased and the demand for water rights became greater and greater, the necessity for the adjudication of all such rights also increased. This was so in order that these rights might, as far as possible, become definitely and permanently settled, as between the various

1 For the adjudication of water rights in equity, see Chap. 78, Secs. 1530-1566.

2 For the determination of rights by administrative officers, see Secs. 1585-1595.

parties claiming the same.[1] And, therefore, owing to the almost numberless actions brought for that purpose, and also the great amount of time consumed by the courts in trying the same, for the purpose of simplifying these proceedings, the legislatures of a number of States have enacted special statutes regulating the proceedings in such cases. Colorado was the first State to provide by legislative enactment special proceedings for the adjudication of water rights, and the provisions of this statute have been, to a greater or lesser extent, followed by the statutes of Idaho, Kansas, Montana, North Dakota, Oklahoma, New Mexico, Oregon, South Dakota, Washington, and Utah.[2] The distinction between these statutes and those enacted by some of the other States, as is the case in Wyoming and those States following its system discussed in the next chapter,[3] for the determination of existing water rights is that the proceedings throughout are always had by the courts, while in those States the proceedings are first had before certain State officials or boards of control, with the right of appeal to the courts. For reasons stated in a previous section, we are very much in favor of the Colorado procedure, and find that greater satisfaction is given where the rights are adjudicated entirely by the courts.[4]

In general, these Acts furnish an elaborate system of special procedure for the settlement and adjudication of all questions of priority of the appropriation of water from a common source of supply, as between the respective claimants thereto, and by decree awarding to each claimant the quantity of water to which he is entitled for the beneficial use or purpose to which he applies it. The power to enact such laws comes within the police power of the State,[5] as one feature of the law of State control, which is the right of each State to adopt such laws regulating and controlling the waters which flow within its boundaries as it sees fit.[6] As well stated in an early Colorado case: "They are in the nature of police regulations to secure the orderly distribution of water for irri-

1 For the necessity of adjudication of water rights, see Sec. 1531.

2 For the statutes of these various States, see Part XIV.

3 See Chap. 80, Secs. 1585-1595.

4 For criticism of the laws of State control, see Sec. 1367.

5 For the power of the legislature to regulate the use of water—police power, see Secs. 1341, 1370.

6 For the laws of State control, see Secs. 1337-1367.

gation purposes, and to this end they provide a system of procedure for determining the priority of rights as between the carriers."[7] Where such statutes have been adopted by the legislature of a State, they will be followed by the Federal Courts.[8]

One end that has been attained by these special proceedings is that they have made a permanent public record of all the rights to the use of water which have been so adjudicated from any common source of water supply, and give the names of the parties who are entitled to the use of the water, together with a definite and certain description of their respective rights.[9] As said in a recent Colorado case: "The statutory decree confers no new rights, but, as this Court has repeatedly held, embodies in the form of a permanent, binding decree the evidence of a pre-existing right."[10] To those who are at all familiar with the previous conditions, or the conditions at the present time, where such rights have not been adjudicated, the need of a public record of all rights is apparent.

In general, these statutory proceedings have given the greatest satisfaction, and there has been no attempt to repeal such laws, where they have been tried. As was said by the Colorado Court in referring to the Acts of 1879, as supplemented by the Act of 1881, "The two together constitute a complete system of procedure, that in operation has been found so salutary and free from unnecessary expense as to command the tacit endorsement of all subsequent leg-

7 Elliott, J., in Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

See, also, Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; White v. Farmers' High Line etc. Co., 22 Colo. 191, 197, 43 Pac. Rep. 1028, 31 L. R. A. 828; affirming 5 Colo. App. 1, 31 Pac. Rep. 345; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

But see Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179, where it was held that unconstitutional provisions of the Idaho statute of 1903 (Sess. Laws, 1903, p. 223), as to parties and service of process were not within the police power of the State.

8 Ames Realty Co. v. Big Indian etc. Co., 146 Fed. Rep. 166.

9 New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

10 Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

islatures."[11] And, in a more recent case it is said: "It was a new field, and, in the light of experience, we can, perhaps, point out many imperfections in these statutes, but they have been upheld by the courts and acquiesced in by the people for more than a quarter of a century."[12]

§ 1569. **The nature of such statutory actions.**—The nature of these purely statutory actions to settle and adjudicate the rights to the use of water, as between the different ditches, or as between the respective claimants to the same, is peculiar and is in a class by itself.[1] Partaking mainly of actions *in rem*, they also contain at times elements of actions *in personam*. They may, therefore, be deemed actions both *in rem* and *in personam*, or, *quasi rem* and *quasi in personam*. As to how these actions are to be considered also depends somewhat upon the jurisdiction where they are brought. In Colorado, where the award of the water is made by the Court to ditches which are given certain numbers, according to their respective priorities which are also given certain numbers, such an action may be regarded as strictly one *in rem;* and, therefore, it is declared by the Supreme Court of that State to be in the nature of an action *in rem*.[2] And being *in rem* and not *in personam* the interference with the water commissioner who seeks to enforce a decree in such an action is not contempt of Court.[3] But in those States where the award of the water is made to individuals or companies, it is made of the thing to the person. Therefore, such an action is both *in rem* and *in personam*.

And, although these actions are in the nature of suits to quiet

11 Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535.

12 Ft. Lyon etc. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

1 For the nature of actions under the equity procedure, see Sec. 1534.

2 "The statutory proceeding is in the nature of an action *in rem*." Louden etc. Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. Rep. 535; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

"The general adjudication statutes have often been before this tribunal for consideration. They have been held to be a legitimate exercise by our general assembly of the police power of the State, and the proceeding thereby furnished is in the nature of a proceeding *in rem*." Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755.

3 Roberson v. People *ex rel.* Soule, 40 Colo. 119, 90 Pac. Rep. 79.

title, as is the case in ordinary suits in equity brought for the same purpose,[4] they are in a class by themselves, or are *sui generis,* to which the rules governing ordinary actions are not always applicable, and in which the courts are at times confronted with the dilemma of exercising their discretion in matters of practice. In one Colorado case it is stated that: "The statutory proceeding to adjudicate priorities of rights to the use of water under the irrigation Acts of 1879 and 1881 is not an ordinary civil action or proceeding. It is *sui generis,* to which the rules governing ordinary actions are not always applicable."[5]

Although the Court is usually vested with the power to grant an injunction in the same case in which the rights to the water are settled and adjudicated, this is not always done. However, in protection of the right, after the same has been adjudicated, an action will lie for an injunction against any interference with that right.[6] So, also, where the right, or a portion of a right so adjudicated, has been conveyed, and there is a dispute as to the extent of the right which was so conveyed, an ordinary action in equity will lie to quiet the title thereto.[7] But it is held that, in such an action, the Court has no power to adjudge that a change in the point of diversion of the water might be made. That can be done only in the special proceedings under the Act.[8]

4 For the nature of equity suits to adjudicate water rights, see Sec. 1534.

For suits to quiet title to water rights, see Secs. 1534-1537.

"It is manifest from a careful examination of our statutes and from the repeated decisions of our courts that our proceeding, if not technically one to quiet title, is quite analogous thereto, for the object is not merely to settle the individual and several priorities of the different appropriators, but the relative priorities as between the different ditches, in which every claimant is seeking to establish his right as against every other person." Crippen v. X. Y. Irr. Ditch Co., 32 Colo. 447, 76 Pac. Rep. 794.

See, also, Gutheil Park Inv. Co. v. Town of Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

5 People *ex rel.* Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787.

See, also, Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

6 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49.

For the protection of rights by injunction, see Secs. 1596-1647.

7 Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469.

8 Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469.

§ 1570. **The constitutionality of Acts.**—The constitutionality of these Acts have, in the main, been upheld by the Supreme Courts of the States where such laws have been enacted. As said by the Colorado Court: "This Court has repeatedly upheld the irrigation law of this State as being an exercise of the police powers of the State."[1] And, "the object of these Acts was to settle the priority of rights to the use of water for irrigation in the respective water districts in the State."[2]

The Supreme Court of Idaho, however, in the case of Bear Lake County v. Budge,[3] held that certain provisions of the original Act of March 11, 1903, passed by the legislature of that State, were unconstitutional. First, that the provisions for the service of process on known resident claimants by publication was in violation of both the Federal and State constitutions; and if such suits, on such process, were prosecuted to judgment, it would result in the taking of private property without due process of law; second, that the provision that the water commissioner of the water district, a public official, should bring the actions as party plaintiff, was in violation of the State constitution, which requires suits to be brought in the name of the real party in interest, and that such commissioner was not the proper party plaintiff, for the reason that such an action was one for the determination of purely private interests; and, third, for the reasons as stated in the first and second grounds, by the Act in question the legislature attempted to go beyond its legitimate police powers. The Court, in this case, declined to pass upon the constitutionality of any of the other provisions of the Act. The

[1] Roberson v. People *ex rel.* Soule, 40 Colo. 119, 90 Pac. Rep. 79.

See, also, White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; Union Colony v. Elliott, 5 Colo. 371; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; People *ex rel.* Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755.

The Act of 1877, for the distribution of irrigation waters (Laws, 1887, p. 295), is constitutional. McLean v. Farmers' High Line etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

See, also, Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

[2] Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

[3] 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

last ground decided, depending as it does upon the first two, the decision really held the Act unconstitutional upon two grounds: First, as to the parties plaintiff; and, second, as to the service of process. The Court, however, in later cases has upheld the constitutionality of the Act with the exception of those provisions held unconstitutional in the Bear Lake County case, as stated above, and it also held that the provisions of the Act as to the form of procedure, also applied to suits in progress at the time of the passage of the Act.[4]

§ 1571. **The jurisdiction of courts—Venue.**—These statutory actions for the adjudication of water rights must be brought in the proper Court as designated in the respective Acts. The States wherein these actions are provided for are usually divided into water districts. Sometimes these districts are conformable to the water system of any given source of supply, and sometimes they conform to the respective counties.[1] Where the rights to be adjudicated are wholly within one county, the action, of course, must be brought in the Court of that county having the jurisdiction of the subject matter.[2] In Colorado, when a water district extends into two or more counties, the District Court of the county in which the first regular term shall soonest occur is the proper county in which proceedings shall be commenced, and that Court thereafter retains exclusive jurisdiction of the case until the final adjudication is had.[3] And, as defined by the Colorado Court, an "adjudication of priorities," within the meaning of the statute, is the judicial determination of the claims of different parties to the use of water for irrigation within the same irrigation district. Therefore, it is held that conflicting claims to priorities beyond the limits of the district can not be determined by the Court for the county within the district.[4] It therefore follows that a claimant to rights

4 Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

1 See Sec. 1345.

2 For jurisdiction in equity suits, see Sec. 1533.

3 Presbyterian College v. Poole, 25 Colo. 50, 52 Pac. Rep. 1103; Louden Irr. C. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535.

4 People *ex rel.* Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787.

See, also, Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722.

"This Court more than once has

in a different district than that which is being adjudicated, and whose rights will be affected by the decree, must either intervene in the action pending, or bring an independent action under the four year statute of limitations.[5] As stated by the Colorado Court in a recent case: "For the statutory period the priority of such districts are, as between the respective appropriators therein, but *prima facie* evidence of the rights of such appropriators, but after the lapse of four years from the date the decree is rendered fixing such priorities, unless suit is theretofore brought, they become conclusive."[6] This section of the statute[7] applies only to the jurisdiction of the Court to adjudicate the rights, and does not apply to actions to protect the rights, which have been awarded in such proceedings. Actions to protect the right may be brought in any county having jurisdiction of the subject matter and the parties, without regard to the county in which the statutory proceedings of adjudication were had.[8] Where one has been a party to proceedings in the District Court of one county, and, without questioning the jurisdiction of that Court, for several years enjoyed the rights acquired by its judgment, he will be estopped from questioning the jurisdiction of the Court rendering the judgment.[9]

expressed regret that our general assembly did not include in one water district the principal stream and all its tributaries, so that a decree therein, when pronounced, should absolutely bind all the users of water therefrom." Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483.

In case of the division of an irrigation district by legislative enactment, it affects the subject matter of a pending proceeding to adjudicate rights; and the District Court of the proper county in the new irrigation district becomes vested with the jurisdiction to determine the priorities in such new district. People *ex rel.* Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787.

[5] 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3313; Rev. Stat. 1908, Sec. 3313.

For independent actions, see Sec. 1581.

[6] Ft. Lyon etc. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

For decrees in statutory adjudications, see, also, Secs. 1577-1579.

[7] 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 2276; Rev. Stat. Colo., 1908, Sec. 3276.

[8] Buckers Irr. Co. v. Farmers' D. Co., 31 Colo. 62, 72 Pac. Rep. 49; Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

[9] Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30.

See, also, for decrees, Secs. 1577-1589.

§ 1572. The jurisdiction of courts—Subject matter and parties.—The Court must also have jurisdiction of the subject matter of the action, and the parties to the same, before there can be an adjudication which will finally settle the respective rights between them.[1] But as to the extent of the jurisdiction of the courts authorized to hear and determine these cases, as held by the Colorado Court, relative to the Acts of the legislature of that State, of 1879, as supplemented by that of 1881,[2] these Acts were passed for the purpose of establishing a system of procedure whereby the appropriators of water could have their priorities and rights determined in one proceeding, and that they do not attempt to limit or extend the jurisdiction of the District Court as to such rights.[3]

As we have discussed in previous sections, in Colorado the consumer under ditches and canals is deemed to be the appropriator, and the ditch or canal company is deemed to be merely the carrier of the water.[4] Yet these special proceedings provide that the award of the water shall be to the ditches and canals, which shall be given a certain number, and which are accorded certain priorities, also to be numbered. And, it is construed by the Supreme Court of Colorado that these special proceedings apply only to the rights as between the various ditches in the district, and that they do not apply to the rights of the respective consumers of the water under those ditches *inter se*. And, further, it is further held that the trial Court has no jurisdiction under these special proceedings to try or determine the rights of the consumers under these ditches *inter se;* and, therefore, that a decree rendered under such proceedings attempting to adjudicate the rights as between the co-owners of a ditch, canal, or reservoir, or as between the consumers of the water under the same is void.[5] But while the statute provides only

1 For the jurisdiction of the parties, see process, Sec. 1573.

2 See Secs. 1790-1793.

3 Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792.

4 For the relations between the ditch companies and consumers, see Secs. 1475-1477.

5 "Not only do our irrigation statutes not contemplate a determination, as between themselves, of the rights of the different owners of a ditch to any particular quantity of water, but the decree entered in this case did not purport to do, as, indeed, it could not, establish any such rights. Our Court has expressly decided that, so far as the questions now under consideration are concerned, the object of these statutory proceedings is to determine the relative priorities of the different ditches in the water district, and that the rights of the owners of a ditch,

for the adjudication of the relative rights of the various ditches, and the decree goes nominally only to the ditches, it is for the benefit, without specifying them, of those who own the rights to the use of the waters, or the consumers. In other words, the owners of the ditches in these proceedings are regarded as the representatives of the consumers thereunder, and that the rights of the two combined constitute the completed appropriation for the entire quantity of water awarded to the respective ditches. But when it comes to the adjudication of the rights of the consumers as between themselves under these ditches or canals, which have been awarded rights and priorities, it is held that it must be by an action to quiet title, under the ordinary proceedings of a Court of equity, as discussed in the previous chapter.[6]

as between themselves, can not be determined therein. So that, even had the decree of 1889 expressly given to the plaintiffs the right, as against their co-owners, to the use of a certain quantity of water from either of the ditches in controversy, it would have been void." Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149.

"The proceeding does not contemplate that there shall be an adjudication of the relative rights of the owners or consumers of water under any particular ditch, as between themselves, but only the relative priorities of the ditches, canals, and reservoirs. . . . And, while no ascertainment is made as to who are consumers under any particular ditch, necessarily the relative rights of ditch owners and all consumers are determined." Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

And the same Court, in a still later case, after quoting the last clause above, said: "This rule, however, is intended to govern contentions between different ditch owners taking water from the same stream, and does not determine the rights of the consumers in a ditch as between themselves, nor their relative priorities." O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849.

See, also, Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Hallett v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317; Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Farmers' etc. Co. v. Riverside Irr. Co., 14 Idaho 450, 94 Pac. Rep. 761; Creer v. Bancroft W. Co., 13 Idaho 407, 90 Pac. Rep. 228; O'Neil v. Fort Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849.

[6] See Chap. 78, Secs. 1530-1566; Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Gutheil etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Bessemer etc. Co. v. Woolley,

From the above it can be readily seen that the Colorado statutes and practice are cumbersome in that they necessitate at least two suits before the rights of the individual consumer of the water can be finally determined and adjudicated in cases where the ditch or canal is owned by one party and the water rights by others: One suit under the statutory proceedings to determine the relative rights and priorities as between the different ditches and canals taking the water from the same stream or other source of supply, and a second suit in equity to determine the relative rights of the respective consumers *inter se* who take the water from the same ditch or canal. The statutes and the practice of the other States which follow the Colorado procedure in the main, differ radically in this respect, and do not limit the jurisdiction of the courts in statutory proceedings to the determination of the rights only as between the various ditches and canals taking the water from the same source of supply. The rule in some of the States is that, where no issue is raised as between the various consumers of the water under any ditch, the Court may make its award to such ditch or canal, regardless of the rights of the respective consumers under the same.[7] But, upon the other hand, where an issue is raised between the rights of the respective consumers, under any particular ditch, the Court has jurisdiction in the same action to hear, determine, and adjudicate those rights and make its award to the respective individuals or consumers. In other States following the Wyoming system, although the Court is given original jurisdiction to try these actions,[8] all

32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Bowman v. Verdin, 40 Colo. 247, 90 Pac. Rep. 506; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

7 In Idaho, in an action between a canal company and an irrigation district, and no issue was raised as between the consumers, and they were not made parties to the action, the Supreme Court held that a failure to bring the consumers into court in no way vitiated the decree as between the parties who were in court. Farmers' etc. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

See, also, for parties to actions for statutory adjudication, Sec. 1573.

8 For the Wyoming system or the determination of water rights by boards, see Chap. 104.

consumers of the water and claimants to the same must be made parties to the action, and their rights must be determined and adjudicated, and a certificate is issued in his name, showing the amount of water to which each claimant is entitled.[9]

These special statutes of the various States providing for the adjudication of water rights within their respective jurisdictions have no application to cases where the point of diversion from the stream or other source of water supply is within a State, but the lands to be irrigated are without its limits; and, therefore, water will not be decreed by the Court of one State to irrigate lands within another State.[10] In Colorado, where a statutory action is required in order to change the point of diversion,[11] an action to determine both the rights and priorities and to change the point of diversion will be maintained.[12]

§ 1573. **Parties to such actions.**—In the majority of the States having these statutory proceedings for the adjudication of water rights, the actions must be instituted by a real party in interest; that is to say, by persons, associations, or corporations owning or claiming any of such water rights.[1] By the Act of March 11, 1903, of the Idaho legislature,[2] it was attempted to make the water commissioner of the district in which the stream is situated the party plaintiff. But the Supreme Court of that State held this portion of the Act invalid, and that such actions must be instituted by the real party in interest.[3] The Utah Act provides that the action shall be instituted by the State Engineer.[4] In New Mexico, North Da-

9 See decrees, Secs. 1577-1581.

For the adjudication of water rights in various States, see Part XIV.

10 Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Turley v. Furman, 16 N. M. 253, 114 Pac. Rep. 278.

11 For change of point of diversion, see Secs. 857-860.

12 Hallett v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317.

1 For the statutes of the various States upon the subject, see Part XIV; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3284; Rev. Stat. Colo., 1908, Sec. 3284.

2 Laws Idaho, 1903, p. 223.

3 "The water commissioner, a public official, is not the real party in interest in a suit to quiet title or to determine adverse interest in property not claimed or belonging to him or the State." Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

4 Comp. Laws of Utah, 1907, Sec. 1271. Owing to the fact that the legislature failed to provide the necessary funds for the State Engineer to make the surveys provided for by the Act, few suits under the Act have been brought. The validity of this portion

kota, Oklahoma, South Dakota, and Washington, the statutes provide that the suit shall be instituted by the Attorney-General, unless the same shall have been instituted by private parties.[5]

Under the Colorado special statute for the adjudication of water rights, and the procedure thereunder, as the rights of the consumers under ditches, canals, or reservoirs, can not be determined in such actions, only the owners of such works are the proper parties in such actions.[6] The corporations or other owners of such works represent the consumers for the purpose of suits against other owners of works of like nature, and the consumers under the same are not proper parties to such an action; but, afterward, their disputes as to their rights to the use of the water, both as between themselves, or as between themselves and the owners of the works, may be settled and adjudicated in the ordinary actions to quiet title.[7] In other words, in Colorado, as these statutory actions lie for the adjudication of rights only as between ditches, canals, or reservoirs, the owners of such works are the only proper parties; and, when sued in such actions, they are regarded as the representatives of the consumers of the water under such works, and are bound to protect the interests of all in the aggregate.[8]

But in Idaho and the other States which follow largely the Colorado statutes and procedure in the adjudication of these rights, the consumers under any ditch, or other works, may or may not be

of the Act has not been tested. In the meantime water rights are being adjudicated under the ordinary equity procedure.

[5] For the Statutes upon the subject, see Part XIV.

[6] For the jurisdiction of courts—subject matter, see Sec. 1572.

[7] For the adjudication of water rights in equity suits, see Chap. 78, Secs. 1530-1566.

For jurisdiction in special proceedings, subject matter, see Sec. 1572.

For actions to quiet title by a consumer as against a corporation owning the ditch, see Kimball v. Northern Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. Rep. 44; Gutheil etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Bessemer etc. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Putman v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406.

[8] Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; O'Neil v. Ft. Lyon etc. Co., 39 Colo. 487, 90 Pac. Rep. 849; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Montrose Canal Co. v. Loutzenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Supply D. Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

made parties to the action, where the action is originally brought to determine the rights as between two ditch companies. But, where the consumers are made parties and their claims to the use of the water are set up *inter se*, their rights must be determined and adjudicated in the same action. And, to this end, upon application of any of the original parties to the action, the general practice is for the Court to make an order bringing in all of such consumers, under any particular ditch or canal where there are controversies between them. Or, the same thing may be accomplished by the consumers themselves, by way of a complaint in intervention setting up their respective claims. But, upon the other hand, where the suit is between two companies, or other owners of water rights, where the water is furnished to consumers, to adjudicate their respective rights in the aggregate, the failure to bring into the action the consumers under the respective ditches and canals in no way voids or vitiates the decree as between the companies, who were parties to the action.[9]

§ 1574. The pleadings or statements of claims.—In the Acts of the various States providing for the statutory adjudication of water rights, it is generally provided that the statements of claims filed by the respective parties shall stand in the place of pleadings and issue be made thereon. And, while the technical forms of equity pleadings are superseded by these statements, it is required that the rights claimed must be set out therein with even greater particularity than is required in the pleadings under the regular practice, in suits brought for the same purpose, and which we have discussed in a previous chapter.

[9] In an action in Idaho between a canal company and an irrigation district, where the consumers were not made parties to the action, and there was no suggestion before the trial court to make them parties, and the award of the water was made to the company and district respectively without objection in the Court below, the Supreme Court upon appeal held that, had it been insisted upon in the trial court, the consumers might properly have been made parties to the action, but that in view of the facts, the failure to bring them into the court in no way voided or vitiated the decree as between the parties who were in court and participated in the action; and, further, that the question could not be heard for the first time on appeal on such objections in urging a reversal of the judgment. Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

In Colorado, as a basis for such an adjudication, the statute designates the facts to be included in the statements.[1] It is necessary for the party claiming a water right, and seeking an adjudication of the same, to file with the District Court a statement under oath, containing the name or names, together with the postoffice address of the claimant or claimants, with a description of the headgate, general course of the ditch or canal, and the name of any stream from which said ditch, canal, or reservoir is supplied with water, the length, width, and depth thereof, the time of the appropriation of the water by original construction, also by enlargement or extension, the present capacity of the ditch, canal, or reservoir, and also the number of acres lying under it, and being, or proposed to be, irrigated by water from such works. It is not necessary to give the names of the individuals supplied by any ditch, or the number of acres owned by each.[2] However, all the facts which are requisite to constitute a right should be set forth; and it is held that the mere difference in the form of the procedure does not vary the principles involved, nor dispense with these rules.

In Utah it is provided that the first pleading shall consist of a written statement by the State Engineer, filed with the Clerk of the District Court having jurisdiction of the case, which statement shall set forth the fact of the completion of the survey of the stream, or other source of water supply, the rights to the water of which are about to be adjudicated, the names and postoffice addresses of all persons, corporations, and associations using the water, so far as the same are known to the State Engineer, and shall also contain such other facts and information as he may deem necessary. Within six months after the service of process, as required by the statute, all persons claiming the right to the use of any of the water from said source of supply must file with the Clerk of said Court their written sworn statements of their claims to the water. These statements must include, as near as may be, the following: The name and postoffice address of the person, corporation, or association making the claim; the nature of the use of the water on which

1 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3277, 3284; Rev. Stat. Colo. 1908, Secs. 3277, 3284.

2 Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

For the pleadings under the equity practice to adjudicate water rights, see Secs. 1447-1552.

the claim of appropriation is based; the flow per second of water used, and the time during which it has been used each year; the name of the stream or other source from which the water is diverted; the place on such stream or source where the water is diverted, and the nature of the diverting works; the date when the first work for diverting the water was begun, and the nature of such work; the dimensions, grade, shape, and nature of the diverting channel as originally constructed; the date when the original diverting channel was completed; the date when the water was first used, the flow per second, and the time during which the water was used the first year; the date and nature of each subsequent change made in the original diverting channel; the flow per second of the water and the time it was used each year between each of the changes so made; the place where and the manner in which the water was first used; the nature of each subsequent change in the place or manner of use, and the place and manner of present use; and such other facts as will clearly define the extent and nature of the appropriation claimed. If the water claimed to have been appropriated is used for irrigation the statement shall show, in addition to the above required facts, the area of land irrigated the first year and each subsequent year; the total area at present irrigated, and its location in section, township, and range wherein it is situated; the character of the soil, and the kind of crops raised during the first year of use and the first year after each subsequent change of channel, and during the last year in which the water was applied. If the water claimed to have been appropriated is used for developing power the statement shall show, in addition to the above required facts, the number, size, and kind of water wheels employed; the head under which each wheel is operated; the extent of power produced, and the purposes for which and the places where it is used, and the point where the water is returned to the natural stream. If the water claimed to have been appropriated is used for mining the statement shall show, in addition to the above required facts, the name of the mine and the mining district in which it is situated; the nature of the material mined, and the place where the water is returned to the natural channel of the stream.

The Clerk of the said Court shall enter the statement in a book kept for that purpose, and shall file and preserve the same in his office, noting the date of filing. The filing of each statement shall

be considered notice to all persons of the claim of the party making the same, and any person failing to make and deliver such statement of claim to the Clerk of the Court within six months after the first publication of the notice provided for, shall be forever barred and estopped from subsequently asserting any rights theretofore acquired to the use of water of said river, system, or water source, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him; provided, that any claimant upon whom no other service of the notice shall be made than by publication in the newspaper may apply to the Court for permission to file a statement of claim after the time therefor has expired, and the Court, or Judge thereof, may extend the time for filing said statement, not exceeding one year from the first publication of said notice.[3]

The Court or the referee appointed is given the power to allow amendments to any statement or pleading.[4]

The statements required by the Acts in the other States which have adopted the statutory method of the adjudication of water rights by special proceedings for that purpose in the courts, are similar to the above. However, space will not permit an abstract of them here. But it must be borne in mind that all the essentials, as required by the particular statute of the jurisdiction in which the action is brought, must be specifically and definitely set forth in the statements of claims.

§ 1575. The process or notice of pending actions.—Some of the legislatures in the provisions for the statutory adjudication of water rights, in endeavoring "that the procedure for determining such rights should be as simple, effective, and inexpensive as practicable under the conditions,"[1] upon the subject of process or the service of notice of the pending of an action, in our opinion, have attempted to sacrifice the rights of the claimants to the water for the sake of obtaining a simple procedure.

In Colorado, however, the procedure in this respect is sufficient. The Act provides for three forms of notice: First, the Clerk of

[3] For the notice or process, see Sec. 1575.

[4] Comp. Laws of Utah, 1907, Secs. 1273, 1274, 1277, 1278.

[1] Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

the Court must give notice of the pendency of the action by publication as provided in the Act; second, ten printed copies of the notice must be posted in ten public places in the water district by the party or parties moving the adjudication; third, the party or parties moving such adjudication shall cause a printed or written copy of such notice to be served on every person, association, or corporation having any claim to the use of the water, by delivering such copy personally to the person to be served, if such person, by due diligence, can be found in the county of his residence. If such person can not be found as aforesaid, then constructive service is provided for by leaving the notice at his residence, or place of business, or by mailing a copy of the notice.[2] But, in Utah, the statute provides that the notice of the pendency of the action may be given by publication of the notice published at least once a week for three successive months, and that the clerk shall also mail, by registered letter, to each of the persons, corporations, or associations whose names and addresses are given in the preliminary statement filed by the State Engineer, a copy of such notice.[3]

In Idaho, the Act of 1903 [4] provided that the service of summons upon all parties should be by publication in a newspaper of general circulation published in the county where such decree is entered and through which the stream flows, and if in more than one county, then in some newspaper of general circulation published in each of said counties; that no affidavit to obtain order for publication of said summons, and no order of publication of the same should be required; and that the affidavit of the publisher, proprietor, business manager, or editor of such newspaper that such summons has been duly published in such newspaper at least once a week for a period of not less than one month, shall be conclusive evidence of such publication and of due service of said summons upon each and every one of the defendants. The Supreme Court, in the first case which was brought before it upon the proposition,[5] held that this portion of the Act was unconstitutional, upon the ground that the remedy by due course of law guaranteed by both the Federal and

2 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3286-3288; Rev. Stat., 1908, Secs. 3286-3288; Doll v. McEllen, —— Colo. App. ——, 121 Pac. Rep. 149.

3 Comp. Laws of Utah, 1907, Secs. 1271, 1272.

4 Idaho Laws, 1903, p. 223, Sec. 34.

5 Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

State constitutions requires that, before there is a judicial determination affecting the right to life, liberty, or property, process to obtain jurisdiction must be issued and personally served when practicable; and that constructive notice can only be made effective when actual service is impracticable. The Court, by Mr. Justice Sullivan, in the course of the opinion said: "If the power assumed by the legislature in the provisions of this Act in regard to the service of summons be sustained by this Court, it would lead to most fearful results, as it would enable them by special and limited law to settle controversies over titles to private property, and to take the property of one person against his consent and give it to another." [6]

We are in hearty accord with the views taken by the Supreme Court of Idaho upon the subject of the service of process or notice of pendency of these actions. These actions being largely *in rem*,[7] jurisdiction over the property can be acquired by the regular proceedings provided for by the statutes of all jurisdictions, even where the owner is not a resident, or the place of his residence not known. To quiet title to a tract of land, for the Court to acquire jurisdiction as against a non-resident claimant by constructive service, the proceedings must be had as prescribed by the general statutes upon the subject. It must be upon an affidavit or showing that the defendant is a non-resident and that personal service can not be had, in which must be also stated the last known address of the defendant; it must be upon an order of the Court for publication of the summons; it must be the mailing of a copy of the summons and complaint by the clerk to such defendant at his last known address; and it must be upon proof of both the publication and mailing in accordance with the statute. Now to prescribe by statute in actions to adjudicate the water rights, which make the same tract of land valuable, that the service shall be complete both as to non-resident and resident defendants, by publication merely, and that, too, without the showing of any necessity therefor, or upon any order of the Court, certainly exceeds the power of any legislature to enact, and still keep within the limitations of both the Federal and State constitutions. And, again, it is class legislation, permitting the service

[6] See, also, for the question of due process of law, Secs. 1568, 1571, 1572. For the service of process or notice in the adjudication before boards, see Sec. 1587.

[7] For the nature of these actions, see Sec. 1569.

of summons in these cases only by special, limited, and constructive service, that is not permitted by the general law of any State in other cases.

§ 1576. The proceedings on the hearing—Referees.—The Acts of all the States provide for a hearing of the cases brought to adjudicate water rights under these special proceedings. Notice of such hearing is required to be given all parties interested. Such hearing may be had before the Court itself; but, owing to the fact that these hearings are usually of great length and in some jurisdictions would practically require all of the time of the Court to the, at least, disarrangement of its other business, the Acts generally provide that the hearings may be had before a referee, or referees, to be appointed by the Court, with the usual powers.[1] At the trial the Court or referee must hear all the evidence that may be offered by any person, corporation, or association, in support or against any claim of appropriation, and a statement of which has been properly filed in accordance with the Act.

If the hearing is had before a referee, the usual procedure is that, after the completion of the testimony,[2] he is required to make an abstract thereof, also separate findings as to each claim submitted,

1 *Colorado.*—3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3291-3205; Rev. Stat., 1908, Secs. 3291-3205.

Utah.—Comp. Laws, 1907, Secs. 1275-1281.

Idaho.—Under the provisions of Sec. 4493, Ann. Code Civ. Proc., 1901 (Sess. Laws, 1901, p. 132), the Court or Judge has authority to appoint a referee to take the testimony in an action where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby. Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

See, also, as to powers of referees, New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693; Ft. Morgan C. Co. v. South Platte etc. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Kerr v. Dudley, 26 Colo. 457, 58 Pac. Rep. 610; Union Colony v. Elliott, 5 Colo. 371; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932.

2 It is held that the referee before his report leaves his hands can reopen the hearing for the purpose of considering a statement and evidence thereon, where the necessary witnesses could not be procured before the close of the hearing. New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989.

and the conclusions of law in relation thereto, and shall report the same to the Court, together with a form of a decree; and the Court, upon notice to all the parties on a day set therein may review the report and enter the decree thereon, or set it aside, alter, or modify the same, and enter the decree thereon so altered and modified.[3] It is also usually provided that all testimony taken before any referee shall be stenographically reported and the same, together with the other evidence in the matter, shall be transmitted to, preserved, and filed in the office of the Clerk of the Court, with the report of the referee. Exceptions to the findings and report of the referee may be taken by the parties as a basis of appeal to the Supreme Court.[4]

§ 1577. **The form and substance of decrees.**—The decrees rendered by the Court in these statutory proceedings to adjudicate water rights must not only be definite and certain, both as to the parties entitled to the use of the water and the quantity of water which they are entitled to use, as is the case of decrees under the ordinary equity procedure,[1] but also they must be rendered substantially in accordance with the formula as prescribed by the respective statutes. This tends, as can be readily seen, toward a uniformity of the forms of decrees within at least the same State.

In Colorado it is provided that the Court, in making such decree, shall number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order, according to the priority of appropriation of water thereby made by the original construction thereof, and shall also number the reservoirs in like manner, separately from ditches and canals, and shall further number each several appropriations of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs, by means of which such appropriations are made; whether such appropriation shall have been made by means of construction, extension, or enlargement.[2] The Court must also

[3] The findings of the referee may be modified either by the trial Judge or by the Supreme Court upon appeal. Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693.

[4] For decrees under these proceedings, see Secs. 1577-1579.

For appeal, see Sec. 1582.

[1] For decrees under the equity procedure, see Secs. 1558-1564.

[2] 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3290; Rev. Stat., 1908, Sec. 3290.

The same ditch may be awarded two or more priorities belonging to the same or different parties, based upon

make its award of the water to which each ditch is entitled by means of such appropriations, describing such amount by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and if not, by width, depth, and grade, and such other description as will most certainly and conveniently show the amount of water intended. The Court must further order that each and every party interested shall receive from the clerk a certificate, under the seal of the Court, setting forth the data contained in the decree as to his right. This certificate is for the information of the water commissioner of the district, and constitutes his warrant of authority for the distribution of water to the ditch involved.[3]

The decree must be expressly based upon beneficial use without waste, or else the actual beneficial use will be implied and read into the decree.[4] As was said in a recent Colorado case:[5] "The test is not necessarily the number of acres irrigated each year. If these tracts were farmed, and all the water necessary to irrigate them was beneficially used with reasonable diligence in the improvement of the land, it is sufficient. What was a sufficient amount of water, and was it applied to a beneficial use, is the test." But a decree is not void for its failure to fix the acreage under the ditch or canal.[6]

In Colorado it is held that a decree can not adjudicate the rights in more than a single water district, and provisions are made for the adjudication of rights in special districts, and when so adjudicated the decrees in each district are to be treated as a single de-

appropriations made at different times. Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

Where, however, in adjudicating priorities of water rights, the decree did not follow the statute in numbering the ditches and awarding the priorities, such errors are irregularities only, and do not render the decree void, so as to be subject to collateral attack. Lake Fork D. Co. v. Haley, 28 Colo. 513, 67 Pac. Rep. 158.

[3] Mills' Ann. Stat., 1905, Secs. 2403, 2408.

For the form of decrees, see Magill v. Hyatt, 20 Colo. App. 542, 80 Pac. Rep. 472; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406.

[4] X. Y. etc. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. Rep. 720; Doll v. McEllen, —— Colo. App. ——, 121 Pac. Rep. 149; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932.

[5] Weldon Valley D. Co. v. Farmers' Pawnee Canal Co., —— Colo. ——, 119 Pac. Rep. 1056.

[6] Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

See, also, Johnson v. Sterling Irr. Co., 49 Colo. 482, 113 Pac. Rep. 496.

cree.[7] Where the petition for the determination of priority of a water right merely asked for an adjudication "for irrigation and domestic purposes," a decree fixing the priority "for domestic, household, stock, and other beneficial purposes," is invalid as going beyond the prayer of the complaint.[8]

In Utah it is provided that the decree shall determine and establish the rights of the several claimants to the use of the water of the river system or water source; and, among other things, shall set forth the name and postoffice address of the person, corporation, or association entitled to the use of water; the quantity of water in acre feet, or the flow of water in second feet to be used; the purpose for which the water is to be used; the time during which the water is to be used each year; the name of the stream or other source from which the water is diverted; the place where it is diverted; the priority number of the right; the date of the right, and such other matter as will fully and completely define the right of such person, corporation, or association to the use of the water. If no appeal is taken from the decree within six months after the same has been entered, or, if the case is appealed within thirty days after final decree is entered, the clerk must issue to each person, corporation, or association a certificate in duplicate, setting forth the substance of the decree, as specified above. One copy is to be given to the appropriator, which must be recorded in the office of the County Recorder of the county in which the water is diverted from its natural channel, and the other to be delivered to the State Engineer, and filed in his office as a part of the records thereof.[9]

The statutes of the other States adopting this mode for the adjudication of water follow more nearly the form of decrees as set forth in the Utah law, than that in Colorado. The radical difference is that in Colorado the award of the water is made to the ditches and canals, or reservoirs, while in the other States the award is made to the persons, corporations, or associations using the water. Under the Colorado rule it is, therefore, held that in decrees under the statutory proceedings to adjudicate water rights, the only award

[7] Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

[8] Doll v. McEllen, —— Colo. ——, 121 Pac. Rep. 149.

[9] Comp. Laws Utah, 1907, Secs. 1282, 1284.

See, also, Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

which can be made is to the respective ditches and canals, and that the rights to the use of the water by the individual consumers, under any ditch, as between themselves, can only be determined in a second action to quiet title.[10] In the other States the respective rights of all, whether they are ditch owners or consumers, may be determined in the same action, provided that the issues in the case, as set forth in the pleadings or statements of claims, call for such an adjudication.

In Idaho the statute requires that the water decreed be made appurtenant to certain lands, and that such lands must be particularly described.[11] But in Colorado a decree awarding a certain priority of a certain amount of water to a particular canal does not attempt to attach priorities to any particular land.[12] A decree which is altered before entry, is held to be inadmissible in evidence.[13]

Costs may be assessed against the parties, at the discretion of the trial Court.[14]

§ 1578. Decrees as to inchoate rights.—At the time of the adjudication of water rights under a certain source of supply, it has often happened that the trial Court has found that certain claims,

[10] An adjudication decreeing a certain priority in a certain amount of water to a particular canal is not intended to determine the rights of the consumers under that canal, except incidentally as against other canal owners. O'Neil v. Ft. Lyon C. Co., 39 Colo. 487, 90 Pac. Rep. 849; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; Farmers' Independent D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

See, also, jurisdiction of courts, subject matter, Sec. 1572.

[11] But this is held not to be necessary where certain water is awarded and time given by the statute to apply it to a beneficial use. Farmers' etc. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

That a water right can not be made an inseparable appurtenance to a certain tract of land, even in Idaho, see Secs. 1015, 1016.

[12] O'Neil v. Ft. Lyon C. Co., 39 Colo. 487, 90 Pac. Rep. 849.

For form of decrees in Oregon, see Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Seaweard v. Duncan, 47 Ore. 640, 84 Pac. Rep. 1043.

[13] Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

[14] Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321; Farmers' etc. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 532, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

at the time of the rendition of the decree, were inchoate, or in an uncompleted condition. But these claims, under the Arid Region Doctrine of appropriation, if properly instituted, and if finally completed, and the water claimed thereunder actually applied to some beneficial use or purpose within a reasonable time, or within the time fixed by the statute, merge into valid and complete rights. The courts have at times been at a loss as to just what kind of a decree to render in such cases as to these inchoate rights. If such claims have not been abandoned, or forfeited under some statutory provision, that they should be recognized, in some manner, is conceded by all. The recognition of these inchoate rights was not provided for by the Colorado statute for the adjudication of water rights, and it was held that the District Court had no authority in such proceedings to give a definite decree in favor of a ditch not then completed; and, if such a decree was to be entered, that the Court would require not only that the ditch be completed, but that the water diverted through it be actually applied to a beneficial use, before awarding to it any priority.[1] In a later case, the Court citing its previous ruling, said: "We have decided that in these special proceedings the Court is without authority to award a ditch or canal, in advance of its completion, any definite quantity of water,[2] but we have not decided it was wrong for the Court to fix a date of priority of a canal begun, but not completed, at the time the decree was rendered."[3] Therefore, the Court holds that, in such cases, the Court may render a decree definitely fixing the priority of the inchoate right in point of time; and, as to the quantity of water, the decree may be made conditional upon the completion of the ditch or canal and the application of the water to a beneficial use, within a reasonable time after the inception of the right, to be determined in a subsequent proceeding to make the decree final. As was said in a recent case by the Supreme Court, referring to a similar decree: "By that decree, therefore, the existence or non-existence of a vested or completed interest in this water was left open to future ascertainment and decision in some appro-

1 Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Water Supply etc. Co. v. Larimer & Weld etc. Co., 24 Colo. 332, 51 Pac. Rep. 496.

2 Citing Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505.

3 *In re* Priorities of Water Rights in Dist. No. 12, 30 Colo. 270, 80 Pac. Rep. 891.

priate action or proceeding."[4] Or, as stated by the Court in a similar case: "It may be, and possibly is, the better practice to withhold entirely a decree, as to any element, until the ditch is finished and the water actually and beneficially applied."[5]

In Idaho the statute requires the amount and the time for future application and use of the water, in case such a claim is made, to be fixed by the decree. The Federal Court, in construing this statute, upheld the same.[6]

§ 1579. Construction and effect of decree.—A Court must take notice of its former decree or adjudications of priorities of water rights in a given district and each subsequent hearing or adjudication is supplementary to the original, and each grant is related to every other grant, though to a different party.[1]

One of the most important subjects for the Court to determine and decree in these actions is in regard to the quantity of water awarded to each party. As is the case in the ordinary equity proceedings for the same purpose, only so much water should be awarded to any party for any use as is reasonably necessary for that use or purpose.[2] As was held by the Supreme Court of Colorado, no waste of water should be countenanced by the courts, and decrees for its use should be withheld in the absence of evidence showing, *inter alia*, with reasonable certainty, the quantity continuously applied to some beneficial use;[3] and, in another case, that where the decree is silent upon the subject, that beneficial use will

[4] Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

See, also, Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Magill v. Hyatt, 20 Colo. App. 542, 80 Pac. Rep. 472; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891; Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528; Crawford etc. Co. v. Needle Rock D. Co., 50 Colo. 176, 114 Pac. Rep. 655.

[5] *In re* Priorities of Water Rights in Dist. No. 12, 30 Colo. 270, 80 Pac. Rep. 891.

[6] Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37.

[1] Doll v. McEllen, —— Colo. App. ——, 121 Pac. Rep. 149.

[2] For decrees adjudicating water rights in equity, see Secs. 1530-1566.

[3] X. Y. Irr. D. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. Rep. 720; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932.

be implied and read into the decree.[4] Again, as said by Mr. Justice Frick, in a Utah case: "The ultimate question for determination, however, is not how much water appellants required, but what amount they had applied to a useful and beneficial purpose for a term of years prior to the time when respondents made their appropriation."[5] The decree rendered by the Court in these cases does not grant any new property rights, but merely embodies in a permanent form the evidence of those rights previously acquired.[6] As was stated in a Colorado case: "No one is entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actually needs."[7] Where the Court found that the appellee made two distinct appropriations of water for a reservoir, the first on March 5, 1901, of 200 cubic feet per second, and the second on October 22d, of the same volume, a decree awarding appellee 400 cubic inches per second, as to March 5, 1901, was erroneous.[8] A diversion and a promise to use in the future will not support the decree.[9] Neither does the decree guarantee that the right awarded shall be a perpetual right regardless of the fact whether or not the water shall be used for a beneficial use or purpose. But the owner of the right is subject to its loss by abandonment by the failure to use the water subsequently to the decree. As stated by the Colorado Court: "It does not purport to be a perpetual insurance or guaranty to the owner of the ditch against a total or partial loss of his priority by abandonment. In that way he may lose the rights resulting from an appropriation and evidenced by the decree, just as he may where they have been acquired by purchase and conveyed by deed."[10] Where the decree is susceptible of other meanings, one of which would be in accordance

For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

4 Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

5 Salt Lake City v. Gardner, —— Utah ——, 114 Pac. Rep. 147.

6 New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

7 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

See, also, Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Water Supply etc. Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

8 Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

9 Ft. Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

10 Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

with the law by recognizing a valid appropriation only upon the application of the water to a beneficial use, and others would disregard the law in that respect, the former interpretation will be adopted.[11]

In Idaho these conditional decrees are especially provided for in the Act, and where a company has works capable of diverting more water than it is then applying to a beneficial use, the decree shall allow it four years thereafter in which to apply the water to a beneficial use.[12]

A decree settling the rights on a particular source of water supply does not prevent the turning developed water into such stream and taking it out again for use below.[13] And, where the flow of a stream is more at certain seasons of the year than at others a decree was sustained which provided that a senior appropriator should permit all the water in excess of his prior appropriation to flow down to the junior appropriator, whenever such excess was sufficient to be beneficially used by him.[14] One effect of a decree is that where one has received the water according to the terms of the award therein made, he is afterward estopped from repudiating or attacking the decree.[15]

§ 1580. The review and modification of decrees—On petition of parties to the action.—The Colorado statute provides that the District Court, or the Judge thereof in vacation, shall have the power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a re-argument or review, with or without additional evidence, of any decree made under the provisions of the Act; but no such review or re-argument shall be ordered unless applied for by petition or otherwise, within two

11 Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Crawford etc. Co. v. Needle Rock D. Co., 50 Colo. 176, 114 Pac. Rep. 655.

12 Farmers' etc. Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 77 C. C. A. 37.

13 Ripley v. Park etc. Co., 40 Colo. 129, 90 Pac. Rep. 75.

For developed water, see Secs. 1205, 1206.

14 City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053.

15 Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120; Denver etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; Handy Ditch Co. v. South Side Ditch Co., 26 Colo. 333, 58 Pac. Rep. 30; Doll v. McEllen, —— Colo. App. ——, 121 Pac. Rep. 149.

years from the time of entering the decree complained of.[1] It is held that the petition for review must be based on facts on which the Court arrived at its conclusions for the decree, and not upon the Court's conclusions of law.[2] In other words, good cause must be shown before the review will be granted. No re-argument or review can be had unless applied for within two years from the entry of the decree, in the absence of fraud.[3] But where an application is made, a rehearing may be granted, for, as said in a recent case, "the decree when first made is not final, because we find provisions for re-argument and review, and for appeals."[4] And a party, whether or not he applies for a review of the decree under this provision, does not waive his right to appeal from the decree.[5] Where such a proper petition for review is filed within the time specified by the Act, and is granted, the Court may set aside the decree pending its final determination, or permit it to stand until it shall make its final entry, since the power of the Court over the proceedings and decree is full and complete, and co-extensive with that which any Court has over its judgments and decrees.[6] It will be noticed that the above provision, Section 3318 of the Colorado statute, applies only to the parties of the action. And it is held that even such a party, who knowingly neglected to notify the Court of his objec-

1 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3318; Rev. Stat., 1908, Sec. 3318.

2 Crippen v. Burroughs, 27 Colo. 155, 60 Pac. Rep. 487, holding that the petition or application for rehearing must state facts, showing that the party has been aggrieved, to enable the Court to determine by examination of the petition whether, if the facts alleged therein are true, the decree should be amended or modified.

See, also, Rio Grande etc. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726; Peterson v. Durkee, 15 Colo. App. 258, 62 Pac. Rep. 370.

3 *In re* Priorities of Water Rights in Dist. No. 12, 33 Colo. 270, 80 Pac. Rep. 891; Peterson v. Durkee, 15 Colo. App. 258, 62 Pac. Rep. 370; Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794; Magill v. Hyatt, 20 Colo. App. 542, 80 Pac. Rep. 472; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

4 Ft. Lyon Canal Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

5 Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753, where application for review was made; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601, where application was not made.

6 Peterson v. Durkee, 15 Colo. App. 258, 62 Pac. Rep. 370; Magill v. Hyatt, 20 Colo. App. 542, 80 Pac. Rep. 472.

tions to the decree, which existed at the time it was rendered, was not entitled thereafter to file such a petition for rehearing.[7] In a proceeding to reopen a decree, under this provision, the statement filed by a claimant in the original adjudication proceedings, may be introduced along with the decree to enable the Court to interpret or construe the decree.[8]

§ 1581. Modification of decrees—On independent action by those not parties to the action.—There is another provision of the Colorado statute which applies only to persons, associations, or corporations who were not parties to such an action to adjudicate priorities.[1] This section, in effect, provides that nothing in the Act or in any decree rendered under the provisions thereof, shall prevent any person, association, or corporation from bringing or maintaining any suit or action whatsoverer hitherto allowed in any Court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under the Act in the water district in which such rights may be claimed.[2] And the following section also provides that,[3]

[7] Rio Grande etc. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726.

[8] New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989.

[1] 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3313; Rev. Stat., 1908, Sec. 3313.

[2] The latter part of Section 3313 also provides: "Save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall affect the distribution of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the Court or Judge determining such priorities, which notice shall be in such form and so given as the said Judge shall order."

For the construction of the above section, see Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 Pac. Rep. 794.

after the lapse of four years from the time of rendering a final decree in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in cases before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to the water in such water district adverse or contrary to the effect of such decree. These provisions are held to apply only to persons, associations, or corporations who were either not parties to the original action,[4] or who were parties, but whose rights grow out of matters arising subsequent to the decree in the original action.[5] These provisions fix a special limitation of four years in such cases in which an independent action may be brought by such parties,[6] as to the rights and matters not tried and finally adjudicated in the original action;[7] and, if such action is not brought within the time specified, by such parties, they are deemed to have acquiesced in

3 Mills' Ann. Stat., 1905, Sec. 2435; 3 Colo. Stats. Ann., 1911, Sec. 3314.

4 "Section 2434 does not permit one who was a party to an adjudication proceeding to maintain an independent action against another party to such a proceeding for the purpose of fixing rights different from those determined in the adjudication proceedings, because such proceedings are, as to such parties, *res judicata*." Ft. Lyon Canal Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

This section is held, also, not to apply to parties to the action who failed to avail themselves of the statute for rehearing, under Section 2425, discussed above. Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794.

See, also, Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Montrose etc. Co. v. Loutsenheiser D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891; Broad Run etc. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Johnson v. Sterling etc. Co., 49 Colo. 482, 113 Pac. Rep. 496.

5 Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Montrose C. Co. v. Loutsenheizer etc. Co., 23 Colo. 233, 48 Pac. Rep. 532.

6 Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770.

7 Handy etc. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Montrose etc. Co. v. Loutsenheizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Boulder etc. Co. v. Lower Boulder etc. Co., 22 Colo. 115, 43 Pac. Rep. 540.

the decree, and are forever barred from setting up any claim to the contrary.[8]

But it is held that neither Section 3318 nor Section 3313 of the Colorado statute, discussed above, is applicable to cases where the priority of right was determined therein, but the decree was conditional as to the quantity of water, from the fact that the canal through which it was made was incomplete when the decree was rendered and, therefore, the right to the water was inchoate.[9] It is also held that the limitation of four years set by the statute in the above section, does not apply to an action to set aside a decree upon the ground of fraud, but that such an action will lie, under the Colorado statute, to within three years after the discovery of the fraud.[10]

The object of the passage of the provisions above discussed and in the previous section, as stated by the Supreme Court of Colorado, was that: "The doctrine of priority to the use of water for irrigation was not, at the time of the passage of these Acts, and is not yet, fully developed. To have given the statutory decree at once the force and effect of a judgment *in rem* would have been contrary to the best interests of the State, which require an economical use of the water in order that the largest acreage may be brought under cultivation. Lands, when first irrigated, require more water than after the soil has become thoroughly saturated by repeated flooding; and the exact amount required to properly irrigate a given tract of land can only be determined by experiment. Hence, the necessity for the various provisions of the statute allowing a decree to be opened within certain fixed periods after its rendition. A conclusive adjudication at the time when the practical application of the proceedings was a matter of conjecture might have been disastrous. To guard against such results as these, it is not unreasonable to suppose that the legislature would make some provision."[11]

[8] Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

[9] *In re* Priorities of Water Rights in Dist. No. 12, 33 Colo. 270, 80 Pac. Rep. 891.

See, also, Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

For decrees as to inchoate rights, see Sec. 1578.

[10] Peck Lateral D. Co. v. Pella Irr. D. Co., 19 Colo. 222, 34 Pac. Rep. 988.

[11] Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535.

§ 1582. Appeals from judgments and decrees.—The statutes of all the States, providing for special proceedings for the adjudication of water rights, also provide for appeals from the decree and final judgment of the District or trial Court, to the Supreme Court of the State. In some of the States no special mode of procedure is provided for. In Utah it is provided that the decree so entered by the District Court may be appealed from to the Supreme Court, in like manner as from decrees and judgments in other cases; provided, that such appeal shall be taken within six months after the entry of said decree, and all proceedings on appeal shall be conducted according to the provisions of the code of civil procedure, and the practice on appeals from the District Court to the Supreme Court.[1] This mode of appeal is also followed in the majority of the other jurisdictions.[2]

In Colorado the Acts provide for special proceedings for appeal in these cases.[3] It is provided, in effect, that any party or parties representing any ditch, canal, or reservoir, or any number of parties representing two or more ditches, canals, or reservoirs, which are affected in common with each other by any portion of the decree, by which he or she or they may feel aggrieved, may have an appeal from said District Court to the Supreme Court.[4] The party or

1 Comp. Laws Utah, 1907, Sec. 1283.

2 For appeals under the ordinary equity proceedings, see Sec. 1565.

3 3 Colo. Stat. Ann., 1911, Secs. 3307-3312; Rev. Stat., 1908, Secs. 3307-3312; Mills' Ann. Stat., 1905, Secs. 2427-2432.

4 Prior to the consolidation of the Colorado Court of Appeals with its Supreme Court it was held that such appeals would lie only to the Supreme Court, upon the ground that such actions related to the freehold. Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

See, also, Hess v. La Junta etc. Co., 25 Colo. 515, 55 Pac. Rep. 728; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753.

A party does not waive his right to an appeal regardless of the fact as to whether or not he applied for a review of the decree under the provisions therefor. Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601; Kerr v. Dudley, 26 Colo. 457, 58 Pac. Rep. 610.

As the statute only applies to the adjudication of water rights as between ditches, canals, or reservoirs, the appeal statute only authorizes an appeal from such a decree by parties representing such a ditch or other works. The consumers under such a ditch, etc., are not entitled to appeal because of the failure of the owner of the works to perfect his appeal, where such failure is due to a mistake in the procedure regulating the appeal, and not to fraud or in-

parties joining in such appeal shall file a statement in writing, verified by affidavit in the District Court, which statement shall show that the appellants claim a valuable interest in the ditch, canal, or reservoir, also stating the name or names, or otherwise the description of the same, and the name or names, or otherwise the description of any one or more other ditches, canals, or reservoirs, which by said decree derive undue advantage in respect to priority as against that of those represented by appellants; and shall also set forth the name or names of the party or parties claiming such other one or more ditches, canals, or reservoirs affected in common by said decree adversely to the interest of appellant or appellants, and praying that an appeal be allowed against such other parties appellees. If the Court, or Judge in vacation, on examination, finds such statement in accordance with the statement of claim filed by the parties named as appellees, he shall approve the same and make an order allowing the appeal, and fix the amount of the appeal bond, which shall be conditioned for the payment of costs, which may be awarded against them or any of them in the Supreme Court, and which bond must be duly executed by the appellants.[5] Such order must be entered of record, and the appellants shall cause a certified copy thereof to be served on each of the appellees in the same manner as summonses are served, and shall also cause the said order to be published in the same manner as the original notices of suit are required to be published. The appellants shall file the transcript of record of the District Court with the Clerk of the Supreme Court at any time within six months after the appeal shall be allowed.[6] Only so much of the decree appealed from, and so

tentional neglect of the consumers. Randall v. Rocky Ford D. Co., 29 Colo. 430, 68 Pac. Rep. 240.

See, also, jurisdiction, subject matter, Sec. 1572.

[5] See Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753.

[6] It will be noticed that the time within which an appeal must be taken is not fixed by the statute, but it is held that the appeal can only be taken within two years after the decree was entered. Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753.

It is also held that, after the Judge of the District Court has signed the order allowing the appeal the following steps prescribed by the statute must be taken within the time as therein prescribed. Such provisions are mandatory, and the Supreme Court has no power to grant any extensions, but must dismiss the appeal if a motion therefor is made. Baer Bros. etc. Co. v. Wilson, 32 Colo. 500, 77 Pac. Rep. 245.

much of the evidence as shall affect the appropriations of water claimed of the several ditches, canals, and reservoirs mentioned in the order allowing the appeal, need be copied into the bill of exceptions.[7]

The Supreme Court is given the power to make any and all rules as may be necessary and expedient in furtherance of the Act, as well as to the preparation of the cases for submission as to supplying deficiencies of record, if any, and for avoiding unnecessary costs and delay. The Supreme Court is also given the power to make such a decree in the matters involved in the appeal as should have been made by the District Court, or direct in what manner the decree of that Court shall be amended.[8] Also, on the dismissal of such appeal, or on affirming or reversing the parts of the decree appealed from, the Supreme Court shall award costs, as in its discretion shall be found and held to be equitable.

The mode of the taking of appeals in such cases, where special statutes are provided therefor, must be in accordance with such special statutes, and the provisions of the code of civil procedure does not apply to such cases.[9] In Colorado the filing of the statement of claims with the District Court is the only method by which the appeal can be allowed.[10] And the regulations prescribed by the

The notice must be published within the time prescribed. Napier v. Glenwood etc. Co., 49 Colo. 208, 112 Pac. Rep. 323.

See, also, Needle Rock D. Co. v. Crawford-Clipper D. Co., 32 Colo. 209, 75 Pac. Rep. 424.

7 Catlin etc. Co. v. Burke, 22 Colo. 419, 45 Pac. Rep. 387, holding that it is only necessary to incorporate all the evidence bearing upon the particular point in question in the bill of exceptions.

But objections and exceptions taken on the hearing of the referee's report are a part of the record and can not be stricken therefrom on appeal. Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753.

8 See Great Plains W. Co. v. Lamar C. Co., 31 Colo. 96, 71 Pac. Rep. 1119; Croke v. American Nat. Bank, 18 Colo. App. 3, 70 Pac. Rep. 229; Magill v. Hyatt, 20 Colo. App. 542, 80 Pac. Rep. 472; Means v. Stow, 31 Colo. 382, 73 Pac. Rep. 48.

As to rules, see La Junta etc. Co. v. Hess, 25 Colo. 513, 55 Pac. Rep. 729; Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729; Doll v. McEllen, —— Colo. App. ——, 121 Pac. Rep. 149.

See, also, for appeals in ordinary equity cases, Secs. 1565.

9 Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Hess v. La Junta etc. Co., 25 Colo. 515, 55 Pac. Rep. 728; Means v. Stow, 31 Colo. 382, 73 Pac. Rep. 48; Means v. Gotthelf, 31 Colo. 168, 71 Pac. Rep. 1117.

10 Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753.

statute for taking such an appeal are mandatory, and can not be waived or ignored by the parties.[11] As in equity cases [12] it is the duty of the Appellate Court to weigh all the evidence with a view to a just determination of the controversy.[13] But the Court will not disturb the decree of the trial Court unless it is well satisfied that the judgment is so unsupported by the evidence as to be against its manifest weight, or the record compels the conclusion that the judgment was the result of those influences, motives, or considerations which the law does not permit to control the findings of either a Court or jury.[14] And, when the question depends upon the weight of the evidence for its determination, and the evidence is conflicting, or of a vague and uncertain character, the Appellate Court, as in other cases, will not disturb the decree.[15]

§ 1583. **The decree as res judicata.**—The decree of the Court in these statutory proceedings to adjudicate water rights, as is the case in ordinary equity actions,[1] as to the matters properly embodied therein, unless the same be appealed or proceedings be taken to reopen and review the same, in accordance with the provisions of the statute, and, if so taken, after they have been finally determined, is *res judicata* between the parties,

11 Napier v. Glenwood etc. Co., 49 Colo. 208, 112 Pac. Rep. 323; Needle Rock D. Co. v. Crawford-Clipper D. Co., 32 Colo. 209, 75 Pac. Rep. 424; Baer Bros. etc. Co. v. Wilson, 32 Colo. 500, 77 Pac. Rep. 245; Haines v. Fearnley, —— Colo. ——, 117 Pac. Rep. 162.

12 For appeals in equity cases, see Sec. 1565.

13 Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Childs v. Lowenbruck, 2 Colo. App. 92, 29 Pac. Rep. 1014; La Jara etc. Assn. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; X. Y. Irr. D. Co. v. Buffalo Creek Irr. Co., 25 Colo. 529, 55 Pac. Rep. 720; affirming *Id.*, 9 Colo. App. 438, 49 Pac. Rep. 624.

14 Bugh v. Rominger, 15 Colo. 452, 24 Pac. Rep. 1046.

An objection that a referee failed to take the oath prescribed will not be considered when made for the first time on appeal. Kerr v. Dudley, 26 Colo. 457, 58 Pac. Rep. 610.

A decree based on a statute subsequently declared invalid will be reversed on appeal. Rio Grande etc. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726.

15 Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856; Ripley v. Park Center etc. Co., 40 Colo. 129, 90 Pac. Rep. 75.

For the consideration of the evidence on appeal in equity cases, see Sec. 1565.

1 For *res judicata* in equity actions, see Secs. 1563, 1564.

and thereafter proceedings can not be taken to reopen the decree by one of the parties to the action, except in case of fraud, for the purpose of making any change or correction in the decree.[2] It therefore follows that a statutory decree is *res judicata* as to the quantity of water awarded to any particular ditch or canal, and can not be attacked collaterally.[3] It is also held that even a mistake of the District Court in computing the carrying capacity of a ditch can not be corrected by a collateral attack upon the decree, made

[2] For decrees adjudicating water rights in equity, see Secs. 1557-1564.

A general adjudication of water rights under statutory provisions therefor is conclusive as to parties to the proceedings properly served with notice, and unless impeached for fraud, or application for review thereof is made by the parties within two years, the provisions of the decree are final and binding. Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Ft. Lyon Canal Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023, where it is held that Section 2434 does not permit one who was a party to the action to maintain an independent action against another party to such proceeding for the purpose of fixing rights different from those determined in the decree, because such proceedings are, as to such parties, *res judicata*.

See, also, Louden C. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Montrose C. Co. v. Loutsenheizer etc. Co., 23 Colo. 233, 48 Pac. Rep. 532; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 Pac. Rep. 794; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Water Supply etc. Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Farmers' Union D. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120; Lake Fork etc. Co. v. Haley, 28 Colo. 513, 67 Pac. Rep. 158; Ft. Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Lower Latham D. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. Rep. 483; Doll v. McEllen, —— Colo. App. ——, 121 Pac. Rep. 149.

[3] Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945; New Mercer D. Co. v. Armstrong, 21 Pac. Rep. 357, 40 Pac. Rep. 989; Boulder etc. Co. v. Lower Boulder etc. Co., 22 Colo. 115, 43 Pac. Rep. 540; Platte Valley etc. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060.

after the time for its reformation and review of the trial Court has gone by, and when also the time for appeal has expired.[4] In fact, all the matters adjudicated in the trial and covered by the decree, are *res judicata*. Therefore, the decree is *res judicata* as to the question of abandonment prior to the date of the decree.[5] But the decree does not affect the question of abandonment after the same was rendered, for the reason that a decreed water right may be abandoned.[6]

In Colorado a decree in an action between ditch companies is conclusive as to the rights awarded to the respective ditches on the persons or consumers receiving water from the same.[7] Again, in Colorado, owing to the provisions for rehearing,[8] independent suits by those not parties to the original action,[9] and appeal, a decree in that State can not be regarded as final until the time has elapsed sufficient to bar such matters, and those pending in the meantime have been fully determined. Notwithstanding these provisions, it is held that a decree, when first entered, is *res judicata* as between the parties to the action, and as to the subject matter covered by such decree, until the same is attacked, reviewed, or modified in the manner provided by the statute.[10] And, as respects decrees entered in different suits for different irrigation districts, but involving the

4 Water Supply etc. Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

5 O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945; Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

6 Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1121; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. Rep. 101.

7 Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

See, also, Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67; affirming *Id.*, 11 Ariz. 99, 89 Pac. Rep. 512, holding that a decree is *res judicata* as to canal owners, and the water users under such canals in a subsequent controversy over the respective rights of the appropriators of the waters of the river.

8 See Sec. 1580.

9 See Sec. 1581.

10 "The decree when first entered is not final, because we find provisions for reargument and review, and for appeals. Notwithstanding these provisions, however, the decrees are *res adjudicata* between those who were parties to, or participated in, the proceedings in which such decrees were rendered, and can only be attacked, reviewed, or modified in the manner provided by law. Ft. Lyons etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

right to the use of the water from the same common source of supply, the Colorado Court holds that the resulting decrees are conclusive and binding upon all those within the same water district, and *prima facie* correct as between the rights in the different water districts, and become conclusive and *res judicata* as to those rights upon the lapse of the four-year statute of limitations, or upon the decree of the Court in an independent action, as provided for under Section 2434.[11]

However, the decrees rendered in these special adjudication proceedings, as is the case with other decrees, are not *res judicata* as to persons or companies who were not parties to such proceedings.[12] The same may be said as to matters not adjudicated by the decree, or as to matters arising subsequent thereto.[13] Decrees rendered as to inchoate rights are not *res judicata* as to such rights.[14] But one who was a party to the action, and who submitted without objection to the jurisdiction of the Court, and accepted the benefits of the decree for several years thereafter, will be estopped from assailing or

11 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3313; Rev. Stat., 1908, Sec. 3313; Mills' Ann. Stat., 1905, Sec. 2434; Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483; Ft. Lyon C. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Farmers' Independent D. Co., v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

12 See Secs. 1563, 1564; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80.

Where the enforcement of a judgment violates his rights, a stranger thereto may maintain suit to enjoin it. Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794.

13 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1121; Montrose v. Loutsenheizer etc. Co., 23 Colo. 233, 48 Pac. Rep. 532; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149.

Such decree is not conclusive as to other reservoirs than those the rights to which were adjudicated, nor as to parties not parties to the prior proceeding. Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

14 For decrees as to inchoate rights, see Sec. 1578; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891; Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Crawford Clipper D. Co. v. Needle Rock D. Co., 50 Colo. 176, 114 Pac. Rep. 655.

repudiating the same upon any ground.[15] These decrees, however, are subject to direct attack for fraud.[16]

§ 1584. The enforcement of decrees and judgments.—As the statutory adjudication of water rights is but one feature of the laws of State control,[1] in those statutes which provide for such special proceedings for adjudication, will also be found provisions for the distribution of the water by State officials to the parties awarded the right to the use of the same in accordance with the decrees. In Colorado, by the Act of 1887, it is made the duty of the superintendents of the water divisions of the State to distribute the water in accordance with the decrees of the Court, without regard to the water districts in which such decrees may have been entered.[2] The power conferred upon the superintendent is executive and not judicial.[3]

The various decrees of the water districts included therein are treated as one and the water distributed accordingly.[4]

[15] "And, even if the water decree of 1897 were void, plaintiff in error would now be estopped from repudiating or assailing the same." Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120.

See, also, Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Denver City etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Boulder & Weld etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540.

[16] Peck etc. Co. v. Pella Irr. D. Co., 19 Colo. 222, 34 Pac. Rep. 988.

[1] For State control, see Chap. 68, Secs. 1337-1367.

[2] The special proceedings outlined by Mills' Ann. Stat., Sec. 2421, providing that no recognition of any priority of water rights shall be regarded by any water commissioner in distributing water until claimant by application to the proper court has obtained leave and made proof thereof and received his decree therefor, is not a proper one to sustain a claim of priority under Sec. 2268 (Rev. Stat. 1908), giving priority to the owner of meadow land watered by the natural overflow of the stream whose supply is diminished by the construction of irrigation ditches by others, where such priority would relate back to an earlier date, and so injure the rights of others whose priorities had been adjudicated in statutory proceedings. Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755.

[3] Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

[4] Ft. Lyon etc. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; New Cache La

In Colorado, as the decree is deemed to be one strictly *in rem*, it is held that it can not be enforced by contempt proceedings against one who prevents the water commissioner from enforcing it.[5] In Oregon it is held that owing to the difficulties usually encountered in the enforcement of decrees, where there are many conflicting interests, the trial Court has the power, when deemed advisable, to enter such supplemental decree, not inconsistent with the decree of the Appellate Court, as may be necessary to make the decree of the Appellate Court effective.[6] In all of these States, however, there are provisions making it a misdemeanor for a person to interfere with the distribution of the water by the respective State officers whose duty it is to distribute the same, and also for the taking of water by a person who is not entitled to its use.[7]

Upon the civil side, for the protection of a decreed right, the parties may resort to the ordinary actions in equity to enjoin in subsequent independent suits acts in violation of the rights granted by an adjudication decree. And all questions determined by a decree adjudicating such rights, affirmed on appeal, are *res judicata*, for the purpose of such subsequent suit against any of the parties thereto, to enjoin them from taking more water than they were awarded under such decree.[8]

In all actions brought for the enforcement of decreed rights, the State officials whose duty it is to distribute the water to the respective parties entitled thereto, may be joined as parties defendant, together with all parties, who it is claimed are using the water

Poudre Irr. Co. v. Water Supply Co., 29 Colo. 469, 68 Pac. Rep. 781; Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79; Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. Rep. 556; White v. Farmers' Highline etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828.

But see Johnson v. Sterling, 49 Colo. 482, 113 Pac. Rep. 496.

5 Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79.

6 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, Taylor v. Hulett, 15 Idaho, 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

7 For the laws of the respective States, see Part XIV.

For the enforcement of decrees under the ordinary equity procedure, see Sec. 1566.

8 Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120; Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 Pac. Rep. 794.

For protection of rights by injunction, see Chap. 81, Secs. 1596-1647.

in violation of the decree.[9] A decree may be enforced by mandamus against the water official having charge of the distribution of the water.[10] An action for an injunction will also lie against acts in violation of an adjudicated decree.[11]

[9] McLean v. Farmers' High Line etc. Co., 44 Colo. 184, 98 Pac. Rep. 16, holding that necessary parties are all who have an interest in the subject and the object of the action, and all persons against whom relief must be obtained in order to accomplish the object of the suit.

See, also, Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

See, also, Boulware v. Parke, 4 Idaho, 692, 43 Pac. Rep. 680.

See, also for the protection of rights by injunction, Chap. 81, Secs. 1596-1647.

[10] Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75; Northern Colorado Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23.

See, also, Parker v. Small, —— Ore. ——, 120 Pac. Rep. 393.

[11] Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120.

CHAPTER 80.

DETERMINATION OF WATER RIGHTS BY BOARDS.

§ 1585. Scope of chapter.
§ 1586. Statutes for the determination of water rights by boards—Nature of proceedings—Constitutionality of Acts.
§ 1587. Procedure—Process or notice.
§ 1588. Procedure—The filing of statements of claims.
§ 1589. Procedure—The hearing by the board.
§ 1590. Procedure—The award—Certificates.
§ 1591. Review of decisions of boards by the courts—Appeal.
§ 1592. Jurisdiction of courts in cases not submitted to board.
§ 1593. Conclusiveness of the determination or award by the board.
§ 1594. The enforcement of awards by board.
§ 1595. Criticism of system for determination by boards.

§ 1585. Scope of chapter.—Having discussed in the preceding chapters of this work the adjudication of existing water rights by the courts,[1] there remains but one method for the determination of these rights. Some of the Western States, by statutory provisions, have provided for the determination of existing water rights, in the first instance, by public officials or public governing boards, with the right of appeal from their decision to the courts. The first State to adopt this system was Wyoming,[2] and the States of Nebraska and Nevada have, with more or less modification, adopted the Wyoming plan. In the present chapter we will discuss these proceedings for such determination.

In Oregon the determination is made in the first instance by the Board of Control, whose determination is afterward submitted to the Court for affirmation.[3]

§ 1586. Statutes for the determination of water rights by boards—Nature of proceedings—Constitutionality of Acts.—Under the laws of State control, or State administrative laws, discussed in a previous chapter,[1] we have seen that there are two methods

1 For the adjudication of rights in equity, see Chap. 78, Secs. 1530-1566.

For the statutory adjudication of rights, see Chap. 79, Sec. 1584.

2 See Sec. 1586.

3 See Lord's Oregon laws, Secs. 6635 *et seq.*

1 For State administrative laws, see Chap. 68, Secs. 1337-1367.

adopted by the statutes of the respective States for the statutory adjudication or determination, in the first instance, of existing water rights. These are: First, by actions brought in the courts either by private parties or by some public officer authorized by statute;[2] second, by proceedings brought before some public official—usually the State Engineer—or before a governing board or board of control,[3] upon their own motion, with the right of appeal from the determination of such officer or board to the courts or with the right of an independent action in the courts against such officer or board rendering such decision.

As stated by Mr. Chief Justice Potter, in speaking for the Wyoming Court, the object of the Act is "for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective State control of the public waters."[4] And the nature of the proceeding as stated by the same justice is one largely *in rem*. "In our view it would seem to partake more largely of the nature of a proceeding *in rem* than of one *in personam*."[5]

From a careful examination of the statutes providing for the determination of existing water rights by governing boards it will be readily seen that they are decidedly drastic and summary in their character.[6] Again, there can be no question but that upon principle, regardless of the fact as to whether these special proceedings are brought before the Court, as is the case in Colorado,[7] or before the State Engineer or board, upon identically the same state of facts, as far as the determination of existing vested rights to the use of water are concerned, involving as they do at times enormous property values, they are in their very nature judicial proceedings, which may result in the taking of the property of one person and giving it to another. Yet in those States following the Colorado rule in providing that these actions should be tried by the courts, the proceeding is strictly judicial, while, upon the other hand, in those

2 For the statutory adjudication of water rights by courts, see Chap. 79, Sec. 1567.

3 For the governing boards, see Sec. 1342.

For the State Engineer and his duties, see Secs. 1343, 1344.

4 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

5 Farm Inv. Co. v. Carpenter, *supra*.

6 For the proceedings thereunder, see Secs. 1587-1590.

7 See Secs. 1569-1584.

States following the Wyoming rule these proceedings are declared to be not judicial, but purely ministerial or administrative acts. Or, as stated by the Wyoming Court: "The board, it is true, acts judicially; but the power exercised is quasi-judicial only, and such as, under proper circumstances, may be conferred upon executive officers or boards."[8] But in a previous portion of the opinion the Court, in speaking of the results attained by these proceedings, said: "But the finality of the proceeding is a settlement or adjustment of the priorities of appropriation of public waters of the State, and is followed by the issuance of a certificate to each appropriator, showing his relative standing among other claimants, and the amount of water to which he is found to be entitled." This is precisely the result of the statutory adjudications by the Colorado courts.[9] But in that State such a proceeding is deemed strictly judicial, and the result of the proceeding is deemed an "adjudication," while in Wyoming the proceeding is deemed ministerial, and where the board "acts judicially; but the power exercised is quasi-judicial only," and the proceeding is deemed a "determination."[10]

From a careful study of the constitution of Wyoming we are of the opinion that the Court might have better rested its decision squarely upon the proposition that, under the State constitution, the board was vested with judicial power to try and decide the existing rights to water. The State constitution seems to have been adopted with this very end in view. It is true that Section 1 of Article 5 provides that: "The judicial power of the State shall be vested

[8] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, wherein it is also stated by Mr. Justice Potter: "The statute nowhere attempts to devest the courts of any jurisdiction granted them by the Constitution to redress grievances and afford relief at law or in equity under the ordinary and well known rules of procedure. A purely statutory proceeding is created, to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the board—a proceeding which is to result, not in a judgment for damages for injuries sustained, nor the issuance of any writ or process known to law for the purpose of preventing the unlawful invasion of a party's rights or privileges."

See, also, Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Ryan v. Lutty, 13 Wyo. 122, 78 Pac. Rep. 661.

[9] See Secs. 1569-1584.

See, also, for Colorado laws, Chap. 87.

[10] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration, and such other courts as the legislature may by general law establish for incorporated cities and incorporated towns." But in the same instrument, by Section 2 of Article 8, upon the very subject under discussion, it is also provided: "There shall be constituted a Board of Control, to be composed of the State engineer and superintendents of water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State and of their appropriation, distribution, and diversion, and of the various officers connected therewith, *its decisions to be subject to review by the courts of the State.*" However, it seems to be the accepted construction of both the courts of Wyoming[11] and the Court of Nebraska construing the Wyoming constitution, and the statutes enacted thereunder, and its own statutes,[12] that the powers vested by the board are not judicial, but administrative; and, furthermore, that these Acts were in all respects constitutional.[13] And, furthermore, that a regular proceeding before such board as prescribed by the statutes constituted due process of law.[14]

11 Farm Inv. Co. v. Carpenter, *supra;* Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661.

The Supreme Court of Colorado in drawing a distinction between the Wyoming and Colorado statutes upon the subject of the adjudication of water rights in the respective States, said: "The statutes of Wyoming on this subject in force before the adoption of its constitution were very similar to the present law of this State, but after the adoption of that instrument an entirely different system was established. The settlement of priorities in that State is made by a State board of control, while in this State it is by the District Courts." Crippen v. X Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794.

12 "The Wyoming statute, from which ours is borrowed, has been subject to judicial construction, and is upheld by the Supreme Court of that State on the express ground that the powers therein are not judicial, but administrative. With this authoritative construction of the statute, and a decision of the very question raised in the case at bar, upon reasoning quite convincing and satisfactory, it would seem that the question should be regarded as at rest." Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

13 See cases cited *supra.*

14 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13.

But the constitutions of all of the States do not permit this arbitrary method of adjudicating existing water rights. While Montana was a Territory an Act of the legislature attempting to confer the authority upon commissioners to determine existing water rights and to apportion the water in accordance with their decision was held to be void, as the attempt to confer judicial power upon non-judicial officials, contrary to the Montana organic Act.[15]

The Oregon law differs from that of Wyoming in the fact that instead of claimants being given a right of appeal from the orders of the Board of Control to the Court, the Court in each instance must confirm the order of the board or make a new adjudication.[16] As was said in a late Oregon case:[17] "The intent of the Act seems to be to place the control of irrigating water under the jurisdiction of the Board of Control as rapidly as rights are determined by it, and become a matter of record in its office. When the board convenes to determine such rights, prior decrees, made independent of action by the board, are conclusive upon it as between the parties to such decrees, and thereafter the rights established thereby may be enforced by the water master, the same as though they had been originally determined by the board. But in the absence of such determination in accordance with the Water Code, such rights must be enforced by the Court making the decree."

§ 1587. Procedure—Process or notice.—In Wyoming, as we have stated in a previous section, the board by which existing water rights are determined in the first instance consists of the Board of Control, composed of the State engineer and the four division superintendents of the State.[1] The statute provides that the board shall prepare a notice setting forth the date and place when and where the

15 Thorp v. Woolman, 1 Mont. 168, 8 Morr. Min. Rep. 87; Thorp v. Freed, 1 Mont. 651.

In Utah, under the constitution of the State, the District Court has held to the same effect. And, in the majority of the States the matter of adjudicating existing water rights is properly left to the courts.

See, also, Cleghorn's Appeal, 3 Hawn. 216, where similar powers conferred were held to be judicial.

For the adjudication of water rights by the court, see Secs. 1530-1584.

16 Lord's Oregon laws, Secs. 6635 *et seq.*

17 Wattles v. Baker County, 59 Ore. 255, 117 Pac. Rep. 417.

1 For the board of control and their duties, see Sec. 1342.

State engineer will begin the measurement of any stream and ditches, and a day and place when and where the division superintendent shall begin the taking of testimony as to the rights of the parties taking water therefrom. The notice must be published in two issues of a newspaper having general circulation in the county in which such stream is situated, the publication to be at least thirty days prior to the taking of any testimony or the measurement of any streams or ditches. A similar notice must be mailed by the superintendent by registered mail to each party having a recorded claim to the waters of such stream. This provision for the service of notice upon claimants has been upheld by the Supreme Court of the State upon the ground that the proceeding was not an action at law, but an administrative act to ascertain for public records the facts as to existing water rights, and, therefore, it is sufficient notice to constitute due process of law.[2]

In Nebraska the details of the proceedings are left to the rules of the State Board of Irrigation, which provide that there shall be ten days' notice of the hearing.[3]

In Nevada, as no formal hearing is provided for, of course, no notice is required for this purpose. But a notice to the claimant must be sent by the State engineer to file his statement of claim, and accompanying such notice must be sent a blank form for the same.[4]

In Oregon it is provided that notice to each claimant must be sent by registered mail at least thirty days prior to the date set therein for making the examination of the stream or the taking of testimony.[5]

[2] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A., 747, 87 Am. St. Rep. 918.

For the laws of Wyoming, see Chap. 104.

See, also, Wyoming Comp. Stats. 1910, Secs. 765 *et seq.*

[3] See Rules of State Board of Irrigation.

"It shall be the duty of the State board to make proper arrangements for the determination of priorities of right to use the public waters of the State, and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the said board." Com. Stats. of Neb. 1911, Sec. 6424.

For laws of Nebraska, see Chap. 92.

[4] For statements of claims, see Sec. 1588.

Revised laws of Nev., 1912, Sec. 4685.

For laws of Nevada, see Chap. 93.

[5] For Lord's Oregon laws, Secs. 6636-6639.

For laws of Oregon, see Chap. 97.

§ 1588. **Procedure—The filing of statements of claims.**—The statutes of all of these States require the filing by the claimants with the board a statement of their claims to the right to the use of the water. In Wyoming, accompanying the notice of the hearing, as discussed in the previous section,[1] a blank form is required to be sent to each claimant to the waters of the stream which the board is about to investigate and determine, on which the claimant is required to present, in writing, under oath, his name and postoffice address, the date of the appropriation, and the nature of the interest claimed, and for what purpose the water is used, the date when the construction of the works began and when completed, the date when the water was first beneficially used, the dimensions of the ditch or canal, the legal subdivisions of the land owned or controlled by the claimant to which the water is applied, the crops grown, and the estimated acreage of each crop, during what months the water is beneficially used, the amount expended in the construction of the ditch and laterals, the estimated cost per acre of preparing the land for irrigation, and a map or plat showing correctly the location of the diverting works, and the area of land where the water is used.[2]

In Nebraska similar statements as are required by the statute of Wyoming are required by the State Board of Irrigation by its rules and regulations.[3]

In Nevada the claimant, within ninety days after the notice from the State engineer, must prepare a statement of his claim on blanks furnished for that purpose, swear to the same, and return it to the State engineer. The blank form of the statement is furnished by the engineer at the same time that the notice is sent. The failure to file such statement within the time prescribed is made punishable

1 See Sec. 1587.

2 The legislature may require all persons claiming rights to water to submit their claims to the board for settlement, and such regulation may apply to existing rights, as well as those sought to be newly acquired. Farm. Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

Wyoming Com. Stats. 1910, Secs. 768, 769.

For laws of Wyoming, see Chap. 104.

3 See Rules and Regulations of the State Board of Irrigation of Nebraska, Sec. 1589.

See, also, as to statements, Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

as a misdemeanor on the complaint of the State engineer or any of his assistants.[4]

In Oregon, it is also required that each claimant must file with the division superintendent a statement of his claim under oath.[5]

§ 1589. **Procedure—The hearing by the board.**—The statutes provide for a hearing by the board of the respective claimants as to their claims, with the exception of the statutes of Nevada. In Wyoming, at the time and place named in the notice,[1] the superintendent of the water division, through which the stream flows, the rights to the waters of which are about to be determined, must begin the taking of the testimony, which may be continued from time to time until completed. And upon the completion of the taking of the proofs the superintendent must give notice in one issue of a newspaper of general circulation of a time and place when and where he will open the evidence for inspection for not less than one day or more than five days. Any person desiring to contest the claim of another shall, within fifteen days after the testimony has been opened for inspection, in writing notify the superintendent, stating the grounds of the proposed contest, which statement must be under oath, and the superintendent shall then notify the contestants and the person whose rights are contested to appear before him at some convenient time and place, in not less than thirty days nor more than sixty days from the date of the service of the notice, to be served and returned in the same manner as summons issued out of the District Court. The hearings may be adjourned from time to time, the superintendent is given the power to issue subpoenas, and has the power to compel the attendance of witnesses. The evidence must be confined to the subjects enumerated in the notice of contest. Upon the completion of the evidence upon all phases of the case, it must be transmitted by the superintendent to the office of the Board of Control.[2]

In Nebraska, under the rules adopted by the State Board of Irrigation, the hearing must be presided over by the secretary of the

[4] Laws Nev., 1907, p. 30, Secs. 15, 16; revised laws of Nevada, 1912, Secs. 4685-4687.

For laws of Nevada, see Chap. 93.

[5] Lord's Oregon laws, Secs. 6636-6639.

[1] For the notice of hearing, see Sec. 1587.

[2] For hearings in Wyo., see Wyo. Comp. Stat. 1910, Secs. 770-773.

For laws of Wyoming, see Chap. 104.

board, who is the State engineer.[3] Claimants may appear in person or by attorney, or both. Claimants may testify as to their respective rights, and witnesses may be examined, or the claimants may fully set forth their claims by affidavits, in which case they need not further appear. A failure to make claim constitutes an abandonment of such claim. Rules of the board also provide for contests similar to the statute of Wyoming providing for such contests. The record in the case of each claim consists of the original notice of appropriation recorded with the county recorder, a verified claim affidavit, and any additional testimony or affidavits offered; and upon this data, together with the stream measurements by the State engineer, the award must be made.[4] The procedure as to the hearing is largely the same as that in Wyoming, discussed above.

These acts of the boards as to the hearing, etc., are declared by both the Supreme Courts of Wyoming and Nebraska to be administrative and not judicial.[5]

In Nevada no hearing is provided for, but the State engineer gathers his data for his decision from a personal examination either by himself or by some qualified assistant. He is required to make an examination of the stream and of the works diverting therefrom, said examination to include the measurement of the discharge of the stream, unless adequate proof is available from the measurements made by the United States Government; he must also measure the carrying capacity of the various ditches and canals diverting therefrom. He must also make an examination of the lands irrigated and make an approximate measurement of such lands, and also the lands susceptible of irrigation from such ditches and canals. The observations and measurements must be reduced to writing, and made a matter of record of his office. He must also make a map or plat showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which

[3] For State engineers and their duties, see Secs. 1343, 1344.

[4] For the award, see Sec. 1593.

[5] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

See, also for the constitutionality of these Acts, Sec. 1586.

are susceptible of irrigation from the ditches and canals already constructed. In performing such work the State engineer or his assistant may avail himself of the works, records, and information of the United States Geological Survey. The record of these investigations, together with the statements of claims of the respective claimants to the use of the water, constitute all of the data required under the Nevada Act for the determination of the respective rights.[6] I am not sure but the Nevada rule is the better one. There is no pretense of a hearing, and, therefore, the question of vesting judicial powers on an administrative board or officer is not involved. Any one dissatisfied with the award of the State engineer may not appeal from such decision, but bring an original action both against the State engineer and also the other claimants.[7]

In Oregon the proceedings as to the hearings largely follow the statutes of Wyoming. The testimony is taken by the division superintendent and by him transmitted to the Board of Control.[8]

§ 1590. **Procedure—The award—Certificates.**—Upon the data gathered as provided by the statutes, the board, or State engineer, must make an award of the rights to the use of the waters to the parties who, in its or his judgment, are entitled thereto.

In Wyoming it is provided that at the first regular meeting of the Board of Control after the completion of the stream measurement and the return of the evidence by the division superintendent, it is the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of the waters of said stream, and the amounts of appropriations of the several persons claiming the same, and the character of the use for which the appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purpose; provided that the appropri-

[6] Laws, Nev., 1907, p. 30, Sec. 17; Rev. Laws Nev., 1912, Secs. 4687, 4688.

See, also, instructions issued by the State Engineer, Rev. laws Nev. 1912, p. 1343.

[7] Laws, Nev., 1907, p. 30, Sec. 19; Rev. laws Nev. 1912, Sec. 4690.

See, also, for right of review by the courts, Sec. 1591.

[8] Lord's Oregon laws, Secs. 6640-6642.

ator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands for the benefit of which the appropriation may have been made; provided, that no allotment shall exceed one cubic foot for each seventy acres of land for which said appropriation shall have been made.[1] It is further provided that, as soon as practicable after the determination of the priorities in any case by the Board of Control, the secretary of the board shall issue to each person, association, or corporation represented in such proceeding a certificate signed by the State engineer as president of the board, and attested under the seal of the secretary, setting forth the name and postoffice address of the appropriator, the priority and number of the appropriation, the amount of water appropriated, and, if the appropriation be for irrigation, a description of the legal subdivisions of the land to which the water is applied. The said certificate must be transmitted by the State engineer or board to the county clerk of the county in which the appropriation is made; and it is the duty of the county clerk, upon receipt of the fee for the same, to record the certificate in a book specially prepared and kept for that purpose, and to immediately transmit the certificate to the appropriator.[2]

In Nebraska the State engineer is the secretary of the State Board of Irrigation. Upon the record of the case the Secretary must, in the first instance, make the determination as to the respective rights.[3] Within thirty days after the determination by the board of priorities of appropriation, the board, through its secretary, must issue certificates to the claimants.[4] Right of appeal is then given under the rules of the board to the board itself. But in case there is no appeal to the board it merely adopts the report and decision of the secretary.[5]

In Nevada, there being no hearing before the State engineer provided for, the engineer is given absolute power to make the determination as to existing rights upon his own investigations, the

1 Wyo. Comp. Stat. 1910, Sec. 777.

2 Wyo. Comp. Stat. 1910, Sec. 778. See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Whalon v. North Platte Canal etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

3 For the hearing, Nebraska, see Sec. 1589.

4 Comp. Stats. of Neb., 1911, Sec. 6429.

5 See Rules State Board of Irrigation, Sec. 1589.

records as to the stream measurements, and the verified statements of the claimants. Within thirty days after the determination of the engineer and the preparation of the list of priorities of appropriation of the use of waters of any stream it is made the duty of the State engineer to issue to each person, association, or corporation a certificate signed by the State engineer setting forth the facts similar to those required in the Wyoming certificates, as stated above. He must also send the certified list of the awards and priorities to the county recorder of the county in which such appropriations have been made, as well as to the county recorder of the county in which the waters appropriated are used. It is then made the duty of the recorders to record such lists in a book specially prepared and kept for that purpose, the fees for the same being paid by the State.[6]

In Oregon it is provided that upon the final determination of the rights to the water it is the duty of the secretary of the Board of Control to issue to each claimant a certificate of his claim, said certificate to be recorded by the county clerk of the county in which the right is located.

§ 1591. Review of decisions of boards by the courts—Appeal.—The saving provision of all of these Acts for the determination of existing water rights by governing boards is the right given to all parties feeling aggrieved by any decision of the board to have the same in some manner reviewed by the courts. In Wyoming it is provided by the constitution that "Its decision to be subject to review by the courts of the State."[1] And in the statutes it is provided that an appeal may be taken from the board to the District Court of the county in which the stream may be situated.[2] The procedure upon appeal as provided by the statute is that the party appealing shall, within sixty days of the determination of the board and the entry thereof in the records of the board, file in the District Court to which an appeal is taken, a notice in writing stating that such party appeals to such Court from the determination and order of the Board of Control; and upon the filing of such notice the appeal

[6] Laws Nev., 1907, p. 30, Sec. 18; Rev. Laws, Nev., 1912, Sec. 4689.

[1] Wyo. Const., Art. 8, Sec. 2.

[2] Wyo. Comp. Stat. 1910, Secs. 779-787.

Daley v. Anderson, 7 Wyo. 1, 48 Pac. Rep. 839, 75 Am. St. Rep. 870.

shall be deemed to have been taken. The appealing party shall also, within such sixty days, enter into an undertaking, to be approved by the District Court, in such an amount as the Court or judge may fix, conditioned upon the prosecution of the appeal and the payment of all costs and damages. The clerk of the court, upon filing the notice of appeal and bond, shall transmit to the secretary of the board a notice to the effect that the appeal has been perfected, and the appellant shall cause a certified copy of such notice to be served upon the adverse parties, in the same manner as a summons. The appellant shall also, within six months after the appeal is perfected, file in the office of the clerk of the court a certified transcript of the order of the board, a certified copy of all records of the board, and of all evidence offered, including the measurements of the streams and ditches, together with a petition setting out the cause of complaint of the party appealing, and all parties named as appellees shall be served with summons in the manner and time as provided for issuance and service of summons.[3]

In Nebraska any party, or number of parties acting jointly, who may feel themselves aggrieved by the determination of the State board, is given the right of an appeal to the District Court, under proceedings provided by the statute.[4]

In both the States of Wyoming and Nebraska the Court to which the appeal is first taken being a *nisi prius*, or trial court, a case appealed as above is tried *de novo*.

In Nevada, under the Act of 1907, there are no provisions for an appeal from the decision of the State Engineer, but it is provided that any party, or number of parties acting jointly, who may feel themselves aggrieved by the determination of the State engineer, may bring an original action in any court having jurisdiction

[3] Wyo. Comp. Stat. 1910, Secs. 780, 781.

The provisions of the statute relating to appeals are mandatory and must be strictly complied with. Daley v. Anderson, 7 Wyo. 1, 48 Pac. Rep. 839, 75 Am. St. Rep. 870.

"Proceedings before the board of control are purely statutory, and an appeal to the District Court from a decision of the board is merely a continuation of those proceedings in an appellate tribunal. Such an appeal is based upon the statute, and does not invite the general law and equity jurisdiction of the Court to afford affirmative relief." Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

[4] Comp. Stats. of Neb., 1911, Secs. 6430-6434.

against such State engineer, and all persons having interests adverse to the party or parties bringing the action to have their respective rights determined. Such action must be brought within one year after the record of the award and list of priorities of appropriation has been recorded. Such action must be tried as speedily as possible, and the Court is authorized to employ a hydraulic engineer or other expert to examine and make report under oath upon any subject matter in controversy, the cost of such employment to be equitably apportioned by the Court and charged against the parties to the suit as costs.[5]

In Oregon a final determination of existing rights being by an adjudication of the Court, an appeal can only be had from such a judgment to the Supreme Court.

§ 1592. Jurisdiction of courts in cases not submitted to board.—In those jurisdictions the statutes of which provide for the filing of claims with the board and a hearing by the board upon the respective rights of the parties before its determination, the question has arisen as to the effect upon the rights of those parties who have claims to the use of the water, but fail to make such statements, or in any manner to appear or participate in such hearing. The general rule upon the subject is that, under statutes having no provisions expressly barring or estopping a claimant failing to participate in the proceedings before the board, he is at liberty to assert and maintain his rights in the courts. The Supreme Court of Wyoming, in speaking of this right, says: "But nowhere is it provided that a claimant failing to appear shall be barred or estopped from subsequently maintaining or asserting his claim."[1] In Nebraska it is said: "Whenever a controversy arises over the substance of the rights of the parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of."[2] In

[5] Laws, Nev. 1907, p. 30, Sec. 19; Rev. Laws, Wyo. 1912, Sec. 4690.

[1] Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

[2] Crawford v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See also, Farmers' etc Co. v. Cozad etc. Co., 65 Neb. 3, 90 N. W. Rep. 951; McCook Irr. Co. v. Crews, 70 Neb. 102, 115 N. W. Rep. 249.

Nevada, where the decision of the State engineer is based upon no hearing, but upon his own investigations, the right is granted all parties, within one year from the recording of the decision of the engineer, to bring an action in the proper court to determine his rights, and that, too, regardless of the fact as to whether their claims were determined by the State engineer or not.[3] But the statute makes it a misdemeanor for any claimant to fail within ninety days to file his statement of claim with the State engineer after notice that such statement is required.[4]

As to the jurisdiction of the courts to adjudicate rights which have previously been determined by the board or the State engineer, we will discuss in the next section.[5]

In Oregon the "decree confirming the determination of the board" is, in fact, a judgment of the Court.

§ 1593. Conclusiveness of the determination or award by the board.—In proceedings where the respective parties have submitted their claims to the board and have participated in the proceedings, and there is no appeal from its decision, and the time for such an appeal has lapsed, the determination or award of the Board of Control of Wyoming, or of the State Board of Irrigation of Nebraska, is conclusive as between the parties so participating in the proceedings. As stated by the Wyoming Supreme Court: "It may be assumed that, in the absence of fraud or collusion, any matter actually and legally determined by the final decree of the board becomes *res judicata*—at least, as to the public and the parties participating in the proceedings."[1] The Nebraska Court, upon the same subject, said: "If a controversy has been submitted to that board and by it adjudicated and no appeal taken, an entirely different question is presented" to those cases where there was no presentation of claims to the board or where there has been no determination by the board.[2] And in a later case the Court said: "It would seem that an adjudication made by the State Board of Irrigation upon a matter properly before it, and within the scope of its

3 Laws, Nev. 1907, p. 30, Sec. 19; Rev. Laws Nev. 1912, Sec. 4690.

4 Laws, Nev. 1907, p. 30, Sec. 16; Rev. Laws Nev., 1912, Sec. 4687.

5 See Sec. 1593.

1 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

2 Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

powers and duties, is final, unless appealed from to the District Court. . . . Indeed, if the determinations of the State Board of Irrigation with reference to the priorities of appropriators are not of this final character, of what benefit or use would they be? For the board to attempt to decide a controversy or to establish a right when, in fact, after it had acted, no right was established or controversy settled, would be a vain thing."[3] Where there has been a contested case before the Board of Control in Wyoming and an appeal to the District Court, the Supreme Court of the State holds that the previous adjudication, even by the Court, is no bar to a future independent action involving the same rights, upon the ground that the proceedings before the Board of Control are purely statutory, and an appeal to the District Court from a decision of the board is merely a continuation of those proceedings to an appellate tribunal, and that such an appeal does not invite the general law of equity jurisdiction of the Court; and such relief may be had in an independent separate action.[4]

In Nevada, under the law of 1907,[5] the determination and award of the State engineer is conclusive upon no one, nor as to any subject covered by his decision; provided, that within the year allowed by the statute a suit is brought to determine such rights. But, as we view the law, the section of the Act allowing one year from the date of the recording of the list of priorities and awards, within which those dissatisfied therewith may bring an action in any court having jurisdiction and have the same adjudicated, is a new statute of limitations upon the subject; and unless such action is brought within the year prescribed, the award of the engineer must be regarded as final as to the rights of the parties and the subject matter covered by the same.

§ 1594. The enforcement of awards by board.—In the chapter discussing the laws of State control [1] we described how, by means of State officials, variously termed division superintendents, division

[3] Farmers' Irr. Co. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

See, also, Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690.

[4] Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; State *ex rel.* Mau v. Ausherman, 11 Wyo. 410, 72 Pac. Rep. 200; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

[5] See Laws, Nev. 1907, p. 30.

[1] See Chap. 68, Secs. 1337-1367.

engineers, water commissioners, water masters, under assistants, or supervisors, the awards of the use of the water given by the respective governing boards were enforced by the distribution of the water to the respective claimants according to the terms of the awards. In all of these States it is made a misdemeanor for any person to interfere with the distribution of the water by these officials, or in any way to interfere with the proper discharge of his duties. The power conferred upon these officials is purely administrative, and in nowise judicial. They are usually given the power to make arrests for any interference with their duties, or any interference with the water as by them distributed. These provisions prevent in a large measure subsequent litigation as between the parties for the protection or enforcement of their rights.[2] But where an award has once been made by the governing board, and it is not properly observed, a party injured has the right to resort to a court of equity for the enforcement and protection of his rights, and the Court, upon a proper showing, will issue an injunction for that purpose.[3]

In all States criminal statutes are provided for the protection of water rights and against the interference with same.[4]

§ 1595. **Criticism of system for determination by boards.**—The laws for the determination of existing water rights by governing boards or State officials constitute one feature of the law of State control discussed in a previous chapter of this work. Under this system the State does not wait for controversies to arise between the claimants to the use of the water of a certain stream, but having ascertained the amount of water available by actual stream measurement, and who are the claimants thereto, awards the water in the first instance to the persons entitled thereto according to their respective priorities. Under this system, at least, there is no longer the ludicrous spectacle of learned judges solemnly decreeing the right to use from two to ten times the amount of water flowing in the stream, or, in fact, amounts so great that the channel of the stream could not possibly carry them, and thus practically leaving the question at stake as unsettled as it was before the trial, as was the fact in

2 For the statutes upon the subject, see Part XIV.

3 McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773.

4 For the statutes, see Part XIV, under the respective States.

See, also, Hamp v. State, —— Wyo. ——, 118 Pac. Rep. 653.

an extreme case arising in Idaho before the adoption in that State of the law of State control.[1]

[1] In the case of Hillman v. Hardwick, 3 Idaho 255, 28 Pac. Rep. 438, the evidence showed that there was about eighty or one hundred inches of water in a certain stream, and the plaintiff claimed by virtue of a prior appropriation one hundred and twenty-five inches of water, but despite the fact that his claim to this amount and his actual application of all of the water to a beneficial purpose was proven, the trial court rendered a judgment giving the defendants permission to divert something like eight hundred inches over and above the amount claimed by the plaintiff. The Supreme Court reversed the judgment below, and in the opinion rendered Mr. Justice Horton said: "We then have this anomalous condition of affairs: A creek or stream of water flowing one hundred inches of water, with appropriations of that water to the amount or extent of eight hundred inches in addition to the prior appropriation by the plaintiff of all the water of the creek and its tributaries. To the ordinary mind this might, and perhaps does, present a somewhat difficult problem for judicial solution, unaided by the statutes; but the learned District Judge found no difficulty whatever in reaching a conclusion as unique as it is unprecedented. We say unprecedented, because this question, under statutes identical with that of Idaho, has been decided so often in favor of the prior appropriator that it has been generally considered both by professionals and profanes as a settled question; as for instance, the question has been decided up to 1889 twice by the Supreme Court of the United States, seventeen times by the Supreme Court of California, five times by the Supreme Court of Colorado, six times by the Supreme Court of Nevada, twice by the Supreme Court of Montana, once by the Supreme Court of New Mexico, twice by the Supreme Court of Utah, once by the Supreme Court of Oregon, and repeatedly by the Supreme Court of Idaho; in fact the decision of the learned District Judge in this case stands alone. We have been unable by the most diligent search to find a precedent or a parallel to it. Heroically setting aside the statute, the decisions and the evidence in the case, he assumes the role of Jupiter Pluvius, and distributes the waters of Gooseberry Creek with a beneficent recklessness which makes the most successful efforts of all the rain-wizards shrink into insignificance, and which would make the hearts of the ranchers on Gooseberry dance with joy if only the judicial decree could be supplemented with a little more moisture. The individual who causes two blades of grass to grow where but one grew before is held in highest emulation as a benefactor of his race. How then shall we rank him who, by judicial fiat alone, can cause four hundred inches of water to run where nature only put one hundred inches? (We veil our faces, we bow our heads before this assumption of judicial power and authority.) . . . Evidently the Court assumed that Gooseberry Creek was as inexhaustible as the widow's cruse, or else that its decree possessed the potency of Moses' rod. All the provisions of the statute in regard to priority of right incident to priority of appropriation are ignored, as are the sources and volume of supply."

But there is another side to this feature of the law. The law of State control, as it is known in the State of Wyoming, including this method for the determination of existing water rights, was conceived by a State engineer, and modeled somewhat after the laws of Italy and India governing waters, with the evident intention that the State engineer should be given powers greater than those of any other officer of the State, and even to the usurpation of the functions of the Court. It was evidently the intent to give him, or the Board of Control, over which he presides, the exclusive jurisdiction in the determination of existing water rights within the State, and the power to enforce his, or its, decisions, in the distribution of the water. In other words, as far as this phase of the subject is concerned, it was to be a government by engineers. But the constitutional convention and the legislature, departing from the original conception of the framer of the bill, gave the right of appeal to the courts. And, further, the Supreme Court of the State, by its decisions in construing the law after its enactment, has also modified what was undoubtedly the intent of the framer of the bill by holding that an appropriator who had not even presented his claim to the Board of Control, even after notice of the proceedings, was not estopped from afterward asserting his rights in the District Court;[2] and, further, by holding that a water right can not be made an inseparable appurtenance to a certain tract of land, as was attempted by the Act, but which feature was held to be unconstitutional, and that, too, even after the "views" of the engineer in question and the framer of the bill had been presented to the Court.[3] It is true that such an arbitrary method as designed might prevent litigation. But it is also true that if the citizens of this country can not settle their disputes peaceably they should be given the right to resort to the courts for their adjudication as to their respective rights. As was said in the recent Wyoming case, decided in the jurisdiction where this theory of absolute control and determina-

See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, quoting Kinney on Irr., 1st Ed., from Sec. 493.

2 See Sec. 1588.

See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

3 Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

That a water right is not an inseparable appurtenance to a certain tract of land, see Secs. 1015, 1016.

tion of the rights of the Board of Control was so strenuously contended for: "We can not agree that the doctrine (of the courts) has resulted from ignorance concerning irrigation matters. Nor can we agree with the notion that men not necessarily or usually trained in the law are more competent than the courts to determine the legal principles controlling the use of water by prior appropriation, notwithstanding that the judges may not, as a rule, be practical irrigators. . . . We can not agree that, in order to discourage litigation or render it impossible, the courts should devest the citizen of his property." [4]

The more we study the workings of the laws of State control as to the determination by governing boards, in the first instance, of existing rights to the use of water, the more firmly we are convinced that all judicial or "quasi-judicial" powers should be taken from the State engineer and governing boards, and vested in the courts, as is the case in Colorado,[5] where, under our form of government, that power properly belongs. And, fortunately, this is the rule in the most of the States which have recently adopted these laws. It is true that in Wyoming and Nebraska any party feeling himself aggrieved by the decision of the State engineer or governing board may appeal from such decision to the District Court, but the first trial is before the board. And, furthermore, when an appeal is taken it takes a double amount of time and expense upon the part of the contestants in attending the trials and getting their evidence properly before the board and Court. Why is it not better for all parties concerned, in the first instance, to bring the action in court and to have the matter properly adjudicated and finally settled by a proper decree? If not satisfied with the decree and judgment of the trial court, a party may then appeal to the Supreme Court of the State. Even the recent law adopted by the State of Nevada is better, where there is not even a pretense of a trial or hearing; but the parties interested are given the right to bring an original action in the courts for a judicial determination and judgment as to their rights within one year from the date of the filing

[4] Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

[5] For the statutory adjudication of water rights, see Chap. 80, Secs. 1585-1595.

of the record of the decision of the State engineer. As it appears to us, from all sides of the question, the better rule is to have these rights determined and authoritatively adjudicated in the first instance by the courts. But, paramount above all questions, it is better even to encourage litigation than that a citizen should be deprived of his property unjustly.

CHAPTER 81.

PROTECTION OF RIGHTS BY INJUNCTION.

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§ 1599. Action for both injunction and damages.
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§ 1618. Injunctions against the interference with easements.
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§ 1641. Findings of fact and conclusions of law.
§ 1642. The decree and judgment.
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§ 1644. Decree and judgment—The balance of convenience—Authorities in favor of.
§ 1645. Decree and judgment—Effect of.
§ 1646. Decree and judgment—Enforcement of—Violation of.
§ 1647. Appeals in injunction cases.

§ 1596. Scope of chapter.—Having discussed in the preceding chapters of this work how rights to the use of waters may be acquired, both under the Arid Region Doctrine of appropriation,[1] and under the common law of riparian rights,[2] the nature and extent of those rights,[3] and how conflicting rights may be determined and adjudicated and the title to the same quieted in their respective owners,[4] we will now discuss in this and the following chapters how those rights may be protected by the lawful owner or owners thereof. In this chapter we will confine our discussion to the phase of the question as to how these rights may be protected in equity by injunction, leaving the question as to how they may be protected by methods other than injunction to the following chap-

[1] For the appropriation of water, see Chap. 38, Secs. 706-732.

[2] For the common law of riparian rights, see Chaps. 21-28, Secs. 450-551.

[3] For the nature and extent of rights, see Part IX.

[4] For the adjudication of water rights in equity, see Chap. 78, Secs. 1530-1566.

For the statutory adjudication of rights, see Chap. 79, Secs. 1567-1584.

For the determination of rights by boards, see Chap. 80, Secs. 1585-1595.

ter,[5] and the question of damages for injuries to rights to the second chapter following this.[6]

§ 1597. Actionable injury to a right.—Before an action in equity will lie to protect a water right, or the right to a ditch, canal, or other works, by the owner or owners thereof, there must be an actual or threatened unlawful invasion of, or injury to, such right. Where the right in question is a right to the use of water, or a water right, the invasion or injury may be one of two kinds, or both: First, an unlawful diminution of the quantity of the water;[1] and, second, an unlawful deterioration of the quality of the water.[2] Where the injury is caused by the diminution of the quantity of the water, it may be the result of one of two acts, or both: First, the actual and unlawful diversion of the water by another;[3] and, second, an injury to the ditch, canal, or other works, whereby their capacity to divert, convey, or store the water is impaired.[4] The result in either case being that the parties entitled to its use are deprived of a portion or all of the water.

Where the right in question is that of the injury to a ditch, canal, or other works used in the diversion and the carrying of the water from the natural source of supply to the place of use, the invasion or injury may consist of any unlawful act which amounts to an actual continuing or threatened trespass upon such works, and which have resulted in, or may result in material injury to, or the impairment of the title to such ditch or works.[5]

Where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time would ripen into an adverse right, and thus deprive a person of his property, he is not only entitled to bring an action for the vindication of his right, but also for its preservation. This is especially true when there is an unlawful diversion of water, and where there is a clear violation of an established right and a threatened continuation

[5] See Chap. 82, Secs. 1648-1659.

[6] See Chap. 83, Secs. 1660 *et seq.*

[1] For relief against unlawful diversion, see Secs. 1610-1614.

[2] For actions against the pollution of water, see Secs. 1142-1147.

[3] For injunctions against the unlawful diversion of water, see Secs. 1610-1614.

[4] For enjoining trespass upon ditches and other works, see Secs. 1619, 1620.

[5] For equitable actions against the invasion of rights in ditches, etc., see Secs. 1619, 1620.

of such violation. Such an invasion of a right is actionable, and that, too, regardless of the fact as to whether or not actual present damages are shown.[6] A distinction in this respect, however, must be noticed where the right claimed is that of the undiminished flow of a stream by a riparian proprietor, in those States which adhere to the common law as one of the rules governing waters, and where it is the theory of the law that all of the existing water supply should be used for beneficial purposes. The tendency in these States is for the courts to refuse equitable relief, where there is no actual material injury, and thus to cause the riparian owner to rely upon an action for damages.[7]

No set rule can be stated as to just when a Court of equity will interfere with the invasion of a right; but it depends upon the facts and circumstances of each particular case.[8]

The fact that the act complained of is a criminal offense, or that the defendant has been prosecuted for such an offense, does not bar a civil action for enjoining the same.[9]

§ 1598. Action for both injunction and the adjudication of rights.—It often happens, where there has been no previous adjudication of the right involved,[1] that an action for protection against the invasion of a right by another also involves the title to the right, as is the case where an injunction is asked for, the gist of the action being as to whether or not the party asking for the injunction is entitled to the same; and, if so, it must be based upon his title to the right. This involves a trial upon the issue as to the respective rights of the parties, and an adjudication or determination as to those rights, before the injunction will issue. And, of course, if the plaintiff asking for the injunction can not show that

6 See, also, for injunctions against the invasion of a right without damages, Sec. 1606.

For the acquisition of title to a water right by prescription, see Secs. 1033-1058.

7 For injunctions by riparian owners for the diminished flow, see Secs. 549, 1611-1614.

8 For injunctions by appropriators, see Sec. 1610.

For injunctions by riparian owners, see Secs. 1611-1614.

9 People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; Spring Valley etc. Water Co. v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108.

1 For the adjudication and determination of water rights, see Chaps. 78-80, Secs. 1530-1595.

he has a title to the right, the injunctive relief will be denied him; but it may then be granted to the defendant, or to an intervenor in the action, in case he shows that the title to the right is in him. The Court having acquired jurisdiction of the case has the power to determine all of the questions involved, and to grant all appropriate relief necessary. An action for an injunction and an action to quiet the title to a water right both appeal to the equity side of the Court, and the Court having acquired jurisdiction for one purpose also acquires jurisdiction to settle and determine all the questions involved. And, it therefore follows that where the principal object of the suit is to enjoin the defendants from interfering with the water which the plaintiff claims, the equitable jurisdiction of the Court is invoked, and the Court can adjudicate and determine which party is entitled to the action, and then grant the injunctive relief to the party found to be entitled to the use of the water.[2]

And, as we have seen in a previous section of this work, where the main object of the suit is to determine and adjudicate the rights between the respective parties, after such determination and adjudication, the common practice of the Court is to grant equitable relief by way of an injunction in favor of the prevailing party and against the losing party. Or the injunction may be granted in favor of both parties, or all parties, restraining them, or any of

2 Where one object of the suit was to enjoin defendant from interfering with plaintiff's use of water rights, the equitable jurisdiction of the Court was invoked, and it could decide all questions involved, and grant appropriate relief, such as the quieting of title. Bessemer Irr. D. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91.

See, also, Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543; Burr v. Maclay Rancho Co., 154 Cal. 428, 98 Pac. Rep. 260; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Pomona etc. Co. v. San Antonio etc. Co., 152 Cal. 618, 93 Pac. Rep. 881; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856; Hawaiian etc. Co. v. Wailuku Sugar Co., 15 Hawn. 675; Donnelly v. Cuhna, —— Ore. ——, 119 Pac. Rep. 331.

See the case of City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120, where a permit-holder was enjoined from interfering with a certain water and the right to the same adjudicated to be in the other claimant.

them, from interfering with the respective rights of any other parties as determined and adjudicated in the action.[3]

§ 1599. Action for both injunction and damages.—Mixed actions appealing to both the equity and law sides of the Court are permitted in all of the Western States. Under the statute of California, and also of those States following the code of civil procedure of that State, there is no question but that both relief at law and in equity may be sought and obtained in the same action. As was said by Mr. Justice Field, in an early California case: "This blending of an action at law, with a petition for ancillary relief to the equity side of the Court, is admissible under our system of practice."[1] Again, upon his accession to the Supreme Court of the United States, in a case arising in the Territory of Montana, and appealed to that Court, the same Justice said: "Sometimes in the same action both legal and equitable relief may be sought, as, for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required; but upon the propriety of an injunction, the action of the Court alone could be invoked."[2] And, referring to the statute of Montana governing civil actions in this respect, he said: "That statute is substantially a copy of the statute of California as it existed in 1851." In an early Montana case it was held that legal and equitable relief could not be obtained in the same proceeding; and, therefore, it was held that a judgment for damages for the diversion of water and which perpetually enjoins parties from using the water, was irregular and void.[3] But this is not the general rule even in Montana at the present time.[4] And the general practice throughout the Western States is that a party may, in one

[3] For actions to quiet title and injunction in the same suit, see Secs. 1536, 1598.

For the enforcement of decrees adjudicating rights, see Secs. 1566, 1584.

[1] Natoma etc. Co. v. Clarkin, 14 Cal. 544.

[2] Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683, affirming Id. 1 Mont. 458.

[3] Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675.

[4] Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Leonard v. Shatzer, 11 Mont. 422, 28 Pac. Rep. 457; Harris v. Shontz, 1 Mont. 212; Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388; Cruse v. McCauley, Mont., 96 Fed. Rep. 369.

action, recover damages for past injuries and secure an injunction preventing a continuance of the injuries.[5]

In the pleadings in such mixed actions, to prevent confusion, and preserve the simplicity and directness requisite, it is the better practice that the grounds of equity interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought.[6] However, it is held in California that a cause of action for damages for a trespass and a cause of action for an injunction to restrain a threatened trespass, not separately stated, can not be reached by demurrer, upon the ground of misjoinder, but can only be reached by motion, unless the failure to state the two causes of action separately renders the complaint ambiguous, unintelligible, or uncertain.[7]

Upon the question of damages, a jury is required, unless the

[5] One may in the same action seek damages for the injury to water rights and an injunction. Watterson v. Salunbehere, 101 Cal. 107, 35 Pac. Rep. 432.

See, also, Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1008, 72 Am. St. Rep. 784; Clark v. Allaman, 71 Kans. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193, 73 Pac. Rep. 548; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557; Union Light etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223; Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. Rep. 965; Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400; Mattis v. Hosmer, 37 Ore. 523, 62 Pac. Rep. 17, 632; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191; the Salton Sea cases, New Liverpool Salt Co. v. California Dev. Co., 172 Fed. Rep. 820, 97 C. C. A. 242.

A complaint in an action to enjoin the maintenance of a dam is not objectionable for asking for both legal and equitable relief. Durga v. Lincoln Cr. Lum. Co., 47 Wash. 477, 92 Pac. Rep. 343.

[6] "It would be the better practice, in such case, to commence that portion of the complaint which seeks the equitable relief, with the form: 'And for equitable relief, pending the above action, the plaintiff further represents'; or, 'and, for a further cause of action, the plaintiff represents.'" Natoma etc. Co. v. Clarkin, 14 Cal. 544.

[7] Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

In addition to the facts averred in the complaint for damages, it was held that it was sufficient to aver facts sufficient to obtain equitable relief, without repeating the averments already made. Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12.

same should be waived; but upon the propriety as to whether or not the injunction should issue, the question is for the Court alone.[8]

As we shall discuss in a following section of this chapter, several persons who have common interests may join together as parties plaintiff in an action for an injunction.[9] The same is true as heretofore discussed in actions for the adjudication of rights.[10] And, although, under the above rule, a single plaintiff may bring an action both for an injunction against the future invasion of his rights and for damages for past injuries, a distinction must be noticed in this respect where there are several plaintiffs. In actions for an injunction and for damages for past injuries, where there are several parties plaintiff, causes of action which are several can not be joined with causes of action which are common to all. Thus, in a case where several persons own tracts of land in severalty, and each was injured by past wrongful diversions by the defendant, they may join together as parties plaintiff in an action for an injunction to prevent the future invasion of their rights, but they can not in that action join in a count for damages for past injuries to their respective tracts of land.[11]

§ 1600. Injunctions—In general—Essentials.—By far the most common equitable remedy for the protection of a right in the owner thereof, and against the continuing invasion of a right to the use of water, or for the trespass upon ditches, canals, or other works used in connection therewith, is the remedy of injunction. Injunctions may be divided into two classes. The most common are pre-

[8] For practice in injunction suits, see Sec. 1639.

[9] For parties plaintiff in injunction suits, see Sec. 1631.

[10] For parties plaintiff in actions to adjudicate rights, see Sec. 1544.

[11] That the same is true in actions for damages only, see Sec. 1684.

A cause of action for injunction, which is common to all the plaintiffs, can not be joined with a cause of action for damages which is not joint as to all the plaintiffs, but is undoubtedly several. Barham v. Hostetter, 67 Cal. 272, 7 Pac. Rep. 689.

See, also, Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94.

Since in a suit to abate a nuisance, the recovery of damages constitutes incidental relief only, and the defendant is not entitled to have such damages assessed by a jury as a matter of right, it is not error for the Court to refuse to accept a verdict on the issue of damages in such action on the ground that the verdict was not in accordance with the evidence, and to itself making a finding of damages. McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7.

ventive injunctions, which command a party to refrain from certain acts.[1] Mandatory injunctions command a party to do a particular thing. These are resorted to rarely and are seldom allowed before the final hearing of a case.[2]

The nature of an action for an injunction is one *in personam;* and the decree in such an action operates against all parties who were duly served with process and against whom the same was rendered.[3]

Upon the subject of when an injunction will be granted against the invasion of water rights, or the works used in connection therewith, the law does not depart materially from the general principles of law against the invasion on other rights. The essentials are that: There must be first the existence of the right in the party seeking the injunctive relief;[4] the injury must be irreparable;[5] there must be an actual continuing injury to the right, or there must be a threat of continuance in the future;[6] the party praying for the injunction must show that he has no adequate remedy at law;[7] and, further, there must have been no unreasonable delay or laches before bringing the action for injunctive relief.[8] We will discuss these subjects in the order named in the following sections.

1 For preventive injunctions, see Secs. 1609-1628.

2 For mandatory injunctions, see Sec. 1608.

3 For effect of decrees of injunction, see Secs. 1642-1646.

Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S. 535.

A remedy by injunction operates *in personam*, so that where defendants were served with process in a suit to obtain an injunction to prevent the continuance of the diversion of water of a stream, and submitted to the jurisdiction of the Court by answering to the merits, the Court had jurisdiction. Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

4 See Sec. 1601.

5 See Sec. 1602.

6 See Sec. 1603.

7 See Sec. 1604.

8 See Sec. 1605.

Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583, holding that, whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged; whether it is irremediable in its nature; whether an action at law would afford adequate remedy; whether the parties are able to respond for the damages resulting from the injury, and other considerations, which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

§ 1601. Injunctions—Must be the existence of the right in the party claiming relief.—Before a court of equity will intervene to protect a right, by way of injunction or otherwise, there must first be the existence of the right in the party seeking the relief. So, a water company, under contract to furnish a certain amount of water to a city, and under no obligation to furnish water for the use of the public schools, will not be prevented by injunction from shutting off the water from the schools.[1] So, also, an action for an injunction against the diversion of the water of a stream can not be maintained, unless the plaintiff has a right to the waters of which he is being deprived by the defendant.[2] So, where all the rights claimed by the plaintiff or defendants were as then only evidenced by notices and maps, and the appropriation was not finally consummated, and not a drop of water had been diverted, it was held that there was not such an evidence of the right that an injunction would lie upon behalf of the plaintiff as against the mere intent of the defendant without some overt act.[3] While the rule is well settled that, to warrant the granting of the injunction, the party seeking the same must show a satisfactory title to the right involved; and, if such title be denied, or in doubt, a perpetual injunction will generally be refused against a defendant in possession until the complainant's title is established; yet the courts hold that an injunction was properly granted where it was to protect the rights of a settler upon the public domain against the claim of a mere trespasser when the threatened injury to the estate would be irreparable, without first trying the title at law.[4]

But it is well settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus ac-

1 Water Supply Co. v. City of Albuquerque, 9 New Mex. 441, 54 Pac. Rep. 969.

2 Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334; Carlson v. City of Helena, 43 Mont. 1, 114 Pac. Rep. 110.

3 Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. Rep. 37.

See, also, Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543.

4 Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304; Kitcherside v. Myers, 10 Ore. 21; Jackson v. Jackson, 17 Ore. 110, 19 Pac. Rep. 847; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Cardoza v. Calkins, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. Min. Rep. 689; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

quired carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained, and any interference with the stream by a party having no interest therein that materially diminishes or deteriorates the water in quantity or quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable.[5] So, too, the owners of a water right, where the water is used for irrigation, may enjoin one who unlawfully diverts water from the ditch, although the ditch may be the property of the third party.[6]

A Court of equity is bound by injunction to protect an equitable as well as a legal estate. Therefore, an injunction will be granted to protect a water right held under an equitable title.[7]

Where there is the existence of the right, the right to injunctive relief is not taken away merely by an action for damages, or the right of action to recover damages for past injuries.[8]

§ 1602. Injunctions—There must be an irreparable injury to the right.—When injuries to a right will be regarded as irreparable at law so that the continuance of the same will be enjoined by a suit in equity must depend upon the facts and circumstances of each particular case.[1] Where the title to the use of the water is acquired by appropriation, and the exercise of the right is continually and unlawfully prevented by others having no right to the use of the water, either by obstructing the flow of the natural stream, or the flow of the water in the ditch, canal, or other works,

[5] Cole v. Richards Irr. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962, citing Kinney on Irr., 1st Ed., Sec. 249; Bear River etc. Co. v. New York etc. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; Hill v. King, 8 Cal. 336; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 M. M. Rep. 552; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Natoma etc. Co. v. McCoy, 23 Cal. 290, 4 Morr. Min. Rep. 590; Stein Canal Co. v. Kern Island Irr. Co., 53 Cal. 563; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537.

[6] Clifford v. Larrien, 2 Ariz. 292, 11 Pac. Rep. 397.

For injunctions against the unlawful diversion of water, see Secs. 1610-1614.

[7] Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

But see Churchill v. Russell, 148 Cal. 1, 82 Pac. Rep. 440.

[8] Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

[1] Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

after it has left the natural stream, and where the water is necessary to preserve the life of fruit trees, or the crops of the owner thereof, there is such an irreparable injury that an action for an injunction against such an invasion of the right will lie.[2]

In those States which adhere to the modified form of riparian rights,[3] where the right to the use of the water is by virtue of the ownership of riparian lands, and especially where it is accompanied by a reasonable actual use of the water, and something more than a claim for the undiminished flow of the stream, the same rule as to irreparable injury for the unlawful diversion of the water necessary for irrigation applies, and an action for an injunction will lie.[4] Again, the injuries are deemed to be irreparable, so as to authorize equitable relief by way of injunction, where the flow of the stream is so obstructed by the means of dams or other works causing the water to overflow the lands along the stream, and thus

2 An allegation in a complaint to enjoin interference with waters flowing through an irrigation canal that such waters are necessary to irrigate and preserve the life of fruit trees, and that such interference would result in great and irreparable injury, is a sufficient allegation of irreparable injury. Smith v. Stearns Rancho Co., 129 Cal. 58, 61 Pac. Rep. 662.

The rights of a settler upon the public domain will be protected by an injunction "when the threatened injury to the estate would be irreparable, without first trying the title at law." Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304.

See, also, Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Van Horn v. Decrow, 136 Cal. 117, 68 Pac. Rep. 473; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Coker v. Simpson, 7 Cal. 340.

See, also, as to injunctions relating to rights of appropriators, Sec. 1610.

3 For these States, see Secs. 507-621.

For the modified form of riparian rights, see Secs. 508-513.

4 The flow of the water of a stream was often insufficient to irrigate the land of a riparian proprietor. The annual rainfall was slight, and, unless irrigated, the land was unfit for cultivation. Overflow water, occasioned by floods, yearly deposited on the land fertilizing materials, increasing its productiveness and enhancing its value. The water overflowing the land was of great benefit to the riparian owner, and, if the flow of the waters was taken away, the land would become arid. Held to show that irreparable injury would result to the riparian owner if the diversion of such waters was accomplished, and authorized equity to interfere by injunction restraining such diversion. Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S. 391.

See, also, Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107.

See, also as to injunctions relating to rights of riparian owners, Secs. 1611-1614.

causing injury to the lands and crops, or retarding the drainage of such lands, so that crops can not be planted until it is too late in the season.[5] Again, the injuries are deemed irreparable where they are caused by the leakage or seepage from reservoirs, and thereby cause material continuing injuries to the surrounding lands, and an injunction will lie to prevent the diverting of water into or filling the reservoirs while such a condition remains.[6] Again, the injuries are deemed irreparable where the waters of a stream are being polluted, or mining debris is being discharged into the stream and carried down to the lands below, to such an extent that the waters are rendered unfit for the purposes to which they were put by their lawful owners, or the lands of such owners are injured.[7] Where a party commits a trespass on real property, does so under a claim of right, and threatens to commit and to repeat numerous trespasses, an injunction will lie to prevent irreparable injury, and to avoid a multiplicity of suits. We will discuss this subject in a subsequent section.[8]

An injury caused by a trespass upon a ditch or canal which does not destroy its efficiency and can be easily repaired does not constitute such an irreparable injury that an action for an injunction will lie.[9]

[5] Obstructions of a river, materially impeding the flow of its waters, and consequently the drainage from the low lands along and near its course, retarding the planting of crops thereon from one to four weeks, is irreparable injury, authorizing equitable relief. Krause v. Oregon Iron & Steel Co., 45 Ore. 378, 77 Pac. Rep. 833.

[6] Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760, and where it is said: "The remedy at law is inadequate because the injuries that were being suffered by plaintiff were irreparable, and also for the reason that a suit at law would not prevent the inflicting of like injuries in the future."

For injunction relating to reservoir rights, see Sec. 1620.

[7] Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; Smith v. Stearns Rancho Co., 129 Cal. 58, 61 Pac. Rep. 662; Cushman v. Highland D. Co., 3 Colo. App. 437, 33 Pac. Rep. 344.

The action must be irremediable before an action for an injunction will lie. Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

See, also, for injunctions against the pollution, Sec. 1143.

[8] For injunctions for trespass on land, see Sec. 1622.

[9] See, also, injunctions at to ditches, etc., Secs. 1618, 1619.

Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54; Clark v. Willett, 35 Cal. 534; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

Threatened continuous trespass upon a reservoir, and the unlawful drawing off of the water therefrom, where the defendant owns no property in the State, are deemed such irreparable injuries to the right that an action for an injunction will lie to restrain such acts.[10]

In order that an action for an injunction should lie, it is not necessary that the irreparable injuries should be capable of measurement in any considerable sum as monetary damages. The injuries are irreparable if a continuance of the invasion would ripen into a title by prescription and thus defeat the right of the original owner, even though the actual damages for the present invasion is nominal, or there are no monetary damages at all.[11] However, an action for an injunction will not lie unless the injuries are deemed to be irreparable. So, where the damages are nominal or there are no actual damages, and where the acts of invasion will not ripen into a title as against an actual right, an action for an injunction will not lie. Such would be the case where there is no injury done or threatened, as where there is plenty of water in the stream for all.[12] Or, where the action is brought to prevent the diversion of the waters of a stream during the period which the plaintiff did not use the water.[13] Or, where a tunnel was constructed in near proximity to a ditch without injury or the drawing the water therefrom.[14] Or, where the party has abated a nuisance before the action or decree;[15] or has taken steps to prevent the injury;[16] or where the

10 Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944.

See, also, for injunctions as to reservoir rights, Sec. 1620.

11 Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Heilbron v. Fowler etc. Co., 75 Cal. 246, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Shields v. Orr etc. D. Co., 23 Nev. 349, 47 Pac. Rep. 194; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425.

See, also, injunctions for an injury to the right without damages, Sec. 1606.

12 Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453, where the Court held that the mere claim of a right to all of the waters of a stream was not sufficient for the exercise of relief by injunction.

13 Nevada v. Kidd, 37 Cal. 282; Brown v. Smith, 10 Cal. 508; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423.

14 Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54.

15 McCarthy v. Gaston Co., 144 Cal. 542, 78 Pac. Rep. 7.

16 Atchison v. Peterson, 1 Mont. 561, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

injury complained of was slight and not due to the acts of the defendants.[17]

In these and many other cases discussed in the following sections of this chapter in relation to particular rights, it was held that the injuries were not irreparable so that the Court would grant relief by injunction.

§ 1603. Injunctions—The injury must be actual, continuing, or threatened.—The general rule is that an action for an injunction will not lie because of the commission of a single trespass. The party seeking the relief must show reasonable grounds for fearing the recurrence of the trespass, with such frequency as seriously to affect the value of his land, or other considerations rendering his remedy at law inadequate.[1] But where the single act is continuous in its nature, and destructive of the property, or the injury irreparable,[2] or if further acts of the same character are threatened, an action for an injunction will lie.[3] But anything short of reasonable probability of future injury is insufficient to warrant the granting of an injunction against the act which it is claimed

[17] Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

[1] Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783.

See, also, for adequate remedy at law, Sec. 1604.

See for trespass and injunctions against, Sec. 1622.

[2] For irreparable injury, see Sec. 1602.

[3] "The general rule is that injunction will not lie merely because of the commission of a single trespass, unless destructive of the property, or the injury is irreparable; but, if of this character, or if further acts of the same kind are threatened, or where the single act is continuous in its nature, an injunction will lie. Here the wrongful acts consisted in cutting the banks of the reservoirs and placing a water pipe therein through which water was withdrawn to the injury of the plaintiff." Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093, holding that the action would lie.

A purchaser of water rights from an irrigation company, having done nothing to justify its arbitrary action in destroying his headgates and ditches, and threatening to continue to do so, is entitled to an injunction and damages. Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400.

See, also, Union etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044; Hains v. Hall, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609; Miller & Lux v. Rickey, 127 Fed. Rep. 573; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; Crisman v. Heiderer, 5 Colo. 589; United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 585, 79 C. C. A. 37.

will cause the injury.[4] The mere intention to interfere with water rights is not sufficient grounds for an injunction. An intent not acted upon is not actionable. The party seeking the relief must wait for some overt and hostile act before the action will lie.[5]

§ 1604. Injunctions—There must be no adequate remedy at law.—Where the party seeking the injunctive relief has an adequate remedy at law for the recovery of damages an injunction will not be granted. If, therefore, the party seeking the relief can recover damages for the trespass in an amount equivalent or adequate to the injury which he has sustained, such injury can, in no sense of the word, be considered irreparable, and, therefore, an action for an injunction will not lie.[1] So, where the injury consisted of the laying of a pipe line across barren, rocky, uncultivated, and worthless land, without doing more, it was held that an action for an injunction would not lie, and that the plaintiff would be remanded to his action at law for damages.[2] So, where plaintiff's ditch was filled with sand and gravel from defendant's mining operations, to the extent that the plaintiff was unable to take out the water claimed under a prior appropriation, it was held that an action for an injunction would not lie, where an action at law would afford ade-

4 Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7; Bryant v. Frank H. Lamb Timber Co., 37 Wash. 168, 79 Pac. Rep. 622; Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31; Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Tuolumne etc. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54.

5 Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. Rep. 37.

1 For irreparable injury, see Sec. 1602.

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." Iowa etc. Co. v. Temescal etc. Co., 95 Fed. Rep. 320, quoting Sec. 723 of the Revised Statutes of the United States.

2 Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; McGregor v. Silver King Min. Co., 14 Utah 47, 45 Pac. Rep. 1091, 60 Am. St. Rep. 883; Thorn v. Sweeney, 12 Nev. 251.

So, when the damage caused by the construction and maintenance of a ditch through plaintiff's land was merely nominal, and the defendant was not insolvent and unable to respond in damages, and plaintiff's remedy at law was ample and adequate, the Court refused to grant an injunction. Hoye v. Sweetman, 19 Nev. 376, 12 Pac. Rep. 504.

quate remedy, and where the defendant was able to respond for the damages resulting from the injury.[3] However, the fact of defendant's insolvency is not essential to the granting of injunctive relief, where money damages are inadequate or the extent of the injuries can not be ascertained, or where the trespasses will destroy the property, although it is an additional ground for relief.[4]

In an action to enjoin the defendant from interfering with the natural flow of a stream, it was held that a Court of equity will not assume jurisdiction of the subject-matter where there is a plain, adequate, and complete remedy at law.[5] So, in an action to enjoin the pumping and carrying off of subterranean waters, and the monetary injury to the land could be determined, it was held that a prohibitory injunction should only be granted if any and all other forms of relief should be found to be inadequate.[6] But, upon the other hand, in all cases having other essentials, discussed in these sections, in order for an action for injunctive relief to fail upon this ground, the remedy at law must be direct, certain, and adequate; and, when the remedy at law is not adequate to the particular facts and circumstances surrounding any case, then a Court of equity has jurisdiction.[7] Therefore, in case an action at law will not afford such adequate relief, the owner of a water right is entitled to an injunction to prevent further interference with the flow of the water to which he is entitled and applies to a beneficial use or purpose, either in the natural stream or the ditch, canal, or other works, and that, too, whether he claims the water by an appropriation or as riparian owner.[8] As was said in a famous California case: "Here the plaintiff must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fails to do this, relief in equity will be denied;

[3] Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

[4] Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093, citing High on Inj., Sec. 717; Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. Rep. 82.

[5] Union etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Whitehair v. Brown, 80 Kans. 297, 102 Pac. Rep. 783; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

[6] Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S. 1098; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

[7] Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

[8] For the right of riparian owners to an injunction, see Secs. 1610-1615.

but, if he proves his case, relief will be granted, although he has not demanded damages at law."[9] Neither is it necessary for the party seeking the injunctive relief to make a demand for damages at law, or to bring an action for damages before the relief will be granted.[10] The decisions which bear on that class of cases, which require the plaintiff to show that he has promptly sought redress at law have no applicability to actions for injunctive relief in actions to prevent the unlawful diversion of water, or the unlawful continuous trespass upon the ditches, canals, or other works used in connection with the right to the use of water.[11]

§ 1605. Injunctions—There must have been no laches in the bringing of the action.—Laches may be defined as unreasonable delay in doing a thing, or the neglect to enforce or protect a right at the proper time, when the delay does not amount to a bar by the statute of limitations.[1]

It is said that equity does not encourage stale claims, nor give relief to those who sleep on their rights.[2] "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for

9 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 647.

See, also, Fabian v. Collins, 3 Mont. 215; Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; McCook Irr. Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996; *Id.*, 70 Neb. 115, 102 N. W. Rep. 249; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37.

10 Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Tuolumne etc. Co. v. Chapman, 8 Cal. 392.

11 That an injunction will be granted, when the threatened injury to the estate would be irreparable, without first trying the title at law, see Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304; Hindman v. Rizor, 21 Ore. 112, 27 Pac. Rep. 13; Cardoza v. Calkins, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. Min. Rep. 689; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807.

But see Iowa etc. Co. v. Temescal W. Co., 95 Fed. Rep. 320, where it is held that Federal Court of Equity can not entertain a suit to enjoin the defendant from proceeding in a statutory manner to enforce a legal demand until complainant can by judicial determination establish an unliquidated claim for damages so that it will operate under the statute as a compensation of defendant's demand, where it is not alleged that defendant is insolvent; plaintiff having in such a case a plain, adequate, and complete remedy at law for the enforcement of his claim for damages.

See, also, Heerman v. Beef Slough etc. Co., 1 Fed. Rep. 145.

1 For the bar of the statute of limitations as a defense, see Secs. 1634, 1635.

2 Piatt v. Vattier, 34 U. S. 9 Peters 405, 9 L. Ed. 173.

his laches in asserting them."[3] Before one will be granted injunctive relief by a court of equity, it must be shown that he has been guilty of no laches or unreasonable delay in the assertion or the protection of his right. But, in general, we will only say here that laches does not depend entirely on the lapse of time; but to constitute laches, there must be something more than mere delay. It must also appear that it would be inequitable to enforce the claim of the party who is charged with the laches.[4] We will discuss this question more thoroughly when we come to the question of defense to actions for injunctions by laches.[5]

§ 1606. Injunctions where no actual damages are shown.—Although, at times, used in a loose manner as synonymous, there is a decided distinction between the words "injuries" and "damages." Injuries in this connection are the physical or harmful results of the invasion of rights. Damages are the estimated reparation in money for the injury sustained. The latter is usually the direct result of the former. But there may be injuries for the invasion of a right which can not be estimated in monetary damages.

In certain instances actions for injunctions will lie enjoining the invasion of a right in cases where there are either no actual damages, or where the damages are very slight. Where the right to the use of water is claimed by appropriation, and where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time would ripen into a

3 Speidel v. Henrici, 120 U. S. 377, 30 L. Ed. 718, 7 Sup. Ct. Rep. 610.

See, also, Just v. Idaho etc. Co., 16 Idaho 639, 102 Pac. Rep. 381, 133 Am. St. Rep. 140; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, distinguishing laches from acquiescence; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Stuart v. Holland, 179 Fed. Rep. 969; Loud Gold Mining Co. v. Blake, 24 Fed. Rep. 249; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; McCook v. Crews, 70 Neb. 115, 102 N. W. Rep. 249.

See, also, for loss of right by laches, Sec. 1634.

4 Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592.

Where the evidence shows that one seeking equity has been guilty of laches, the court will deny relief on that ground, though laches was not pleaded. Stevenson v. San Joaquin etc. Co., —— Cal. ——, 121 Pac. Rep. 398.

5 See Sec. 1634.

title by prescription, and thereby deprive the owner of his property, he is not only entitled to such an action for the vindication of his right, but also for its preservation and protection. In such cases it is not necessary to show actual damages to the owner of the right in order that the injury be an actionable one; and, therefore, an action for an injunction will lie for the protection of such a right, without such damages being shown, or upon a showing that such damages are nominal. The injury to the right is deemed irreparable if the continuance of such an invasion of a right would eventually ripen into a title by prescription, and thus deprive the lawful owner of his property.[1]

An injunction will not be granted where the act complained of will not ripen into an easement and causes no actual damage. Such, for example, is the case where there is sufficient water for all.[2] Again, an injunction will not be granted where the defendant uses the water during the period of time that it is not needed by the plaintiff.[3] The same may be said where the water is claimed by virtue of riparian ownership, especially where it is accompanied with the actual application of the water to some beneficial use or purpose by the riparian owner. But the old common law rule that a riparian owner is entitled to an injunction merely for the diminished flow of the stream which adjoins or runs through his land, and that, too, without actual use, is practically abrogated in the Western States which still adhere to the modified common law rule

1 For injunctions, irreparable injury, see Sec. 1602.

"The diversion of water of the stream is an injury to the freehold of the riparian owner, and may be enjoined without a showing of other immediate monetary damages." Shurtleff v. Bracken, —— Cal. ——, 124 Pac. Rep. 724, citing Anaheim Union W. Co. v. Fuller, 150 Cal. 333, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

In actions for the diversion of water, where there is a clear violation of an established right, it is not necessary to show actual damages in order to authorize a court to issue an injunction and make it perpetual. Brown v. Ashley, 16 Nev. 311.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73, citing Kinney on Irr., 1st Ed., Sec. 329; Cache La Poudre Res. Co. v. Water Supply etc. Co., 27 Colo. 532, 62 Pac. Rep. 420.

2 Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Bates v. Hall, 44 Colo. 300, 98 Pac. Rep. 3; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453.

3 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

of riparian rights,[4] and the more modern rule is that a riparian owner must show some damage in order to enjoin the diversion of the water of the stream where such diversion is accompanied by an actual use of the water.[5] As this Western country becomes settled the demand for water becomes greater and greater, and, therefore, this latter rule, disregarding the old common law precedents, and holding that a right to water can only be based upon actual use, and that, too, whether the right is claimed as an appropriation or by riparian ownership, is undoubtedly the correct rule.[6]

An injunction will lie for the wrongful diversion of percolating waters without actual damages, especially where the wrongful acts may ripen into an adverse right.[7] So, an action will lie against the owner of a ditch for the escape of water therefrom onto the plaintiff's land, which in time would ripen into a prescriptive right, although the damages are nominal.[8] So, also, it is held by the Federal Court that the flooding of the plaintiff's land will be enjoined, even though the land may be practically ruined by the

4 When a riparian owner is entitled to an injunction, see Secs. 1610-1615.

So, where a claim of a riparian owner was based on use for irrigation, it was held that a wrongful diversion of the water would be enjoined, although no actual damages are averred or proved; the relief being granted to prevent the wrongful acts from ripening into a right. Anaheim Union W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

See, also, Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, citing Kinney on Irr., 1st Ed., Sec. 329.

See, also, for injunctions by riparian proprietors without use, Sec. 1612.

5 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Byers v. Colonial Irr. Co., 134 Cal. 553, 66 Pac. Rep. 732; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Standford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Conkling v. Pacific etc. Co., 87 Cal. 296, 25 Pac. Rep. 399.

6 For the right of riparian owners to an injunction, see Sec. 1616.

7 Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118.

See, also, for injunctions relating to percolating or underground waters, Sec. 1616.

8 Shields v. Orr Ex. D. Co., 23 Nev. 349, 47 Pac. Rep. 194.

flood which has already occurred, but where the title to the land still remains to be protected.[9] So, a land owner is entitled to an injunction against a stranger, who, under a claim of right, is taking water from his canal by means of a ditch across his land, even though the amount of water taken is inappreciable, since its continued use would ripen into an easement in the land.[10] The building of a ditch over the land of another, without right, will be enjoined although the actual damage is small.[11] So, also, an injunction will be granted against the change in the location of the ditch constructed over the land of another without showing damage.[12]

§ 1607. **Restraining orders or preliminary injunctions.**—As with other cases, upon a proper showing and the furnishing of a bond as required by law, temporary writs of injunction, or restraining orders, may be issued by the Court to restrain, during the pendency of the action, a trespass to a water right, or upon the ditches, canals, or other works necessary for the utilization of the same. The granting of a preliminary injunction is a matter resting largely in the discretion of the trial Court, and its decision thereon will not be disturbed upon appeal in the absence of an abuse of discretion.[1] The purpose of a preliminary injunction is to preserve the *status quo*, or to protect the rights of the party in

9 Salton Sea Cases, 172 Fed. Rep. 792, 97 C. C. A. 242.

10 Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968.

An injunction will be granted to prohibit the continuance of actions that obstruct a land owner's free use and enjoyment of his land, irrespective of other damage, where such action, if continued, will ripen into an easement. Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381.

See, also, for injunctions for the interference with ditches, etc., Sec. 1619.

For injunctions relative to easements, see Sec. 1618.

11 Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Winslow v. Vallejo, 148 Cal. 725, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851.

12 Vestal v. Young, 147 Cal. 721, 82 Pac. Rep. 383.

1 Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391, where it was said upon rehearing: "It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court."

See, also, Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751; 115 Pac. Rep. 951; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932.

whose favor it is granted pending the final determination of the case.[2] A Court vested with the power to issue preliminary injunctions should not hesitate to issue one *ex parte* upon a proper showing and in a proper case.[3] Aud where the damage or injury is imminent, a preliminary injunction should be granted,[4] but, upon the other hand, great care should be exercised by the Court in so doing, lest those against whom the writ issues, or who are affected thereby, are irreparably injured instead of the applicant for the writ, if it is refused.[5] And, in general, it may be said that the preliminary writ should not be granted unless it be in cases where

2 Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Custer Consol. Mines Co. v. City of Helena, — Mont. —, 122 Pac. Rep. 567.

See White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329, where a preliminary injunction was issued upon a defective complaint and a demurrer to which was sustained, but where the court refused to dissolve the injunction. The Court said: "The prevailing doctrine now is that, when a demurrer to a complaint upon which an injunction is issued is sustained, the court in its discretion may continue the injunction pending an amendment to the complaint." Citing 2 High on Injunctions, Sec. 1594; 10 Enc. Pl. & Pr. 983.

A judgment against plaintiff in a suit for an injunction, on demurrer being sustained to the complaint, and he declining to plead further, is not an order denying a temporary injunction, which is unappealable, but a final and appealable judgment. Peters v. Lewis, 28 Wash. 366, 68 Pac. Rep. 869; *Id.*, 33 Wash. 617, 74 Pac. Rep. 815.

3 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Derry v. Ross. 5 Colo. 295; Krause v. Oregon etc. Co., 45 Ore. 378, 77 Pac. Rep. 833; Smith v. Stearns Rancho Co., 129 Cal. 58, 61 Pac. Rep. 662; White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; Copper King v. Wabash M. Co., 114 Fed. Rep. 991; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423; Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106.

4 Hagerman Irr. Co. v. McMurray, 16 N. M. 172, 113 Pac. Rep. 823; Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 341.

5 "Rights to the use of water for the purposes of irrigation are of that supreme importance to all entitled to take water from a common source of supply that a court to which an application is made for an interlocutory injunction should exercise great care in granting it *ex parte*." McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

In Texas, a temporary injunction will not be granted unless the plaintiff shows that he is actually using the water or is intending to immediately use it. Biggs v. Leffingwell, —— Tex. Civ. App. ——, 132 S. W. Rep. 902.

the rights of the party applying for the same have either been adjudicated in a previous action and determined in his favor, or in cases where his rights are plain. Again, it is a dangerous proposition for the party applying for a preliminary injunction, owing to the fact that the laws of all States require the furnishing by the applicant of a bond; and, therefore, if the applicant should be finally defeated in his action, he is made liable for all damages suffered by the adverse party by reason of the preliminary injunction, up to the amount named in the bond.[6] In cases involving any class of rights in the waters of artesian basins or saturated strata, preliminary injunctions must be granted, if at all, "only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause."[7]

And, while in these cases preliminary injunctions are sometimes granted, it is the more common practice to wait until the final determination of the action before the injunctive relief is asked for or granted by the Court. This is especially true in actions where the rights of the parties to the use of the water and the right to a final injunction are to be determined in the same case.[8] As it is wholly within the discretion of the Court to grant a preliminary writ of injunction, so also it is within its discretion, during the progress of the action, should the Court find that the writ was wrongfully issued, to dissolve the temporary injunction,[9] or to

6 For the recovery of damages on injunction bonds, see Sec. 1680.

Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

7 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

8 In California, Sec. 526 of the Code of Civ. Proc. authorizes the granting of a preliminary injunction only where the complaint shows that the plaintiff is entitled to a decree restraining the commission of the act complained of, or, where it appears that, pending the litigation, the commission of some act will produce irreparable injury to the plaintiff. Van Horn v. Decrow, 136 Cal. 117, 68 Pac. Rep. 473.

9 Campbell v. Flannery, 29 Mont. 246, 74 Pac. Rep. 450, where it was held that, under Sec. 878, Code of Civ. Proc. of Montana, providing that if an application to dissolve a temporary injunction be made on affidavits on defendant's part, but not otherwise, plaintiff may oppose the same by affidavits, a plaintiff, on such an application made on the complaint alone, has no right to file an affidavit in support of his pleading.

modify the terms thereof.[10] So, also, where the Court granted a preliminary injunction in a suit to restrain the diversion of water of a stream, while a suit to quiet title to the water was pending in another county, the Court must modify the injunction so as to conform to any determination of the Court to quiet title.[11] So, again, in the final determination of the injunction suit, the Court may either dissolve the preliminary injunction, or it may make such modifications of the terms thereof in the decree making the preliminary injunction permanent, as will conform to the rights of the parties as finally determined in the action.[12]

In very rare cases preliminary mandatory injunctions are granted by the Court, but it is only where the party's right to the relief is clear and certain.[13] As a general proposition, a mandatory injunction will not lie to compel the destruction of buildings or structures prior to a hearing and determination of the case on its merits.[14]

§ 1608. **Mandatory injunctions.**—Mandatory injunctions, or those which command a party to an action to do a certain thing, are often decreed upon the final determination of an action, but are resorted to rarely, and are seldom allowed before the final hearing.[1]

Mandatory injunctions may be granted ordering the abatement of nuisances.[2] Such an injunction may be granted ordering a

10 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

11 Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

12 Where a court granting a temporary injunction dissolves it on final hearing, error in granting such injunction will not be considered on appeal, but the aggrieved party will be left to his remedy by suit on the injunction bond. Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199.

See, also, for final decrees in injunction cases, Secs. 1642-1646.

13 See next section, 1608.

14 Ryan v. Weiser Valley etc. Co., 20 Idaho 288, 118 Pac. Rep. 769.

1 For restraining orders or preliminary injunctions, see Sec. 1607.

2 For injunctions abating nuisances, see Sec. 1621.

For injunctions abating the pollution of waters, see Sec. 1143.

Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; International etc. R. Co. v. Davis, —— Tex. ——, 29 S. W. Rep. 483; Ramsey v. Chandler, 3 Cal. 90, 4 Morr. Min. Rep. 240; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. Rep. 265; Bingham v. Walter, 80 Kan. 617, 103 Pac. Rep. 120; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168.

party to place a weir, or measuring box, in a stream or ditch, and when so granted it is *res judicata* as between the parties in a later action.[3] Where the water is being wrongfully diverted from the lawful owners thereof, it may order the removal of the dam or other means of diversion, or all obstructions which prevent the flow of the water to the ditches of the owners thereof.[4] It may order the removal of dams, embankments, or dikes, by the means of which the land and property of others is flooded to their injury,[5] and that, too, although the party injured has not established his right to damages by a verdict or a finding of the Court.[6] However, where the facts do not warrant the Court in granting such an injunction, it, of course, should be denied.[7]

In rare cases mandatory preliminary injunctions are issued by the Court. But, if mandatory injunction may issue at all before the final determination of the case, it is only where the party's right

3 McPherson v. Alta Irr. Dist. 14 Cal. App. 353, 112 Pac. Rep. 193; Elliott v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

A mandatory writ of injunction may be issued *ex parte*. New Iberia etc. Co. v. Romero, 105 La. 439, 29 So. Rep. 876.

4 Evans Ditch Co. v. Lakeside Ditch Co., 15 Cal. App. 119, 108 Pac. Rep. 1027; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326; Montecito etc. Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Ramsey v. Chandler, 3 Cal. 90, 4 Morr. Min. Rep. 240; Johnson v. Superior Ct. of Tulare Co., 65 Cal. 567, 4 Pac. Rep. 575; Evans v. Ross, 67 Cal. 19, 8 Pac. Rep. 88; Allen v. Stowell, 145 Cal. 666, 79 Pac. Rep. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80.

The restoration of streams to their natural channels may be included in the relief granted against diversion of the waters of such streams. Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425, ordering the removal of a dam.

5 McPherson v. Alta Irr. Dist., 14 Cal. 353, 112 Pac. Rep. 193; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. Rep. 265; International etc. R. Co. v. Davis, —— Tex. Civ. App. ——, 29 S. W. Rep. 483; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11.

6 A mandatory injunction may be awarded to compel the removal of dams which have wrongfully diverted water onto plaintiff's property, the effect of which will be to destroy trees and cut gulches, although the plaintiff has not established his right to damages by a verdict of a jury or a finding of the court. Allen v. Stowell, 145 Cal. 666, 79 Pac. Rep. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80.

7 Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922; Lanham v. Wenatchee etc. Co., 48 Wash. 337, 93 Pac. Rep. 522.

to the relief is clear and certain.[8] In Arizona a temporary mandatory injunction was granted while the action was pending and before its final determination, requiring the defendant company to deliver water to the plaintiff for use in irrigating his land at such price as should be fixed by the Court. In compliance with this order the price was fixed by the Court and the money paid by the plaintiff to the defendant company.[9] But where the petition or complaint fails to set up the jurisdictional facts upon which an injunction may be granted, the Court will refuse to grant a temporary mandatory injunction.[10]

§ 1609. **Injunctions in the alternative, or conditional.**—An injunction may be granted in the alternative. As, where it was adjudged that the defendants abate a certain nuisance by the mandatory order to remove an embankment or dike made by them, and to fill up a certain ditch enlarged by them to its former level, and they be enjoined from a further continuance of said embankment and ditch in its present condition; but where it was also provided that "the defendants, as an alternative for doing of said

8 Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 Pac. Rep. 522; citing 22 Cyc. 743.

A mandatory injunction pending suit, requiring the removal of logs from plaintiff's land, was proper where defendant had no conceivable right, under any possible view of the case, to float logs on plaintiff's land, and leave them there, as he had done. White v. Codd, 39 Wash. 14, 80 Pac. Rep. 836.

"This court will in proper cases order the entry of interlocutory restraining orders, either mandatory or prohibitory, as the case may require." Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168.

"The jurisdiction of the court to grant a preliminary injunction restraining the defendant from interfering with the flow of the water pending the litigation can not be doubted, and we can not see that its jurisdiction is exceeded when it requires the removal of the means by which the diversion is made." Johnson v. Superior Ct. of Tulare Co., 65 Cal. 567, 4 Pac. Rep. 575.

9 Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711. Upon appeal the Supreme Court in passing upon this point said: "If the granting of this order was an erroneous exercise of power, the error would not have been ground for reversing or modifying the final judgment, upon the rendition of which the interlocutory order expired by its own limitation."

10 Fulton D. Co. v. Twombly, 6 Colo. App. 554, 42 Pac. Rep. 253; People *ex rel.* Hinckley v. District Court, Lake County, 29 Colo. 277, 68 Pac. Rep. 224, 93 Am. St. Rep. 61; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168.

acts, may make other suitable and proper provision for the care of the storm waters deflected by such works and caused thereby to flow upon the plaintiff's land.[1]

So, also, an injunction may be granted conditional upon the non-performance of some order of the Court. Such was the case where an injunction was sought by a riparian owner to restrain the maintaining of a dam and the diversion of the waters of a river, and thereby preventing their natural flow through the lands of the plaintiff, and where the plaintiff had been guilty of laches by permitting the defendants to expend large sums of money in the construction of their works, and to continue the construction for a period covering two years. The Supreme Court of the United States held that an ascertainment and decree for the payment of damages, with an order for injunction in the alternative, and not a permanent injunction, to be entered on a specified date unless the parties shall sooner agree to compensation, was the measure of relief by the riparian owners. That a certain time should be fixed within which the defendant would be required to pay such sum, and that upon the failure to make such payment an injunction would issue as prayed for; and, on the other hand, that upon payment a decree would be entered in favor of the defendant. And, again, if the plaintiffs should prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law.[2] So, again, in California it was held that, where it was to the interest of the public that subterranean waters be pumped and diverted to supply the needs of a town, and the monetary injury to the land from under which it is taken can be determined, an absolute injunction will not be granted, but merely one conditioned on the failure to make good the damages.[3]

§ 1610. An appropriator's right to an injunction for unlawful diversion or diminution of quantity.—A person who has acquired the right to the use of a certain quantity of water by an appropria-

1 Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. Rep. 1085.

See, also, Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Brown v. Gold Coin etc. Co., 48 Ore. 277, 86 Pac. Rep. 361.

2 City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592; rev'g *Id.*, 112 Fed. Rep. 98.

3 Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098.

tion of the same, or one who has in some lawful manner succeeded to the rights of an appropriator, is entitled to have the water continue to flow in the natural stream, or, after diversion, in his ditch, canal, or other works, so that he may continue to enjoy its use. Such a right is a property right of which the owner can not be deprived without due process of law, and upon the payment of just compensation.[1] Therefore, for the protection of such a property right, and against the wrong-doer unlawfully diminishing the quantity of water to which the prior appropriator is entitled, by the unlawful diversion of the same, or otherwise, equity affords the appropriate remedy by way of an injunction.[2] This is no modern

1 That a water right is a property right, see Secs. 768-771.

For the acquisition of rights by eminent domain, see Secs. 1059-1098.

For condemnation proceedings, see Secs. 1092-1097.

2 "The rule is well settled that a bill which discloses, as this does, a continuing trespass on lands of the complainant by a large number of defendants, and a constant and wrongful diversion of water from a stream thereon, which tends to depreciate the value of the land, is sufficient to entitle the complainant to an injunction." Miller & Lux v. Rickey, 127 Fed. Rep. 573.

See, also Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224.

So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that such appropriator is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. Moe v. Harger, 10 Idaho 302, 77 Pac. Rep. 645.

"It has been so often decided that it has become almost axiomatic that one who appropriates the waters of a stream running through public land acquires a special property therein, as against all persons acquiring rights subsequent in time, either as appropriators or as riparian proprietors, and may, as against such persons, insist that the waters shall be at all times subject to his use, to the extent of his original appropriation." Britt v. Reed, 42 Ore. 76, 70 Pac. Rep. 1029; holding that an action for injunction against the unlawful interference of such waters would lie.

Where the title to the water has been obtained by prior appropriation, a decree enjoining one from wrongfully diverting it is not erroneous merely because the party so enjoined owns the land through which the water naturally flows. Ronnow v. Delmue, 23 Nev. 29, 41 Pac. Rep. 1074.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; King v. Stuart, 84 Fed. Rep. 546; United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Henderson v. Nichols, 67 Cal. 152, 7 Pac. Rep. 412; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Santa Rosa Irr. Co. v. Pecos River Irr. Co. —— Tex. Civ. App. ——, 92 S. W. Rep. 1014; No-

rule of law, but has been enforced ever since the earliest times when the Arid Region Doctrine of appropriation was adopted in the Western States of this country.[3] Not only does an action for an injunction lie where the interference of the water occurs while it is still running in the natural stream, but it also lies for an unlawful interference with the water after it has been diverted into the ditch, canal, or other works of the owner.[4] An injunction will be granted

vada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; Salazar v. Smart, 12 Mont. 395, 30 Pac. Rep. 676; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823; Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; Desmond v. Sander, 46 Wash. 58, 89 Pac. Rep. 179; City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053; Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Barnes v. Gerberg, 27 Wash. 126, 67 Pac. Rep. 568; Ogilvy Irr. & L. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. Rep. 598; Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304; McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; McPhail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773; Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875; Moore v. Clear Lake etc. Co., 68 Cal. 147, 8 Pac. Rep. 816; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Roberts v. Arthur, 15 Colo. 456, 24 Pac. Rep. 922; Bartlett v. O'Connor, 102 Cal. 17, 36 Pac. Rep. 513; Britt v. Reed, 42 Ore. 76, 70 Pac. Rep. 1029; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568.

[3] For the history of the Arid Region Doctrine of appropriation, see Secs. 595-626.

See, also, Cole v. Virginia etc. Co., 1 Sawy. 470, Fed. Cas. No. 2989; Park v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 552; Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Tuolumne W. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Rupley v. Welch, 23 Cal. 452, 4 Morr. Min. Rep. 243; Hill v. Smith, 27 Cal. 476; Lake v. Tolles, 8 Nev. 285; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Harris v. Shontz, 1 Mont. 212; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; aff'g *Id.*, 1 Mont. 457; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Fabian v. Collins, 3 Mont. 215; Schilling v. Rominger, 4 Colo. 100; Keeney v. Carillo, 2 N. M. 480; Ellis v. Tone, 58 Cal. 289.

[4] An injunction lies to prevent the unlawful interference with water rights of the owner of an irrigation ditch by the owners of the land through which it extends. Shaw v. Profitt, 57 Ore. 192, 109 Pac. Rep. 584.

So, also, with the interference with a dam. Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

See, also, Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; Me-

to enjoin the acts of a junior appropriator by taking water from a tributary of the main stream, and that, too, where the plaintiff's point of diversion is above the junction of the main stream and tributary, provided, that there are those below who own rights prior in time to those of the plaintiff.[5] So, an action will lie for obstructing the flow of springs.[6] But where the water was appropriated from a stream and a spring was found not to be one of its sources of supply, an injunction will not be granted in a suit by the appropriator.[7] Again, an action for an injunction will lie not only against the unlawful diversion of the water by obstructions in the natural stream or ditch, but it will lie also against the continuance of any unlawful acts whereby the flow of the quantity of water to which the appropriator is entitled is materially diminished. So, such an action will lie for the converse of diversion; that is, against the repetition of trespass in tearing out of the diverting works of the appropriator,[8] or by the diminishing of the velocity of the stream, or causing the irregularity of its flow,[9] or where the diminution is caused by a sawmill discharging sawdust into the stream and causing the clogging up of the stream and the ditches of the appropriator.[10]

Also a prior appropriator may maintain an action against a

Phail v. Forney, 4 Wyo. 556, 35 Pac. Rep. 773.

See, also, for injunctions for interference with ditches, etc., Sec. 1619.

5 Water Supply etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386; rev'g *Id.*, 7 Colo. App. 225, 42 Pac. Rep. 1020.

See, also, Buckers etc. Co. v. Platte Valley etc. Co., 28 Colo. 187, 63 Pac. Rep. 305; Cole v. Richards etc. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962.

See, also, for the rights to the water of tributaries, Sec. 649.

6 Town of Suisun City v. De Freitas, 142 Cal. 350, 75 Pac. Rep. 1092; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Berry v. Equitable etc. Co., 29 Nev. 451, 91 Pac. Rep. 537; City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Bruening v. Dorr, 23 Colo. 195, 47 Pac. Rep. 290, 35 L. R. A. 640; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Mason v. Yearwood, 58 Wash. 276, 108 Pac. Rep. 608.

7 Leonard v. Shatzer, 11 Mont. 422, 28 Pac. Rep. 475; Sparlin v. Gotcher, 23 Ore. 186, 31 Pac. Rep. 399.

See, also, for rights to the waters of springs, Sec. 648.

8 Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22.

9 Natoma etc. Co. v. McCoy, 23 Cal. 490, 4 Morr. Min. Rep. 590; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Stone v. Bumpers, 40 Cal. 428; Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22.

10 Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185.

junior appropriator to abate a ditch so constructed along the stream as to withdraw water by seepage.[11] Again, an action will lie by an appropriator whose rights are interfered with by another appropriator in changing his point of diversion,[12] his place of use,[13] the change of the use itself,[14] or the change of the location of a ditch or canal,[15] whereby the quantity of the water to which the appropriator is entitled is unlawfully diminished, But, upon the other hand, an action for an injunction can not be successfully maintained against those who did not cause the injury,[16] nor can a prior appropriator maintain such an action against a subsequent appropriator, where the latter takes only the surplus water of a stream, which is not covered by the claim of the former,[17] nor during those periods of time when the prior appropriator has no use for the water.[18] If the contrary were the rule, the first appropriator upon a stream might claim all of its waters, regardless of use. If the prior appropriator receives the water to which he is

11 Platte Valley Irr. Co. v. Buckers, 25 Colo. 77, 53 Pac. Rep. 334.

12 For changing point of diversion, see Secs. 857-859.

13 For the change of place of use, see Secs. 867-871.

14 For change of use, see Secs. 870-872.

North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223.

15 For change of location of ditch or canal, See Sec. 860.

For injunctions relating to ditches, etc, see Sec. 1619.

16 In order to successfully maintain an injunction proceeding, it must appear that the acts of those sued caused the injury. West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

17 For the rights of prior and subsequent appropriators, see Secs. 776-786.

Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 115 Cal. 496, 47 Pac. Rep. 454; Hillman v. Newington, 57 Cal. 56; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Junkans v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568.

18 Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Natoma W. Co. v. Hancock, 101 Cal. 42, 31 Pac. Rep. 112, 35 Pac. Rep. 334.

See, also, for periodical appropriations, Sec. 786.

entitled, at a point where he can apply the same to the entire beneficial use for which the appropriation was made, he can not complain. Therefore, where the subsequent appropriator diverted the water of a prior appropriator and used it for the generation of power, and thereafter turned the water into the prior appropriator's ditch above his place of use, an injunction will not lie against the later appropriation.[19] Neither does an injunction lie against the cutting or felling of timber, by the owner of the land above the appropriator's point of diversion, and thereby diminishing the flow of the stream by facilitating evaporation.[20] Nor will an injunction be granted where the plaintiff bases his right of action upon a prior appropriation and the proof discloses the fact that it was based upon a contract.[21]

But, in all cases, whether a court of equity will interfere and enjoin acts claimed to be injurious to the rights of the prior appropriator will depend entirely upon the character and extent of the injury alleged; whether it is irremediable in its nature; whether it is continuing or is threatened; whether an action at law would afford adequate remedy; whether the parties defendant are able to respond in damages resulting from the injury; whether if the injury is continued it will ripen into an adverse title by prescription, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction. As was said by Mr. Justice Field, in speaking for the Supreme Court of the United States, of the rights of the prior appropriator to an injunction: "In all cases, therefore, between him and the parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."[22]

19 Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483.

See, also, Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756.

20 Fisher v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77.

21 City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348.

22 Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; affirming *Id.*, 1 Mont. 561, denying the writ.

§ 1611. Riparian owner's right to injunction for diminution of quantity.—As to when a riparian owner is entitled to an injunction to enjoin the diminishing of the flow of a natural stream which flows through or by his land depends upon a number of considerations. As we have discussed in previous portions of this work, a number of the Western States have attempted to reconcile the common law of riparian rights with the Arid Region Doctrine of appropriation in the government and control of the waters flowing within their respective boundaries. And, they have, therefore, both systems.[1] We have also discussed as to how the strict rule of the common law of riparian rights, as the same is known in England and the Eastern States, when it was found that such a rule was inapplicable to the arid conditions of this Western country, had been gradually modified by court decisions.[2] These modifications have continued until certain fundamental propositions have been established and may now be regarded as settled. First, that all of the waters of this Western country are for some beneficial use or purpose; and, second, the right of a riparian owner to maintain an injunction against the diminished flow of a stream depends largely upon the use to which he himself is applying it. In other words, the right to a certain flow of water, as a riparian owner, must be accompanied by a use of the water.[3]

The time has passed when a riparian owner will be aided by a court of equity in insisting upon the undiminished flow of a stream, without use, simply because it adds to the beauty of the scenery. As was said upon this subject by one of the latest cases decided by the Supreme Court of California, which Court, by the way, has been the one most strenuous to insist upon the rights of riparian proprietors: "Even if at common law, or under the civil law, it was a part of the usufructuary right of a riparian owner to have the water flow by for no purpose other than to afford him pleasure at its prospect, such is not the rule of decision in this State."[4]

Then, again, where the right of an injunction is claimed as

1 For these States, see Secs. 507, 621.

2 For the modifications of the common law, see Secs. 508-513.

For irrigation as a riparian right, see Secs. 498-525.

3 See the following sections, 1612-1615.

4 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

against the excessive diversion by other riparian owners on the same stream, the relative rights of all of such owners must be considered, the damage which has been suffered by the plaintiff, and the beneficial uses to which those who are diverting the water are applying it.[5]

And, again, where the right is claimed as against non-riparian owners, or appropriators, the question as to the use which the party applying for such relief is making of the water, the actual damages which he is sustaining by reason of the diversion of the water by the others, and the other facts and circumstances surrounding each particular case must be considered by the Court. And, in this connection, it may be added that there is another modification of the common law rule of riparian rights which has become practically settled in this Western country, and that is, as stated by the California Court: "The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water."[6] Such a rule is necessary for the reason that, as stated in the same case: "The fair apportionment and economic use of the waters of this State are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law." The same reason applies also to the other Western States which still adhere to the common law rule of riparian rights.[7]

§ 1612. A riparian owner's right without use to injunction against diversion for use—The California cases.—Under the old common law rule of riparian rights, as construed in England and in most of the Eastern States of this country, and indeed by the Western courts, in those States which still adhere to the common law of riparian rights,[1] until a comparatively recent date, a riparian pro-

5 For the apportionment of water between riparian owners, see Sec. 1538.

Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

That an action for apportionment is distinct from one for an injunction, see Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

6 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

7 That the common law is inapplicable to govern waters of an arid region, see Secs. 588-594.

1 For these States, see Secs. 507, 621.

prietor is given the aid of equity to prevent the diversion of the waters of a stream which runs through or adjoins his land, to prevent the diversion of the waters of such stream from their natural channel, although he may have made no use of the water himself, or have sustained small, or no pecuniary damages. In other words, under this construction, an action in equity will lie to maintain the undiminished flow of the stream as it was wont to flow by nature, unimpaired in quantity and undeteriorated in quality.[2] This right is regarded as absolute, and as a part and parcel of the land adjoining which the stream naturally flows, and that, too, regardless of the fact as to whether the water is put by the riparian owner to any actual use, other than the incidental benefit of having the stream flow by the land. The party diverting the water might go to great expense in the construction of his works, and yet the Court will compel the restoration of the flow to the natural channel of the stream. As was said in this regard in a Pennsylvania case: "The necessity of one man's business can not be the standard of another's right in a thing which belongs to both."[3] The injunction, under such a construction of the common law, will be granted, and that, too, without proof of use by or damages to the riparian owner bringing the action. This construction of the common law rule, until a comparatively recent date was followed by some of the Western courts.[4] As stated by the California Court: "If he does not in fact use any of the water himself, the inferior proprietor has a right to the flow of the entire stream.[5] The plaintiff's right to an injunction does not depend upon the amount of injury which he

2 See, for rights of riparian proprietors in this respect, Secs. 1611, 1612.

3 Wheatley v. Crisman, 24 Pa. St. 302, 64 Am. Dec. 657, 11 Morr. Min. Rep. 24.

See, also, Angell on Watercourses, Sec. 135; Wood on Nuisances, p. 348.

4 Where non-riparian owners divert part of the waters of a stream, and claim the right to do so, the right of the riparian owner to an injunction does not depend upon the amount of injury received, since he is entitled to the flow of the entire stream as against them. Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

5 Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181, citing the English cases of Stockport Waterworks Co. v. Potter, 3 Hurl. & C. 300, 10 Jur., N. S., 1005, 10 L. T., N. S., 748; Ormerod v. Todmorden Mill Co., 11 Q. B. Div. 155, 52 L. J. Q. B., N. S., 445, 31 Week. Rep. 759, 47 J. P. 532; Swindon Waterworks Co. v. Wilts etc. Co., L. R. 7 H. L. 697, 45 L. Ch., N. S., 638, 33 L. T., N. S., 513, 24 Week. Rep. 284.

has received."[6] And, upon this subject the California Courts are in an almost inextricable confusion, as regards the right of a riparian proprietor without using the water to an injunction as against both an appropriator, or non-riparian owner actually using the water for some beneficial purpose, and against another riparian owner for the use of what is an excessive amount of water without regard to the equal or correlative rights of all. There is a line of decisions which follow the decision in the case of Modoc etc. v. Booth,[7] which held that a riparian owner is not entitled to an injunction to restrain the diversion of water above him by a non-riparian owner or appropriator actually using the water, where the amount diverted would not be used by the former, nor cause any loss or injury to him or his land, present or prospective, and would greatly benefit the party diverting it.[8]

6 See, also, Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Bliss v. Johnson, 76 Cal. 597, 16 Pac. Rep. 542, 18 Pac. Rep. 785; Creighton v. Evans, 53 Cal. 55, 8 Morr. Min. Rep. 123; Moore v. Clear Lake Water Co., 68 Cal. 147, 8 Pac. Rep. 816; Heilbron v. Fowler etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Conklin v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968; Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Mott v. Ewing, 90 Cal. 237, 21 Pac. Rep. 194; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338; Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Anaheim Union W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Stein Canal Co. v. Kern Island etc. Co., 53 Cal. 563; Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820; Anaheim etc. Co. v. Semi-Tropic etc. Co., 64 Cal. 185, 30 Pac. Rep. 623; Heilbron v. 76 Land etc. Co., 80 Cal. 189, 22 Pac. Rep. 62; Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129.

Under the laws of California, a riparian proprietor on a stream is entitled to an injunction to restrain the unlawful diversion of water, although the injury is incapable of ascertainment or of being estimated in damages. California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741.

7 102 Cal. 151, 36 Pac. Rep. 431.

8 See Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

There is another line of decisions which follow the case of Gould v. Eaton, [9] which held exactly to the contrary to the case last cited, that as against an appropriator, or a non-riparian owner, the right of a riparian owner to an injunction does not depend upon the amount of injury received, since he is entitled to the entire flow of the stream as against them.[10] And in Huffner v. Sawday, [11] it is said: The right of riparian proprietors "to restrain the diversion, by others than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might have been done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from a reasonable use by other riparian proprietors. This is a right of property, 'a part and parcel' of the land itself,[12] and plaintiffs are entitled to have restrained any act which would infringe upon this right." [13] And then comes the late case of San Joaquin etc. Co. v. Fresno etc. Co.,[14] in which the Court held that as against the use of an upper riparian owner for what might be termed an excessive use of the water, a lower owner must show substantial damage before the Court would grant an injunction against the upper owner, and modifying the doctrine as laid down in Gould v. Eaton to this extent, and holding that, if the rule of the common law is unfitted to the changed conditions existing in that State, so that its application will work hardship, the Supreme Court will not follow it. And then later comes the case of Porters etc. Co. v. Beaudry, decided by the Court of Appeals,[15] in which the Court reaffirmed the old common law doctrine as announced in the case of Gould v. Eaton,[16] and where the Court said:

9 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

10 See the late cases of Duckworth v. Watsonville, 150 Cal. 520, 89 Pac. Rep. 338; Anaheim Union W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062, in which the doctrine is reaffirmed.

11 153 Cal. 86, 94 Pac. Rep. 426.

12 Citing Duckworth v. Watsonville etc. Co., *supra*.

13 See, also, the cases cited in the first notes of this section.

14 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

15 15 Cal. App. 751, 115 Pac. Rep. 951.

16 *Supra*. Also as announced in Huffner v. Sawday, and Duckworth v. Watsonville, *supra*.

"The rights of a riparian proprietor as such are not to be tested by the use or uses to which he puts the riparian waters, or whether he uses them at all or not. If one's lands are riparian to a stream of water, the owner of the lands can not be devested of his rights as a riparianist merely because he may either put the waters flowing in such stream to other than a riparian use or not use them for any purpose at all. Nor would a non-riparian owner of the waters of the same stream for such reason alone be permitted to divert the waters of such stream." [17]

The latest exposition of the California Court upon this subject was in the case of Shurtleff v. Bracken,[18] in which the Court said: "The diversion of water of the stream is an injury to the freehold of the riparian owner, and may be enjoined without a showing of other immediate monetary damages." [19]

§ 1613. A riparian owner's right without use to injunction against diversion for use—The more modern rule.—But in the evolution of the law of water rights in the Western States, the courts of those States have considerably changed their attitude upon the question of the right of a riparian proprietor to maintain an action for an injunction against the diversion of the waters of a stream, where such waters flow mostly over public lands and are needed for irrigation, and where the riparian owner is not actually applying the water to some beneficial purpose, and where he is not materially injured by the diversion of a certain quantity of the flow before it reaches his land. Therefore, a distinction must be noticed in the more recent decisions of the courts of these States; where the right claimed is merely the undiminished flow of the stream by a riparian proprietor, as between the construction of the strict common law rule of riparian rights as the same is recognized and enforced in England and in the Eastern States, and even as between the earlier decisions of some of the Western courts and their more modern decisions. Upon the theory that all of the existing water supply should be for actual use, in those Western States

17 See, also, Davis v. Martin, 157 Cal. 657, 108 Pac. Rep. 866; Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

18 —— Cal. ——, 124 Pac. Rep. 724.

19 Citing Anaheim Union W. Co. v. Fuller, 150 Cal. 333, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

which adhere to a modified form of the common law, the courts are now loth to grant equitable relief on behalf of a riparian proprietor on account of the mere diminished flow of a stream, caused by the diversion of the water above his lands, without actual material damage to him, and where the water diverted is applied to some beneficial use or purpose. And, therefore, it may be regarded as the settled rule that, in such cases, the Court will consider all of the equities of the case; and, without prejudice to an action for damages, will refuse to grant the injunction.

We deem the true rule to be that the lower riparian owner seeking the injunction must show some real, material, and substantial damage to justify a court of equity in enjoining an upper claimant from his actual beneficial use of the water; and, that, too, regardless of the fact as to whether such upper claimant claims his right to the use of the water as an appropriator, or as a riparian owner using more than his just proportion of the water, after taking into consideration the equal or correlative rights of the other owners, under the strict construction of the common law doctrine. And, we will add that, owing to the great need and scarcity of water in this Western country, and the necessity that all of the available water supply be put to some beneficial use or purpose, the courts are rapidly coming to this view.[1] Such was the ruling of the Su-

1 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Miller & Lux v. Madera C. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; City of Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. Rep. 869; dis., 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; Jones v. Conn., 39 Ore. 30, 64 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Cruse v. McCauley, 96 Fed. Rep. 369; Morris v. Bean, 146 Fed. Rep. 423; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54

preme Court of the United States in a case where the State of Kansas as riparian proprietor claimed the right to the undiminished flow of the stream, without actual use, as against the State of Colorado, and certain appropriators therein where the water diverted was used for the irrigation of arid lands, although the Court found that there was "perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet, to the great body of the valley it has worked little, if any detriment."[2] And Mr. Justice King, in commenting upon

Am. St. Rep. 337; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Charnock v. Higuerra, 111 Cal. 471, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; Coleman v. La Franc, 137 Cal. 214, 69 Pac. Rep. 1011; Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Arroyo Ditch Co. v. Baldwin, 155 Cal. 280, 100 Pac. Rep. 874; Anderson v. Bassman, 140 Fed. Rep. 14; Ison v. Nelson Mfg. Co., 47 Fed. Rep. 199; Lone Tree Ditch Co. v. Cyclone Ditch Co., 51 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 129 N. W. Rep. 596; Redwater etc. Co. v. Jones, —— S. D., ——, 130 N. W. Rep. 85; North Port Brew. Co. v. Perrott, 22 Wash. 243, 60 Pac. Rep. 403; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

In Washington, a defendant's answer claiming ownership of the water, and right to its use, because of a homestead entry made prior to the appropriation of the plaintiff, was held to be fatally defective because the defendant did not show that he was making any beneficial use of the water. Northport Brewing Co. v. Perrott, 22 Wash. 243, 60 Pac. Rep. 403.

An injunction will not be issued to restrain the unlawful diversion of the water of a stream in favor of a riparian proprietor who is taking no advantage of his usufructuary right, but allows the water to flow by unutilized, further than to vindicate his rights, and prevent a loss of it by adverse user and lapse of time, especially where the diverted water is of great value to defendant. Ulbricht v. Eufalia W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

In Colorado, it was recently held that the common-law doctrine of riparian rights that the riparian proprietor is entitled to the continuous flow of the stream does not obtain in that State. Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

In a recent case in Texas, it was held that a lower riparian owner is not entitled to a temporary injunction against the diversion of water for the irrigation of non-riparian land in the absence of a showing that his land is now being used, or is intended for immediate use, or is prepared for agricultural or other purposes, rendering the use of the water of the river necessary and beneficial. Biggs v. Leffingwell, —— Tex. Civ. App. ——, 132 S. W. Rep. 902.

2 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. St. Rep. 655, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

this last case in a recent case in Oregon, said that it "is a strong and commendable tendency on the part of that great Court to recognize that the rigid rules of common law, as interpreted and sought to be applied by those insisting upon the 'undiminished flow' theory, are inapplicable to the many new and intricate questions necessarily arising under our form of Government and throughout the arid and semi-arid sections."[3] And, the Supreme Court of California, in deciding the same question, in one of its very late decisions, said: "The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must continue to be solved by this Court as the cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found to the radically changed conditions existing in this State, so that its application will work wrong and hardship rather than betterment and good, this Court will refuse to approve and follow the doctrine." And, commenting upon an earlier decision of the same Court, it is said: "If the doctrine announced in Gould v. Eaton,[4] may be thought to confer upon a riparian proprietor a greater right than these, namely, the right to have all the water of the stream at all times flow past his land, without regard to the question as to whether or not any diminution of the flow does or could injure him, then it must be said that the doctrine of Gould v. Eaton is to this extent modified by later decisions."[5]

The above rule, applying as it does to the ordinary flow of a stream, applies with much greater force where the flow is augmented by flood water.[6] And, again, under the modern rule as

[3] Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

[4] 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

[5] San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

[6] The impounding and distribution of flood and storm waters is not prohibited by law, but is rather encouraged, where it does not substantially damage the existing riparian rights of others. San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Heilbron v. 76 Land & W. Co., 80 Cal. 189, 22 Pac. Rep. 62; Brown v. Smith, 10 Cal. 508; Ortman v. Dixon, 13 Cal. 33; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min.

stated above, an injunction will not lie against the diversion of water by a riparian proprietor, during the period of time that the water is not put to an actual use.[7]

Neither is it the rule that a lower riparian proprietor must show some material damage to his rights before a court of equity will grant an injunction against an upper claimant who is applying the water of the stream to some beneficial use or purpose, entirely confined to the Western States. Some of the eminent authorities of the Eastern States, in effect, hold the same rule.[8]

§ 1614. A riparian owner with use has a right to injunction for unlawful diversion.—Having discussed in the preceding section the question of the right of a riparian owner without use to an injunction against the continuing diversion of the waters of a stream which flows through or by his land,[1] we will now discuss the proposition of the right of a riparian proprietor, who, up to the time of the unlawful diversion was actually applying the water to some beneficial use or purpose, to an injunction restraining such diversion. And, in general, we will say that in those States which

Rep. 650; Nevada etc. Co. v. Kidd, 37 Cal. 282; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Coleman v. La Franc, 137 Cal. 214, 69 Pac. Rep. 1101; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Miller & Lux v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. Rep. 439; Crawford v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

But see Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129; California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741.

7 Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598.

8 "The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not." Mr. Justice Story in Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14312.

See, also, Elliott v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; Parker v. American etc. Co., 195 Mass. 591, 81 N. E. Rep. 468, 10 L. R. A., N. S., 584; Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; 3 Kent's Comm. 429; Gould on Waters, 3d Ed., p. 422, and cases.

1 See Sec. 1613.

still adhere to the modified rule of the common law of riparian rights, the right of a riparian owner to maintain an injunction against a continuing diversion which invades his rights is practically the same as is the right of an appropriator to maintain such an action for such a purpose and discussed in a previous section.[2] This is also true, regardless of the fact as to whether the unlawful diversion is made by an appropriator, or by another riparian owner upon the same stream.[3] If one riparian proprietor is taking more water out of the stream than he is justly entitled to, bearing in mind the relative rights of all of the other riparian proprietors upon the same stream, he may be enjoined by another riparian proprietor whose rights are materially injured thereby.[4] If the water is being diverted by an appropriator, and the rights of the riparian owner are materially injured by such diversion, he has the same right of action.[5] But, according to the better rule, the rights

2 See Sec. 1610.

3 Union M. & M. Co. v. Dangberg, 2 Sawyer 450, Fed. Cas. No. 11,370, 8 Morr. Min. Rep. 113; Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; Heilbron v. 76 Land & W. Co., 80 Cal. 189, 22 Pac. Rep. 62; Slattery v. Harley, 58 Neb. 575, 79 N. W. Rep. 151; Moore v. Clear Lake Water Works, 68 Cal. 147, 8 Pac. Rep. 816; Conkling v. Pac. Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399; Gould v. Eaton, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; Rigney v. Tacoma, etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Santa Rosa Irr. Co. v. Pecos etc. Co., —— Tex. Civ. App. ——, 92 S. W. Rep. 1014.

4 Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288; *Id.*, 154 Cal. 150, 97 Pac. Rep. 178; Coleman v. La Franc, 137 Cal. 214, 69 Pac. Rep. 1011; Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308, Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

But a diversion of water will not be restrained at the suit of a riparian owner, unless such diversion diminishes the quantity of water which would otherwise have flowed in the natural channel. Creighton v. Kaweah etc. Co., 67 Cal. 221, 7 Pac. Rep. 658.

5 Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Anaheim Union W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062;

of an upper proprietor to the use of the waters of a stream for irrigation purposes are superior to those of a lower owner without use.[6] But, in each case, under the latest exposition of the law upon the subject, a lower riparian owner must show some damage in order to restrain a diversion above his land, where the water so diverted is applied to a beneficial use or purpose.[7] In other words, a riparian owner will not be permitted to invoke the power of a court of equity to enjoin the diversion of water above him, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it.[8] And, upon this subject the Texas Court has, as it seems to us, adopted the proper rule of law. It was there held that a lower riparian owner can not invoke a court of equity to enjoin the use of water by an appropriator, or a non-riparian owner, without showing that his own land is being used, or intended for immediate use, or is prepared for agricultural or other purposes, which render the use of the water necessary and beneficial.[9] So, also, where a spring rises on the land of one person and has sufficient flow to form a water course, which runs through the land of a lower owner, an injunction will be granted the latter owner, who insists that the stream be permitted to flow without material alteration or diminution of the quantity of water.[10]

In a preceding section we discussed the proposition that unreasonable delay, or laches, to enforce or protect a right at the proper

Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Andrews v. Donnelly, —— Ore. ——, 116 Pac. Rep. 569; Miller v. Baker, —— Wash. ——, 122 Pac. Rep. 604.

6 Cormick v. Arthur, 31 Tex. Civ. App. 579, 73 S. W. Rep. 410.

7 See previous section, 1613.

8 Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; Fisher v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Cruse v. McCauley, 96 Fed. Rep. 369; Peregoy v. McKissick, 79 Cal. 572, 21 Pac. Rep. 967; Mason v. Cotton, 2 McCreary 82, 4 Fed. Rep. 792; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449.

9 Biggs v. Leffingwell, —— Tex. Civ. App. ——, 132 S. W. Rep. 902.

10 Hollett v. Davis, 54 Wash. 326, 103 Pac. Rep. 423; Bartlett v. O'Connor, 102 Cal. 17, 36 Pac. Rep. 513.

time would bar a right of action for an injunction.[11] This proposition applies with equal force to a riparian owner who has unreasonably delayed bringing his action to protect his rights, where otherwise he could maintain such an action.[12] But, although the Court may refuse to grant the injunction, he may still have his action for damages for the injuries incurred.[13]

§ 1615. Riparian owner's right to protection for future use.—The great weight of the modern authority being to the effect that a lower riparian owner is not entitled to an injunction, where he is not actually using the water flowing by his lands, and where his rights are not materially and substantially injured by a diversion by an upper claimant who is actually putting the water to beneficial use;[1] but that he is entitled to injunctive relief where he was actually using the water, and his rights are substantially injured,[2] the question naturally arises as to how long a time such a riparian owner, after his rights have vested as such, is to be given within which to put the water to a beneficial use. In other words, what right has a riparian owner to protection by injunction of his rights for future use? In answer to this we will say it should depend upon the facts and circumstances of each particular case. In some cases he is not entitled to any protection at all, as where the water could not be used by him, and where, by the diversion above, there is "no loss or injury to him or to his land, present or prospective." Such would be a case where the land was high and rocky and incapable of cultivation; or, again, where the land was so low that the riparian owner had too much water as it was,[3] or where there was ample water for all.[4]

11 That there must be no laches, see Sec. 1605.

See, also, for the defense of laches, Sec. 1634.

12 City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592; modifying *Id.*, 112 Fed. Rep. 98; Loud Gold M. Co. v. Blake, 24 Fed. Rep. 249; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Thomas v. Woodman, 23 Kan. 217, 33 Am. Rep. 156; Clark v. Cambridge Irr. Co., 45 Neb. 798, 64 N. W. Rep. 239; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

13 See Secs. 1660 *et seq.*

1 See Secs. 1611-1614.

2 See Sec. 1614.

3 Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762.

4 Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423.

See, also, Jones v. Conn, 39 Ore. 30,

Where the use of the water by the lower riparian proprietor is possible, as is the case with appropriators, he should be given a reasonable time within which to actually apply the water to that use; and, as to what constitutes such a reasonable time is a question of fact dependent upon the circumstances of each particular case. He should not by the aid of a court of equity in granting an injunction against the diversion by upper claimants for actual use be permitted to hold his rights indefinitely, upon the theory that he may possibly some time in the future use the water for some indefinite purpose; and, in the meantime, with the assistance of the Court, permit the water to run to waste. The Texas Court has gone even further than this in a recent case, in holding that a lower riparian proprietor without actual use is not entitled to even a temporary injunction against the diversion of water for the irrigation of non-riparian land by an appropriator, in the absence of a showing that the water is intended for immediate use, or that his land is prepared for agricultural or other purposes, rendering the use of the water therefor necessary and beneficial.[5]

§ 1616. Injunctions against unlawful diversion of subterranean waters.—In a previous portion of this work we have discussed at length the subject of the acquisition of rights to the use of the waters of subterranean, or underground waters.[1] The right of action to enjoin the wrongful diversion of the waters of subterranean streams whose courses are known and defined, does not differ materially from the right of such an action for the wrongful diversion of the waters of surface streams.[2] But the party seeking

64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; McCook Irr. Co. v. Crews, 70 Neb. 109, 102 N. W. Rep. 249; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

5 Biggs v. Leffingwell, —— Tex. Civ. App. ——, 132 S. W. Rep. 902.

The right of a riparian owner to the use of the stream for irrigation is limited to the amount actually used by him for proper irrigation purposes within a reasonable time after settlement on the land, not exceeding the carrying capacity of his ditch. Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402.

See, also, McCook Irr. Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996.

1 See Chaps. 59-62, Secs. 1148-1211.

2 For subterranean known and defined streams, see Secs. 1115-1160.

the injunction must, by proper and competent testimony, prove that the stream from which he claims the wrongful diversion was made is the same as that from which he claims his rights; and, where he does not do this the injunction will be refused.[3]

When we come to the subject of those underground waters whose courses are unknown and undefined, such as the waters of artesian basins,[4] saturated strata,[5] and percolations,[6] which waters underlie in common the lands of several or many land owners, the right of one of these land owners to enjoin another from drawing off more than his proportion of these waters by means of wells or other devices upon his own lands, depends upon the rule of law governing such waters in the jurisdiction where such acts are being carried on. In those jurisdictions which follow the strict rule of the common law governing all forms of percolations, an action in equity to enjoin one land owner from drawing off all of the percolating waters found in his lands will not lie, such waters being considered a part of the very soil itself, to which the owner is entitled as much as he is to the very stones and gravel thereon, and any interference by

For injunctions against the wrongful diversion of water, see Secs. 1610-1615.

Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280; Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Stillwater W. Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541.

Where the rights of a riparian owner were not affected by the diversion of the underflow of a stream by means of pipe lines and a dam above his lands, an action for an injunction will not lie in his behalf. Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

See, also, Yarwood v. West Los Angeles W. Co., 132 Cal. 204, 64 Pac. Rep. 275.

3 McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280.

The burden of proof to show the existence of an underground stream of water is upon the one asserting the right to its use. Barclay v. Abraham, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365.

The only difference in the application of the law to surface and subsurface streams is in ascertaining the character of the stream. Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262.

4 For the rights in artesian waters, see Secs. 1166-1184.

5 See Sec. 1196.

6 See Secs. 1197-1200.

him with such waters found on his own lands, as to the neighboring land owners, is considered *damnum absque injuria.*[7]

But in those jurisdictions which follow the rule of correlative rights of the owners of lands overlying these waters, especially as laid down in the case of Katz v. Walkinshaw,[8] such waters being considered the property of all the land owners whose lands overlie them in common, it is held that an action for an injunction in behalf of one land owner against another, who is drawing off more than his fair proportion of such common waters, will lie, especially where the actual use of the plaintiff to his proportion of such waters is being interfered with by such acts.[9] In a recent case, holding that an injunction would lie against such an invasion of a land owner's right, and reaffirming the doctrine as decided in the case of Katz v. Walkinshaw, the Supreme Court of California said: "The common law rule was rejected as inapplicable to the conditions of this State, and the rule of *sic utere tuo* announced, and, applying it, it was held that the rights of the parties in the suit to take these particular waters were correlative, and that the defendant could not divert them for sale elsewhere, so as to prevent the plaintiff from obtaining a reasonable supply for irrigation and

[7] See Sec. 1188.

See, also, Gould on Waters, 3d Ed., Secs. 282-290; Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch., N. S., 289.

Water standing in land underneath the surface, or passing through it by filtration, percolation, chemical attraction, or in undefined and unknown streams, belongs to the land, and the incidental drying up of springs caused by the escape of such waters into and out through a tunnel driven by one on his own land is *damnun absque injuria.* Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719, holding that an injunction would not lie.

See, also, Herriman Irr. Co. v. Butterfield etc. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Boyce v. Cupper, 37 Ore. 256, 61 Pac. Rep. 642; Crescent M. Co. v. Silver King M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; Mosier v. Caldwell, 7 Nev. 363; Willow Creek Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Sullivan v. Northern Spy Min. Co., 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186; Hansen v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. St. Rep. 558.

[8] 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

[9] Katz v. Walkinshaw, *supra.*

An injunction will lie to restrain a threatened permanent interference with the rights of the owner of the fee with respect to percolating water. Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118.

other ordinary uses upon his land. The doctrine thus announced in this pioneer case has been subsequently followed, so that the rule is now settled beyond further question."[10] But, before either a preliminary or a final injunction in such cases will be granted, there must be the clearest showing upon the part of the party seeking such relief, that there is imminent danger of irreparable and substantial injury to his rights, and that the diversion complained of is the real cause of such injury, and, further, that he has not been guilty of laches or unreasonable delay in seeking to protect such rights.[11] Therefore, it is held that percolating waters may be developed by means of a tunnel and conducted away from the land, as against the owners of adjoining lands, where the waters would otherwise, in their natural flow, sink into the ground and be lost.[12] Also, where the complainant stood by while a development was made for public use, and had suffered it to proceed at large expense to a successful operation, having reasonable cause to

10 Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772, citing McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849.

See, also, Cohen v. La Canada, 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Burr v. Maclay Rancho Co., 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098; Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118.

11 Katz v. Walkinshaw, *supra*.

"The decision of Katz v. Walkinshaw is adhered to, but as plaintiffs, on the facts, failed to establish any ground for relief under the principles there laid down, no amplification of those principles becomes necessary." Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098.

The doctrine of correlative rights in percolating waters was a change in the law, so that a clear case must be made thereunder to justify an injunction to prevent a continuance of the use of such waters, taken in good faith before such doctrine was enunciated, and which use was in full operation at that time. Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

12 Cohen v. La Canada etc. Co., 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; for first appeal, see 142 Cal. 437, 76 Pac. Rep. 47.

believe that it would affect his own water supply, an injunction against the continued use of such waters would be refused.[13]

The general rule that an injunction will not be issued enjoining the use of water by the defendant when the plaintiff does not need the same, also applies to subterranean waters.[14]

§ 1617. Right of riparian owner to an injunction against negligent logging.—As we discussed in a previous section of this work, streams of water, which in their natural condition are capable of floating logs and timber to market are deemed to be navigable waters.[1] Again, streams of water, which are not in their nature capable of floating logs, may by dams and other artificial works be made capable of such service. And when such is the case, where the rights of riparian owners and appropriators are not materially and irreparably injured by such a use of the stream, it is always permitted. But such operations must be carefully conducted and if material, irreparable injury is caused thereby, either in the interference with the flow of the stream or to the banks of the stream or the lands of the riparian owners, an action for damages will lie,[2] or if such acts are continued or threatened, an action for an injunction will lie against such use.[3]

But, if there is no such material, irreparable injury, or if there is

13 Barton v. Riverside W. Co., 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

14 Burr v. Maclay Rancho Co., 154 Cal. 428, 98 Pac. Rep. 260.

1 See Secs. 344-346.

2 For damages for negligent logging, see Sec. 1679.

3 Where the facts show that a stream is not navigable for floating logs without doing irreparable injury to an estate through which it flows, and the defendant claims the right to use such stream for that purpose, not only for himself, but for the public, and threatens to commit and claims the right to repeat numerous trespasses which the exercise of such right necessarily involves, it was held by the Oregon Court that the plaintiff was entitled to an injunction to prevent irreparable injury, and to avoid a multiplicity of suits. Hains v. Hall, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609.

See, also, Watkinson v. McCoy, 23 Wash. 372, 63 Pac. Rep. 245; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. Rep. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. Rep. 1046; White v. Codd, 39 Wash. 14, 80 Pac. Rep. 836; Shephard v. Coeur d'Alene Lbr. Co., 16 Idaho 293, 101 Pac. Rep. 591; Kamm v. Normand, 50 Ore. 9, 91 Pac. Rep. 448, 11 L. R. A., N. S., 290, 126 Am. St. Rep. 698; Berryman v. East Hoquiam Boom & Log Co., —— Wash. ——, 124 Pac. Rep. 130.

an adequate remedy at law, or the waters of the stream can be used for both purposes, an action for an injunction can not be maintained; but the party claiming to be injured will be left to an action at law for damages.[4]

And therefore when the interference with the flow of the stream was by the construction of dams and it was sought to enjoin such interference by a riparian owner, it was held in a very recent case by the Supreme Court of California that a riparian owner must show some damage in order to restrain an upper owner from the beneficial use of the water and that an upper riparian owner may dam the waters of a stream for the purpose of floating logs therein if such use did not interfere with the water rights of the lower owner. In other words, the Court held that the lower riparian owner was not entitled to the undiminished flow of a stream, without damage, where the water was used above for this beneficial purpose.[5]

§ 1618. Injunctions against the interference with easements.—An action for an injunction will lie to prevent the continuous or threatened interference with the use of an easement, granted for the purpose of the construction and operation of ditches, canals, or other works over the lands of another.[1] So, the owner of an estate

4 For damages for negligent logging, see Sec. 1679; Winsor v. Hanson, 40 Wash. 423, 82 Pac. Rep. 710; Sengstacken v. McCormac, 46 Ore. 171, 79 Pac. Rep. 412; Bryant v. Frank H. Lamb Co., 37 Wash. 168, 79 Pac. Rep. 622; Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 Pac. Rep. 904; Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199.

5 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, Secs. 1611-1615.

1 For the acquisition of rights of way over private lands, see Secs. 972-993.

Where the owners of certain real estate threatened to prevent plaintiff from operating under a grant of right of way for a pipe line, together with the right to divert the waters of a certain stream, plaintiff was entitled to prevent such threatened interference by injunction. Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617.

See, also, Tew v. Powar, 37 Colo. 392, 86 Pac. Rep. 342; Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690.

An injunction will be granted against the interference with a right of way granted to a city for a pipe line, where the grantor interferes with the construction of a telephone line convenient for the proper repair, maintenance, and operation of the pipe line, where the same does not

in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.[2] The owner of an easement has a right of entry upon the servient estate, to make repairs and to clean out his ditch and canal and if the land owner interferes he may maintain an action for an injunction.[3] But it is held that a city owning an easement across the lands of a person will not be granted an injunction against the owner of the land to restrain him from allowing his cattle to feed and graze in the field along the banks of the ditch and to cross over and wade through the waters thereof, for the reason that the duty of protecting the easement is upon the owner of the easement and not upon the owner of the fee.[4]

An action for an injunction will also lie by a land owner to restrain the defendants from conducting or maintaining any ditch, canal, or other works on his land, or from maintaining any flow of water over his lands.[5]

interfere with the land owner's use of the land. City of Portland v. Metzger, 58 Ore. 276, 114 Pac. Rep. 106.

See, also, for the interference with ditches and canals, etc., Sec. 1619.

2 Los Robles W. Co. v. Stoneman, 146 Cal. 203, 79 Pac. Rep. 880; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569, where the right to the joint use of a ditch was determined as between the parties in an action brought to enjoin the defendant from interfering with his easement to carry water from an irrigation ditch through the defendant's land.

3 Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. Rep. 140; Hutchinson v. Watson D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

See, also, for the right of entry to make repairs, Sec. 992, 993.

4 City of Bellevue v. Daly, 14 Idaho 545, 94 Pac. Rep. 1037, 15 L. R. A., N. S., 992; Swanson v. Groat, 12 Idaho 148, 85 Pac. Rep. 384; Durfee v. Garvey, 78 Cal. 546, 21 Pac. Rep. 302.

But see City of Portland v. Metzger, 58 Ore. 276, 114 Pac. Rep. 106, where under a grant of a right of way no right was given to fence a right of way.

5 Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989, where it was held that in order to sustain a plea to a prescriptive right to take water from a stream over another's land, the defendant must show that he took some definite quantity of water therefrom in the past; it being insufficient merely to show that he had taken some water. Citing Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. Rep. 704; Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994.

§ 1619. Injunctions against the interference with ditches and other works.—An action will lie to enjoin an unlawful interference with the ditch, canal, or other works of another where the facts show the injury to be irreparable and for which an action at law will not afford adequate remedy and to prevent a multiplicity of suits. The interference with a ditch which the owner thereof is authorized to maintain and with the flow of the water therein is a continuous trespass which a court of equity will enjoin.[1] So, where an abutting owner maintaining an irrigation ditch in the non-traveled portion of a highway adjoining his land brought an action against the interference therewith by the defendant, it was held that such acts constituted a continuous trespass causing irreparable and special damage to plaintiff and that he was entitled to relief by injunction.[2]

It is held in Wyoming that where the proceedings in the condemnation of a right of way were invalid, that the land owner was

1 See, also, for injunctions for trespass on land, Sec. 1622.

For injunctions concerning easements, see Sec. 1618.

For rights of way over private lands, see Secs. 972-993.

See, also, Derry v. Ross, 5 Colo. 295.

2 Holm v. Montgomery, 62 Wash. 398, 113 Pac. Rep. 1115, 34 L. R. A., N. S., 506.

An injunction will lie to prevent the construction of a lateral ditch across the right of way of an irrigation canal, by one having no legal authority to do so. Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690.

A purchaser of water rights from an irrigation company, having done nothing to justify an action in destroying his headgates and ditches, is entitled to an injunction and damages. Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400.

See, also, Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

See, also, Park v. Ackerman, 60 Neb. 405, 83 N. W. Rep. 193; Mabee v. Platte Land Co., 17 Colo. App. 476, 68 Pac. Rep. 1058; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; but see *Id.*, 137 Cal. 432, 70 Pac. Rep. 288; Hayois v. Salt River Valley C. Co., 8 Ariz. 285, 71 Pac. Rep. 944; Wilson v. Eagleson, 10 Idaho 755, 81 Pac. Rep. 434; Kleyenstuber v. Robinson, 6 Ariz. 31, 52 Pac. Rep. 1117; Salem etc. Co. v. Stayton etc. Co., 33 Fed. Rep. 146; McLaughlin v. Del Re, 71 Cal. 230, 16 Pac. Rep. 881; Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690.

Where complainants constructed a ditch and flume across defendant's mining claims without objection, and without condemning the right of way, the defendants being only entitled to damages for the construction of the ditch, complainants were entitled to an injunction from continuing to destroy the same *pendente lite*. Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106.

entitled to an injunction to restrain the defendants from going upon and constructing an irrigation ditch over and across plaintiff's land.[3]

So, the right to have an original community ditch run through or near the lands of one of the owners thereof, upon its ancient course, being a property right, secured by the mutual understanding by which the ditch was constructed upon such course, an injunction will be granted against any change in the location of such ditch.[4]

Again, an injunction will be granted against the discharging of water into a ditch to the injury of the owners thereof.[5] But it was held that an injunction would not be granted to abate dams so constructed on the lands of the owner as to turn into a ditch surface water where the owner of the ditch had so constructed aprons to run such surface water over the ditch on the cultivated land of the land owner.[6] Again, an injunction will be granted to prevent the unlawful interference with the water flowing in a ditch by the owners of the land through which the ditch passes, such owners having no right to the water flowing in such ditch.[7] But where the right of way was granted for a ditch for the purpose of drainage it was held that such right was an easement only, and that the owner of the land had the right to use such water for irrigation and that an injunction would be granted to such owner against the interference with such right.[8]

An action will lie to abate a ditch so constructed along a stream as to draw the water therefrom by seepage as against the rights to the use of the water by others.[9] So, also, where a new ditch is con-

3 Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994.

4 Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589.

5 North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A., 851, 67 Am. St. Rep. 607.

6 North Fork W. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69.

See, also, Menthoe Cattle Co. v. Williams, 64 Wash. 457, 117 Pac. Rep. 239.

7 Shaw v. Profitt, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. Rep. 952.

See, also, Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546.

8 Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139; *Id.*, 54 Wash. 653, 104 Pac. Rep. 141.

9 Platte Valley etc. Co. v. Buckers, 25 Colo. 77, 53 Pac. Rep. 334.

structed in such a way as to cut into and draw the water appropriated and flowing in an old ditch.[10]

But in order for the owner to be entitled to equitable relief by way of an injunction for the interference with a ditch or canal the complainant must make out a plain case containing all the essentials for injunctive relief otherwise the injunction will be refused and he will be left to the remedy of an action at law for damages.[11]

So, also, where the defendant has acquired a prescriptive right to impede the flow of a ditch by a flume.[12] So, also, where by changes in the ditch it was an additional burden upon the land than originally covered by the right of way as granted.[13] But, upon the contrary, an injunction will be granted the land owner against the making of such change.[14] Again, an injunction will not be granted where the plaintiff made a contract with the defendant granting it the prior right to the use of a certain amount of water from its ditch, and where the water in the ditch could not be taken out except by the means of dams in the ditch, even if by so doing it raised the water in the ditch so as to destroy the water power of the plaintiff.[15] Where a decree was granted in favor of an irrigation district, restraining the defendants from interfering with the irrigation ditch of such district, such decree was held not to survive a dissolution of the district.[16]

10 Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

11 An injury to a ditch which will not destroy its efficiency and can be easily repaired will not support an action for an injunction. Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54.

12 Centerville etc. Co. v. Sanger Lumber Co., 140 Cal. 385, 73 Pac. Rep. 1079.

13 Campbell v. Flannery, 32 Mont. 119, 79 Pac. Rep. 702, 80 Pac. Rep. 240; *Id.*, 29 Mont. 246, 74 Pac. Rep. 450; Arthur Irr. Co. v. Strayer, 50 Colo. 371, 115 Pac. Rep. 724.

14 See Sec. 860; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422.

An injunction will be granted to prevent the widening of a ditch through plaintiff's land, and the erection of a dam which would destroy the plaintiff's ford, the defendant having no legal right to do either. Mendenhall v. Harrisburgh etc. Co., 27 Ore. 38, 39 Pac. Rep. 399.

See, also, for changes in ditch which may be made, Sec. 860.

15 Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

See, also, Bowman v. Ayers, 2 Idaho 465, 21 Pac. Rep. 405.

16 Thompson v. McFarland, 29 Utah 455, 82 Pac. Rep. 478.

§ 1620. Injunctions relating to reservoir rights.—As is the case with the interference with ditches and canals, so, also, will a court of equity enjoin the interference with reservoir rights in all proper cases where the essentials for granting equitable relief are shown. So, where there was at all times water enough in the stream for both parties it was held that it would not justify the defendants in going upon the plaintiff's premises and withdrawing water stored in his reservoir, especially where plaintiff's rights in the stream were superior, and that an injunction would lie against such continued acts.[1] Upon the other hand, an action for an injunction will not lie in favor of one having junior water rights, to prevent the storage of water in a reservoir, it not being clearly shown that but for it more water would reach him when needed.[2]

So, as between the riparian owners on a stream, where the upper owners construct dams in the stream for the purpose of storing the flood and storm waters for beneficial use, it is held that an injunction will not lie to abate such dams on behalf of the lower riparian owners not actually damaged thereby, although such dams diminish at certain times the natural flow of the stream.[3] But where a reservoir leaks and thereby injures the land of those near by, an injunction will be granted against the filling of such reservoir while it is in such condition. But after it has been repaired an application may be sustained to have the injunctive order modified or dissolved.[4]

§ 1621. The abatement of nuisances by means of injunctions.—As far as this work is concerned, nuisances may be defined as that class of wrongs that arise from the unreasonable or unlawful use by a person of his own property which affects the health, comfort, or the profitable enjoyment of the property of another or of the public, producing such material annoyance, discomfort, or in-

1 Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Emerson v. Bergin, 71 Cal. 335, 12 Pac. Rep. 242.

That damages may also be recovered, see Green Bay etc. Co. v. Kaukauna etc. Co., 112 Wis. 323, 87 N. W. Rep. 864, 62 L. R. A. 579, and note.

See, also, for damages, Secs. 1660 *et seq*

2 Larimer & Weld Res. Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 Pac. Rep. 525; affirmed, 24 Colo. 144, 53 Pac. Rep. 318.

3 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

4 Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

jury that the law will presume a consequent damage. A public or common nuisance is such an injury that affects the whole community in general and produces no special injury to one more than another of the people. A private nuisance produces damage to but one or few persons and does not affect the public generally. A mixed nuisance is one which, while producing injury to the public at large, does some special damage to some individual or class of individuals. In order to determine the proper mode of procedure and the proper parties to bring an action to abate a nuisance, it is first necessary to determine whether it is a public or private nuisance.

In general, it may be said that either a public or private nuisance may be abated by a court of equity by way of either preventive or mandatory injunction in a proper action and brought by the proper parties affected by such a nuisance.[1]

A suit for the abatement of a nuisance by an injunction, either prohibitive or mandatory, is within the equitable jurisdiction of the superior court, under the direct provisions of the constitution.[2]

The general rule as to the proper parties plaintiff for the abatement of a public nuisance is that the action must be brought by some public officer authorized by law.[3] In the case of a private nuisance the proper party plaintiff is the party injuriously affected thereby.[4] But in the case of a public nuisance, the one suffering some special injury, different from and greater than the injury suffered by the community at large, may bring an action for its abatement.[5] A

1 See, also, for the abatement of the pollution of streams, Secs. 1142-1144.

For the abatement of nuisances in mining debris cases, see Sec. 1136.

2 McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7.

3 Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178; Morris v. Graham, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33.

4 Crane v. Winsor, 2 Utah 248; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168.

5 A private person may maintain an action to abate a public nuisance, if it is especially injurious to himself or to his property. The Mining Debris Case, 9 Sawyer 441, 18 Fed. Rep. 753; Blanc v. Klumpke, 29 Cal. 156; Grigsby v. Clear Lake W. Co., 40 Cal. 396; Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178; Morris v. Graham, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Small v. Harrington, 10 Idaho 499, 79 Pac. Rep. 461.

A public nuisance is, as to a county suing to protect its property against the maintenance thereof, a private nuisance. Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. Rep. 1049.

party who continues a nuisance, but is not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made that it be abated before an action will lie for that purpose, unless it appears that he had knowledge of its hurtful character. But where the extent of the nuisance is increased by such party, the rule is otherwise.[6]

We will now discuss some of the specific nuisances which a court of equity will abate. The owners of a water right are entitled to have the waters of the natural stream, at least as to the quantity of water to which they are entitled, flow down to their point of diversion, and its pollution[7] or unlawful diversion is a private nuisance and equity will abate the continuance of the same;[8] so, the maintenance of a dam constructed in such a way as to back up the water and flood the lands of the owners above;[9] so, also, the maintenance of a dam dangerous to life and property.[10] Also,

6 Grigsby v. Clear Lake W. Co., 40 Cal. 369.

See, also, Hudson v. Doyle, 6 Cal. 101; Bear River etc. Co. v. Boles, 24 Cal. 354; Courtwright v. Bear River Co., 30 Cal. 573; Blood v. Light, 31 Cal. 115; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334.

7 For pollution, see Secs. 1129-1147.

8 Crane v. Winsor, 2 Utah 248; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Tuolumne W. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34.

The diversion of water, or the unreasonable obstruction of its course, is a private nuisance which equity will enjoin to prevent a multiplicity of suits or irreparable damage. Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

But the maintenance of dams for the purpose of diverting water for irrigation, and the diversion thereof for such purpose, so as to materially diminish the amount, or even consume the entire quantity, flowing in the stream, is not of itself a nuisance, where such diversion has been continued for a great number of years under a claim of right. Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231.

See, also, for the defense of prescription in actions to abate private nuisances, Sec. 1146.

9 Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168, holding that the decree in such a case should not require the rebuilding, repair, or removal of the dam, but should command the abatement of the nuisance, employing the necessary and requisite means therefor whatever they may be.

See, also, Byers v. Colonial Irr. Co., 134 Cal. 553, 66 Pac. Rep. 732; Strumbo v. Seely, 23 Neb. 212, 36 N. W. Rep. 487; Booker v. McBride, 16 Tex. Civ. App. 348, 40 S. W. Rep. 1031; Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. Rep. 1085.

10 Hollenback v. Dingwell, 16 Mont. 335, 40 Pac. Rep. 863, 50 Am. St. Rep. 502.

where the stream is navigable and used for that purpose including the floating of timber and logs an action may be maintained by a private citizen for the abatement of a nuisance consisting of a dam or other works which prevent the use of the stream for that purpose.[11] Also, a person entitled to fish in a certain place in a navigable stream who is specially damaged by the placing of an obstruction in such stream which interferes with the carrying on of his business may maintain an action to abate such obstruction.[12] But in non-navigable streams, as the right of fishery is in the riparian owner, a fence constructed by such riparian owner across the stream will not be abated at the suit of one not entitled on such land.[13] Also, the negligent maintenance of an irrigation ditch or canal in such a manner that leakage or seepage is caused to the injury of adjoining lands.[14] So, the wrongful leaving uncapped artesian wells tapping a subterranean water course or water bearing stratum to the injury of the lands of the parties entitled to such waters.[15]

So, also, the pollution of streams and water courses;[16] and also the permitting of mining debris to be discharged into a stream to the injury of the ditches, canals, and lands of those below.[17]

The construction of an irrigation ditch or canal in a highway or

11 Small v. Harrington, 10 Idaho 499, 79 Pac. Rep. 461; Dawson v. McMillan, 34 Wash. 269, 75 Pac. Rep. 807, holding that where a private party is specially damaged by the obstruction of navigable waters, he may maintain an action to abate the nuisance.

See, also, Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 Pac. Rep. 904.

But a mere threatened nuisance will not be enjoined. Winsor v. Hanson, 40 Wash. 423, 82 Pac. Rep. 710.

12 Morris v. Graham, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33.

But the erection of a dam across a navigable stream, though a nuisance, will not be enjoined on the application of one sustaining no special injury thereby. Esson v. Wattier, 25 Ore. 7, 34 Pac. Rep. 756.

13 Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178.

14 Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1008; North Point Consol. Irr. Co., v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Andrews v. Village of Steele City, 2 Neb. 676, 89 N. W. Rep. 739.

15 Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748, but holding that this particular action was barred by the statute of limitations.

16 McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7.

For the abatement of nuisances by pollution, see Secs. 1142-1146.

17 See Sec. 1136.

the streets of a municipal corporation is not a nuisance *per se*.[18] But such ditch or canal may be maintained in such a manner that it may become a nuisance, upon which it will be ordered that such nuisance be abated.[19]

Where a party sued for the abatement of a nuisance has abated the same before the decree, the court will refuse an injunction.[20]

§ 1622. **Injunctions for trespass on land.**—In cases involving trespass, especially the trespass on land, the foundation of the jurisdiction of a court of equity to grant an injunction against such acts is the probability of irreparable injury, the inadequacy of pecuniary compensation, or the prevention of the multiplicity of suits. Where the party committing the trespass does so under a claim of right and threatens to commit and claims the right to repeat numerous trespasses which the exercise of such right necessarily involves, an injunction will be granted to prevent irreparable injury and to avoid a multiplicity of suits.[1] But, as said by the Utah Court: "Few if any cases can be found where a court of equity has interfered by injunction to restrain a naked trespass, as such, without showing that the property itself had some peculiar value and could not admit of due recompense or would be destroyed or irreparably injured by repeated or continued acts of trespass."[2]

[18] "The use which the abutting owner may make of the highway includes the right to maintain ditches or drains for the benefit of his lands, provided he maintains no nuisance in so doing, nor interferes with the use as a highway." Holm v. Montgomery, 62 Wash. 398, 113 Pac. Rep. 1115, 34 L. R. A., N. S., 506; City of Fresno v. Fresno etc. Co., 98 Cal. 179, 32 Pac. Rep. 943; MacCammelly v. Pioneer Irr. Dist., 17 Idaho 415, 105 Pac. Rep. 1076; Walley v. Platte & Denver D. Co., 15 Colo. 579, 26 Pac. Rep. 129; People v. Stephens, 62 Cal. 209; Drew v. Hicks, 101 Cal. 17, 35 Pac. Rep. 563.

[19] City of Denver v. Mullin, 7 Colo. 345, 3 Pac. Rep. 693; Platte etc. Co. v. Anderson, 8 Colo. 131, 6 Pac. Rep. 515.

[20] McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7.

[1] McGregor v. Silver King Min. Co., 14 Utah 47, 45 Pac. Rep. 1091, 60 Am. St. Rep. 883; Hains v. Hall, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609; Crescent Min. Co. v. Silver King Min. Co., 14 Utah 57, 45 Pac. Rep. 1093; *Id.*, 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

[2] Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

See, also, Smith v. Gardner, 12 Ore. 221, 6 Pac. Rep. 771, 53 Am. Rep. 342.

Therefore, in order to maintain an action for an injunction for trespass on land, the plaintiff must affirmatively show how and why it should be so, otherwise the extraordinary remedy by injunction ought not to be allowed. As a general rule an injunction will not be granted to restrain a trespass on land unless the trespasser is insolvent [3] or the injury and destruction to the plaintiff's estate goes to its very nature and substance and such as call for immediate relief. There must be something particular or special for which a court of law can not afford adequate relief, before such an action will lie for trespass.[4] However, where that is the case the injunction will be granted.[5] An injunction will be granted to prohibit the continuance of acts which obstruct a land owner in the free use and enjoyment of his land, irrespective of other damages, where such acts if continued will ripen into an easement.[6] So, where one cut down trees on the land of another, to prevent the obstruction to the flow of a stream and threatened to continue to do so an injunction will lie to restrain such injury.[7] So, also, it was held by the Colorado court that the cutting of the banks of the plaintiff's reservoir by defendant as manager of a corporation and the placing a pipe therein to withdraw the water was a continuing trespass so as to authorize the enjoining of the defendant from continuing such acts; and, also, that the defendant's insolvency is not essential against injury to realty where the money damages are inadequate or the extent of the injuries can not be ascertained or where the trespass will destroy the property, though it is an additional ground for relief.[8] A land owner is also entitled to an injunction against a stranger, who, under a claim of right, is taking water from his canal by means of a ditch across his land, where no easement for the same has been granted, even though the amount of water taken is

3 But see Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

4 Waldron v. Marsh, 5 Cal. 1120; Wells Fargo & Co. v. Dayton, 11 Nev. 161; Ritter v. Patch, 12 Cal. 298; Branch Turnpike Co. v. Supervisors of Yuba Co., 13 Cal. 190.

5 Schneider v. Brown, 85 Cal. 205, 24 Pac. Rep. 715; Mendenhall v. Harrisburgh etc. Co., 27 Ore. 38, 39 Pac. Rep. 399; Chicago etc. Co. v. Porter, 72 Iowa 426, 34 N. W. Rep. 286; Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381.

6 Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381; Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968; Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. Rep. 922.

7 Hatton v. Gregg, 4 Cal. App. 537, 88 Pac. Rep. 592.

8 Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

inappreciable, since its continued use would ripen into an easement in the land.[9] But where the remedy at law was adequate for a trespass across lands, it was held that an injunction would not be granted; and, further, that no easement could be acquired in plaintiff's land without his acquiescence in such trespass.[10] Where the owner of an easement attempts to impose an extra burden upon the land over which his easement runs an action for an injunction will lie to prevent such acts.[11]

In general, an injunction will lie against the United States Reclamation Service officers for trespass on land. It was held by the Idaho Court that an injunction would be granted against the interference by such officers with a right of way of a railroad subject to the Act of Congress of August 30, 1890.[12]

§ 1623. Injunctions against the flooding of lands from ditches or other works.—Where ditches, dams, or other works for the

9 Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968.

But where the consent was given by the owner of the land to construct a ditch, an injunction will be refused. Hoye v. Sweetman, 19 Nev. 376, 12 Pac. Rep. 504.

A landlord may sue for a trespass which affects his reversion, though a tenant is in possession, both parties having the right of action where there is injury to both estates. Custer Consol. Mines Co. v. City of Helena, —— Mont. ——, 122 Pac. Rep. 567.

10 Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

An injunction will be granted against a land owner from destroying a ditch constructed over his lands without objection, and without condemning a right of way. Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106.

11 Where the defendants had acquired an easement over plaintiff's land for an irrigation ditch, and commenced the construction of another ditch some distance from the original one, it was immaterial to plaintiff's right to enjoin such acts that the land taken had no appreciable value. Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381.

See, also, Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; *Id.*, 147 Cal. 233, 81 Pac. Rep. 512; North Fork W. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69; Josephs v. Ager, 108 Cal. 517, 41 Pac. Rep. 422, Kern Island etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052; Colegrove v. Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904.

But see City of Portland v. Metzger, 58 Ore. 276, 114 Pac. Rep. 106, holding that the operation of a telephone line was not an additional burden to a right of way given to operate a pipe line.

12 26 Stat. L. 391; 2 U. S. Comp. Stat., 1901, p. 1570; Minidoka etc. Co. v. Weymouth, 19 Idaho 234, 113 Pac. Rep. 455.

diversion, storage, or the carrying of water are so constructed or managed that they continually flood the lands of others in the neighborhood to their irreparable injury, an injunction either mandatory or preventive will be granted by a court of equity in a proper action against such acts, as the circumstances of any particular case may warrant, and the land owner whose property is so injured will be entitled to recover in an action at law for the actual damages sustained.[1] So, where the defendant by the negligent construction of the works by which it diverted water from the Colorado River into its irrigation canal caused an overflow through a breach in the bank, creating a lake in the Salton Basin, which covered and practically destroyed the value of complainant's property situated in the basin, in a suit by the complainant it was awarded damages for the injury, and also an injunction restraining the defendant from diverting water from the river in excess of the substantial needs of the people dependent on its canal, and from permitting any waste water to flow on or over complainant's land, or into the lake in such an amount as would "substantially increase the amount of water therein," or prevent the decrease thereof by natural causes.[2]

An injunction will also lie to restrain the land owners on one side of a stream from maintaining a levee upon the bank thereof whereby the flood waters of the stream are made to overflow unnaturally the land of others on the other side of the stream.[3] So, also, an injunction will be granted against the filling of a reservoir

1 For damages for flooding lands, see Secs. 1674-1677; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Wallace v. Farmers' D. Co., 130 Cal. 578, 62 Pac. Rep. 1078; Fischer v. Davis, 19 Idaho 493, 116 Pac. Rep. 412; Ryan v. Weiser Valley etc. Co., 20 Idaho 288, 118 Pac. Rep. 769.

An irrigation district can not collect the waters and pour them out through one spillway in one volume onto the lands of another, so as to increase the damage done to his lands; but, on the contrary, if it desires to collect waters and turn them through spillways, it must do so as to allow them to flow over the lands of the owner in as nearly the same manner and proportion as they would in their natural state, and in such manner as to do no greater damage than they would inflict in their usual and ordinary flow. Teeter v. Nampa etc. Irr. Dist., 19 Idaho 355, 114 Pac. Rep. 8, holding that for any increased flow an injunction would be granted.

2 The Salton Sea Cases—New Liverpool Salt Co. v. California Development Co., 172 Fed. Rep. 820, 97 C. C. A. 242.

3 Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214; Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

while it is in a leaky condition.[4] In the construction and maintenance of such works, causing the property to be injured, the party so maintaining them is presumed to have intended the natural consequences of his acts and therefore is chargeable with notice of whatever conditions resulted from such acts. He can not complain, therefore, that the plaintiff failed to give notice that he had been injured and demand redress therefor before bringing his action.[5]

But an injunction in such cases will not lie where the trouble has been corrected, or where it does not appear that the injuries complained of are liable to be repeated.[6] Nor will one be granted where it does not plainly appear that the maintenance of the works of the defendant caused the injuries.[7] Nor, again, where it appears that the defendant has acquired a right to such overflow or flowage by grant or prescription will an injunction be granted;[8] nor where the right has been acquired by prescription to discharge waste water upon the lands of others.[9]

In Idaho it is held that a riparian owner upon any of the streams of that State, whether navigable or non-navigable, may maintain an action for an obstruction in such stream which diverts the stream or portion thereof from its natural course to his damage.[10]

§ 1624. Injunctions against the turning of surface water upon the lands of others.—It is not the intention of the author of this work to discuss herein to any great extent the questions involved in the disposal of surface waters. That question is more appropriate for a work upon the subject of drainage.

4 Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

5 Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168.

6 Bryant v. Frank H. Lamb Timber Co., 37 Wash. 168, 79 Pac. Rep. 622.

7 Esson v. Wattier, 25 Ore. 7, 34 Pac. Rep. 756.

8 Where a dam across a stream has been maintained for 15 years, the period of limitations for actions to determine an interest in real property, the right to its continued maintenance can not be ordinarily enjoined by the owners of the land flooded thereby. Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783.

See, also, Farnham, Waters and Water Rights, Secs. 558-561; Grigsby v. Clear Lake Waterworks Co., 40 Cal. 396; Sweetland v. Grants Pass etc. Co., 46 Ore. 85, 79 Pac. Rep. 337.

9 Abbott v. Pond, 142 Cal. 393, 76 Pac. Rep. 60; Durning v. Walz, 42 Ore. 109, 71 Pac. Rep. 662.

See, also, for the defense of actions by the statute of limitations, Secs. 1634, 1635.

10 Fischer v. Davis, —— Idaho ——, 116 Pac. Rep. 412.

In general, however, it may be said that an owner of upper lands may have the surface waters from his land flow in their natural course down to the lands below without incurring any liability therefor. But, upon the other hand, he is not permitted, by the construction of dams, ditches, or other works, to turn the surface waters which flow or have accumulated on his land down on the lands of his neighbors. And where such works are constructed and such water is thereby caused to flow on the land of another, which would not naturally flow thereon, there is an invasion to his neighbor's right of property and a nuisance *per se*, and against the continuance of which an action for an injunction will lie.[1]

Of course, as in many other cases involving rights in waters, a prescriptive right may be acquired by an upper owner to divert surface water and discharge it upon the land of another.[2] But where the defense in an action for an injunction is that of a prescriptive right to so discharge such waters and to overflow the land of another, it must be shown that there has been an uninterrupted enjoyment under a claim of right for at least the period of time which is a bar for the maintaining an action for the possession of real property in the jurisdiction where the action is brought and that there was an actual occupation by the flow of the water to the knowledge of the owner of the land and such as to occasion damage and give him a right of action, and there must have been such a use

1 Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. Rep. 174.

A land owner may fill in and raise the level of his ground, and erect embankments to protect his premises from overflow water, but he has no right to cast the water on the land of another to his injury. Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

See, also, Cushing v. Pires, 124 Cal. 663, 57 Pac. Rep. 572; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gray v. McWilliams, 98 Cal. 157, 32 Pac. Rep. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872; Wood v. Moulton, 146 Cal. 317, 80 Pac. Rep. 92; Drew v. Hicks, 101 Cal. 17, 35 Pac. Rep. 563; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. Rep. 400; Sullivan v. Johnson, 30 Wash. 72, 70 Pac. Rep. 246; Noyes v. Cosselman, 29 Wash. 635, 70 Pac. Rep. 61, 92 Am. St. Rep. 937; Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. Rep. 1085; Peck v. Peterson, 15 Cal. App. 543, 115 Pac. Rep. 327; State *ex rel.* Knittle v. Zerbe, —— Kan. ——, 124 Pac. Rep. 160.

But see Bryant v. Merritt, 71 Kan. 272, 80 Pac. Rep. 600.

2 For rights by prescription, see Secs. 1033-1058.

of the land and such damage as will raise a presumption that he would not have submitted to it unless the right existed.[3]

§ 1625. Injunctions protecting the navigable capacity of waters.—An action for an injunction will lie to protect the navigable capacity of waters both of the United States and of a State;[1] and that, too, regardless of the fact as to whether such capacity is being impaired by the direct means of obstructions placed in the navigable portion of the rivers and streams or whether it be by the diversion of water from the stream itself or from its tributaries to such an extent as to lower the flow and thus to impair its navigable capacity below.[2] Of course, before such an action can be maintained the stream must be in its natural condition; in fact, navigable.[3] But, where such is the fact, in cases where the general public only are injured, the proper party to bring such actions where they are navigable waters of the United States is the Government and where they are navigable waters of a State, is the State or some public official authorized by law.[4] But where a private citizen is specially

3 Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. Rep. 174; Carson v. Hayes, 39 Ore. 97, 65 Pac. Rep. 814; Woodruff v. North Bloomfield etc. Co., 8 Sawy. 628, 16 Fed. Rep. 25, 9 Sawy. 441, 18 Fed. Rep. 753.

1 For the navigable waters of the United States, see Sec. 348.

For the navigable waters of a State, see Sec. 348.

2 The prohibition by the Act of Congress of September 19, 1890, against the creation of any obstruction to the navigable capacity of any waters, includes not only an obstruction in the navigable portion of the stream, but also anything, wherever or however done, to destroy the navigable capacity of one of the navigable waters of the United States. United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; reversing *Id.*, 9 N. M. 303, 51 Pac. Rep. 674; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; reversing *Id.*, 10 N. M. 677, 65 Pac. Rep. 276; *Id.*, 13 N. M. 386, 85 Pac. Rep. 393; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Miller & Lux v. Enterprise etc. Co., 142 Cal. 208, 75 Pac. Rep. 770, 100 Am. St. Rep. 115; Heilbron v. Fowler etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

See, also, for injunctions against negligent logging, Sec. 1617.

3 For navigable waters, see Secs. 344-346; Hains v. Hall, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609.

4 Esson v. Wattier, 25 Ore. 7, 34 Pac. Rep. 756; Luhrs v. Sturtevant, 10 Ore. 170; Jones v. St. Paul etc. R. Co., 16 Wash. 25, 47 Pac. Rep. 226; Griffith v. Holman, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178.

damaged by the obstruction of a navigable stream he may maintain the action.[5]

The question as to whether the acts complained of actually impair the navigable capacity of the stream is one of fact to be determined by the facts and circumstances surrounding each particular case.[6]

§ 1626. Injunctions as between ditch companies and their stockholders or consumers.—Injunctions are oftentimes granted to protect the rights of the respective parties and to regulate the dealings between ditch and canal companies and their stockholders or consumers.[1] The shareholders in a mutual ditch company may maintain an action to enjoin the company from disposing of any of the water appropriated and diverted to persons other than the *bona fide* shareholders where the effect of this action upon the part of the company would be to deprive such shareholders of some of the water to which they were entitled.[2]

So, also, the consumers furnished with water by a corporation organized for profit may maintain an action to enjoin the company from selling to other consumers applying later water beyond the capacity of the company to furnish, to the injury of the rights of the prior consumers.[3] So, also, where such a company previously

5 Dawson v. McMillan, 34 Wash. 269; 75 Pac. Rep. 807; Small v. Harrington, 10 Idaho 499, 79 Pac. Rep. 461; Morris v. Graham, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33.

6 United States v. Rio Grande etc. Co., *supra*.

1 For the control by private water companies, see Part XII, Chaps. 72-75.

2 McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. Rep. 779.

For mutual water companies, see Secs. 1453-1463, 1479-1489.

3 Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Lanning v. Osborne, 76 Fed. Rep. 319; affirmed, 178 U. S. 22, 20 Sup. Ct. Rep. 860, 44 L. Ed. 961.

See, also, Blakely v. Ft. Lyon etc. Co., 31 Colo. 224, 73 Pac. Rep. 249; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; New La Junta etc. Co. v. Kreybill, 17 Colo. App. 26, 67 Pac. Rep. 1026.

See, also, for duty to furnish water, Secs. 1497-1500.

A consumer whose right to demand a supply of water from a company has once vested is protected from injury from having his supply cut off. He may prevent, by injunction, if need be, the distributor from disposing of it to others beyond the capacity of the system. Lanning v. Os-

furnished water to a *bona fide* consumer, and might still continue to do so, but refused to comply with a demand accompanied with a tender of the established rates to further furnish it, and threatened to cut off the supply, an action for an injunction will lie against the company by the consumer to prevent the company from depriving him of his water.[4] But a perpetual mandatory injunction requiring a company to supply water to a consumer will not be granted where such consumer had no right to the water other than that which existed by virtue of a contract for a single season.[5] However, the usual remedy in actions of this nature is an action in mandamus, and not by injunction.[6] An action will lie for an injunction to restrain a corporation from compelling early consumers to prorate the water in time of scarcity with later comers, in the absence of contract.[7]

An action for an injunction will lie by minority owners of the waters of a stream to prevent a corporation representing the majority owners from regulating and controlling all of the waters of the stream.[8] An injunction will also lie against the enforcement of an invalid assessment levied by the company upon behalf of a stockholder.[9] So, also, such an action will lie against the enforcement of illegal assessments or sales by irrigation districts.[10]

borne, 76 Fed. Rep. 319; affirmed, 178 U. S. 22, 20 Sup. Ct. Rep. 860, 44 L. Ed. 961.

4 Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137; Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336.

5 Fulton v. Twombly etc. Co., 6 Colo. App. 554, 42 Pac. Rep. 253.

6 Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497.

For the compulsory service of water, see Secs. 1506, 1507.

For actions in mandamus, see Secs. 1506, 1649.

7 Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

8 Bartholomew v. Fayette Irr. Co., 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912.

9 But where a person failed to pay assessments levied on his stock, and the same was sold, and the corporation brought it in, and where the sale was void because not held in conformity to law, and where subsequent assessments were levied on the stock outstanding, but he received no notice thereof, it was held that he was not entitled to a decree enjoining the corporation from withholding the water from his land without paying the assessments levied; it being inequitable to permit him to use the water without paying his share of the expenses. Curtin v. Arroyo etc. Co., 147 Cal. 337, 81 Pac. Rep. 982.

10 For the enforcement of assessments by irrigation districts, see Secs. 1422, 1423.

See, also, Hughson v. Crane, 115 Cal. 404, 47 Pac. Rep. 120; Baxter v.

§ 1627. Injunctions against the violation of contracts.—In certain cases an action for an injunction will lie to enjoin the violation of contracts. So, where a corporation is under contract obligation to furnish water, an injunction will be granted to prevent the company from shutting off the water.[1] So, where a city gave a contract to a water company for 30 years to have full control of its waterworks plant, with power to enlarge it and extend its mains, and at the end of the time the city was given the right to take possession on the payment of the value of the improvements, it was held that the city would be enjoined from taking possession of the plant under the contract without first paying or tendering the value thereof.[2] Again, a consumer having a contract with a water company whereby the company engages to furnish the consumer with a continual supply of water may by injunction prevent the corporation from contracting with other later parties which would impair the company's ability to supply the amount of water called for under the first consumer's contract.[3]

But it was held that where a corporation was under contract to furnish a city with a certain amount of water, an action for an injunction to prevent the company from shutting off the water from the city schools would not lie, for the reason that the board of education of the city was a distinct corporation and not a mere function or part of the municipal government of the city.[4] So, also, where the plaintiff in his pleading based his right upon appropriation and the evidence disclosed the fact that he held under contract, it was held that there was a fatal variance and that an injunction

Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514.

1 Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 686, holding that the company will either be compelled in equity to specifically execute the contract, or will be restrained from violating it.

See, also, contracts, Secs. 917-926.

Contracts with companies, Secs. 1509-1529; Bowman v. Ayers, 2 Idaho 465, 21 Pac. Rep. 405; City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348.

2 Los Angeles v. Los Angeles City W. Co., 124 Cal. 368, 57 Pac. Rep. 210.

3 Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Eaton v Larimer etc. Co., 35 Colo. 16, 83 Pac. Rep. 627; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720.

But see Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965, holding that a consumer can not complain if his rights are not interfered with.

4 Water Supply Co. v. City of Albuquerque, 9 N. M. 441, 54 Pac. Rep. 968.

would not be granted.[5] Again, an injunction will not lie to relieve one from his own contract, although the effect of the contract was not anticipated when made.[6]

§ 1628. Injunctions to protect decreed rights.—Although the rights of the respective parties to the use of waters from the same source of supply may be adjudicated and as so adjudicated may be protected by injunction granted in the same action,[1] this is not always done. Where, however, the rights have been adjudicated in a previous action, and the decree is in full force and effect, an injunction in a subsequent action will always be granted in a proper case to prevent the interference with the rights decreed by the parties to the previous action. Such an action is to protect priorities already established and not to determine them.[2] Such an action may be defended upon the ground that the decreed rights have been abandoned. But the burden of proof is upon the party setting up such a defense to establish the fact that there has been an actual abandonment since the award was made in the previous suit.[3]

5 City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348.

6 Consolidated Canal Co. v. Mesa Canal Co., 6 Ariz. 135, 53 Pac. Rep. 575; affirmed, 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628.

1 For the adjudication of water rights and injunction in same action, see Secs. 1536, 1598.

2 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

"No adjudication of water rights is sought in this action; no modification of the decree is asked. Plaintiff is simply seeking to protect the rights which were awarded in the adjudication proceedings. For this purpose the Court had jurisdiction, without regard to the Court where the statutory proceedings were had." Buckers etc. Co. v. Farmers' etc. Co., 31 Pac. Rep. 62, 72 Pac. Rep. 49; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Barnes v. Gerberg, 27 Wash. 126, 67 Pac. Rep. 568; Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Buckers etc. Co. v. Platte Valley Irr. Co., 28 Colo. 187, 63 Pac. Rep. 305; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. Rep. 868; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Lower Latham D. Co. v. Louden C. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391.

3 Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Lower Latham D. Co. v. Louden C. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80.

For abandonment, see, also, Secs. 1100-1117.

§ 1629. **Injunctions — Jurisdiction of courts — Venue.** — The county in which an action must be brought to enjoin an invasion of any of the rights under discussion depends upon the constitutions and statutes of the respective States. As we have seen in previous sections, actions to adjudicate rights must be commenced in the county where the right is situated, for the reason that it is in the nature of an action to quiet title to real property.[1] Therefore, it must follow that where an action for an injunction is combined with an action to adjudicate a right, it must be also commenced in the county where the property is situated. But, where the action is simply for an injunction against the invasion of a right, or an action for an injunction combined with an action for past damages for such invasion, the basis of the action is one for tort; and under the California rule it is not required that the action be commenced in the county where the property is situated, but may be brought in any county and the court of that county acquires jurisdiction to try the case, unless the defendant applies for its transfer for trial to the county where the property is situated, upon which application it must be transferred to the county where the property is situated.[2]

In Colorado it is held that the statute providing that the court, having properly acquired jurisdiction of a proceeding to adjudicate water rights, shall thereafter retain exclusive jurisdiction for that purpose, does not apply to an action in which it is merely sought to protect rights awarded in the jurisdiction proceedings, but that the action may be brought in another county and that, too, without regard to the court in which the statutory proceedings were had.[3]

In Utah it is held that water wrongfully diverted in one county to the injury of plaintiff's rights in another county constitutes one cause of action, and the plaintiff may elect in which county he will bring the action.[4] In Wyoming it is held that where owners of

1 For jurisdiction of courts in actions to quiet title, venue, see Sec. 1533.

For the nature of such actions, see Sec. 1534.

2 Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Miller & Lux v. Kern County etc. Co., 140 Cal. 132, 73 Pac. Rep. 836; Grocers' etc. Union v. Kern County etc. Co., 150 Cal. 466, 89 Pac. Rep. 120.

See, also, Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

3 Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

4 Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628; Lower

land in Montana have acquired prior right by appropriation to the use of water to irrigate their lands by means of a ditch and headgate located in Wyoming, the District Court of Wyoming has jurisdiction to enjoin others from diverting the water by means of ditches located in Wyoming or in Montana for the irrigation of lands in Wyoming.[5] The question as to the jurisdiction can not be raised for the first time on appeal.[6]

Where there is an actual diversity of citizenship, such actions may be originally brought in the Federal court, or, after it has been brought in a State court, upon the proper motion to remove, it will be transferred to the Federal court; provided, of course, that the requisite amount is involved, which must exceed $2,000 exclusive of interest and cost, as to each complainant.[7] But the diversity of citizenship must be *bona fide* in order for the Federal court to acquire jurisdiction, otherwise the action will be dismissed. It is, therefore, held that the incorporation in one State by direction of a corporation of another State for the sole purpose of having the matter in dispute between such corporation and another corporation of the latter State determined in the Federal rather than in the State court must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the Federal court, and such an action will be dismissed for want of jurisdiction of the Federal court.[8]

Where a water company has constructed a dam across a stream

Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Last Chance etc. Co. v. Emigrant etc. Co., 129 Cal. 277, 61 Pac. Rep. 960.

5 Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See, also, Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423; Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

See, also, for interstate waters, Secs. 664, 1221-1234.

6 Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

7 Morris v. Bean, 123 Fed. Rep. 618; *Id.*, 146 Fed. Rep. 423; Howell v. Johnson, 89 Fed. Rep. 556; Hoge v. Eaton, 141 Fed. Rep. 64, 72 C. C. A. 74; *Id.*, 135 Fed. Rep. 411; Mohl v. Lamar Canal Co., 128 Fed. Rep. 776; Shepard v. Tulare Irr. Dist., 94 Fed. Rep. 1; San Joaquin etc. Co. v. Stanislaus County, 90 Fed. Rep. 516; Anderson v. Bassman, 140 Fed. Rep. 14.

8 Miller v. East Side etc. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111.

for the purpose of impounding water, and the dam results in the flooding of the lands of another, and an action for condemnation of such land is prosecuted in the Federal court and a judgment is entered in favor of the land owner for the value of the land taken, and the plaintiff then appeals to the United States Circuit Court of Appeals, it is held in Idaho that the State court has the jurisdiction to issue an injunction to restrain such company from flooding the land sought to be condemned until such time as the value thereof has been paid to the land owner, for the reason that no title can pass to the condemner in condemnation proceedings until after the payment of the value of the property which has been determined and assessed in the manner prescribed by law.[9]

Where the controversy is between two States, the only court having original jurisdiction is the Supreme Court of the United States.[10]

An allegation in a bill that the complainant is a corporation organized under an Act of Congress makes the case one arising under the laws of the United States and confers jurisdiction upon the Federal Court.[11] And the fact that a plaintiff is given a different remedy in the State courts can not affect the jurisdiction of a Federal Court to entertain his action, where, by reason of his citizenship, and the amount involved, he has the right to sue in that Court.[12] Any invasion of the prior right of the United States to the waters of a stream is a trespass, and the Government may maintain a suit in equity to protect its right against any one or all of such trespassers.[13] The place of trial in an action to

9 Ryan v. Weiser Valley etc. Co., 20 Idaho 288, 118 Pac. Rep. 769.

10 See for original jurisdiction of the Supreme Court of the United States, Sec. 1533.

See, also, Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268.

11 United States v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13.

12 Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705.

13 United States v. Conrad Inv. Co., 156 Fed. Rep. 123.

abate a nuisance lies where the injury is done, and not where the defendant resides.[14]

§ 1630. Injunctions—Jurisdiction of courts—Person and subject matter.—As the remedy by injunction to prevent the continuance of the invasion of a right operates *in personam*,[1] so, where the defendant has been served with process in accordance with the law of the jurisdiction where the action is brought, or submits to the jurisdiction of the Court without objection thereto by answering to the merits, the Court has jurisdiction of the person.[2]

Upon the question of the jurisdiction of the subject matter of the suit, it is necessary in order to confer jurisdiction upon a court of equity to grant injunctive relief, for the plaintiff to allege in his petition or complaint essentials necessary for the granting of such relief,[3] and to show that there is no plain, adequate, and complete remedy at law.[4] And, further, where the facts necessary to confer jurisdiction on a court of equity have been alleged and denied, the question of jurisdiction is not waived, but is to be determined on the hearing; and it it is the duty of the Court to dismiss the suit whenever, during the trial, want of jurisdiction appears.[5] But, as is the case in actions where the main object is for the purpose of adjudicating water rights, and the injunctive feature is but incidental for the protection of the decreed rights, a court of equity having acquired jurisdiction for one purpose has jurisdiction for all.[6] It has been decided a number of times by the Supreme Court of the United States that the

14 City of Marysville v. North Bloomfield etc. Co., 66 Cal. 343, 5 Pac. Rep. 507; Drinkhouse v. Spring Valley W. W., 80 Cal. 308, 22 Pac. Rep. 252; Last Chance etc. Co. v. Emigrant etc. Co., 129 Cal. 227, 61 Pac. Rep. 960.

1 See Sec. 1600.

2 Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364.

See Salem etc. Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832.

3 For the essentials necessary for such relief, see Secs. 1601-1605.

For complaints in suits for an injunction, see Sec. 1633.

4 See Sec. 1604; Union etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106.

5 Union etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044.

6 See Secs. 1629, 1630; Feeney v. Chester, 7 Idaho 324, 63 Pac. Rep. 192.

question of settling and adjudicating water rights and protecting the same, involved no Federal question, but that the same was left, as far as this aspect was concerned, to the State Courts.[7]

§ 1631. **Injunctions—Parties plaintiff.**—Upon the subject of parties plaintiff in actions for an injunction, in general, it may be said that any one who has an actual right in, or legal or equitable claim to, any of the rights under discussion [1] may maintain an action in equity to prevent the continuous interference with the same by another, and that, too, regardless of the fact as to how such party acquired such rights. We have discussed in previous sections of this chapter some of the most important rights which may be protected by an action for an injunction.[2] Where the action is for an injunction simply, and the element of damages is not included, several owners who are in a similar situation may join together as parties plaintiff and maintain an injunction against the invasion of their rights. It is held that such parties have such a common interest as will "justify them in uniting as joint plaintiffs in a suit to enjoin a continuation and repetition

7 Findings of fact of questions of local law upon which depends a party's right, under U. S. Rev. Stat., Sec. 2339 (U. S. Comp. Stat., 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on a writ of error to a State court, for the reason that the same involves no Federal question. Telluride etc. Co. v. Rio Grande etc. Co., 187 U. S. 579, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; see same case below, 23 Utah 22, 63 Pac. Rep. 995; see, also, *Id.*, 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; for same case below, see 16 Utah 125, 51 Pac. Rep. 146; Hooker v. Los Angeles, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. Rep. 869, 1135; affirmed, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452.

See, also, Sec. 593.

1 That there must be the existence of a right, see Sec. 1601.

For the protection of equitable estates, see Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

The Government may protect its right to the waters by injunction. United States v. Conrad Inv. Co., 156 Fed. Rep. 123; Custer Consol. Mines Co. v. City of Helena, —— Mont. —, 122 Pac. Rep. 567, where it is held that all actions must be brought in the name of the real party in interest, and an action for the interference with an interest in a water right must be brought in the name of the person whose right is invaded.

See, also, for parties plaintiff in actions to adjudicate rights, Sec. 1544.

2 See Secs. 1610-1628.

of such unlawful acts."[3] But the rule is to the contrary, where the action is at law for damages,[4] and where an action for an injunction, which is common to all the plaintiffs, is joined with an action for damages, which is not joint to all the plaintiffs, but is several.[5] But, as held by the Supreme Court of Oregon, in an action for an injunction against the invasion of rights, the fact that some of the parties plaintiff were not shown to be injured by the acts of the defendants, and some of the parties defendant had not interfered with the plaintiffs' rights, did not affect the right to maintain the action, since it was necessary, in order to determine the rights of the parties, which involved the entire water of the stream, that all the parties having rights therein should be made parties, and it was immaterial whether they were made plaintiffs or defendants.[6] Tenants in common may join together as parties plaintiff to protect their common rights.[7]

[3] Frost v. Alturas W. Co., 11 Idaho 294, 81 Pac. Rep. 996, citing Kinney on Irr., 1st Ed., Sec. 327; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Churchill v. Lauer, 84 Cal. 233, 24 Pac. Rep. 107; Ronnow v. Delmue, 23 Nev. 29, 41 Pac. Rep. 1074; Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106; Deseret etc. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628; Barham v. Hostetter, 67 Cal. 272, 7 Pac. Rep. 689; Miller v. Highland D. Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; Schultz v. Winter, 7 Nev. 130; Montecito Valley W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Rickey v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 415.

The owners in severalty of different tracts of land may join in an action to restrain the diversion of the waters of a stream along whose banks their lands are located, and in which they have riparian rights, and rights acquired by appropriation. Churchill v. Lauer, 84 Cal. 233, 24 Pac. Rep. 107.

But see Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543, holding that the other riparian owners are not necessary parties to such an action.

"Those who are united in interest must be joined as plaintiffs or defendants." Kaukauna etc. Co. v. Green Bay etc. Co., 75 Wis. 385, 44 N. W. Rep. 638.

See, also, Grand Rapids etc. Co. v. Bensley, 75 Wis. 399, 44 N. W. Rep. 640; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Miller & Lux v. Rickey, 127 Fed. Rep. 573.

[4] For parties plaintiff, in actions at law for damages, see Sec. 1684.

[5] Barham v. Hostetter, 67 Cal. 272, 7 Pac. Rep. 689.

[6] Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

[7] Smith v. Stearns Rancho Co., 129 Cal. 58, 61 Pac. Rep. 662; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726.

See, also, for tenants in common, Secs. 1454-1458.

Again, the rule is well settled that one tenant in common may sue alone to protect the common rights of all without joining with him his cotenants as parties plaintiff.[8] Again, one tenant in common in a water right or in a ditch, canal, or other works, may sue another tenant in common for the unlawful interference therewith.[9]

A ditch or canal company may itself maintain an action for an injunction to protect the rights of its stockholders and consumers against the invasion by another company, without making its stockholders or consumers parties plaintiff.[10] Again, the stockholders and consumers of water furnished by a ditch and canal company may maintain such an action against the company for any invasion of their rights.[11] A pledgee of corporate stock may maintain an action against the corporation to have certain assessments declared void, and to enjoin the enforcement of the same.[12] A mortgagee is also held to have such a right of action against a canal company for the failure to furnish water.[13] Again, a person need not be the owner of the water rights or the works used in connection therewith to maintain such an action. A tenant of the owner of such rights may maintain such an action in his own name, without joining his landlord as party plaintiff, where he

8 Spanish Fork v. Hopper, 7 Utah 235, 26 Pac. Rep. 293; Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426; Rodgers v. Pitt, 89 Fed. Rep. 420; *Id.*, 129 Fed. Rep. 932; Hildreth v. Montecito Creek W. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Crowder v. McDonald, 21 Mont. 367, 54 Pac. Rep. 43, citing Kinney on Irr., 1st Ed., Sec. 301.

9 Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Lorenz v. Jacob, 63 Cal. 73; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

10 Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532.

See, also, Springville v. Fulmer, 7 Utah 450, 27 Pac. Rep. 577.

11 Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 415; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397.

12 Farmers' etc. Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063.

See, also, for ditch and canal companies, Secs. 1449-1529.

13 Equitable etc. Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747.

has the right of possession.[14] Upon the other hand, a landlord may sue a stranger to prevent the unlawful interference with the right without joining with him the tenant in possession.[15] The owner of the water right, but not of the ditch, may also maintain such an action.[16] So, also, the holder of the equitable title;[17] again, the holder of the legal title as trustee;[18] so, also, a person in possession of land under the land laws of the United States.[19] It is also held that an assignee may maintain the action, although the assignment was made with the express purpose of enabling him to bring the action.[20] But under the rule that in order to maintain such an action the plaintiff must have some ownership or interest in the rights sought to be protected, it is held that a city having the first right of appropriation, has the *prima facie* right to divert the waters from the watershed of the creek in sufficient quantity to supply the needs of itself and its inhabitants, and that a taxpayer who is not a subsequent appropriator can not maintain an action for an injunction to prevent the diversion of water by the city on the ground that it will injuriously affect the rights of subsequent appropriators.[21] A defect of parties plaintiff must be raised by demurrer or answer, and if objection is not so taken, it is waived.[22]

14 Heilbron v. Fowler Switch etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Los Robles W. Co. v. Stoneman, 146 Cal. 203, 79 Pac. Rep. 880; Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397; Heilbron v. Kings River etc. Co., 76 Cal. 11, 17 Pac. Rep. 933; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Crook v. Hewitt, 4 Wash. 749, 31 Pac. Rep. 28.

Under the rule that those having no interest in the subject matter are not proper parties, an irrigation company was not a necessary party to a suit by a reservoir owner to enjoin interference with its water, flowing in a canal of the irrigation company, where the issue was whether the plaintiffs or defendants owned the water. Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224; Beck v. Bono, 59 Wash. 479, 110 Pac. Rep. 13, 1 Water and Min. Cas. Ann. 222.

15 Heilbron v. Last Chance etc. Co., 75 Cal. 117, 17 Pac. Rep. 65.

16 Clifford v. Larien, 2 Ariz. 202, 11 Pac. Rep. 397; Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170.

17 Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

18 Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

19 Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399.

20 Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678.

21 Carlson v. City of Helena, 43 Mont. 1, 114 Pac. Rep. 110.

22 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

§ 1632. Injunctions—Parties defendant.—Upon the question of parties defendant, in general, it may be said that all persons, corporations, or companies, whenever the result of their acts, either joint or several, deprives the plaintiff of his rights or substantially interferes with the same, may be made parties defendant in an action for an injunction. All parties against whom the relief must be obtained to accomplish the object of the suit are necessary parties.[1] And, that some of the parties defendant had not interfered with the plaintiff's rights, does not affect the right to maintain the action, although they were not necessary parties.[2] And, as a general rule, it may be said that all persons using water from the stream above the plaintiff's point of diversion should be made parties defendant to such an action for an injunction only, because the use of each contributes to the plaintiff's shortage,[3] and that, too, regardless of the fact as to whether such persons are joint or several tort feasors.[4] In an action by one con-

1 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Woodruff v. North Bloomfield etc. Co., 8 Sawy. 628, 16 Fed. Rep. 25, 9 Sawy. 441, 18 Fed. Rep. 753; Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Squires v. Livesey, 36 Colo. 302, 85 Pac. Rep. 181; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 415; Hillman v. Newington, 57 Cal. 56.

See, also, Gay v. Hicks, —— Okla., ——, 124 Pac. Rep. 1077.

2 Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Daly v. Ruddell, 137 Cal. 671, 70 Pac. Rep. 784.

3 West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

But see Beck v. Bono, 59 Wash. 479, 110 Pac. Rep. 13.

4 For the contrary rule for several tort feasors in actions for damages, see Secs. 1684, 1685.

In the case of a joint trespass it was held that if the defendant and a corporation for which he worked were both responsible for trespasses to plaintiff's reservoir, plaintiff could elect to sue one or both of them in an action for damages and injunction. Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

See, also, Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Mau v. Stoner, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466, 14 Wyo. 183, 83 Pac. Rep. 218; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Miles v. Du Bey, 15 Mont. 340, 39 Pac. Rep. 313.

And, in the case of a several trespass, it is held that a single suit may be brought to enjoin several defendants from diverting waters from a stream, though the defendants are not acting in concert, and are not joint tort feasors. Montecito etc. Co. v.

sumer against a ditch company and co-consumers all co-consumers should be joined as parties defendant.[5] And where it appears that other persons not parties to the action diverted water from the same stream to such an extent that it can not be satisfactorily shown, but that for the acts of the persons not sued no injury would have resulted to the plaintiff, the Court may make an order requiring all such persons to be made parties defendant,[6] or, if this is not done, the Court may refuse to grant the injunction.[7] So, in a suit to enjoin a water commissioner from diverting water in a stream from the use of prior appropriators to the use of subsequent appropriators, the subsequent appropriators being the persons really interested, are necessary parties, and their absence is fatal to the validity of the decree.[8]

In Colorado it is held that in an action between two ditch companies for an injunction, the consumers and stockholders of the defendant company need not be made parties defendant.[9] Persons using water for irrigation from a creek branch are not necessary parties defendant to a suit by a lower riparian owner on the main stream to enjoin the enlargement of the head of the

Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, Hillman v. Newington, 57 Cal. 56; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Miller v. Highland D. Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523.

[5] Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 415; Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

[6] Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

A motion made only two days before the day set for the hearing, and more than 20 months after the answer was filed, to make other persons parties defendant, was properly refused as made too late. Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

[7] West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

[8] Squires v. Livesey, 36 Colo. 302, 85 Pac. Rep. 181; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Buckers etc. Co. v. Farmers' Ind. D. Co., 31 Colo. 62, 72 Pac. Rep. 49; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

[9] Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532.

See, also, Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965; Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701.

branch and consequent diversion of an undue amount of water.[10] The defect of parties defendant must be raised by demurrer or by answer, and if objection is not so taken, it is waived.[11] But the misjoinder of two persons defendant can not be raised by joint demurrer.[12] But it is held in Colorado that the rule that a defect of parties is waived by the defendants in joining issue and going to trial does not apply where the Court can not proceed to judgment without the presence of others who have not been made parties.[13]

§ 1633. **Pleadings—Complaint, petition, or bill.**—In an action for an injunction the complaint, petition, or bill, whatever it may be called in the respective jurisdictions, must set forth the right of the plaintiff, and that the defendant is wrongfully invading that right, and other essential elements necessary to give a court of equity jurisdiction of the case.[1] In general, it may be said that the rights of the plaintiff in actions for an injunction must be set forth even with greater particularity than where the action is simply to quiet the title to a water right or the adjudication of rights.[2] Where the complainant bases his action upon an appropriation of the water, the complaint should contain every essential allegation necessary to show the facts of such appropriation and its priority.[3] A complaint alleging the ownership and the right

10 Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280.

11 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

12 Empire etc. Co. v. Board of Commissioners of Rio Grande Co., 21 Colo. 244, 40 Pac. Rep. 449.

13 McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

1 For the essential elements in an action for injunction, see Secs. 1601-1605.

See, also, for complaints in actions to quiet title, Sec. 1548.

2 Unlike an action where plaintiff seeks to restrain a defendant from unlawfully interfering with his prior appropriation, it is not necessary in a complaint to quiet title to specifically set forth the facts constituting a valid appropriation. Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333.

3 Carroll v. Vance, 39 Colo. 216, 88 Pac. Rep. 1069, where it is held that a complaint in an action by a senior appropriator to enjoin an unlawful diversion of water merely alleged that plaintiff had a priority superior to that of the defendants with which defendants were interfering, was insufficient without showing plaintiff's appropriation and priority.

In a suit to prevent defendant from diverting water and from interfering with plaintiff's use for domestic and irrigation purposes of a certain number of cubic feet of water a second,

to use the waters of certain springs, and the defendant's interference therewith, states a cause of action.[4] And it is held that a complaint which merely alleges a priority of appropriation, without alleging the facts constituting such priority of appropriation, and the application of the water to a beneficial use, states a conclusion of law only, and is, upon demurrer, fatally defective.[5]

the complaint must allege facts showing plaintiff's right to the water claimed, and that the right was prior and superior to the defendant's right. White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329.

A complaint in an action to restrain a wrongful diversion of water, alleging that plaintiffs are owners in severalty of certain tracts of land under defendant's ditch; that they appropriated for irrigation definite amounts of water at certain times from 1872 to 1885; that ever since such appropriation they have continued to use the water each year during the irrigating season, until the years 1894 and 1895, when defendant wrongfully refused to deliver the water in the quantities to which they were entitled; that the amounts of water appropriated were and are necessary to make their lands productive; and that at all times between the years 1885 and 1893 defendant recognized the priorities of the plaintiffs to the quantities claimed, states a cause of action. Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

See, also, Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; rev'g *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Salazar v. Smart, 12 Mont. 395, 30 Pac. Rep. 675; Anderson etc. Co. v. McConnell, 133 Fed. Rep. 581; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12; Smith v. Stearns Rancho Co., 129 Cal. 58, 61 Pac. Rep. 662; Raymond v. Winsette, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; Sternberger v. Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Ball v. Kehl, 87 Cal. 506, 25 Pac. Rep. 679; Montpelier etc. Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741; Hill v. Lenormand, 2 Ariz. 354, 16 Pac. Rep. 266, where it is held that an injunction may be granted where the court finds the plaintiff's right to be less in amount than alleged.

A general prayer in a complaint in an action to quiet title is sufficient to support an injunction where the facts alleged warrant it. Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. Rep. 869; dis., 217 U. S. 217, 53 L. Ed. 736, 30 Sup. Ct. Rep. 452.

4 Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802.

5 Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336; Campbell v. Flan-

However, it is not necessary for the complainant to set out his deraignment of title in the complaint or bill,[6] or the particular tract or tracts of land that have been irrigated by him or by his grantors,[7] the character of the crops grown thereon,[8] or the fact that the raising of crops by irrigation on the land was successful,[9] or the particular point of diversion,[10] or the means and methods of the diversion used,[11] or the local customs referred to in Section 2339 of the Revised Statutes of the United States.[12]

In Washington it is held that the Court will take judicial notice of the fact that at least that portion of the States east of the Cascade Mountains was within the territory where the customary law of miners was in force for the appropriation of waters.[13] But in Texas it is necessary to plead that the stream is in the arid portion of the State where the water claimed is used for irrigation,

nery, 29 Mont. 246, 74 Pac. Rep. 450; Carroll v. Vance, 39 Colo. 216, 88 Pac. Rep. 1069; McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. Rep. 779; Heintzen v. Binninger, 79 Cal. 5, 21 Pac. Rep. 377.

See, also, Van Horn v. Decrow, 136 Cal. 117, 68 Pac. Rep. 473.

But where, in a suit to enjoin the defendant from interfering with the flow of water in plaintiff's ditch, defendant by answer made no claim to any water, and plaintiff claimed no definite quantity of water, and did not prove the amount to which he was entitled, the court held that the only relief that the court could grant was to enjoin the defendant from interfering with the flow of the water. Simpson v. Harrah, 58 Ore. 448, 103 Pac. Rep. 58.

6 Miller & Lux v. Rickey, 127 Fed. Rep. 573; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106; Hague v. Nephi etc. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

7 Miller & Lux v. Rickey, 127 Fed. Rep. 573; Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543; Anderson etc. Co. v. McConnell, 133 Fed. Rep. 581.

8 Miller & Lux v. Rickey, 127 Fed. Rep. 573.

9 Miller & Lux v. Rickey, *supra*.

10 Miller & Lux v. Rickey, *supra*.

11 Miller & Lux v. Rickey, *supra*.

12 For which see Secs. 598, 600.

See, also, Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

It is not necessary for plaintiff to plead and prove a custom of appropriation, as the courts will take judicial notice thereof. Parkersville Drainage Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

13 Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772.

See, also, Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Morris v. Bean, 146 Fed. Rep. 423.

and that the rainfall is insufficient and irrigation is necessary, as the courts will not take judicial knowledge of the aridity of any particular portion of the State.[14]

In those jurisdictions which recognize riparian rights under the *strict construction* of the rule, it is not necessary for a riparian owner to allege the use of the water by himself, or damages for its unlawful diversion. The very nature of his ownership entitles him to the natural flow of the stream, subject to the reasonable use by the other riparian owners above him. It is therefore sufficient to plead the ownership of the land, that it borders upon the stream, and the obstruction of its flow or the unlawful diversion by the defendant, and the law will imply damage and grant injunctive relief against such an invasion of the owner's right. As was held in a California case, under this rule, the allegation of use by a riparian owner was mere surplusage.[15] But under the more modern rule as to the rights of riparian owners, especially under the later California decisions, holding that the strict rule of the common law is unfitted to the changed conditions in that State, and that a lower riparian proprietor must show use and damage in order to enjoin an upper riparian owner from a beneficial use of the water,[16] the allegations in a complaint in an

14 McGhee etc. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398.

15 "We think that the complaint is sufficient. It states facts showing that plaintiff is a lower and defendant an upper riparian proprietor upon a stream that is sufficiently described; and the averments of plaintiff's use of the water for a mill, winery, domestic purposes, etc., are mere surplusage." Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066.

A complaint by a riparian owner does not state a cause of action without alleging facts showing that the appropriation and use of the water by the defendant is unlawful. Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

See, also, Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Moore v. Clear Lake Waterworks, 68 Cal. 147, 8 Pac. Rep. 816.

In an action for an injunction, the plaintiff must plead that the defendant's taking is excessive. Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

16 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, for the right of riparian owners to an injunction, Secs. 1611-1616.

action to enjoin the diversion of the water, where the same is put to actual use by the parties diverting it, should be substantially the same as to use and damage as is required in actions of the same nature by appropriators, discussed above, with the allegation of riparian ownership added. So, in an action to adjudicate water rights, where it is not necessary that the pleadings be so correctly drawn, as is the case in actions for an injunction, the California Court recently said: "Moreover, considering Pogue's claim as resting upon his riparian ownership, he nowhere properly pleads his riparian rights, nor the amount of his irrigable lands, nor the amount of water reasonably necessary for his use upon such lands."[17] So, in either case, whether the plaintiff claims his right as an appropriator or as a riparian owner, he should show in his complaint in an action for an injunction to prevent the invasion of his rights that the defendant's acts were unlawful and unauthorized, not as a conclusion of law, but he must allege the facts constituting the illegality and that the acts of the defendant irreparably injure the plaintiff.[18] The pleadings of a party must be consistent with themselves. So, where a complaint asserted a right to a certain quantity of water from a stream by prior appropriation, and the reply set up a claim to the entire flow by reason of riparian proprietorship, it was held that there was a departure, since the rights by prior appropriation and by riparian proprietorship are incompatible.[19]

In an action to restrain the interference with a ditch, canal, or other works, the complaint must show the right in the plaintiff

17 Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362, citing Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

18 A complaint was not aided by an allegation that defendants' acts were unlawful and unauthorized, it being merely a conclusion of law unsupported by the facts, and, where illegality of official action is relied on as a ground of injunction, the facts constituting the illegality must be alleged. McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16.

See, also, Bowman v. Virdin, 40 Colo. 247, 90 Pac. Rep. 506; Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336.

19 Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193, citing Kinney on Irr., 1st Ed., Sec. 272.

and the facts constituting the invasion by the defendant and the other essentials necessary to be shown in injunction actions.[20] In actions where the rights have been previously adjudicated, such adjudication should be pleaded, unless the plaintiff relies on some additional right.[21] Where there are several plaintiffs, as is the case in actions for the adjudication of rights merely, the rights of such plaintiffs as between each other to an injunction can not be determined, unless they have joined issues thereof by pleading their rights *inter se*. If they have so pleaded their rights, they may be determined, and an injunction be granted preventing the interference with such right as between each other.[22]

§ 1634. Pleadings—Answer—Defenses.—The defendant in an action for an injunction may demur to the plaintiff's complaint,[1] he may answer the complaint by denying the allegations therein

20 For essentials, see Secs. 1600-1605.

Wilson v. Eagleson, 10 Idaho 755, 81 Pac. Rep. 434; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Union etc. Co. v. Litchy, 42 Ore. 563, 71 Pac. Rep. 1044; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944; Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

21 Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108; Flannery v. Campbell, 30 Mont. 172, 75 Pac. Rep. 1109; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

22 Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

See, also, Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, for the adjudication of rights of the respective parties *inter se*, Sec. 1550.

1 The general rule that the truth of material and relevant matters set forth with requisite precision is admitted by demurrer will not be applied in a controversy between States, which involves the question whether one State may wholly deprive the other State and its inhabitants of all the water of a river accustomed to flow through that State. Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

A complaint which merely alleges conclusions of law is, upon demurrer, fatally defective. Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

See, also, Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336.

Carroll v. Vance, 39 Colo. 216, 88 Pac. Rep. 1069, holding that the complaint, though demurrable, was cured by the defendant's answer raising an issue as to plaintiff's ownership.

See, also, White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329, holding that when the demurrer to the complaint is sustained a temporary injunction issued thereon may be continued pending the amendment to the complaint.

contained,[2] and, in addition thereto, he may set up in his answer as many affirmative defenses as he may have by properly pleading the same.[3] In an action to enjoin the diversion of water it is always a good defense for the defendant to show that he has a right to the water, and, therefore, that the diversion is not unlawful.[4] It is no defense, in an action to enjoin the unlawful diversion of water, that other persons are also unlawfully diverting it; and, therefore, it is not error to exclude evidence of such diversion by other persons.[5] It is not a good defense to allege that some

2 A general denial puts in issue all the material allegations of a verified complaint. Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

Portions of an answer consisting mainly of denials of the allegations to the complaint can not be treated as sham or irrelevant. Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054.

An answer which puts in issue some of the material averments of the complaint is not demurrable. Wellington v. Beck, 30 Colo. 409, 65 Pac. Rep. 626, 70 Pac. Rep. 687.

See, also, Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922; Ogilvy etc. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. Rep. 598; Raymond v. Wimsette, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; Churchill v. Bauman, 95 Cal. 541, 30 Pac. Rep. 770; *Id.*, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43.

3 In an action where the defendant made no claim to any water nor title to any land, it was held that an injunction must be granted the plaintiff. Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58.

In an answer to enjoin the diversion of water of a stream used by both parties, defendants alleged that since a certain date, two years before plaintiff's appropriation, and every year thereafter, they diverted the stream for the purpose of irrigating their lands, and that during part of the irrigating season the volume of water was no greater than required for that purpose, it was held that the answer showed such a prior appropriation as to constitute a defense. Wellington v. Beck, 30 Colo. 409, 65 Pac. Rep. 626, 70 Pac. Rep. 687.

But it is held that a claim of title to water by prescription is inconsistent with a defense by the claimant that his use results in no injury to the plaintiff seeking to enjoin such use. Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

See, also, Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802.

4 Posachane v. Standart, 97 Cal. 476, 32 Pac. Rep. 532.

5 Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 879; Heilbron v. Kings River etc. Co., 76 Cal. 11, 17 Pac. Rep. 933; Blakeley v. Ft. Lyon etc. Co., 31 Colo. 224, 73 Pac. Rep. 249; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76.

Where one sued for diverting water from a mill defends on the ground that the water was diverted by others after it passed him, it is in the nature of a plea in abatement, and is demurrable. North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223.

stranger to the suit has a better right than the plaintiff. The rights of such third persons can not be set up unless they are brought into court, and then only by themselves. "It can not be vicariously contested by another on behalf of the owner of the better right."[6] Nor is it a defense that the defendant needs the water and is wholly dependent upon it.[7] Again, it is no defense in an action to enjoin the interference with the water in a canal that there was a large volume of water in the stream and sufficient for both parties.[8] Again, it is no defense by a defendant that he was working for a company and that the orders to trespass upon property were given by the company.[9]

Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Beck v. Bone, 59 Wash. 479, 110 Pac. Rep. 13.

But see West Point etc. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

6 Duckworth v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 338, 1 Water and Min. Cas. Ann. 140; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927, 1 Water and Min. Cas. Ann. 128.

"Neither do we think that the trial court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of the water below the mouth of the proposed canal of appellee would be injured by the construction of the canal." Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

See, also, McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304; Hayden v. Long, 8 Ore. 244; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; People's etc. Co. v. Fresno etc. Co., 152 Cal. 87, 92 Pac. Rep. 77; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Silva v. Hawkins, 152 Cal. 138, 92 Pac. Rep. 72; Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621; Ellis v. Tone, 58 Cal. 289; Craig v. Crafton W. Co., 141 Cal. 178, 74 Pac. Rep. 762; Burkhart v. Meinberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382; 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; Crippen v. Glasgow, 38 Colo. 104, 87 Pac. Rep. 1073; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; Larimer etc. Co. v. Water Supply Co., 7 Colo. App. 225, 42 Pac. Rep. 1020; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Schneider v. Schneider, 36 Colo. 518, 86 Pac Rep. 347; Lower Latham etc. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. Rep. 483; Denver etc. Co. v. Denver etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

7 Roberts v. Arthur, 15 Colo. 456, 24 Pac. Rep. 922.

See Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811, 30 Pac. Rep. 768.

8 Hackett v. Larimer etc. Co., 48 Colo. 178, 100 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224.

9 Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

It is a well-settled rule of the law of pleading that, in order for the defendant in such an action to avail himself of any affirmative defense which he may have, he must specially plead the same. So, where the defendant relies on prescription as the basis of his right, he must properly plead prescription.[10] This may be done in one of two methods: First, by alleging that the action is barred by a certain section of the statute, and properly referring to the same by number, as provided for by the respective codes;[11] or, second, by pleading the facts constituting the limitation or prescriptive right. In following the latter method, however, it is incumbent upon him to plead all the elements entering into a prescriptive right.[12] Again, an answer by a riparian owner, claiming the water as against a subsequent appropriator for use, was held to be fatally defective because it did not show that he was making any use of the water.[13] Nor was it a good defense that

10 State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; American W. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Matthew v. Ferrea, 45 Cal. 51; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108.

See, also, for pleading prescription, Sec. 1055.

11 Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Alhambra etc. Co. v. Richardson, 72 Cal. 589, 14 Pac. Rep. 379; Partridge v. Shepard, 71 Cal. 470, 12 Pac. Rep. 480; Centerville etc. Co. v. Sanger Lumber Co., 140 Cal. 385, 73 Pac. Rep. 1079.

See, also, for the acquisition of rights by prescription, secs. 1033-1058.

12 For the essential elements necessary to acquire a right by prescription, see Sec. 1048.

Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052, where the plea failed to allege that the use was adverse to plaintiff, or that plaintiff had notice of the occupancy, or facts sufficient to charge him with notice thereof, was insufficient as a plea of prescription.

See, also, Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795, holding that the question when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice.

See, also, Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Whitehair v. Brown, 80 Pac. Rep. 297, 102 Pac. Rep. 783; Wasatch Irr. Co. v. Fulton, 25 Utah 466, 65 Pac. Rep. 205; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. Rep. 704; Richard v. Hupp, 104 Cal. 18, 37 Pac. Rep. 920.

13 Northport Brewing Co. v. Perrot, 22 Wash. 243, 60 Pac. Rep. 403; Riverside W. Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889.

the plaintiff was obstructing a navigable stream by means of a dam in an action to enjoin the diversion of water.[14] It is a good defense to an action to enjoin the diversion of water by one claiming the right thereto as a riparian owner for the defendant to show that the stream in question is an artificial and not a natural water course, since riparian rights do not attach to artificial streams.[15] It is, of course, a good defense to an action for an injunction enjoining the obstruction of the flow of a stream to show that there is no such obstruction as alleged by the plaintiff,[16] or that the obstruction has been abated before the action or decree, or that steps have been taken to prevent the injury.[17] It is also a good defense to show that the unlawful diversion was made by some person other than the defendant in the action.[18] And the plea of prescription is in effect an action to establish a new right in the defendant. Where the latter method is used it is better that such a claim be set up by way of a cross-complaint or cross-bill, discussed hereafter in next section.[19] So, also, where it is claimed that the plaintiff has abandoned his rights or some

But see Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280.

For the right of riparian owners to an injunction, see Secs. 1610-1615.

14 Miller & Lux v. Enterprise C. Co., 145 Cal. 652, 79 Pac. Rep. 439.

15 Green v. Carotta, 72 Cal. 267, 13 Pac. Rep. 685; Sampson v. Hoddinott, 1 C. B. N. S. 611, 87 E. C. L. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 5 Week. Rep. 230.

16 Sparlin v. Gotcher, 23 Ore. 186, 31 Pac. Rep. 399.

17 McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7; Atchison v. Peterson, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

18 Gould v. Stafford, 101 Cal. 32, 35 Pac. Rep. 429, where a landlord was held not liable for the unlawful diversion of his tenant.

See, also, West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16; Simmons v. Winters, 21 Ore. 35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

19 So, again, where the defense is that of estoppel, it must be specially pleaded.

For the doctrine of estoppel, see Secs. 1121-1128.

In a suit to establish priority of appropriation of water, and to restrain interference therewith, the defense of estoppel constitutes new matter and is of no avail unless specially pleaded. Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205.

See, also, United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Lower Latham D. Co. v. Louden Irr. C. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Flannery v. Campbell, 30 Mont. 172, 75 Pac. Rep. 1109; Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Hackett v. Larimer

portion thereof.[20] Again, where the defense is that of laches or unreasonable delay in seeking to enforce a right, it must be specially pleaded in the answer.[21] Again, where the flow of a stream is increased by the defendant turning other water into the same.[22]

Where, also, the defendant relies upon the defense that the water if not diverted by him would be of no benefit to the plaintiff, for the reason that it would not reach him anyway, there is no question but that such a defense must be specially pleaded.[23] Under the more recent decisions governing subterranean waters, especially as to the underflow of surface streams, it is a serious question whether such a defense, even if properly pleaded, is good. The diversion of the waters of a stream above a certain point undoubtedly contributes to the diminished flow below, either surface or subterranean.[24] The Utah Court holds that such a defense is good.[25] But the Federal Court and a number of other courts

etc. Co., 48 Colo. 178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Durga v. Lincoln Creek Lum. Co., 47 Wash. 477, 92 Pac. Rep. 343.

20 For the doctrine of abandonment, see Secs. 1099-1120; Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205; White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391.

21 Laches is not ground for demurrer, but is to be raised in the answer. Ogilvy etc. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. Rep. 598.

See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Blakely v. Ft. Lyon C. Co., 31 Colo. 224, 73 Pac. Rep. 249; Miller v. Dondero, 139 Cal. 643, 73 Pac. Rep. 583; Krause v. Oregon etc. Co., 45 Ore. 378, 77 Pac. Rep. 833.

That there must be no laches in an action for injunction, see, also, Sec. 1605.

22 See, also, for developed waters, Secs. 1205, 1206.

Right to use channel of stream to convey water, Sec. 832; Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205.

23 Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

24 For the underground flow of surface streams, see Secs. 1161-1163.

25 Before an appropriator of water can be enjoined for diversion by an appropriator further down the stream, it must satisfactorily appear that, had the water been allowed to pass down

hold that such a defense is not good.[26] Such a defense should not be good if in any way the acts of the defendant materially contribute to the diminishing of the quantity of water to which the plaintiff is entitled; and that such acts do not so contribute and that the plaintiff will derive no benefit, even if the defendant is enjoined, must be established by the clearest and most satisfactory proof.[27] Where the defendant relies upon a former decree as the basis of his right, he should plead such former decree.[28] But it is no defense unless the plaintiff was a party to the former action.[29] Again, where the defendant relies upon a contract made with the plaintiff, or a license granted by him, such contract or license should be specially pleaded.[30]

§ 1635. Pleadings—Defenses—Cross-complaint or cross-bill.—In addition to the defenses which may be set up by the defendant

the stream, it would have reached plaintiff's ditch. West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

26 Morris v. Bean, 146 Fed. Rep. 423, wherein it is said that such a defense is as old as irrigation and perhaps as old as trespass itself.

See, also, Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Raymond v. Wimsette, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Paige v. Rocky Ford etc. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; City of Telluride v. Blair, 33 Colo. 353, 80 Pac. Rep. 1053.

27 Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Moe v. Harger, 10 Idaho 302, 77 Pac. Rep. 645; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Booth v. Trager, 44 Colo. 409, 99 Pac. Rep. 60.

28 Community Ditch or Acequia of Tularosa Townsite v. Tularosa Community Ditch, —— N. M. ——, 114 Pac. Rep. 285; Carroll v. Vance, 39 Colo. 216, 88 Pac. Rep. 1069.

29 Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224.

30 For contracts with companies, see Secs. 1500-1529.

For contracts in general, see Secs. 917-926.

For license, see Secs. 981-984.

But see Churchill v. Bauman, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43, where it was held that, where it appeared that the plaintiff assisted in maintaining the dam and diverting the water, it was held that he could not recover in an action to enjoin such diversion, and that such participation in the diversion of the water need not be specially pleaded, but may be proved under a general denial. But, De Haven, J., while concurring in the judgment, said: "I think such defense should have been specially set out in the answer."

in his answer in an action for an injunction against him for the invasion of any of the rights under discussion,[1] he may also set up, by way of cross-complaint or cross-bill any claim that he may have to those rights, and, in turn, ask for an injunction against the plaintiff enjoining him from invading the rights of the defendant.[2] Although an action to enjoin the unlawful diversion of water, or to enjoin the continuous invasion of any of the other rights under discussion, is an action found in tort, as said by the Supreme Court of California: "There are many cases of that kind where a cross-complaint might be proper and affirmative relief be granted."[3] So, where the action is by a riparian owner, and the defendant claims the right to the use of the water as an appropriator, he may set up his claim by a cross-complaint or cross-bill to the plaintiff's complaint.[4] And, also, upon the other hand, where the action is by an appropriator, the riparian owner may, by the proper allegations, set up his claim to the water by a cross-complaint and seek to enjoin the appropriator.[5] So, also, where the action is brought by a corporation to enjoin one of its stockholders from diverting more water from the stream than it is alleged he is entitled to, the defendant may, by way of cross-complaint, set up his claim to the right to the use of the water by an independent appropriation or by prescription.[6] So, again, where the action is brought by one appropriator against the alleged diversion of water, the defendant may, by cross-bill, set up his claim to a prior or superior right, and pray for an injunction against the plaintiff.[7] Upon the question of the allegations necessary, in general, it may be said that the defendant's right to the use of the water in question, or his right to the use of an easement, or to a ditch, canal, or other

1 See Sec. 1634.

2 For cross-complaints in suits for the adjudication of water rights, see Sec. 1550.

3 Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308, overruling Heilbron, v. Kings River etc. Co., 76 Cal. 11, 17 Pac. Rep. 933, holding to the contrary.

See, also, Rickey v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Ames v. Big Indian etc. Co., 146 Fed. Rep. 166; Reno v. Reno & Juchem, —— Colo. ——, 119 Pac. Rep. 473.

4 Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. Rep. 308.

5 Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191.

6 Center Creek etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

7 Bessemer Irr. D. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91.

works, must be so set forth in his cross-complaint as to clearly and concisely state the facts constituting his cause of action, and with the same precision as is required of the plaintiff in the original complaint.[8] Again, the allegations of the cross-complaint must be germane to the subject matter set up in the complaint of the plaintiff or it can not avail the defendant. So, in an action brought by the plaintiff for the purpose only of restraining the defendants from breaking its headgates and interfering with the management of its canal, a cross-complaint setting up prior appropriation and ownership of the water, and praying for an adjudication of their water rights, was held demurrable as not germane to the principal suit.[9] In order to have determined the right to an injunction as between themselves, defendants must specially plead such rights and the issues must be joined *inter se*. However, where the issues are so joined, the respective right of the defendants to an injunction may be determined.[10]

§ 1636. Pleadings—The reply—Answer to cross-complaint.—The plaintiff, in turn, may demur to the answer of the defendant,[1] and to his cross-complaint, if one is filed.[2] Also, in those jurisdic-

8 Center Creek etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559; Bessemer Irr. D. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191.

See, also, for allegations of complaint, Sec. 1633.

9 Hayois v. Salt River Valley C. Co., 8 Ariz. 285, 71 Pac. Rep. 944.

10 Rickey v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. Rep. 166.

In an action to determine plaintiff's water right, and to restrain the defendants from interfering therewith, the rights of the defendants, as between themselves, are not subject to determination, except so far as, between themselves, they have tendered and joined hostile issues. Nevada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

For the adjudication of water rights *inter se* as between the respective parties, see Secs. 1550, 1554.

For the right to injunction *inter se* as between plaintiffs, see Sec. 1633.

1 Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223.

A defect in an answer is waived by the plaintiff pleading over. McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075.

2 Hayois v. Salt River C. Co., 8 Ariz. 285, 71 Pac. Rep. 499; Silver Creek etc. Co. v. Hayes, 113 Cal. 142,

tions where the new matters set up in an answer are not deemed denied, a reply should also be filed to the affirmative defenses set up by the defendant.[3] The plaintiff should also answer or reply to the allegations of the defendant as set up in his cross-complaint or cross-bill.[4]

§ 1637. **Pleadings—Intervention.**—Persons who are not made parties to the action, and have an interest in the subject matter in controversy, have the right, upon leave granted by the Court, to come into an action brought for an injunction and ask for injunctive relief upon their own behalf. "They may intervene for their own protection" in such an action, if they deem that the acts of either the plaintiffs or the defendants will be an invasion of their rights.[1] Upon the hearing of the case, if the facts and circumstances warrant it, the Court may grant the injunctive relief prayed for in favor of such intervenors and against both the original parties to the action. But persons not parties to the action are held not entitled to the enjoyment of personal privileges accorded by the decree therein to those who were impleaded.[2]

§ 1638. **Pleadings—Amendments to.**—The power to allow amendments to the pleadings in actions for an injunction, as in other cases, is necessarily intrusted in a large degree to the sound discretion of the trial court, and the courts, in furtherance of jus-

45 Pac. Rep. 191; Center Creek etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

3 Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 605, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Reno v. Reno & Juchem, —— Colo. ——, 119 Pac. Rep. 473.

Where defendant pleaded a former adjudication in bar to a suit for an injunction, and alleged that the plaintiff in the case was a party to the former action, it was held error to strike out a verified answer by plaintiff to the plea in bar, denying that the plaintiff in the case at bar was a party to or in any way bound by the decree in the former action. Community Ditch v. Tularosa Community Ditch, —— N. M. ——, 114 Pac. Rep. 285.

4 State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

1 Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

For intervention in actions to adjudicate water rights, see Sec. 1546.

See, also, West Point Irr. Co. v. Moroni etc. Co., 14 Utah 127, 46 Pac. Rep. 762; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317.

2 Slattery v. Harley, 58 Neb. 575, 79 N. W. Rep. 151.

tice, are usually liberal in allowing such amendments. But when an application to amend is resisted, it should not be granted except upon good cause shown, and upon such terms as the justice of the particular case may require.[1] When a demurrer to a complaint is sustained the Court may grant time within which the complaint may be amended.[2] When a temporary injunction is granted upon the original complaint and a demurrer to the complaint is sustained, the Court may, in its discretion, continue the injunction pending an amendment to the complaint.[3] A plaintiff in his amended complaint can not depart from his original cause of action and set up an entirely new one. But the ultimate question involved from the inception of the case was the priority to the use of the water of a certain stream; a mere change in the allegations as to the method of the appropriation does not change the cause of action, and is not a departure.[4]

The courts are particularly liberal in granting leave to amend the answer in these cases. The general rule is that a defendant may set up as many defenses to the plaintiff's complaint as he may have, so long as they are not so inconsistent that they nullify each other, in which case he is generally required to elect the one upon which he will stand. In a California case it was held that the defendant might be permitted to amend his answer by omitting the defense in his original answer, and setting up an entirely new defense in the amended answer.[5] An answer may also be amended by reference to certain paragraphs of the original answer.[6] Amend-

1 Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320.

2 Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381.

3 White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329.

4 White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; Davidson v. Fraser, 36 Colo. 1, 84 Pac. Rep. 695, 4 L. R. A., N. S., 1126.

Where a decree for plaintiff, in a suit to restrain the interference with plaintiff's right to change his point of diversion, was held erroneous, on reversal and remand the plaintiff was allowed to maintain the action and amend his pleadings so as to conform with the statutory proceedings, for change of point of diversion. New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781.

5 Gould v. Stafford, 101 Cal. 32, 35 Pac. Rep. 429.

6 Welsh v. Bardshar, 137 Cal. 154, 69 Cal. 977.

It is not error, however, for the court to refuse to allow facts occurring subsequent to the commencement of the action to be pleaded as an amendment to the original answer, but

ments to the pleadings may also be allowed after the evidence is before the Court. It is held by the Supreme Court of the United States that no amendment to a bill filed by one State against another State, whose averments are sufficient to present the question whether the latter State has the power to wholly deprive the former State of the benefits of water from a river which rises in the former and flows through the latter State, will be compelled on demurrer, whatever imperfections a close analysis of the bill may disclose; but any decision as to the sufficiency of the bill to warrant the relief prayed for will be postponed until the facts are before the Court on evidence.[7]

§ 1639. Practice in actions brought for injunction.—In actions brought for an injunction against the invasion of water and kindred rights, as in other cases, the practice as prescribed by the codes of the respective States or by the Federal statutes and rules, if the action is brought in that Court must be strictly followed. As we have discussed in previous sections of this chapter, an action for an injunction against the future invasion of rights may be combined with an action for damages for past invasions of such rights.[1] So, also, in an action brought principally for the object of quieting title to a water right, and to adjudicate the same, may an injunction be granted in favor of the parties found entitled to the rights and against those found not entitled to such rights, or against the

to require them to be set out in a supplemental answer. Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

7 Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

So it is held that where the evidence showed a prescriptive right in the defendant to maintain a private nuisance was admitted without objection that it was not within the issues made by the pleadings, it was held by the Supreme Court of California to be an abuse of discretion to refuse to allow the defendant to amend his answer so as to allege the right. Drew v. Hicks, 101 Cal. 17, 35 Pac. Rep. 563.

See, also, Buckers etc. Co. v. Platte Valley Irr. Co., 28 Colo. 187, 63 Pac. Rep. 305; Richard v. Hupp, 104 Cal. 18, 37 Pac. Rep. 920, holding that a refusal to permit the complaint to be amended so as to conform with the evidence was within the discretion of the trial court.

See, also, Small v. Harrington, 10 Idaho 499, 79 Pac. Rep. 461.

One is not entitled to have his pleadings amended to conform to the proof, where objection was made to the introduction of evidence for which the amendment is desired. Mendenhall v. Harrisburgh etc. Co., 27 Ore. 38, 39 Pac. Rep. 399.

1 See Sec. 1599.

respective parties enjoining each respectively from interfering with each other's rights as adjudicated in the action, if both are entitled under the decree to certain rights as therein specified.[2] The equitable features in such actions are for the decision of the judge or Court alone, with, perhaps, a submission of the facts in the case to a jury, whose decision may be considered by the Court as advisory only.[3] So, in an action for an injunction alone it is within the discretion of the Court to submit the issues of fact to a jury, but whose findings will not bind the judge trying the case. But he may adopt them in whole or in part, or he may reject them *in toto*, and adopt his own findings.[4] The better practice, it seems to us, is for the judge alone to decide the equitable features of the case as to whether or not the injunction should be granted without submitting the facts to the jury. The submission of these cases to a jury seems too much like an attempt upon the part of the judge to shift the responsibilities and duties of his office.[5] But an action for damages is one at law.[6] Therefore, in mixed actions, where an injunction is prayed for and also damages for past injuries, upon the question of damages the general practice is that a jury is required unless the same should be waived. As said by the Supreme Court of the United States: "Upon the question of damages a jury would be required, but upon the propriety of an injunction the action of the Court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished, but the essential distinction between law and equity is not changed."[7]

2 See Secs. 1536, 1598.

3 For the submission to a jury suits to quiet title to water rights, see Sec. 1553.

4 Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Berry v. Equitable Gold M. Co., 29 Nev. 451, 91 Pac. Rep. 537; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. Rep. 965; Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Churchill v. Bauman, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569.

5 See, also, Sec. 1553.

6 For actions for damages, see Secs. 1660-1704.

7 Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

"Both legal and equitable relief are prayed for. On the question of damages for the injuries sustained through the alleged wrongful acts of the defendant, either party was entitled to a trial by jury, and the court, in the course of deciding upon the question of equitable relief, might submit the facts to a jury in an advisory capacity." Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193.

See, also, Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891, where the court held that the trial court should have

But it was held by the Supreme Court of California, in an action to abate a nuisance, where the recovery of damages constituted incidental relief only, that the defendant was not entitled to have such damages assessed by a jury as a matter of right.[8] As courts of equity are vested with the discretionary powers to consolidate causes, and such discretion will not be reviewed on appeal, except for abuse, where two suits involving irrigation rights could have been joined in the same complaint, and were between the same parties and with reference to the same subject matter, the ditches in controversy only being different, it is held that they were properly consolidated.[9]

§ 1640. **Proof—Burden of proof.**—In an action to enjoin the defendant from diverting water, or to prevent him from a continuous invasion of any of the plaintiff's alleged rights, it devolves upon the plaintiff, in the first instance, to establish a *prima facie* case to his right to the use of the water or other right in question, as set forth in the allegations of his complaint, and also the essentials necessary, such as irreparable injury to his rights, before the Court will grant the injunction prayed for.[1] Where the complaint is framed upon the theory that there has been an abandonment of all or a portion of the water, or that there was an enlarged use of such water, or a change in the point of diversion by the defendant, the burden of proof is upon the plaintiff to establish these facts by a preponderance of all the evidence in the case that such is the fact.[2]

first tried the equitable part of the action, and thereafter, if a jury was demanded, have tried the issue of damages, and submitted that question to a jury.

See, also, North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851; *Id.*, 23 Utah 199, 63 Pac. Rep. 812; Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052; Churchill v. Bauman, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43; Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422; Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; McCarthy v. Gaston Ridge etc. Co., 144 Cal. 542, 78 Pac. Rep. 7.

8 McCarthy v. Gaston Ridge etc. Co., 144 Cal. 542, 78 Pac. Rep. 7.

9 Hayward v. Mason, 54 Wash. 653, 104 Pac. Rep. 141.

1 For the elements necessary to give a court of equity jurisdiction, see Secs. 1600-1605.

Barnes v. Gerberg, 27 Wash. 126, 67 Pac. Rep. 568; Yick Wai Co. v. Ah Soong, 13 Hawn. 378.

See, also, for the proof in actions to adjudicate water rights, Sec. 1554.

2 Platte Valley Irr. Co. v. Central Trust Co., 22 Colo. 102, 75 Pac. Rep.

But, as a general rule, upon the plaintiff making out a *prima facie* case, the burden is then cast upon the defendant to show that he is entitled to the water claimed by him in accordance with the allegations of his answer. So, where the defendant claims the water diverted by him because it had been previously turned into the stream by him, the burden of proof is upon him to establish that fact, and also the fact that he is not taking out more water than he turned into the stream.[3] So, where an appropriator sues to restrain the loaning of water on the ground that it would result in injury to his vested rights, the burden of showing that the loaning will not so operate is on the parties to the loan.[4] Again, an appropriator must show that he uses the water which he claims economically, or he is not entitled to an injunction to prevent its use by another.[5] So, where the defendant seeks to justify his acts in taking the water under the allegation that it will not reach the prior appropriator and plaintiff below, even if permitted to flow down the stream, and will, therefore, be of no use to him, not only is the burden of proof upon such defendant to show that fact, but the evidence must be most clear and convincing.[6] Again, where the defendant sets up in his answer a prescriptive right to the use of the water, either as against a prior appropriator or a riparian owner, the burden is upon him to show by a preponderance of all the evidence all the essential elements that enter into the acquisition of water rights by prescription, and such evidence must be clear and conclusive.[7] Again, where the defendant sets up that the

391; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047.

See, also, for abandonment, Secs. 1100-1115.

For change in point of diversion, see Secs. 857-859.

[3] Herriman Irr. Co. v. Butterfield etc. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Steinberger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483.

See, also, for developed water, Secs. 1205, 1206.

For the use of stream for a canal, see Sec. 832.

[4] Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37.

See, also, Slosser v. Salt River Val. C. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

[5] Court House etc. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463.

[6] "The infringement of a prior by the owner of a junior right constitutes a legal injury, and, before the junior can justify his acts of the interference with the prior right upon the ground stated, a strong showing should be made." Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

See, also, for defenses of no benefit, Secs. 1550, 1634.

[7] For the acquisition of rights by prescription, see Secs. 1033-1058.

right was abandoned by the plaintiff, the burden is upon him to establish that fact.[8] Where it was stipulated before the trial that no question should be raised as to the titles of the respective parties to the lands described in the pleadings, in connection with which the water claimed by each was used, it was held that evidence that the defendant's premises were located upon an Indian reservation, which they could not lawfully occupy, was held to be inadmissible.[9] Where either party sets up a former adjudication of his rights, the decree in the former case should be offered and admitted in evidence.[10] In any case the proof should conform to the pleadings of the party alleging them, and should tend to prove the theory upon which he places his right to the injunction; otherwise there is a fatal variance, and the injunction will not be granted.[11] But it is not necessary that all the theories upon which

See, also, Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; Morris v. Bean, 140 Fed. Rep. 433; McRae v. Small, 48 Ore. 139, 85 Pac. Rep. 503; Kleyenstuber v. Robinson, 6 Ariz. 31, 52 Pac. Rep. 1117; Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205.

Parties who have appropriated water for irrigation purposes pursuant to law, and continued the use under such appropriation for more than seven years, can not be enjoined from the continued use of such right by a lower riparian owner. Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

8 For the abandonment of water, see Secs. 1099-1115.

See, also, Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945; Platte Val. Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

9 Phillips v. Coburn, 28 Mont. 45, 72 Pac. Rep. 291.

10 Barnes v. Gerberg, 27 Wash. 126, 67 Pac. Rep. 568; Salt Lake etc. Co. v. Salt Lake City, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

A judgment roll in a former suit is not admissible in bar of an action where there is no privity between defendants and either of the parties to the former action, although plaintiffs may have acquired their interests from parties to the former suit. Silva v. Hawkins, 152 Cal. 138, 92 Pac. Rep. 72.

11 City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348, where the complaint alleged appropriation, but the proof showed that the right of plaintiff was in contract; held, that there was a substantial and fatal variance.

So, where the plaintiff based his right on an appropriation, and the proof offered tended to show that the prior appropriator had relinquished his right to the water. Wellington v. Beck, 43 Colo. 70, 95 Pac. Rep. 297

So, where plaintiff set up a decree

a party bases his right to an injunction should be proven, or all the allegations which he sets up relative thereto. It is sufficient if enough of the facts which are set forth in the pleadings are established by a preponderance of the evidence, without substantial conflict, to constitute a good cause of action, although other allegations are not proven.[12] In the support of the claims of either party, especially upon the question of the measurement of the water and the amount actually necessary for any use to which the water is applied, expert testimony may be introduced. But this kind of testimony should be considered by the Court with the usual caution which is applied in other cases.[13]

In those States where it is not necessary to plead the local customs referred to in Section 2339 of the Revised Statutes of the United States, it, of course, is not necessary to prove such customs. As a general rule the Court will take judicial notice of the fact that the customary rules and regulations of the miners are in force either in the whole State or in certain portions thereof.[14] However, in Texas, in an action to restrain an irrigation company from proceeding with the construction of its works, the burden of proof is on

in a former action restraining defendant's predecessor in interest from diverting water above plaintiff's land based on the latter's riparian rights, it would not protect any rights based on a prior appropriation now claimed by him against defendant. Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

So, again, where the theory of the plaintiff was wholly based upon the right acquired by prescription, a finding and decree thereon that the use of the water and the ditch was by the consent of the owners can not be sustained. Schirmer v. Drexler, 135 Cal. 134, 66 Pac. Rep. 180.

12 Katz v. Walkinshaw, 141 Cal. 116, 76 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

13 Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Robertson v. Wilmoth, 40 Colo. 74, 90 Pac. Rep. 95.

See, also, for the economical use of water and the suppression of waste, Secs. 874-916.

14 For customs, see Secs. 598, 600.

See, also, Parkersville Drainage Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Crawford v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Morris v. Bean, 146 Fed. Rep. 423.

But see McGhee etc. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398.

the plaintiff to show by his pleadings and proof that in that particular portion of the State irrigation is unnecessary.[15]

§ 1641. **Findings of fact and conclusions of law.**—As is the case in actions to adjudicate water rights and to quiet the title to the same, so in actions for an injunction, the Court must make findings of fact and conclusions of law.[1] The findings must conform to the pleadings and the evidence in the case,[2] and must support the decree and judgment rendered in the case.[3] And for this purpose the findings should definitely and specifically state the rights of the respective parties.[4] The findings in a case must be consistent

15 McGhee etc. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398, 22 S. W. Rep. 967.

1 For findings and conclusions in actions to quiet title, see Sec. 1556.

Findings of fact and conclusions of law should cover the issues in the case, and be made separate from the opinion of the judge. Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867.

It is the duty of the court to find on all material issues in the case, regardless of any request of the parties. Davies v. Angelo, 8 Cal. App. 305, 96 Pac. Rep. 909.

Where the defendant is entitled to the water saved and developed by it above the natural flow of the stream, the court must find with such exactness as is possible how much water is saved and developed. Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881, and holding that the court must not shirk the duty of making its findings on account of the difficulties presented in the case.

See, also, Butte C. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552.

2 Schirmer v. Drexler, 134 Cal. 134, 66 Pac. Rep. 180; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22; Goon v. Proctor, 27 Mont. 526, 71 Pac. Rep. 1003; Town of Suisun City v. De Freitas, 142 Cal. 350, 75 Pac. Rep. 1092; Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; North American etc. Co. v. Adams, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Last Chance D. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; Wilson v. Collin, 45 Colo. 412, 102 Pac. Rep. 20.

3 For the decree and judgment, see Secs. 1642-1646.

Miller & Lux v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. Rep. 439; Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; Welsh v. Bardshar, 137 Cal. 154, 69 Pac. Rep. 977; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162; Wilson v. Collin, 45 Colo. 412, 102 Pac. Rep. 20.

"A decree should be based upon definite findings, and the findings can be no more definite nor certain than the evidence justifies." Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

4 Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692;

with each other, and one must not negative another upon any material issue.[5] But in cases where the facts have been submitted to a jury, and where the Court adopts their findings as expressed in their verdict, there is no necessity of any further finding by the Court.[6] Again, where the defendant sets up affirmative matter in his answer, which presents no material and substantial issue, and which in no way affects the rights of the plaintiff in the action, it is unnecessary for the Court to make findings thereon, and a failure to make such findings is not error.[7]

§ 1642. **The decree and judgment.**—Upon the final hearing of an action for an injunction, according to the allegations of the pleadings, and the facts and circumstances as evolved in each particular case, the trial court may render a decree and judgment granting an injunction in favor of either party and against the other party to the action, or it may make a temporary injunction permanent as originally issued or as modified by the Court; or, again, upon the other hand, it may refuse to grant the injunction or dissolve the temporary injunction already issued in the action. This does not mean that the granting or refusing to grant injunctive relief in these actions is discretionary with the trial court, but these actions being in equity, are subject to review, reversal, or modification by the Appellate Court to a much greater extent than

Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

"In the absence of a finding of the actual diversion of some definite quantity of water, sufficiently supported by the evidence, the plea of prescription must necessarily fail." Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989.

See, also, Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. Rep. 704.

[5] Davies v. Angelo, 8 Cal. App. 305, 96 Pac. Rep. 909; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; Beaverhead C. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Authers v. Bryant, 22 Nev. 245, 38 Pac. Rep. 439.

But a finding in conflict with an "opinion" of the court is not ground for reversal. Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

[6] Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569.

[7] Montpelier M. Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

See, also, Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405.

A judgment in a court of equity will not be reversed because the court failed to make express findings, where it does not affirmatively appear that such findings were not waived. Richardson v. Eureka, 110 Cal. 441, 42 Pac. Rep. 965.

actions at law, where the judgment is based upon the verdict of a jury.[1]

As we have discussed in a previous section, the decree and judgment in actions for the adjudication of water rights and to quiet the title thereto must be definite and certain as to the rights of the parties,[2] so, also, the decree and judgments in actions where the injunction is granted must also be definite and certain as to the rights of the respective parties, and must also go one step further and specifically state just what acts the party enjoined must refrain from doing to prevent a further invasion of the rights in question. So, in a well-reasoned case decided by the Supreme Court of Nevada, where all the parties had done all the things necessary for a valid appropriation of water, and it was not claimed that the plaintiffs had appropriated all the water, a decree without any definite finding of amount appropriated, but only that plaintiffs had appropriated enough to irrigate certain portions of their land, which enjoins defendants from diverting any of the water, and from interfering therewith so as to prevent the water from flowing onto plaintiffs' land in sufficient quantity to irrigate it, was held to be too indefinite to be sustained.[3] The decree and judgment in an injunction case should specifically award the water to the respective

1 For appeal in injunction cases, see Sec. 1647.

For appeal in damage cases, see Sec. 1704.

For appeal in actions to quiet title, see Sec. 1565.

2 For decrees and judgments in actions to quiet title, see Secs. 1557-1563.

3 Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

See, also, White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Wilson v. Eagleson, 10 Idaho 755, 81 Pac. Rep. 434; *In re* Huntley, 85 Fed. Rep. 889, 29 C. C. A. 468; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Wallace v. Farmers' D. Co., 130 Cal. 578, 62 Pac. Rep. 1078; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Steinberger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483; Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223.

parties, notwithstanding their right might be implied by law.[4] The quantity of water should be based upon beneficial use, and an injunction will be dissolved whenever the writ is ineffectual by reason of uncertainty.[5] And, again, it may be dissolved when its object has been wholly accomplished and the cause of action abated.[6] A decree enjoining the use of a ditch does not, unless specified, enjoin the use of the water formerly conducted through the ditch.[7] Neither does a decree enjoining the use of water *per se* also enjoin the use of a ditch.[8] These are separate property rights, and the decree must specify which one is intended.[9] A mandatory decree ordering the abatement of a nuisance [10] should simply order its abatement, regardless of the means to be taken by the defendant therefor.[11] A decree must be based upon definite findings and conform thereto; [12] and it must also conform to the pleadings [13] and the evidence taken in the case.[14] A conditional decree may be entered instead of a mandatory decree, the decree being worded to

4 Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

See, also, for economic use and suppression of waste, Chap. 49, Secs. 874-916.

See, also, Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128.

5 McKenzie v. Ballard, 14 Colo. 426, 24 Pac. Rep. 1.

6 Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

7 Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045.

8 Nevada etc. Co. v. Kidd, 37 Cal. 282.

9 See, also, Secs. 1618, 1619.

10 For injunctions as against nuisances, see Sec. 1621.

11 Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Mace v. Mace. 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

The owner of a ditch is entitled to no greater relief than the restoration of the ditch to its former condition and damages for the injuries occasioned. Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. Rep. 140; Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322.

12 Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

13 Schirmer v. Drexler, 134 Cal. 134, 66 Pac. Rep. 180; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781.

14 City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

restrain the operation of the parties until they had made suitable provision to prevent the injury.[15] And where the evidence shows that there is no probability of a recurrence of the injury, the suit may be dismissed.[16]

In the matter of costs, the general rule is that the party who recovers in the injunction proceedings is entitled to his costs against the party losing. Where, however, mutual injunctions are granted, it is not error to divide the costs between the parties thereto.[17] And, again, in the discretion of the Court costs may be denied all parties.[18]

§ 1643. Decree and judgment—The balance of convenience—Authorities against.—It has been frequently asserted that in rendering its final decree and judgment in actions brought for an injunction the Court should take into consideration the balance of convenience and losses of the respective parties; or, stating the proposition in the converse, the balance of inconvenience and losses to the one as compared with the gain of the others. In general, it may be said that there is a direct conflict of authorities upon this proposition which can not be reconciled. By one line of authority it is held that the absolute right of property should be protected in the owner until he is dispossessed of the same in accordance with law, against the continuous invasion of his rights, causing material and irreparable injury, and that, too, regardless of the fact of the expense or loss which may be incurred by the opposite party by the decree of injunction, and that any other rule would be in violation of the Federal and State constitutions forbidding the taking of property for private use.[1]

15 Brown v. Gold Coin etc. Co., 48 Ore. 277, 86 Pac. Rep. 361.

16 Union etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044.

17 Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; McCarthy v. Gaston Ridge etc. Co., 144 Cal. 542, 78 Pac. Rep. 7.

18 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

1 Where an irreparable injury is being suffered, and will continue by the maintenance of a lawful business, relief by injunction against such business will not be withheld merely because the financial interests sought to be protected are small in comparison with those sought to be restrained. Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465.

"In a state of society the rights of the individual must to some extent be sacrificed to the rights of the social body; but this does not warrant the forcible taking of property from a

It is held that there is no principle of law or power in a court of equity to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience, necessities or profits of another private party. "It is the duty of courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property or to compel the owner to

man of small means to give it to the wealthy man, on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights." Marshall, J., in McCleery, v. Highland Boy G. M. Co., 140 Fed. Rep. 951.

An injunction can not be refused because more injury will result from awarding than from refusing it, if the one asking for it is entitled to it as a matter of right. Sullivan v. Jones etc. Co., 208 Pa. 540, 57 Atl. Rep. 1065, 66 L. R. A. 712.

"It is earnestly urged by counsel for respondents that if this court should hold that there is error in sustaining the demurrers to the complaints, or either of them, it would result in 'the depopulation of Shoshone County, the abandonment of all mining and milling therein, and the consequent bankruptcy of the inhabitants thereof.' Deplorable as this might be, if true, it furnishes no excuse for the court to shirk its responsibilities in disposing of the question before us on the merits. The law is no respecter of persons, corporations, or individuals, and in its creation and enforcement reaches out and protects the lone settler in his rights, let them be ever so meager, as well as the capitalist, the corporation, or individual with its or his millions. . . . The law does not measure the rights of litigants by the amount involved, nor the manner in which it may affect others not parties to the litigation." Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907.

The right to take subterranean water for use at a distance can not be determined by the relative area or value of the local lands and those to which it is to be taken. "Such an argument has no standing in a court of law, and is distinctly repudiated." Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098; Verdugo W. Co. v. Verdugo, 152 Cal. 655; 93 Pac. Rep. 1021.

See, also, Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Woodruff v. North Bloomfield etc. Co., 9 Sawy. 441, 18 Fed. Rep. 753; dissenting opinion by Hawley, J., in Mountain Copper Co. v. United States, 142 Fed. Fep. 625, 73 C. C. A. 621; Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828; Cole Silver M. Co. v. Virginia etc. Co., 1 Sawy. 470, Fed. Cas. No. 2989, 7 Morr. Min. Rep. 503; Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124; Weiss v. Oregon Iron & Steel Co., 13 Ore. 496, 11 Pac. Rep. 255; Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S. W. Rep. 420, Heilbron v. Fowler Switch etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Fabian v. Collins, 1 Mont. 215.

exchange the same for other property to answer private purposes or necessities."[2] "Every substantial, material right of person or property is entitled to protection against all the world."[3] Neither is there any reason upon principle why this rule should be relaxed where the injunction is sought in behalf of a private party as against an invasion by the public and for public uses. If the acquisition of these rights are necessary for a public use, there are methods provided by law whereby they may be acquired by comdemnation proceedings, and not by the unlawful invasion of the vested rights of private parties.[4]

In order for the Court to grant a permanent injunction it must be proven by the party seeking such relief that there is a continuous or threatened invasion of his substantial and material rights, which will cause irreparable injury; otherwise the party will be left to his action at law for damages. We will concede the proposition that where the injury is slight and inappreciable, and the plaintiff can be fully recompensed in an action at law for damages, no injunction should be granted which will overthrow great property interests.[5] Under the rule it is held, however, that the granting of preliminary injunctions or the refusal thereof being largely discretionary with the trial court, the Court may govern its action by considering the balance of present convenience between the parties.

2 Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124.

3 Sawyer, J., in Woodruff v. North Bloomfield etc. Co., 9 Sawy. 441, 18 Fed. Rep. 753.

See, also, Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907.

4 Pomeroy's Equitable Remedies, Sec. 531.

5 "Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim *de minimis non curat lex* is applicable." Sawyer, J., in Woodruff v. North Bloomfield etc. Co., 9 Sawy. 441, 18 Fed. Rep. 753.

"No doubt there are cases in which the court will refuse to interfere by injunction to prevent a trespass, where it can see that the injury will be slight, and the injunction will work great injury." Heilbron v. Fowler Switch etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

See, also, Hoye v. Sweetman, 19 Nev. 376, 12 Pac. Rep. 504; Thorn v. Sweeney, 12 Nev. 251; Crescent M. Co v. Silver King M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; McGregor v. Silver King M. Co., 14 Utah 47, 45 Pac. Rep. 1091, 60 Am. St. Rep. 883; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

But in the granting or refusing of the final decree it is held that this question should not enter into the consideration of the Court.[6]

§ 1644. Decree and judgment—The balance of convenience—Authorities in favor of.—There are, however, many authorities to the contrary to those cited in the preceding section.[1] A number of courts of the highest authority in more recent times support the contention that the injury to one of the parties as compared to the injury or loss or gain to the other party should be considered by the Court in granting or withholding the injunctive relief, and where the plaintiff can be fully recompensed for his injuries, he should be left to his action for damages. There have been two similar decisions by the United States Circuit Court of Appeals holding to this effect.[2] Such, as we view the law, is the case in an arid country, where all the water is needed for irrigation, where a riparian owner insists upon the undiminished flow of a stream

6 "We do not regard the principle as one properly applicable to a final determination, or a matter which ought to be considered by a court in rendering its final decree. The question of balance of injury may possibly be right, and the court may have a right to consider it on an interlocutory application; but we know of no principle by which equity, otherwise having cognizance of the case, should measure the rights of one party by the cost to the other, committing the injury, to prevent either its commission or its continuance." Suffolk etc. Co. v. San Miguel etc. Co., 9 Colo. App. 407, 48 Pac. Rep. 828.

See, also, California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741; Contra Costa W. Co. v. City of Oakland, 165 Fed. Rep. 518; Spring Valley W. Co. v. San Francisco, 165 Fed. Rep. 667.

1 See Sec. 1643.

2 McCarthy v. Bunker Hill etc. Co., 164 Fed. Rep. 927, 92 C. C. A. 259; writ of certiorari denied, 212 U. S. —, 53 L. Ed. 660; Mountain Copper Co. v. United States, 142 Fed. Rep. 625, 73 C. C. A. 621.

See, also, Bliss v. Anaconda Copper Co., 167 Fed. Rep. 342; Slade v. Sullivan, 17 Cal. 102, 7 Morr. Min. Rep. 419; Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; City of Aberdeen v. Lytle etc. Co., 58 Wash. 368, 108 Pac. Rep. 945; Heilbron v. Fowler etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. Rep. 557; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Real Del Monte Min. Co. v. Pond Min. Co., 23 Cal. 82, 7 Morr. Min. Rep. 452; Hoye v. Sweetman, 19 Nev. 376, 12 Pac. Rep. 504; Edwards v. Allouez etc. Co., 38 Mich. 46, 31 Am. Rep. 301, 7 Morr. Min. Rep. 577.

which flows by his land, without actual use of the water other than is incidental or "for no purpose other than to afford him pleasure in its prospect," as against the diversion of the water by expensive works and the application of the water to useful purposes, whereupon the very life of the community depends. In such a case great interests should not be overthrown upon such "trifling and frivolous grounds." And, we will add, that such is the rule adopted in some of the Western States, where the doctrine of the common law of riparian rights is in force, and especially in the State of California, by the later and best-reasoned decisions of its Supreme Court.[3] The leading case holding to this side of the contention is that of Kansas v. Colorado,[4] decided by the Supreme Court of the United States. In that case Mr. Justice Brewer, in summing up the conclusions of the Court, said: "That the appropriation of the waters of the Arkansas by Colorado for purposes of irrigation has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields, and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States, and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we

3 A riparian owner is not entitled to an injunction to restrain the diversion of water above him by a nonriparian owner, where the amount diverted would not be used by the former, nor cause any loss or injury to him or to his lands, present or prospective, and would greatly benefit the party diverting it. Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431.

"Even if at common law or under the civil law it is a part of the usufructuary right of a riparian owner to have the water flow by for no purpose other than to afford him pleasure in its prospect, such is not the rule of decision in this State. The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water." San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, for right of riparian owner to an injunction, Secs. 1611-1615.

4 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

are not satisfied that Kansas has made out a case entitling it to a decree." In other words, the Court held that in granting the injunction the damage to the State of Colorado would be so great, as compared to the damage to the State of Kansas, were it not granted, that it should not be granted.[5]

Also, in another late case decided by the Circuit Court of Appeals, it was held that an injunction of such a positive and sweeping character that it would practically result in destroying all other interests in the Imperial Valley should not be granted.[6] So, again, in cases where the rights of the respective parties can be reconciled so that both may have the use of the water without materially impairing the rights of either, as would be the case where the water could be returned to the stream before it reached the lower user,[7] the injunction should not be granted. Again, a mandatory injunction should not be granted ordering the removal of a dam or other works constructed at great expense when the nuisance caused thereby may be abated without such destruction of property.[8]

Our conclusions upon this subject are that where the plaintiff's injuries are small as compared with the loss of the defendant in the case, and he can be fully recompensed in damages in an action for the same, a court of equity in determining whether or not a final injunction should be granted should take into consideration the balance of convenience as between the respective parties and the comparative losses that the respective parties should be put to in case the injunction was or was not granted.

§ 1645. Decree and judgment—Effect of.—A decree and judgment granting an injunction, being *in personam*, is binding only upon the parties mentioned therein, who must have been parties to the action.[1] It is a fundamental proposition of law that a person

[5] See, also, New York City v. Pine, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592.

[6] The Salton Sea Cases, 172 Fed. Rep. 820, 97 C. C. A. 242.

[7] Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

[8] Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

[1] All who are neither parties to a judgment, nor privies to such parties, are not bound by such a judgment. Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891.

"The rights of such persons will not, of course, be injuriously affected by the decree in this cause." Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

who is not made a party to an action, or who has not had "his day in court," is not bound by any decree or judgment granting an injunction in favor of one party and against another.[2] It therefore follows that many cases, especially those to enjoin the diversion of water, have been decided as between certain parties and the injunction granted where a third person not a party to the action has a better right to the use of the water than either of the parties to the action. This condition has oftentimes resulted in the bringing of another action by this third person against both of the parties to the former action to enjoin them from diverting the water to the injury of this third person. It was this condition of affairs that was one of the cases for the passage of the codes in the various States for the adjudication of all the water rights of any certain source of supply, and the granting of injunctive relief against all of the parties to the action against the interference with the rights of the others as decreed and adjudicated in the action.[3] An injunction granted in such an action is only ancillary to and in aid of the decree establishing and quieting the title to the rights of the

"The rights of the parties to this suit must be determined, therefore, with reference to the priorities as between themselves, without regard to the rights of persons not parties to the suit, and who, of course, can not be affected in any way by the decree." McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976.

See, also, Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304.

2 Where by the final decree in an action the rights of all the parties to the use of the waters of a creek were determined, and all parties, their heirs, assigns, tenants, etc., were enjoined from interfering with the rights of the other parties, the court is without jurisdiction in a summary proceeding, on less than twenty-four hours' notice, to enjoin a person not a party to the action, whether he be a trespasser or claim an independent right, from using the waters of the creek for any purpose whatever. State *ex rel.* Pew v. District Court, 34 Mont. 233, 85 Pac. Rep. 525, saying: "If the relator was a trespasser he could be enjoined only after a hearing in a regular action, brought in the usual way."

3 For the adjudication of rights in equity, see Secs. 1530-1566.

For the statutory adjudication of water rights, see Secs. 1567-1584.

In Oregon, where, in a suit as to the right to the use of water and for an injunction, it appeared that parties other than the parties to the action were entitled to a prior use of the water, it was held that the court properly refused to award defendants the use of all the water in excess of plaintiffs' allowance. Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

respective parties to the action, and it merely commands and enforces obedience to the decree and judgment.[4]

§ 1646. Decree and judgment—Enforcement of—Violation of.—Where the Court has jurisdiction of the subject matter and acquires jurisdiction of the defendant by service of process, it is thereby vested with full power and authority to make such orders and to issue such writs and process as may be necessary and essential to carry the decree into effect and render it binding and operative.[1] The proper proceeding for the violation of an injunction decree is by contempt proceedings, and not by a bill to enforce the decree.[2] The violation of the decree and judgment rendered upon the final hearing of the case, and the violation of the temporary or interlocutory order of injunction by the party against whom such judgment or order is issued, may be punished in the same manner as in other cases for contempt of Court; and the same general rules of procedure relating to contempts govern in these cases.[3] Upon the subject of a violation of a temporary injunction, it is held in a recent case in Colorado that where the case made by the complaint authorized injunctive relief if the facts alleged were sufficient, so that a decree based on the complaint would not be actually void, a violation of an injunction issued thereon constituted contempt of Court, though the complaint was insufficient.[4] The procedure in these actions, being in its nature criminal procedure,

[4] "The injunction would only be ancillary to and in aid of a decree establishing and quieting plaintiff's title. It would merely command and enforce obedience to the decree. That would be a remedy *in personam*, and would act only upon the person of the parties enjoined." Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

See, also, Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

[1] Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

See, also, for the enforcement of decrees in actions to adjudicate rights, Sec. 1566.

[2] Raft River etc. Co. v. Langford, 5 Idaho 62, 46 Pac. Rep. 1024.

[3] *In re* North Bloomfield etc. Co., 27 Fed. Rep. 795, 11 Sawy. 590.

[4] White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329.

See, also, Johnson v. Superior Court, 65 Cal. 567, 4 Pac. Rep. 575.

One who is a party to a decree enjoining him from diverting certain water is guilty of contempt if his tenant, by his direction, actually diverts the water. State *ex rel.* Thompson v. Lavery, 31 Ore. 77, 49 Pac. Rep. 852.

But a decree requiring defendants to allow a sufficient quantity of water to flow in a stream, so that after a person named, who is not a party,

the Court may, upon a proper showing, issue an attachment for the party charged with violating the decree or order, and cite him to show cause why he should not be punished for contempt. And upon the hearing, if the Court adjudges him guilty, it may punish him by a fine, by imprisonment in jail, or by a fine and commit him to jail until the fine is paid.[5]

Before one can be punished for the violation of an injunction both the subject matter for which the injunction was issued to protect and the party in whose favor it was issued or its lawful successors in interest, must be in existence, and must have suffered some actual or special damages. So it is held in Utah that where the defendants, who were land owners under the canals of a quasi-public irrigation district and members thereof, were restrained from interfering in any manner with the ditches of the district, such decree became *functus officio* upon the dissolution of the district, and they could not thereafter be punished for contempt for such interference; and even if such proceedings were maintainable by a corporation entitled to a portion of the water, they were not maintainable in the absence of proof of actual or special damages.[6] Again, a reasonable construction must be placed upon the decree of injunction, and there must be a direct violation of its terms before one can be adjudged in contempt. In the recent Salton Sea cases, where the defendant, by the negligent construction of its works, by which it diverted the water from the Colorado River, caused an overflow through a breach in the bank, creating a lake in the Salton Basin which covered and practically destroyed the value of complainant's property situated in the basin, in a suit by complainant an injunction was granted restraining the defendant from

shall have diverted all of the water to which he is entitled, there shall be enough to carry 150 inches statutory measurement, to the complainant's premises, is void for uncertainty, so that no contempt can be based on its alleged violation. *In re* Huntley, 85 Fed. Rep. 889, 29 C. C. A. 468.

[5] Shore v. People, 26 Colo. 516, 59 Pac. Rep. 49.

A court has power to imprison a person for breach of an injunction until he complies therewith, when it is within his power to do so, and he refuses to do so. Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

In re Whitmore, 9 Utah 441, 35 Pac. Rep. 524; State *ex rel.* Stevens v. Catlin, 21 Wash. 423, 58 Pac. Rep. 206; Johnson v. Superior Court, 65 Cal. 567, 4 Pac. Rep. 575.

[6] Thompson v. McFarland, 29 Utah 455, 82 Pac. Rep. 478.

diverting water from the river in excess of the substantial needs of the people dependent on its canal, and from permitting any waste water to flow on or over complainant's land, or into the lake in such amount as would "substantially increase the amount of water therein," or prevent the decrease thereof by natural causes. Defendant's canal was the only source of supply for an arid valley containing 20,000 people who were wholly dependent thereon for water for domestic purposes and the raising of crops. It appeared that in order to supply their needs, and especially to meet emergencies, as in the case of hot winds, to which the valley was subject, it was necessary to run through the canal, which was 61 miles long, a quantity of water somewhat in excess of the average consumption, and that excess, when unused, was discharged through waste gates into the lake at a point some 40 miles from the complainant's land, but not in such quantity as to materially affect its volume. It was held that, giving the decree a proper and reasonable construction, such waste of water into the lake did not work substantial injury to the complainant, and was not a violation of the injunction.[7]

A decree adjudicating water rights merely being *in rem* and not *in personam*, it is held that one interfering with the water commissioner who seeks to enforce the decree is not contempt of court.[8]

In a recent case in Idaho, the question arose as to the enforcement of a decree of injunction, restraining the interference with the waters of an interstate stream, where the defendant against whom the writ was granted goes beyond the jurisdiction of the State where the same was rendered, and into the other State, and there commits the acts in violation of the decree and injunction. It was held that the party in favor of whom the decree was rendered could go into the court of the other State with his decree and there obtain a like injunction from that court, where personal service could be had, and the defendant would be held amenable to the orders and process of that court. "The decree and injunction from the Idaho Court would undoubtedly be accorded full faith and credit by the Wyoming Court."[9]

7 New Liverpool Salt Co. v. California Dev. Co., 172 Fed. Rep. 820, 97 C. C. A. 242.

8 For the enforcement of decrees adjudicating rights, see Secs. 1566, 1584.

9 Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535

See, also, Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See, also, for rights in interstate waters, Secs. 664, 1221-1234.

§ 1647. Appeals in injunction cases.—As with other cases, any party feeling aggrieved by the decree in an injunction case may appeal from the final judgment therein rendered by the trial court to the appellate court having the proper jurisdiction.[1] And, in these appeals the same rules of procedure are in force as are in force in other cases. The statutes and rules of the Appellate Court are mandatory in this respect and must be strictly followed. Upon the question of a final judgment from which an appeal will lie, in an action for an injunction and for damages, a judgment for defendant, after a hearing on the injunction is a final judgment, because it has disposed of the entire case as to the plaintiff, his claim for damages resting on the tort he is seeking to enjoin.[2] So, also, a judgment against the plaintiff, on demurrer being sustained to the complaint, and he declining to plead further, is held to be not an order denying a temporary injunction, which is unappealable, but a final and appealable judgment.[3]

Pending the appeal a stay of the injunctive order may be granted by the trial court, upon the filing of a supersedeas bond fixed and approved by the trial court, and it was held to be error for the trial court to refuse to fix and allow a supersedeas bond to stay the injunction pending the appeal.[4] As is the rule in other cases, the findings of fact by the trial court will not be disturbed by the Appellate Court, where they are based upon substantial evidence,[5] or where there is a conflict of evidence.[6] The Appellate Court will not review any questions except such as have been raised in the trial court.[7] The theory of appellant's case can not be changed upon appeal.[8]

By the decision of the Appellate Court the injunction decree and judgment may be affirmed, modified, reversed, and sent back for

1 For appeals in actions to adjudicate rights, see Sec. 1565.

See, also, Egan v. Estrada, 6 Ariz. 248, 56 Pac. Rep. 721; Bliss v. Grayson, 24 Nev. 442, 56 Pac. Rep. 231.

2 North Point etc. Co. v. Utah etc. Co., 23 Utah 199, 63 Pac. Rep. 812.

3 Peters v. Lewis, 28 Wash. 366, 68 Pac. Rep. 869.

4 Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

5 Hagerman Irr. Co. v. McMurry, —— N. M. ——, 113 Pac. Rep. 823; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772.

6 See, for appeals in actions to adjudicate rights, Sec. 1565. Herriman v. Keel, 25 Utah 96, 69 Pac. Rep. 719.

7 Tew v. Powar, 37 Colo. 292, 86 Pac. Rep. 342.

8 Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

See, also, Sec. 1565.

a new trial, or, by a mandatory order, it may be modified.[9] The effect of a decision of an Appellate Court constitutes the law of the case only as to such questions as were necessarily involved in such decision, and were presented to the Court and expressly or impliedly decided.[10]

9 Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Erickson v. Crookston etc. Co., 105 Minn. 182, 117 N. W. Rep. 435, 17 L. R. A., N. S., 650.

10 Herriman v. Keel, 25 Utah 96, 69 Pac. Rep. 719.

CHAPTER 82.

PROTECTION BY MISCELLANEOUS ACTIONS.

§ 1648. Scope of chapter.
§ 1649. Actions for mandamus.
§ 1650. Actions on contracts to protect rights—Specific performance.
§ 1651. Actions for writ of prohibition.
§ 1652. Actions for certiorari of review.
§ 1653. Actions in quo warranto.
§ 1654. Actions in ejectment.
§ 1655. Actions for receivers.
§ 1656. Actions for an accounting.
§ 1657. The enforcement of the criminal statutes.
§ 1658. Protection of rights by physical force.
§ 1659. Protection by various actions previously discussed.

§ 1648. Scope of chapter.—Having discussed in the preceding chapter the protection of rights by the means of equitable relief by injunction, we will discuss in this chapter the miscellaneous remedies and actions for the protection of rights both in equity and at law, other than by injunction.[1]

§ 1649. Actions for mandamus.—Where there is a duty imposed either by law or by contract on a person or company to do or perform a certain act, and the right exists in a party to demand the performance of such act, a common method to enforce such performance is for the party in whom the right exists to bring an action for mandamus. Actions for mandamus are not peculiar for the protection of water and other kindred rights, but lie in relation to many other subjects. In a previous portion of this work we have shown that whenever the law imposes upon a water company or a public officer a duty to do and perform certain acts in relation to the distribution of water, at the instance of any person having the right to demand it, and upon such demand having been made, accompanied by a tender of the legal rate, a court of equity, in an action for mandamus, will compel such company or officer to furnish

1 For the protection of rights by injunction, see Secs. 1596-1647.

him the water.[1] The duty to furnish the water may be imposed by statute,[2] or, in certain instances, it may be imposed by contract.[3] However, in some jurisdictions, it is held that mandamus will not lie to compel the performance of a contract,[4] but that the remedy must be by an action for specific performance.[5]

Before a writ of mandamus will be granted by the Court, and the defendant ordered to furnish the plaintiff the water demanded, there must have been found to exist the following essentials: First, that the duty is imposed upon the defendant to furnish the water;[6] second, that the plaintiff has the right to demand the performance of that duty and to be furnished with the water;[7] third, that a legal demand has been made, accompanied with a payment or a tender of the established rates;[8] fourth, that the defendant has the water under its control which it can furnish the plaintiff, without

1 See corporations for profit—Duty to furnish water, Secs. 1497-1502.

Duty to furnish water—Compulsory service, Sec. 1506.

2 See Sec. 1497.

3 See Sec. 1510.

See, also, People v. Farmers' Highline etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; rev'g *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Bonslett v. Butte County Canal Co., —— Cal. App. ——, 122 Pac. Rep. 821; Cozzens v. North Fork etc. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; Bay City Irr. Co. v. Sweeney, 81 S. W. Rep. 545; New Iberia etc. Co. v. Romero, 105 La. 439, 29 So. Rep. 876; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Bright v. Farmers' etc. Co., 3 Colo. 170, 32 Pac. Rep. 433.

4 Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293; State *ex rel.* Krutz v. Washington etc. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019; Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 Pac. Rep. 522; Northern Colo. Irr. Co v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23; Bright v. Farmers' etc. Co., 3 Colo. App. 170, 32 Pac. Rep. 433; State *ex rel.* Shaw v. Noyes, 25 Nev. 31, 56 Pac. Rep. 946.

5 For actions for specific performance, see Secs. 1520, 1650.

6 For the duty of companies to furnish water, see Secs. 1497-1502.

7 It is held in Colorado that a writ of mandamus will not be granted to compel the State engineer or division superintendent to close certain ditches unless the rights of the petitioner have been ascertained and adjudicated. Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 477, 36 Pac. Rep. 556.

8 Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Price v. Riverside etc. Co., 56 Cal. 431, 433.

"Where the person aggrieved has a private interest in or claims the immediate benefit of the act sought to be covered, he must make a demand upon the officer to lay the foundation for relief by mandamus." Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 477, 36 Pac. Rep. 556.

impairing the rights of others previously entitled to the same;[9] and, fifth, that the plaintiff has no plain, speedy, or adequate remedy at law.[10]

An action to compel a company to furnish water is not usually brought until there is need for the water. Therefore, proceedings of this nature must, to be effective, be somewhat summary in character. And it is held that the trial courts should be liberal in the matters of pleading and practice, as well stated by the Colorado Court, "lest the crops of the farmer burn while counsel contend over legal technicalities."[11] Where the action is brought to compel a company to furnish water for irrigation, the petition should show: That the water is sought to irrigate land which lies within the flow of the ditches and canals of the company; that such company owns or has under its control the water in quantity to supply the one demanding and all others previously entitled to its use; that a legal demand has been made for the quantity of water required; and that a payment of the water rates has either been made,

9 Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; Price v. Riverside etc. Co., 56 Cal. 431, 433.

There is a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream, and the rights of later applicants for water are subordinate to those of prior consumers. Gerber v. Nampa etc. Dist., 19 Idaho 765, 116 Pac. Rep. 104.

10 An action for damages held not to be a speedy or adequate remedy. Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142.

"This is the general rule, and the courts hold that mandamus is a remedy to compel the performance of a duty required by law where the party seeking the relief has no other adequate remedy, and where the duty sought to be enforced is clear and indisputable." State *ex rel.* Krutz v. Washington Irr. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

11 Townsend v. Fulton etc. Co., 17 Colo. 142, 29 Pac. Rep. 453.

The above principle is well illustrated in a Colorado case, where an action for mandamus was instituted for the purpose of compelling a company to furnish water to the plaintiff for the season of 1886, and owing to delays in the trial and appeal the case was not finally decided until January 4, 1888. The court then held that it would not order an impossible act, and that to permit the amendment of the writ so as to cover the approaching irrigation season would be to allow the substitution in the proceeding of a wholly new and different cause of action, and to violate an established rule of pleading. Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

or that there has been a legal tender thereof, and an allegation of willingness to pay when due.[12]

The defendant may plead such defenses that it may have in answer to the petition for a writ of mandate. It may plead that it is a mutual company organized for the purpose only of furnishing water to its shareholders and that it has no more water than is necessary for their use.[13] And, if the company is organized for profit, or hire, it may defend upon the ground that it has no water under its control, other than is necessary for those who have previously acquired rights to its use.[14] But an allegation, in an answer of such

12 Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; Price v. Riverside etc. Co., 56 Cal. 431, 433; Helphery v. Perrault, 12 Idaho 451, 86 Pac. Rep. 417; Merrill v. Southside Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Hewitt v. San Jacinto etc. Co., 124 Cal. 186, 56 Pac. Rep. 893; Hildreth v. Montecito etc. Co., 70 Pac. Rep. 672; Bright v. Farmers' etc. Co., 3 Colo. App. 170, 32 Pac. Rep. 433; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; State *ex rel.* Milsted v. Butte City W. Co., 18 Mont. 199, 44 Pac. Rep. 966, 56 Am. St. Rep. 575, 32 L. R. A. 697.

Allegations that relators made a contract with the defendant because induced to believe they had no legal means to compel defendant to repair its canal, and that they were so induced to believe at the connivance of the defendant, and as they believed at the defendant's instance, will be disregarded as a plea of fraud or mistake, as they are mere legal conclusions. State *ex rel.* Crawford v. Minnesota etc. Co., 20 Mont. 198, 50 Pac. Rep. 420.

Where, on an application for a writ of mandate to compel the delivery of water, the evidence establishes a right inferior to that of prior consumers, a judgment awarding the plaintiff the same right as prior consumers is erroneous, and should be modified so as to make such right subordinate to that of prior consumers. Gerber v. Nampa & Meridan Irr. Dist., 19 Idaho 765, 116 Pac. Rep. 104.

"Appellant's application shows that she is not dependent upon the remedy which is provided for the enforcement of a mere public duty. It shows that she holds a private contract whereby respondent has obligated itself to furnish water. She can resort to the ordinary remedies upon that contract, as in the case of any private contract." State *ex rel.* Krug v. Washington Irr. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

13 Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; McFadden v. Board, 74 Cal. 571, 16 Pac. Rep. 397.

14 Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Gerber v. Nampa etc. Co., 16 Idaho 1, 100 Pac. Rep. 80.

a company, that it has not sufficient water to supply the plaintiff, and all lands lying under its ditch that need water, states no defense, in the absence of an averment that others have demanded or have purchased it.[15] Neither can the defendant set up a contract with plaintiff for a higher rate than the late legally fixed.[16] Again, the defendant may set up that the demand of the plaintiff is excessive for his needs.[17] The defects in plaintiff's petition may be supplied by the defendant's answer.[18]

Upon the subject of parties, it is held that in an action to procure a peremptory writ of mandate against a water master, commanding him to distribute waters from a different stream than that named in a previous decree under which he was making the distribution, all parties to be affected thereby should be made parties to the action.[19] Where there is a community of interest between a number of consumers, they may join as parties plaintiff in an action for a writ of mandate to compel the defendant to deliver the water.[20] But, upon the other hand, where there is no such community of interest and especially where the rights of the parties are based upon separate and individual contracts, they can not be joined as parties plaintiff, but must bring their separate actions.[21] In this respect the law is different from actions to adjudicate and determine rights,[22] and from actions for an injunction.[23] But, where it appears that other persons are interested in the water sought, they should be made parties defendant.[24]

15 Merrill v. Southside Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720.

16 Northern Colo Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23.

17 Bright v. Farmers' etc. Co., 3 Colo. App. 170, 32 Pac. Rep. 433.

18 Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267.

19 Stetham v. Skinner, 11 Idaho 374, 82 Pac. Rep. 451.

20 Where several land owners contract and agree among themselves to unite in interest and construct their own ditch or lateral, and make a joint application to a ditch company for sufficient water for all their land as one applicant, they may join as plaintiffs in an action to compel the water company to deliver the quantity of water applied for at their headgate. Helphrey v. Perrault, 12 Idaho 451, 86 Pac. Rep. 417.

21 Creer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228.

22 For parties plaintiff in actions to adjudicate rights, see Secs. 1530-1584. See, also, Frost v. Alturas W. Co., 11 Idaho 294, 81 Pac. Rep. 996.

23 See Sec. 1631.

24 Mandamus will not lie where the right to invoke the writ rests only on the allegations of the complaint, and it is apparent that the rights of many persons not before the court will be affected. Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac.

So, it is held that in a proper case the Court may, by its decree, compel the delivery of water;[25] but it is held that perpetual right to the use of water is not the proper subject-matter of adjudication by mandamus. It, therefore, must necessarily follow that an action must be brought each season, or whenever occasion arises.[26] And a judgment awarding the writ rendered after the expiration of the irrigation season for the designated year is erroneous, under the rule that courts do not order performance of impossible acts.[27] Mandamus will lie to compel a public officer to do his duty.[28] Therefore, the State Engineer may be compelled to perform the ministerial duties of his office by a writ of mandate.[29] So, also, a water commissioner may be compelled by mandamus to distribute water according to the decree of the Court.[30] So, also, mandamus will lie to enforce the plain rights of stockholders of corporations to restore a member of a mutual corporation to his corporate rights.[31] It will also lie to compel the performance of a public duty, for which the corporation was organized, and the delivery of stock to those entitled thereto.[32]

In California it is held that an action for mandamus will lie to compel the Board of Supervisors of a county to create an irrigation district if the facts are such that no room for discretion is left.[33] Also, it will be issued to compel the trustees of an irrigation district to perform their duties under the law.[34] Also action

Rep. 556; Bright v. Farmers' etc. Co., 3 Colo. App. 170, 32 Pac. Rep. 433.

25 See cases cited above.

See, also, Miller v. Imperial W. Co. No. 8, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

26 Northern Colo. Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23; Townsend v. Fulton Irr. D. Co., 17 Colo. 142, 29 Pac. Rep. 453; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Agricultural D. Co. v. Rollins, 42 Colo. 267, 93 Pac. Rep. 1125.

27 Agricultural D. Co. v. Rollins, 42 Colo. 267, 93 Pac. Rep. 1125; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

28 Riemenschneider v. Wilson, 6 Hawn. 375.

29 Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

30 Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75; Northern Colo. Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23.

31 Miller v. Imperial Water Co., 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

32 State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039.

33 Inglin v. Hoppin, 156 Cal. 483, 105 Pac. Rep. 582; Chinn v. Superior Court of San Joaquin, 156 Cal. 478, 105 Pac. Rep. 580.

34 Harris v. Tarbet, 19 Utah 325, 57 Pac. Rep. 33.

will lie to compel the district to keep its ditches and canals and other works in repair.[35] It will also lie to compel an irrigation district having a supply of water undisposed of, to deliver such water to consumers.[36] An action in mandamus will lie to compel the defendant irrigation district to classify the lands to which water is delivered by said district in accordance with the revised codes, Section 3287, which provides for the division of the consumers into classes in accordance with their priorities. Again, when the directors of an irrigation district refuse to make the levy of assessments to pay the interest and principal of bonds issued, an action for a writ of mandamus will lie to enforce such levy.[37] An action will also lie to compel a county board to make an assessment to pay a judgment against an irrigation district.[38]

A proceeding in mandamus may be maintained by a State to compel an irrigation company to construct bridges over highways which it obstructs by its ditches, and the duty to construct such bridges need not be imposed by statute, but is imposed by the common law independent of statute.[39] Mandamus will lie to compel a State Auditor to issue a warrant on the Treasurer for relator's salary as superintendent of a water division.[40] So, the writ will be issued to compel County Commissioners to establish a ditch fund and make special assessments to pay warrants issued for the construction of a ditch, under the Act of the legislature of the State of Washington of 1895.[41] But an action for mandamus will not lie to compel a company to continue in business, but in such a case it can not continue to control the water.[42] In Colorado it is held that the writ will not be issued by the Supreme Court to a District Judge

35 McPherson v. Alta Irrigation Dist., 14 Cal. App. 353, 112 Pac. Rep. 193.

36 Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

37 Nevada Bank v. Board of Supervisors, 5 Cal. App. 638, 91 Pac. Rep. 122; Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. Rep. 1002; Miller v. Perris Irr. Dist. 85 Fed. Rep. 693, 92 Fed. Rep. 263; State *ex rel.* Witherop v. Brown, 19 Wash. 383, 53 Pac. Rep. 548.

38 Board of Supervisors of Riverside County v. Thompson, 122 Fed. Rep. 860, 59 C. C. A. 70.

39 State *ex rel.* Diffenbacher v. Lake Koen etc. Co., 63 Kan. 394, 65 Pac. Rep. 681.

40 State *ex rel.* Hamilton v. Grant, 14 Wyo. 41, 81 Pac. Rep. 795, 1 L. R. A., N. S., 588, 116 Am. St. Rep. 982.

41 Espy Estate Co. v. Board of Commissioners of Pacific County, 40 Wash. 67, 82 Pac. Rep. 129.

42 Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137.

directing him to order certain proceedings in the matter of taking testimony in an action brought for the purpose of adjudicating rights.[43] Again, in the same State, it is held that a void judgment against a county for costs can not be enforced by mandamus or otherwise.[44] In Nevada it was held that under the Act of March 5, 1887,[45] providing for the payment of bounties for the sinking of artesian wells of a given capacity, and wherein it was provided "no two wells shall receive a bounty if located in the same county," but that the bounty should be paid for the first well, and where the law was afterward amended in 1889,[46] but contains no words of repeal, it was held that where a well was sunk in a certain county and a bounty for it granted under the original Act, another bounty would not be granted under the amendatory Act for another well sunk in the same county, and the writ of mandamus for the payment of the bounty for such second well against the State Comptroller was denied.[47]

§ 1650. Actions on contracts to protect rights—Specific performance.—Where the basis of a right rests in contract, equity, in a proper case, will protect the right of either party to the contract, by decreeing specific performance. And, upon this subject, there is nothing peculiar upon the enforcement of private contracts relating to water and other kindred rights, but the general law of contracts applies.[1] Before a court of equity will decree the enforcement of a private contract by specific performance protecting the rights claimed thereunder, it must be shown that the party seeking the relief has such a contract and that nothing remains to be performed thereunder upon his part; that there is a breach or a threatened breach by the adverse party; and that the contract is capable of being performed.[2] A contract to furnish the spe-

43 People *ex rel.* Sterling Irr. Co. v. Downer, Judge, 19 Colo. 595, 36 Pac. Rep. 787.

See, also, Union Colony v. Elliott, 5 Colo. 371.

44 Downs v. Reno, —— Colo. ——, 124 Pac. Rep. 582.

45 Stat. 1887, p. 119.

46 Stat. 1889, p. 84.

47 State *ex rel.* Blossom v. Horton, 21 Nev. 300, 30 Pac. Rep. 876.

1 For contracts, see Secs. 917-926.

For contracts with corporations, see Secs. 1500-1529.

For the enforcement of contracts, see Sec. 1520.

2 One who has prepared his land and planted a crop, relying on a contract whereby another was required to furnish water, is entitled to an injunction compelling specific performance. Bay City Irr. Co. v. Sweeney, 81 S. W. Rep. 545.

See, also, Bree v. Wheeler, 4 Cal.

cific number of miner's inches of water for irrigation purposes, is held to be sufficiently certain to justify specific performance, where witnesses explain the meaning of the ambiguous "miner's inch."[3] The Court will also grant specific performance of parol agreements, where there has been a part performance upon behalf of the party seeking the relief, so as to take the case out of the statute of frauds.[4] Contracts by water companies with their consumers that, upon the happening of a certain contingency, such as the sale of a certain amount of water or water rights, that it will turn the ownership and management of its property rights to the consumers, will be specifically enforced.[5]

App. 109, 87 Pac. Rep. 255; Gelwicks v. Todd, 24 Colo. 494, 52 Pac. Rep. 788; Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; San Diego W. Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839; Bowen v. Webb, 34 Mont. 61, 85 Pac. Rep. 739; *Id.*, 37 Mont. 479, 97 Pac. Rep. 839; Giddings v. Seventy-Six Land etc. Co., 109 Cal. 116, 41 Pac. Rep. 788; Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293; Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 686; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

[3] Ulrich v. Pateros Water Ditch Co., —— Wash. ——, 121 Pac. Rep. 818; Russ etc. Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186; Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 686; Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Creer v. Bancroft etc Co., 13 Idaho 407, 90 Pac. Rep. 228; State *ex rel.* Krutz v. Washington etc. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

[4] See Sec. 980.

See, also, Flickinger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 286, 11 L. R. A. 134, 22 Am. St. Rep. 234, where it is said: "To refuse specific performance under the circumstances would be to sanction fraud, and to allow a statute passed for the prevention of fraud to become the means of accomplishing a fraud."

See, also, Churchill v. Russell, 148 Cal. 1, 82 Pac. Rep. 440; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79; Schilling v. Romminger, 4 Colo. 100; Corfman v. Robbins, 8 Ore. 279; Combs v. Slayton, 19 Ore. 99, 26 Pac. Rep. 661; Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Lavery v. Arnold, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; Maple Orchard etc. Co. v. Marshall, 27 Utah 215, 75 Pac. Rep. 369; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Jensen v. Hunter, 108 Cal. 17, 41 Pac. Rep. 14; McPhee v. Kelsey, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034.

[5] La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50, 31 Colo. 1, 71 Pac. Rep. 415; Blakely v. Ft. Lyon

But, where the party seeking the relief has not himself fully complied with its terms, an action for the specific performance of the contract will not lie.[6] Again, a court of equity will not enforce a part specific performance. So, where it appears that the defendant is not able to perform all of its terms, the Court will not grant the decree for a part performance.[7] Again, a court of equity will not decree a vain and useless thing, by granting the decree to specifically perform, where it is an impossibility for the party in default to perform, but will relegate the party seeking the relief to his action at law for damages for the breach.[8] Again, where the defendant with a covenant of warranty sold land to the plaintiff, and also the right to a certain number of inches of water each season from a ditch company on making an annual payment therefor, and the ditch company refused to deliver the water on demand, it was held that an action for specific performance against the defendant would not lie; but that plaintiff's remedy was by action against the ditch company, or, failing in that, then against the defendant on the covenant for breach of warranty.[9]

Upon the questions of parties and pleadings in actions on contracts involving these rights, the law does not differ from actions on contracts involving water rights; and, therefore, an extended discussion upon these subjects would be useless. In a recent case decided by the Supreme Court of Idaho, where an action was brought by 14 persons owning distinct and separate tracts of land, upon 14 distinct and separate contracts, for a specific performance of said contracts, and the complaint was demurred to on the ground of a misjoinder of parties plaintiff and causes of action, it was held that the trial court erred in not sustaining such demurrer, the Court

Canal Co., 31 Colo. 224, 73 Pac. Rep. 249; Patterson v. Ft. Lyon Canal Co., 36 Colo. 175, 84 Pac. Rep. 807; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

See, also, upon this subject, Secs. 1516-1518.

6 Senior v. Anderson, 155 Cal. 496, 47 Pac. Rep. 454.

7 Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216.

8 For actions for damages for breach of contract, see Sec. 1526.

9 Starbird v. Jacobs, 46 Colo. 507, 105 Pac. Rep. 872, the Court saying: "The authorities are not in substantial conflict on the question as to whether an action for specific performance will lie in cases like this, and we cite, as placing the question beyond dispute: Brown v. Lapham, 22 Colo. 264, 44 Pac. Rep. 504; Kennedy v. Hazelton, 128 U. S. 667, 9 Sup. Ct. Rep. 202, 32 L. Ed. 576; Pomeroy on Specific Performance, Secs. 465-475."

saying: "There is no community of interest whatever between the plaintiffs, and we know of no rule that would permit the plaintiffs to join in this action, no more than in an action on promissory notes held by each of 14 plaintiffs against one defendant."[10] But, where the contract is joint and there is a community of interest between the parties such parties may join as parties plaintiff, either to enforce specific performance, or for damages for the breach of the contract.[11]

The allegations of the complaint must, of course, set out the contract, and the rights claimed, all of which must be proven.[12] A complaint asking for the specific performance of a contract and damages for its non-performance on the same facts sets up a single cause of action.[13]

It is held in California that in an action for specific performance, the Court may award any legal damages suffered by delay in performance. In other words, as said by the Court: "He might have brought an action to recover such damages as were caused him by the breach; or, he might, as he did, bring his action for specific enforcement of the contract, and in such action obtain, not only the specific enforcement of his contract, but also such damages as he was lawfully entitled to; for it is thoroughly settled that a court of equity taking jurisdiction for the purpose of specifically enforcing a contract, takes full jurisdiction of all the rights of the parties, whether legal or equitable, and may award such legal damages as the vendee may have suffered by reason of the delay in performance."[14]

§ 1651. Actions for writ of prohibition.—When a judge of a District Court, in a cause of which the Court has no jurisdiction,

10 Creer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228.

11 Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

12 If the allegations of the complaint were not sufficiently broad to cover the contract sued on, because not including certain water rights, but the defendant's answer stated and her proofs showed that the contract did include such water rights, an amendment should be allowed to make the complaint correspond to the proof. Gelwicks v. Todd, 24 Colo. 494, 52 Pac. Rep. 788.

13 San Diego W. Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839.

14 Abbott v. 76 Land & Water Co., —— Cal. ——, 118 Pac. Rep. 425.

See, also, Ulrich v. Pateros W. Ditch Co., —— Wash. —— 121 Pac. Rep. 818.

insists in its prosecution, or, in an action over which the Court has jurisdiction, the judge attempts to proceed with its prosecution by rules differing from those which ought to be observed in the action, an action for a writ of prohibition will lie commanding him to cease from the prosecution of the cause. The writ is issued by a superior court and directed to the judge of the inferior court and generally to the parties to the suit. So, in Idaho, it was held that the writ would be issued by the Supreme Court of that State to the judge of the District Court, where he attempted to proceed with the prosecution of an action in the adjudication of water rights, by the special proceedings provided in such cases by the Act of the legislature of the State of March 11, 1903,[1] and wherein it was provided that the action should be brought by a water commissioner, and that the summons against the defendants in such actions should be by publication only, and that the costs in such actions, including attorney's fees, should be paid by the county and afterward assessed against the lands of the real parties in interest, all against the constitution or laws of the State.[2] But, later, the same Court in an action involving the same subject-matter, with the above errors of procedure eliminated, but proceeding under the regular rules of practice of the State, refused to grant the writ.[3] The Supreme Court will grant a writ of prohibition to prevent the District Court from proceeding further in an action, where it appears that the action is not within the jurisdiction of the District Court.[4]

The matter of fixing water rates is not judicial, and a writ of prohibition will not be granted against a board of commissioners to prohibit them from performing their duty.[5] Neither will the writ be granted against town authorities having the jurisdiction of the abatement of a nuisance and who do not follow the law in that respect.[6]

1 Laws, Idaho, 1903, p. 223.

2 Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

3 Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25.

4 People *ex rel.* Hinckley v. District Court of Lake County, 29 Colo. 277, 68 Pac. Rep. 224, 93 Am. St. Rep. 61.

5 Spring Valley Water Works v. Bartlett, 63 Cal. 245.

6 Montezuma v. Minor, 70 Ga. 191.

§ 1652. Actions for certiorari or review.—A writ of *certiorari* or review will, in proper cases, be issued by a Supreme Court, or by a District Court, or a judge thereof, when an inferior court, board, or officer exercising judicial functions has exceeded its jurisdiction, by requiring the latter to transmit to it the records and proceedings in a cause or matter therein pending, or of some case or matter already terminated, where the procedure therein has not been according to the course provided by law, and where there is no appeal,[1] nor, in the judgment of the Court or judge, any plain, speedy, and adequate remedy. The judgment in such an action is either that the proceedings below be quashed or that they be affirmed. A writ of review lies only where the tribunal has exceeded its jurisdiction, or has exercised its judicial functions erroneously and contrary to the course of procedure applicable to the matter before it; and it does not go to a review of questions of fact, and has nothing to do with the evidence. So, where in a recent case in Oregon, the main contention of the plaintiffs was that by the terms of Sections 45 and 47 of the Act of the legislature of that State of 1909,[2] known as the "Water Code," the first person filing an application for a water right is entitled to the first right, and that the law is mandatory upon the State engineer to approve it, unless the proposed use is a menace to the safety and welfare of the public, in which case he must refer it to the board of control, and where in the case the State engineer, being of the opinion that the proposed use would be a menace to the safety and welfare of the public, referred such applications, by letter, to the board of control, with a statement of his opinion, and where the board, after a consideration of the

1 State *ex rel.* Nelson v. Superior Court, 31 Wash. 32, 71 Pac. Rep. 601, where the writ was denied upon the ground that the petitioners had a plain and adequate remedy by appeal.

The Supreme Court, on *certiorari*, is not limited to the mere question whether the trial court his exceeded its jurisdiction, but may review errors at law affecting the substantial rights of the parties, and determine if there is competent evidence to warrant the judgment; but it is not authorized to set the judgment aside by reason of a conflict of evidence, or errors not affecting substantial rights. Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

See, also, Imperial Water Co. v. Board of Supervisors of Imperial County, —— Cal. ——, 120 Pac. Rep. 780; Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88.

2 Laws, 1909, pp. 332, 333; L. O. L., Secs. 6624, 6627.

same, directed the State engineer to refuse the applications, upon the grounds mentioned, and where the plaintiffs contended that there was no evidence in the case to disclose any such menace, and where the Circuit Court upon a hearing upon the return sustained the writ, the judgment of the lower court upon appeal was reversed by the Supreme Court and the cause remanded with directions to dismiss the writ, upon the ground that the Court in such an action could not consider the evidence.[3] "It is a settled law that in *certiorari* the reviewing court will not consider the weight of conflicting evidence as to jurisdictional facts given before the tribunal whose action is sought to be reviewed."[4]

The writ will be granted to annul an order of a District Court enjoining a person from diverting water, where the Court had no jurisdiction, in a summary proceeding on notice of less than twenty-four hours to the person.[5] It will also be granted where town authorities having jurisdiction of the abatement of a nuisance do not follow the law in administering it to the facts in the case.[6] The writ will also be granted to annul condemnation proceedings in favor of a corporation organized for the furnishing of power, which has no franchise and is under no contractual relations to furnish power or electricity to any person for any purpose.[7] Where the Court had jurisdiction, under certain limits, to entertain condemnation proceedings for the enlargement of an irrigation ditch, the writ will not lie to review its proceedings until after the final determination has been had.[8] Neither will the writ lie to review a judgment

[3] Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88; State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650.

But see Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

[4] Imperial Water Co. v. Board of Supervisors of Imperial County, —— Cal. ——, 120 Pac. Rep. 780.

[5] State *ex rel.* Pew v. District Court, 34 Mont. 233, 85 Pac. Rep. 525.

[6] Montezuma v. Minor, 70 Ga. 191; People *ex rel.* New York etc. R. Co. v. Bd. of Health, 58 Hun 595, 12 N. Y. Supp. 561.

[7] State *ex rel.* Tacoma Industrial Co. v. White River Power Co., 39 Wash. 648, 82 Pac. Rep. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987.

[8] Sievers v. Garfield County Court, 11 Colo. App. 147, 52 Pac. Rep. 634.

See, also, State *ex rel.* Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968; State *ex rel.* Wilson v. Superior Court, 47 Wash. 397, 92 Pac. Rep. 269; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

in such a case, where notice in the hearing was waived, and the only question for review was the question of damages.[9]

In order to have the writ issued and a review of proceedings had there must be a legally constituted tribunal or board.[10] The writ will not be granted to review the action of a municipal corporation in fixing water rates merely because the schedule did not originate with the executive board as required by the charter, where the rate was not inequitable, and had received the approval of the legislative department, whose approval would have been necessary had it originated in the manner pointed out by statute, and the irregularity may be cured by legislative means.[11]

One of the most important cases to be decided upon *certiorari*, was the case of Schodde v. Twin Falls Land & Water Co., decided by the Supreme Court of the United States on April 1, 1912,[12] in which the Court affirmed the judgment of the Circuit Court of Appeals.[13]

§ 1653. **Actions in quo warranto.**—Whenever it is claimed that an office is wrongfully held by a person, or a franchise is wrongfully held by a corporation or person, an action in *quo warranto* may be brought by the State. The writ is issued by the Court and commands the sheriff to summon the defendant to appear before the Court and to show cause by what authority he or it claims the office or franchise. The judgment is ouster, when it is against an officer or individuals, determined in the proceedings to be holding an office illegally; it is the forfeiture of the franchise, when it is against persons or a corporation determined to be wrongfully holding such franchise.

It is held to be the appropriate remedy to test the validity of reclamation districts, where there was no method provided by the

9 State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650.

10 Such self-constituted board, having no legal existence, had no functions, judicial or otherwise, and could make no record which could be brought to the court on *certiorari*. State *ex rel.* Township of Dry Run v. Board of Assessment, 1 S. D. 62, 45 N. W. Rep. 38.

11 State *ex rel.* Hallauer v. Gosnell, 116 Wis. 606, 93 N. W. Rep. 542, 61 L. R. A. 33.

12 224 U. S. 107, 56 L. Ed. ——, 32 Sup. Ct. Rep. 470.

13 161 Fed. Rep. 43, 88 C. C. A. 207.

statute for the confirmation of the organization of such districts.[1] It is also the appropriate remedy to test the validity of irrigation district organizations, where special proceedings are not provided by statute for the confirmation of such organizations. But, where such special proceedings are provided, it is held that *quo warranto* will not lie to declare the organization invalid after the confirmatory decree has been rendered, upon the ground that it is a collateral attack upon the confirmatory decree.[2] *Quo warranto* is the proper proceeding to annul the franchises of a water company where it fails to comply with the law or with contracts. In Colorado it is provided that, when any corporation shall fail to deliver water upon demand and tender of the established rates, and having the ability to do so, it shall be the duty of the attorney-general to institute and prosecute to judgment and final determination proceedings in *quo warranto,* for the forfeiture of the corporate rights, privileges, and franchises, or by mandamus or other proper proceedings to compel it to do its duty in that behalf.[3] *Quo warranto* is

1 People v. Reclamation Dist. No. 136, 121 Cal. 522, 53 Pac. Rep. 1085, 50 Pac. Rep. 1068, where it is held that in *quo warranto* by a State against a pretended corporation, it is sufficient to allege the ultimate fact that it was usurping corporate functions without legal right, without stating the facts constituting such usurpation. People *ex rel.* Thisby v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. Rep. 27.

2 People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86; People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep. 381; People *ex rel.* Brady v. Browns Valley Irr. Dist., 119 Fed. Rep. 538, but it is held that *quo warranto* will not lie to declare the organization of the irrigation district invalid after the confirmatory decree has been rendered upon the ground that such an action would be a collateral attack upon the confirmatory decree.

People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86.

In an action by the State, on the relation of an individual, against an irrigation district, formed under the statutes of the State, to have such district declared to have no legal existence, laches may be imputed to the plaintiff for failure to prosecute with due diligence, so as to authorize dismissal. People *ex rel.* Stone v. Jefferds, 126 Cal. 296, 58 Pac. Rep. 704.

See, also, for confirmatory proceedings for irrigation districts, Sec. 1421.

3 Mills' Ann. Stat., Sec. 2307; 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3274; Rev. Stats., 1908, Sec. 3274.

See, also, Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Palestine etc. Co. v. Palestine, 41 S. W. Rep. 659; aff'd 91 Tex. 540, 44 S. W. Rep. 814, 40 L. R. A. 203; St. Cloud v. Water etc. Co., 88 Minn. 329, 92 N. W. Rep. 1112; Capital

also a proper proceeding to compel the abatement of an obstruction of a stream which constitutes a nuisance.[4]

§ 1654. Actions in ejectment.—An action in ejectment will not lie for the recovery of the possession of a natural stream or water course as such.[1] The action will, of course, lie for the recovery of land covered with water, and the recovery will include all of the incidents of the land.[2] Again, a riparian owner may maintain an action for ejectment against one who unlawfully does acts which exclude him from the use of the stream.[3] There are a number of property rights directly connected with the Western theory of water rights, for the recovery of the possession of which an action in ejectment will lie; but, of course, these rights must be in the nature of real property. A ditch or canal being land,[4] it is held that an action in ejectment will lie on behalf of one entitled to the possession thereof.[5] Such an action not being for an incorporeal here-

City W. Co. v. State, 105 Ala. 406, 18 So. Rep. 62, 29 L. R. A. 743; State *ex rel.* Macdonald v. Capital City W. Co., 102 Ala. 231, 14 So. Rep. 652.

4 Lake Shore etc. R. Co. v. State of Ohio *ex rel.* Humphrey, 165 U. S. 365, 41 L. Ed. 747, 17 Sup. Ct. Rep. 357; Dover v. Portsmouth Bridge, 17 N. H. 200; State *ex rel.* Blake v. Northeastern R. Co., 9 Rich. L. 247, 67 Am. Dec. 551.

1 Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Newell on Ejectment, 54; Gould on Waters, 3d Ed., Sec. 471.

Ejectment does not lie against one diverting or disturbing a water course, where the plaintiff does not have the title to the land under the water. Yelverton's Report, Eng. K. B. 143.

2 Lawe v. Kaukauna, 70 Wis. 306, 35 N. W. Rep. 561; Beidelman v. Foulke, 5 Watts 308.

3 Cole v. Wells, 49 Mich. 450, 13 N. W. Rep. 813; Asher Lumber Co. v. Lumsford, 17 Ky. Law Rep. 245, 30 S. W. Rep. 968; Pitman v. Nunnelly, 17 Ky. Law Rep. 793, 32 S. W. Rep. 606; Castle v. Elder, 57 Minn. 289, 59 N. W. Rep. 197; Glassell v. Hansen, 135 Cal. 547, 67 Pac. Rep. 964; Laddies' Seamen's Friend Soc. v. Halstead, 58 Conn. 144, 19 Atl. Rep. 658; Chapin v. Bourne, 8 Cal. 294; Nichols v. Lewis, 15 Conn. 143; Frisbie v. McClernin, 38 Cal. 568.

4 See Secs. 833, 834.

See, also, Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628.

But see Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826.

5 Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. Rep. 985; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Nevada etc. Co. v. Kidd, 37 Cal. 282; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Silver Peak Mines v. Valcalda, 79 Fed. Rep. 886; Stockley v. Sissna,

ditament merely, but for the ditch itself, an action in ejectment will therefore lie.[6] It is also held that an action in ejectment will lie to recover a certain ditch and the water rights used in connection therewith.[7] However, under the more modern practice, the adjudication of water rights is unusual by actions at law in ejectment, the more common method of procedure being to try the rights to the same by actions in equity brought for the determination and adjudication of such rights,[8] or by the statutory proceedings provided for by the statutes of various States.[9]

An action for ejectment will lie in behalf of a person entitled to the possession of land under the land laws of the United States, although no patent has been issued to him.[10]

A distinction must be made between a ditch or canal and the easement for the same. A mere easement for a ditch or canal, being simply a right in the owner of one tract of land to the use of the land of another for this special purpose not inconsistent with the general property rights of the owner, and being an incorporeal

119 Fed. Rep. 822, 56 C. C. A. 324; Ada County Farmers Irr. Co. v. Farmers County, 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

But see Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561.

[6] Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566.

[7] Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Nevada etc. Co. v. Kidd, 37 Cal. 282; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246.

[8] For the adjudication of rights in equity, see Secs. 1530-1566.

[9] For the statutory adjudication of water rights, see Secs. 1567-1584.

For the determination of rights by boards, see Secs. 1585-1595.

A vendor of a contract of sale which does not provide that time is the essence, nor stipulate for a forfeiture on failure to pay the price, is not entitled to maintain ejectment against the purchaser, who has paid a part of the price and taken possession, because of his failure to pay the balance, without showing an abandonment of the contract. Brixen v. Jorgensen, 28 Utah 290, 78 Pac. Rep. 674, 107 Am. St. Rep. 720; *Id.*, 33 Utah 97, 92 Pac. Rep. 1004.

[10] Howard v. Perrin, 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. Rep. 195; aff'g *Id.*, 8 Ariz. 347, 76 Pac. Rep. 460, where the defendant claimed no title to the land except by the appropriation of subterranean waters from wells sunk thereon.

See, also, Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. Ed. 999, 12 Sup. Ct. Rep. 158.

See Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118, holding the injunction is the proper remedy where one wrongfully diverts percolating water from an abutting owner of the fee.

hereditament, an action of ejectment will not lie for the possession of the same as against the owner of the land.[11] The owner of mere easement is not entitled to maintain ejectment to try title as against the fee owner of land rightfully in his possession.[12] But the remedy for the interference with an easement by the owner of the land must be by injunction, or some other form of action.[13]

In an action in ejectment, where the plaintiffs claimed that they were entitled to the possession of a certain tract of land, through a certain deed, and it was alleged by the answer of the defendant and proven by the evidence that the deed, although absolute in form, was but a mortgage given to secure the performance of a certain contract to furnish water for the irrigation of lands, it was held that ejectment would not lie, and that an obligation to complete an irrigation canal and to furnish water for land in the future has the same effect on the question of a deed to secure performance as if it were an obligation to pay a debt in a fixed sum due at a specified future date; and, further, that although in the action the deed under which the plaintiffs claimed was found to be a mortgage, it was improper to enter judgment for foreclosure, where neither the complaint nor reply brought the foreclosure in issue, and where the proof did not appear to have been offered with foreclosure in view.[14]

The rule in ejectment is that the plaintiff must recover, if at all, upon the strength of his own title; but, in this respect, his prior possession for any considerable length of time is *prima facie* evidence of title, and sufficient to enable him to a judgment therefor as against a mere volunteer or trespasser.[15]

§ 1655. Actions for receivers.—Under certain conditions an action for the appointment of a receiver will lie against a water com-

[11] Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Tibbetts v. Bakewell, —— Cal. ——, 35 Pac. Rep. 1007.

[12] Cornick v. Arthur, 31 Tex. Civ. App. 579, 73 S. W. Rep. 410.

See, also, Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826.

[13] For injunctions for the interference with easements, see Sec. ——/.

See, also, Bonetti v. Ruiz, 15 Cal. App. 7, 113 Pac. Rep. 118.

[14] Boyer v. Paine, 60 Wash. 56, 110 Pac. Rep. 682.

[15] Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304; Oregon etc. Co. v. Hertzberg, 26 Ore. 216, 37 Pac. Rep. 1019; Johnston v. Meaghr, 14 Utah 426, 47 Pac. Rep. 861.

pany, consisting of either a corporation or a partnership, and a receiver will be appointed and authorized by the Court to take charge of all of the property and assets of the company and to either continue the management of the business, or to wind up the affairs of the company and to dispose of its property, all under the orders and direction of the Court. And it is therefore held, in a recent case in Idaho, that where the plaintiff alleges that it has acquired an interest in an irrigation system by the purchase of water rights therein, and the irrigation company owning such system becomes insolvent and is unable to protect and care for its property and comply with its contracts with the plaintiff to furnish water, the District Court or the judge thereof has the power and jurisdiction to appoint a receiver for such irrigation company to preserve and care for and operate its property pending the litigation as to plaintiff's interest in said property.[1] But a receiver will not be appointed unless the plaintiff's right is sufficiently probable, nor when the property of the company is not in danger of loss, removal, material injury, or that the business will be mismanaged; and, when wrongfully appointed by the trial court, the receiver may be removed upon appeal by a mandatory order of the Appellate Court.[2] It is

1 Idaho Fruit Land Co. v. Great Western etc. Co., 17 Idaho 273, 105 Pac. Rep. 562.

See, also, Russ Lum. & M. Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186, holding that while a receiver of an irrigation company is not bound to perform its contracts to supply water, yet a demand on him is proper, as performance, if possible, might accrue to the interest of creditors.

See, also, Savings & Trust Co. v. Bear Valley Irr. Co., 93 Fed. Rep 339; Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39; *Id.*, 79 Fed. Rep. 501; *Id.*, 86 Fed. Rep. 975; Los Angeles v. Los Angeles etc. Co., 124 Cal. 368, 57 Pac. Rep. 210; West River City 350-Inch Water Co. v. Rogers, 16 Cal. App. 262, 116 Pac. Rep. 683; Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296.

2 Ogden City v. Bear Lake etc. Co., 16 Utah 440, 52 Pac. Rep. 697, 41 L. R. A. 305.

See, also, New Albany Waterworks v. Louisville Banking Co., 122 Fed. Rep. 776, 58 C. C. A. 576.

The court will not appoint a receiver of a public service irrigation corporation to supply the water needed to irrigate the lands of those who have purchased water rights where there has been no misappropriation of corporate funds, and, where the owners of the lands have refused to pay further water rents on the ground that the damages for the failure of the corporation to comply with the contracts to furnish water, exceeded the amount claimed for water rents, and where the only source of revenue of the cor-

held in Utah that an order appointing a receiver is a final judgment from which an appeal may be taken to the Supreme Court.[3]

It has sometimes occurred that a water company, even before it had got to be a fairly going concern, and before the construction of its works had been completed, has become financially involved with mortgage debts, liens for labor and material, and other claims, so that it was unable to complete the works and to perform its contracts, and to accomplish the purposes for which it was organized. A common procedure in cases of this kind is to have a receiver appointed to take charge of the property of the company and usually sell the same and apply the proceeds to the payment of the indebtedness. In cases of this nature the question has arisen as to the preference right of claims for services and materials as against prior mortgage claims. And, upon this subject it is held that claims for work and material furnished in the operation of the company's business, and which were essential to its operation and to the preservation of its property, are preferred, on the appointment of a receiver, over a prior mortgage of the company's property. But claims against the company for services and material furnished in the construction of an extension which was not necessary to preserve the property of the company, or to keep it in operation, are not entitled to preference over the prior mortgage.[4] Neither are claims for materials furnished the company for use in the original construction of its works given the preference over a prior mortgage.[5] The principle on which claims for labor and materials furnished to a corporation of a public nature, like a railroad or an irrigation company, are given priority in equity over a prior mortgage only apply to claims incurred to keep its business going, either

poration is the collection of water rents from the purchasers of water rights, and where it is not shown that a receiver has facilities for collecting those rents superior to those possessed by the corporation, or that sufficient funds for the operation of the irrigation plant can be collected by any one. Grandfalls etc. Co. v. White, —— Tex. Civ. App. ——, 131 S. W. Rep. 233.

3 Ogden City v. Bear Lake etc. Co., 16 Utah 440, 52 Pac. Rep. 697, 41 L. R. A. 305.

4 Atlantic Trust Co. v. Woodbridge etc. Co., 86 Fed. Rep. 975; *Id.*, 79 Fed. Rep. 501.

For preference right of mechanics' liens over mortgages, see Sec. 1022.

5 Savings & Trust Co. v. Bear Valley Irr. Co., 93 Fed. Rep. 339.

before the receiver is appointed or while the property is in the hands of the Court.[6]

So, also, the script of a water company, issued in payment of claims for labor, which stipulates that it is accepted for the purpose only of being used in the payment for the purchase of a water right, is a floating right, not yet attached to any specific property, and, in the absence of a showing by the holder that he has land alongside the ditch or canal, and that the ditch has arrived opposite his land, accompanied by an offer of the script in payment for the water right, can not be recognized to the prejudice of a prior mortgage lien by decreeing a conveyance of a water right, or by providing in the decree that the holder shall be paid the amount of the script out of the proceeds of the sale of the company's property in advance of the mortgage, or by decreeing that it shall be recognized as a subsisting right by the purchaser of the property.[7]

§ 1656. Actions for an accounting.—Under certain circumstances, an action for an accounting will lie by a partner against his co-partners,[1] or by a stockholder against his corporation.[2] The jurisdiction of a court of equity in these actions is usually based upon the grounds of the complicated character of the accounts, the need of discovery, and the existence of a trust or fiduciary relation. There are very few cases reported which involve the rights under discussion, but that is no reason why, in a proper case, such an action would not lie. A parol agreement of partnership in the profits of buying and selling real property is not within the statute of frauds, and, therefore, an action for an accounting by one partner against another will lie.[3] But in an action in California, brought by certain stockholders to compel an accounting by the directors of a ditch and canal company for losses claimed to have been sustained, resulting from the alleged fraudulent failure of the directors to sell water which flowed through the ditch of the com-

6 Savings & Trust Co. v. Bear Valley Irr. Co., 93 Fed. Rep. 339.

See, also, Bear Lake etc. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; aff'g *Id.*, 9 Utah 350, 34 Pac. Rep. 368.

7 Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 501.

1 For partnerships, see Secs. 1460, 1461.

2 For corporations, see Secs. 1464-1508.

3 Bates v. Babcock, 95 Cal. 479, 30 Pac. Rep. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133.

pany, and to obtain a judgment for the amount so found due for such alleged failure to sell the water, and where the complaint alleged that the company "is incorporated under and by virtue of the laws of the State of California, for the purpose of constructing a water ditch for irrigating purposes, and that defendants have fraudulently distributed the water gratuitously," without alleging that the corporation was organized for profit or for the purpose of selling water, it was held that the complaint did not state a cause of action, since it showed no misconduct on the part of the defendants, and "having violated no obligation which was binding upon them, they can not be made to respond in damages for failing to sell water."[4]

§ 1657. **The enforcement of the criminal statutes.**—In every State of the arid and semi-arid West, there are criminal statutes relating to the interference with water rights, and the enforcement of these statutes which tend to protect valid rights in their owners.[1] The stealing of water is made, in some jurisdictions, a misdemeanor,[2] and in others a crime.[3] The cutting into and the destruction of any irrigation, or other water works, maliciously and wilfully, is usually made a crime.[4] Criminal statutes are also provided making it a misdemeanor to maintain appliances injurious to fish, for the discharging of refuse or deleterious matter into the streams to their injury,[5] or for the failing to screen irrigation ditches against their access, or for failing to provide for fishways over dams and obstructions placed in the streams. There are also

4 Applegarth v. McQuiddy, 77 Cal. 408, 19 Pac. Rep. 692.

1 For the statutes upon the subject, see Part XIV.

2 Cal. Pen. Code, Sec. 499.

3 In a prosecution for the wrongful taking of water from an irrigating canal, the information failing to allege ownership of the canal was fatally defective, the statute under which the suit was brought being analogous to those of theft and malicious mischief involving trespass upon the property of others. Dolan v. State, Tex. Crim. App., 129 S. W. Rep. 840.

4 Wash. Ballinger's Ann. Codes, Sec. 7154, providing for the punishment of persons who shall wilfully or maliciously make any aperture in any milldam, canal, flume, aqueduct, reservoir, embankment, or other structure erected to conduct water for agricultural purposes; held, to include a dam erected for storing and conducting water for irrigation purposes. State v. Tiffany, 44 Wash. 602, 87 Pac. Rep. 932.

5 People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183.

criminal statutes against the pollution of streams or the poisoning of their waters.[6] It is also made a misdemeanor in some States to waste water, to interfere with headgates or measuring devices, or for the interference with officers in the performance of their duties in the distribution of water. But it was held in an early case in New Mexico that an offense is not created which may be prosecuted as a crime by a statute providing for the enforcement of a pecuniary penalty against a person interfering with the water ditch or acequia without the consent of the owner thereof, and that such person should be fined for each offense, and that he may be compelled to work on the public works in default of payment, where the statute also further provides that the fine shall be recovered by the public officer and applied by him for the benefit of the ditch.[7] In California it was held that under the penal code, Section 165, prescribing a penalty for offering bribes "to any member of a common council, board of supervisors, or board of trustees of any county, city, or corporation, with intent to corruptly influence such member in his action on any matter pending before the body of which he is a member, . . . is punishable by imprisonment in the State prison," etc., an indictment charging the defendant with having offered a bribe "to one Giddings, a member of the board of directors of a corporation, to wit, 'Alta irrigation district,'" etc., and failing to allege that such corporation is a public corporation, is fatally defective, as the section applies only to public and quasi-public corporations.[8]

The making of certain acts a crime or a misdemeanor, or the enforcement of such statute and punishment of the defendant thereunder, does not preclude a civil action for an injunction enjoining the defendant from the continuance of such acts.[9]

§ 1658. **Protection of rights by physical force.**—Up to a certain extent, an owner may protect his water rights or the works used in connection therewith, by physical force. To be sure the use of

[6] For criminal statutes against pollution, see Sec. 1145. See, also, statutes under Part XIV.

[7] Territory v. Tafoya, 2 N. M. 191; Territory v. Baca, 2 N. M. 183.

[8] People v. Turnbull, 93 Cal. 630, 29 Pac. Rep. 224.

[9] People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Spring Valley Water Works v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108.

For the criminal statutes of the respective States, see Part XIV.

physical force in the protection of such rights is not an action at law or in equity, the subject under discussion, but the use of physical force in protecting such rights has resulted in many actions at law, and some in equity. Reasonable physical force is always permitted to eject trespassers from off one's property. But the criminal and civil codes provide plenty of redress against trespassers; and, therefore, the use of physical force should not be resorted to unless it is absolutely necessary, and when the trespasser is caught in some overt act, and even then it should not be excessive in its application. In one case, cited by Mr. Wiel,[1] the Court held that this right extends to a "*moliter manus imposit,*" which, according to Mr. Wiel's translation from the Latin, means "a gentle use of one's fists." We will add, upon our own responsibility, that the use of force, according to a modern slang expression, may also, under great provocation, be extended to "a swift kick in the rear." But, throughout the entire West, the use of excessive force has too often been resorted to to prevent some trespass upon the rights of another, and even to redress some real or imaginary wrong. Men have been killed, maimed, and injured for life, by others taking the law in their own hands, in the attempt to protect what they deemed to be their rights. The assailant has also been convicted for these acts, and has been punished. Therefore, a reasonable degree of physical force may be resorted to to prevent an immediate trespass on these rights, where such rights are clear and absolute in the assailant. In a recent analogous case in California, where a trespasser brought a civil action for damages resulting from an assault and battery in being forcibly ejected from an oil claim by the owner thereof, the Court held that it was a complete defense to the maintenance of the action, either for exemplary or actual damages, if it be shown that the injuries claimed to have been sustained by one wrongfully in possession were sustained while the owner of the property was exercising a right to the possession of his lands, although using force to obtain such possession, if no more force was employed than was necessary to accomplish it.[2] But the use of phys-

1 Wiel on Water Rights in the Western States, 2d Ed., Sec. 215, citing Mechanics' Foundry of San Francisco v. Ryall, 75 Cal. 601, 17 Pac. Rep. 703.

2 Walker v. Chanslor, 153 Cal. 118, 94 Pac. Rep. 606, 17 L. R. A., N. S., 455, 126 Am. St. Rep. 61.

See, also, Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583;

ical force to any extent whatever should never be resorted to to redress a wrong, or to punish the trespasser, after the trespass has been committed, and the trespasser has departed from the premises. This matter should be left entirely to the courts.

The owner of the right to the use of water, whether he claims the same as an appropriator or as a riparian owner, has the right to go upon the upper lands of another and to remove obstructions from the natural stream, which materially interfere with his rights, as far as he can do so peaceably, doing no unnecessary injury to the lands of the other, and that, too, without rendering himself a trespasser on such lands.[3] So, too, the right of an easement over the lands of another for a ditch and canal, gives as an incident thereto, the right to go upon the lands and remove obstructions from the ditch, or to make necessary repairs, without rendering the owner of the ditch a trespasser.[4] But the one attempting to remove the obstructions or to make the repairs must be careful not to exceed his rights, or to injure the lands of the owner, for, if he does so he will be liable as a trespasser.[5] Again, the owner of an

McCarty v. Fremont, 23 Cal. 196; Canavan v. Gray, 64 Cal. 5, 27 Pac. Rep. 788; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Burnham v. Stone, 101 Cal. 164, 35 Pac. Rep. 627.

[3] For the right to remove obstructions, at common law, see Sec. 545.

See, also, Miner v. Gilmour, 12 Moore, P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Strong v. Benedict, 5 Conn. 210; Darlington v. Painter, 7 Pa. 473.

An appropriator may also go upon the land of an upper proprietor and remove obstructions from the bed of the natural stream. Crisman v. Heiderer, 5 Colo. 589.

Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475; Ennor v. Raine, 27 Nev. 178, 74 Pac. Rep. 1; Keller v. Fink, 103 Cal. 17, 37 Pac. Rep. 411, where it was held that, where the plaintiff had the right to the water of a ditch and to a dam on defendant's land, which the latter used for pasturing stock, defendant was not liable for injuries to the dam by cattle trampling and treading the same, since the plaintiff had the right to enter the land and protect the dam against such injuries.

See, also, for the appropriator's right to the flow of the stream, Secs. 801, 802.

[4] See Secs. 991-993; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Pico v. Colimas, 32 Cal. 578; McGuire v. Brown, 106 Cal. 660, 39 Pac. Rep. 1060, 30 L. R. A. 384; United States etc. Co. v. Gallegos, 89 Fed. Rep. 773, 32 C. C. A. 470, 61 U. S. App. 13; Flickinger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; Spear v. Cook, 8 Ore. 380; Ennor v. Raine, 27 Nev. 178, 74 Pac. Rep. 1.

[5] Greenslade v. Halliday, 6 Bing. 379, 4 Moore & P. 71, 8 L. J. C. P. 124.

The mere right to maintain a ditch

easement can not exceed his rights and use the same for any other purpose than that for which the same was acquired. So, it is held in a Utah case, that the owners of the land, over which there was a right of way for a ditch, might forcibly remove from such right of way, building material intended to be used in the erection of a saloon, so long as no unnecessary damage is done thereto, and they were not liable to the owner thereof in damages.[6]

A city without power to take possession of a water works plant rightfully may be enjoined from doing so forcibly.[7]

§ 1659. **Protection by various actions previously discussed.**— In a general sense, any action brought in a court of justice is for the protection of certain rights either to the individual or to the State or public. In addition to the miscellaneous actions discussed in this chapter for the protection of water rights, and rights kindred thereto, there are a number of other actions which have been fully discussed under different heads throughout this work, and concerning which we will give no further extended discussion here.

First and foremost among these actions are those brought for an injunction, either prohibitory or mandatory, and concerning which subject we have devoted an entire chapter.[1]

Actions to determine and adjudicate water rights, either as between appropriators, riparian owners, or as between appropriators and riparian owners, and to quiet the title thereto in the respective parties, either with or without asking for injunctive relief, are in the nature of actions for the protection of rights.[2]

So, again, actions for past injuries to rights and for damages therefor have the tendency to protect such rights from future invasion. This subject will be fully discussed in a future chapter.[3]

does not give the right to use the soil of the land owner adjoining the ditch in making such repairs. Thompson v. Uglow, 4 Ore. 369.

6 Whitmore v. Pleasant Valley etc. Co., 27 Utah 284, 75 Pac. Rep. 748.

7 Los Angeles v. Los Angeles etc. Co., 124 Cal. 368, 57 Pac. Rep. 210.

1 For the protection of rights by injunction, see Chap. 81, Secs. 1596-1647.

2 For actions to adjudicate water rights in equity, see Chap. 78, Secs. 1530-1566.

For the statutory adjudication of water rights, see Chap. 79, Secs. 1567-1584.

For the determination of water rights by boards, see Chap. 80, Secs. 1585-1595.

3 For injuries to rights and damages therefor, see Chap. 83, Secs. 1660 *et seq.*

An action at law will lie for the recovery of rent to premises and it is held that a lessee of lands may be found to have had sole and exclusive possession so as to be liable for rent, notwithstanding a brief and insignificant trespass upon water rights appurtenant thereto.[4]

Again, upon the subject of contracts, besides actions for the specific performance of contracts discussed in this chapter, we have discussed in other chapters actions for the protection of contract rights.[5] These actions include actions for the enforcement of contracts,[6] for the recovery on contracts for water furnished,[7] the reformation of contract,[8] the rescission of contracts,[9] the cancellation or annulment of contracts,[10] and for actions for the breach of contracts.[11] All of these actions tend in a way to protect the rights under discussion in their respective owners. Actions may also be brought to foreclose a mortgage or a mechanic's lien covering the property under discussion, and title to the property may be acquired by the purchasers at such foreclosure sale.[12] Again, in another portion of this work, we have fully discussed actions for the condemnation of land and water rights by virtue of the power of eminent domain.[13]

An action may also be brought to declare and enforce a parol trust.[14]

It is held, however, that "One seeking to have rights declared and enforced, founded upon a verbal or written agreement, and involving or growing out of an alleged trust or confidential relation, is

4 Kelly v. Long, —— Cal. App. —, 122 Pac. Rep. 832.

5 For the enforcement of performance of contracts, see Sec. 1520.

6 See Sec. 1520.

7 Secs. 1521, 1522.

8 Sec. 1523.

An action may be maintained to reform a deed and to restrain the diversion of water. State v. Lorenz, 22 Wash. 289, 60 Pac. Rep. 644.

9 Sec. 1524.

10 Sec. 1525.

11 Secs. 1526-1529.

12 For the foreclosure of mortgages, see Secs. 1019, 1020.

For the foreclosure of mechanics' liens, see Secs. 1021, 1022.

For preference rights as between mortgage and mechanics' liens, see Sec. 1022.

See, also, Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296.

13 For rights acquired by eminent domain, see Secs. 1059-1098.

For actions for condemnation, see Secs. 1092-1097.

14 Coray v. Holbrook, —— Utah ——, 121 Pac. Rep. 572.

required, among other things, to show, with at least reasonable certainty, the terms of the agreement and the character and extent of the trust or confidential relation. These things can not be left to loose or flexible language, or to vague or indefinite terms. The Court, from the language used, from the acts and conduct of the parties, and from all the facts and circumstances surrounding the alleged agreement, and under which it was made, must be able to ascertain, with at least reasonable certainty, the essential terms of the agreement and the character and extent of the alleged trust or confidential relation."

Action may also be brought between tenants in common and partners for contribution for the expenses of maintaining and repairing of ditches, canals, and other works, and to recover the proportion of the expenses expended by one party for the maintenance and repair of such works.[15]

[15] See Secs. 992, 993, 1457. See, also, Rogers v. West Riverside etc. Co., —— Cal. App. ——, 124 Pac. Rep. 447.

CHAPTER 83.

ACTIONS FOR DAMAGES.

§ 1660. Scope of chapter.
§ 1661. Actions for damages—In general.
§ 1662. Damages to prior appropriator for unlawful diversion.
§ 1663. Damages to riparian owners for unlawful diversion.
§ 1664. Damages to riparian owners for diversion as against other owners.
§ 1665. Damages to riparian owners for diversion as against appropriators.
§ 1666. Damages for the unlawful diversion of subterranean waters.
§ 1667. Damages for the failure to furnish water under duty imposed by law.
§ 1668. Damages for breach of contract to furnish water.
§ 1669. Damages caused by the breakage of works.
§ 1670. Liability for negligence—Damages from reservoirs.
§ 1671. Liability fixed by statute—Damages caused by the breakage of works.
§ 1672. Liability for negligence—Damages from ditches and canals.
§ 1673. Injuries from ditches and canals—Actions for damages lie when.
§ 1674. Damages for flooding lands from overflow and leakage from works.
§ 1675. Damages from seepage of water.
§ 1676. Damages for the flowage or backing up of water.
§ 1677. Damages for flooding lands by the interference with the flow of surface waters.
§ 1678. Damages for injuries to ditches or other works.
§ 1679. Damages from logging.
§ 1680. Actions on bonds for damages.
§ 1681. Damages as the result of fraud.
§ 1682. Damages for using force.
§ 1683. Jurisdiction of courts—Venue.
§ 1684. Parties plaintiff.
§ 1685. Parties defendant—Joint or several tort feasors.
§ 1686. Pleadings—Complaint.
§ 1687. Pleadings—Answer—Cross-complaint.
§ 1688. Pleadings—Defense—Acts of the plaintiff and contributory negligence.
§ 1689. Pleadings—Defenses—Grant or contract.
§ 1690. Pleadings—Defenses—Limitation of actions and prescriptions.
§ 1691. Act of God or inevitable accident as a defense for injuries to property.
§ 1692. Act of God as a defense for failure to deliver water under duty or contract.
§ 1693. Evidence—Burden of proof.
§ 1694. Instructions to the jury.

§ 1695. Verdict—Non-suit.
§ 1696. Judgments—Measure of damages.
§ 1697. Compensatory damages—Measure of damages for injuries to lands.
§ 1698. Compensatory damages—Measure of damages for injuries to crops.
§ 1699. Compensatory damages—Measure of damages for the loss of stock.
§ 1700. Compensatory damages—Measure of damages for loss of power.
§ 1701. Compensatory damages—Measure of damages for loss of or injury to a water right.
§ 1702. Exemplary or punitive damages.
§ 1703. Nominal damage.
§ 1704. New trial—Appeal.

§ 1660. Scope of chapter.—Having discussed in the previous chapters of this part of this work the adjudication of water rights, and the rights of ditches, canals, and other works constructed for the purpose of utilizing such water rights,[1] also the protection of rights by actions for injunction and miscellaneous actions,[2] we will now discuss the subject of actions for damages for injuries to water and kindred rights, with the exception of the question of damages for the pollution of water, which subject has been discussed in a previous chapter.[3] The question of damages on eminent domain has also been discussed in previous sections.[4]

§ 1661. Actions for damages—In general.—The law does not always afford a complete remedy by an action in equity for injuries to water or kindred rights, but a proper action in equity, supplemented by an action at law for damages, either in the same or separate suits, will afford the party injured complete relief. An action for damages for past injuries is an action at law, and does not differ materially, where the damages suffered are caused by injuries to water rights, or the works connected therewith, from actions for damages for other injuries. There is no special procedure provided for the prosecution of these actions, as is the case in some States relative to the adjudication of water rights,[1] but the general law relating to all damage suits applies.

In order to be entitled to damages for the injury to a water right, or to the ditch, canal, or other works connected therewith, the per-

1 For the adjudication of water rights, see Chaps. 78, 80, Secs. 1530-1595.

2 See Chaps. 81, 82, Secs. 1596-1659.

3 See Chap. 58, Secs. 1129-1147.

4 See Secs. 1090, 1091.

1 For the statutory adjudication of water rights, see Secs. 1567-1584.

son suing must be the owner of the title to such rights, or must have been entitled to their use.[2] By making the proper allegations in the complaint, an action both for damages for past injuries, and for equitable relief against future invasions of the right, may be combined in the same suit.[3] So may an action for the adjudication of rights, damages for the unlawful past diversion, and for injunctive relief against future diversions be combined in the same action.[4]

§ 1662. Damages to prior appropriator for unlawful diversion.—The rights of the prior appropriator being fixed by the nature and extent of his appropriation,[1] for any material infringement upon those rights by which he is injured, an action at law for damages will lie. He is entitled to have the full quantity of water up to the full extent of his appropriation continue to flow either in the natural stream, or his ditch or canal, in such a manner that he can enjoy its use as a property right; and, therefore, for any material interference with this flow of the water by which his rights are substantially injured, he is entitled to maintain an action for damages. This has become a well settled rule of law in all jurisdictions where the Arid Region Doctrine of appropriation is in force, from the earliest period to the present time.[2] Not only has a prior appropriator the right to maintain an action to recover dam-

2 "A judgment for damages for the diversion of water could only be based upon the ownership or right of property in the water, and the wrongful invasion of that right." Cash v. Thornton, 3 Colo. App. 475, 34 Pac. Rep. 268.

3 For the combination of such actions, see Sec. 1599.

See, also, Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12.

4 See Secs. 1536, 1537, 1598, 1599.

1 See Secs. 776-782.

2 Union Water Co. v. Crary, 25 Cal. 502, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Tuolumne D. Co. v. Chapman, 8 Cal. 392, 4 Morr. Min. Rep. 34; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94; Hulsman v. Todd, 96 Cal. 228, 31 Pac. Rep. 39; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388; Brown v. Ashley, 13 Nev. 251, 16 Nev. 312; Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Dalton v. Kelsey, 58 Ore. 244, 114 Pac. Rep. 464; Boulware v. Parke, 4 Idaho 692, 43 Pac. Rep. 680; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; McCarthy v. Gaston etc. Co., 144 Cal. 542, 78 Pac. Rep. 7; White v. Brash, 3 Ariz. 212, 73 Pac. Rep. 445.

ages, where his rights are injured by the unlawful diversion of the water to which he is entitled by trespassers without right,[3] but he also has the right to maintain such an action against subsequent appropriators, with rights to water flowing in the same stream, for injuries caused by the acts of such subsequent appropriators above, in erecting their dams or other obstructions by which the regularity of the flow of the stream is so interfered with as to cause the prior appropriator actual injury.[4] An action for damages will also lie for the unlawful diversion of water from a ditch, canal, or reservoir, as well as from the natural stream.[5] Damages may also be recovered for the loss of the water by the destruction of a ditch or other works.[6] But in all cases, in order to recover damages, the plaintiff must show that he has been actually injured in some manner. So, it is held that although the right to the use of the water is prior in the plaintiff, during the process of the construction of a dam and other works for diverting the water, and before the owner of the right is able to make use of the water, he can not maintain an action against another person for damages for the diversion of the water.[7] The wrongful diversion of water to which the prior

3 Browning v. Lewis, 39 Ore. 11, 64 Pac. Rep. 304.

4 Coker v. Simpson, 7 Cal. 340; Phoenix W. Co. v. Fletcher, 23 Cal. 482, 15 Morr. Min. Rep. 185; Natoma W. Co. v. McCoy, 23 Cal. 290, 4 Morr. Min. Rep. 590; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. Rep. 12; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673; Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

5 Dalton v. Kelsey, 58 Ore. 244, 114 Pac. Rep. 464; Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388.

Defendant agreed with plaintiff that plaintiff might make a ditch across defendant's land to convey water for plaintiff's crops, defendant to have the right to carry his own water in the ditch, and to use plaintiff's water only when not required by plaintiff. Held, in an action for depriving plaintiff's crops of the necessary water, that it was no defense that the plaintiff did not have a valid appropriation of the water claimed by him, so long as it was not the defendant's. Dalton v. Kelsey, 58 Ore. 244, 114 Pac. Rep. 464.

The fact that a person entitled to one-half of the water of an irrigation ditch is denied such right by the other owner is no defense to an action by the latter for damages caused by the former digging another ditch and appropriating all of the water. Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

6 Denver etc. R. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22.

7 Nevada etc. Co. v. Kidd, 37 Cal. 282.

appropriator is entitled is a continuing wrong, for which successive actions for damages may be brought.[8]

But an action for damages can not be maintained for the value of so much water stated in quantity as so much per inch, cubic foot, diverted from the natural source of supply, to the injury of the plaintiff, because it does not become his property until the water is reduced to possession in his reservoir, ditches, or canals.[9] But, it is held that the water taken from a natural stream and reduced to possession by artificial means, is personal property. It may be the subject of purchase and sale, or of larceny.[10] Under these circumstances, as we view the law, an action for damages for the taking of a certain quantity of water valued at a certain amount would lie, although there seems to be no decided cases upon this exact point.

§ 1663. **Damages to riparian owners for unlawful diversion.**—In those States which adhere to the doctrine of the common law of riparian rights as one of the rules of law governing waters,[1] a riparian owner may also maintain an action for damages for the unlawful diversion of the waters of a stream flowing through or adjoining his land to his injury. In fact, under the modified common law rule upon this subject, it is held that a riparian owner may maintain an action for damages, where the Court would not grant an injunction against the continuance of the very acts causing the injuries to his rights. Such is the case where a riparian owner claims merely the right to the undiminished flow of the stream, without the actual use of the water. He will be relegated under this rule to an action at law for damages for the injuries caused by the diversion of the water, or the interference with its natural flow, for a beneficial use, although such acts, under the strict construction of the common law rule, are technical invasions upon his rights.[2] And, upon the question of damages, under the more recent decisions of the Western States under the modified rule of ripa-

8 Toombs v. Hornbuckle, 3 Mont. 193.

9 Parks etc. Co. v. Hoyt, 57 Cal. 44.

10 Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823; Bear Lake etc. Co. v. Ogden, 8 Utah 494, 33 Pac. Rep. 135; Hesperia etc. Co. v. Gardner, 4 Cal. App. 357, 88 Pac. Rep. 286.

See, also, Secs. 773, 774.

1 For these States, see Secs. 507, 621.

2 For the right of riparian owners to an injunction, see Secs. 1611-1615.

rian rights,[3] the tendency is more and more to hold that the right of a riparian proprietor to the natural flow of a stream is based upon a usufructuary right only. This is to say by virtue of his ownership of riparian lands he has a right to the use of a reasonable quantity of the water of a stream which runs through or adjoins the same, but if he does not use the water to which he is entitled within a reasonable time, he can not recover even nominal damages in an action against others, who, either as riparian owners or as appropriators, divert the water above his lands and apply such waters to a beneficial purpose. But, upon the other hand, if the riparian owner is actually using the water, and there is a diversion of the natural flow of the stream to his injury, he may recover in an action for damages against those who have caused him the injury such damages as he may have actually sustained by reason of the same, and no more. This we believe to be the correct rule, which should be applied in all the arid and semi-arid States; and, as we have said, the tendency of decision is in that direction in all the so-called common law States. The peculiar conditions of this arid country, so different from those where the common law originated, and the absolute necessity that all of the available waters be applied to some beneficial use or purpose, in order that the prosperity and general development of this portion of the country continue, demand that the strict construction of the common law of riparian rights, in relation to the undiminished flow of streams, in cases where it merely affords the owners of riparian lands "pleasure in its prospect," should be entirely abrogated. In California, where the struggle has been the greatest to maintain both the principles of the common law of riparian rights and the Arid Region Doctrine of appropriation, and where the latter doctrine originated,[4] in one of the most recent decisions of its Supreme Court,[5] it was said: "The fair apportionment and economic use of the waters of this State are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must

[3] For modified doctrine of riparian rights, see Secs. 508-512.

[4] For the history of the Arid Region Doctrine of appropriation, see Secs. 595-626.

[5] San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

continue to be solved by this Court as cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found unfitted to the radically changed conditions existing in this State, so that its application will work wrong and hardship rather than betterment and good, this Court will refuse to approve and follow the doctrine."[6] In passing it may be remarked that this was the exact reasoning of the courts of other States of the arid West in entirely abrogating the doctrine of the common law of riparian rights, and in holding that the Arid Region Doctrine of appropriation of waters for a beneficial or useful purpose was the only rule of law of waters applicable to this portion of the country.[7]

We will now discuss the right of riparian proprietors to damages, first, as between themselves; and, second, as against appropriators for use on non-riparian lands.[8]

§ 1664. Damages to riparian owners for diversion as against other owners.—As we have discussed in a previous portion of this work, the respective rights of the various riparian owners whose lands border a natural stream, or other source of water supply, to the use of the water naturally flowing therein, are relative or correlative. At least, under the modified common law rule, which rule of the common law is the only one which is attempted to be applied in this Western country, each proprietor has the right to a reasonable use of the water flowing in a stream for irrigation, or for any other beneficial purpose, taking into consideration a like reasonable use by all the other riparian proprietors upon the same stream, and no more.[1] It therefore follows that the right to the use of the water by each proprietor being so limited and restricted, if one uses more than his share of the water to the material injury of the rights of others, an action for damages will lie by any owner injured against the one making the excessive use of the water.[2] But in order to recover compensatory damages by one riparian owner against an-

[6] See, also, Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

[7] See Secs. 586-594.

[8] See Secs. 1664, 1665.

[1] For the right to the use of water at common law, see Secs. 483-497.

For irrigation as a riparian right, see Secs. 498-525.

For the modified doctrine of the common law as applied in the West, see Secs. 508-513.

[2] "Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until

other, the acts of the latter must have caused the former actual loss or injury by the taking of the water, which the law recognizes as belonging to him, and to deprive him of that which is to take from him a substantial property right. In other words, it must be such a taking of or damage to property as to substantially and materially depreciate the value of the real estate of which it forms a part.[3] Even, as held in an early Massachusetts case, where the tendency is toward a strict construction of the common law rule in this respect, one riparian owner is liable to other riparian owners below him on the same stream only for an entire diversion of the water in such stream, or for an unreasonable use thereof.[4] The same rule is applied under the more recent decisions of the courts, which follow the holding in the case of Katz v. Walkinshaw,[5] as to those percolating waters filling subterranean catchment or artesian basins.[6]

he diverts more than his share and injures and damages the other thereby." Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Cal. 978, 11 L. R. A., N. S., 1062.

3 A diminution of the flow of water over riparian land, caused by its use for irrigation purposes by upper riparian proprietors, occasions no injury for which damage may be allowed, unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the land owner is able to enjoy. Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

See, also, Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Union M. & M. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Hayward v. Mason, 54 Wash. 653, 104 Pac. Rep. 141; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

4 Elliott v. Fitchburg R. R. Co., 10 Cush. 191, 57 Am. Dec. 85.

See, also, Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230; Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14,312; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Embrey v. Owen, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

Damage to a riparian owner resulting from the diminution of the flow of water incidental to the cutting down of trees by another riparian owner higher up on the stream, thereby causing an increase of evaporation, is *damnum absque injuria*. Fisher v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77.

5 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, Secs. 1197-1200.

6 For subterranean catchment basins, see Secs. 1197, 1198.

For artesian basins, see Secs. 1177, 1178.

Again, if one riparian owner can not maintain an action for compensatory damages, for the diversion and use of the water by another owner, he can not get nominal damages.[7] This is upon the theory that if a wrong is done by the diversion of an excessive amount by one riparian owner, the party injured may secure compensatory damages to the full extent of the injury. But, upon the other hand, if no wrong is done by the taking, the complainant is not entitled to damages in any amount.

§ 1665. Damages to riparian owners for diversion as against appropriators.—In every Western State which holds to the modified common law doctrine of riparian rights, the Arid Region Doctrine of appropriation is also in force.[1] As we have seen in previous sections, there has been, in these States, a continual clash between the respective claimants to the use of the waters of a certain stream, under these two systems, as to which class had the superior rights.[2] There is, therefore, another question in connection with the subject under discussion, and that is the right of a riparian proprietor to damages, as against an appropriator of the water, or as against another riparian proprietor for the diversion of the water of a stream for use on non-riparian lands, which in effect, as far as this subject is concerned, is the same thing as an appropriation of the water. Here, again, the question of the actual use of the owner seeking to recover damages should be the basis of his right to recover. The mere fact that a riparian proprietor is deprived of the full flow of the stream adjacent to his land in itself should furnish no basis for the recovery of compensatory damages. At best, under the common law, he has but a usufructuary right to the flow of the water of the stream; and, therefore, if his right is not accompanied

7 So, where "the plaintiff contended that if the jury were satisfied of the existence of the brook, as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damages, without proof of actual damage, but the presiding judge instructed the jury that unless the plaintiff suffered actual perceptible damage in consequence of the diversion the defendants were not liable in the action," the instruction was held good upon appeal and that the plaintiff could not recover nominal damages without proof of actual loss. Elliott v. Fitchburg R. R. Co., 10 Cush. 191, 57 Am. Dec. 85.

But see Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Dec. 504.

1 For the States having both doctrines, see Secs. 507, 621.

2 See Secs. 594, 810-823.

by an actual use of the water, or, at least, if he is not in a position to actually use it, its loss, by diminishing the natural flow of the stream by appropriation for the irrigation of non-riparian lands, or for other useful purposes, can result only in *damnum absque injuria*. The peculiar conditions of the arid West and the great need for the use of all of the available water supply, demand that the strict construction of the common law rule in this respect be abrogated. Upon this subject, the Nebraska Court has laid down the correct rule, in holding that a riparian owner can recover for only an interference with or injury to his usufructuary estate in the water, and that, without use, no compensation may rightfully be claimed, where the water of the stream is appropriated and diverted for irrigation purposes.[3] So, as far as compensatory damages are concerned, as is the more modern rule in actions for injunction,[4] a riparian proprietor, without use, should not be permitted to recover for the diversion of the natural flow of the stream above his lands, by an appropriator, where the water diverted is actually applied to a beneficial use or purpose. But, upon the other hand, if the riparian owner is actually using the water for some purpose, "other than to afford him pleasure in its prospect,"[5] or is in a position to use it, he should recover such pecuniary damages as will recompense him fully for the actual loss sustained, and no more.

Upon the question of the right of a riparian owner to recover

3 "In order to entitle a riparian owner to compensation, he must suffer in actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the stream is diverted and appropriated for the use of irrigation. It is such a taking of or damage to property as materially and substantially depreciates the value of the real estate of which it forms a part." Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Elliott v. Fitchburg R. R. Co., 10 Cush. 191, 57 Am. Dec. 85; Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 20 Sup. Ct. Rep. 592.

4 For injunctions by riparian proprietors, see Secs. 1611-1615.

5 San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

nominal damages, we believe that the same rule should follow as stated above relative to the recovery of compensatory damages. If, as stated by the Nebraska Court, at most the naked right to the full flow of the stream, and its loss by diminishing the volume of the water, when appropriated for a useful purpose, can "result only in *damnum absque injuria*,"[6] then a riparian proprietor, without use, should not be permitted to recover even nominal damages. The effect of a recovery of a judgment for nominal damages in such a case is but the recognition of the right of the riparian proprietor to some time in the future step in and claim the right to the use of the water as against the actual appropriators for use, and, perhaps, to utterly exclude such appropriators from any further use of the water, after they have been to the expense of diverting it and conducting it to their place of use. This is but a "dog in the manger" rule, and permits a riparian owner by successive suits, brought at intervals, to prevent the statute of limitations from running, to hold forever what is at best a mere usufructuary right, or a right of use, and that, too, where he makes no actual use of the water. Yet such is the rule of construction of the strict common law right of a riparian proprietor,[7] and has been followed many times by not only the Eastern courts, but also those of the West, and especially by the courts of California,[8] in actions brought to vindicate a usu-

[6] Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

[7] "The law, in the absence of any special injury, gives nominal damages, on the ground that the undisturbed enjoyment or continuation of such acts, without the consent of the owner, would ripen into a right to do them." Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453; *Id.*, 27 Ala. 104; *Id.*, 29 Ala. 127, 65 Am. Dec. 394.

And, in Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72, it is said: "It is decided in these cases that a riparian proprietor is entitled to nominal damages for any disturbance of his right by diversion of the waters from the stream, without returning them to the natural channel, although he offers no evidence of actual or special damage."

But see Elliott v. Fitchburg R. R. Co., 10 Cush. 191, 57 Am. Dec. 85, where the Supreme Court of Massachusetts held that if the proprietor was not entitled to recover actual damages he could not recover nominal damages.

[8] The right of a riparian proprietor to have the water of a stream run through his land is a vested right, and any interference therewith imports at least nominal damages, even if there be no actual damage. Creighton v. Evans, 53 Cal. 55, 8 Morr. Min. Rep. 123.

fructuary right which was not used, and in which either nominal damages were given or an injunction granted.[9]

§ 1666. Damages for the unlawful diversion of subterranean waters.—As discussed in a previous portion of this work, if in fact it is known that a subterranean stream of water flows in a well-defined channel, capable of being distinctly traced, it is governed by the same rules of law as are applicable to streams flowing upon the surface of the earth.[1] It therefore follows that, as is the case with surface streams, an action at law for damages will lie for the unlawful diversion of the waters of subterranean streams, and the grounds for such an action do not differ from those for the unlawful diversion of surface streams, and, of course, the procedure is the same. This right is given to both those who have acquired the right to the water by appropriation,[2] and under the common law by virtue of their riparian ownership on such streams.[3]

Under the common law, all waters flowing or moving through the ground, whose courses are not known or defined, belong to the soil as a part and parcel thereof.[4] Therefore, under this rule of law, an action for damages for their abstraction by the owner of the land in which they are found will not lie.[5] But, owing to the recent scientific investigations, certain subterranean waters, which were formerly treated as mere percolations, have been classified, which classifications have been recognized by the courts, especially

9 For right of riparian proprietors to an injunction without use, see Sec. 1613.

1 For subterranean water courses, see Secs. 1153-1165.

2 Where a subterranean stream of water appropriated by the plaintiff was diverted by the wrongful act of the defendant, plaintiff was entitled to recover whatever damages were the proximate and direct result of the diversion. Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

3 For riparian ownership on subterranean streams, see Sec. 1158.

See, also, Willis v. Perry, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124; Dickinson v. Grand Junction Canal Co., 7 Exch. 299, 21 L. J. Exch. N. S. 241, 16 Jur. 200; Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; affirming 2 Hurlst. & N. 168; Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719.

4 See Secs. 1155, 1188-1190.

5 See Sec. 1188.

since the decisions in the California cases of Los Angeles v. Pomeroy,[6] and Katz v. Walkinshaw,[7] as either belonging to the subflow of surface streams,[8] artesian basins,[9] or to catchment basins,[10] and that certain definite rights may be acquired in and to such waters, either by the land owners whose lands overlie the same, or by appropriation. It therefore follows that, if certain definite rights may be acquired in and to such waters, for any invasion of these rights by another, damages may be recovered upon proof of the ownership of such rights, the material and substantial injury of the same by another, and the proof of the actual damages suffered from such injuries.[11] But, in order to recover damages for the abstraction of such water the land owner must prove these facts, as it is held that the mere taking of such water does not imply damages, as it is not a wrong *per se*.[12] These facts in the case of underground waters are harder to prove than in the case of surface waters; but,

6 124 Cal. 597, 57 Pac. Rep. 585.

7 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

8 See Sec. 1149.

9 See Sec. 1168.

10 See Sec. 1197.

11 Where there has been unnecessary delay in asserting the right, the party will be left to his action for such damages as he can prove, and an injunction will be refused. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

For injunctions against the taking of subterranean water, see Sec. 1616.

12 Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098, where it is held that where it is to the interest of the public that water be pumped and diverted to supply the needs of a town, and the monetary damages can be determined, an absolute injunction will not be granted, but merely one conditioned on the failure to make good the damages.

In an action to recover damages for the deprivation of water, it is sufficient for the plaintiff to show that the defendant's wrongful acts actually deprived the plaintiff of the water, to which he was legally entitled; and, if these acts consisted of subsurface excavations, it is not necessary for the plaintiff to show that a well-defined subterranean stream had been intercepted, or to show the particular subterranean conditions which were disturbed, provided it clearly appears that defendant's acts caused the destruction or diminution. Cohen v. La Canada etc. Co., 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752.

See, also, McClintock v. Hudson, 141 Cal. 275, 74 Pac. Rep. 849; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Burr v. Maclay Rancho W. Co., 154 Cal. 428, 98 Pac. Rep. 260; Verdugo Canyon W. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

where proven, the party whose rights are materially injured by the unlawful acts of another may recover actual damages suffered as the direct result of such acts, or he may obtain an injunction against the future invasion of his rights.[13]

§ 1667. Damages for the failure to furnish water under duty imposed by law.—As we have discussed in a previous portion of this work, whenever a corporation or association is organized for the purpose of supplying consumers with water for profit or hire, a duty devolves upon such company, as a public service corporation or association, without imposing any unreasonable conditions, to furnish the water for the actual needs of such consumers, who legally apply therefor, and pay, or tender the payment of, the established rates for such water, to the full extent of the capacity of such company. Also, under certain conditions, upon the refusal of the company to furnish the water, such service may be enforced by a proper action.[1] Therefore, where a person, association, or corporation is under the duty to furnish actual consumers with water, either as imposed by law or under contract, and has failed in the past to comply with such duty and to furnish the water, an action at law for damages resulting therefrom will lie by the party injured against the party having so failed to furnish him with water.

In order for an action for damages to lie for the failure to furnish water, under the duty imposed by law, there are certain essentials which must be observed. First, the defendant company must have been a quasi-public corporation or association and under the duty to furnish the water;[2] second, it must have had the water under its control which it could have spared without infringing upon the rights of the prior applicants;[3] third, there must have been a legal application or demand for the water, made in time,

13 See cases cited above.

For injunctions against the unlawful diversion of subterranean waters, see Sec. 1616.

1 For the duty to furnish water imposed by law, see Secs. 1497-1502.

For the duty under contract to furnish water, see Sec. 1510.

For the compulsory service of water, see Sec. 1506.

For actions for mandamus to compel service, see Sec. 1649.

2 See Secs. 1493, 1507.

For actions for damages for breach of contract, see Sec. 1529.

3 Where the evidence was conflicting as to whether the failure resulted from the scarcity of water in the river from which a ditch was taken, or from a failure of a corporation

and accompanied with a tender of the established rates, or an actual payment of such rates;[4] fourth, there must have been a failure upon the part of the company to furnish the water;[5] and, fifth, the plaintiff must have actually sustained material and substantial damage resulting from the failure of the defendant to furnish the water.[6]

An action for damages will also lie against an irrigation district for the failure to supply water to which one within the district is entitled.[7]

§ 1668. Damages for breach of contract to furnish water.—Where the duty to furnish the water is imposed by a contract between the company and the consumer, in a proper case, the courts will enforce such contracts, either by decreeing specific performance of the same,[1] or, in some jurisdictions, by mandamus.[2] And, if there is a breach of the contract, and the company obligated

to maintain a proper dam across the river at the head of the ditch, and to repair a broken flume, a finding for the plaintiff will not be disturbed. Pawnee etc. Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. Rep. 381.

4 Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Lowe v. Yolo etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; affirmed, *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 379; Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098, holding that the demand must have been made in time in order for the company to be liable for the loss of crops of any particular season.

5 See cases cited under this section.

For exemplary damages for the failure to furnish water through malice, see Sec. 1702.

6 In Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423, damages were given the owner of virgin land, which he had agreed to lease for farming and gardening purposes, for the refusal of the ditch company to furnish water without payment of a royalty as a condition precedent, and thus preventing the land from being broken and put in crops.

"They must have been damages capable of ascertainment by proof to a reasonable certainty. Uncertain and speculative profits, which might or might not have been realized, are not recoverable in such actions." Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058.

For the measure of damages for the failure to furnish water, see Secs. 1698, 1700.

7 Snake River Valley Irr. Dist. v. Stevens, 18 Idaho 541, 110 Pac. Rep. 1033.

1 For the enforcement of contracts, see Secs. 1519, 1520.

2 For the enforcement of contracts by mandamus, see Sec. 1649.

therefor fails to furnish the water, the consumer may maintain an action for damages. As to whether or not an action for damages will lie in such a case depends largely upon the terms of the contract itself,[3] the nature of the breach thereof, and as to whether or not the consumer has been materially damaged by such breach. But the general rule upon the subject may be stated that, where a water company by a contract binds itself to furnish a consumer with a certain quantity of water at a certain time, and negligently or wilfully fails to supply the water in accordance with the terms of the contract, or fails for any reason to furnish the water except on account of an act of God, or *vis major*,[4] or a waiver of the terms of the contract, either by explicit terms or by some act upon the part of the consumer, the company is liable in damages for any injury suffered as the direct and proximate result of such breach of the contract.[5]

Under the rule that an entire claim arising under contract or tort can not be made the subject of several suits for damages, it is held in California that one who elected to sue for the specific performance of an agreement to convey, instead of for damages for the breach of contract, was bound to recover incidentally thereto all his damages from delay in conveying, so that the decree for specific performance barred a subsequent action for damages from the delay.[6] Again, where there is a duty to furnish water, a re-

3 For the construction of contracts, see Secs. 919, 1513.

4 For the defense of failure to perform on account of act of God, see Secs. 1691, 1692.

5 "When an irrigation company which contracts to furnish water to a consumer negligently or wilfully fails to furnish water in accordance with its contract, it is liable to the consumer for any damages suffered in the loss or injury to his crops by reason of such breach of contract." Colorado Canal Co. v. McFarland, 94 S. W. Rep. 400; *Id.*, 50 Tex. Civ. App. 92, 109 S. W. Rep. 435.

6 Abbott v. Seventy-Six Land & Water Co., —— Cal. ——, 118 Pac. Rep. 425.

A purchaser of water rights from an irrigation company, having done nothing to justify its arbitrary action in destroying his head gates and ditches, and threatening to continue to do so, is entitled to an injunction and damages. Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400.

Under contracts requiring five days' written notice to furnish water, a company is not liable for damages which accrued prior to the five days after such demand was made. Gravity Canal Co. v. Sisk, 43 Tex. Civ. App. 194, 95 S. W. Rep. 724.

"The essence of the contract was the furnishing of 140 inches of water for a given number of acres of desert land." Rios v. Azcuenaga, 19 Idaho

fusal or failure to furnish the same gives concurrent remedies in tort and contract, and the consumer may recover in either form of action.[7] Where there are several consumers named in the contract who all take their water from the same lateral, but where the lan-

739, 115 Pac. Rep. 922, holding that an action for damages would lie.

Where, after a lease of water to plaintiff by defendant, a third person was decreed to be the owner of a part of the leased water, so plaintiff was deprived of such part, plaintiff was entitled to damages for the loss. Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

See, also, Knowles v. Leggett, 7 Colo. App. 265, 43 Pac. Rep. 154.

The recovery for a breach of a contract can not be defeated because an injunction was issued restraining the granting party from diverting the water. Sample v. Fresno etc. Co., 129 Cal. 222, 61 Pac. Rep. 1085; Orr Water-Ditch Co. v. Reno W. Co., 19 Nev. 60, 6 Pac. Rep. 72, where it was held that for a breach of a contract by the failure to repair a ditch, an action for damages would lie.

See, also, Crowder v. McDonnell, 21 Mont. 367, 54 Pac. Rep. 43.

See, also, Roberts v. Crafts, 141 Cal. 20, 74 Pac. Rep. 281; Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215; Ferrea v. Chabot, 63 Cal. 564, *Id.*, 121 Cal. 233, 53 Pac. Rep. 689; Booth v. Chapman, 59 Cal. 149; Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366; Stoner v. Mau, 11 Wyo. 366, 72 Pac. Rep. 193; Glick v. Weatherwax, 14 Wash. 560, 45 Pac. Rep. 156; Gagnon v. Molden, 15 Idaho 727, 99 Pac. Rep. 965; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Pawnee etc. Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. Rep. 381; Hewitt v. San Jacinto etc. Dist., 124 Cal. 186, 56 Pac. Rep. 893; Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400; Rocky Ford etc. Co. v. Simpson, 5 Colo. App. 30, 36 Pac. Rep. 638; Candler v. Washoe Lake etc. Co., 28 Nev. 151, 80 Pac. Rep. 751; Hutchinson v. Mt. Vernon etc. Co., 49 Wash. 469, 95 Pac. Rep. 1023; Barstow Irr. Co. v. Cleghon, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; City of Yaleta v. Babitt, 8 Tex. Civ. App. 432, 28 S. W. Rep. 703; Raywood etc. Co. v. Wells, 32 Tex. Civ. App. 545, 77 S. W. Rep. 253; Mabb v. Stewart, 147 Cal. 413, 81 Pac. Rep. 1073; *Id.*, 133 Cal. 556, 65 Pac. Rep. 1085; Clague v. Tri-State Land Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; Dunbar v. Montgomery, — Tex. Civ. App. ——, 119 S. W. Rep. 907; Miller v. Mt. Nebo L. & Irr. Co., 37 Utah 1, 106 Pac. Rep. 504; Ulrich v. Pateros W. Ditch Co., —— Wash. ——, 121 Pac. Rep. 818.

[7] Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Colorado Canal Co. v. McFarland, 94 S. W. Rep. 400; Sisk v. Gravity etc. Co., —— Tex. Civ. App. ——, 113 S. W. Rep. 195; Clague v. Tri-State etc. Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; Sample v. Fresno etc. Co., 129 Cal. 222, 61 Pac. Rep. 1085; Northern Colorado etc. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423.

guage of the contract requires the company to account to each of the consumers, respectively, or, by the use of any words, imports a separate right of action, the contract is several, and each consumer may sue upon a breach for the damages sustained by himself, without joining the other consumers.[8] A consumer may recover damages for the breach of a contract of an irrigation district agreeing to furnish him with water.[9]

It is held, however, that where the consumer did not put his land in a proper state of cultivation, and failed to avail himself of the offer of the company to furnish the water, and did not seek to minimize the injury, that he was not entitled to recover damages.[10]

Where an agent makes a contract on behalf of his principal to furnish a certain quantity of water, in excess of his authority, he is personally liable thereon, under an implied warranty of authority, for damages for the failure of the principal to furnish such water, even though he made no false representations concerning his authority.[11]

§ 1669. Damages caused by the breakage of works.—Water, at times, is a most dangerous element even flowing in its natural con-

[8] Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

[9] Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 56 Pac. Rep. 893, where it is said: "An irrigation district may be sued. Boehmer v. Big Rock Creek Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908. And it was observed in that case that 'the legislature did not intend that such actions should be profitless to the parties.' Damage being proved to result from the default of the district, the appropriate judgment should have followed."

[10] Carr v. Miller-Morris etc. Co., 105 La. 239, 29 So. Rep. 715.

See, also, Cotton v. Jennings Irr. Co., 108 La. 4, 32 So. Rep. 193.

Again, where the owners of land contract to sell it, together with certain water rights, and are unable to transfer a title to the water rights, but did not induce the purchaser to enter into the contract by fraud, and their attempt to carry out the terms of the contract after it was made was free from bad faith, the purchaser in a suit for damages can recover moneys paid on the purchase price and the expenses legitimately incurred in pursuance of the contract, but is not entitled to damages for the loss of the bargain. Babcock-Cornish Co. v. Urquart, 53 Wash. 168, 101 Pac. Rep. 713.

See, also, Mabb v. Stewart, 147 Cal. 413, 81 Pac. Rep. 1073, 133 Cal. 556, 65 Pac. Rep. 1085.

[11] Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

See, also, Sommerville v. Idaho Irr. Co., —— Idaho ——, 123 Pac. Rep. 302.

dition, without the influence of man; and, when formally restrained by the works of man, it suddenly breaks through its barriers and tears through the lands below to the great destruction of life and property, it becomes even more dangerous. Therefore, in a previous section of this work, we stated to the effect that it is the duty of all irrigation or water companies, especially in the construction of dams and reservoirs for the storage or the holding back of great quantities of water, to so construct them that they will be of such a strength as to withstand all pressure of water on both ordinary and extraordinary occasions, so far as skilled human foresight can determine, and with that reasonable degree of care as is commensurate with the nature and magnitude of the undertaking, in order to protect the lives and property of those below.[1] This is the common law rule, as adopted by the leading English case upon the subject. And, under that rule, the person who stores water upon his premises, which is likely to do injury if it escapes, is held to keep it there at his peril, and that he is *prima facie* answerable for all damages which are the natural consequence of its escape, and that, too, without proof of actual negligence, or the want of reasonable care, upon the part of the owner of the works so storing the water.[2]

The English rule as laid down in the case of Rylands v. Fletcher,[3] has been literally followed by some of the American courts, where

1 For the character of construction of works, see Sec. 836.

2 Rylands v. Fletcher, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220; affirming L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, which reversed 3 Hurlst. & C. 774, where it is said: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God."

See, also, Barber v. Nottingham Canal Co., 15 C. B. N. S. 726, 33 L. J. C. P. N. S. 193, 10 Jur. N. S. 260, 9 L. T. N. S. 829, 12 Week. Rep. 376, where it was held that the owner of a reservoir was not relieved from liability for injuries to a mine by the fact that the flooding of the mine was caused by the sinking of a shaft by the mine owner, which, from the porous nature of the ground, caused the water to seep from the reservoir into the mine, without the mine owner's fault.

3 *Supra.*

injuries were caused by the breaking away or the leakage of water from storage reservoirs, and from dams holding back great quantities of water.[4] But this ruling has been rejected in other States.[5]

The effect of the English rule, as can be readily seen, is to make the owners of all such works absolute insurers against all damages, and to remove the question of negligence entirely, and to hold that if the injury occurs the owner is liable in damages without regard to his negligence. Therefore, some of the American courts have refused to follow literally the rule, but hold that it is not ap-

[4] In the case of Defiance Water Co. v. Olinger, 54 Ohio St. 532, 44 N. E. Rep. 238, 32 L. R. A. 736, the Court, after citing the case of Rylands v. Fletcher, *supra*, said: "The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes or noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

When a land owner collects a lake on his land and permits the water to escape and destroy the land and property of an adjoining owner, he becomes liable for the damages occasioned thereby, regardless of the question of negligence in its construction. Texas etc. R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. Rep. 902.

See, also, Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Southard v. Brooklyn, 1 App. Div. 175, 37 N. Y. Supp. 136; Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184; Clear Creek etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 299; Harwood v. Benton, 32 Vt. 724; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352.

But see Scott v. Longwell, 139 Mich. 12, 102 N. W. Rep. 230, 5 Ann. Cas. 679; Pennsylvania etc. Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453, 57 Am. St. Rep. 445; Marshall v. Welwood, 38 N. J. Law 339, 20 Am. Dec. 394.

Damages to a riparian owner caused by another maintaining a dam, boom, and pier in the river, are recoverable, irrespective of the negligence of the latter, provided the damages are caused by the obstructions in the river. Gibson v. Cascade Lbr. Co., 54 Wash. 289, 103 Pac. Rep. 11.

[5] Losee v. Buchannan, 51 N. Y. 476, 10 Am. Rep. 623; Moore v. Berlin etc. Co., 74 N. H. 305, 67 Atl. Rep. 578, 11 L. R. A., N. S., 284, 124 Am. St. Rep. 968, 13 Am. & Eng. Ann. Cas. 217; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. Rep. 453, 57 Am. Rep. 445.

plicable to every case of the storage of water, and that the right of recovery for such injuries depends upon the negligence of the owner, or upon his want of reasonable care in the construction and maintenance of such works.[6] To be sure, it does not require the same degree of care to construct a small reservoir as is required in the construction of one of a larger type. Neither does it require the same degree of care in the construction of a ditch or canal used in the conveying of water to the place of use as is required in the construction of a reservoir. In the former the water is not restrained and the pressure is but comparatively slight, while in the latter the water is restrained and the pressure is small or great according to the size of the reservoir.[7] But, in either case, why one, who constructs a reservoir upon his own premises and stores water therein, which he knows to be "a movable, wandering thing,"[8] and always seeking to escape, should be absolutely relieved from all liability for damage when it does break out and injure the property of innocent parties, who are not in any way connected with the enterprise, simply because it can not be proven that the reservoir owner was guilty of actual negligence, or had failed to exercise ordinary care in the construction and maintenance of such works, we are unable to see. We are, therefore, very much inclined to hold that the English rule is the correct one, and that a person who so stores water upon his land does so at his peril, and is liable for the actual injuries in damages which are the direct and proximate result of the breaking out of the water, and that, too, without the proof of actual negligence, or the want of ordinary care, upon the part of the owner of such works. All parties storing water upon their lands should also be held to the same rule. The man who constructs a duck pond, requiring slight skill or care, upon his own land should be liable for damages if the water does break out and ruin his neighbor's garden or floods his cellar. So, again, the corporations constructing these enormous reservoirs throughout the West, which reservoirs cover, at times, thousands of acres of land, and the waters of which are a hundred feet or over in depth, and where the water pressure is very great, requiring the exercise of the greatest amount of skill and care in

[6] See authorities cited in the next section.

[7] See Sec. 1670. For damages from ditches and canals, see Secs. 1672, 1673.

[8] 11 Blackstone Comm. 18.

their construction and maintenance, should be held to the same rule that they are liable for all damage resulting from breakage and overflow. If the English rule is adopted and enforced by the courts of this country, it will result in better constructed dams and reservoirs, fewer breakages, and, of course, less actual injury to life and property, and, at the same time, less damage from the failure of the company to furnish the water when it is needed by the settlers. The trouble of it is that many of these enterprises are projected by speculators and are upon the boom order. And, although, under the recent statutes in the various States, the works must be constructed under the supervision and inspection of some State official,[9] usually the State engineer, dams and reservoirs have been in the past, and undoubtedly will be in the future, hurriedly and unskillfully constructed. Settlers have been and are being induced by advertising agents to come and settle the lands, at times, in the very path of destruction, should the water break out; and, then, when it does break out and ruin the homes and farms, and perhaps destroy the lives of the settlers and their families, to hold to the rule that before damages can be recovered that the burden is upon the plaintiff to prove that the company was guilty of actual negligence, or that it failed to use reasonable care in the construction and maintenance of such reservoirs and dams, is in our opinion entirely wrong. And, if the courts do not adopt the English rule as to such liability, the legislature should, as is the case in Colorado,[10] where the statute places an absolute liability upon the owners of reservoirs for all damages arising from leakage, or overflow of the water, or by floods caused by the breakage of embankments, and which statute is held by the Supreme Court of that State to be simply an affirmation of the common law principle.[11]

§ 1670. Liability for negligence—Damages from reservoirs.—In any event, whether the strict rule of liability under the common law, as discussed in the previous section,[1] is adopted or not as to rule of decision in any State, any person storing water upon his land

9 For laws of State control, see Secs. 1337-1367.

10 See Mills' Ann. Stat., Sec. 2272.

11 Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Garnett etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79.

See, also, for statutory liability, Sec. 1671.

1 See Sec. 1669.

is liable for all injuries caused by the escape of the same and due to actual negligence, or from the want of reasonable or ordinary care in the construction or maintenance of the works used for the storage of the water.[2] But the interchangeable terms "reasonable care" or "ordinary care" used in this connection are relative. That is to say, it does not take the same degree of engineering skill to construct a small reservoir as it does a large one. And, therefore, what would be reasonable care in the construction of a small reservoir, where the water is retained by a natural depression of the earth and a brush and earthen dam, but where, even if it does break out it will do little or no damage, might be the most flagrant negligence in the construction of a large reservoir covering perhaps thousands of acres of land, and where the water pressure is very great upon the dam and natural embankments. Therefore, the degree of care which must be exercised in the construction and maintenance of these works is not the same in all cases of stored water. No rule can be stated which will be applicable to all cases; but, in those States which hold that the liability for injuries caused by the escape of the water depends upon the question of negligence or ordinary care exercised by the owners of such works in their construction and maintenance, it must also depend upon the facts and circumstances surrounding each particular case. As is said by Mr. Farnham:[3] "There are many cases where water can be stored with comparative safety, and where the effect of its es-

2 Griffith v. Lewis, 17 Mo. App. 605; Defiance Water Co. v. Olinger, 54 Ohio St. Rep. 532, 44 N. E. Rep. 238, 32 L. R. A. 736.

In Montana it is held that the fact that one knew of the dangerous condition of a dam, and failed to institute special proceedings provided by the Act of Feb. 16, 1877, giving persons living on a stream below a dam, who deem the same insecure, the right to institute proceedings to have the dam declared dangerous, will not bar an action by him for damages caused by a subsequent breaking of the dam. Hollenbeck v. Dingwell, 16 Mont. 335, 40 Pac. Rep. 863, 50 Am. St. Rep. 502, the Court saying: "It would be likewise a bad precedent to exonerate the defendants, otherwise clearly negligent, because a settler below them did not avail himself of the statutes quoted, which, as we have said, were a permission expressly accorded to him, but certainly were never intended to shield those who were careless from liability in damages for the consequences of negligently maintaining a fearful danger to those lawfully occupying their homes below the point of such danger."

See, also, Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

3 3 Farnham on Waters and Water Rights, Sec. 982.

cape will be slight, while in other cases the attempt to store is attended with such imminent danger, and the result of a breaking away of the water would be so disastrous, that the one attempting the storage may well be required to take all the risk of the enterprise. Therefore, no rule can be stated which will be applicable to all cases, but the extent of liability must be determined from the circumstances of each case as it arises."

Again, a distinction must be made as to the ordinary care which must be exercised in the construction and maintenance of dams and reservoirs and the construction and maintenance of ditches and canals, the damages caused by which we will discuss in following sections.[4] It is generally held that the owners of ditches and canals, even in those States which by legislative enactment the liability for injuries from the escape of water from reservoirs is fixed,[5] are held only to the exercise of ordinary care. This follows the rule that the greater the risk the greater is the care which must be exercised. As was said in a recent Colorado case, in discussing this distinction: "A ditch carrying water can, by the exercise of ordinary care, be rendered harmless. The carrying of water through ditches is not a dangerous or menacing vocation—the water is not restrained and the pressure is but slight—while in a reservoir, the water is restrained and the pressure is very great, so great that the exercise of the greatest amount of care and skill may not prevent the water from effecting its escape."[6]

So, in applying the rule of negligence or ordinary care to reservoir and dam cases, and in all cases where barriers are placed in natural streams to hold back their waters, the courts hold that a much greater degree of care must be exercised than is the rule in ditch and canal cases. The one, storing water under pressure, must exercise such a degree of skill in each case in the construction and maintenance of his works as is commensurate with the magnitude of the undertaking. They must be so constructed by such engineering skill as to withstand ordinary and extraordinary floods, and are not relieved from liability for damage caused by their breaking away, except such as comes strictly within the terms of act of God or *vis major*. This was the rule adopted by the United States Circuit Court of Appeals in what are known as the Salton Sea

[4] See Secs. 1672, 1673.

[5] See Sec. 1671.

[6] Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610.

cases,[7] where an irrigation company constructed the intakes from the Colorado River into its canal without headgates or other means of controlling the flow, by reason of which, in a time of flood, the water flowed through in such a volume as to wash away the river bank and overflow the lands of others, and for which damages were awarded, and where the Court said: "The fact that an extraordinary flood came down the river, contributing to the disaster, does not relieve the defendant from responsibility. Under the conditions prevailing in that locality and known to have existed for many years, it was the duty of the defendant to have maintained proper control of the waters at its headgates"; quoting Kinney on Irrigation, First Edition, Section 314, which is as follows: "It is the duty of all irrigation companies in building ditches, canals, aqueducts, reservoirs, and other works, to so construct them that so far as human foresight can reasonably determine the lives and property of the people living below them will be safe from breakage and overflow. Where a company constructs a ditch which passes over the land of others it is bound to construct it and use it so as not to injure those lands regardless of the question as to who has the older right or title; and if through any fault or neglect of the owner of the ditch in not properly constructing, managing, and repairing the ditch, the water overflows or breaks through the banks, and destroys or damages the lands of others, either by washing away the crops or soil, or covering the land with sand or debris, the owner of the ditch is liable for such injury. However, the owners of the ditch or canal may not be held liable for what is known as an act of God, unless the acts of the owner are combined with it in such a manner as to render him liable."[8] And, again, as was held in a recent

7 California Dev. Co. v. New Liverpool Salt Co., 172 Fed. Rep. 792, 97 C. C. A. 214.

8 And also quoting Kinney on Irr., 1st Ed., Sec. 315.

In the case of Defiance Water Co. v. Olinger, 54 Ohio St. 532, 44 N. E. Rep. 238, 32 L. R. A. 736, where the Court held that the common law rule as laid down in Rylands v. Fletcher was the correct rule of liability without proving negligence, but because the defendant had expressly pleaded negligence, in the failure to make repairs, the case was decided upon that theory, and that one who collects water on his own premises liable to escape, and, if it should escape, likely to cause mischief, must at least use reasonable care to restrain it. If for want of such care it escapes and injures persons or property rightfully on adjoining premises, he is answerable for damages sustained on account thereof.

Oregon case:[9] "The true test, considering all the circumstances, is, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff and to have made provisions therefor?" But even this rule is not as strong as that laid down in the Salton Sea cases, as even competent engineers are liable to mistakes. In that case the Court held that it was the absolute duty of the defendant to have maintained proper control of the water at its headgates, and the fact of extraordinary flood did not relieve the defendant from responsibility.[10]

Floods that are of periodical occurrence must be guarded against by the ditch owner, as it is possible to take precautions against floods of this nature.[11]

Upon the other hand, where the owner is not made the insurer by statute, there is no liability from floods, except for negligence or want of reasonable care.[12]

§ 1671. Liability fixed by statute—Damages caused by the breakage of works.—The ninth section of the Act of Congress of July 26, 1866,[1] provides: "But whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such in-

9 Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. Rep. 843.

10 See, also, Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where the Court held that in reservoir cases the owners were held to the strict rule of liability, but in ditch or canal cases the owners were held only to ordinary or reasonable care.

11 The Salton Sea Cases, 172 Fed. Rep. 820, 97 C. C. A. 242; Burbank v. West Walker River Ditch Co., 13 Nev. 431; Fairbury v. Chicago etc. Co., 79 Neb. 854, 113 N. W. Rep. 535, 13 L. R. A., N. S., 542.

12 Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Mathews v. Kinsell, 41 Cal. 512; Lisonbee v. Monroe etc. Co., 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784; Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214.

In an early case in California of Todd v. Cochell, 17 Cal. 97, in an action for damages for the breaking of a small reservoir, the Court instructed the jury that to entitle the plaintiff to recover, it must appear that the breaking of the reservoir resulted from gross negligence of the defendants. This instruction was held erroneous, but the Court held that it was cured by other instructions.

1 Rev. Stat. of U. S., Sec. 2339; 7 Fed. Stat. Ann., 1905, p. 1090; 2 U. S. Comp. Stat., 1901, p. 1437; 14 Stat. L. 253.

For construction of above section, see Secs. 611-619, 933, 934.

jury or damage shall be liable to the party injured for such injury or damage." And, under the Right of Way Act of March 3, 1891,[2] the clause quoted above was re-enacted. This section has been generally construed as referring only to the injuries resulting "in the construction" of such works and not as fixing the liability for the breakage of such works after the same were constructed.[3]

In Colorado and Wyoming it is provided that the owners of reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by the breaking of the embankments of such reservoirs.[4] This section is held to be simply an affirmation of the common law rule, discussed in the previous section.[5] This rule has been upheld as constitutional by the courts, which also hold that the liability was sufficiently absolute, as imposed by its terms, to relieve the plaintiff in an action for damages from alleging and proving negligence.[6] And it is also

2 6 Fed. Stat. Ann., 1905, p. 508; 2 U. S. Comp. Stat., 1901, p. 1570; 26 Stat. L. 1102.

For the construction of the above section, see Secs. 938-940.

3 See McGuire v. Brown, 106 Cal. 660, 39 Pac. Rep. 1060, 30 L. R. A. 384; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081; Culbertson etc. Co. v. Olander, 51 Neb. 539, 71 N. W. Rep. 298; Clear Creek etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; Noteware v. Stearns, 1 Mont. 311, 4 Morr. Min. Rep. 650; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243.

4 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3213; Rev. Stat. 1908, Sec. 3213; Mills' Ann. Stat., Sec. 2272; Rev. Stat. Wyo., 1899, Sec. 974; Wyo. Comp. Stat., 1910, Sec. 751.

5 See Sec. 1669; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610; Canyon City etc. R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. Rep. 1127.

See, also, Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where the plan for the construction of an irrigation canal resulted in the creation of an extensive basin, wherein a large body of water was artificially collected and stored, it was held that such basin constituted a reservoir, within Rev. St. 1899, Sec. 947, declaring that owners of reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by the breaking of embankments thereof.

6 "It would be a gross abuse of the judicial power to construe away the words of the statute by holding the owners of reservoirs exempt from liability for damages, upon their proof of the exercise of reasonable care and caution." Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79.

See, also, Larimer County D. Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. Rep. 1111; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Canyon City etc. R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. Rep. 1127; Mustang etc.

held in a recent case that the liability is the same, even if they have used a natural hillside as a part of the restraining wall and it washes out.[7]

As we stated in the previous section, we believe this to be the correct rule fixing the liability of all who construct dams and reservoirs for the purpose of holding back and storing water.[8] So, where the courts of a State hold that such a company is absolved from liability by showing that it exercised reasonable care in the construction and maintenance of such works, or worse, before a party injured by the breaking of such works can recover damages that he must prove actual negligence upon the part of the owners of such works, a similar statute to the above should be enacted by the legislature.

§ 1672. Liability for negligence—Damages from ditches and canals.—But the strict rule of liability, as laid down in the cases of dams and reservoirs, and discussed in the previous sections,[1] is not usually applied to ditches and canals, where the water is under no, or comparatively little, pressure. The carrying of water through ditches and canals is not a dangerous or menacing undertaking, and, by the exercise of ordinary or reasonable care, it can be rendered comparatively harmless.[2] And, therefore, even the English courts, which hold the owners of reservoirs to the strict liability for the damages caused by water escaping from such reservoirs without proof of negligence,[3] do not hold the same rule of liability in the cases of water escaping from ditches and canals, upon the ground that it is not so liable to escape except in case of actual negligence, and, if the water does escape it is liable to do little injury, as com-

Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800, where only the measure of damages was considered.

7 Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610.

8 See Sec. 1669.

1 See Secs. 1669-1672.

2 Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610; Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where a sharp distinction is drawn as between the liability in reservoir and ditch cases.

See, also, Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795, holding that the ditch owners are not insurers, although in reservoir cases in the same State it is held that under the statute they are insurers.

For liability in reservoir cases, see Secs. 1669-1672.

3 For the English rule as to reservoirs, see Sec. 1669.

pared with that when the escape is from a reservoir.[4] Therefore, in applying the rule of negligence or ordinary care to ditch and canal cases, the courts hold that it is the duty of the owners thereof to exercise in their construction, maintenance, or operation, only such a degree of care, which ordinarily prudent men would exercise under like circumstances were the *risk* their own. And, that, in order to recover damages for injuries from the escape of the water from such works, the plaintiff must allege and prove negligence upon the part of the owners, or at least the want of ordinary care. In other words, the owners of an irrigation canal or ditch are not liable as insurers, for injuries sustained to adjoining property by seepage, leakage, or overflow from the canal or ditch, but are only liable for such injuries in case of actual negligence.[5]

[4] Boughton v. Midland etc. R. Co., Ir. Rep. 7 C. L. 169; Nield v. London etc. R. Co., 10 Exch. 4, 23 Week. Rep. 60, 44 L. J. Exch. N. S. 15.

[5] "The well settled rule is that the owner of an irrigation ditch is bound to exercise reasonable care and skill to prevent injury to other persons from such ditch, and he will be liable for all damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining, or operating the ditch." Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596.

A person may recover for damages sustained by reason of the mismanagement of a canal, which damage resulted from defective waste gates, or from opening them to relieve the canal from an over supply of water, or from neglect in keeping the canal in proper repair, which resulted in seepage of the water. Stuart v. Noble D. Co., 9 Idaho 765, 76 Pac. Rep. 255.

A ditch owner is bound to keep his ditch in good repair, so that the water will not overflow or break through its banks, or destroy or damage lands of other parties; and, if through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the ditch and injure the lands of others, either by washing away the soil or covering the soil with sand, the law holds him responsible. Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612.

An instruction, in an action for damages from the breaking of an irrigation ditch, that it is incumbent on an irrigation company to construct its flumes and ditches in such a reasonable and prudent manner that no damages shall result to the person, whose lands are crossed, is erroneous, as making it an insurer. King v. Miles City etc. Co., 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506.

A corporation, to supply water to its stockholders for irrigation and domestic purposes, is not an insurer, and is only liable for injuries caused by its works when guilty of negligence, which must be pleaded and proved. Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

A corporation which constructed an irrigation plant so as to obstruct the

And, in this connection negligence may be defined as the omission to do something which a reasonable man, guided by those

natural drainage from plaintiff's land was held not relieved from liability from a resulting flood by the fact that it employed a competent engineer to superintend the construction of its works. Barstow Irr. Co. v. Black, 39 Tex. Civ. App. 30, 86 S. W. Rep. 1036.

However, in Canada, it is held that where the statute authorized an owner of land to divert unrecorded and unappropriated water from any stream for the purpose of irrigating his land, it was held that such right was permissive and not imperative, and that he was liable to adjoining owners for injury done their lands, even in the absence of negligence upon his part. Canadian P. R. Co. v. Parke, 68 L. J. P. C. N. S. 89.

See, also, Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1008, 72 Am. St. Rep. 784; Kearney etc. Co. v. Akeyson, 45 Neb. 635, 63 N. W. Rep. 921; Malmstrom v. People's etc. Co., 32 Nev. 246, 107 Pac. Rep. 98; Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829; Emison v. Owyhee D. Co., 37 Ore. 577, 62 Pac. Rep. 13; McCarty v. Boise City C. Co., 2 Idaho 225, 10 Pac. Rep. 623; Shields v. Orr Extension D. Co., 23 Nev. 349, 47 Pac. Rep. 194; Bacon v. Kearney etc. Syndicate, 1 Cal. App. 275, 82 Pac. Rep. 84; Sutter v. Wenatchee etc. Co. 35 Wash. 1, 76 Pac. Rep. 298; Paolini v. Fresno etc. Co., 9 Cal. App. 1, 97 Pac. Rep. 1130; Mullen v. Lake Drummond etc. Co., 130 N. C. 496, 41 S. E. Rep. 1027, 61 L. R. A. 833; Clear Creek etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819; Arave v. Idaho etc. Co., 5 Idaho 68, 46 Pac. Rep. 1024; Crowder v. McDonnell, 21 Mont. 367, 54 Pac. Rep. 43; Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781; Burbank v. West Walker River D. Co., 13 Nev. 431; Thomas v. Blaisdell, 25 Nev. 223, 58 Pac. Rep. 903; Catlin etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391; Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; Consolidated etc. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. Rep. 582; North Point Cons. Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Platte etc. Co. v. Anderson, 8 Colo. 131, 6 Pac. Rep. 515; Denver etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; City of Boulder v. Fowler, 11 Colo. 396, 18 Pac. Rep. 337; Old v. Keener, 22 Colo. 6, 43 Pac. Rep. 127; Fleming v. Lockwood, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263; Mulrone v. Marshall, 35 Mont. 238, 88 Pac. Rep. 797; Bean v. Stoneman, 104 Cal. 49, 38 Pac. Rep. 39; Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30; Weidekind v. Tuolumne etc. Co., 65 Cal. 431, 4 Pac. Rep. 415, 12 Pac. Rep. 387; Everett v. Hydraulic etc. Co., 23 Cal. 225, 4 Morr. Min. Rep. 589; Hoffman v. Tuolumne etc. Co., 10 Cal. 413; Tenney v. Miners' D. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31; Wolf v. St. Louis etc. Co., 10 Cal. 541, 10 Morr. Min. Rep. 636; McLelland v. Brownsville etc. Co., 46 Tex. Civ. App. 249, 103 S. W. Rep. 206; Todd v. Cochell, 14 Cal. 98, 10 Morr. Min. Rep. 655; Campbell v. Bear River etc. Co., 35 Cal. 679, 10 Morr. Min. Rep. 656; Gibson v.

considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Moreover, negligence is not absolute or intrinsic, but always relative, and depends upon the circumstances of time, place, or person, or other facts surrounding each particular case. And, upon the subject of the standard of care in such cases, it may be said: "The legal test of negligence, whether negligence be conceived as a sort of legal or moral delinquency, or whether it be conceived as a breach of implied duty, is this: Did the defendant, in doing the alleged negligent act, use that reasonable care and caution which an ordinarily prudent person would have used in the same situation? If not, he is guilty of negligence. Stated in another way, conduct is said to be negligent when a prudent man in the position of the tort feasor would have foreseen that a harmful effect was sufficiently probable to warrant his foregoing the conduct or guarding against its consequences."[6]

It is the duty of the ditch owner to keep his ditch in such a condition that the water therefrom will not cause a breach in it and flood the adjoining property.[7] In most of the States this duty is fixed by statute, and any failure to comply with the same is deemed negligence.[8] But negligence can not be presumed from the mere fact of the breaking of the ditch or canal, without other evidence, so as to shift the burden of proof upon the defendant to relieve himself from negligence.[9] But in a late Washington case,[10] it was held that the rule of *res ipsa lognitor* does apply to the breaking of an irrigation ditch, and that this rule, like all other rules of evidence, must be applied with reference to the particular case.

Puchta, 33 Cal. 310, 12 Morr. Min. Rep. 39; Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30; Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22.

[6] Street on Foundation of Legal Liability, Vol. 1, p. 96.

[7] Where the defendant permitted a break in his ditch to remain unrepaired for three weeks, whereby plaintiff's land was flooded, such conduct was held negligence *per se*. Catlin etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391.

[8] For the statutes of the various States, see Part XIV.

[9] For pleading negligence, see Sec. 1686.

For evidence, burden of proof, see Sec. 1693; Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31.

[10] Dalton v. Selah Water Users' Association, —— Wash. ——, 122 Pac. Rep. 4.

In summing up the principles of law applicable to ditch and canal cases, as decided almost unanimously by the authorities, we find the following: First, the owner of a ditch or canal is not an insurer against damages which may result from its construction, maintenance, or operation. Second, the owner of a ditch or canal, where his negligence or unskillfulness in the construction, maintenance, or operation of the same is sufficiently established, or his want of reasonable and ordinary care, is liable in damages for injuries resulting from breakage and overflow, leakage, seepage, or the escape of the water in any manner upon the lands and premises of others, if without fault of the land owner himself,[11] or due to an act of God or *vis major*.[12]

§ 1673. Injuries from ditches and canals—Actions for damages lie when.—The conveyance of water from the natural streams to the place of use for all beneficial purposes, being a legitimate and most necessary enterprise, especially in the Western portion of this country, and protected and encouraged by the law to the fullest extent possible, and the liability of ditch owners for damage from overflow, leakage, seepage, or the escape of the water in any manner, depending upon the negligence of the ditch owner,[1] and the actual injury caused thereby, there is, therefore, no liability imposed upon the owner of a canal or ditch, existing by lawful authority, for damages resulting from the mere existence of a ditch or canal, *ipso facto*.[2] In order for the plaintiff to recover damages in ditch and canal cases not only must there have been actual injuries, but those injuries must have been caused by some negligent act upon the

11 For contributory negligence, see Sec. 1688.

12 For act of God as a defense, see Secs. 1691, 1692.

1 See Sec. 1672.

2 A ditch existing by lawful authority, its proprietors are not liable for damages resulting from such existence of the ditch *ipso facto*. Platte & Denver D. Co. v. Anderson, 8 Colo. 131, 6 Pac. Rep. 515.

See, also, City of Denver v. Mullin, 7 Colo. 345, 3 Pac. Rep. 693; Walley v. Platte & Denver D. Co., 15 Colo. 579, 26 Pac. Rep. 129; Gibson v. Puchta, 33 Cal. 310, 12 Morr. Min. Rep. 227.

The maintenance of ditches and canals, or other works, is not in and of itself a nuisance. Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231.

See, also, Fresno v. Fresno etc. Co., 98 Cal. 179, 32 Pac. Rep. 943; Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; Boise City v. Boise City Canal Co., 19 Idaho 717, 115 Pac. Rep. 505.

part of the ditch owner.[3] But, when these two elements are present in any case, and properly alleged and proven,[4] the plaintiff should recover damages against the ditch owner, regardless as to who he may be, and also against his servants and agents whose acts jointly contributed to his injuries.[5] A recovery may be had for injuries to the person, as well as for injuries to property, or for the death of a person.[6] Damages may also be recovered for injuries to personal property, such as horses or cattle, as well as for injuries to land.[7] So, again, damages may be recovered for injuries to growing crops.[8]

It was also held that a notice or warning to the ditch owner of certain defects in his works is sufficient to fix him with negligence if he remains inactive and permits the damages thereafter to occur.[9] Where a right of way has been granted to a ditch owner over the lands of others, either by deed or by condemnation proceedings, damages may be recovered for injuries resulting from the negligent maintenance of the ditch.[10] Although an owner of a ditch may acquire an easement for the same by prescription,[11] he can not acquire a prescriptive right to be negligent in the maintenance of his

[3] See previous section, No. 1672, and cases cited.

[4] For pleadings in damage cases, see Secs. 1686-1690.

For proof, see Sec. 1693.

[5] Bates v. Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. Rep. 949.

See, also, for parties defendant, Sec. 1685.

[6] Platte & Denver Canal Co. v. Dowell, 17 Colo. 376, 30 Pac. Rep. 68, where the parents recovered for the drowning of a child.

But see Farmers' High Line etc. Co. v. Westlake, 23 Colo. 26, 46 Pac. Rep. 134, where it was held that the frightening of a horse was the proximate cause of the accident, and not the ditch.

[7] For actions for damages for injuries to stock, see Sec. 1699.

[8] For actions for damages to crops, see Sec. 1698.

[9] Greeley etc. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; McCarty v. Boise etc. Co., 2 Idaho 225, 10 Pac. Rep. 623.

[10] Old v. Keener, 22 Colo. 6, 43 Pac. Rep. 127; Clear Creek etc. Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. Rep. 819; Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 Pac. Rep. 295.

In condemnation proceedings all damages, present and prospective, that are the natural, necessary, or reasonable incident of the improvement must be assessed, not including such as may arise from negligent or unskillful construction or use thereof. Denver etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234.

[11] For the acquisition of rights of way by prescription, see Secs. 1044, 1045.

ditch, however long he may have been guilty of it; nor can he excuse his negligence by showing the custom used by other companies in repairing their ditches at the same time and in the same manner.[12] A person can not recover damages for a public nuisance, unless he has actually suffered damages peculiar to himself.[13]

§ 1674. Damages for flooding lands from overflow and leakage from works.—Coming down to the results of negligence in the handling of waters, or the actual injuries themselves, we find that one of the most common causes of action for damages is for the flooding of lands by the escape of water from canals, ditches, or other works, by overflow or leakage therefrom. And, upon this subject, it is the general duty of the owners of all such works to carefully construct and maintain the embankments so that the water will not escape to the injury of adjoining property. But, with the exception of the owners of reservoirs, as discussed in a previous section,[1] the owners of other works are not liable as insurers, for injuries sustained to adjoining property from overflow and leakage from such works, but are liable only for injuries which are the direct results of the negligence of such owners, in the construction, maintenance, or operation of the same.[2] So, in the case of the construction of a canal, where no care was taken to prevent leakage, except an endeavor to tramp the earth solid by teams, such construction was held to constitute negligence.[3] In actions of this

12 Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829.

13 "Of course the plaintiff can not recover damages for a public nuisance so far as the injury is to the public only, but if he suffers damage peculiar to himself, as by flooding his land and thereby depriving him of the use of it, the nuisance is to that extent a private nuisance as to him for which he may recover damages." Grigsby v. Clear Lake Water Co., 40 Cal. 396.

See, also, Blanc v. Klumpke, 29 Cal. 156.

See, also, for injunctions against nuisances, Sec. 1621.

1 See Secs. 1669-1671.

2 For liability for damages from ditches and canals, see Sec. 1673.

3 Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596.

See, also, Platte & Denver D. Co. v. Anderson, 8 Colo. 131, 6 Pac. Rep. 515; Denver City etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234.

A corporation owning a ditch or canal is not liable for the acts of one to whom it has granted the right to manage the ditch for a definite period of time and whose conduct is not under its control, and when the injury claimed was during the latter's man-

nature the principle of actual compensation governs, and the damages awarded must be confined to the actual damages sustained as the results of such negligence.[4] But a canal or ditch owner is not an insurer against all damages caused by his works. Therefore, an instruction that "It is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch," was held erroneous.[5] He is liable only for such injuries as are caused by his negligence.[6] And, in order

agement. Alexander v. Winters, 23 Nev. 475, 49 Pac. Rep. 116, 24 Nev. 143, 50 Pac. Rep. 798.

See, also, Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574; California Dev. Co. v. New Liverpool Salt Co., 172 Fed. Rep. 792, 97 C. C. A. 214; Bacon v. Kearney etc. Syndicate, 1 Cal. App. 275, 82 Pac. Rep. 84; Thomas v. Bolsa Land Co., 1 Cal. App. 335, 82 Pac. Rep. 207; Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691; Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58, 91 Pac. Rep. 425; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. Rep. 220; French v. West Seattle etc. Co., 50 Wash. 257, 97 Pac. Rep. 60; McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193; Mustang etc. Co. v. Hessman, 49 Colo. 308, 112 Pac. Rep. 800; Hayden v. Consolidated etc. Co., 3 Cal. App. 136, 84 Pac. Rep. 422; Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296; Emison v. Owyhee D. Co., 37 Ore. 577, 62 Pac. Rep. 13; Stuart v. Noble D. Co., 9 Idaho 765, 76 Pac. Rep. 255; Oldenburg v. Oregon Sugar Co., 39 Ore. 564, 65 Pac. Rep. 869; Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. Rep. 965; Wilson v. Boise City, 6 Idaho 391, 55 Pac. Rep. 887; Arave v. Idaho C. Co., 5 Idaho 68, 46 Pac. Rep. 1024; Orchard Place Land Co. v. Brady, 53 Kan. 420, 36 Pac. Rep. 728; De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. Rep. 610, 46 Am. St. Rep. 237; Kearney v. Akeyson, 45 Neb. 635, 63 N. W. Rep. 921; Big Goose etc. Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955; Messenger v. Gordon, 15 Colo. App. 429, 62 Pac. Rep. 959; Catlin etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; Chidester v. Consolidated etc. Co., 53 Cal. 56; De Costa v. Massachusetts Flat etc. Co., 17 Cal. 613; Crowder v. McDonnell, 21 Mont. 367, 54 Pac. Rep. 43; Lyon v. Chicago etc. Co., —— Mont. ——, 121 Pac. Rep. 886; Colorado Springs etc. Co. v. Albrecht, — Colo. App. ——, 123 Pac. Rep. 957.

4 Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296; Old v. Keener, 22 Colo. 6, 43 Pac. Rep. 127; Malmstrom v. People's Drain D. Co., 32 Nev. 246, 107 Pac. Rep. 98.

See, also, for the measure of damages, Secs. 1697-1701.

5 King v. Miles City etc. Co., 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506; Whitehouse Birmingham Canal Co., 27 L. J. Exch. N. S. 25.

6 See Secs. 1673; Colorado etc. Co. v. Morris, 1 Colo. App. 401, 29 Pac. Rep. 302, where there was no evi-

for the plaintiff to recover, he must not have contributed to the injuries in any manner.[7] A riparian proprietor who interferes with the flow of a natural stream by the construction of works, so that the water floods the lands of others is liable for the actual damages incurred.[8]

It is also an act of negligence upon the part of an appropriator who diverts water into his ditches and canals, and who either permits the surplus water, or the water after it has been used, to flow away from his works over the land of others to their injury. The one diverting water from a stream must provide adequate means for the drainage of the unused or surplus water through some outlet by the means of which it can be either returned to the natural stream or pass away without doing injury to the lands of others; and, if he does not do so, he is liable for the damages sustained.[9]

It is held that a ditch owner is not liable for damages from leakage, caused by the burrowing of some animal, unless after notice he should negligently permit the same to continue.[10]

dence as to which of two companies caused the injury.

7 For contributory negligence as a defense, see Sec. 1688.

8 A proprietor of land over which surface water is wont to flow in two or more channels may not collect such water into a single channel and discharge the aggregate volume upon the land of a lower proprietor, to the detriment of the latter. Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. Rep. 1085.

See, also, Hartshorn v. Chaddock, 135 N. Y. 116, 31 N. E. Rep. 997, 17 L. R. A., 426.

9 Boynton v. Longley, 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781; Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Richardson v. Kier, 37 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; North Point Consolidated Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

In a recent case in Colorado, where plaintiff was entitled to the unobstructed use of waste water as the same should be discharged into her ditch at the terminus of a particular lateral connected with an irrigation system of a water company, it was held that the defendants could not wilfully and maliciously discharge water as waste and at the same time invoke the rule that they were not bound to maintain conditions so as to supply plaintiff's appropriation of waste water at any time or in any quantity. Green Valley D. Co. v. Schneider, 50 Colo. 606, 115 Pac. Rep. 705.

10 Tenney v. Miners' Ditch Co., 7 Cal. 335, 11 Morr. Min. Rep. 31; Greeley etc. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329.

§ 1675. Damages from seepage of water.—The seepage of water from ditches, canals, or other works, is but one method of its escape from such works. Therefore, the same duty devolves upon the owner of such works to so construct them as far as possible so that the water will not seep or percolate therefrom to the injury of the lands of others below. The law upon this subject and that of overflow and leakage, discussed in the last section,[1] is tersely expressed in the legal maxim, *Sic utere tuo ut alienum non laedas*, which expressed in English and applied to the subject under discussion, is: "The owner of such works must so use, maintain, and operate his works as not to injure the property of another."[2] And, as in other cases, the owner is held not to be the insurer against all damages incurred, he is held liable in damages for all injuries which are the direct and proximate result of his actual negligence, or the failure to exercise ordinary and reasonable care.[3] And, therefore, it is held that, if a ditch owner negligently permits water to escape onto the land of another, because of defects in the ditch, or allows the flow of the water to be obstructed so as to cause it to seep or percolate through the ditch and injure the land, the owner is liable in damages for such injuries; the injury not being *damnum absque injuria*.[4] It is held to be the duty of ditch and canal com-

1 See Sec. 1674.

2 Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30.

3 The owner of an irrigation ditch, seepage of the water from which, not intentionally caused, injures the property of another, is liable for the injury only in case of negligence. Fleming v. Lockwood, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263.

See, also, Howell v. Big Horn Basin C. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where it is said: "The failure to specifically require the observance of care in constructing and guarding the bottom of a ditch can not be regarded as an exemption from liability, should damage be caused through negligence in that respect."

"But assuming, under our constitution and legislative enactments, the owners of canals are liable for damages to distant proprietors occasioned by waters seeping therefrom, although not negligent in their construction or operation, they are not insurers, and have never been so held by this Court." Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

See, also, Malmstrom v. People's Drain D. Co., 32 Nev. 246, 107 Pac. Rep. 98.

4 Paolini v. Fresno etc. Co., 9 Cal. App. 1, 97 Pac. Rep. 1130.

See, also, Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Shields v. Orr Ext. D. Co., 23 Nev. 349, 47 Pac. Rep. 194; Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829;

panies to take care of their own seepage and percolating waters. And, where this may be done by the construction of a "sweat" ditch, it is held to be negligence not to construct such a ditch.[5] But there is no duty imposed upon the party injured to construct such a ditch to avoid the injury.[6]

It often happens that the irrigation of upper lands has the effect of causing seepage to the lands of those lying below. Here, again, the liability of the upper owner for damages resulting from such seepage depends upon his negligence, as is the case where the seepage is directly from the ditches or canals, discussed above. And, when the lower land becomes soaked and too wet from the seepage from irrigated lands, the upper land owners can not be held liable, when they use ordinary and reasonable care in the irrigation of their lands, and when they use no more water than is reasonably necessary in so doing.[7] But the land owner who, in irrigating his land, uses more water than is necessary, and permits the water to form in pools thereon, and from thence to seep and percolate to his neighbor's land, is guilty of negligence and is liable for the injuries sustained.[8]

Negligence being the gist of such actions, the plaintiff has the

Stuart v. Noble D. Co., 9 Idaho 765, 76 Pac. Rep. 255; Consolidated etc. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. Rep. 582; Canyon City R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. Rep. 1127; Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; McCarty v. Boise City Canal Co., 2 Idaho 225, 10 Pac. Rep. 623; North Point Consol. Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574; Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30; Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784; Mullen v. Lake Drummond etc. Co., 130 N. C. 496, 41 S. E. Rep. 1027, 61 L. R. A. 833; Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 Pac. Rep. 295; Schuster v. Albricht, 98 Wis. 241, 73 N. W. Rep. 990, 67 Am. St. Rep. 804; Ward v. Ford, 58 S. C. 557, 36 S. E. Rep. 916; Gibson v. Puchta, 33 Cal. 310, 12 Morr. Min. Rep. 227.

5 Mullen v. Lake Drummond etc. Co., 130 N. C. 496, 41 S. E. Rep. 1027, 61 L. R. A. 833; North Point Cons. Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

6 McCarty v. Boise City C. Co., 2 Idaho 225, 10 Pac. Rep. 623.

7 Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784.

8 Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30.

burden of proof, in the first instance, to prove negligence on the part of the defendant.[9]

It is held in Colorado that injuries to land from water seeping from a properly constructed irrigation ditch which is maintained to be permanent constitutes a single cause of action, and as affected by the statute of limitations accrues at the beginning of the injury.[10]

§ 1676. Damages for the flowage or backing up of water.—One of the results of the placing of dams or other obstructions in natural streams is the flowage or the backing up of the waters so that they cover the lands above such obstructions. Flowage is usually governed by statute, and where the use to which the water is to be put is a public one, the right to acquire such land as may be necessary is given by virtue of the power of eminent domain, upon just compensation.[1] Such a right may also be acquired by grant or prescription.[2] But, where the flowage covers the lands of others, over which the party constructing such works has no right, such party is liable for the injuries caused thereby. So, again, where a party has the right to a certain amount of flowage land, and reconstructs his works so that other lands are flooded, he is liable for the additional injuries incurred thereby.[3] To render one liable for damages in such cases it is sufficient if the obstruction was such that a reasonably prudent man would know that it would be likely to do injury by the backing up of the water, and would have taken

[9] Fleming v. Lockwood, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263; Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329.

[10] Middlekamp v. Bessemer Irr. Ditch Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

[1] For the right of eminent domain, see Secs. 1059-1098.

The flowing of land by a dam for manufacturing purposes is a taking within the meaning of the constitutional provision regulating the taking of land by right of eminent domain. Avery v. Vermont Elec. Co., 75 Vt. 235, 54 Atl. Rep. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818.

For the defense of prescription, see Sec. 1690.

For the defense of a contract right to flow land, see Sec. 1689.

[2] See Secs. 1659-1698.

[3] Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985.

See, also, Charnley v. Shawano etc. Co., 109 Wis. 563, 85 N. W. Rep. 507, 53 L. R. A. 895, and note; Avery v. Vermont Elec. Co., 75 Vt. 235, 54 Atl. Rep. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818, and note; McCombs v. Stewart, 40 Ohio St. 647; Fredericks v. Pennsylvania Canal Co., 148 Pa. 317, 23 Atl. Rep. 1067.

the precaution to guard against it.[4] Therefore, where a party constructs a permanent dam across a stream, the effect of which can be but apparent that it will back up the water over the lands of others to which he has no right, it must be presumed that he intended the natural consequences of his act, and he will be therefore charged with notice of whatever conditions resulted from the same, and liable for the injuries caused thereby, without the proof of negligence upon his part in the construction of such works.[5] Where, however, there are but partial obstructions placed in a stream, which, upon all ordinary occasions, will permit the water to pass down as it was wont, as is the case of bridges and culverts, the party owning such works is liable only for such injuries as reasonably might have been foreseen by persons skillful and competent to construct such works in accordance with the demands of the physical conditions of each particular case.[6] But the owner of such works is not bound to provide against unusual and extraordinary floods such as come within the terms of "act of God," or "inevitable accident." And whether or not such floods do come within the meaning of such terms is a question of fact to be submitted to the jury.[7]

Where certain expert witnesses testified that a dam is a given elevation above sea level, and that it did not, and could not hold back flood waters, and cause the overflow above that elevation, and other witnesses saw the lands at the time of high or flood season,

[4] Schmeckpepper v. Chicago etc. R. Co., 116 Wis. 592, 93 N. W. Rep. 533.

He will be liable even though the work may have been performed with reasonable care and skill. Selden v. Delaware etc. Co., 24 Barb. 362.

See, also, Chicago etc. Co. v. Davis, 26 Okla. 434, 109 Pac. Rep. 214, 1 Water and Min. Cas. Ann. 566.

[5] Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985.

[6] Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. Rep. 843, where it was held that the true test, considering the circumstances, was, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff's land, and to have made provision therefor?

That such works must be constructed in accordance with skillful engineering, see Ohio etc. R. Co. v. Nuetzel, 43 Ill. App. 108; Illinois C. R. Co. v. Bethel, 11 Ill. App. 17; Omaha etc. R. Co. v. Brown, 14 Neb. 170, 15 N. W. Rep. 321; Pittsburg etc. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98.

[7] Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. Rep. 843; Peoria etc. R. Co. v. Barton, 38 Ill. App. 469; Gulf etc. R. Co. v. Pool, 70 Tex. 713, 8 S. W. Rep. 535; Southern R. Co. v. Piott, 131 Ala. 312, 31 So. Rep. 33; Ohio etc. Co. v. Thillman, 143 Ill. 127, 32 N. E. Rep. 529, 36 Am. St. Rep. 539.

and testified that they actually were flooded and submerged to a higher elevation than that testified to by the expert witnesses, there is such a substantial conflict in the evidence as to go to the jury.[8]

§ 1677. Damages for flooding lands by the interference with the flow of surface waters.—As to whether or not an action at law will lie for damages resulting from the interference with the flow of what are strictly surface waters,[1] depends largely upon the fact as to whether the common law or the civil law has been adopted as the rule of decision in the jurisdiction where the action is brought. According to the rule of the common law, as accepted in England and in many of the States of this country, surface water may be regarded as a common enemy which every land owner may fight and get rid of as best he may, and for which acts no action for damages will lie, the same being *damnum absque injuria.*[2] Under this

8 Petajaniemi v. Washington W. Pr. Co., —— Idaho ——, 124 Pac. Rep. 783.

1 As to what constitutes surface waters, see Sec. 318.

2 "At common law, for the purpose of drainage, construction, or any other lawful purpose, every proprietor had the right to elevate the surface of his own land, or to erect embankments whereby the natural flow of the water from the upper ground shall be stopped, without liability." Chicago etc. Co. v. Groves, 20 Okla. 101, 93 Pac. Rep. 755, 22 L. R. A., N. S., 802.

An obstruction by a railroad embankment of the ordinary ditches and passageways which surface water will cut in a generally level district in its efforts to reach some flowing stream does not constitute an injury to other land owners, where the common law is recognized as the rule of practice and decision, and there are no special statutory provisions in respect to the matter. Walker v. New Mexico etc. Co., 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421; affirming *Id.*, 7 N. M. 282, 34 Pac. Rep. 43.

"Under this rule it is within the control of the owner of any land upon which it falls or over which it flows. He may use all of it that comes upon his own, or decline to receive any that falls on his neighbor's land. . . . The doctrine of the common law with respect to the obstruction and flow of mere surface water is not only in force in England, but in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont, and Wisconsin. . . . The rule of the civil law seems to be in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and referred to with approval in Ohio." Kansas City etc. Co. v. Riley, 33 Kan. 374, 6 Pac. Rep. 581.

See, also, Greatrex v. Hayward, 8 Exch. 291, 22 L. J. Ex. 137; Wood v. Waud, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; Broadbent v. Ramsbotham, 11 Exch. 602, 25 L. J. Ex. N. S. 115, 4 Week. Rep. 290,

rule, not only may a land owner get rid of mere surface water by casting it upon the lands of others, but he may also appropriate the same to his own use for any purpose, or for the express purpose of depriving an adjoining land owner of it,[3] and any person from whose land it is withheld, and whose supply is depleted thereby, will have no right of action for damages for such diversion or obstruction.[4]

In distinction from the common law rule upon the subject, discussed above, the doctrine of the civil law is, that each of the owners of both the upper and lower estates has a natural easement or servitude in the estate of the other for the flow of mere surface water as it was wont to flow by nature. Therefore, the lower owner can not reject the water as it naturally comes to his land, from the land of the upper owner, by interposing obstructions or barriers against the same; and, upon the other hand, the upper owner can not entirely withhold the supply that would naturally flow to the lands of the lower owner. But, under the American decisions, it is held that either land owner may somewhat interfere with the natural flow of surface water, where it is needed for domestic purposes, or for use upon the land according to the ordinary modes of good husbandry.[5] And it therefore follows that, for any material interference by one party with the reciprocal rights of the other to the natural flow of the surface water, an action for damages will lie.[6]

34 Eng. L. & Eq. 553; Atchison etc. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Buffum v. Harris, 5 R. I. 243; Barkley v. Wilcox, 86 N. Y. 140, 19 Hun, 320, 40 Am. Rep. 519; Flagg v. Worcester, 13 Gray 601; Franklin v. Fisk, 13 Allen 211, 90 Am. Dec. 194; Walker v. Old Colony etc. R. Co., 103 Mass. 10, 4 Am. Rep. 509; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473.

3 Chatfield v. Wilson, 28 Vt. 49; Rawson v. Taylor, 11 Exch. 369, 4 Week. Rep. 290; Barkley v. Wilcox, 86 N. Y. 140, 19 Hun, 320, 40 Am. Rep. 519.

4 See cases, *supra*.

5 Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Martin v. Jett, 12 La. 503, 32 Am. Dec. 120; Kauffman v. Griesmer, 26 Pa. St. 407, 67 Am. Dec. 437; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Gillham v. Madison County R. Co., 49 Ill. 484, 95 Am. Dec. 627; Porter v. Dunham, 74 N. C. 767; Mizzell v. McGowan, 125 N. C. 439, 34 S. E. Rep. 538; Livingston v. McDonald, 21 Iowa 160, 89 Am. Dec. 563; Goldsmith v. Elsas, 53 Ga. 186; McCormick v. Kansas City R. Co., 70 Mo. 395, 35 Am. Rep. 431.

6 Interference with the natural flow of surface water is regarded as a nuisance, for which nominal damages

In the arid and semi-arid States of this country, where at times every drop of available water is needed for the proper cultivation of lands, and where it is held that there can be no appropriation of what is strictly mere surface water,[7] the courts are inclined to hold more in accordance with the rule of the civil law, which, as it seems to the writer, is more consistent with the needs and necessities of an arid region than is the rule of the common law which originated where the question was more one of drainage than of the right to use the water. Some of the Western courts, however, have adopted the common law rule. The leading State to reject the common law rule upon the subject as inapplicable, and to adopt the rule of the civil law, is California. And, in a late case upon the subject, in which damages were recovered in the trial court, by a lower proprietor against an upper for maintaining certain embankments and thereby changing the natural course of surface water, which resulted in flooding of the plaintiff's land, it is said: "It follows, therefore, that the owner of higher lands has no right, for his own relief, either to divert surface or storm waters from his lands onto the lands of another, over which they would not naturally have flowed, nor has he the right, by accumulating surface water upon his own lands in ditches or other artificial channels, to precipitate them upon his neighbor's land in larger quantities or in different form from that which they would have had or taken in the course of nature. The rule of this State is the rule of the civil law, '*Aqua currit, et debet currere, ut currere solebat,*' and we have, moreover, modified, to meet our conditions, the harsh and drastic common-law maxim of '*Cujus est solum, ejus est usque ad coelum et ad infernos,*' by applying with it the more benign and equitable rule of '*Sic utere tuo ut alienum non laedas.*'"[8] The

may be recovered without proof of actual damages. Tootle v. Clifton, 22 Ohio St. 274, 10 Am. Rep. 732.

See, also, Schrope v. Pioneer Tp., 111 Iowa 113, 82 N. W. Rep. 466; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452.

7 See Sec. 654.

8 Wood v. Moulton, 146 Cal. 317, 80 Pac. Rep. 92.

See, also, Cushing v. Pires, 124 Cal. 663, 57 Pac. Rep. 572; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. Rep. 795, 8 L. R. A. 575; Gray v. McWilliams, 98 Cal. 157, 32 Pac. Rep. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Los Angeles Cemetery Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. Rep. 375; Rudel v. Los Angeles

rule of the civil law is adopted as the rule of decision in Montana,[9] Texas,[10] and Wyoming.[11] The common law rule is followed in Kansas,[12] New Mexico,[13] and Oklahoma.[14] In Oregon, as late as 1906, the question had not been decided.[15] This rule is adopted in Washington. As was said in a recent case:[16] "It is also the settled doctrine in this State that surface water, caused by the falling of rain or the melting of snow, is to be regarded as an outlaw or common enemy against which every proprietor of land may defend himself, even if in consequence of such defense injury result to others. As to surface waters this Court has definitely adopted the

County, 118 Cal. 281, 50 Pac. Rep. 400; Larabee v. Cloverdale, 131 Cal. 96, 63 Pac. Rep. 143; Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. Rep. 174; Peck v. Peterson, 15 Cal. App. 543, 115 Pac. Rep. 327; Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. Rep. 1085; Cox v. Odell, 1 Cal. App. 682, 82 Pac. Rep. 1086; Cederberg v. Dutra, 3 Cal. App. 572, 86 Pac. Rep. 838.

9 Lyon v. Chicago etc. R. Co., —— Mont. ——, 121 Pac. Rep. 886.

10 Sabin etc. R. Co. v. Joachumi, 58 Tex. 456.

11 Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

12 Darlington v. Board of Commissioners of Cloud County, 75 Kan. 810, 88 Pac. Rep. 529; Bryant v. Merritt, 71 Kan. 272, 80 Pac. Rep. 600; Missouri Pac. R. Co. v. Keys, 55 Kan. 205, 40 Pac. Rep. 275, 49 Am. St. Rep. 249; Singleton v. Atchison etc. R. Co., 67 Kan. 284, 72 Pac. Rep. 786; Baldwin v. Ohio Tp., 70 Kan. 102, 78 Pac. Rep. 424, 67 L. R. A. 642, 109 Am. St. Rep. 414; Atchison etc. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Kansas City etc. R. Co. v. Riley, 33 Kan. 374, 6 Pac. Rep. 581.

But in the latest decision of the Supreme Court of that State, the court seems to modify the strict common-law rule by holding that the owner of land is not responsible for injuries occasioned by the flow of surface water from his land upon adjacent lands; but, if he causes it to accumulate and then casts it in a volume upon the land of his neighbor, he is responsible for the increased damages, if any, caused thereby. Johnston v. Hyre, 83 Kan. 38, 109 Pac. Rep. 1075.

13 Walker v. New Mexico etc. Co., 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421; aff'g *Id.*, 7 N. M. 282, 34 Pac. Rep. 43.

14 Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214, Chicago etc. Co. v. Groves, 20 Okla. 101, 93 Pac. Rep. 755, 22 L. R. A., N. S., 802; Davis v. Frey, 14 Okla. 340, 78 Pac. Rep. 180, 69 L. R. A. 460; Chicago etc. R. Co. v. Davis, 26 Okla. 434, 109 Pac. Rep. 214, 1 Water and Min. Cas. Ann. 566.

15 "The question has never been decided in this State." Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. Rep. 843.

See, also, West v. Taylor, 16 Ore. 165, 13 Pac. Rep. 665; Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649.

16 Wood v. City of Tacoma, —— Wash. ——, 119 Pac. Rep. 859.

rule of the common law as distinguished from the contrary rule of the civil law." [17]

It is held by the Supreme Court of the United States that that Court will follow the State's decisions as to the rights and liabilities respecting surface water as a matter of local law.[18]

§ 1678. Damages for injuries to ditches or other works.—Not only will an injunction be granted the owner in a proper case against any future unlawful interference with ditches, canals, or other works,[1] but also an action for damages will lie for any past injury to such works, committed negligently or wilfully, either by the owner of the land over which such works are constructed or by others.[2] In an early case decided by the Supreme Court of the United States, it was held that the owner of a water right who, in constructing his ditch, crosses the ditch of another person in such a way as to cut into it and carry the water down his own ditch, can not complain if the owner of the first ditch in making repairs cuts down and washes away a portion of the intersecting ditch, and it "was not, therefore, an injury for which damages could be recovered." [3] A covenant in a lease to defend the lessee in the peaceful and quiet possession of the premises and every part thereof does not require the lessor to maintain a ditch running through the premises; and therefore the lessor is not liable to the lessee for damages caused

[17] See, also, Harvey v. Northern Pacific Ry Co., —— Wash. ——, 116 Pac. Rep. 464.

But see Peters v. Lewis, 28 Wash. 366, 68 Pac. Rep. 869; *Id.*, 33 Wash. 617, 74 Pac. Rep. 815.

[18] Walker v. New Mexico etc. Co., 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421; aff'g *Id.*, 7 N. M. 282, 34 Pac. Rep. 43.

[1] See injunctions, Secs. 1596-1647.

[2] In an action for destroying plaintiff's ditch, which crossed the defendant's mine, the fact that there had been locations covering part of the mine before the ditch was constructed is immaterial when defendant's title was not connected with them, but was based upon a survey and location made after the construction of the ditch. Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119.

See, also, as to priorities, Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039.

For the recovery for damages to a flume, see Jones v. Bondurant, —— Colo. App. ——, 120 Pac. Rep. 1047; Gustin v. Harting, —— Wyo. ——, 121 Pac. Rep. 522.

[3] Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

See, also, Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Gregory v. Nelson, 41 Cal. 278.

by the temporary destruction of the ditch by floods.[4] If one owns a ditch and a right of way for the same, a court of equity has no authority by its judgment to allow the ditch to be washed away for mining purposes, even after providing that such portion of the ditch as might be destroyed should be replaced by a metal pipe or flume which would answer all the purposes of the ditch. The court should not license a trespass on such property or compel the owner thereof to exchange the same for other property for the convenience of a private person.[5] Damages may be recovered against a railway company for changing the course of an irrigation ditch;[6] also, for the interfering with such ditch by improperly constructing a syphon to pass the water under a right of way.[7] So, also, against a corporation for unlawfully placing a dam in a river which caused the washing away of plaintiff's ditches.[8] As it is the duty of the ditch owner to keep his ditch in repair, and for this purpose he may go upon the lands of others through which the ditch runs, and for the purpose of which he has acquired in some manner a right of way, it is also his duty to protect his ditch against the invasion of cattle of the land owner; and, as a general thing, the land owner is not liable for injuries to a ditch of another passing through his land from the tramping of cattle.

It was held in Nevada that no action for damages will lie where a subsequent appropriator of water removed a portion of a dam constructed upon public land by a prior appropriator in such a manner as to divert the entire stream, and by such removal allowed a portion of the stream to continue in its natural course to the prior appropriator, where the latter did not employ a reasonable and economical method of diverting the water and where he permitted two-thirds of the water diverted to become lost in a swamp without any good excuse therefor.[9] But it was held in Oregon that the owner of

[4] Stevens v. Wadleigh, 50 Ariz. 90, 46 Pac. Rep. 70.

[5] Gregory v. Nelson, 41 Cal. 278.

[6] Denver etc. R. Co. v. Heckman, 45 Colo. 470, 101 Pac. Rep. 976.

[7] Chicago etc. Co. v. McPhillamey, —— Wyo. ——, 118 Pac. Rep. 682.

[8] Oldenburg v. Oregon Sugar Co., 39 Ore. 564, 65 Pac. Rep. 869.

See, also, Stocker v. Kirtley, 6 Idaho 795, 59 Pac. Rep. 891; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039; Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

[9] Doherty v. Pratt, —— Nev. ——, 124 Pac. 574; Durfee v. Garvey, 78 Cal. 546, 21 Pac. Rep. 302; City of Bellevue v. Daly, 14 Idaho 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992; Keller v. Fink, 103 Cal. 17, 37 Pac. Rep. 411.

sheep can be held in damages for injuries done by them to a ditch running across the unfenced public lands, and in the absence of proof that they were purposely or negligently driven thereon.[10] It is held that the measure of damages for the permanent destruction of an irrigation ditch is the difference between the value of the land irrigated with and without the ditch.[11]

§ 1679. **Damages from logging.**—Many of the rivers and streams of the arid and semi-arid West are navigable at least to the extent that they are used for floating logs from the timber lands along their sources to the market.[1] And where a stream is of sufficient capacity to be used for this purpose, the right to its use is vested in the public. In this use, it frequently happens that the lands of the riparian owners are injured by the destruction of improvements or by the flooding or washing of their lands. As we have discussed in a preceding section, an injunction may be granted in certain cases against continuous negligent logging;[2] so, also, an action for damages will lie to recover compensation for the actual injuries sustained by the negligent acts of those using the stream for this purpose. But the one so using the stream is not an insurer that the riparian owner shall not suffer injury. One engaged in driving logs down a stream is bound to exercise ordinary prudence and skill, and where it is so exercised any injuries which may be caused by his operations will be *damnum absque injuria*.[3] But for all injuries resulting from actual negligence or the want of ordinary or reasonable care he is liable.[4]

10 Bileu v. Paisley, 18 Ore. 47, 21 Pac. Rep. 934, 4 L. R. A. 840.

11 Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322.

1 As to what constitutes a navigable stream, see Secs. 344-346.

2 See Sec. 1617.

3 "The gist of this action is negligence, and until some negligence is shown there can not be said to be any liability." Hopkins v. Butte etc. Co., 13 Mont. 223, 33 Pac. Rep. 817, 16 Mont. 356, 40 Pac. Rep. 865, 40 Am. St. Rep. 438.

See, also, Haines v. Welch, 14 Ore. 319, 12 Pac. Rep. 502; Watkinson v. McCoy, 23 Wash. 372, 63 Pac. Rep. 245; Hunter v. Grande Ronde Lum. Co., 39 Ore. 448, 65 Pac. Rep. 598; Eernert v. Eureka Lbr. Co., 43 Mont. 517, 117 Pac. Rep 1060.

See, also, Brisky v. Leavenworth etc. Co., —— Wash. ——, 123 Pac. Rep. 519.

4 Watkinson v. McCoy, 23 Wash. 372, 63 Pac. Rep. 245; Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199; Bryant v. Frank

Again, damages may be recovered by one using a navigable stream for the floating of logs against the riparian owner for placing obstructions in the stream, which prevent the plaintiff from driving their logs.[5]

§ 1680. **Actions on bonds for damages.**—Where a party entitled to the use of water is prevented from exercising his right by an injunction wrongfully sued out by a party who gives a bond, an action for damages will lie on the bond for all damages which are the direct result of his being deprived of the water.[1] But it is held that damages from the issuance of a temporary injunction can not be recovered in the injunction suit itself by way of cross-complaint.[2] A bond given to an incorporated reservoir company for whatever damages might be awarded through the granting of an injunction against the distribution of water does not include damages to an individual stockholder of the company for the loss of crops, unless the company through some valid contract, made antecedently, would be compelled to make good the loss.[3] A plaintiff in an action on such a bond can not recover a greater sum in damages than he would have had to expend to obtain water from another source, from which he could have obtained a sufficient supply by a reasonable exertion. Nor can he recover more than nominal damages for the loss of his crops by being deprived by the injunction of the use of the water, where during the time the injunction was in force the water was so low that it could not have reached the plaintiff's land.[4]

§ 1681. **Damages as the result of fraud.**—It has sometimes happened that fraud has entered into the operations of certain water companies. And where this is the case, upon properly alleging and proving the fraud, and that the plaintiff acted thereon to his injury,

H. Lamb Timber Co., 37 Wash. 168, 79 Pac. Rep. 622; Lownsdale v. Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. Rep. 904; Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. Rep. 34; Sacchi v. Bayside Lbr. Co., 13 Cal. App. 72, 108 Pac. Rep. 885.

5 Creech v. Humptulips etc. Co., 37 Wash. 172, 79 Pac. Rep. 633.

1 Rohwer v. Chadwick, 7 Utah 385, 26 Pac. Rep. 1116; Mack v. Jackson, 9 Colo. 536, 13 Pac. Rep. 542; Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199.

2 Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

3 Eaton v. Larimer etc. Co., 3 Colo. App. 366, 33 Pac. Rep. 278.

4 Mack v. Jackson, 9 Colo. 536, 13 Pac. Rep. 542.

damages may be recovered against the party making the misrepresentations, or if these were made by a duly authorized agent, against the company of which he was the agent. So, in an action against an irrigation company for false representations of its general manager, a petition alleging that the general manager, on being applied to for information as to the location of a water right, consulted certain records, and informed the plaintiff that the water right was located on a certain tract on which there was, in fact, no water right, was held sufficient on a general demurrer in showing that the general manager held authority to make the representations complained of, which, if proven, would make the company liable in damages to the plaintiff.[1]

It has sometimes happened that the promoters of companies have sought to reap secret profits at the expense of the stockholders of the corporation which they have organized. "If, without the knowledge or consent of such stockholders, the promoters cause funds of the corporation to be so disbursed as to secure undisclosed profits to themselves, they may be called to account."[2] So, where this was attempted by one of these enterprising gentlemen, but who was frustrated in his efforts, and afterward had the assurance to bring an action against the corporation for damages to recover the "undisclosed profits," it was held that he could not recover.[3]

§ 1682. Damages for using force.—As we have discussed in a previous section of this work, the owner of a water right, ditch, canal, or other works, may, under certain circumstances, use a reasonable amount of force in protecting his rights. It has sometimes happened that following the use of force an action for damages has

1 Cleghon v. Barstow Irr. Co., 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020. See, also, Grant v. Huschke, —— Wash. ——, 126 Pac. Rep. 416.

2 Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. Rep. 173; Camden Land Co. v. Lewis, 101 Mo. 78, 63 Atl. Rep. 523.

3 Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. Rep. 173.

Where a purchaser of stock of an irrigation company agreed that the corporation would convey to the sellers all water rights not theretofore conveyed to others, which it subsequently did, evidence of false representations by the sellers as to the capacity of the company's canal was not admissible in an action for failure to deliver water in accordance with the conveyance; the plaintiffs not asking for damages from such representations or a rescission of the contract not being asked by the defendants. Lombard v. Schlotfeldt, —— Wash. ——, 123 Pac. Rep. 787.

followed. Of course, if the use of force was justified and not used to excess, no damages in such an action should be recovered.[1] This force is not necessarily confined to assault and battery upon the person, but it may have been used in the removal of obstructions from a stream or ditch which prevented the water from reaching the prior appropriator,[2] or the removal of building material placed upon a right of way for an unlawful purpose.[3] Where, however, the use of force was not justified, or there was an excessive use of force, a plaintiff in an action for damages should recover.

§ 1683. **Jurisdiction of courts—Venue.**—An action for damages for injuries to a water right, or to a ditch, canal, or other works used to utilize a water right, being an action for injuries to real property,[1] the general rule is that it must be commenced, or tried, at least, in the county where the real property or some portion thereof is situated. Upon this subject, however, the constitutions and statutes of the respective States govern, and should be consulted before such an action is instituted. Where, however, an action is commenced in the wrong county, it is generally the rule that the failure of the defendant at the proper time to object to the jurisdiction of the Court, or to move for its transfer to the proper county, waives the want of jurisdiction of the trial court. In a recent case decided in California it was therein decided that the statute [2] only requires that such actions must be tried in the county where the real estate injured is situated, and that it is not required to be commenced there. And when it is commenced in a county other than the one where the real property injured is located, the Court acquires jurisdiction to try the cause, unless the defendant applies for its transfer for trial to the county where the real property is situated.[3]

1 Walker v. Chanslor, 153 Cal. 118, 94 Pac. Rep. 606, 17 L. R. A., N. S., 455, 126 Am. St. Rep. 61; Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; McCarty v. Fremont, 23 Cal. 196.

2 Ennor v. Raine, 27 Nev. 178, 74 Pac. Rep. 1.

3 Whitmore v. Pleasant Valley Coal Co., 27 Utah 284, 75 Pac. Rep. 748.

1 That a water right is real property, see Sec. 769.

2 Sec. 392, subd. 1, Code Civ. Proc.

3 Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 503, 22 L. R. A., N. S., 391.

See, also, Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. Rep. 836; Grocers' etc. Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. Rep. 120.

Where the property injured lies in two or more counties, the plaintiff may select the county in which the action may be commenced and tried. These rules are also subject to the provisions for the change of venue for trial in another county, as provided by the respective statutes.

Under certain conditions, as in other cases, a change of venue may be had of the trial of such an action from one county to another. In this respect the statute of the State where the action is pending must be followed, both by the moving party and by the Court. However, an application for a change of venue is addressed to the sound legal discretion of the trial court, and the decision reached by such Court on such matter will not be reversed on appeal unless the showing made is such as to convince the Appellate Court that the trial court has abused such discretion.[4]

§ 1684. **Parties plaintiff.**—The several owners of the waters of a stream, ditch, canal, or other works, as we have discussed in previous portions of this work, may unite as parties plaintiff in an action to enjoin the unlawful diversion by a third person [1] to quiet title to their respective rights [2] or to abate a nuisance; [3] but unless there is a community of interest between such parties they can not unite as parties plaintiff in an action at law for damages for past injuries to their rights, and where this is attempted there is a misjoinder of parties plaintiff.[4] So, it is held that a cause of action

4 An application for a change of venue ought to be supported by the affidavits of persons who have either been over the county generally, or through large communities thereof, and have heard the citizens generally express themselves in regard to the matter in issue, or by residents of different portions of the county who know of the sentiment prevailing in their respective communities. Gibbert v. Washington etc. Co., 19 Idaho 637, 115 Pac. Rep. 924.

1 For parties plaintiff in injunction suits, see Sec. 1631.

2 For parties plaintiff in actions to adjudicate water rights, see Sec. 1544.

3 See Sec. 1621.

4 "It has been frequently held that the appropriators and users of water from the same stream, where each owned his separate tract of land and right, could not join in an action against other appropriators and users of water from the same stream for the recovery of damages for an obstruction of their rights or an unlawful diversion of the water, to their damage or prejudice." Frost v. Alturas W. Co., 11 Idaho 294, 81 Pac. Rep. 996; citing Kinney on Irr., 1st Ed., Sec. 327.

See, also, Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94; Barham v. Hostetter, 67 Cal. 272, 7 Pac. Rep. 689; Blaisdell v. Stephens, 14 Nev.

for injunction, which is common to all the plaintiffs, can not be joined with a cause of action for damages which is not joint as to all the plaintiffs, but several.[5]

Where the rights of the parties plaintiff are based upon a contract, as to whether such contract is several or joint depends upon the terms expressed in the contract itself. It is therefore a question of its construction. Generally, where there are joint obligees the contract is joint, and such obligees must join in an action for damages for the breach thereof. Where, however, the language of the contract requires the obligor to account to each of the obligees, respectively, or by the use of any words imports a separate right of action, the contract is several to the extent that each obligee may maintain an action for damages resulting from the breach of the contract.[6] So, in an Arizona case, it is held that a contract between a canal company and the shareholders in an unincorporated mutual association whereby the canal company agreed to furnish water to the "respective" parties forming the mutual association, naming them, and the latter agreed to rent their "respective" shares in the association to the first party, it was held to be a several contract, and that either of the second parties might maintain an action for damages occurring to him through a breach of the contract without joining the others.[7] Parties to a contract for cropping land on shares, each of whom owns an interest in the growing crop, are properly joined as parties plaintiff in an action for damages for the destruction of their crop.[8] In Nevada, where the law of community property is in force, where the title to land purchased with money earned after marriage is taken in the name of the wife, the land is held to be "community property" under the husband's control, so

17, 3 Am. Rep. 523; Miller v. Highland D. Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; Ronnow v. Delmue, 23 Nev. 29, 41 Pac. Rep. 1074.

See, also, Bliss on Code Pleading, Sec. 76.

5 Barham v. Hostetter, 67 Cal. 272, 7 Pac. Rep. 689; Ronnow v. Delmue, 23 Nev. 29, 41 Pac. Rep. 1074; Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94; Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. Rep. 570; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349.

See, however, the Revised Codes of Montana, 1907, Sec. 4852.

6 Consolidated C. Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74; Lawless v. Lawless, 39 Mo. App. 539.

7 Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

8 Thomas v. Bolsa Land Co., 1 Cal. App. 335, 82 Pac. Rep. 207.

that an action for damages for injuries thereto from flooding and seepage may be maintained by him alone.[9]

A corporation organized to furnish water for hire or profit may maintain an action for damages against one unlawfully depriving it of the water which the corporation has obligated itself to furnish its consumers.[10] But where no obligation has been entered into to furnish the water to consumers, and the company has not been compelled to respond for the breach of a valid contract to furnish such water, it is held that a corporation can not maintain an action for damages which have been suffered by stockholders by their inability to obtain water.[11] In Oklahoma it is held that a private citizen, although a taxpayer of a municipality, can not maintain an action against a water company to recover damages for losses by fire sustained by him in consequence of the failure of the company to perform its contract with the municipality to furnish a supply of water for the extinguishment of fires, for the reason that there is no privity between the citizen and the company.[12] The mortgagee of a mortgage covering all the crops on certain land for a year is entitled to maintain an action against a water company failing to furnish water to the land as bound by its obligation to the mortgagor.[13] So, also, may an action be maintained by the pledger of water stock for damages caused by the act of the pledgee in directing a water company to withhold the water from the pledger.[14] So, again, an action for damages may be maintained by a landlord against a tenant for injuries to his rights or for the failure to make

9 Malmstrom v. People's Drain D. Co., 32 Nev. 246, 107 Pac. Rep. 98; Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. Rep. 547.

10 Where it appeared that the plaintiff had undertaken to supply water to about 200 farmers, some of them at lands thirty-five miles away, and that it would be unable to perform its agreements with them if it should be deprived of the water which defendant was unlawfully taking for his own use, it was said by the Court: "Clearly, that would amount not merely to the loss of a certain amount of water for which compensation could be given in a suit for damages, but to injure the plaintiff's business so seriously as to be considered irreparable." Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

11 Eaton v. Larimer etc. Co., 3 Colo. App. 366, 33 Pac. Rep. 278.

12 Lutz v. Talequah W. Co., 29 Okla. 171, 118 Pac. Rep. 128, 36 L. R. A., N. S., 568.

13 Equitable Securities Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747.

14 Mabb v. Stewart, 147 Cal. 413, 81 Pac. Rep. 1073; *Id.*, 133 Cal. 556, 65 Pac. Rep. 1085.

repairs to a ditch;[15] or against a water company for failure to furnish his tenant with water.[16] A tenant may maintain an action for damages against his landlord for a breach of an agreement by the landlord to furnish the tenant with water;[17] and he may also sue as party plaintiff in an action for damages against a third party whose duty it is to furnish the land with water, but who has failed to furnish it.[18]

§ 1685. **Parties defendant—Joint or several tort feasors.**—Although in an equitable action any number of persons whose rights are invaded may join as parties plaintiff against any number of persons as parties defendant to adjudicate water rights,[1] or to prevent by injunction the unlawful invasion of rights,[2] this can not be done in an action at law for damages unless, as far as parties plaintiff are concerned, there is such a community of interest in the subject matter of the suit that it makes them practically one party,[3] or, so far as parties defendant are concerned, unless they all acted in concert or jointly, so that by their concurrent wrongdoing they caused the injuries for which damages are asked. It is a well-settled principle of law of procedure that an action at law for damages can not be maintained against several persons as parties defendant when each acted independently of the others and there was no concert or unity of design or action between them.[4] It is held

15 Hayden v. Consolidated etc. Co., 3 Cal. App. 136, 84 Pac. Rep. 422.

16 Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290.

17 Knowles v. Leggett, 7 Colo. App. 265, 43 Pac. Rep. 154; Dunbar v. Montgomery, 119 S. W. Rep. 907.

18 Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366.

1 See Secs. 1544, 1545.

2 See Secs. 1631, 1632.

3 See preceding section, No. 1684.

4 In a leading case upon this subject in Nevada, involving an action for damages against several defendants and asking for an injunction, it was held that tort feasors who "own, occupy, and irrigate separate and distinct tracts or parcels of land," and where it did not appear that the injury complained of "was the result of the joint or concurrent act of defendants," can not be held jointly liable, or be joined as parties defendant, and that a motion for a non-suit should be sustained by the trial court, so far as the cause of action for damages was concerned, although as far as the injunctive feature was concerned such a joinder was held proper. "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other." Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523.

that in such a case the tort of each defendant is several when committed, and that it does not become joint because afterward its consequences united with the consequences of several other torts committed by other persons. If the rule were otherwise, the authorities hold that one defendant, however little he might have contributed to the injury of the plaintiff, would be liable for all the injury caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter because no contribution can be enforced between tort feasors.[5]

But where the parties acted in concert and by their concurrent wrongdoing jointly committed the unlawful act complained of, or the act of one causing the injury was made for the benefit of the others, who took advantage of such benefit, they are jointly and severally liable, and should be joined in an action for damages as

In a law action for damages for wrongful diversion, where no equitable relief is asked, and no facts are alleged which would authorize the granting of such relief, plaintiff can not join as defendants persons who did not act jointly in diverting the water. Miles v. Du Bey, 15 Mont. 340, 39 Pac. Rep. 313.

But see the earlier case decided by the same court as last above of Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388, where equitable relief was asked and the verdict of the jury, "that plaintiff had suffered damage in the sum of $1,535.88 by reason of the defendants wrongfully depriving plaintiff of the use of said waters during the year 1889, which damage was apportioned against twelve defendants in divers sums, found by the jury, and set forth in the verdict," was upheld by the Supreme Court. Upon principle as set forth in the text above, and the decision in the case of Miles v. DuBey, *supra*, we believe that this decision was erroneous, although from the record as stated in the opinion no objections were made to the misjoinder of parties defendant.

See, also, Miller v. Highland etc. Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94; Barham v. Hostetter, 67 Cal. 272, 7 Pac. Rep. 689; Miles v. DuBey, 15 Mont. 340, 39 Pac. Rep. 313; Evans v. Ross, 67 Cal. 19, 8 Pac. Rep. 88; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Frost v. Alturas W. Co., 11 Idaho 294, 81 Pac. Rep. 996; Mau v. Stoner, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466; Hillman v. Newington, 57 Cal. 56; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. St. Rep. 80; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Ronnow v. Delmue, 23 Nev. 29, 41 Pac. Rep. 1074; Watson v. Colusa-Parrott etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; Hulsman v. Todd, 96 Cal. 228, 31 Pac. Rep. 39.

[5] Chipman v. Palmer, 77 N. Y. 51; Pomeroy on Remedies, Secs. 207, 308.

parties defendant.[6] Where there is a water master and he fails to apportion the water according to the decree adjudicating such rights, such water master may be joined with the consumers to whom the water was wrongfully given as a party defendant.[7]

The plaintiff in an action for damages must make the party causing the injury the party defendant.[8] Municipalities may be made parties defendant, as well as individuals or private corporations.[9]

6 "It is well settled that where two or more parties, by their concurrent wrongdoing, cause injury to a third person, they are jointly and severally liable. It is optional with the injured party to proceed against one or all of those contributing to the injury, as any one who aids and assists in committing the wrong is liable for the whole." City of Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. Rep. 706.

Where defendants in an action for diversion of water admit the diversion, and set up a claim of right to use the water on land farmed by them jointly, a finding that defendants caused the diversion is not necessary to support a joint judgment against them. Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405.

See, also, Hulsman v. Todd, 96 Cal. 228, 31 Pac. Rep. 39; Hillman v. Newington, 57 Cal. 56; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Bates v. Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949.

If defendant and the corporation for whom he worked were both responsible for trespass to plaintiff's reservoir, plaintiff could elect to sue one or both of them in an action for damages and injunction. Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

Where a contractor constructs for a city a work which, by reason of its nature and location, causes damage to another, which might have been prevented by the exercise of reasonable prudence as to the plan and location of such works, the contractor and the city are severally liable. De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. Rep. 610, 46 Am. St. Rep. 237.

"If two or more parties, acting jointly, wrong and injure another, they are jointly and severally liable for the consequences, and the injured party may at his option sue one or all of those contributing to the injury." Arnold v. Chicago etc. R. Co., —— Kan. ——, 119 Pac. Rep. 373.

7 In an action, where it does not appear from the complaint that the subject of litigation is within any water district, or that there is any water master in charge of the water in question, a demurrer based on the nonjoinder of the water master is not well taken. Boulware v. Parke, 4 Idaho 692, 43 Pac. Rep. 680.

8 Colorado etc. Co. v. Morris, 1 Colo. App. 401, 29 Pac. Rep. 302.

9 Boulder v. Fowler, 11 Colo. 396, 18 Pac. Rep. 337; Hughes v. City of Austin, 12 Tex. Civ. App. 178, 33 S. W. Rep. 607; City of Paris v. Tucker, ——Tex. Civ. App. ——, 93 S. W. Rep. 233; City of San Antonio v. Rivas, Tex. Civ. App., 57 S. W. Rep. 855; Umschied v. City of San Antonio, Tex. Civ. App., 69 S. W. Rep. 496; Levy v. Salt Lake City, 3 Utah 63, 1 Pac. Rep. 160; *Id.*, 5 Utah 302, 16 Pac. Rep. 598; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. Rep.

So, also, may public corporations, such as irrigation districts.[10] And both municipalities or irrigation districts are held to the same rule for negligence, as are private individuals or corporations.

The tenant is the proper party defendant for injuries caused by his acts during his tenancy to the lands of third parties, without the landlord's direction or control.[11]

In Montana it is provided by statute that when damages are claimed for the wrongful diversion of water, in any such action the same may be assessed and apportioned by the jury in their verdicts, and the judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants. In any action concerning joint water rights or joint rights in ditch, unless partition of the same is asked by parties to the action, the Court shall hear and determine such controversy as if the same were several as well as joint.[12]

§ 1686. Pleadings—Complaint.—The material allegations in a complaint in an action for damages for injuries to water rights, ditches, or canals, or other works, lands, growing crops, or personal property, do not differ materially from the allegations of a complaint for damages caused from other injuries. The plaintiff should allege his ownership, or right of possession, of the property in question;[1] the specific injury to such property caused by the act of the

965; Willson v. Boise City, 6 Idaho 391, 55 Pac. Rep. 887; Esberg-Gunst Cigar Co. v. City of Portland, 34 Ore. 282, 55 Pac. Rep. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651.

10 McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193; Turpen v. Turlock Irr. Dist. 141 Cal. 1, 74 Pac. Rep. 295.

11 A landlord is not liable for injuries to adjoining land by the diversion of surface water by the tenant plowing without the landlord's direction or control. Peck v. Peterson, 15 Cal. App. 543, 115 Pac. Rep. 327.

See, also, Booth v. Trager, 44 Colo. 409, 99 Pac. Rep. 60.

12 Rev. Codes Mont. 1907, Sec. 4852; Beach v. Spokane Ranch Co., 25 Mont. 367, 65 Pac. Rep. 106; McNinch v. Crawford, 30 Mont. 297, 76 Pac. Rep. 698; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855.

See, also, Comp. Laws, Utah, 1907, Sec. 1288x40.

1 Where the water rights in question have been decreed to the plaintiff, such decree should be set up. Boulware v. Parke, 4 Idaho 692, 43 Pac. Rep. 680.

Carter v. Wakeman, 42 Ore. 147, 70 Pac. Rep. 393, holding that a complaint for the obstruction of an easement need only state plaintiff's ownership thereof, describing it, without stating how it was acquired.

A complaint, in an action for injury to real estate by water from an irrigation canal, which describes the prem-

defendant,[2] and, in cases of negligence, except in actions caused from the breakage or leakage of reservoirs, where the owner is held to be the insurer against damage,[3] he must set forth the specific act or acts which constituted the negligence upon the part of the defendant, or the facts which constituted his want of reasonable or ordinary care;[4] the amount that he was damaged by such injuries and pray for the same.[5] The motive of the defendant in committing the injuries need not be stated, and when so stated may, upon motion, be stricken out.[6]

ises as the north half of the northwest quarter of a specified section in a designated township and range, with the exception of twenty-nine acres previously sold, which twenty-nine acres were unaffected, sufficiently describes the land against a general demurrer or objection to evidence. Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

In an action for injury to crops by the destruction of a flume feeding and conveying water to irrigate plaintiff's land, and proof of plaintiff's occupancy for over thirty years is sufficient proof of title without deraigning a record title. Gustin v. Harting, —— Wyo. ——, 121 Pac. Rep. 522.

2 Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58, 91 Pac. Rep. 425.

The date of such injury must be pleaded. Miller v. Douglass, 7 Ariz. 41, 60 Pac. Rep. 722.

The damages claimed must be for injuries to plaintiff's enterprise, and not for the value of a certain quantity of water. Parks etc. Co. v. Hoyt, 57 Cal. 44.

3 See Secs. 1669-1674.

See, also, Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79.

4 A complaint that the damage caused was due to defendant's gross and willful negligence in failing to properly construct the canal and headgate, and in failing to properly maintain the headgate and to control the water in the canal, was held to be sufficiently specific as to the manner in which the defendant was guilty of the negligence charged. Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58, 91 Pac. Rep. 425.

See, also, Crowder v. McDonnell, 21 Mont. 367, 54 Pac. Rep. 43; Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74; McDonald v. Bear River etc. Co., 15 Cal. 145, 1 Morr. Min. Rep. 626.

That negligence must be pleaded and proved, see Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907.

5 Boulware v. Parke, 4 Idaho 692, 43 Pac. Rep. 680.

In an action for damages by a riparian owner for injuries caused by the diversion of the waters of a stream to plaintiff's land and cattle, evidence is not admissible for injuries to lands or cattle not mentioned in the complaint, or to lands not bordering on the stream. Heinlen v. Fresno etc. Co., 68 Cal. 35, 8 Pac. Rep. 513.

6 Equitable Securities Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747.

Where a complaint alleged that defendant had constructed an irrigation ditch intersecting land on which the plaintiff had a right of pasture, and that the defendant negligently permitted the ditch to enlarge, and that plaintiff's cattle were lost by miring therein, but did not state that after its enlargement the ditch was larger than its right of way, and did not state whether the plaintiff knew the conditions of the ditch when he turned his cattle on the land, it was held that the complaint did not state a cause of action.[7] Where the plaintiff alleged and relied wholly upon an express contract, he can not recover on a *quantum meruit*, no contract being proven.[8] All special damages must be pleaded before a recovery can be had.[9]

Where the basis of the action is for damages resulting from a breach of contract, the substance of such contract should, at least, be pleaded, also that the plaintiff has complied with all of its terms upon his part to be performed, the facts constituting the breach, and the injuries resulting therefrom, and the amount of damages resulting therefrom. A complaint by one who entered into a contract with a company alleged that the defendant refused to deliver water in sufficient quantities to irrigate plaintiff's crops when there was water flowing in the river sufficient for such purpose, and, at periods of low water, had refused to deliver to the plaintiff the amount of water called for. The complaint did not allege that the plaintiff ever requested the defendant to deliver water to him, and did not state how much was necessary, nor the quantity actually delivered. It was held that the complaint did not state a cause of action.[10]

In an action for damages based upon fraud, a complaint alleging that, by virtue of a water right held by the plaintiff, appurtenant to one of four subdivisions of land which he owned, he was entitled to receive from the defendant irrigation company water

7 Messenger v. Gordon, 15 Colo. App. 428, 62 Pac. Rep. 956.

8 Wright v. Sonoma County, 156 Cal. 475, 105 Pac. Rep. 409, 134 Am. St. Rep. 140.

9 Sommerville v. Idaho Irr. Co., —— Idaho ——, 123 Pac. Rep. 302.

10 Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

It was held that where one framed his complaint for damages on the theory that the defendants were liable for a violation of a general duty, that he could still recover for breach of contract, and where the defendant in his answer had set up the contract. Crowder v. McDonnell, 21 Mont. 367, 54 Pac. Rep. 43.

with which to irrigate the parcel of land on which the water right was located; that he did not know the true location of the water right, and that the defendant company was the only depositary of the desired information; that on application of the general manager plaintiff was falsely and fraudulently informed that the evidence in his custody showed the location of the water right on a subdivision on which no such right existed; that such representation was knowingly made that the plaintiff should act thereon; and that he did act thereon. It was held by the Court that such complaint was sufficient.[11]

In an action for damages by a riparian owner as such, a complaint which states that the plaintiff is the owner and in the possession of a certain tract of land, describing it, through which a certain stream was accustomed to flow, and that the defendant diverted the water from the stream from its accustomed channel to his injury, describing it, need not also allege that the plaintiff had the right to the use of the water, since such right is implied from his ownership of the land.[12]

The courts are usually liberal in allowing amendments to pleadings, and should always allow them when they do not impair the rights of the opposite party by such procedure.[13]

§ 1687. **Pleadings—Answer—Cross-complaint.**—The defendant may demur to the complaint of the plaintiff, upon any ground allowed by the statute of the State where the action is brought.[1]

11 Cleghon v. Barstow Irr. Co., 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020.

12 Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574.

See, also, damages to riparian ownership, Secs. 1662, 1665.

13 An amendment of the *ad damnum* clause by increasing the amount claimed may be allowed during the trial. Shields v. Orr Extension D. Co., 23 Nev. 349, 47 Pac. Rep. 194.

See, also, Saint v. Guerrerio, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39; Gould v. Stafford, 101 Cal. 32, 35 Pac. Rep. 429.

1 Boulware v. Parke, 4 Idaho 692, 43 Pac. Rep. 680; Equitable Securities Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747.

The failure of a complaint to state a cause of action may be availed of by demurrer, by objection to the evidence, by motion for judgment on the

In the consideration of a general demurrer, by the Court, every intendment favorable to the pleader should be indulged in to sustain the pleading.[2] But objections to a complaint, not taken by demurrer or answer, are waived.[3] The defendant may also answer the allegations of the plaintiff's complaint by merely denying the allegations therein contained.[4] The defendant may, also, in addition thereto, set up as many affirmative defenses as he may have, such as contributory negligence,[5] contract,[6] the limitation of the action,[7] or act of God.[8] He may amend his answer by omitting the original defense, and set up by new allegations an entirely new defense.[9] Again, should the defendant have a cause of action

pleadings, by motion in arrest of judgment, or on motion for new trial. Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

2 Cleghon v. Barstow Irr. Co., 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020.

3 Under Rev. Codes, Sec. 6539, providing that objections to a complaint, not taken by demurrer or answer, are waived, an objection to a complaint for injury to land, because it is indefinite in the description of the land involved, must be made by special demurrer, or it is waived. Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

4 The failure of the owner of an irrigation ditch to file a statement and map thereof as required by the statute is no defense to an action by the owners against a railroad company for the destruction of the ditch in building its roadbed. Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322.

It is no defense to an action against a water company for refusal to furnish water to an applicant for water for irrigation, that his ditch for taking water from the ditch of the company is in part upon its right of way, if it be there with its consent, or if its refusal was not based on such ground. Lowe v. Yolo County etc. Co., 157 Cal. 503, 108 Pac. Rep. 207, 8 Cal. App. 167, 96 Pac. Rep. 379.

The fact that a person entitled to the use of one-half of the water of an irrigation ditch is denied such right by the other owner is no defense to an action by the latter for damages caused by the former digging another ditch and appropriating all of the water. Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

In an action for damages sustained by defendant's cutting plaintiff's irrigation ditch and diverting water from plaintiff's land, it is no defense that the defendant was a lessee of plaintiff and had a right to take the water as a tenant for the year, or, if not a tenant, that he was a licensee of plaintiff, where such tenancy or license had been terminated by defendant's act of "jumping" the land and claiming the same adversely to plaintiff. White v. Brash, 3 Ariz. 212, 73 Pac. Rep. 445.

5 See Sec. 1688.

6 See Sec. 1689.

7 See Sec. 1690.

8 See Secs. 1691, 1692.

9 As an amendment to a pleading may be allowed to correct certain enumerated mistakes, or "a mistake in any other respect," and "in other

against the plaintiff which is germane to the original action, he may set the same up by way of cross-complaint. But he should plead his right and the injuries thereto with the same particularity as is required of the plaintiff in his complaint.[10]

§ 1688. Pleadings—Defenses—Acts of the plaintiff and contributory negligence.—The plaintiff can not recover where the injuries to his property were the direct result of his own acts, or where he assisted the defendant by acts of his own whereby the injuries resulted, or through his own negligence. So, where such is the case, the defendant in an action for damages may set up such acts of the plaintiff as a defense. So, it is held in an action for damages for the diversion of the water by the building and maintenance of a dam by defendants, and where it appeared that plaintiff assisted in maintaining the dam and diverting the water, he can not recover, and that such participation in the diversion of the water need not be specially pleaded, but that it might be proved under the issue raised by the defendant's denial that the plaintiff was injured by such diversion.[1]

particulars'' (Code Civil Proc., Sec. 473), the Court may allow an amendment to an answer, though it is mainly to correct a mistake of law made by defendant's attorney. Gould v. Stafford, 101 Cal. 32, 35 Pac. Rep. 429.

In an action for depriving plaintiff's crops of the necessary water, it is held that it was no defense that plaintiff did not have a valid appropriation of the water claimed by him so long as it was not defendant's. Dalton v. Kelsey, 58 Ore. 244, 144 Pac. Rep. 464.

10 Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191; Peters v. Lewis, 33 Wash. 617, 74 Pac. Rep. 815.

Damages from the issuance of a temporary injunction can not be recovered in the injunction suit itself by cross-complaint. Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

1 Churchill v. Bauman, 95 Cal. 541, 30 Pac. Rep. 770; 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43. In the first appeal Haven, J., dissented for the reason that such defense should have been specially set out in the answer.

In an action against an irrigation company, by a stockholder, for failure to supply her with her proportion of the water, where the defendant relied upon the defense that it had done the best it could, and that the ditch was new, and that the laterals built by the plaintiff were not properly constructed, it was held that the questions thus raised were for the jury. Rocky Ford etc. Co. v. Simpson, 5 Colo. App. 30, 36 Pac. Rep. 638.

See, also, McLellan v. Brownsville etc. Co., 46 Tex. Civ. App. 249, 103 S. W. Rep. 206; Cline v. Stock, 71

Where the injuries to the plaintiff resulted from his own negligent act, the defendant may set up as one of his defenses that of contributory negligence, and, if proven, such a defense will be good. And, in this connection, contributory negligence may be defined as the want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury, as the proximate cause thereof, without which the injury would not have occurred.[2] But, the contributory negligence in cases of this nature must consist of some overt act of the plaintiff, which was the proximate cause of his injuries. So, in an action for flooding land, in order to successfully maintain a defense of contributory negligence, the defendant must show that the plaintiff himself opened the waste gate of the defendant's canal, or broke through its bank, or committed some other overt act, and thus caused the overflow of the water.[3]

The duty to exercise reasonable and ordinary care in the construction, maintenance, or operation of a ditch, canal, or other

Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249.

2 Moakler v. Willamette etc. R. Co., 18 Ore. 189, 22 Pac. Rep. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717; Emison v. Owyhee D. Co., 37 Ore. 577, 62 Pac. Rep. 13; Platte etc. Co. v. Dowell, 17 Colo. 376, 30 Pac. Rep. 68.

An affirmative defense in an action for damages by drainage from defendant's lands, simply stating that, if plaintiff was damaged, it was by reason of his own neglect, and not by any act of the defendants, is sufficient. Peters v. Lewis, 33 Wash. 617, 74 Pac. Rep. 815.

Where plaintiffs claimed injuries to their premises by the overflow of defendant's irrigation ditch, it was not liable for that part of the injury which was caused by plaintiffs' own acts in excavating their cellar and placing the foundation of their house so dangerously close to the ditch or on such low and wet ground that the cellar was flooded and the earth soaked and softened under the foundations by percolating water, which might have come into and stood stagnant in the cellar if the ditch had never overflowed. Malmstrom v. People's etc. Co., 32 Nev. 246, 107 Pac. Rep. 98, the Court saying: "If the defendant were holden for any injury resulting to the plaintiffs from their own acts under these circumstances, the owners of ditches that traverse the lands of others would have little protection for their prior rights."

See, also, Johnston v. Hyre, 83 Kan. 38, 109 Pac. Rep. 1075; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22.

3 Emison v. Owyhee D. Co., 37 Ore. 577, 62 Pac. Rep. 13.

works, so that property shall not be injured from overflow or leakage, rests wholly with the ditch owner. Furthermore, there is no duty resting upon the land owner to avoid the consequences of the ditch owner's negligence. The doctrine of contributory negligence, therefore, is usually not applicable to cases of this nature; and, where the plaintiff is merely passive, although he may have had knowledge of the defects in the works, and could by effort upon his part have prevented the injury, he is not liable for contributory negligence on account of his mere inactivity.[4] And it is held that

[4] An instruction was also asked to the effect that the plaintiff himself should have exercised ordinary care to have avoided the consequences of defendant's acts, and, failing to do so, the parties were in mutual fault. The doctrine of contributory negligence is not applicable to cases of this nature, where the defendant had knowledge of the defects of its ditch, and could have prevented the injury. Under these circumstances, no duty rested upon the plaintiff to have avoided the consequences of defendant's acts." Shields v. Orr. etc. Co., 23 Nev. 349, 47 Pac. Rep. 194.

The fact that the plaintiff knew of the dangerous condition of a dam, and failed to institute special proceedings, for his protection, will not bar an action by him for damages caused by a subsequent breaking of the dam. Hollenbeck v. Dingwell, 16 Mont. 335, 40 Pac. Rep. 863, 50 Am. St. Rep. 502.

Where an action is brought to recover damages for injuries immediately resulting to land by the construction of a dam, and not for any injury that might thereafter occur, evidence as to whether or not plaintiff had made any effort to protect the land from erosion is immaterial. Oldenburg v. Oregon Sugar Co., 39 Ore. 564, 65 Pac. Rep. 869.

See, also, Reynolds v. Chandler River Co., 43 Me. 513; Plummer v. Penobscot Lum. Association, 67 Me. 363.

See, also, McCarty v. Boise City C. Co., 2 Idaho 225, 10 Pac. Rep. 623; McLeod v. Lee, 17 Nev. 103, 28 Pac. Rep. 124; Bacon v. Kearney Vineyard Syndicate, 1 Cal. App. 275, 82 Pac. Rep. 84; North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829; Fraler v. Sears etc. Co., 12 Cal. 555, 73 Am. Dec. 562; Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; Arave v. Idaho C. Co., 5 Idaho 68, 46 Pac. Rep. 1024; Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784.

See, also, Shields v. Orr etc. Co., 23 Nev. 349, 47 Pac. Rep. 194; Consolidated etc. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. Rep. 582; Stuart v. Noble Ditch Co., 9 Idaho 765, 76 Pac. Rep. 255; McLellan v. Brownsville etc. Co., 46 Tex. Civ. App. 249, 103 S. W. Rep. 206.

But see Sweeney v. Montana Cent. R. Co., 25 Mont. 543, 65 Pac. Rep. 912, where it was held that, in an action for injuries caused by the diversion of a stream, evidence that plaintiff, by a small expense in riprapping the bank of the new channel,

in order that contributory negligence of the plaintiff should defeat his recovery, his act must be the proximate cause of his injury; and if, without certain remote negligence, he still would have suffered the injuries for which he has brought an action for damages, the same was not contributory, in a legal sense.[5]

It was held in Colorado that where a party sues for damages by being restrained from using the water from a certain ditch, if it is shown that he could have obtained sufficient water from another source, he will not be entitled to receive a greater sum than he would have had to expend to obtain water from such source.[6]

§ 1689. **Pleadings—Defenses—Grant or contract.**—A good defense if properly pleaded is that the defendant had acquired the right to commit the act or acts complained of by grant or contract. So, where the defendants had a grant in writing for a valuable consideration for the erection of certain dams across a river, a judgment against them for damages under a complaint charging them with "wrongfully erecting and maintaining" such dams was erroneous, as violating the rights of the defendants under the grant.[1] But it is held in Oregon that a clause in a lease of water power, that, in default of a sufficient supply of water the lessor shall forfeit a *pro rata* proportion of the water rents accruing during such deficiency, is not a provision for the liquidated damages, such as will prevent the recovery of other damages by the lessee, when it appeared that the deficiency was the result of the lessor's failure to repair injuries to the race and dam.[2]

Local customs can not change the law of negligence; but it is held by the Utah Court, that when such customs are reasonable, un-

could have avoided or diminished the damages to his property, was admissible, it being his duty to use reasonable care to save it from injury.

See, also, Fullerton v. Fordyce, 144 Mo. 519, 44 S. W. Rep. 1053; Douglass v. Stephens, 18 Mo. 362; Lawson v. Price, 45 Md. 123; Scherrer v. Baltzer, 84 Ill. App. 126; Kansas Pac. R. Co. v. Mihlman, 17 Kan. 224.

[5] O'Connor v. North Truckee D. Co., 17 Nev. 245, 30 Pac. Rep. 882.

[6] Mack v. Jackson, 9 Colo. 336, 13 Pac. Rep. 542.

[1] Peay v. Salt Lake City, 11 Utah 331, 40 Pac. Rep. 206; Sweetland v. Grants Pass etc. Co., 46 Ore. 85, 79 Pac. Rep. 337; Alexander v. Winters, 23 Nev. 475, 49 Pac. Rep. 116; *Id.*, 24 Nev. 143, 50 Pac. Rep. 798; Malmstrom v. People's etc. Co., 32 Nev. 246, 107 Pac. Rep. 98.

[2] Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

interrupted, and uniform, and not contrary to public policy, they may affect the interpretation of contracts in their locality.[3]

The fact that there are also other wrong-doers is no defense to an action for damages, although the evidence of such is receivable in mitigation of damages.[4]

§ 1690. Pleadings—Defenses—Limitation of actions and prescription.—An action for damages must be brought within the period provided by the statute of limitations of the State where the cause of action arose; otherwise it will be barred. And, upon this subject, it is held that the statute of limitations begins to run from the time the cause of action accrues, even though the actual damages resulting therefrom may not have accrued until some time afterwards.[1] So, it is held that injuries to land from water seeping from a properly constructed irrigation ditch which is intended to be permanent constitutes a single cause of action; and, as affected by the statute of limitations accrues at the beginning of the injury.[2] And, in cases where the statute of limitations has run,

[3] Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829; Hartson v. Dill, 151 Cal. 137, 90 Pac. Rep. 530.

[4] Gould v. Stafford, 77 Cal. 66, 18 Pac. Rep. 870; Beck v. Bono, 59 Wash. 479, 110 Pac. Rep. 13.

An irrigation company sued for failure to furnish sufficient water for plaintiff's rice crops during a certain season can not rely upon a release of liability contained in a contract for service for the succeeding season if there was no other consideration than the agreement for such subsequent service; the company being legally bound to furnish the water. Lone Star Canal Co. v. Cannon, —— Tex. Civ. App. ——, 141 S. W. Rep. 799.

[1] Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795, and cases cited.

Where plaintiff and defendant had an agreement whose express purpose was to settle and establish the respective rights of the parties to the water and ditches therein mentioned, an action by plaintiff for interfering with his rights thereunder, in that defendant entered upon the ditch upon his own land and diverted the water so that it failed to reach the land of the plaintiff, but did not enter upon the plaintiff's land, is an action on the case, and is barred in two years under L. O. L., Sec. 8, subd. 1, and is not an action on the contract or for trespass, which are barred in six years by L. O. L., Sec. 6, subd. 1. Dalton v. Kelsey, 58 Ore. 244, 114 Pac. Rep. 464.

[2] Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

See, also, Sulens v. Chicago etc. R. Co., 74 Iowa 659, 38 N. W. Rep. 545, 7 Am. St. Rep. 501; Drake v. Chicago etc. R. Co., 63 Iowa 302, 19 N. W. Rep. 215, 50 Am. Rep. 746; Kansas

where such statute is properly pleaded, it constitutes a good defense in an action for damages of all character.[3] But in order to maintain such a defense, or one based upon a prescriptive right, it must be properly pleaded.[4] A finding of fact which found that the damages sought to be recovered accrued within the period covered by the statute of limitations immediately prior to the commencement of the action, when such statute is made a defense, is a sufficient finding on such defense, and negatives it.[5]

§ 1691. Act of God or inevitable accident as a defense for injuries to property.—The defense of act of God, or *vis major,* or inevitable accident, has been oftentimes interposed in actions for damages for injuries from the flooding of land, or other destruction of property, resulting from the breakage, overflow, or leakage of works. As to whether such a defense can be maintained or not depends upon the circumstances of each particular case. To be sure, "No one is responsible for that which is merely the act of God, or inevitable accident."[1] But, in order to determine whether a

City v. Frohwerk, 10 Kan. App. 120, 62 Pac. Rep. 432.

A cause of action for flooding lands by the erection of a dam accrues for the purpose of determining limitations when the land is flooded, and not when the dam is erected. Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985.

3 Middlekamp v. Bessemer etc. Co., 48 Colo. 102, 108 Pac. Rep. 280, 29 L. R. A., N. S., 790; Trombe v. Horsbuckle, 3 Mont. 283; Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574; Suter v. Wenatchee etc. Co., 35 Wash. 1, 76 Pac. Rep. 298; Conniff v. San Francisco, 67 Cal. 45, 7 Pac. Rep. 41; Kansas City v. Frohwerk, 10 Kan. App. 120, 62 Pac. Rep. 432.

4 Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052.

For pleading a prescriptive right, see Sec. 1055.

5 Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574.

1 Chidester v. Consolidated D. Co., 59 Cal. 197.

Canal companies and others attempting to control and use water are only required to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature. They are not required to meet unlooked-for and overwhelming displays of power—such as storms of unusual violence as to surprise cautious and reasonable men. Lincoln v. Monroe etc. Co., 18 Utah 343, 54 Pac. Rep. 1008, 72 Am. St. Rep. 784.

"So far as disclosed by the evidence, the damage proximately resulted, not from human agency, but from one of those unexpected, unanticipated, superior causes over which the canal company had no control, and which no reasonable precaution could have prevented. We think it clear,

ditch, canal, or reservoir owner can maintain such a plea in an action for damages against him, it is necessary to ascertain the true legal significance of the term "act of God," or "inevitable accident." One of the best definitions that we have found and especially applicable to the cases under discussion, is taken from the work of an eminent law book writer, and we will therefore adopt it as our own. It is stated thus: "The act of God signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may, indeed, be considered to mean something in opposition to the act of man, as storms, tempests, and lightning. The above maxim may therefore be paraphrased and explained as follows: It would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there has been no laches."[2] The expression, as

therefore, that, under the case as presented here, the defendant can not be held liable." Grand Valley Irr. Co. v. Pitzer, 14 Colo. App. 123, 59 Pac. Rep. 420.

See, also, Proctor v. Jennings, 6 Nev. 83, 3 Am. St. Rep. 240, 4 Morr. Min. Rep. 265; Mathews v. Kinsell, 41 Cal. 512; Ohio etc. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. Rep. 529, 36 Am. St. Rep. 359; Blythe v. Denver etc. R. Co., 15 Colo. 333, 25 Pac. Rep. 762, 11 L. R. A. 615, 22 Am. St. Rep. 403; Denver etc. R. Co. v. Andrews, 11 Colo. App. 204, 53 Pac. Rep. 532; Town of Jefferson v. Blake, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214; Broadway Mfg. Co. v. Leavenworth etc. Co., 82 Kan. 616, 106 Pac. Rep. 1034; Eagan v. Central Vermont R. Co., 81 Vt. 141, 69 Atl. Rep. 732, 16 L. R. A., N. S., 928, 130 Am. St. Rep. 1031; Buel v. Chicago etc. R. Co., 81 Neb. 130, 116 N. W. Rep. 299.

A charge which after defining an act of God stated that a person is not liable for injuries resulting therefrom, "provided reasonable and ordinary care is exercised to guard against such occurrences," is erroneous, since a person is not bound to anticipate or guard against an act of God. Lyon v. Chicago etc. R. Co., —— Mont. ——, 121 Pac. Rep. 886.

[2] Broom's Legal Maxims, pp. 227, 228.

"But an act of God, in legal phraseology, means an accident against which ordinary skill and foresight are not expected to provide. This, applied to water courses, would include only floods or extraordinary freshets, and not such rises or high water in a stream as are usual and ordinary, and reasonably anticipated at particular seasons of the year." Dorman v. Ames, 12 Minn. 451 (Gil. 347).

The term "act of God," in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. Gulf Red Cedar Co. v. Walker, 132 Ala. 553, 31 So. Rep. 374.

will be noticed, excludes the idea of human agency; and, therefore, if it appears that the injuries happened in any way through the intervention of man, it can not be held to have been the act of God, but must be regarded as the act of man.[3] This principle is well illustrated by the Circuit Court of Appeals in the recent Salton Sea cases.[4] There, as the Court states: "The evidence shows conclusively that it was the defendant's method of constructing the intakes that resulted in turning the flood of the Colorado River into the Salton Sink," and the result of which was the destruction of a large amount of farming land. And, although "the fact that an extraordinary flood came down the river contributing to the disaster," the Court held that that fact did not relieve the defendant from liability. If it had not been for the intervention of man in the construction of the works, the flood, although extraordinary, would have passed down the river without doing damage, as it had done on previous occasions. Therefore, the Court held that the injuries could not be regarded as having been caused by act of God, but must be regarded as the act of the ditch owners, and for which they were held liable.

As well stated in a Washington case:[5] "The 'act of God' as that expression is known in law, is a mixed question of law and fact. The defining and limitation of the term, its several characteristics, its possibilities as establishing and controlling exemption from liability, are questions of law for the Court; but the existence or non-existence of the facts upon which it is predicated are questions for the jury."[6]

So, therefore, the correct rule of law in actions for damages, where the defense is set up that the injuries were caused by act of

[3] Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115; Chidester v. Consolidated D. Co., 59 Cal. 197.

[4] California Dev. Co. v. New Liverpool Salt Co., 172 Fed. Rep. 792, 97 C. C. A. 214, quoting from Kinney on Irr., 1st Ed., Secs. 314, 315.

[5] Gibson v. Cascade Lbr. Co., 54 Wash. 289, 103 Pac. Rep. 11.

[6] Where the Court, in instructing the jury, defined "an extraordinary flood" that it "means one of the heaviest that ever occurred in that locality," it was held that such instruction was not misleading, where the jury were also instructed that if the river overflowed its banks by reason of an extraordinary flood, or freshet, which it was not capable of carrying within its banks, and was not occasioned by the dam of the defendants, plaintiffs could not recover, and that defendants would be excused from liability on account of an extraordinary flood which could not be foreseen and guarded against. Greeley

God, is that, when two causes combine to produce the injury, both of which causes are, in their nature, proximate, the one being a negligent act of the defendant, and the other in the nature of an act of God, for which neither party is responsible, then the defendant is liable for such loss as is proximately caused by his own negligent act concurring with the act of God, provided the loss would not have been sustained by the plaintiff, but for such negligent act of the defendant.[7]

In order to take advantage of act of God as a defense, it must be properly pleaded by the defendant.[8] No definite rule can be laid down as to what will or will not constitute a defense of act of God which will apply to all cases, but it is a question of fact for the jury to determine under the facts and circumstances of each particular case, and under the proper instructions of the Court.[9]

Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985. Judgment in this case was rendered in favor of the plaintiffs, and affirmed by the Supreme Court.

See, also, Jordan v. City of Mt. Pleasant, 15 Utah 449, 49 Pac. Rep. 746; Mulrone v. Marshall, 35 Mont. 238, 88 Pac. Rep. 797; Turner v. Tuolumne etc. Co., 25 Cal. 397, 1 Morr. Min. Rep. 107; Burbank v. West Walker River D. Co., 13 Nev. 431; Brown v. Pine Creek R. Co., 183 Pa. 38, 38 Atl. Rep. 401; Ohio etc. Co. v. Ramey, 139 Ill. 9, 28 N. E. Rep. 1087, 32 Am. St. Rep. 176; Van Duzer v. Elmira etc. Co., 75 Hun 487, 27 N. Y. Supp. 474; Fairbury etc. Co. v. Chicago etc. R. Co., 79 Neb. 854, 113 N. W. Rep. 535, 13 L. R. A., N. S., 542; Ryan v. Rogers, 96 Cal. 349, 31 Pac. Rep. 244; Greeley etc. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. Rep. 843; City of Oroville v. Indiana Gold Dredging Co., 165 Fed. Rep. 505; Vyse v. Chicago etc. R. Co., 125 Iowa 90, 101 N. W. Rep. 736.

7 Mulrone v. Marshall, 35 Mont. 238, 88 Pac. Rep. 797.

Where damage to property by a flood was occasioned by a combination of negligence of the owner of a dam and by an unprecedented flood constituting an act of God, the owner of the property can recover damages from the owner of the dam provided his negligence was the proximate cause of the injury. Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

See, also, Meisner v. City of Dillon, 29 Mont. 116, 74 Pac. Rep. 130; Birsch v. Citizens Electric Co., 36 Mont. 574, 93 Pac. Rep. 940.

8 Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726; Chicago etc. R. Co. v. Shaw, 63 Neb. 380, 88 N. W. Rep. 508, 56 L. R. A. 341.

9 Mulrone v. Marshall, 35 Mont. 238, 88 Pac. Rep. 797; Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. Rep. 843; Greeley v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985; Ohio etc. Co. v. Thillman, 143 Ill. 127, 32 N. E. Rep. 529, 36 Am. St. Rep. 359; Chicago etc. Co. v. Schaffer, 26 Ill. App. 280.

§ 1692. Act of God as a defense for failure to deliver water under duty or contract.—Where a person or company is under the duty or contract of furnishing water to consumers, and is prevented from so furnishing the water by storms whereby their works are broken, the defense of act of God has often been pleaded in actions for damages for the breach of such contract or the violation of such duty.[1] But, as to whether such a defense can be maintained or not depends entirely as to whether or not the disaster was caused solely by an act of God, as defined in the preceding section,[2] or whether the acts of the defendant contributed to the injuries. Where, however, the injuries resulted from the failure of the company to furnish water caused solely by act of God, such as some extraordinary and unprecedented storm, or even some extraordinary and unprecedented drought, whereby the water in the natural source of supply is so lowered to such an unusual stage that it could not have been anticipated by engineering skill or the residents of the neighborhood,[3] or through some other unforeseen and extraordinary occurrence, which ordinary prudence might not have anticipated, and at the same time have taken the proper steps to guard against, through which it is a physical impossibility for the company to furnish the water as contracted, the company will be excused from performing the contract in that respect. In such a case there will be no such breach of the contract that an action will lie for damages by a consumer against the company for its failure to perform.[4]

1 For such a defense in actions for damages to property, see Sec. 1507.

2 See Sec. 1691.

3 "If the stream had, in consequence of drought, failed to furnish the necessary amount of water to operate defendant's mills, this would have been a destruction of the subject matter of the contract which would have been excused." Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

A party must perform his contract, unless its performance is rendered impossible by act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. Ingle v. Jones, 69 U. S. 2 Wall. 1, 17 L. Ed. 762.

See, also, Beebe v. Johnson, 19 Wend. 500, 32 Am. Dec. 518.

4 The impossibility of repairing leased dams or races ten days after the water falls to the average winter stage, as agreed upon by the lease, because the water immediately rises again and continues high, releases the lessor from liability for breach of the covenant, if he makes the repairs as soon as possible. Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

Such is the rule of law upon the subject, especially in cases of fire, but the fact is that the cases are very few where a water company has been excused from the solemn obligations of its contracts, whereby it bound itself to furnish its consumers with water at a certain time, for such an alleged reason. There is usually some fact connected with the case which does not bring it within the rule. As was said in a Colorado case: "Under the conditions and circumstances shown in this case, the results to the users of water, in a failure to supply it, are so disastrous and irremediable that the party contracting to supply it should not be exonerated from a failure to perform, except under circumstances clearly showing that the failure was chargeable to *vis major*, and not to negligence and inattention."[5] It is no excuse for the non-performance of a contract that it is impossible for the company to fulfill it, if the performance be in its nature possible.[6]

If, however, the failure to furnish the water was not due to any negligence or inattention upon the part of the company, and it is provided in the contract itself that the company is exempt from all liability on account of any unforeseen causes of accident, or where from natural causes there is an unusual shortage of water in its source of supply, the company will not be able to furnish its consumers the amount of water contracted for, the courts will uphold such a provision in the contract and excuse the company from such a cause from furnishing the full amount of water;[7] and, in such a

For release from liability from torts by act of God, see Sec. 1691.

[5] Pawnee etc. Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. Rep. 381; Sacchi v. Bayside Lbr. Co., 13 Cal. App. 72, 108 Pac. Rep. 885; Evans v. Prosser Falls Land & Pr. Co., 62 Wash. 178, 113 Pac. Rep. 271; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213.

[6] The facts "do not tend to show that the source of the water was wholly exhausted, so as to render the irrigation of the land physically impossible; and for this reason the act of God is not involved." Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

See, also, Reid v. Alaska etc. Co., 43 Ore. 429, 73 Pac. Rep. 337; Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726, where it was held that it was no excuse that the work could not be profitably done within the time agreed upon.

Ryan v. Rogers, 96 Cal. 349, 31 Pac. Rep. 244.

[7] Landers v. Garland Canal Co., 52 La. 1465, 27 So. Rep. 717.

A contract releasing a company from damages by reason of unavoidable accidents and breaks in its works, will not release a liability for damages which are the result of gross and continued negligence. Catlin etc.

case, the consumers are not liable to the company for the water rates for the amount of water not furnished.[8] And, contracts which provide that in time of unusual drought the consumers shall prorate the supply according to their respective rights are upheld by the courts, and, where the shortage of supply is due to no fault of the company, it is exempt from further liability for not furnishing the full amount.[9] But it should be provided in such contracts to the effect that the consumers should have a *pro rata* deduction from the sum stipulated to be paid each year for the water.[10] But where the deficiency was caused by other means than by an act of God, as where there would have been sufficient water except for some new use made by the company, the company will be held liable.[11]

§ 1693. **Evidence—Burden of proof.**—In all actions for damages for the injury to property from breakage and overflow, except in reservoir and dam cases in jurisdictions where by statute, or by court decisions, the owner is made the insurer against all damages,[1] the gist of such actions is negligence; and, therefore, until such negligence is shown by the evidence, there can be no liability upon the part of the defendant causing the injuries.[2] We have shown in previous sections that the acts constituting the negligence must be alleged with particularity, otherwise the complaint does not state a cause of action and is demurrable.[3] And, it being necessary to allege such acts, it is also necessary to prove them by a preponderance of the evidence; and, therefore, the burden of proof rests in the first instance upon the plaintiff to prove the negligence in

Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391.

See, also, Landers v. Garland Canal Co., 25 La. 1465, 27 So. Rep. 717.

But see Dalton v. Selah Water Users Ass'n, —— Wash. ——, 122 Pac. Rep. 4, holding that the maxim of *res ipsa loquitur* applies to the breaking of an irrigation ditch.

8 Landers v. Garland Canal Co., 52 La. 1465, 27 So. Rep. 717.

9 Souther v. San Diego Flume Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849; Jackson v. Indian Creek etc. Co., 16 Idaho 430, 101 Pac. Rep. 814; Great Western Sugar Co. v. White, 47 Colo. 547, 108 Pac. Rep. 156.

For prorating water, see Sec. 769.

10 Great Western Sugar Co. v. White, 47 Colo. 547, 108 Pac. Rep. 156.

11 Evans v. Prosser Falls etc. Co., 62 Wash. 178, 113 Pac. Rep. 271.

1 See Secs. 1668-1671.

2 See Sec. 1672.

3 See Sec. 1686.

conformity with the allegations in his complaint charging the same. In reservoir and dam cases, however, where the owner is made the insurer, it is only necessary for the plaintiff to prove the injury and that it was caused from such works, and it is not necessary to prove negligence upon the part of the defendant.[4] But, in ditch and canal cases, owing to the fact that with ordinary care a ditch and canal can be rendered harmless, and owing to the rule of law that the owner thereof is not made the insurer against all damages, the mere fact of the water overflowing, breaking, or seeping through the banks of a ditch or canal, while it may be one fact tending to prove negligence upon the part of the owner thereof, which may be considered by the jury together with the other facts and circumstances surrounding each particular case, it can not be considered as a legal presumption in and of itself of negligence. Mr. Farnham states a different rule, as follows: "If a break occurs, the burden is upon the owner of the ditch to establish his freedom from negligence, and his failure to do this will render him liable."[5] That this is not the rule of law in these cases is borne out by the great weight of authority. As was held in an early California case, the rule of *res ipsa loquitur* does not apply to such cases.[6] In a late Washington case, however, the exact contrary rule was adopted, and the Court said: "We think the better rule is that the doctrine of *res ipsa loquitur* applies in cases of this character."[7] If the rule of reasonable and ordinary care in ditch and canal cases is to be adhered to, and the ditch owner is not to be held as the insurer of all damages caused by the escape of the water, the rule as stated by Mr. Farn-

[4] Rylands v. Fletcher, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220; affirming L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799; Texas etc. R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. Rep. 902; Clear Creek etc. Co. v. Kilkenney, 5 Wyo. 38, 36 Pac. Rep. 819; Garnett etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79; Larimer County D. Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. Rep. 1111; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Canyon City R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. Rep. 1127; Mustang etc. Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800; Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

[5] Farnham on Waters and Water Rights, Sec. 634.

[6] Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31.

[7] Dalton v. Selah W. Users' Assn., —— Wash. ——, 122 Pac. Rep. 4.

ham is not the correct one as laid down by the authorities, neither is it the logical one.[8]

The mere fact of the breaking of a ditch, although it is one circumstance of evidence which may be considered by the jury with the other circumstances proven in any particular case, does not, in and of itself raise the legal presumption of negligence, and thus throw the burden upon the defendant "to establish his freedom of negligence." But, as in other cases involving negligence, the negligent acts of the defendant must be pleaded, and the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the negligent acts of the defendant as pleaded.[9] And, fur-

[8] "A ditch owner is not an insurer of his ditch against damages which may result from its operation." Fleming v. Lockwood, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263.

See, also, Howell v. Big Horn Basin C. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596; King v. Miles City etc. Co., 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506; Chidester v. Consolidated D. Co., 59 Cal. 197; Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784; Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

The owner of a ditch is not liable *per se* from leakage from his ditch, without negligence upon his part, by the burrowing of gophers or other animals. Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31. However, if the ditch owner is negligent and injuries occur from this cause, he is liable. Greeley etc. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329.

[9] "The gist of this action is negligence; and until some negligence is shown there can not be said to be any liability." Hopkins v. Butte etc. Co., 13 Mont. 223, 33 Pac. Rep. 817, 40 Am. St. Rep. 438.

"The burden of proof was on the plaintiff to show that this water broke through the mismanagement or imperfect construction, repair, or management of the ditch, and damaged the property of the plaintiff; and the burden devolves upon the plaintiff to show the amount of damages to her property, or the value of the property destroyed." Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329.

Where several acts of negligence are charged in the complaint, a recovery will be sustained on proof of any one of them, provided the negligence proved was the proximate cause of the injury; but where two acts of negligence are charged, and the pleading discloses that neither act in itself would have caused the injury, but that the concurrence of both was necessary, proof of both acts is necessary to justify a recovery. Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

The burden in such case is on the one claiming damages to show an appreciable injury to his crops. Lum Ah Lee v. Ah Soong, 16 Hawn. 163.

See, also, Malmstrom v. People's Drain D. Co., 32 Nev. 246, 107 Pac. Rep. 98; King v. Miles City Irr. Co., 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506; Tenney v. Miners' D. Co., 7 Cal. 335, 11 Morr. Min. Rep.

thermore, the proof must conform to the allegations of negligence as set forth in the complaint. Otherwise there will be a fatal variance, and the plaintiff can not recover.[10]

Where the defendant in his answer sets up an affirmative defense,[11] the burden is, of course, upon the defendant to prove such defense, by a preponderance of all the evidence in the case upon that point. So, it therefore follows that where the defendant sets up an act of God as a defense, the burden of proof is upon him.[12]

It is error for the Court to refuse to admit in evidence an original complaint for the purpose of contradicting the allegations of an amended complaint.[13] It is competent to prove that a headgate in defendant's ditch was lowered after the suit was brought, and that the water then flowed down, and ceased to stand in it, as evidence tending to prove that the defendants were negligent in not lowering the gate before the injury complained of.[14] Photographs after

31; Colorado etc. Co. v. Morris, 1 Colo. App. 401, 29 Pac. Rep. 302; Fleming v. Lockwood, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 620, 13 Am. & Eng. Ann. Cas. 263; Howell v. Big Horn Basin C. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596; Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58, 91 Pac. Rep. 425; Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296; Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828; Poutra v. Martin, —— Tex. Civ. App. ——, 135 S. W. Rep. 725.

10 "We think the law is well settled that a plaintiff can not declare on one theory and recover on another. It is a well-established rule of evidence that the testimony offered must correspond with the allegations in the complaint, and not show an entirely different state of facts." So, it is held that, under a complaint alleging that defendants had wrongfully erected and maintained dams across the natural outlet of a lake, causing the waters of the lake to overflow and damage plaintiff's land, proof that such dams were erected under a contract with the plaintiff and others constituted a fatal variance, and that the plaintiff could not recover. Peay v. Salt Lake City, 11 Utah 331, 40 Pac. Rep. 206.

See, also, Equitable Securities Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747.

A defendant can not complain of the variance between the pleadings and the proof, resulting from the Court relieving the defendant of the duty of meeting a part of the allegations of the complaint. Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

Where the defect in the complaint was cured by the answer of the defendant, see Crowder v. McDonald, 21 Mont. 367, 54 Pac. Rep. 43.

11 For affirmative defenses, see Secs. 1688-1692.

12 Buel v. Chicago etc. Co., 81 Neb. 130, 116 N. W. Rep. 299.

13 Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574.

14 Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829.

Where evidence was introduced as to damages accruing since the commence-

proof of correctness and time of taking are properly admitted in evidence to show the condition of the land and the works.[15] A tax list is held as inadmissible to prove the value of the land injured.[16]

Under the provisions of Section 5950 of the Revised Codes of Idaho, 1908, it is held that the courts of that State will take judicial notice of the laws of Nature, and in such cases resort for their aid and information to appropriate books and documents of reference.[17]

§ 1694. **Instructions to the jury.**—As in other actions for damages, the questions of negligence and the measure of damages are for the consideration of the jury under proper instructions of the Court.[1] In an action for damages for diverting water from an irrigation ditch, an instruction that, where the Court in a former action had found certainly upon any point that had arisen in the action at bar, its finding must control, and was conclusive upon the parties thereto, was held erroneous, as leaving to the jury the construction of the findings of the Court, which the Court should have construed and explained to the jury.[2] A requested instruction, in an action against a water company for refusal to furnish water to an applicant, that before the company was required to deliver the water the applicant must make necessary provision for receiving it was properly refused, where the refusal of the company was not based on that ground.[3] It is held to be improper for the Court to

ment of the action, but was afterward withdrawn, and the jury instructed not to consider it, there was no error. Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8.

15 Pickett v. Atlantic Coast Line R. Co., 153 N. C. 148, 69 S. E. Rep. 8.

16 Oldenburg v. Oregon Sugar Co., 39 Ore. 564, 65 Pac. Rep. 869.

17 Petajaniemi v. Washington W. & Pr. Co., —— Idaho ——, 124 Pac. Rep. 783.

1 The Court should instruct the jury as to the measure of damages, including the elements of damage involved; and hence, in an action for damages to land by flooding through the breaking of defendant's reservoir, the Court should have instructed on its own motion as to plaintiff's measure of damages. Mustang etc. Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800.

Error of an instruction, in putting on plaintiff too high a degree of proof, is harmless, his right of recovery depending on negligence, of which there was no proof, he taking the position that plaintiff was an insurer. Fleming v. Lockwood, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263.

2 Dalton v. Kelsey, 58 Ore. 244, 114 Pac. Rep. 464.

See, also, Colorado Springs etc. R. Co. v. Albrecht, —— Colo. App. ——, 123 Pac. Rep. 957.

3 Lowe v. Yolo etc. Co., 157 Cal. 503, 108 Pac. Rep. 207.

charge that the doctrine of contributory negligence was not applicable to the case if defendant knew of the danger to the plaintiff's premises and could have prevented the injury.[4]

An instruction in an action for damages from the breaking of an irrigation ditch, as follows: "In this connection the Court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage will result to persons whose lands are crossed by the ditch," was held to be erroneous as making the ditch owner an insurer.[5]

The instructions given by the Court must be read together, and are sufficient if, when so read, they appear to cover the whole case and state correctly the law applicable thereto.[6] It is not error for the Court to refuse a correct instruction, where other appropriate instructions on the same subject have been given.[7] Where an instruction does not fully set forth the issues as fully as counsel for a party desires, he must offer an instruction to meet his views, or he can not complain on appeal.[8]

§ 1695. Verdict—Non-suit.—After hearing the evidence, except in cases which are tried before the Court alone, a jury having been waived, and the Court having instructed the jury, the case must be submitted to them for their verdict.

In deciding a motion for a non-suit or a directed verdict for the defendant, the Court should take the plaintiff's evidence as ad-

[4] Malmstrom v. People's Drain D. Co., 32 Nev. 246, 107 Pac. Rep. 98; distinguishing Shields v. Orr. D. Co., 23 Nev. 349, 47 Pac. Rep. 194.

An instruction that plaintiff could not recover if her own carelessness in the management of her estate contributed to her injury—there being no evidence to that effect—was erroneous. Emison v. Owyhee D. Co., 37 Ore. 577, 62 Pac. Rep. 13.

[5] King v. Miles City Irr. D. Co., 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506.

[6] Hayden v. Consolidated etc. Co., 3 Cal. App. 136, 84 Pac. Rep. 422; Wood v. Moulton, 146 Cal. 317, 80 Pac. Rep. 92; Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

[7] Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

[8] Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

"The measure of damages for destruction of apple trees planted and growing is what such destroyed trees were worth on the premises in their growing state, and the jury in determining this may consider the difference in the value of the land with and without such growing trees thereon at the time of the destruction." Hanes v. Idaho Irr. Co., —— Idaho ——, 122 Pac. Rep. 859.

mitted, and every reasonable inference from any fact should be regarded as proved; and, if all the facts and permissible inferences would sustain a verdict for the plaintiff, the motion should be denied. It is only proper to sustain such a motion for a nonsuit or directed verdict for the defendant, where the Court would be compelled to set aside a verdict if rendered for the plaintiff. In cases where reasonable men might differ in their conclusions, it is improper for the Court to take the case away from the jury.[1]

In their verdict, the jury must determine the liability of the defendant; and, if they find against him, they must assess the damages which the plaintiff has sustained.[2]

§ 1696. Judgments—Measure of damages.—The judgment in an action for damages must be entered on the verdict of the jury, or the decision of the Court, in accordance with the practice of the jurisdiction where the action was tried.[1]

1 "It is only where the facts are such that a verdict for plaintiff would compel the Court to set it aside that a non-suit is properly granted." Paolini v. Fresno etc. Co., 9 Cal. App. 1, 97 Pac. Rep. 1130.

"In a case where reasonable men might, upon deliberation, differ in their conclusions, it would be improper for the Court to interfere with the verdict." Chidester v. Consolidated D. Co., 59 Cal. 197.

In an action for damages against a railroad company for injury from changing the course of plaintiff's irrigation ditch, a verdict for $600 held to be not excessive nor a result of passion or prejudice. Denver etc. R. Co. v. Heckman, 45 Colo. 470, 101 Pac. Rep. 976.

2 For measure of damages, see Secs. 1696-1702.

1 A judgment for a specified amount, and costs, is not void as to the costs because the amount thereof is left blank, since it may be afterward inserted by the clerk. Big Goose etc. Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955.

Where plaintiff notified defendant not to take water from his premises and that he would demand $50 for every day the notice was violated, and afterward obtained a decree restraining defendant from taking the water, the taking of the water after the notice was held not an acceptance of a proposition to sell at that specified price. Wright v. Sonoma County, 156 Cal. 475, 105 Pac. Rep. 409, 134 Am. St. Rep. 140.

See, also, Sommerville v. Idaho Irr. Co., —— Idaho ——, 123 Pac. Rep. 302, where an irrigation company entered into a contract with a settler to furnish such settler with water and it was unable to furnish such water for the settler's tract of land, it was held that the correct measure of damages included such damages as the settler had sustained by reason of the expense incurred, labor performed, or any outlay of time which he had made under the contracts, and which he had

In actions where the jury find for the plaintiff, the jury may assess the compensatory damages against the defendant, which the plaintiff has actually sustained, and which are the direct and proximate result of the defendant's unlawful act.[2] And, in certain cases, they may assess nominal damages,[3] or punitive or exemplary damages.[4] In our discussion of the measure of compensatory damages, we will discuss the subject under the heads of damages for injury to lands, both for the total or partial destruction thereof;[5] damages for the loss of stock;[6] and damages for the loss of crops by reason of the failure of a company, under public duty or contract to furnish a consumer with water, or for the unlawful diversion of the water by another. In this connection, we will add here, that as far as compensatory damages are concerned, it makes no difference as to whether the plaintiff's failure to get the water to which he was entitled was the result of the violation of a duty either imposed by statute or contract, or was the result of the unlawful diversion of the water by the defendant. In any case, the plaintiff is entitled to complete and full compensation for the injuries sustained by him as the direct result of the unlawful act of the defendant.

As is the case in all actions at law, costs are usually awarded to the prevailing party. But in mixed actions at law and in equity the costs may be apportioned between the respective parties as may to the Court seem just and equitable.[7]

§ 1697. Compensatory damages—Measure of damages for injuries to lands.—The measure of compensatory damages for injuries to land depends, of course, upon the value of the land before the injury, and the nature and extent of the injuries thereto, that

suffered by reason of the failure of the company to comply with the terms of the same, and in addition thereto all payments on the land and water right, with interest thereon.

See, also, Reinking v. Goodell, —— Iowa ——, 133 N. W. Rep. 774; Fairbanks etc. Co. v. Stites, —— Tex. Civ. App. ——, 125 S. W. Rep. 636.

[2] For compensatory damages, see Secs. 1697-1701.

[3] See Sec. 1703.

[4] See Sec. 1702.

[5] See Sec. 1697.

[6] See Sec. 1699.

[7] For costs in equitable actions, see Sec. 1562.

See, also, Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; Big Goose etc. Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955; Hill v. Standard M. Co., 12 Idaho 223, 85 Pac. Rep. 907.

is to say, whether there has been a total or only a partial destruction, and whether the injuries are permanent or only temporary.

A total destruction of land may be illustrated by a case where there is a permanent dam or other obstruction constructed in a stream which permanently backs up or overflows the lands of the plaintiff. In such a case, as far as the owner is concerned, there is a total destruction of the land, and the measure of damages is the actual value of the land permanently submerged by the works of the defendant just before the injury occurred, and the depreciation of the value of the remainder of the plaintiff's land by reason of said flowage.[1]

Lands may also be permanently injured by the acts of the defendant, but still there may not be a total destruction of the value thereof to the plaintiff. Such is the case where there is an injury to the land from the seepage of water from an irrigation ditch which is a permanent structure and properly constructed, and where, although the land affected can not be used for the raising of crops, it may be used for pasture or for some other purpose. Again, lands may be permanently injured but not totally destroyed by the sudden breaking out of the water from a ditch, canal, or reservoir, which results in covering the land of the plaintiff with sediment and debris, or the washing off of the soil, or the cutting of gullies therein. In such a case the measure of damages for the injury to the land is the difference between the value of the land immediately

[1] The measure of damages for permanently overflowing plaintiff's land is the value of the land submerged, and the depreciation in the value of the remainder of the land by reason thereof. Hall v. Austin, 20 Tex. Civ. App. 59, 48 S. W. Rep. 53; Missouri etc. Co. v. Graham, 12 Tex. Civ. App. 54, 33 S. W. Rep. 576; Sweeney v. Montana Cent. R. Co., 25 Mont. 543, 65 Pac. Rep. 912; Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; Town of Norman v. Ince, 8 Okla. 412, 58 Pac. Rep. 632.

The measure of damages for the permanent destruction of an irrigation ditch is held in Colorado to be the difference between the values of the land irrigated with and without the ditch. Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322.

See, also, Sacramento etc. Co. v. Heilbron, 156 Cal. 408, 104 Pac. Rep. 979, where it is held that the measure of damages for land taken by condemnation is its market value in view of all the purposes to which it is adapted, and while evidence that it is valuable for particular purposes is admissible, its money value for any particular purposes, as for nursery purposes, can not be shown in determining its market value.

See, also, Pick v. Rubicon Hydraulic Co., 27 Wis. 423.

before and immediately after the injury accrued.[2] But in the measure of damages a distinction must be made between the permanent destruction of the land in question, and for the permanent or temporary injury to it.[3] Again, where there is a permanent destruction of the land, or a permanent injury to the land, it constitutes but one cause of action, and all the damages must be assessed in one action. There can be no second recovery in such a case where the permanent damages have been once assessed in a previous suit.[4]

2 The seepage and leakage being a necessary result of the character of the soil, the injury arising therefrom was a permanent one, and the measure of damages was the diminished value of the land. Consolidated etc. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. Rep. 582.

The measure of damages for injury to land, by its being covered with sediment and debris by being flooded by the breaking of a reservoir, is the difference between the value of the land before and immediately after the injury, and not the reasonable cost of clearing the land, though evidence of such cost would be admissible to aid in determining such difference in the value of the land. Mustang etc. Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800.

If the land is permanently injured but not totally destroyed, the owner will be entitled to recover the difference between the actual cash value of the land at any time immediately preceding the consummation of the injury and the actual cash value of the land in the condition it was immediately after the injury, with legal interest thereon to the time of trial. Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296.

See, also, Middlekamp v. Bessemer Irr. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; Oldenburg v. Oregon Sugar Co., 39 Ore. 564, 65 Pac. Rep. 869; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 575; French v. West Seattle etc. Co., 50 Wash. 257, 97 Pac. Rep. 60; Missouri etc. R. Co. v. Graham, 12 Tex. Civ. App. 54, 33 S. W. Rep. 576; Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; San Antonio v. Horkan, —— Tex. Civ. App. ——, 45 S. W. Rep. 391; Texas C. R. Co. v. Brown, —— Tex. ——, 86 S. W. Rep. 659; Barrows v. Fox (Cal.), 30 Pac. Rep. 768; *Id.*, 98 Cal. 63, 32 Pac. Rep. 811; Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058.

See, also, Colorado Springs etc. Co. v. Albrecht, —— Colo. App. ——, 123 Pac. Rep. 957, where it is held that the amount of damages to real estate by flooding or overflow is fixed by the difference in the value of the property before and after the injury.

3 Shurtliff v. Extension D. Co., 14 Idaho, 416, 94 Pac. Rep. 574; Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296.

4 "When the structure itself is permanent, and is the cause of the injury, the injury is permanent, and all damages are to be recovered in one action, the right to which accrued with the beginning of the injury." Middlekamp v. Bessemer Irr. D. Co., 46

Again, the injuries to the land may not be permanent, but may be temporary or comparatively slight in character. Such would be the case where the water broke out from a ditch, or canal, or reservoir, and caused erosion on the plaintiff's land, but not to such an extent but that the land, with small expense, could be restored to its former condition. In such a case the plaintiff is entitled to recover the amount necessary to repair the injury and put the land in the condition that it was in immediately preceding the injury.[5]

The measure of damages in an action for breach of contract for failing to keep the plaintiff's ditch in repair is the money paid by the plaintiff for such repairs.[6] And, where on account of such temporary injuries to the land, the plaintiff was prevented from raising a crop, the difference between the rental value of the land immediately preceding the injury and the rental value immediately after the injury is the proper measure of damages.[7]

In a recent case in Nevada, where the fact was that a stand of alfalfa, which ordinarily would produce two crops per year for many years, was destroyed by the failure of the defendant company to furnish water for the same, the Court, although not very defi-

Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

Having recovered damages for such permanent injury to the land, no further action, by reason of the continuance of the nuisance, will lie. Consolidated etc. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. Rep. 582.

See, also, Cumberland & Oxford Canal Co. v. Hitchings, 65 Me. 140; Van Hoozier v. Hannibal etc. R. Co., 70 Mo. 145.

[5] If the land is temporarily but not permanently injured, the owner is entitled to recover the amount necessary to repair the injury, with legal interest thereon to the time of trial. Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296.

See, also, Sweeney v. Montana Cent. R. Co., 25 Mont. 543, 65 Pac. Rep. 912; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574; Malmstrom v. People's etc. Co., 32 Nev. 246, 107 Pac. Rep. 98.

[6] Orr Water Ditch Co. v. Reno Water Co., 19 Nev. 60, 6 Pac. Rep. 72; Hayden v. Consolidated etc. Co., 3 Cal. App. 136, 84 Pac. Rep. 422; Denver etc. Co. v. Heckman, 45 Colo. 470, 101 Pac. Rep. 976.

But that this is not the measure of damages where the injury to the land is permanent, see Mustang etc. Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800.

[7] "We think it is well established by the authorities that for temporary injuries to land, where one is simply prevented from raising a crop, the rental value is the proper measure of damages." Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296.

For measure of damages for injuries to crops, see Sec. 1698.

nite as to the measure of damages, held that the injury was to the realty itself, "and would amount at least to the value of the seed planted to produce the stand."[8] It seems to us that the true measure of damages in this case was the full rental value of the land before the injury, during the full period of time that it took to replace the stand of alfalfa in practically the same condition that it was before the injury, as while this was being done the land could not be used for anything else.

In actions for damages which are temporary and recurring, the plaintiff is not limited to one action, but he may recover in successive actions damages which will compensate him for the actual injury which he has sustained in each case.[9] He may, however, recover in one action all damages from recurring causes up to the time of the commencement of the action, which are not barred by the statute of limitations.[10]

§ 1698. Compensatory damages—Measure of damages for injuries to crops.—One of the most common causes of action for damages is that for the destruction of, or injury to, the crops of the plaintiff. The measure of compensatory damages, which the plaintiff in such an action is entitled to recover for the loss of or injury to crops is the same, and that, too, whether he bases his action upon the breach of a contract with a water company for the failure to furnish water as agreed, or upon the violation of a duty imposed upon such company as a quasi-public corporation,[1] or whether the action is based upon a tort, caused by the negligent construction, maintenance, or operation of the works of the defendant, so that the water overflows, breaks out, or seeps the lands of the plaintiff, and from which direct and proximate cause his crops are injured or destroyed. And, where the defendant is liable for such injuries, the plaintiff is entitled to recover an amount that will fully compensate him for all injuries sustained in this respect. But

[8] Candler v. Washoe etc. Co., 28 Nev. 151, 80 Pac. Rep. 751.

[9] Sulens v. Chicago etc. R. Co., 74 Iowa 659, 38 N. W. Rep. 545, 7 Am. St. Rep. 501; St. Louis etc. Co. v. Brown, 34 Ill. App. 552; Cobb v. Smith, 38 Wis. 21; Savannah etc. Co. v. Bourquin, 51 Ga. 378.

[10] Goodrich v. Dorset Marble Co., 60 Vt. 280, 13 Atl. Rep. 636; Watson v. Colusa etc. M. Co., 31 Mont. 513, 79 Pac. Rep. 14.

[1] For ditch and canal companies as quasi-public corporations, and their duties, see Secs. 1493-1502.

the plaintiff is entitled to recover for only the injuries for which the defendant is directly liable. Therefore, in Hawaii, where, by decree, the plaintiffs were held to be entitled to a certain amount of water at certain times, and it appeared that the defendants diverted a portion of the plaintiffs' water, but as the plaintiffs had not upon their part complied with the order of the commissioners to clean out the water course, and had allowed the defendants to neglect to furnish the water on the designated days, it was held that the amount of the damages which the plaintiffs could recover was proportionately lessened.[2]

But, as to the method of the measurement of such damages, and the basis upon which they should be estimated, the authorities seem to differ somewhat. Some of the authorities hold that the proper basis for the estimation of damages for the loss of growing crops is the difference between the rental value of the land with the water and its rental value without it.[3]

Other authorities hold that the proper basis for the measurement of damages is the value of the crops that would have been produced under ordinary conditions, less the expense that would have been incurred in planting, raising, harvesting, and marketing.[4]

Both methods have their merits and their difficulties. It is certain that the full rental value of the land is not the proper measure of damages unless the owner thereof is deprived of the entire use of his land. And, when the owner's injury arises, not from being entirely deprived of the use of the land, but only from the impairment of its use, the allowance of the full rental value, without deducting the benefits derived from such use as he could make of it,

2 Mele v. Ahuna, 6 Hawn. 346.

See, also, Lum Ah Lee v. Ah Soong, 16 Hawn. 163.

3 Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366; Ferrea v. Chabot, 63 Cal. 564; *Id.*, 121 Cal. 233, 53 Pac. Rep. 689; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562; Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296; Reisert v. New York, 74 N. Y. Supp. 673, 69 App. Div. 302.

4 Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Barstow Irr. Co. v. Cleghon, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; Knowles v. Leggett, 7 Colo. App. 265, 43 Pac. Rep. 154; Colorado Canal Co. v. Sims, 42 Tex. Civ. App. 442, 94 S. W. Rep. 365; Gulf etc. R. Co. v. Nicholson, 25 S. W. Rep. 54; Raywood etc. Co. v. Wells, 32 Tex. Civ. App. 401, 77 S. W. Rep. 253; Chicago etc. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. Rep. 540, 68 Am. St. Rep. 602; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423.

would be manifestly unjust.[5] Therefore, where the rental value is taken as the basis of computation, as stated by the California Court, it is: "The difference between the rental value of the land with the water and its rental value without it."[6]

In California it was held that the proper measure of damages for the refusal of a water company to furnish water either in accordance with the terms of a contract, or under its statutory duty to furnish the water upon proper application and a payment or tender of the legal rates, is the difference between the rental value of the land with the water and its rental value without it, after deducting the lawful price of the water; and that uncertain and speculative profits, from crops, which might or might not have been raised, and which might or might not have been realized had they been raised, can not be recovered in such actions.[7] This rule for assessing damages may be proximately correct, where the land is planted or sown to annual crops. But, where the land is planted to perennial crops or to fruit trees there may be other damages which should be considered. It takes a number of years to bring fruit trees to the bearing point. Yet, after they have been brought to this point, by being deprived of the water for a single year, or even for a portion of a year, they may die, and the expense and labor of years be lost to the owner; or, again, their bearing capacity may be so impaired that it may take a number of years with sufficient water to bring them back to their former condition. There-

[5] Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423.

[6] Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562.

[7] "The measure of damages arising from a breach of contract or in tort is the detriment proximately caused thereby. . . . The proper measure of damages in a case like this is the difference between the rental value of the land with the water and its rental value without it, and the lawful price of the water should also be taken into consideration and deducted. . . . Conjectural profits of the kind sought here can not be recovered as damages in such cases. They must be damages capable of ascertainment by proof to a reasonable certainty. Uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action." Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562.

"The evidence objected to and received by the Court was confined to the rental value of the land with and without water for irrigation. Evidence as to the value of a possible crop that might be grown with the use of water would be as purely speculative as could well be imagined." Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366.

fore, damage to growing trees or to perennial crops is damage to the realty itself, for which a recovery may be had.[8] So, the California Court has modified the above rule in assessing damages in cases of this nature, and holds that damages for injuries to fruit trees and growing crops are not too remote, and that such injuries may be assessed as special damages.[9] But it seems to us that the Court could, with all propriety, have gone still further and still

8 "The Court found, because of the failure of the defendant to furnish water as agreed, that the stand of alfalfa and timothy was in the main killed out. The damage thus resulting was damage to the realty itself." Candler v. Washoe etc. Co., 28 Nev. 151, 80 Pac. Rep. 751.

9 "As to the amount of damages: This only applies to the $1,000, which the Court found the plaintiff had suffered to trees, and the fruit crop thereon, by reason of the defendant's failure to furnish the water as agreed. It is insisted by appellants that such damages are too remote and speculative. The Court found that, when the contract between the parties was made the defendants knew that the 10 inches of water contracted for had a peculiar value to the plaintiff, inasmuch as his land and orchard were of little value without it. The orchard was in bearing when the breach of the covenant was committed, and there was no other source from which the plaintiff could obtain water for irrigation. There is no question but what the amount of damages awarded was suffered, and we think that, under the facts as found, the Court was warranted in making the award." Roberts v. Crafts, 141 Cal. 20, 74 Pac. Rep. 281.

In a late action founded on tort for the flooding of plaintiff's land, the California Court held that the proper measure of damages was the value of the crop in the condition it was in at the time and place of destruction. Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58, 91 Pac. Rep. 425.

See, also Hewitt v. San Jacinto etc. Co., 124 Cal. 186, 56 Pac. Rep. 893; Barrows v. Fox, 30 Pac. Rep. 768; *Id.* 98 Cal. 63, 32 Pac. Rep. 811; Thomas v. Bolsa Land Co., 1 Cal. App. 335, 82 Pac. Rep. 207; Bacon v. Kearney Vineyard Syndicate, 1 Cal. App. 275, 82 Pac. Rep. 84; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Teller v. Bay Cities etc. Co., 151 Cal. 209, 90 Pac. Rep. 942, 12 L. R. A., N. S., 267; Sacchi v. Bayside Lbr. Co., 13 Cal. App. 72, 108 Pac. Rep. 885; Lester v. Highland Boy etc. Co., 27 Utah 470, 76 Pac. Rep. 341, 101 Am. St. Rep. 988, 1 Am. & Eng. Ann. Cas. 761.

Land prepared for alfalfa will produce several crops each year for several years without further care, except by way of irrigation, and the measure of damages of one who just having prepared his land for alfalfa, and cutting the first crop, was wrongfully denied water for irrigation by a water company, whereby he lost two additional crops, which, with irrigation, the land would have produced that year, and a reseeding was necessary, is the value of the two crops, less cost of irrigation, plus cost of reseeding. Lowe v. Yolo County etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; affg. *Id.* 8 Cal. App. 167, 96 Pac. Rep. 379.

have kept within the law, and have considered such injuries as permanent injuries to the land—at least where trees are destroyed there is a permanent injury to the land—and the Court might have held, under the general rule for the measure of such damages, that the true measure was the difference in the value of the land with the live, growing trees thereon, just prior to the injury and its value immediately after the trees were destroyed.[10]

The correct rule, as it seems to us, was held in a late Idaho case,[11] and is set forth as follows: "The measure of damages for destruction of apple trees planted and growing is what such destroyed trees were worth on the premises in their growing state, and the jury in determining this may consider the difference in the value of the land with and without such growing trees thereon at the time of destruction."

In Colorado the rule for the assessment of damages for the failure of a company to furnish water under its statutory duty, was held by the Court to be "the difference between the amount realized from the crops the land did produce without the water, and the amount that would have been realized therefrom had the water been furnished, less the added cost of raising, harvesting, and marketing the product, the loss of trees," and the loss of that portion of the owner's farm which he was thereby prevented from cultivating; but that he was not entitled to recover damages for permanent improvements, or for the depreciation in the value of live stock and farm implements, although the expenses for such were made on the faith of receiving the water for the suceeding season.[12] In Arizona the actual loss to plaintiff's crops is also held to be the true measure of damages, and are held not too "fanciful, speculative, or remote."[13] The same rule for the measurement of such

[10] For the measure of damages for permanent injuries to land, see Sec. 1697.

See, also, Sacchi v. Bayside Lbr. Co., 13 Cal. App. 72, 108 Pac. Rep. 885.

[11] Hanes v. Idaho Irr. Co., —— Idaho ——, 122 Pac. Rep. 859.

[12] Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Colorado etc. Co. v. Hartman, 5 Colo. App. 150, 38 Pac. Rep. 62; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. Rep. 220.

Evidence merely as to the amount of crops which could have been raised if the proper amount of water had been furnished, together with evidence of the market value of such crops, is insufficient as a basis for recovery, without proof of the cost of raising and marketing the crops. Knowles v. Leggett, 7 Colo. App. 265, 43 Pac. Rep. 154.

[13] Miller v. Douglass, 7 Ariz. 41, 60 Pac. Rep. 722.

damages is adopted by the courts of Nevada,[14] Idaho,[15] Montana,[16] Nebraska,[17] New Mexico,[18] Texas,[19] South Dakota,[20] Oregon,[21] and also in Kansas, although it was there held that where the demand was not made until late in the season, the company was not liable for the entire loss for the year.[22] In Utah it is held that, in a

14 The measure of damages for the total destruction, or nearly total destruction, of growing crops which would to a reasonable certainty have matured, except for the defendant's wrongful act, is the value of the probable yield of the crops under proper cultivation when matured and ready for the market, less the estimated expense of producing, harvesting, and marketing them, including the expense of irrigation, and the value of any portion of the crops that may have been saved. Candler v. Washoe etc. Co., 28 Nev. 151, 80 Pac. Rep. 751.

The measure of damages for the total destruction of growing crops is the value of the probable yield of the crops under proper cultivation when matured and ready for the market, less the estimated expense of harvesting the same, including the expense necessary for irrigation, and the value of any portion of the crops that may have been saved. Malmstrom v. People's etc. Co., 32 Nev. 246, 107 Pac. Rep. 98.

15 Where there was a total destruction of plaintiff's crops, an instruction to the jury that they should find for the plaintiff the reasonable value of the said crop at maturity, less the reasonable cost of irrigating, caring for, and harvesting the same, was held proper. Rios v. Azcuenaga, 19 Idaho 739, 115 Pac. Rep. 922; see, also, Risse v. Collins, 12 Idaho 689, 87 Pac. Rep. 1006; Gagnon v. Molden, 15 Idaho 727, 99 Pac. Rep. 965.

16 The value of crops, and the expense of maturing, reaping, threshing, and moving them to market, are competent facts to be considered in arriving at the measure of damages to crops by the overflowing of a stream, caused by negligence in driving logs. Hopkins v. Butte etc. Co., 16 Mont. 356, 40 Pac. Rep. 865.

See, also, Watson v. Colusa Parrot etc. Co., 31 Mont. 513, 79 Pac. Rep. 14; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388.

17 Claque v. Tri-State Land Co., 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; Chicago etc. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. Rep. 540, 68 Am. St. Rep. 602.

18 Smith v. Hicks, 14 N. M. 560, 98 Pac. Rep. 138.

19 Barstow Irr. Co. v. Cleghon, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; Colorado Canal Co. v. Sims, 42 Tex. Civ. App. 442, 94 S. W. Rep. 365; Gulf etc. R. Co. v. Nicholson, 25 S. W. Rep. 54; Raywood v. Wells, 33 Tex. Civ. App. 545, 77 S. W. Rep. 253; Lutcher v. Stoddard, —— Tex. Civ. App. ——, 56 S. W. Rep. 608; Gulf etc. Co. v. McGowan, 73 Tex. 355, 11 S. W. Rep. 336; San Antonio etc. Co. v. Kiersey, ——Tex. Civ. App. ——, 81 S. W. Rep. 1045.

20 Nebraska etc. Co. v. Burris, 10 S. D. 430, 73 N. W. Rep. 919.

21 Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215; see instruction given by the trial court.

22 Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098.

suit for damages for flooding certain ice ponds used for putting up ice, the proper measure of damages is the value of the ice that might have been put up with reasonable diligence, less the cost of putting it in the ice house.[23] In Washington, in an action for injury to crops by defendant's refusal to furnish water, evidence that the net value of the plaintiff's crops raised in each of certain specified years was less than a stated sum than it would have been had plaintiff been furnished with the water as agreed was competent, and showed substantial damage from defendant's breach of contract, but judgment by the trial court for $2,100 was modified to $500 by the Supreme Court.[24]

Interest prior to the recovery of judgment for damages for the failure to secure water should not be allowed, such damages being unliquidated and uncertain until the same shall have been adjudicated.[25]

§ 1699. Compensatory damages—Measure of damages for the loss of stock.—Where the defendant is liable at all for the damages caused by the loss of live stock, he is liable for their full market value at the time of the loss.[1] And, it is held that a ditch company, with the right to maintain a ditch over the lands of another, is liable to the land owner for injury to his stock, which is caused by the negligence of the company, in not properly protecting the ditch from the cattle, or in permitting a dangerous washout to occur and remain a considerable time, into which cattle fell therein.[2] But it is held in Colorado that where the defendant con-

[23] Farr v. Griffith, 9 Utah 416, 35 Pac. Rep. 506.

See, also, Lester v. Highland Boy etc. Co., 27 Utah 470, 76 Pac. Rep. 341, 101 Am. St. Rep. 988, 1 Am. & Eng. Ann. Cas. 761.

[24] Hutchinson v. Mt. Vernon etc. Co., 49 Wash. 469, 95 Pac. Rep. 1023; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254.

But see Hayward v. Mason, 54 Wash. 649, 104 Pac. Rep. 139; *Id.* 54 Wash. 653, 104 Pac. Rep. 141, where in each case it was held that there was no liability upon the part of the defendant.

See, also, Ulrich v. Pateros W. Ditch Co., —— Wash. ——, 121 Pac. Rep. 818.

[25] Ferrea v. Chabot, 121 Cal. 233, 53 Pac. Rep. 689; Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

But see Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296.

[1] Big Goose etc. Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955.

[2] Big Goose etc. Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955, wherein it is said: "It is an old and familiar maxim that one must so use his own property as not to

structed an irrigation ditch across land on which the plaintiff had a right of pasturage, and the plaintiff knew that the condition of the ditch was such that his stock were likely to become mired therein, he took the risk of such injury, and could not recover for such loss in an action against the ditch owner.[3]

§ 1700. Compensatory damages—Measure of damages for loss of power.—Compensatory damages may be recovered for the loss of power, where such loss is occasioned by the unlawful diversion of the water which generates such power. The measure of such damages is held to be the market value of the power actually taken.[1] Or, where other power is substituted, it is held that the measure of damages is the reasonable cost to the plaintiff of the substituted power.[2]

§ 1701. Compensatory damages—Measure of damages for loss of or injury to a water right.—Damages may also be recovered for the loss of or the injury to a water right, separate and apart from any considerations of the injury to the land,[1] or injuries to crops.[2] Such would be a case of a grantor conveying by warranty deed a water right for which he had no title. The measure of damages in an action for the breach of the warranty or contract is the value of the water right.[3] So, also, where, after the lease of water to the plaintiff by the defendant, a third person was decreed to be

injure that of other persons—'*Sic utere tuo ut alienum non laedas*'—and, in our opinion, plaintiff in error is not exempt from its application.''

See, also, Hopkins v. Butte etc. Co., 16 Mont. 356, 40 Pac. Rep. 865.

3 Messenger v. Gordon, 15 Colo. App. 429, 62 Pac. Rep. 959.

See, also, Heinlen v. Fresno etc. Co., 68 Cal. 35, 8 Pac. Rep. 513.

1 Green Bay etc. Co. v. Kaukauna etc. Co., 112 Wis. 323, 87 N. W. Rep. 864, 62 L. R. A. 579.

2 The measure of damages for wrongfully preventing the use of a water power is the reasonable cost of the steam power used as a substitute during such time. Hottell v. Farmers' etc. Assn., 25 Colo. 67, 53 Pac. Rep. 327, 71 Am. St. Rep. 109.

1 For the measure of damages for injuries to land, see Sec. 1697.

2 For measure of damages for injuries to crops, see Sec. 1698.

3 In a case involving damages for the failure of a vendor to furnish a certain number of inches of water to be furnished by a ditch company, under his warranty deed, and the company refused to furnish the water, it was held that no other measure of damages was competent than the value of the water. Starbird v. Jacobs, 46 Colo. 507, 105 Pac. Rep. 872, the Court saying: ''The case at bar is not different in principle than it would be if

the owner of a part of the leased water right, so that the plaintiff was deprived of such part, the plaintiff is entitled to damages for the loss.[4] But it is held in Washington that, where the owners of land contract to sell it together with certain water rights and are unable to transfer title to the water rights, the purchaser in a suit for damages can recover moneys paid on the purchase price and expenses legitimately incurred in pursuance of the contract, but is not entitled to damages for the loss of the bargain.[5]

§ 1702. **Exemplary or punitive damages.**—Under certain circumstances, exemplary or punitive damages may be awarded the plaintiff and against the defendant. This is true where the defendant has been guilty of oppression, fraud, or malice. So, a public service corporation guilty of fraud, oppression, or malice, in failing to furnish water, to the extent of its actual supply, is liable to

the question in dispute were as to the title of the land itself."

In Idaho, in an action for damages caused by reason of the failure of the defendant to comply with his contract "to convey and deliver to the second party," upon his land, "a water right of 100 inches of water," the Court held, that the proper measure of damages is the difference between the contract price for the water and the water right and its delivery upon the land, and the price it would cost to purchase a like water right and equal number of inches of water delivered upon the land at the time of the breach of the contract; and that, if however, it should appear that no water right could be purchased either at the time of the breach or at any time thereafter prior to the trial, evidence as to the value of the buildings and other improvements made by the owner of the land might be introduced in the case in order to arrive at the actual damages sustained through and on account of the breach of the contract. And, in this connection, that it would be proper and necessary to prove how much the plaintiff had paid on the contract, "because, if he is not to receive the consideration, he should, among other things, receive the money paid by him on the contract." Gagnon v. Molden, 15 Idaho 727, 99 Pac. Rep. 965.

[4] Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

The measure of damages for the loss of the use of water by the wrongful acts of another is the value of the water in the market for irrigation purposes. North Point etc. Co. v. Utah etc. Co., 23 Utah 199, 63 Pac. Rep. 812.

See, also, Mack v. Jackson, 9 Colo. 536, 13 Pac. Rep. 542; Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 Pac. Rep. 1094; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290.

But see Stevens v. Wadleigh, 5 Ariz. 90, 46 Pac. Rep. 70.

[5] Babcock-Cornish Co. v. Urquhart, 53 Wash. 168, 101 Pac. Rep. 713.

exemplary damages within the California Civil Code, Section 3294, providing that in an action for the breach of an obligation not arising from contract exemplary damages may be recovered, where the defendant has been guilty of oppression, fraud, or malice. Therefore, in a case arising in California, where $500, as exemplary damages, was awarded the plaintiff, in a case where it was proven that the defendant was guilty of malice and undue oppression in not furnishing the plaintiff with water, under its duty as a public service corporation, the Court of Appeals said: "We can see no good reason for holding that the appellant is an exception to the rule which imposes an additional penalty for fraud, oppression, or malice."[1] And the Supreme Court in affirming the judgment said: "As said before, there is in all this clearly sufficient support for the conclusion that the defendant was guilty of oppression and malice."[2] In order to have exemplary damages awarded, the pleadings and proof must show such a state of fraud, malice, or oppression, as to warrant such a judgment, and the plaintiff in his complaint must ask that they be awarded. The theory upon which they are granted is that the defendant has been guilty of such acts as deserve punishment, and that such a judgment will be an example to others to refrain from such acts. Under the proper pleadings and proof the question of exemplary damages is addressed to the discretion of the jury, or the Court trying the case without a jury, where the evidence legally warrants a judgment of such damages. Upon appeal, the Supreme Court will not ordinarily, at least, undertake to control that discretion by requiring the assessment of such damages.[3] But, where the evidence does not show such a state of facts as above stated, such damages should not be awarded.[4]

1 Lowe v. Yolo County etc. Co., 8 Cal. App. 167, 96 Pac. Rep. 379, aff'd. 157 Cal. 503, 108 Pac. Rep. 297.

2 See, also, Greenberg v. Western Turf Assn., 140 Cal. 358, 73 Pac. Rep. 1050; Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

3 "Such damages . . . are in the discretion of the jury, where the facts are such as legally warrant them." 4 Sutherland on Damages, 1031.

Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

4 "We think, therefore, in the absence of evidence that it was done with the intent to injure plaintiff, or wantonly and in disregard of whether

§ 1703. Nominal damages.—In cases where there has been clearly an invasion of a right, but no actual damages are proven, nominal damages may be awarded.[1] So, it is held that a riparian owner who uses an unreasonable amount of the water is liable for at least nominal damages, in an action by another riparian owner lower down the stream whose riparian rights are affected.[2] But he can not recover damages for injury such a diversion does to his non-riparian lands.[3]

§ 1704. New trial—Appeal.—A motion for a new trial may be made upon the grounds as specified by the statute of the jurisdiction where the action was tried. In all motions for a new trial the statute must be strictly followed, as to time and procedure.[1]

Usually these cases are appealed to some appellate court, and oftentimes to the court of last resort, as is witnessed by the many cases cited in the notes of the preceding sections of this chapter. The statute of the State where the action is tried must be strictly followed. The questions involved may be reviewed in the same manner by the Appellate Court that may be reviewed in other actions at law. If error is committed by the trial court, in the admission of testimony, or in its instructions to the jury, the usual practice is to reverse the judgment and remand the case to the trial court for a new trial. If, upon the other hand, the Appellate Court finds

it might work injury to her or not, no case is made out for exemplary damages." Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

Mabb v. Stewart, 133 Cal. 556, 65 Pac. Rep. 1085; *Id.* 147 Cal. 413, 81 Pac. Rep. 1073.

1 The evidence did not require a finding of any more than nominal damages for the plaintiff. Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

See, also, Rohwer v. Chadwick, 7 Utah 385, 26 Pac. Rep. 1116; Mack v. Jackson, 9 Colo. 536, 13 Pac. Rep. 542; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Creighton v. Evans, 53 Cal. 55, 8 Morr. Min. Rep. 123; Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

2 Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Parker v. Griswold, 17 Conn. 288.

3 Heinlein v. Fresno etc. Co., 68 Cal. 35, 8 Pac. Rep. 513.

See, also, for injunctions without proof of damages, Sec. 1606.

1 Denver etc. R. Co. v. Heckman, 45 Colo. 470, 101 Pac. Rep. 976.

no error which affects the substantial rights of the parties, the judgment of the trial court will be affirmed.[2]

2 A judgment in favor of defendants will not be reversed where it appears that the plaintiff was merely entitled to nominal damages; the statute requiring a new trial to be granted for causes "affecting the substantial rights of a party." Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

But see Hagerman Irr. Co. v. McMurry, 16 N. M. 174, 113 Pac. Rep. 823, where the judgment, as rendered by the trial court was corrected to include $1, as nominal damages, in accordance with the findings of the trial court, and as corrected, the judgment was affirmed.

A TREATISE

ON THE

LAW OF IRRIGATION

AND WATER RIGHTS

AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS

AS THE SAME IS IN FORCE IN THE STATES OF THE ARID AND SEMI-ARID REGIONS OF THE UNITED STATES; AND ALSO INCLUDING AN ABSTRACT OF THE STATUTES OF THE RESPECTIVE STATES, AND THE DECISIONS OF THE COURTS RELATING TO THOSE SUBJECTS.

BY

CLESSON S. KINNEY

OF THE

SALT LAKE CITY BAR.

SECOND EDITION

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KINNEY

ON

IRRIGATION AND WATER RIGHTS.

SECOND EDITION—VOLUME FOUR.

PART XIV.

SPECIAL FEATURES AND STATUTORY LAWS OF THE ARID AND SEMI-ARID STATES.

CHAPTER 84.

ALASKA.

§ 1705. Particular features of the district.
§ 1706. The use of water in the district.
§ 1707. Criticism of the Alaska laws.
§ 1708. Appropriation of water.
§ 1709. Rights of way and condemnation therefor.
§ 1710. Riparian rights in Alaska.

§ 1705. **Particular features of the district.**—Alaska is our most northerly possession. It is characterized by long winters, and extremely humid climate in summer, and other conditions that go to make up anything but a typical agricultural country. However, as we shall see in the following sections, agriculture is carried on, and to a considerable extent. The country is traversed by mountain ranges, gashed by deep gorges, through which the streams swiftly make their courses to the sea.

The Government has established scattered weather bureau and experiment stations in Alaska, and from these reports may be determined the approximate conditions of the climate of the district. From an examination of the meteorological reports it will be seen that there is a vast difference in temperature, precipitation, and weather conditions in different portions of the district. For example, at Sitka, during the month of July, 1910, there was a maximum temperature of 80° F., a minimum of 38° F., a daily mean of 54.5° F. During the same month there was a total precipitation of 3.74 inches. There were 5 clear days, 4 partly cloudy days, 22 cloudy days, and 20 days of rain or snow. During the month of August of 1910, there was a maximum temperature of

75° F., minimum of 40° F., daily mean of 55.3° F. The total precipitation was 3.35 inches. There were 9 clear days, 7 partly cloudy, 15 cloudy, and 13 with rain or snow. At the station of Rampart, during the month of July, 1910, the maximum temperature was 92° F., minimum 35° F., daily mean 61.1° F. There was .71 of an inch precipitation, and there were 4 clear days, 11 partly cloudy, 16 cloudy, and 8 days with rain or snow. At the same station during the following month of August, the maximum temperature was 85° F., minimum 27° F., daily mean of 56.6° F. The total precipitation was .62 of an inch. There were 9 clear days, 8 partly cloudy, 14 cloudy days, and 6 with rain or snow. At the station of Kodiak, during the month of July, 1910, the maximum temperature was 71° F., minimum 35° F., daily mean of 52.4° F. The total precipitation was 5.23 inches. There were 9 clear days, 13 partly cloudy, 9 cloudy, and 12 with rain or snow. During the following month of August, the maximum temperature was 78° F., minimum 37° F., daily mean 54.4° F. The total precipitation was 1.75 inches. There were 5 clear days, 20 partly cloudy, 6 cloudy, and 10 with rain or snow.[1] It will be noticed from the above figures that one of the most notable variations is in the precipitation for the months of July and August, for which compare that of Rampart and Kodiak with that of Sitka.

§ 1706. **The use of water in the district.**—The general impression throughout the country that Alaska is a land of icebergs, impassable mountain ranges, and bleak headlands is given a much softer tone by the annual report of the Alaska Agricultural Report for 1910.[1] Although there is practically no irrigation in the District

[1] See Annual Report of Alaska Agriculture Experiment Stations, for 1910, by C. C. Georgeson, special agent in charge, United States Department of Agriculture, office of Experiment Stations, Washington, 1911, pp. 76-85.

See, also the Water Supply of Nome Region, Seward Peninsula, Alaska, 1906, by John C. Hoyt; and Fred F. Henshaw, Water Supply and Irrigation Paper No. 196, United States Geological Survey, 1907.

See, also, Water Supply Investigations in Alaska, 1906-7, including the Nome and Kougarok Rivers, Seward Peninsula, Fairbanks District, Yukon-Tanana Region, by Fred F. Henshaw; and C. C. Covert, Water Supply Paper No. 218, United States Geological Survey, Washington, 1908.

[1] See said report by C. C. Georgeson, special agent in charge, Washington, 1911, under the supervision of the office of Experiment Stations, U. S. Dept. of Agriculture.

of Alaska, there is considerable agriculture. Grain of various kinds can be raised to maturity, berries of all kinds flourish, as well as all kinds of vegetables, and garden truck. Hay and grasses especially flourish, and stock raising promises to be the big industry of the rural population of Alaska. Cattle, horses, sheep, and hogs all thrive and withstand the severe winters. But as it is not our intent to go into this very deeply here, we will close this phase.

The principal industry in the District of Alaska at present, and likely to remain such, is that of mining of all classes. It is for this purpose that the waters of the streams are mostly used. Many water power plants are installed throughout the district, but the power generated is mostly used in some phase of mining operations. There are great opportunities for power development in case market can be found for the product. There are also great coal beds, which, owing to the present condition of our laws relative to Alaska, remain undeveloped and unexplored. Steps, however, are being taken to give Alaska a more generous law relative to the development of its coal mines.

§ 1707. **Criticism of the Alaska laws.**—The laws for the District of Alaska governing the use of the waters of natural streams or other bodies, as they stand at the present time, relate more to their use for mining, or as an incident to mining claims, than for any other purpose. There is no direct statute for the appropriation of waters for any use; however, there is a statute, which in terms grants the right of the exercise of the power of eminent domain for the construction of ditches, canals, and reservoirs over the private lands of others for the purpose of utilizing the water appropriated. The appropriation of water is governed by the local rules and regulations of the respective organized mining districts.[1] The situation in this respect in Alaska is somewhat analogous to that in California at an early day, which finally resulted in the Arid Region Doctrine of appropriation for all beneficial uses. As population increases and the requirements for the use of water become greater, as the resources of the country become developed, the same result will necessarily follow in Alaska, regardless of the nature of the use, so long as it be a beneficial one.

Alaska at the earliest possible date should be given a Territorial

[1] Thorndyke v. Alaska etc. Co., 164 Fed. Rep. 657, 90 C. C. A. 473.

form of government. The people there are very much dissatisfied at the present with the conditions of their laws. Being governed by Congress, at a distance of five thousand miles, is not as advantageous as that of a local government, duly organized in Territorial form.

§ 1708. **Appropriation of water.**—In the District of Alaska there is no statute which in terms grants the right to appropriate water. However, the right of appropriation is allowed, and provisions made for recording such claims. The district is divided into three divisions, and provisions made for the appointment of a clerk for the court of each division, who "shall be *ex officio* recorder of instruments."[1] And among the instruments required to be recorded are "notices and declaration of water rights."[2]

It is held by the Alaska Court that Sections 2339 and 2340, of the United States Revised Statutes, recognizing the right of appropriation of water for beneficial uses, does not apply to the District of Alaska, except so far as they relate to mining claims and rights incident thereto.[3] But as to appropriations for mining purposes, it is held that the above sections do apply.[4]

It is held that the right to appropriate water is governed by the code of local laws and rules governing the local mining districts. The rules of these districts follow largely the statute of California as to the right of and the details which must be followed in making an appropriation.[5]

[1] 1 Fed. Stats. Ann., 1903, p. 25, Sec. 7; 31 Stat. L. 324, Sec. 7.

[2] 1 Fed. Stats. Ann., 1903, p. 29, Sec. 14, Subd. 7; 31 Stat. L. 327.

See Thorndyke v. Alaska etc. Co., 164 Fed. Rep. 657, 90 C. C. A. 473; Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106; Miocene D. Co. v. Lyng, 2 Alaska 265, 138 Fed. Rep. 544, 70 C. C. A. 458; Noland v. Coon, 1 Alaska 36.

[3] Ketchikan etc. Co. v. Citizens etc. Co., 2 Alaska 120; John G. Brady, 26 Land Dec. 305; Van Dyke v. Midnight Sun etc. Co., 177 Fed. Rep. 85, 100 C. C. A. 503; McFarland v. Alaska etc. Co., 3 Alaska 308; Revenue etc. Co. v. Balderston, 2 Alaska 363.

[4] Revenue etc. Co. v. Balderston, 2 Alaska 363; John G. Brady, 26 Land Dec. 305.

[5] Thorndyke v. Alaska etc. Co., 164 Fed. Rep. 657, 90 C. C. A. 473.

For a copy of the rules and regulations of the Harris Mining District, see statement of facts in the above case.

§ 1709. **Rights of way and condemnation therefor.**—As regards rights of way for ditches, canals, and reservoirs over the public lands of the United States in the District of Alaska, the Right of Way Act of Congress of March 3, 1891,[1] does not apply. Neither do the subsequent Acts of Congress relative to rights of way over the public domain of the United States apply unless Alaska is specially mentioned in the Acts themselves.[2]

The right of eminent domain in the District of Alaska may be exercised in behalf of the following public uses: "Canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any precinct, city, town, or other municipal division, whether incorporated or unincorporated";[3] also for "canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and sites for reservoirs necessary for collecting and storing water";[4] also, for "roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, and sites for reservoirs necessary for collecting and storing water."[5]

1 6 Fed. Stat. Ann., pp. 508-510; 26 Stat. L. 1101.

For a full discussion of this Act, see Secs. 937-948.

2 For rights of way over public lands, see Chap. 51, Secs. 927-971.

The provisions of Secs. 18 to 21, inclusive, of the Act of March 3, 1891, granting rights of way through the public lands for canals, ditches, and reservoirs, have no application to lands within the District of Alaska. Miocene D. Co., 35 Land Dec. 297.

The Secretary of the Interior has never been clothed with general jurisdiction of the public lands in Alaska, his jurisdiction being limited, under the several Acts of Congress relating to such lands. Opinion Atty.-Gen., 30 Land Dec. 417.

Martin v. Burford, 181 Fed. Rep. 922, 104 C. C. A. 360.

3 1 Fed. Stat. Ann., 1903, p. 269, Sec. 204, Subd. 3; 31 Stat. L. 522.

4 1 Fed. Stat. Ann., 1903, p. 269, Sec. 204, Subd. 4; 31 Stat. L. 522.

See, also, Miocene D. Co. v. Lyng, 2 Alaska 265, 138 Fed. Rep. 544, 70 C. C. A. 458; Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106.

5 1 Fed. Stat. Ann., 1903, p. 269, Sec. 204, Subd. 5; 31 Stat. L. 522.

The estates which may be acquired by such condemnation are prescribed as follows: "A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine."[6]

The private property which may be taken under the Act includes: All real property belonging to any person; lands belonging to the district, or to any precinct, city, town, or village; property appropriated to a public use, for a more necessary purpose; franchises; "all rights of way for any and all purposes mentioned in Section 204,[7] and any and all structures and improvements thereon, and the lands held and used in connection therewith, must be subject to be connected with, crossed, or intersected by any other right of way or improvements or structures thereon. They must also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections must be made in a manner most compatible with the greatest public benefit and the least private injury;" all classes of property not enumerated may be taken for public use when such taking is authorized by law."[8]

Parties desiring to condemn property are given the right to enter lands to make surveys.[9] All proceedings under the Act must be brought in the District Court of the district, and these proceedings are fully set forth in the Act itself.[10]

The plaintiff or defendant or any party interested in the proceedings is given the right of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from any finding or judgment rendered under the Act, as in other cases.[11]

§ 1710. **Riparian rights in Alaska.**—As to whether or not the rights of riparian proprietors exist in Alaska seems to be somewhat undecided. Upon the one hand there has been no abrogation of the common law rule upon the subject by statute. It was also held

[6] 1 Fed. Stat. Ann., 1903, p. 270, Sec. 205, Subd. 1; 31 Stat. L. 523.

[7] *Supra.*

[8] 1 Fed. Stat. Ann., 1903, p. 270, Sec. 206, Subds. 1-6; 31 Stat. L. 523.

[9] 1 Fed. Stat. Ann., 1903, p. 270, Sec. 208; 31 Stat. L. 523.

[10] 1 Fed. Stat. Ann. 1903, pp. 271-275, Secs. 209-224.

[11] 1 Fed. Stat. Ann., 1903, Sec. 207; 31 Stat. L. 523.

in one case that riparian rights existed somewhat after the modified rule upon the subject as held by the California courts.[1] But, upon the other hand, it can be said that the common law rule does not exist to the extent that a riparian proprietor has the right to insist upon the undiminished flow of a stream, without use, from the very fact that the right of appropriation of water for beneficial uses is allowed, especially for the use in connection with mining claims. In the late case of Thorndyke v. Alaska etc. Co.[2] it was contended that riparian rights did exist, but the Court held that "from the pleadings of the parties we think it clear that no question of riparian rights arises in the case," and proceeded to decide the case wholly upon the theory of appropriation and abandonment of the same as between the parties.

In a still later case, decided by the United States Circuit Court of Appeals,[3] it was held that the common law doctrine of riparian rights does not apply to the Seward Peninsula of Alaska, and the Court, by Mr. Justice Ross, said: "The common law doctrine of riparian rights being wholly inconsistent with and antagonistic to that of appropriation, it necessarily follows that when the Federal and State Governments assented to, recognized, and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they in effect declared that that of riparian rights did not apply. The doctrine of appropriation thus established was not a temporary thing, but was one born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands. . . . We are of the opinion that the plaintiffs in error in the present case acquired, by virtue of the placer mining locations held by them, no riparian rights in or to the waters of Hurrah Creek. They undoubtedly had the right to appropriate such of the unappropriated waters of that stream as were needed in and for the working of their mining claims."

1 Ketchikan etc. Co. v. Citizens etc. Co., 2 Alaska 120; McFarland v. Alaska etc. Co., 3 Alaska 308; McCloskey v. Pacific Coast etc. Co., 160 Fed. Rep. 794, 87 C. C. A. 568.

2 164 Fed. Rep. 657, 90 C. C. A. 473.

3 Van Dyke v. Midnight Sun etc. Co., 177 Fed. Rep. 85, 100 C. C. A. 503.

CHAPTER 85.

ARIZONA.

§ 1711. Particular features of the State.
§ 1712. Irrigation in the State.
§ 1713. Constitutional provisions.
§ 1714. Criticism of the Arizona laws.
§ 1715. Title to water—Water rights defined.
§ 1716. The appropriation of water.
§ 1717. Reservoir rights.
§ 1718. The right and method of appropriation.
§ 1719. Ditches and canals and rights of way therefor.
§ 1720. Overseers of acequias or public ditches.
§ 1721. Corporations and companies.
§ 1722. Criminal statutes.
§ 1723. Riparian rights in Arizona.

§ 1711. Particular features of the State.—Arizona, the oldest irrigated region within the limits of the United States, where ancient and ruined systems of irrigating canals and reservoirs serve as models for modern work, is much interested in the subject of irrigation. The territory covered by the State has been inhabited at different times by three races of people, each making use of irrigation in agricultural operations. Of the first or prehistoric race very little is known. Evidence abounds that this race inhabited Arizona for an extended period, and had entirely vanished before the coming of the white man to America.[1] The second race was that of the Indians, who were practicing irrigation in a primitive manner at the advent of the white man. The third race is that of the white man, who has taken up and perfected the work of the former inhabitants.

The surface of the State is divided into two clearly defined regions. In the northern portion is a plateau with an elevation of from five to eight thousand feet. This plateau is mainly a level mesa, except where there are groups of volcanic mountains, rising above seven thousand feet, and in the San Francisco Mountains, attaining an elevation of 13,000 feet. The climate of the plateau region is typified by that of the city of Flagstaff, which has a mean

[1] For ancient irrigation in Arizona, see Secs. 81, 82.

annual temperature of about 45° F., and a rainfall of nearly 20 inches. The second region consists of broad valleys, separated by narrow, steep ranges, having a surface varying in altitude from nearly sea level to three thousand feet. The climatic conditions in this region are typified by those of the city of Phoenix, where the average temperature is about 69° F., or about the same as that of New Orleans, and the rainfall is five inches. There are but two river systems within the State—the Colorado and the Gila. The drainage area of the former and its tributaries comprise about one-half of the State. The drainage area of the Gila, with its numerous branches, is of far more importance agriculturally. The most of the agricultural and irrigable land is situated in the Gila basin.[2]

§ 1712. **Irrigation in the State.**—According to the meteorological reports for Arizona, we find from foothills to mountains an annual average precipitation of from 12 to 25 inches, and on the plains and mesas of the western and southern part of the State the very low average of from 3 to 12 inches. Hence, it follows for the greater part of the State irrigation is practiced as an absolute necessity to successful farming. Without irrigation this part of Arizona is a semi-tropical desert; with irrigation it is capable of sustaining a dense population, limited only by the water supply that can be secured by ditches, reservoirs, and wells, and by the wisdom shown in the distribution of water thus obtained. In the lower plains the temperature is such that crops will grow and mature in any season of the year, provided there is sufficient moisture, and in many respects this portion of the State is not unlike the shores of the Mediterranean, where irrigation is older than the his-

2 See, also, Irrigation Near Phoenix, Arizona, by Arthur P. Davis, Water-Supply and Irrigation Paper No. 2, U. S. Geol. Survey, Washington, 1897; Water Storage on Salt River, Arizona, by Arthur P. Davis, Water-Supply and Irrigation Paper No. 73, U. S. Geological Survey, Washington, D. C.

Surface Water Supply of the Colorado River Drainage Above Yuma, Arizona, by R. L. Meeker and H. S. Reed, Water-Supply Paper No. 211, U. S. Geological Survey, Washington, 1908.

Surface Water Supply of the United States, 1907-8, Part IX, Colorado River Basin, prepared under the direction of M. O. Leighton, by W. B. Freeman and R. H. Bolster, Water-Supply Paper No. 249, U. S. Geological Survey, Washington, 1910.

Same as last above, Water-Supply Paper No. 269, U. S. Geological Survey, Washington, 1911.

tory of the race which now inhabits them. In the valley portion of the State irrigation is kept up during the entire year.

The area in the State under irrigation is confined largely to the watershed of the Gila River, wherein the greatest agricultural development has been made. The rivers tributary thereto lend themselves much more readily to the construction of canals and ditches and comprise much more available land, which will ultimately be reclaimed, than the drainage area of the Colorado River and its tributaries. The acreage at present under irrigation in Arizona may be regarded as approaching the maximum possible to the present supply of water, and the methods of using it. All the available water in the natural streams and lakes have been utilized, and any extended area can be brought under cultivation only by greater economy in using the existing supply or by the further adoption of systems of storage for the conservation of the flood waters now annually running to waste. There are a great many storage reservoir sites in the country, and irrigators are looking forward to this method as the most effectual means of obtaining relief from the troubles and uncertainties existing at present. The National Government has constructed two of its projects, the Salt River project and the Yuma project, authorized by the Reclamation Act.[1]

In the matter of practical irrigation, in most cases throughout the State, the water is applied by the flooding method, after the custom established by the Mexicans. This method is at best an exceedingly wasteful one, where there is such a scanty supply of water; and it has been demonstrated in many cases where too much water is used that better crops could be matured by using the water more sparingly. This would also have the effect of increasing the area under cultivation.

According to the Census Reports of 1910, the total number of farms irrigated in Arizona in 1909 was 4,509. Exclusive of Indian

1 See, also, Irrigation in the Salt River Valley, by W. H. Code, Special Agent of the United States, Report of Irrigation Investigations for 1900, No. 2. Reprint from U. S. Dept. of Agriculture, Office of Experiment Stations, Bulletin No. 104. Use of Water in Arizona, by W. H. Code, Reprint from the U. S. Dept. of Agriculture, Office of Experiment Stations, Bulletin No. 86, Irrigation Investigations in Salt River Valley, by W. H. Code, Reprint from U. S. Dept. of Agriculture, Office of Experiment Stations, Bulletin No. 119.

reservations the total was 3,847, against 2,981 in 1899, an increase of 866, or 29.1 per cent. The total acreage irrigated in 1909 was 320,051 acres, or, excluding Indian reservations, 300,665 acres, against 185,396 acres in 1899, an increase of 115,269 acres, or 62.2 per cent. The total acreage which all enterprises were capable of supplying with water in 1910 amounted to 387,655 acres, an increase of 67,604 acres over the area irrigated in 1909. The total acreage reported in projects completed and uncompleted, including those of the Government, was 944,090 acres, an increase of 624,039 acres over the area actually irrigated in 1909. This indicates in a general way the area which will be available for settlement within the next few years.

§ 1713. **Constitutional provisions.**—The new constitution of Arizona upon the subject of water rights has several provisions. Article XVII, Sections 1 and 2, provide:

"Sec. 1. The common law doctrine of riparian water rights shall not obtain or be of any force or effect in the State.

"Sec. 2. All existing rights to the use of any of the waters in the State for all useful or beneficial purposes are hereby recognized and confirmed."

Article XV, Sections 1 to 19, provide for the creation of a Corporation Commission, among whose duties, as prescribed by Sections 2 and 3, is to be found the following:

"Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire, or in furnishing gas, oil, or electricity for light, fuel, or power, or in furnishing water for irrigation, fire protection, or other public purposes, or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes, or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

"Sec. 3. The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders by which such corporations shall be governed in the transaction of business within the State," etc.

Article X, Section 5, also provides:

"Sec. 5. No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre; provided, that the State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such Government project, and other lands in lieu thereof shall be selected from lands of the character named and in the manner prescribed in Section 24 of the said Enabling Act." [1]

Article XX, Section 10, provides:

"Tenth. There are hereby reserved to the United States, with full acquiescence of this State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress, entitled, 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June 17, 1902, and Acts amendatory thereof or supplementary thereto, to the same extent as if this State had remained a Territory."

By the Enabling Act there was reserved to the United States and excepted from the operation from any and all grants made or confirmed by the Act to the proposed State, all lands of prospective value for the development of water power or power for hydroelectric use or transmission, which shall be ascertained and designated by the Secretary of the Interior, within five years after the proclamation of the President declaring the admission of the State.[2]

§ 1714. **Criticism of the Arizona laws.**—The two States of Arizona and New Mexico may be considered as constituting a sort of group somewhat separate from the other commonwealths of the arid region as regards their original laws regulating the water and

[1] For the Enabling Act, admitting Arizona to the Union, see Stats. of U. S., 2d Sess. 61st Cong., p. 557.

[2] See Enabling Act, Statutes of the United States, passed at the 2d Session, 61st Congress, 1909-1910, p. 575.

water rights within their respective jurisdictions. The early legislation of both of the Territories is somewhat similar, and both follow largely the old Spanish and Mexican laws upon the subject.[1] In New Mexico, by the adoption of the Water Code of 1907,[2] many of the Spanish and Mexican laws were abrogated relative to the subject, while in Arizona these old laws are still in full force and effect. Indeed, it is provided in the statute that the regulation of acequias, which have been worked according to the laws and customs of Sonora, shall remain as they were made and used up to the date of the passage of the Act, and should be enforced and observed.[3] It is to be expected that about the first legislature of the State of Arizona will follow the other States and enact a Water Code governing the subject of waters and water rights within the new State.

There are no special statutes now upon the subject of the adjudication of existing rights; but that subject is left entirely to the equity side of the courts under general provisions for equitable actions.

The legislature is to be criticised for its failure to enact earlier provisions for the acceptance and operation of the Carey Act. An irrigation district law should also have been enacted earlier. However, at the first session of the legislature of 1912, after the adoption of the constitution, Acts were enacted and approved accepting the provisions of the Carey Act, creating drainage districts, and also for the creation of irrigation districts. Enactments in aid of the National Reclamation Act should also have been passed, although this feature does not seem to have hindered the Government in projects in the Territory to any great extent.[4]

§ 1715. **Title to water—Water rights defined.**—In the Bill of Rights of the Territory of Arizona is to be found the following declaration:

"All streams, lakes, and ponds of water capable of being used for the purpose of navigation or irrigation are hereby declared to be public property; and no individual or corporation shall have the

1 For the Spanish and Mexican laws, see Secs. 570-584.

2 For the laws of New Mexico, see Chap. 94, Secs. 1924-1941.

3 Rev. Stats., 1901, Sec. 4199.

4 See Secs. 1235-1286.

right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose." [1]

In the statutes is found the further declaration:

"All rivers, creeks, and streams of running water in the Territory of Arizona are hereby declared public and applicable to the purposes of irrigation and mining, as herein provided." [2]

§ 1716. **The appropriation of water.**—The method of appropriation is simple and somewhat antiquated as compared with the method in the States having adopted water or irrigation codes. A notice of appropriation must be posted at the place of diversion on the stream, a copy of which must be filed and recorded in the office of the county recorder in which the dam, reservoir, or canal contemplated is to be constructed, and if the canal runs through more than one county, it must be filed and recorded in each county, and a copy of such notice must also be filed and recorded in the office of the secretary of the State. The appropriator must, "within a reasonable time thereafter, construct" the necessary works and use reasonable diligence to maintain the same, and a failure to do this shall be held to work a forfeiture of such right to the water or waters attempted to be appropriated.[1]

It is made unlawful for any one to obstruct the flow of streams by any works, except by erecting mills and machinery for mining purposes or for the reduction of metals, as the right to irrigate the fields shall be preferable to all others. Where reduction works or mining apparatus shall be placed upon lands previously held for agricultural purposes, the person or persons so holding such lands shall be entitled to remuneration for the damages caused thereby. When any ditch or acequia shall be taken out for agricultural purposes the party so taking out such ditch shall have the exclusive right to the water, or so much as may be necessary for his purpose, and if at any time the water so required shall be taken for mining operations, the person owning such water shall be entitled to damages.[2]

1 Rev. Stats., Ariz., 1901, Sec. 22.
2 Rev. Stats., Ariz., 1901, Sec. 4174.
1 Rev. Stats., 1901, Sec. 4170.
2 Rev. Stats., 1901, Secs. 4178-4180.

For the pollution of water by mining debris, see Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465.

§ 1717. **Reservoir rights.**—The right to construct reservoirs for the storage of waters is granted as well as the use of the natural channels of streams to conduct such stored water to the place of use, and to divert the same below. The quantity of water which may be again taken from the stream is subject to agreement of the interested parties. But, in case the parties can not agree upon the division of the water, it shall be distributed in the following manner: "There shall be ascertained the quantity of water which shall flow into said natural channel from the storage reservoir and from that quantity there shall be deducted one-half of one per centum for each one mile of length of the natural channel through which said water shall flow before being diverted therefrom." [1]

§ 1718. **The right and method of appropriation.**—"All the inhabitants of this Territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias and obtain the necessary water for the same from any convenient river, creek, or stream of running water." [1]

It is also further provided that:

"Any person or persons, company or corporation shall have the right to appropriate any of the unappropriated waters or the surplus or flood waters in this Territory for delivery to consumers, rental, milling, irrigation, mechanical, domestic, stock or any other beneficial purpose," and they are given the right to construct and maintain reservoirs and the other necessary works for the same. "And the person or persons, company or corporation first appropriating water for the purposes herein mentioned shall always have the better right to the same." [2]

1 Rev. Stats., 1901, Secs. 4202, 4203.

1 Rev. Stats., 1901, Sec. 4176.

For the appropriation of water, see Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504; aff'd, 212 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493; Howard v. Perrin, 8 Ariz. 347, 76 Pac. Rep. 460; aff'd, 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. Rep. 195; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465; Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483; Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

2 Rev. Stats., 1901, Sec. 4169.

See, also, Gould v. Maricopa etc. Co., 8 Ariz. 429, 76 Pac. Rep. 598; Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944.

§ 1719. Ditches and canals and rights of way therefor.—"Whenever such public or private acequias shall necessarily run through the lands of any private individuals not benefited by said acequias the damages resulting to such private individuals, on the application of the parties interested, shall be assessed by the probate judge of the proper county in a summary manner."[1]

In case a community or people desire to construct an acequia in any part of the State, and the persons desiring to construct the same are the owners of land upon which they design constructing such acequia, no one shall be bound to pay damages for such land, as all persons interested in the construction of such acequia are to be benefited thereby.[2]

Any person owning land which may include a spring or stream of running water, or owning lands upon a river where there is not population sufficient to form a public acequia, may construct a private acequia for his own use, subject to his own regulations, provided it does not interfere with the rights of others.[3]

"The regulations of acequias, which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day and the provisions of this chapter shall be enforced and observed from the day of its publication."[4]

Canals and ditches must be kept in good repair by their respective owners. When any corporation, association, or individual fails to keep his works in proper repair, so that the water may be delivered to consumers, then it is lawful for such consumers who have contracted for the water to make such repairs at their own cost, which cost and charge shall be a lien on such works and may be foreclosed the same as other liens on real estate.[5]

All owners or operators of irrigating canals are required to remove from the banks of their canals all weeds growing thereon.[6]

"All owners and proprietors of arable and irrigable land bordering on or irrigable by any public acequia shall labor on such public acequia whether such owners or proprietors cultivate the land or not."[7] And, "All persons interested in a public acequia, whether

[1] Rev. Stats., 1901, Sec. 4177.

[2] Rev. Stats., 1901, Sec. 4186.

See Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

[3] Rev. Stats., 1901, Sec. 4201.

[4] Rev. Stats., 1901, Sec. 4199.

[5] Rev. Stats., 1901, Secs. 4172, 4173, 4185.

[6] Rev. Stats., 1901, Sec. 4183.

[7] Rev. Stats., 1901, Sec. 4182.

owners or lessees of land, shall labor thereon in proportion to the amount of land owned or held by them and which may be irrigated or subject to irrigation."[8]

Suitable bridges and crossings must be constructed by the owners of ditches wherever they cross public highways.[9]

By the Act approved March 17, 1903,[10] all dams, reservoirs, canals, and other works and property used for and in connection with the development, storage, and distribution of water for the purpose of generating electricity was exempted from taxation for a period of nine years from date of Act, upon the owners complying with the provisions of the Act by filing a notice of the intention to construct such plant and giving therein a full description of such plant. Work must be commenced upon such plant within six months from the date of the filing of such notice and prosecuted with due diligence to completion. A failure to comply with the provisions of the Act shall be grounds for the forfeiture of the exemption. In the construction of the works and the use of the water valid and existing rights must not be interfered with. By the Act of March 21,[11] the above exemption, under the same conditions, was extended for a period of ten years from the date of the latter Act.

By the Act of March 19, 1903,[12] all works constructed for the development, conservation, storage, and distribution of water for mining, manufacturing, and agricultural purposes were exempted from taxation.

§ 1720. **Overseers of acequias or public ditches.**—It is provided that it shall be the duty of the several justices of the peace in the State to call together in their respective precincts all the owners and proprietors of land irrigated by any public acequia, for the purpose of electing one or more overseers of said acequia for the year. The manner of conducting such election and the number of overseers shall be regulated by the justices of the peace of their respective precincts, and the only persons entitled to vote at such

8 Rev. Stats., 1901, Sec. 4184.
9 Rev. Stats., 1901, Secs. 4205-4208.
10 Laws, 1903, p. 39.
11 Laws, 1907, p. 170.
12 Laws, 1903, p. 136.

elections are the owners and proprietors of land irrigated by the acequia.

It is the duty of the overseers to superintend the opening and repairs of the acequias; to apportion the number of laborers to be furnished by the owners of the lands; to regulate them according to the quantity of land to be irrigated by each one from the acequia; to distribute and apportion the water, and in making such apportionment he shall take into consideration the nature of the seed sown or planted; and to conduct and carry on such distribution with justice and impartiality. During the years of scarcity of water, owners of fields shall have preference of the water for irrigation according to the dates of their respective occupation of the land, either by themselves or their grantors. Then follow provisions that it shall be the duty of the owners of lands to furnish laborers as required by the overseer; for the removal and punishment of the overseer in case of wilfully neglecting or refusing to fulfill the duties of his office, or for malfeasance in office. Fines are prescribed for the refusal of land owners to furnish the number of laborers required; for the interference with the acequia or works without the consent of the overseer, all of which fines and forfeiture shall be for the benefit of the public acequia.[1]

The overseer may be removed from office upon a second conviction for the failure to perform his duty, and a new overseer elected.[2]

§ 1721. **Corporations and companies.**—Corporations and companies may be organized for the purpose of appropriating water either for their own use or for the sale or rental of the water to others. Railroad companies are given power to appropriate water and to acquire rights of way for their own use.[1]

"All corporations, associations, or individuals, owning, managing, or controlling any canals, irrigating ditches, flumes, pipe lines, or other means for conveying water from any public stream in this Territory, on or to the lands of occupants, for the purpose of selling, hiring, or letting the same to such occupants for pay or hire, shall not sell, hire, or let, or contract to sell, hire, or let, more water than

1 Rev. Stats., 1901, Secs. 4187-4195. See Dyke v. Caldwell, 2 Ariz. 394, 18 Pac. Rep. 276; Clifford v. Laurrien, 2 Ariz. 202, 11 Pac. Rep. 397.

2 Rev. Stats., 1901, Secs. 4193, 4194.

1 Rev. Stats., 1901, Secs. 859-861.

the said canals, ditches, flumes, or pipe lines may be estimated to carry at any one time, whether such contract be made for measured time or acreage quantity." [2]

There rests upon such a corporation, so long as it uses its franchise, a duty to render the public at a reasonable rate the services in furnishing the water for which it was created.[3]

Article XV of the new State constitution [4] provides for the creation of a Corporation Commission with power to fix just and reasonable rates and charges for the furnishing of water for irrigation and other purposes.

§ 1722. **Criminal statutes.**—It is made a misdemeanor to steal water,[1] so, also, for any person during the season when there is a scarcity of water for irrigation to waste water.[2] So, also, for any person to unlawfully use the water from any acequia or irrigating canal without the proper gates required by law, or for any person to unlawfully construct or maintain any dam, or in any way impede the free passage of the water in any irrigating canal or acequia.[3] So, also, the failure to construct the proper bridges, or to permit water to flow from irrigating canals over the highways.[4]

All by-paths or foot paths across any cultivated fields are prohibited, under penalty of a fine not to exceed $10, for the benefit of the public acequia, to be assessed in a summary manner by the justice of the peace of the precinct, "and if the person so offending shall not have the wherewith to pay the fine, he shall be adjudged and sentenced to work ten days on the public acequia." [5] It is also made a misdemeanor for the failure to remove weeds from the banks of canals.[6] So, also, for the failure of the overseer of a ditch or acequia to perform his duties.[7] So, also, the failure of land owners to furnish laborers at the request of the overseer, and the unlawful obstruction of acequias.[8]

2 Rev. Stats., 1901, Sec. 4171.

3 Salt River Valley Canal Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

4 For which see Sec. 1713.

1 Rev. Stats., Penal Code, 1901, Secs. 456, 493.

2 Rev. Stats., Penal Code, 1901, Sec. 612.

3 Rev. Stats., Penal Code, 1901, Secs. 530, 531.

4 Rev. Stats., Penal Code, 1901, Secs. 528, 529, 4207.

5 Rev. Stats., 1901, Sec. 4181.

6 Rev. Stats., 1901, Sec. 4183.

7 Rev. Stats., 1901, Sec. 4193.

8 Rev. Stats., 1901, Secs. 4195, 4196.

All fines and forfeitures, recovered for the use and benefit of any public acequia, shall be applied by the overseers in improving and repairing the same.[9]

§ 1723. **Riparian rights in Arizona.**—The doctrine of riparian rights as recognized by the common law is entirely abolished by statute and Court decision. It is provided: "The common law doctrine of riparian water rights shall not be of any force or effect in this Territory."[1] It is held that the arid condition of the country and the necessities of the people require the change to the Arid Region Doctrine of appropriation.[2]

[9] Rev. Stats., 1901, Sec. 4197.

[1] Rev. Stats., 1901, Sec. 4168. See, also, Art. XVII, Sec. 1, Constitution, Sec. 1713.

See, also, Boquillas etc. Co. v. Curtis, 11 Ariz. 128, 89 Pac. Rep. 504; aff'd, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. St. Rep. 493; Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453; Austin v. Chandler, 4 Ariz. 346, 42 Pac. Rep. 483; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. Rep. 465.

[2] The common law rule against obstructing running streams to the injury of adjacent lands applies in Arizona to well-defined arroyos, or the natural channels through which surface or flood waters flow. Kroeger v. Twin Buttes R. Co., 13 Ariz. 348, 114 Pac. Rep. 553.

CHAPTER 86.

CALIFORNIA.

§ 1724. Particular features of the State.
§ 1725. Irrigation in the State.
§ 1726. Criticism of the California laws.
§ 1727. State constitutional provisions.
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§ 1729. Title to and the right to appropriate water.
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§ 1764. The pollution of waters.
§ 1765. Construction and repair of bridges.
§ 1766. Taxation of water works.
§ 1767. Criminal statutes.
§ 1768. Riparian rights in California.

§ 1724. Particular features of the State.—The State of California is traversed by the Sierra Nevada Mountains and the Coast Range, both of which, in a general way, are parallel to the Pacific Coast. The greater part of the agricultural land of the State lies in the great central valley, between these ranges, and in the portion of the State south of the Kern River, sometimes called the Tehachapi, Mountains. In most of the sections of the State there is usually sufficient rainfall for the maturing of some crops, although there are some sections where no crops can be grown without irrigation. The normal annual precipitation ranges from about two inches in the Imperial Valley, in the southeastern part of the State, to above sixty inches along the coast in the western part. The rivers are small, except the Colorado, which separates Arizona from California in the southeast portion of the State. The State, with its varied topography, soil, and climate, offers an interesting field for the study of irrigation, which we will discuss in the following section.[1]

§ 1725. Irrigation in the State.—With the exception of the extreme northwestern portion, irrigation is practiced to some extent throughout the entire State of California; but the larger part of the

[1] See, also, for additional data, California Hydrography, by Joseph B. Lippincott, Water-Supply and Irrigation Paper No. 1, U. S. Geological Survey, Washington, 1903; Storage Reservoirs on Stony Creek, California, by Bert Cole, Water-Supply and Irrigation Paper No. 86, U. S. Geological Survey, Washington, 1903; Surface Water Supply of California, 1906, by W. B. Clapp, District Hydrographer, Water-Supply and Irrigation Paper No. 213, U. S. Geological Survey, Washington, 1903; Surface Water Supply of the United States, 1909, Part XI, California, prepared under the direction of M. O. Leighton by W. B. Clapp and F. F. Henshaw, Water-Supply Paper No. 271, U. S. Geological Survey, Washington, 1911; Water Resources of Antelope Valley, California, by Harry R. Johnson, Water-Supply Paper No. 278, U. S. Geological Survey, Washington, 1911.

irrigated land lies in the south portion of the great central valley, between the two ranges of mountains and in the south part of the state.

No other State of the Union produces such a variety of crops, and in no other State has agricultural land reached the selling price of the semi-tropical fruit orchards of Southern California. Except in a few localities, there is not in California the absolute necessity for irrigation that exists in most of the other Western States. On nearly all of the lands that are irrigated some crops will grow without the artificial application of water. The most valuable crops, however, usually require irrigation, and with it the yield of all crops is greatly increased. In years of drought an irrigation system is an insurance against crop failure.

Reports upon the conditions of that State show that California is utilizing practically all of her water resources and employing all the methods peculiar to other localities. Irrigators are using surface waters from the streams, drainage water, sewage water, water from catchment basins, and other subterranean sources, water from artesian wells, from tunnels run into mountain sides, and water impounded in reservoirs, filled by large or small drainage areas. The present California idea is that water is gold, and that it is hunted for and appropriated with as much ardor as the precious metal itself was in the earlier history of the State.

Up to a few years ago California was ahead of any other State of the Union in the development of her water supply and number, size, and boldness of design of her irrigation works, but within recent years some of the other States are forging ahead. For example, as reported by the census of 1910, Colorado in 1909 had something like 30,000 acres more under irrigation than did California. The State of Idaho has some of the largest projects in the country, especially those operating under the Carey Act. But the State of California has made great advancement in this part of her development, and has reduced to an exact science the amount of water that can be applied to a tract of land at certain intervals with the best results, both in quantity and quality of crops, and thus is rapidly doing away with the wasteful methods of the past. This advancement was rendered possible in that State by the existing extremes—the economic uses of water rendered necessary by scanty supply, and the dense population in some localities.

It is safe to say that California owes the larger portion of its prominence, which it occupies today, to the result of irrigation. The localities where irrigation has been practiced the longest and most extensively have gained the widest reputation outside of the State. Almost every step taken in advance in California's prosperity since the first great rush for gold has been anticipated by new and more extensive irrigation development. It is no exaggeration to say that were it not for irrigation the fame of California would be confined to the products of her mines, and she would not have more than half her present population. Without irrigation the major portion of the State, which is today thickly populated and in the highest degree productive, would still be in its original barren condition.[1]

As reported by the census of 1910, the total number of farms irrigated in California in 1909 was 39,352, as against 25,675 in 1899, an increase of 13,677, or 53.3 per cent, during the decade. The total area irrigated in 1909 was 2,664,104 acres, as against 1,446,114 acres in 1899, an increase of 1,217,990 acres, or 84.2 per cent. The

[1] See, also, Irrigation in Santa Clara Valley, California, by S. Fortier, Engineer in Charge, Office of Experiment Stations, U. S. Dept. of Agriculture, Reprint from Bulletin No. 158, Washington, 1905; Irrigation Conditions in the Imperial Valley, California, by J. E. Roadhous, Agent and Expert; also, Distribution and Use of Water in Modesto and Turlock Irrigation Districts, California, by Frank Adams, Irrigation Engineer; also, Relation of Irrigation to Yield, Size, Quality, and Commercial Suitability of Fruits, by E. J. Wickson, Prof. of Agricultural Practice in the University of California, Separate No. 3, Annual Report of the Irrigation and Drainage Investigations, 1904, Office of Experiment Stations, U. S. Dept. of Agriculture, Washington, 1905.

The Agricultural Situation in California, by Elwood Mead, Irrigation Expert in charge; Irrigation Problems of Honey Lake Basin, California, by William E. Smythe, vice president of the California Water and Forest Association; Figures and Water Rights of Yuba River, California, by Marsden Manson, C.E., Ph.D.; Irrigation Investigations on Cache Creek, by J. M. Wilson, Agent Expert, Irrigation Investigations; Report of Irrigation Problems in Salinas Valley, by Charles D. Marx, Prof. of Civil Engineering in Leland Stanford Junior University; Irrigation on San Joaquin River, by Frank Soule, Prof. of Civil Engineering in the University of California; Water Appropriation from Kings River, by C. E. Grunsky, City Engineer of San Francisco; Problems of Water Storage on Torrential Streams in Southern California, Typified by Sweetwater and San Jacinto Rivers, by James D. Schuyler, Hydraulic Engineer; all included in Bulletin No. 100, Office of Experiment Stations, U. S. Dept. of Agriculture.

total acreage which all enterprises were capable of irrigating in 1909 was 3,619,378 acres. The area included in projects completed or under construction in 1910 was 5,490,360 acres.

Of the area irrigated in 1909, according to the report, only 400 acres were irrigated under the United States Reclamation projects, and no area under the Carey Act. Irrigation districts, co-operative enterprises, and individual partnership enterprises, which together supplied about 72 per cent of the acreage irrigated in 1909, are all controlled by the water users. Commercial enterprises or corporations organized for profit, the only other class in the State that irrigated any extensive area in 1909, supplied 28 per cent of the total irrigated area.

§ 1726. Criticism of the California laws.—In the present chapter we have endeavored to set forth an abstract of the statutory laws of the State of California upon the subjects of waters and water rights and the construction of those laws by the courts. The task has been an arduous one for the reasons explained herein; and perhaps it may be deemed by some that more space has been devoted to the chapter than there should have been. But these laws have been abstracted down to the smallest possible space and still give an intelligent statement of what they contain.

Upon the subject of the appropriation of water, the old California code adopted in 1872 is still in force with some slight amendments.[1] This code simply embodies in statutory language those rules and regulations adopted by the early California miners for the government of water rights within their respective mining districts and afterward recognized by Congress as the Arid Region doctrine of appropriation, and which rules and regulations the courts, long prior to their enactment into statutory law, had upheld as a matter more largely based upon necessity than upon law.[2] But this code, according to the best accepted authorities, based upon actual experience in other States, is antiquated and out of date, and not the best law for governing the appropriation and distribution of waters, especially in thickly settled communities. It is as antiquated and out of date as is the measurement of water by the miner's inch, for

1 See Secs. 1410-1422, Civil Code; 2 Kerr's Cyc. Codes, pp. 1137-1164.

2 For the history of the Arid Region Doctrine of appropriation, see Chap. 32, Secs. 595-626.

which the California code still provides, as compared to the more modern measurement by the cubic foot per second of time or the acre-foot. For many years this simple code existed in California without change, and the right to the use of water was based upon its actual application to some beneficial or useful purpose. Then came the decision in the case of Lux v. Haggin,[3] in 1886, which fixed upon the State the common law doctrine of riparian rights, without use, in addition to the doctrine already adopted of prior appropriation. These two rules of law are as opposite in principle as it is possible to find two rules—the one that in order to acquire a right to the use of water it must be actually diverted from the natural stream and applied to some beneficial use or purpose, and the other that the water must be permitted to flow by the lands of the riparian owners as it was wont to flow by Nature. As stated by a California Federal Judge for the Circuit Court of Appeals in an Alaska case, "The common law doctrine of riparian rights being wholly inconsistent with and antagonistic to that of appropriation, it necessarily follows that when the Federal and State Governments assented to, recognized, and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they in effect declared that that of riparian rights did not apply."[4] But in California this rule has not been followed, as the courts have attempted to maintain both systems. The result is that from the date of the decision in the Lux v. Haggin case to the present there has been an "irrepressible conflict" in the State in attempting to reconcile these contrary doctrines and enable both to exist side by side. And upon this question alone millions of dollars have been expended in litigation, and still the question is as unsettled as it was when the conflict first began. It never will be settled until there is some effective statutory law enacted to dispose of all claims to water by riparian owners, except that quantity which is actually applied by them to some beneficial use or purpose. They have such a statute in Oregon, and it could be adopted in California.[5]

If the signs of the times indicate anything, which is not always

[3] 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[4] Judge Ross in Van Dyke v. Midnight Sun etc. Co., 177 Fed. Rep. 85, 100 C. C. A. 503.

[5] Oregon Statutes of 1909, Chap, 216; Lord's Oregon Laws, Secs. 6575 *et seq.* See, also, Sec. 1997.

the case in California, the State is on the eve of a complete change in its system of laws upon the subjects of water and water rights. Already there has been adopted a statute, similar statutes to which are always made the fundamental declaration of the constitutions or statutes of the other States adopting the laws of State control or of State administrative laws,[6] that: "All the water or the use of water within the State of California is the property of the people of the State of California."[7] Again, in the Water Power Act of 1911,[8] with the exception of the question of the determination of existing rights, there were conferred upon the board of control, for the purposes of that Act only, almost the exact powers and duties which are conferred upon the Wyoming Board of Control for all purposes.[9] Furthermore, there have been several attempts at recent sessions of the California legislature to adopt a statute similar in many respects to that of Wyoming. But these bills failed simply from lack of votes. It remains to be seen what the Conservation Commission created at the last session of the legislature, under the powers and duties conferred upon it, will do in this respect.[10]

There is one subject as to the California statutory laws which should be severely criticised, and that is the habit of the legislature when it enacts a law upon a certain phase of a subject to retain all previous laws upon the same subject. There are many examples of this, but one will suffice. There are two existing statutory laws relative to the powers and duties of the county supervisors to fix water rates for the furnishing of water outside of cities and towns. There is the Act of 1880[11] and the Act of 1885.[12] This habit

[6] See Chap. 68, Secs. 1337-1367.

[7] Amendment to Civil Code, Sec. 1410, Stats. and Amdts., 1911, Chap. 407, p. 821; 2 Kerr's Cyc. Codes, p. 1137.

[8] Stats. and Amdts., 1911, Chap. 406, p. 813; Kerr's Bien. Supp., 1911, p. 1468. See, also, Sec. 1732.

[9] For the board of control under the Wyoming law, see Secs. 2102, 2103.

[10] See Stats. and Amdts., 1911, Chap. 408, p. 822; Kerr's Bien. Supp., 1911, p. 1023. See, also, Sec. 1752.

[11] Stats. and Amdts., 1880, p. 16. See, also, Secs. 1744, 1745, note.

[12] Stats. and Amdts., 1885, p. 95; Gen. Laws., Henning, p. 601.

"It is believed that the foregoing Act fully supersedes Stats. 1880, p. 16, Chap. 21." Gen. Law of California, Henning, p. 604.

See, also, McFadden v. Los. Angeles County, 74 Cal. 571, 16 Pac. Rep. 397; Crow v. San Joaquin etc. Irr. Co., 130 Cal. 309, 62 Pac. Rep. 562; Fresno Canal etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395.

leads to confusion, endless search upon the part of the court and bar to determine just what the law is, and, where the phrasing is somewhat different, it requires, at times, several constructions by the Supreme Court.

During recent sessions of the legislature a number of boards and commissions have been created. Our criticism upon this subject is that there are now too many boards which simply act in an advisory capacity and not enough active boards with authority. Take, for example, the "advisory board" and the "consulting board" to the department of engineering.[13] Again, the only powers conferred upon the conservation commission by the Act of 1911 [14] are to investigate certain subjects and to make a report thereon.

California led the Western States in its irrigation district law. The law commonly designated as the Wright Act has been at least followed by every State and Territory adopting such a law, and in a number of the States it has been literally copied. California was also the battlefield upon the question of the constitutionality of that law.[15] Many of the States withheld the enactment of such a law until this question was settled, then, by adopting the California statute, they also adopted the decisions holding that the law was constitutional. But in recent years California seems to have gone district mad. Besides the irrigation district law, there are general statutes providing for the organization, control, and operation of municipal water districts of two classes,[16] reclamation districts,[17] levee districts,[18] protection districts,[19] overflow districts,[20] and storm water districts.[21] Besides these, there are a number of special Acts, scattered throughout the various codes, which authorize the organization and operation of particular districts for different purposes, and especially as relating to drainage. About the only law that the State of California really lacks in the way of district law, relating to waters, is one upon the subject of the control and regulation of rain water before it hits the earth, and we have no doubt but that such a law will be enacted, upon our suggestion, at the next

13 See Sec. 1728.

14 Stats. and Amdts., 1911, Chap. 408, p. 822; Kerr's Bien. Supp., 1911, p. 1023.

15 See Secs. 1405-1407.

16 Sec. 1756.

17 Sec. 1757.

18 Sec. 1758.

19 Sec. 1759.

20 Sec. 1760.

21 Sec. 1761.

session of the legislature. It has evidently been overlooked. The Acts mentioned above are all long and encumber many pages of the statutes; and those Acts relating to the subject of drainage and the protection of lands from overflow and storm waters treat kindred subjects and are largely similar in terms. Surely it would not require a man with the brain of a David Dudley Field to codify at least these latter laws into one.

There is another serious criticism of the California statutes upon the subject of waters and water rights that goes not so much to the substance of the laws themselves as to where to find the laws. And from a careful examination of the statutes this applies to all the statutory laws of the State. The system of codes is in itself confusing, even if the codes were consistent, which they are not. According to the latest and best compilation of the California codes [22] there are the following codes, which, with their construction by the courts, cover the pages, as follows: Volume 1, Political Code, 1234 pages; Volume 2, Civil Code, 2318 pages; Volume 3, Code of Civil Procedure, 2609 pages; Volume 4, Penal Code, 1494 pages; Volume 5, General Laws, Henning, 1564 pages; Volume 6, Supplement 1906-1909, 2157 pages. Besides this there are the statutes and amendments of 1911, bringing the laws down to date, containing 2186 pages. This makes 13,564 pages one must search through in order to find the statutory laws of California upon the subject of waters or upon any other subject. Then, again, the code divisions are not consistent. For example, the irrigation district law is found in the General Laws, the reclamation district law in the Political Code, the levee district law again in the General Laws. It is the same relative to many subjects.

In concluding this section we will add that the statutory laws of California are swollen beyond all reasonable proportions. It seems to be the intent of the California legislators to cover all phases of human action by statutory rule. The legislature of 1911 enacted 2186 pages of matter, which include a great number of constitutional amendments. And upon the subject of the constitution of California we find it to be a rapidly growing document. With the amendments submitted by the last legislature and adopted by a vote of the people on October 10, 1911, it will probably cover 150 pages. It should be remembered that the Commonwealth of Massachusetts

22 Kerr's Cyc. Codes.

has struggled along in her feeble way for over one hundred years with a constitution covering less than thirty pages. The statutory laws of California should be codified, not compiled, there are compilations enough, but codified in the full sense of the term.

§ 1727. **State constitutional provisions.**—The provisions of the State constitution of California of 1879, upon the subject of waters, were adopted long before the law of State control or State administrative law was fully evolved, and also before it was fully settled as to just what authority a State had over the waters flowing within its boundaries. Therefore, these provisions have more to do with the exercise of the right of eminent domain and the fixing of the water rates which might be charged for the use of water in the State.

Article I, Section 13 of the State constitution provides:

"No person shall be . . . deprived of life, liberty, or property without due process of law."

Article I, Section 14, provides:

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company, or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier." [1]

[1] The last sentence was added by Senate Constitutional Amendment No. 17, Stats. and Amdts., 1911, Chap. 9, p. 1488, and for the purpose of making effective Subd. 11 of Sec. 1238 of the Code of Civil Procedure, which says that eminent domain may be exercised in behalf of "roads and flumes for logging or lumbering purposes," but which provision of the Code was held not valid under the existing constitution. The above amendment was adopted by a vote of the people on the 10th day of October, 1911.

Rudel v. Los Angeles Co., 118 Cal. 281, 50 Pac. Rep. 400.

Upon the subject of the fixing of water rates and charges, Article XIV, Section 1 of the constitution provides:

"The use of water now appropriated or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law;[2] provided, that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative Acts or resolutions are passed by such body, and shall continue in force for one year, and no longer.[3] Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county or city or town where the same are collected for the public use."[4]

2 See Merrill v. Southside Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; People *ex rel.* Ricks W. Co. v. Elk River etc. Co., 107 Cal. 221, 40 Pac. Rep. 531, 48 Am. St. Rep. 125; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; People v. Stephens, 62 Cal. 209; Price v. Riverside etc. Co., 56 Cal. 431, 433; Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; Lanning v. Osborne, 76 Fed. Rep. 319; Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39, 501, 86 Fed. Rep. 975; San Joaquin etc. Co. v. Stanislaus Co., 90 Fed. Rep. 516.

3 For the fixing of water rates, see Chap. 69, Secs. 1368-1385.

4 See People v. Stephens, 62 Cal. 209; McCrea v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; Spring Valley Water Works v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; Fitch v. Board of Supervisors of San Francisco, 122 Cal. 285, 54 Pac. Rep. 901; Jacobs v. Board of Supervisors of San

Article XIV, Section 2, also provides:

"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law."

By the amendment filed with the Secretary of State on March 28, 1911, as Senate Constitutional Amendment No. 47,[5] and adopted by the voters of the State on October 10, 1911, Article XII, Section 23, of the State constitution, was amended to read as follows:

"Section 23. Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any . . . canal, pipe line, plant, . . . for the production, generation, transmission, delivery, or furnishing of heat, light, water, or power, or for the furnishing of storage, . . . either directly or indirectly, to or for the public, and every common carrier is hereby declared to be a public utility, subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise the power and jurisdiction to supervise and regulate public utilities in the State of California, and to fix the rates to be charged for commodities furnished or services rendered by public utilities as shall be

Francisco, 100 Cal. 21, 34 Pac. Rep. 630; Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Spring Valley Water Works v. Board of Supervisors of San Francisco, 61 Cal. 3; San Francisco etc. Factory v. Brickwedel, 60 Cal. 166; San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213; Lowe v. Yolo etc. Co., 8 Cal. App. 167, 96 Pac. Rep. 379; *Id.*, aff'd., 157 Cal. 503, 108 Pac. Rep. 207; Lanning v. Osborne, 76 Fed. Rep. 319; San Diego etc. Co. v. City of National City, 74 Fed. Rep. 79; aff'd, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; Crow v. San Joaquin W. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Fresno C. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Contra Costa W. Co. v. Breed, 39 Cal. 432, 73 Pac. Rep. 189; San Diego Flume Co. v. Souther, 104 Fed. Rep. 706, 44 C. C. A. 143; *Id.*, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134.

[5] Stats. and Amdts., 1911, Chap. 60, p. 2164.

conferred by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution.

"From and after the passage of the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission"; provided, however, that this section shall not affect such powers of control over any public utility vested in any municipality as, at an election to be held pursuant to laws to be passed hereafter, a majority of the qualified electors of such municipality shall vote to retain, but if the vote so taken shall not favor the continuation of such powers, they shall thereafter vest in the Railroad Commission; and, provided further, that such municipality may, by vote, surrender such powers to the Railroad Commission; or if such municipality shall have surrendered any powers to the Railroad Commission it may, by like vote, thereafter reinvest itself with such power.

"Nothing in this section shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this constitution now existing or adopted concurrently herewith."

By Senate Constitutional Amendment No. 49,[6] and adopted by the voters of the State on October 10, 1911, Article XI, Section 19, of the State constitution, was amended to read as follows:

"Section 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal gov-

[6] Stats. and Amdts., 1911, Chap. 67, p. 2180.

ernment shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

§ 1728. **Administrative officers.**—The State of California never having adopted the law of State control or State administration of the waters within its jurisdiction, has, therefore, no administrative officers, as have many other States of the West, whose duties are to regulate and control the appropriation, distribution, and use of the waters of the State.[1] It is true that by the Act of April 8, 1911,[2] the office of State engineer was created, but the powers and duties of such engineer are limited, and, as prescribed by the Act, in no way relate to the appropriation or the distribution of the waters within the State, which powers and duties, among other things, are conferred by the statutes of many of the other Western States upon their State engineers.[3] However, the tendency seems to be in the direction of a system of State control in California, and in recent sessions of the legislature bills have been introduced, based largely upon the Wyoming and Colorado systems. These bills, however, failed to pass.[4] Therefore, at the present writing the State officials having duties concerning waters are more in the nature of advisory or investigating commissions or boards, with the single exception of the board of control, as created and provided for by the Water Power Act of 1911,[5] as discussed in another section of this chapter.[6]

Board of Control Under Water Power Act.—This board, relative to the appropriation and use of water for power purposes, has conferred upon it, for the purposes of the Act only, almost the exact

1 For the law of State control, see Chap. 68, Secs. 1337-1367.

2 Stats. and Amdts., 1911, Chap. 409, p. 823; Kerr's Bien. Supp. to Codes, 1911, p. 1081.

3 For the law of State control, see Chap. 68, Secs. 1337-1367.

For State engineers, see Secs. 1343-1345.

See, also, for the administrative officers of other States, the sections under the respective States in this part.

4 See criticism of the California laws, Sec. 1726.

5 Stats. and Amdts., 1911, Chap. 406, p. 813; Kerr's Bien. Supp. to Codes, 1911, p. 1468.

6 See Sec. 1732.

powers conferred upon other boards in other States relative to the appropriation and use of waters for all beneficial uses and purposes.

The Conservation Commission.—By the Act of April 8, 1911,[7] there was created a Conservation Commission, for the purpose of investigating, among other things, the subjects of water, the use of water and water power, and of recommending legislation thereon.[8]

The Department of Engineering and the State Engineer.—Among the State civil executive officers there is provided for "a surveyor-general, who shall be *ex officio* register of the State land office."[9] The duties imposed upon him, among other things, are to make an estimate of the aggregate quantity of land belonging to the State and what information he may be able to obtain as to the characteristics of the same; to make an estimate of the various crops produced, and all facts which, in his opinion, are calculated to promote the development of the resources of the State.[10]

By the Act of March 11, 1907,[11] afterward amended by the Act of March 20, 1909,[12] a "Department of Engineering" of the State of California was thereby created. This Act was again amended to a large extent by the Act of April 8, 1911,[13] and, as amended, provides that "a Department of Engineering" was created to consist of an "advisory board," comprised of the Governor, as *ex officio* member and chairman of said board, and a State Engineer, who shall be the chief executive officer of the department; the general superintendent of State hospitals, the chairman of the State board of harbor commissioners of San Francisco, and three other members to be appointed by the Governor. The Governor shall also appoint five persons, who shall be known as a "consulting board" to the department of State engineering, upon all matters that affect irrigation, drainage, and river improvement. Such con-

7 Stats. and Amdts., 1911, Chap. 408, p. 822; Kerr's Bien. Supp. to Codes, 1911, p. 1023.

8 For the powers and duties of the Conservation Commission, see Sec. 1752.

9 Pol. Code, Sec. 343, 1 Kerr's Cyc. Codes, p. 71.

10 Pol. Code, Sec. 488; 1 Kerr's Cyc. Codes, p. 100.

11 Stats. and Amdts., 1907, Chap. 183, p. 215; Kerr's Bien. Supp., 1906-1909, p. 1604.

12 Stats. and Amdts., 1909, Chap. 338, p. 558. See, also, Supp. Kerr's Cyc. Codes, 1906-1909, p. 1604, which includes the original Act and the amendments of 1909.

13 Stats. and Amdts., 1911, Chap. 409, p. 823; Kerr's Bien. Supp., 1911, p. 1081.

sulting board to report to the advisory board on all matters relating to such subjects mentioned, together with their conclusions thereon. The State engineer shall be at the head of the Department of Engineering, and shall have charge of all engineering and structural work of the department.

By the Act of April 22, 1909,[14] the department of engineering as above created was empowered to make topographical surveys and investigations of the water resources of the State, and the use and distribution of water for agricultural purposes, and for this purpose to co-operate with the different departments of the Federal Government.

Water commissioners were provided for in early California Acts.[15] These Acts have been practically superseded by subsequent laws, but they have never been repealed, and are preserved in the codes in the following language:

"Section 6. All Acts creating or regulating boards of water commissioners and overseers in the several townships or counties of the State."[16]

§ 1729. Title to and the right to appropriate water.—The State of California never adopted the law of State control or the law of State administration of the appropriation, use, and distribution of the waters flowing within its boundaries, as is the case of many of the States of the West; and it was not until the Act approved April 8, 1911, that there was any declaration in its constitution or codes relative to the title to the waters being in the State or public. By that Act the old Section 1410 of the Civil Code [1] was amended to read as follows:

[14] Stats. and Amdts., 1909, Chap. 704, p. 1079; Supp. Kerr's Codes, 1906-1909, p. 2106.

[15] Stats. and Amdts., 1854, p. 76; 1862, p. 234.

[16] Pol. Code, Sec. 19, Subd. 6; 1 Kerr's Cyc. Codes, p. 18.

See Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Daley v. Cox, 48 Cal. 127.

[1] This section formerly read as follows: "The right to the use of running waters flowing in a river or down a canyon or ravine may be acquired by appropriation." Civil Code, Sec. 1410, 2 Kerr's Codes, p. 1137.

For the construction of the above provision, see Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. Rep. 432, holding that the right may be acquired without compliance with the code; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674; *Id.*, 4 Pac. Rep. 919; Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 537; South-

"All water or the use of water within the State of California is the property of the people of the State of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law; provided, that no water for the generation of electricity or electrical or other power may be appropriated for a longer period than twenty-five years, except by a municipal corporation, other than an irrigation district or lighting district or by an irrigation district when such electricity, electrical or other power is for use and distribution only within its own limits, and as subsidiary to and mainly for the purpose of serving and carrying out irrigation, or by a lighting district when such electricity, electrical or other power is for use and distribution only within its own limits."[2] Whether this amendment is the foundation of a complete system of State control in the State of California remains to be seen.

The old section as it formerly stood contained a mere statutory declaration of the rule of law, in accordance with the Arid Region Doctrine of appropriation, which had been previously settled by the courts concerning the appropriation of water from the streams of the State. In the early days of the State, in the absence of legislation upon the subject, it became necessary for those claiming rights by virtue of an appropriation to depend wholly upon the courts to uphold their claims, in case of any controversy arising

ern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. Rep. 783, 19 L. R. A. 92; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; Integral Quicksilver M. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823; Wishon v. Globe Lt. & Pr. Co., 158 Cal. 137, 110 Pac. Rep. 291.

For the appropriation and ownership of waters by municipalities, see Sec. 756.

2 Civil Code, Sec. 1410; 2 Kerr's Cyc. Codes, p. 1137; as amended, Stats. and Amdts., 1911, Chap. 407, p. 821; Kerr's Bien. Supp., 1911, p. 584.

See, also, for Act of 1911, prohibiting the taking of waters from the State, Sec. 1750.

"The mouth of a creek, river, or slough which empties into another creek, river, or slough, is the point where the middle of the channel intersects." Pol. Code, Sec. 3908; 1 Kerr's Cyc. Codes, p. 1041.

regarding them. And, fortunately for those claiming such rights, the courts, by a long line of decisions, and before any direct statutory enactments either by Congress or by the State, under the peculiar arid condition of the country and the needs and necessities of the people, held that exclusive rights to the use of water might be acquired by prior appropriation.[3] This subject has been fully discussed in a previous portion of this work.[4]

By the Act of April 8, 1911,[5] it is further declared that: "All water or the use of water which has been heretofore appropriated and which has not been put, or which has ceased to be put to some useful or beneficial purpose, or which is not now in the process of being put to some useful or beneficial purpose with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water, or use of water, is hereby declared to be unappropriated."

Upon the subject of the ownership of the soil under waters it is declared:

"The State is the owner of all land below tidewater, and below the ordinary tidewater mark, bordering upon tidewaters within the State; of all land below the water of a navigable lake or stream"; etc.[6]

The purpose for which an appropriation may be made is defined:

"The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."[7]

[3] Hoffman v. Stone, 7 Cal. 46; Tarter v. Spring Creek etc. Co., 5 Cal. 395, 14 Morr. Min. Rep. 371.

[4] For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

[5] Stats. and Amdts., 1911, Chap. 406, p. 813, Sec. 4; Kerr's Bien. Supp., 1911, p. 1469, Sec. 4.

[6] Civ. Code, Sec. 670; 2 Kerr's Cyc. Codes, p. 629.

See, also, for navigable waters, Pol. Code, Secs. 2348, 2349, 2875; 1 Kerr's Cyc. Codes, pp. 544, 545, 680.

[7] Civil Code, Sec. 1411; 2 Kerr's Cyc. Codes, p. 1149.

For Secs. 1412, 1413, see ditches and canals, Sec. 1734.

Barrows v. Fox, 30 Pac. Rep. 768; *Id.*, 98 Cal. 63, 32 Pac. Rep. 811; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; *Id.*, 110 Cal. 122, 42 Pac. Rep. 453; Peregoy v. McKissick, 79 Cal. 572, 21 Pac. Rep. 967; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Dougherty v. Haggin, 61 Cal. 305; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Duckworth

The doctrine set forth in this section was also established by the early decisions to mean that the beneficial purpose may be agricultural, mining, milling, manufacturing, domestic, municipal, or any other useful or beneficial purpose to which water may be applied; but must be some actual positive beneficial purpose existing at the time or contemplated in the future as the object for which the water is to be utilized; otherwise no prior and exclusive right to water can be acquired, no matter how elaborate and complete may be the physical structures by which the appropriation is proposed to be effected.[8] "As between appropriators, the one first in time is the first in right."[9]

v. Watsonville etc. Co., 150 Cal. 520, 89 Pac. Rep. 388; Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; White v. Todd's etc. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Riverside etc. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; *Id.*, 130 Cal. 290, 62 Pac. Rep. 563; Barneich v. Mercy, 136 Cal. 205, 68 Pac. Rep. 589; Strong v. Baldwin, 137 Cal. 432, 70 Pac. Rep. 288; Hewitt v. Story, 64 Fed. Rep. 510, 12 C. C. A. 250, 30 L. R. A. 265, 29 U. S. App. 155.

[8] McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Maeris v. Bicknell, 7 Cal. 262, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397; Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Peregoy v. McKissick, 79 Cal. 572, 21 Pac. Rep. 967; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. Rep. 762; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592.

[9] Civil Code, Sec. 1414; 2 Kerr's Codes, p. 1155.

See cases cited *supra*.

See, also, Conrad v. Arrowhead Hotel Co., 103 Cal. 399, 37 Pac. Rep. 386; Utt v. Frey, 106 Cal. 392, 39 Pac. Rep. 807; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. Rep. 128; Natoma etc. Co. v. Hancock, 101 Cal. 42, 35 Pac. Rep. 334; rev. 31 Pac. Rep. 112; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Byrne v. Crafts, 73 Cal. 641, 15 Pac. Rep. 300; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732; *Id.*, 4 Pac. Rep. 426; Brown v. Mullin, 65 Cal. 89, 3 Pac. Rep. 99; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Junkans v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Ramelli v. Irish, 96 Cal. 214, 31 Pac. Rep. 41; Wutchumna etc. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Wishon v. Globe Lt. & Pr. Co., 158 Cal. 137, 110 Pac. Rep. 290.

This section of the statute embodies, as we have seen in our previous discussions upon the subject,[10] the great basis by which the rights of appropriators are determined. The waters of a stream which are not embraced in the lawful claim of the first appropriator may be appropriated by others; and as between the rights of successive appropriators on the same stream, each is in the position of a prior one as to all who follow him. This section is simply the adoption of the right of priority in statutory language as the same had been decided by a long line of decisions of the California Court.[11] And following the early decisions and statute of California, the doctrine of priority was adopted in every Western State and Territory.

§ 1730. The appropriation of water—Notice—Construction of works.—The State of California never adopted the elaborate code relative to the method of appropriating water, as has been done in

[10] For the doctrine of priority, see Secs. 776-786.

[11] Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113, 15 Morr. Min. Rep. 178; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Kelly v. Natoma W. Co., 6 Cal. 106, 1 Morr. Min. Rep. 592; Tenney v. Miners' D. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31; Marius v. Bicknell, 10 Cal. 217; Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Phoenix W. Co. v. Fletcher, 23 Cal. 481, 15 Morr. Min. Rep. 185; McKinney v. Smith, 21 Cal. 374, 1 Morr. Min. Rep. 650; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Nevada W. Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685, 4 Morr. Min. Rep. 253; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Bear River etc. Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; McDonald v. Askew, 29 Cal. 200, 1 Morr. Min. Rep. 660; Esmond v. Chew, 15 Cal. 137, 5 Morr. Min. Rep. 175; Ortman v. Dixon, 13 Cal. 33, 37, 143; Hill v. King, 8 Cal. 336; Hill v. Smith, 27 Cal. 476, 32 Cal. 166, 4 Morr. Min. Rep. 597; Stein Canal Co. v. Kern Island etc. Co., 53 Pac. Rep. 563; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; American etc. Co. v. Bradford, 27 Cal. 360, 15 Morr. Min. Rep. 190; Nevada etc. Co. v. Kidd, 37 Cal. 282; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Crandall v. Woods, 8 Cal. 136, 1 Morr. Min. Rep. 604; Wixon v. Bear River etc. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90, 6 Morr. Min. Rep. 172; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Osgood v. El Dorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

many of the other States, but has adhered to the simple rules of the statute as enacted in 1872, and as afterward amended.

"A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

"1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;[1]

"2. The purpose for which he claims it, and the place of intended use;

"3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it."[2]

No particular form of notice is required, and all that is necessary is that it should be sufficient to put a prudent man on inquiry, and to this end its language must be liberally construed.[3]

[1] By the Act of 1901 it was provided that: "The standard miner's inch of water shall be equivalent or equal to one and one-half cubic feet of water per minute measured through any aperture or orifice." Stats. and Amdts., 1901, p. 660. See, also, Gen. Laws of Cal., Henning, 1905, p. 722.

See Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989.

[2] Civil Code, Sec. 1415; 2 Kerr's Cyc. Codes, p. 1159.

For the appropriation and ownership of waters by municipalities, see Sec. 1756.

[3] Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Wishon v. Globe etc. Co., 158 Cal. 137, 110 Pac. Rep. 290; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146; Last Chance etc. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674, 4 Pac. Rep. 919; Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Mitchell v. Amador M. Co., 75 Cal. 464, 17 Pac. Rep. 246; Lillis v. People's D. Co., —— Cal. ——, 29 Pac. Rep. 780; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543.

As to the effect of notice before adopting the above provision, see De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; Nevada etc. Co. v. Kidd, 37 Cal. 282; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Osgood v. El Dorado W. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Wishon v. Globe Lt. & Pr. Co., 158 Cal. 137, 110 Pac. Rep. 290; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927, 1 Water and Min. Cas. Ann. 140; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. Rep. 1027.

"A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.[4]

"After filing such copy for record the place of intended diversion or the place of intended use or the means by which it is intended to divert the water may be changed by the person posting said notice or his assigns, if others are not injured by such change. This provision applies to notices already filed as well as to notices hereafter filed.[5]

"One must not change his purpose to the injury of others.[6]

"Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road, or trail building, necessary incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; provided, that if the erection of a dam has been recommended by the California debris commission at or near the place where it is intended to divert the water the claimant shall have sixty days after the completion of such dam in which to commence the excavation or construction of the works in which he intends to divert the water;[7] provided, that whenever any city and county,

[4] Civil Code, Sec. 1415; 2 Kerr's Cyc. Codes, p. 1159; Lillis v. People's D. Co., —— Cal. ——, 29 Pac. Rep. 780; Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543; Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001.

[5] Civil Code, Sec. 1415; 2 Kerr's Cyc. Codes, p. 1159.

Following the rule laid down in Maeris v. Bicknell, 7 Cal. 262, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

[6] Civil Code, Sec. 3512; 2 Kerr's Cyc. Codes, p. 2312.

See, also, for changes which may be made, Secs. 856-873.

[7] Civil Code, Sec. 1416, as amended March 24, 1903, p. 396, 2 Kerr's Cyc. Codes, p. 1160; Kerr's Bien. Supp., 1911, p. 585; Wishon v. Globe Lt. & Pr. Co., 158 Cal. 137, 110 Pac. Rep. 290; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. Rep. 1027; Inyo Consol. W. Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 934.

Whether the work has been prosecuted with reasonable diligence is a question of fact for the jury. Osgood v. El Dorado Water Co., 56 Cal. 571, 5 Morr. Min. Rep. 37.

See, also, Ely v. Ferguson, 91 Cal. 187, 27 Pac. Rep. 587; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Cardoza v. Calkins, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. M. Rep. 689; Bledsoe v. Deck-

or any incorporated city or town within this State makes, or has made, or acquires, or has acquired any appropriation of any of the waters of this State in accordance with the provisions of Section 1415 of this Code, it shall not be necessary for such city and county, city or town to commence the works for development of more water so claimed than is actually necessary for the immediate needs of such city and county, city or town, and it shall be held to be a sufficient compliance with the requirements of this chapter, to the full amount of water stated in the notice posted and recorded, for such city and county, city or town to within sixty days make the necessary surveys, or within six months to authorize the issuance of municipal bonds, for the construction of the necessary works designed

row, 132 Cal. 312, 64 Pac. Rep. 397; Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674, 4 Pac. Rep. 919; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Maeris v. Bicknell, 7 Cal. 262, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528, 1 Morr. Min. Rep. 594; Weaver v. Conger, 10 Cal. 234, 6 Cal. 203; Nevada etc. Co. v. Kidd, 37 Cal. 282; Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. Rep. 1081; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543.

See, also, for reasonable diligence, Secs. 733-741.

By the Act of 1907 it was provided further, that if it shall be necessary, by proceedings in eminent domain, to acquire water rights held by adverse riparian owners or to acquire sites for dams or power plants at the point of intended diversion or the point of intended use, as described in the notice of appropriation of said water, or if there shall be conflicting claims to the waters so appropriated, then the party so appropriating, or his assigns, shall have sixty days after the determination of legal proceedings by final judgment in which to commence to excavate or construct the works in which he intends to divert the water as provided in this section; and provided further, that if suits for such purpose are not already pending at the date of the passage of this Act, they shall be commenced within sixty days after this Act takes effect, and as to future appropriations of water, within sixty days after notice of such appropriation is posted as required by law, and such proceedings shall be prosecuted diligently to final judgment; but nothing in this Act shall be construed to revive or renew appropriations of water heretofore made which have been abandoned and lost, as against subsequent claimants who have complied with this Act. Civil Code, Sec. 1416, as amended by Stats. and Amdts., 1907, Chap. 429, p. 780, Supp. Kerr's Cyc. Codes, 1906-1909, p. 787. But the above provisions were amended out by the Act approved May 1, 1911, Chap. 730, p. 1419.

to supply such city and county, city, or town with the water required for immediate use. Any appropriation heretofore made by any such city and county, city, or town in connection with which surveys were at any time made, or an issue of bonds authorized for the construction of any portion of the works necessary for a diversion of any part of the water appropriated, is hereby confirmed to the full amount of water stated in the original notices." [8]

The undoubted effect of the above proviso will be bad, for the reason that a municipality may lay claim to all the waters of a stream at that time unappropriated, although it may not actually need the water or use it for many years to come.[9]

By the Act of March 24, 1903,[10] it was still further provided upon the subject of construction, as follows:

"If the place of intended diversion or any part of the route of intended conveyance of water so claimed, be within, and a part of any national park, forest reservation, or other public reservation, and be so shown in the notice of appropriation of said water, then the claimant shall have sixty days after the grant of authority to occupy and use such park or reservation for such intended purpose within which to commence the excavation or construction of said works, provided that within sixty days after the posting of said notice of appropriation, as provided in Section 1415 of the Civil Code, the claimant shall in good faith commence (and thereafter diligently and continuously, except when temporarily interrupted by snow or rain, prosecute to completion) such surveys and other work, as under the regulations governing such park or reservations, may be required as preliminary to, or for use with, an application for such authority; and provided, also, that the claimant shall in good faith, on completion of such survey and preliminary work, apply to the officer, board, or body having charge of such park or reservation, for such authority, and shall thereafter prosecute said application with reasonable diligence." [11]

[8] Civil Code, Sec. 1416; 2 Kerr's Cyc. Codes, p. 1160; as amended by Stats. and Amdts., 1911, Chap. 730, p. 1419; Kerr's Bien. Supp., 1911, p. 585.

[9] See, also, for appropriation and ownership by municipalities, Sec. 1731.

[10] Civil Code, Sec. 1422, Stats. and Amdts., 1903, p. 397; 2 Kerr's Cyc. Codes, p. 1164.

[11] The original Sec. 1422 of the Civil Code read as follows: "The rights of riparian proprietors are not affected by the provisions of this Act." This was repealed by the Act of 1887, Stats. and Amdts., 1887, p.

The completion of an appropriation is defined as follows:

"By 'completion' is meant the conducting of the waters to the place of intended use." [12]

The doctrine of relation is stated as follows:

"By compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." [13]

A forfeiture for non-compliance is provided:

"A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." [14]

114, and the above provision was enacted March 24, 1903, Stats. and Amdts., 1903, p. 397, 2 Kerr's Cyc. Codes, p. 1164.

For riparian rights in California, see Sec. 1768.

See, also, Wishon v. Globe etc. Co., 158 Cal. 137, 110 Pac. Rep. 290; Inyo Consol. W. Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 934.

12 Civil Code, Sec. 1417; 2 Kerr's Cyc. Codes, p. 1161.

Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. Rep. 1027.

It will be noticed that the above section of the statute only requires the water to be conducted to the place of intended use in order to complete the appropriation, and does not require the actual application of the water to the beneficial use or purpose, as is the case in the most of the States. For the completion of an appropriation, see Secs. 725-728.

13 Civil Code, Sec. 1418; 2 Kerr's Cyc. Codes, p. 1161.

For the doctrine of relation, see Secs. 742-756.

Osgood v. El Dorado etc. Co., 56 Cal. 571, 5 Morr. Min. Rep. 37; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Maeris v. Bicknell, 7 Cal. 262, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Nevada etc. Co. v. Kidd, 37 Cal. 282; Weaver v. Eureka Lake Co., 15 Cal. 271, 1 Morr. Min. Rep. 642; White v. Todd's Valley W. Co., 8 Cal. 443, 68 Am. Dec. 338, 4 Morr. Min. Rep. 536; Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081, 1 Water and Min. Cas. Ann. 280; De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. Rep. 1001; Rincon etc. Co. v. Anaheim Union W. Co., 115 Fed. Rep. 543; Wishon v. Globe Lt. & Pr. Co., 158 Cal. 137, 110 Pac. Rep. 290; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. Rep. 1027.

14 Civil Code, 1419; 2 Kerr's Codes, p. 1161.

See Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563,

"Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases." [15]

A record must be kept of the notices:

"The recorder of each county must keep a book, in which he must record the notices provided for in this title." [16]

§ 1731. Appropriation and ownership of waters by municipalities.—By the Act approved March 18, 1907,[1] it was provided that: "Any incorporated city, town, or municipal corporation in this State is hereby authorized to construct, equip, use, maintain, and operate any works, road, railroad, tramway, power plant, telephone or telegraph line, or other necessary works or structures, within or without such city, town, or municipal corporation, or the county wherein such city, town, or municipal corporation is located, for the

22 Pac. Rep. 198; Last Chance D. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399; Taylor v. Abbott, 103 Cal. 421, 37 Pac. Rep. 408; Himes v. Johnson, 61 Cal. 259; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Kelly v. Natoma W. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Cardoza v. Calkins, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. Min. Rep. 689; Maeris v. Bicknell, 7 Cal. 262, 68 Am. Dec. 257, 1 Morr. Min. Rep. 601; Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081; Nevada etc. Co. v. Kidd, 37 Cal. 282; Inyo Consol. W. Co. v. Jess, —— Cal. ——, 119 Pac. Rep. 934.

However, it is held that an actual appropriation may be made and right to it acquired without following the course laid down by the statute, and it only affects the question of relation. See Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. Rep. 432; Wells v. Mantes, 99 Cal. 583, 34 Pac. Rep. 324; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. Rep. 563, 22 Pac. Rep. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146; Senior v. Anderson, 115 Cal. 496, 47 Pac. Rep. 454.

15 Civil Code, Sec. 1420; 2 Kerr's Cyc. Codes, p. 1163; Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674; *Id.*, 4 Pac. Rep. 919; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 86 Pac. Rep. 1081.

16 Civil Code, Sec. 1421; Kerr's Cyc. Codes, p. 1164; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Lower Tule etc. Co. v. Angiola W. Co., 149 Cal. 496, 81 Pac. Rep. 1081; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. Rep. 1027.

1 Stats. & Amdts., 1907, Chap. 321, p. 597; Supp. Kerr's Cyc. Codes, 1906-1909, p. 1764.

preparation, manufacture, handling, or transporting of any materials or supplies required in the construction or completion by such city, town, or municipal corporation of any public work, improvement, or utility, and, for the purpose of constructing, equipping, using, maintaining, or operating any such works, road, railroad, tramway, power plant, telephone or telegraph line, or other necessary works or structures, such city, town, or municipal corporation is hereby authorized to lease or acquire by purchase, condemnation, or otherwise, and hold and use any land, rights of way, water, water rights, quarry, gravel bed, or other mineral deposits, or any other necessary property, within or without such city, town, or municipal corporation, or the county wherein such city, town, or municipal corporation is located."

"Nothing in this Act contained shall be construed as extending or enlarging any limitation prescribed by law or municipal charter upon taxation, expenditure of public funds, or the incurring of indebtedness by any city, town, or municipal corporation."

By the Act approved March 20, 1909,[2] there was granted to every municipal corporation of the State the right of way for the location, construction, and maintenance of water works over any public lands of the State not otherwise disposed of or in use; also the right to take from any of the lands belonging to the State adjacent to the works all material which may be necessary for the original construction of such works; and also the right to take any waters belonging to the State not otherwise disposed of, as far as may be necessary to give such municipality and its inhabitants an ample supply of water for all municipal, domestic, irrigation, and manufacturing purposes. "Whenever any municipal corporation shall desire to take any of the said waters so belonging to the State for the purposes mentioned in this Act, the legislative authority thereof shall cause a notice that said municipal corporation intends to take such waters, to be posted and recorded as in the manner provided in Section 1415 of the Civil Code of California. Said notice shall be signed in the corporate name of such municipal corporation by its mayor, or other officer authorized so to do by the legislative authority thereof. In taking any of said waters under this Act, such municipal corporation shall comply with and be subject to all the

2 Stats. & Amdts., 1909, Chap. 352, p. 581; Supp. Kerr's Cyc. Codes, 1906-1909, p. 1815.

provisions of Title VIII, Sections 1410 to 1422, inclusive, of said Civil Code"; etc.[3]

By the Act approved April 10, 1911,[4] it was provided that whenever the water supply owned by any city, incorporated town, county, or city and county, is in excess of the amount required by the inhabitants thereof, it may be declared by ordinance that such excess exists, and such excess of water may be sold outside of the limits of the corporation; but in no case shall a contract be made for a supply of any excess of water so sold for a period longer than one year; but water not required at any time may be sold from month to month during the existence of such excess, and shall be sold only at the rates fixed for consumers inside the corporate limits.

By the Act approved May 1, 1911,[5] whenever any municipality shall develop an excess of water, over and above the amount thereof which is necessary for the use of such municipality and its inhabitants, or any portion thereof as the legislative body of such municipality may determine shall be supplied therewith, then such municipality may sell, lease, or distribute such excess of water outside of the corporate limits of such municipality. No lease shall be valid for a period of more than fifteen years and all such leases shall be let to the highest bidder at public auction.[6]

§ 1732. An Act regulating the appropriation of water for power purposes.—By the Act approved April 8, 1911,[1] the State of California took a radical step in regulating and limiting the appropriation of water for generating electricity or other electrical power, and fixing the terms and conditions, and providing the manner and procedure upon which water for such purposes may be appropriated.

[3] For municipal water districts, see, also, Sec. 1756.

For rights of way granted municipalities over roads and streets, etc., see Act of April 10, 1911, Stats. & Amdts., 1911, Chap. 526, p. 852.

[4] Stats. & Amdts., 1911, Chap. 429, p. 854; Kerr's Bien. Supp., 1911, p. 1233.

[5] Stats. & Amdts., 1911, Chap. 715, p. 1394, Sec. 3.

[6] See, also, for municipal water districts, Sec. 1756.

[1] Stats. & Amdts., 1911, Chap. 406, p. 813; Kerr's Bien. Supp., 1911, p. 1468.

For the purposes of the Act it is provided:

"Water or the use of water for the generation of electricity, or of electrical or other power, shall not be appropriated for a longer period than 25 years."

The appropriation of water for such purposes shall be made as provided by the Act, and not otherwise. Water or the use of water appropriated for purposes other than the generation of electricity must be appropriated under a separate and distinct appropriation. All water not being used is declared to be unappropriated. The State may regulate and fix the rates for water so appropriated.

The appropriation must be made by an application for a permit for the same to the board of control provided for in the Act itself. All the facts necessary must be stated in the application, which must be accompanied by such maps and drawings; and a copy of the application must be recorded by the applicant in the office of the county recorder of the county, in which the proposed works are to be erected. The board of control must examine the application, and, if defective, it may be returned for amendment, without losing its priority. The application may be approved by the board for a less amount of water than is applied for. The approval or rejection of the application shall be endorsed thereon, and one copy returned to the applicant. If the application be approved the applicant shall immediately record such approval, and proceed with the construction of the necessary works, and take all steps required to complete the appropriation. Actual construction work must begin within six months of the date of the approval, and shall thereafter be prosecuted with reasonable diligence in proportion to the magnitude of the undertaking. Upon their completion the board must cause the same to be inspected, and a report upon their construction and condition. If the law has been fully complied with, the board shall issue a license to the applicant, allowing him to divert and use the water, for a certain period of time, but in no case for more than 25 years, which license may be renewed for a period of not more than 25 years.

The board of control may also upon application grant a license to divert and store surplus waters of any stream during floods of high water, or during those portions of the year when such water is not required, or being stored for irrigation purposes.

All appropriations of water shall be subject to the fees and charges as in the Act provided, which are as follows: Upon making the application, $10; upon receiving the license, $100; and, in addition thereto and annually thereafter, for the first 100 horsepower there shall be no charge; for all above 100 horsepower, ten cents for each horsepower.

For the purpose of carrying out the purposes of the Act, a board of control is created and established, to consist of five members, three of whom are to be appointed by the governor, and of which board the governor and the State engineer are *ex officio* members. The appointed members shall receive $10 per day for each day's service. Said board shall cease to exist if any general commission shall be created by law having the power to regulate and fix rates to be charged by public utilities, and the powers now vested in the said board shall vest in such commission.[2] In the meantime, the board of control is empowered to do and perform the acts required by the Act, and to adopt rules and regulations necessary, and to provide for public hearings upon the merits of applications. Full annual reports must be made by all taking advantage of the Act. Combinations in restraint of trade are prohibited. None of the provisions of the Act shall apply to municipal corporations, other than irrigation districts or lighting districts, but all municipal corporations desiring to appropriate water for power purposes mentioned in the Act, shall, within ten days from the time they post and record notices of appropriation for such purposes, file with the board of control a copy of such notice, giving full particulars.

Any violation of the provisions of the Act or of any order or regulation of the board is declared to be a misdemeanor and shall be punished by a fine not exceeding $5,000, or imprisonment in the county jail not exceeding one year, or by both, and the agents are declared to be equally liable with the principal.

§ 1733. **The adjudication and protection of water rights.**—The matter of the adjudication of existing water rights as between the different claimants thereto in California, has always been left to the courts, under the general equity procedure. This subject has been fully discussed in a previous chapter of this work.[1] The leg-

[2] See constitutional amendment, Sec. 1727.

[1] For adjudication of rights in equity, see Chap. 78, Secs. 1530-1566.

islature of the State of California never adopted any special code of procedure for these cases, as has been done in a number of the other States.[2]

Upon the question of injunctions and restraining orders in actions involving water rights, the Code of Civil Procedure has the following:

Section 527 of the Code of Civil Procedure, as amended by the Act of February 15, 1911, provides:

"No preliminary injunction shall be granted without notice to the opposite party, nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from the facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard.[3]

"In all actions which may be hereafter brought when an injunction or restraining order may be applied for to prevent the diversion, diminution, or increase of the flow of the water in its natural channels, to the ordinary flow of which the plaintiff claims to be entitled, the court shall first require due notice of the application to be served upon the defendant, unless it shall appear from the verified complaint or affidavits upon which the application therefor is made, that, within ten days prior to the time of such application the plaintiff has been in the peaceable possession of the flow of such water, and that, within such time, said plaintiff has been deprived of the flow thereof by the wrongful diversion of such flow by the defendant, or that the plaintiff, at the time of such application is, and for ten days prior thereto has been in possession of the flow of said water, and that the defendant threatens to divert the flow of such water, and if such notice of such application be given, and upon the hearing thereof it be made to appear to the court that the plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon the defendant, and that the plaintiff will not be greatly damaged by the acts complained of pending the litigation, and can be fully compensated for such damage as he may suffer, the court may refuse the

2 For the statutory adjudication of water rights, see Chap. 78, Secs. 1567-1584.

For the determination of rights by boards, see Chap. 80, Secs. 1585-1595.

3 Code Civ. Proc., Sec. 527; 3 Kerr's Cyc. Codes, p. 837, as amended; Stats. & Amdts., 1911, Chap. 42, p. 59; Kerr's Bien. Supp., 1911, p. 701.

injunction upon the defendant giving a bond such as is provided for in Section 532; and upon the trial the same proceedings shall be had, and with the same effect as in such section provided."[4]

A following section of the Code of Civil Procedure also provides that a temporary injunction or restraining order may be vacated or modified upon motion and notice thereof. And, it is further provided that: "In all actions pending, or which may hereafter be brought, when an injunction or restraining order has been, or may be granted or applied for, to prevent the diversion pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that great damages will be suffered by the person enjoined, in case the injunction is continued, and that the person in whose behalf it is issued can be fully compensated for any damages he may suffer by reason of the continuance of the acts enjoined during the pendency of the litigation, the court in its discretion may dissolve or modify the injunction, upon the person enjoined giving a bond with sureties to be approved by the judge, and in such amounts as may be fixed by the court or judge, conditioned that such enjoined person will pay all damages which the person in whose behalf the injunction issued may suffer by reason of the continuance, during the litigation, of the acts complained of. Upon the trial the amount of such damages must be ascertained, and in case judgment is rendered for the person in whose behalf the injunction was granted, the amount fixed as such damages must be included in the judgment, together with reasonable attorney's fees. In any suit brought on the bond, the amount of damages as fixed in said judgment is conclusive on the sureties."[5]

[4] Code of Civ. Proc., Sec. 530; 3 Kerr's Cyc. Codes, p. 843; as amended, Stats. & Amdts., 1907, p. 342, and Stats. & Amdts., 1911, Chap. 733, p. 1421; Kerr's Bien. Supp., 1911, p. 702; San Diego W. Co. v. Pacific Coast S. S. Co., 101 Cal. 216, 35 Pac. Rep. 651; San Antonio W. Co. v. Bodenhamer, 133 Cal. 248, 65 Pac. Rep. 471; Burnett v. Whitesides, 13 Cal. 156.

[5] Code Civ. Proc., Sec. 532; 3 Kerr's Codes, p. 847; as amended, Stats. & Amdts., 1907, p. 342; Fountain W. Co. v. Dougherty, 134 Cal. 376, 66 Pac. Rep. 316; Natoma etc. Co. v. Clarkin, 14 Cal. 544; Natoma etc. Co. v. Parker, 16 Cal. 83; Hicks v. Compton, 18 Cal. 206; Burnett v. Whitesides, 13 Cal. 156; County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740; Hobbs v. Amador etc. Co., 66 Cal. 161, 4 Pac. Rep. 1147; Humphry v. Buena Vista W. Co., 2 Cal. App. 540, 84 Pac. Rep. 296.

Upon the subject of damages it is provided that: "Any person owning or occupying lands upon the banks of any stream where the lands lying back of such stream are lower than the banks thereof, is responsible for all damages which may be sustained by the owners or occupants of lower lands by reason of any cut or embrasure made in the bank of such stream by the owner or occupant of the bank.[6] If such cuts were made for the purpose of irrigation, and headgates and culverts have been made which competent persons consider sufficient to restrain the water, and where great diligence has been made to prevent damage, these facts may be pleaded and proved, in mitigation of damages."[7]

Relative to the proof of customs and regulations concerning mining claims, an old section adopted in the Civil Practice Act of 1851 is still maintained in the statutes of California. It reads as follows:

"In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim, and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action."[8]

This section has also been incorporated in the statutes of many of the Western States.

§ 1734. **Ditches and canals and rights of way therefor.**—Upon the subject of ditches and canals the California statute provides:

"The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made."[1]

[6] Pol. Code, Sec. 3486; 1 Kerr's Cyc. Codes, p. 837.

[7] Pol. Code, Sec. 3487; 1 Kerr's Cyc. Codes, p. 838; Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30.

[8] Civil Practice Act of April 29, 1851, Sec. 621, as afterward amended; Code Civ. Proc., Sec. 748; 3 Kerr's Cyc. Codes, p. 1273; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

[1] Civil Code, Sec. 1412; 2 Kerr's Cyc. Codes, p. 1153.

That the place of diversion may be changed, see Secs. 857, 858.

See, also, Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571; Junkins v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Byers v. Colonial Irr. Co., 134 Cal. 553, 66 Pac. Rep. 732; Ramelli v. Irish, 96 Cal. 214, 31 Pac. Rep. 41; Gallagher

By the Act of March 21, 1903,[2] it was also provided:

"After filing such copy for record, the place of intended diversion, or the place of intended use, or the means by which it is intended to divert the water, may be changed by the person posting said notice, or his assigns, if others are not injured by such change. This provision applies to notices already filed, as well as notices hereafter filed."[3]

The right to the use of the natural channels of streams is given:

"The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished."[4]

Upon the liability of joint owners in ditches, canals, or other works, it is provided that each is liable to the others for the reasonable expenses of maintaining and repairing the same, and of dis-

v. Montecito W. Co., 101 Cal. 245, 35 Pac. Rep. 770; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Last Chance M. Co. v. Bunker Hill M. Co. (Idaho), 49 Fed. Rep. 430; Charnock v. Higuerra, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075; McGuire v. Brown, 106 Cal. 660, 39 Pac. Rep. 1060, 30 L. R. A. 384; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Correa v. Frietas, 42 Cal. 339.

But see Oliver v. Agasse, 132 Cal. 297, 64 Pac. Rep. 401; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93.

That a change in the place of use may be made, see Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257; Santa Paula W. Co. v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Southside Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. Rep. 1107.

2 Stats. & Amdts., 1903, p. 361.

3 Civil Code, Sec. 1415, added as a part thereof; 2 Kerr's Cyc. Codes, p. 1158; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424; Wishon v. Globe Lt. & Pr. Co., 158 Cal. 137, 110 Pac. Rep. 291; Duckworth v. Watsonville etc. Co., 158 Cal. 206, 110 Pac. Rep. 927; Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. Rep. 1027.

4 Civil Code, Sec. 1413; 2 Kerr's Cyc. Codes, p. 1155; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900; Byers v. Colonial Irr. Co., 134 Cal. 553, 66 Pac. Rep. 732; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, 4 Morr. Min. Rep. 604; Butte etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552; Paige v. Rocky Ford C. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Burnett v. Whitesides, 15 Cal. 35; Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397; *In re* Nelson, 27 Land Dec. 511, citing Kinney on Irr., 1st Ed., p. 536.

tributing the water. Upon the failure of any owner to pay his proportion, suit may be brought by any or all the parties who have contributed more than his or their just proportion of such expenses, and judgment may be recovered, including costs and attorney's fees.[5]

No canal, flume, or other appliance for the conducting of water must be laid, constructed, or maintained as to obstruct any public highway; all such works must be kept in repair, and bridges constructed where necessary, at the expense of the owners.[6]

§ 1735. **Servitudes upon land.**—Upon the question of servitudes upon land as far as water rights and easements are concerned, the California statutes provide:

"The following land burdens, or servitudes upon land, may be attached to other land or incidents or appurtenances thereto, and are called easements:

"9. The right of receiving water or discharging the same upon land.

"10. The right of flooding land.

"11. The right of having water flow without diminution or disturbance of any kind.[1]

[5] Civil Code, Secs. 842, 843; 2 Kerr's Cyc. Codes, p. 723; Arroyo D. Co. v. Bequette, 149 Cal. 543, 87 Pac. Rep. 10.

[6] Civil Code, Sec. 551; 2 Kerr's Cyc. Codes, p. 532.

See, also, Pol. Code, Secs. 2694, 2737; 1 Kerr's Cyc. Codes, pp. 646, 653; City of Fresno v. Fresno etc. Co., 98 Cal. 179, 32 Pac. Rep. 943; County of Fresno v. Fowler etc. Co., 68 Cal. 359, 9 Pac. Rep. 309; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; City of Madera v. Madera etc. Co., 159 Cal. 749, 115 Pac. Rep. 936, where it was held that under the Civil Code, Sec. 551, and Pol. Code, Secs. 2694, 2737, the duty was not imposed upon the owner of an existing canal to construct a bridge over a subsequently constructed highway.

[1] Civil Code, Sec. 801; 2 Kerr's Cyc. Codes, p. 694; Farmer v. Ukiah W. Co., 56 Cal. 11; Crooker v. Benton, 93 Cal. 365, 28 Pac. Rep. 953; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. Rep. 198; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. Rep. 795, 8 L. R. A. 575; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. Rep. 558; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; City of Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. Rep. 287; Stockton v. San Joaquin Co., 148 Cal. 313, 83 Pac. Rep. 54, 7 Am. & Eng. Ann. Cas. 511; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. Rep. 213; Pogue v. Collins, 146 Cal. 435,

"The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.[2]

"A servitude is extinguished:

"1. By vesting of the right to the servitude and right to the servient tenement in the same person;

"2. By the destruction of the servient tenement;

"3. By the performance of any Act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise, or,

"4. Where the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment."[3]

§ 1736. The sale and transfer of water rights and easements and appurtenances.—The California statutes provide that, with

80 Pac. Rep. 623; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; Corea v. Higuera, 153 Cal. 451, 95 Pac. Rep. 882; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. Rep. 167.

Under the Civil Code, Section 801, Subdivision 5, which provides that the right of taking water, wood, minerals, and other things, may attach to other lands as incidents or appurtenances called easements, the right to take driftwood from other land may be acquired by prescription. Yuba Consol. Gold Fields v. Hilton, 16 Cal. App. 228, 116 Pac. Rep. 712.

2 Civil Code, Sec. 806; 2 Kerr's Cyc. Codes, p. 700; Los Robles W. Co. v. Stoneman, 146 Cal. 203, 79 Pac. Rep. 880; Winslow v. City of Vallejo, 148 Cal. 723, 84 Pac. Rep. 191, 5 L. R. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93; Kern Island Irr. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052; Colegrove W. Co. v. City of Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. Rep. 213; Smith v. Cooley, 65 Cal. 46, 2 Pac. Rep. 880; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 164; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. Rep. 167.

3 Civ. Code, Sec. 811; 2 Kerr's Cyc. Codes, p. 703; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453; Dixon v. Schermeier, 110 Cal. 582, 42 Pac. Rep. 1091; Los Angeles v. Pomeroy, 125 Cal. 420, 58 Pac. Rep. 69; Allen v. San Jose etc. Co., 92 Cal. 138, 28 Pac. Rep. 215, 15 L. R. A. 93; McRose v. Bottyer, 81 Cal. 122, 22 Pac. Rep. 393; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. Rep. 213; Corea v. Higuera, 135 Cal. 451, 95 Pac. Rep. 882, 17 L. R. A., N. S., 1018; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. Rep. 167.

certain exceptions named, the transfer of all real property must be in writing and subscribed by the party transferring the same.[1]

Water rights are held to be real property and are hence subject to the above provision.[2]

"A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has, unless a different intention is expressed or is necessarily implied.[3]

"The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.[4]

"A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the

[1] Code Civ. Proc., Sec. 1971; 3 Kerr's Cyc. Codes, p. 2401.

[2] Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Richey v. East Redlands W. Co., 141 Cal. 221, 74 Pac. Rep. 754; Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140, 4 Morr. Min. Rep. 513; South Tule etc. Co. v. King, 144 Cal. 450, 77 Pac. Rep. 1032; California etc. Co. v. County of Los Angeles, 10 Cal. App. 185, 101 Pac. Rep. 547; Santa Paula etc. Co. v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Pacific Club v. Sausalito Co., 98 Cal. 487, 33 Pac. Rep. 322; Fudickar v. East Side Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024; Blankenship v. Whaley, 124 Cal. 300, 57 Pac. Rep. 79.

But see Bree v. Wheeler, 4 Cal. App. 109, 87 Pac. Rep. 255.

[3] Civil Code, Sec. 1083; 2 Kerr's Cyc. Codes, p. 877; Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. Rep. 471.

[4] Civil Code, Sec. 1084; 2 Kerr's Cyc. Codes, p. 877; Cross v. Kitts, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. St. Rep. 558; McShane v. Carter, 80 Cal. 310, 22 Pac. Rep. 178; Hungarian Hill etc. Co. v. Moses, 58 Cal. 168; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Farmer v. Ukiah W. Co., 56 Cal. 11; McDonald v. Bear River etc. Co., 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Clyne v. Benicia W. Co., 100 Cal. 310, 34 Pac. Rep. 714; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. Rep. 213; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Rubio Canyon W. Co. v. Everett, 154 Cal. 29, 96 Pac. Rep. 811; Rianda v. Watsonville etc. Co., 152 Cal. 523, 93 Pac. Rep. 79; Corea v. Higuera, 135 Cal. 451, 95 Pac. Rep. 882, 17 L. R. A., N. S., 1018; Oliver v. Burnett, 10 Cal. App. 403, 102 Pac. Rep. 223; Pendola v. Ramm, 138 Cal. 517, 71 Pac. Rep. 624; Jones v. Sanders, 138 Cal. 405, 71 Pac. Rep. 506; Pogue v. Collins, 146 Cal. 435, 80 Pac. Rep. 623; Anaheim Union W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613.

benefit thereof, at the time when the transfer was agreed upon or completed.[5]

"One who grants a thing is presumed to grant also whatever is essential to its use.[6]

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."[7]

§ 1737. Acquisition of title by prescription.—"Occupancy for a period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."[1] And, upon the question of the time prescribed as referred to above, it is provided:

[5] Civ. Code, Sec. 1104; 2 Kerr's Cyc. Codes, p. 887.

See cases cited in last note above.

See, also, Pendola v. Ramm, 138 Cal. 517, 71 Pac. Rep. 624; Cave v. Crafts, 53 Cal. 135; Farmer v. Ukiah W. Co., 56 Cal. 11; Dixon v. Schermeier, 110 Cal. 582, 42 Cal. 1091; Anaheim Union W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Pogue v. Collins, 146 Cal. 435, 80 Pac. Rep. 623.

[6] Civil Code, Sec. 3522; 2 Kerr's Cyc. Codes, p. 2314.

See, also, cases cited above; Smith v. Corbit, 116 Cal. 587, 48 Pac. Rep. 725; Vernon v. Board of Supervisors of San Bernardino Co., 142 Cal. 513, 76 Pac. Rep. 253; Esmond v. Chew, 15 Cal. 137, 5 Morr. Min. Rep. 175; Sulloway v. Sulloway, 160 Cal. 508, 117 Pac. Rep. 522.

[7] Civil Code, Sec. 830; 2 Kerr's Cyc. Codes, p. 708; Packer v. Bird, 71 Cal. 134, 11 Pac. Rep. 873; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Foss v. Johnstone, 158 Cal. 119, 110 Pac. Rep. 294.

[1] Civil Code, Sec. 1007; 2 Kerr's Cyc. Codes, p. 834; Hesperia etc. Co. v. Rogers, 83 Cal. 10, 23 Pac. Rep. 196, 17 Am. St. Rep. 209; Alhambra etc. Co. v. Richardson, 72 Cal. 598, 14 Pac. Rep. 379; Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Woodward v. Faris, 109 Cal. 12, 41 Pac. Rep. 781; Thomas v. England, 71 Cal. 456, 12 Pac. Rep. 491; Jatunn v. Smith, 95 Cal. 154, 30 Pac. Rep. 200; Montecito W. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Smith v. Hawkins, 110 Cal. 122, 42 Pac. Rep. 453, 19 Morr. Min. Rep. 243; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Lakeside D. Co. v. Crane, 80 Cal. 181, 22 Pac.

"No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action."[2] And, to acquire title by prescription as against the State, the time prescribed is ten years.[3]

§ 1738. The right of eminent domain.—Upon the subject of the condemnation of private lands for the rights of way for ditches, canals, or other works, Section 11 of the Act of March 12, 1885,[1] provides:

"Whenever any person, company, association, or corporation shall have acquired the right to appropriate water, or shall have acquired the right to appropriate such water in this State, such

Rep. 76; Hargrave v. Cook, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; Last Chance D. Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Centerville etc. Co. v. Sanger L. Co., 140 Cal. 385, 73 Pac. Rep. 1079; Cox v. Clough, 70 Cal. 345, 11 Pac. Rep. 732; Green v. Carotta, 72 Cal. 267, 13 Pac. Rep. 685; Shenandoah etc. Co. v. Morgan, 106 Cal. 409, 39 Pac. Rep. 802; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 870; Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185, 30 Pac. Rep. 623; Heintzen v. Binninger, 79 Cal. 5, 21 Pac. Rep. 377; Natoma etc. Co. v. Hancock, 101 Cal. 42, 31 Pac. Rep. 112, 35 Pac. Rep. 334; Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Gallagher v. Montecito W. Co., 101 Cal. 245, 35 Pac. Rep. 770; Paige v. Rocky Ford C. Co., 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; Bliss v. Johnson, 76 Cal. 597, 16 Pac. Rep. 542, 18 Pac. Rep. 785; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 746; Yankee Jim's etc. Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Evans v. Ross, 67 Cal. 19, 8 Pac. Rep. 88; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162; Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. Rep. 985; Gurnsey v. Antelope Creek etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

2 Code Civ. Proc., Sec. 318; 3 Kerr's Cyc. Codes, p. 226.

See cases cited in last note.

See, also, Alta etc. Co. v. Hancock, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; Rice v. Meiners, 136 Cal. 292, 68 Pac. Rep. 817; Silva v. Hawn, 10 Cal. App. 144, 102 Pac. Rep. 952; Gallagher v. Montecito etc. Co., 101 Cal. 245, 35 Pac. Rep. 770; Gutierrez v. Wege, 145 Cal. 730, 79 Pac. Rep. 449; Lillis v. People's D. Co., —— Cal. ——, 29 Pac. Rep. 780.

3 Code Civ. Proc., Sec. 315; 3 Kerr's Cyc. Codes, p. 223; People *ex rel.* Love v. Center, 66 Cal. 551, 6 Pac. Rep. 481.

As to the elements that constitute adverse possession, see Code Civ. Proc., Sec. 325; 3 Kerr's Cyc. Codes, p. 236.

1 Gen. Laws Cal., Henning, 1909, p. 604.

person, company, association, or corporation may proceed to condemn the lands and premises necessary to such right of way, under the provisions of Title 7 of Part III of the Code of Civil Procedure of this State, and the amendments made and to be made thereto, and all the provisions of said code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act."[2]

By the Act approved March 20, 1909,[3] there was granted to every municipal corporation of the State a right of way for ditches, canals, and other works, over any of the public lands not otherwise disposed of, and also the right to take material from adjacent lands for the purpose of original construction.[4]

By the Act approved April 10, 1911,[5] there was also granted to municipal corporations a right of way for water and gas pipes, mains and conduits, along or upon any road, street, alley, avenue, or highway, or across any railroad, canal, ditch, or flume.

By the Act approved May 1, 1911,[6] it was further declared that:

"Sec. 1. Irrigation in the State of California is hereby declared to be a public necessity and a public use, and the power of eminent domain may be exercised on behalf of such public use in accordance with the provisions of Title 7, Part III, of the Code of Civil Procedure of the State of California; provided, that any person, firm, or corporation exercising the power of eminent domain, and in control of water appropriated for sale, rental, or distribution, shall not, by this Act, be relieved from the duty of furnishing water to irrigate lands over which any right of way is obtained by condemnation for irrigation purposes," as required by the Act approved March 12, 1885,[7] and other Acts supplemental thereto and amendatory thereof, nor shall the same be construed to alter or change the law as to the duty of any person, firm, or corporation in charge of a public use to furnish water.

[2] For condemnation proceedings in California, see Code of Civil Procedure, Secs. 1237-1256; 3 Kerr's Cyc. Codes, pp. 1746-1787.

[3] Stats. & Amdts., 1909, Chap. 352, p. 581; Kerr's Cyc. Codes, Supp., 1906-1909, p. 1815.

[4] See, also, appropriation and ownership of waters by municipalities, Sec. 1731.

[5] Stats. & Amdts., 1911, Chap. 426, p. 852; Kerr's Bien. Supp., 1911, p. 1221.

[6] Stats. & Amdts., 1911, Chap. 719, p. 1407; Kerr's Bien. Supp., 1911, p. 1124.

[7] For Act March 12, 1885, see Sec. 1745.

§ 1739. Eminent domain—Public uses for which right may be exercised.—Quite a number of the Western States have adopted the California Code of Civil Procedure, or certain portions thereof. This is true in regard to the exercise of the right of eminent domain and the condemnation proceedings therefor. We will therefore abstract the statutes upon this subject at considerable length, and under the respective sections thereof cite the cases involving water rights construing the same.

The right of eminent domain is defined as:

"Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title." [1]

Upon the question of the purposes for which the right of eminent domain may be exercised, Section 1238 of the California Code of Civil Procedure was entirely re-enacted twice during the session of the legislature of 1911: First, by the Act approved March 22, 1911,[2] and second, by the Act approved April 28, 1911.[3] The later Act undoubtedly repealed and superseded the earlier Act.

This Act, as far as the subject under discussion is concerned, provides as follows:

"Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

"3. . . . ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of any county, incorporated city, or city and county, village or town; . . . raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; . . . public mooring places for water craft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city

[1] Code of Civil Proc., Sec. 1237; 3 Kerr's Cye. Codes, p. 1746.

See City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Marin County W. Co. v. Marin County, 145 Cal. 586, 79 Pac. Rep. 282; Laguna D. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. Rep. 933; Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Northern Lt. & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896.

[2] Stats. & Amdts., 1911, Chap. 251, p. 431; Kerr's Bien. Supp., 1911, p. 780.

[3] Stats. & Amdts., 1911, Chap. 635, p. 1206; Kerr's Bien. Supp., 1911, p. 783.

and county, village or town, or the inhabitants thereof, which may be authorized by the legislature," etc.

"4. . . . Canals, ditches, dams, poundings, flumes, aqueducts, and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

"5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

"6. By-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes.

"7. Telegraph and telephone lines, systems, and plants.

"8. Sewerage from any incorporated city," etc.

"11. Roads and flumes for logging or lumbering purposes.[4]

"12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes, and outlets, natural or otherwise, for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities, and counties," etc.

"13. Electric power lines, electric heat lines, electric light lines, electric light, heat, and power lines, and other works or plants for the generation, transmission, or distribution of electricity," etc.[5]

[4] See Constitutional Amendment, Art. 1, Sec. 14, Sec. 1727.

[5] Code of Civil Proc., Sec. 1238; 3 Kerr's Codes, p. 1747; as amended, Stats. & Amdts., 1911, Chap. 635, p. 1206; Consolidated C. Co. v. Central Pac. R. Co., 51 Cal. 269; St. Helena W. Co. v. Forbes, 56 Cal. 593; Lorenz v. Jacob, 63 Cal. 73, 3 Pac. Rep. 654; Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 123, 28 Pac. Rep. 447; Lake Pleasanton W. Co. v. Contra Costa W. Co., 67 Cal. 659, 8 Pac. Rep. 501; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Amador Queen M. Co. v. Dewitt, 73 Cal. 482, 15 Pac. Rep. 74; Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; Bishop v. McKinley, Judge, 87 Cal. 226, 25 Pac.

§ 1740. Eminent domain—Classification of estates subject to be taken.—The following is a classification of the estates and rights in lands subject to be taken for public use:

"1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

"2. An easement when taken for any other use; provided, that when the taking is by a municipal corporation, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary.

"3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use." [1]

Rep. 435; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. Rep. 681; City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. Rep. 197; Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Emigrant D. Co. v. Webber, 108 Cal. 88, 40 Pac. Rep. 1061; Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; Crall v. Board of Directors of Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237; *In re* Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. Rep. 354; Cummings v. Peters, 56 Cal. 593; Dower v. Richards, 73 Cal. 477, 15 Pac. Rep. 105; County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. Rep. 78; Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705; People v. Brown Valley Irr. Dist., 119 Fed. Rep. 538; Marin County W. Co. v. Marin County, 145 Cal. 586, 79 Pac. Rep. 282; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Moran v. Ross, 79 Cal. 159, 21 Pac. Rep. 547; overruling Mahoney v. Spring Valley Waterworks Co., 52 Cal. 159, which held that the right could be exercised by a corporation only; Reclamation Dist. No. 551 v. Superior Court of Sacramento Co., 151 Cal. 263, 90 Pac. Rep. 545; Laguna D. Dist. v. Charles Martin Co., 5 Cal. App. 166, 89 Pac. Rep. 993; Hercules W. Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. Rep. 401, upon the subject of the condemnation of water rights, and limitation of powers; Northern Lt. & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Tuolumne Water Pr. Co. v. Fredrick, 13 Cal. App. 498, 110 Pac. Rep. 134.

[1] Code Civ. Proc., Sec. 1239; 3 Kerr's Cyc. Codes, p. 1755; as amended, Stats. & Amdts., 1911, Chap. 356, p. 618; Kerr's Bien. Supp., 1911, Sec. 1239a, p. 787.

See St. Helena W. Co. v. Forbes, 62 Cal. 182, 45 Am. Dec. 659; Lake Pleasanton W. Co. v. Contra Costa W. Co., 67 Cal. 659, 8 Pac. Rep. 501; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. Rep. 681; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; City of Pasadena

§ 1741. Eminent domain—Private property which may be taken.—"The private property which may be taken under this title includes:

"1. All real property belonging to any person.

"2. Lands belonging to the State, including tide and submerged lands, not within the corporate limits of any city," etc.

"3. Lands belonging to the United States or owned or held by the United States in trust, or otherwise, for any purpose, except lands owned or held for lighthouses," and other public buildings.

"4. Property appropriated to a public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated"; etc.

"5. All franchises for other more necessary public use.

"6. All rights of way for any and all purposes mentioned in Section 1238.[1]

". . . They shall also be subjected to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

"7. All classes of private property may be taken for public use when such taking is authorized by law."[2]

It is also provided in the Irrigation District Act that:

"The use of all water required for the irrigation of the lands of any district formed under the provisions of this Act, or the Act of which this is supplementary or amendatory, and for domestic and other incidental and beneficial uses, within such district, together with the rights of way for the canals and ditches, sites for reservoirs, and all other property required in fully carrying out

v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Northern Lt. & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896.

1 See Sec. 1739.

2 Code Civ. Proc., Sec. 1240; 3 Kerr's Cyc. Codes, p. 1756; as amended, Stats. & Amdts., 1911, Chap. 358, p. 620; Kerr's Bien. Supp., 1911, p. 786, Sec. 1240a.

See, also, St. Helena W. Co. v. Forbes, 62 Cal. 182, 45 Am. Dec. 659; City of Pasadena v. Stimson, 91 Cal. 238, 24 Pac. Rep. 604; Marin County W. Co. v. Marin County, 145 Cal. 586, 79 Pac. Rep. 282; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Reclamation Dist. No. 551 v. Superior Court, 151 Cal. 263, 90 Pac. Rep. 545; Northern Lt. etc. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Laguna Drainage Dist. v. Charles Martin Co., 5 Cal. App. 166, 89 Pac. Rep. 993.

the provisions of this Act is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law."[3]

§ 1742. Eminent domain—Facts necessary to be found before property can be taken.—"Before property can be taken it must appear:

"1. That the use to which it is to be applied is a use authorized by law;

"2. That the taking is necessary to such use;

"3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use"; provided that the taking by a municipal corporation for a public street shall be deemed a more necessary public use, etc.[1]

§ 1743. Eminent domain—Procedure and jurisdiction.—In all cases where land is required for public use, the State, or its agents, may enter the lands sought to be taken and make surveys, and such entry shall constitute no cause of action in favor of the owners, except for injuries resulting from negligence, wantonness, or malice.[1]

"All proceedings under this title must be brought in the Superior Court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.[2]

[3] Gen. Laws, 1908, Henning, pp. 559-596, Sec. 17; as amended, Stats. & Amdts., 1911, Chap. 317, p. 512.

[1] Code Civ. Proc., Sec. 1241; 3 Kerr's Cyc. Codes, p. 1758; as amended, Stats. & Amdts., 1911, Chap. 358, p. 622; Kerr's Bien. Supp., 1911, p. 790, Sec. 1241a; Spring Valley Waterworks v. San Mateo Waterworks, 64 Cal. 123, 28 Pac. Rep. 447; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Pool v. Simmons, 134 Cal. 621, 66 Pac. Rep. 872; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. Rep. 681; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Hercules W. Co. v. Fernandez, 5 Cal. App. 726, 91 Pac. Rep. 401; Northern Lt. & Pr. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. Rep. 896; Tuolumne W. Pr. Co. v. Fredrick, 13 Cal. App. 498, 110 Pac. Rep. 134.

[1] Code Civ. Proc., Sec. 1242; 3 Kerr's Cyc. Codes, p. 1761; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Tuolumne W. Pr. Co. v. Fredrick, 13 Cal. App. 498, 110 Pac. Rep. 134.

[2] Code Civ. Proc., Sec. 1243; 3 Kerr's Cyc. Codes, p. 1762; Miller & Lux v. Kern Land Co., 134 Cal. 586, 66 Pac. Rep. 856; City of Santa Rosa

"The complaint must contain:

"1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.

"2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

"3. A statement of the right of the plaintiff.

"4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof," etc.

"5. A description of each piece of land sought to be taken," etc.[3]

"The clerk of the court must issue summons, which must contain the names of the parties, and a description of the property, a statement of the public use, and a reference to the complaint for further description, and a notice to the defendants to appear and show cause why the property should not be condemned as prayed for in the complaint." In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.[4]

"All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, can appear, plead, and

v. Fountain W. Co., 138 Cal. 579, 71 Pac. Rep. 1123; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Beaulieu Vineyard v. Superior Court, 6 Cal. App. 242, 91 Pac. Rep. 1015.

[3] Code Civ. Proc., Sec. 1244; 3 Kerr's Cyc. Codes, p. 1763; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Aliso W. Co. v. Baker, 95 Cal. 268, 30 Pac. Rep. 537; Rialto Irr. Dist. p. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Lake Pleasanton W. Co. v. Contra Costa W. Co., 67 Cal. 659, 8 Pac. Rep. 501; Lake Merced W. Co. v. Cowles, 31 Cal. 241; Cummings v. Peters, 56 Cal. 593; Tuolumne W. Pr. Co. v. Fredrick, 13 Cal. App. 498, 110 Pac. Rep. 134.

[4] Code Civ. Proc., Sec. 1245; 3 Kerr's Cyc. Codes, p. 1767.

In proceedings to condemn land belonging to the State, the summons and the copy of the complaint must be served on the governor, attorney general, and surveyor general of the State. In proceedings to condemn lands belonging to the United States, the same must be served on the United States district attorney. Amendment to Code Civ. Proc., Sec. 1240; Stats. & Amdts., 1911, Chap. 358, p. 621, Secs. 8, 9; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.[5]

"The court shall have the power:

"1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of Section 1240.[6]

"2. To hear and determine all adverse and conflicting claims to the property sought to be condemned, and to the damages therefor.

"3. To determine the respective right of the different parties seeking condemnation of the same property."[7] And, by the Act of 1911, there was added: "The court shall also have the power to regulate and determine the place and manner of removing or relocating structures or improvements, or of enjoying the common use mentioned in the fourth subdivision of Section 1240."[8]

The court, jury, or referee, must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess the value of the property as prescribed in the statute.

"4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural channel, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property."[9] The value at date of the issuance

[5] Code Civ. Proc., Sec. 1246; 3 Kerr's Cyc. Codes, p. 1767; Drinkhouse v. Spring Valley Waterworks, 87 Cal. 253, 25 Pac. Rep. 420; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

[6] See Sec. 1741.

[7] Code Civ. Proc., Sec. 1247; 3 Kerr's Cyc. Codes, p. 1768; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; Spring Valley Waterworks v. San Francisco, 22 Cal. 434; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

[8] Stats. & Amdts., 1911, Chap. 358, p. 622, Sec. 1247a.

[9] Code Civ. Proc., Sec. 1248; 3 Kerr's Cyc. Codes, p. 1768; as amended, Stats. & Amdts., 1911, Chap. 358, p. 622; Kerr's Bien. Supp., 1911, p. 791, Sec. 1248; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. Rep. 681; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585;

of the summons shall be the measure of compensation; provided, that in any case which is not tried within one year after the date of its commencement, unless the delay is caused by the defendant, the damages shall be deemed to have accrued at the date of the trial.[10]

"If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.[11]

"The plaintiff must, within 30 days after the final judgment, pay the sum of money assessed." In case the plaintiff is the State, or a public corporation, and it appears that bonds must be issued to pay the sum assessed, then such sum may be paid at any time within six months from the date of such judgment.[12]

Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants. "If the money be not paid or deposited, the defendants may have execution as in civil cases; and if the money can not be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff." [13]

San Diego etc. Co. v. Neale, 88 Cal. 50, 25 Pac. Rep. 977, 11 L. R. A. 604; *Id.*, 78 Cal. 63, 20 Pac. Rep. 372, 3 L. R. A. 83; Heyneman v. Blake, 19 Cal. 579; San Francisco etc. Co. v. Alameda etc. Co., 36 Cal. 639; Spring Valley Waterworks v. San Francisco, 22 Cal. 434; *In re* Clear Lake W. Co., 48 Cal. 586; Cummings v. Peters, 56 Cal. 593; Lake Merced W. Co. v. Cowles, 31 Cal. 241; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Beveridge v. Lewis, 137 Cal. 619, 67 Pac. Rep. 1040, 70 Pac. Rep. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188; Tuolumne W. Pr. Co. v. Fredrick, 13 Cal. App. 498, 110 Pac. Rep. 134.

10 Code Civ. Proc., Sec. 1249; 3 Kerr's Cyc. Codes, p. 1775; as amended, Stats. & Amdts., 1911, Chap. 417, p. 842; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; San Mateo v. Sharpstein, 50 Cal. 284; Callahan v. Dunn, 78 Cal. 366, 20 Pac. Rep. 737; Bensley v. Mountain Lake W. Co., 13 Cal. 306, 73 Am. Dec. 575; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

11 Code Civ. Proc., Sec. 1250; 3 Kerr's Cyc. Codes, p. 1776.

12 Code Civ. Proc., Sec. 1251; 3 Kerr's Cyc. Codes, p. 1776; as amended, Stats. & Amdts., 1911, Chap. 80, p. 92; Kerr's Bien. Supp., 1911, p. 793; Bensley v. Mountain L. W. Co., 13 Cal. 306, 73 Am. Dec. 575; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

13 Code Civ. Proc., Sec. 1252; 3 Kerr's Cyc. Codes, p. 1778; San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372, 3 L. R. A. 83; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

When the payments have been made, the court must make a final order of condemnation, a copy of which must be filed with the county recorder of the proper county.[14]

The statute also provides for putting the plaintiff in possession of the property condemned, the payment to the defendant of the money paid into court, and that the acceptance of such compensation by the defendant is an abandonment of all defenses that he may have except as to greater compensation.[15]

"Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the Court.[16]

"Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of 30 days after final judgment, by serving on defendant and filing in court a written notice of such abandonment," etc.[17]

"Except as otherwise provided in this title, the provisions of Part II of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title."[18]

[14] Code Civ. Proc., Sec. 1253; 3 Kerr's Cyc. Codes, p. 1779; Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. Rep. 477; *Id.*, 133 Cal. 529, 65 Pac. Rep. 1049; Bensley v. Mountain Lake W. Co., 13 Cal. 307, 73 Am. Dec. 575; Callahan v. Dunn, 78 Cal. 366, 20 Pac. Rep. 737; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

[15] Code Civ. Proc., Sec. 1254; 3 Kerr's Cyc. Codes, p. 1780; Neale v. Superior Court, 77 Cal. 28, 18 Pac. Rep. 790; San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372, 3 L. R. A. 83; San Jose etc. Co. v. Mayne, 83 Cal. 566, 23 Pac. Rep. 522; Spring Valley W. W. v. Drinkhouse, 95 Cal. 220, 30 Pac. Rep. 218; Los Angeles v. Pomeroy, 133 Cal. 529, 65 Pac. Rep. 1049; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604; Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. Rep. 706.

[16] Code Civ. Proc., Sec. 1255; 3 Kerr's Cyc. Codes, p. 1786; San Diego etc. Co. v. Neale, 88 Cal. 50, 25 Pac. Rep. 977, 11 L. R. A. 604; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; San Jose etc. Co. v. Mayne, 83 Cal. 566, 23 Pac. Rep. 522; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

[17] Code Civ. Proc., Sec. 1255a, added by Stats. & Amdts., 1911, Chap. 208, p. 377; Kerr's Bien. Supp. 1911, p. 794.

[18] Code Civ. Proc., Sec. 1256; 3 Kerr's Cyc. Codes, p. 1787; Roach v. Riverside W. Co., 74 Cal. 263, 15 Pac. Rep. 776; Drinkhouse v. Spring Valley W. W., 87 Cal. 253, 25 Pac. Rep. 420; City of Santa Rosa v. Fountain W. Co., 138 Cal. 579, 71 Pac. Rep. 1123.

§ 1744. The establishment of water rates for cities and towns.—In compliance with the provisions of the constitution of California, Article XIV, Sections 1 and 2,[1] it is provided that contracts between water companies are valid and binding in law, "but do not take from the city, city and county, or town, the right to regulate rates for water," etc.[2] It is also provided that "the proper city or town authorities may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State."[3]

In fixing rates the authorities must exercise their discretion in a reasonable and fair manner, and the rights of the public and of the company must be considered.[4]

§ 1745. The establishment of water rates for other than for cities and towns.—The first Act of the California legislature for the establishment of water rates furnished to other than cities and towns was approved March 26, 1880.[1] The greater portion of this

1 See Sec. 1727.

2 Civil Code, Sec. 548; 2 Kerr's Cyc. Codes, p. 524.

For the general discussion of the establishment of water rates, see Secs. 1368-1385.

3 Civil Code, Sec. 549; 2 Kerr's Cyc. Codes, p. 525; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Fitch v. Board of Supervisors San Francisco, 122 Cal. 285, 54 Pac. Rep. 901; People v. Stephens, 62 Cal. 209; Spring Valley Waterworks v. Board of Supervisors San Francisco, 61 Cal. 3; *Id.*, 52 Cal. 111; San Francisco etc. Factory v. Brickwedel, 60 Cal. 166; San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Jacobs v. Board Supervisors San Francisco, 100 Cal. 21, 34 Pac. Rep. 630; San Diego W. Co. v. San Diego, 59 Cal. 517; Spring Valley Waterworks v. Bartlett, 63 Cal. 245; McFadden v. Board of Supervisors Los Angeles Co., 74 Cal. 571, 16 Pac. Rep. 397; Sheward v. Citizens W. Co., 90 Cal. 635, 27 Pac. Rep. 439; Berryman v. Perkins, 55 Cal. 483; Los Angeles W. Co. v. Los Angeles, 55 Cal. 176; San Francisco v. Spring Valley Waterworks, 48 Cal. 493.

4 Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 6 L. R. A. 756, 16 Am. St. Rep. 116; Redlands etc. Co. v. Redlands, 121 Cal. 365, 53 Pac. Rep. 843; San Diego W. Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; People v. Stephens, 62 Cal. 209; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87.

1 Stats. & Amdts., 1880, p. 16; 2 Deering's Code 271.

This Act provided as follows:

"Section 1. The boards of supervisors of the several counties of this State in which water is appropriated, furnished, and sold principally for the purpose of irrigation are hereby authorized and required to fix the maximum rates at which such water shall be furnished and sold, at a meeting to

Act was superseded by the Act approved March, 1885,[2] which was an Act entitled: "An Act to regulate and control the sale, rental, and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use." This Act, with its amendments, provides as follows:

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this State by the several boards of supervisors thereof, in the manner prescribed in this Act.

"Section 2. The several boards of supervisors of this State, on petition and notice as provided in Section 3 of this Act, are hereby

be held in the month of February of each year; provided, that in the year 1880 such rates shall be fixed at the first meeting after the passage of this Act. The rates so fixed and established shall be in force from and after the first day of July, after the date fixing said rates, and shall continue in force for the period of one year; provided, that nothing in this section shall apply to water furnished within the limits of any incorporated city and county, city, or town.

"Sec. 2. Any person, company, or corporation collecting rates for water furnished for irrigation in any county of this State in excess of the rates as provided in Section 1 of this Act shall forfeit for the public use the franchise and waterworks of such person, company, or corporation to the county in which such excessive rates were charged.

"Sec. 3. Upon affidavit being made by any interested party, setting forth that any such company, person, or corporation has charged rates for water in excess of the rates established by the board of supervisors, the said board of supervisors shall cause the district attorney to commence an action in the Superior Court of the county, within 30 days from the receipt by them of such affidavit, to enforce the forfeiture of the franchise and waterworks of such person, company, or corporation.

"Sec. 4. If the board of supervisors fail or neglect to fix the rates as provided in Section 1 of this Act, or if the board of supervisors fail or neglect to commence the action provided for in Section 3 of this Act, as therein provided, any interested person may commence proceedings to compel the performance of such duties.

"Sec. 5. No person, company, or corporation selling water for irrigation shall be permitted to exercise any control as to the use of the water after its delivery to the purchaser."

2 Stats. & Amdts., 1885, p. 95; Gen. Laws of Cal., Henning, 1908, p. 601; 2 Deering's Code 272.

authorized and required to fix and regulate the maximum rates at which any person, company, association, or corporation, having or to have appropriated water for sale, rental, or distribution, in each of said counties, may and shall sell, rent, or distribute the same."

Section 3 provides substantially as follows: That whenever a petition of not less than twenty-five taxpayers of any county in the State shall, in writing, petition the board of supervisors thereof to regulate and control the rates and compensation to be charged by any person or company specified in the petition the clerk of said board shall immediately publish said petition with a notice of time and place of hearing, "which shall impart notice to all persons, companies, associations, and corporations mentioned in such petition and all persons interested in the matters of such petition and notice. Such board may also cause citations to issue to any person or persons within such county to attend and give evidence at the hearing of such petition and may compel attendance by attachment."

Section 4 of said Act contains provisions for the supervisors to estimate the value of the property, and their annual reasonable expenses for repairs, management, and operating works; "and for the purpose of such ascertainment may require the attendance of such persons to give evidence and the production of papers, books, and accounts, and may compel the attendance of such persons and the production of papers, books, and accounts, by attachments, if within their respective counties."

Section 5 of the Act provides that the board of supervisors may also establish different rates and compensation for water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing, and domestic, for which such water shall be supplied to the inhabitants, but such rates as to each class shall be equal and uniform. Said board of supervisors in fixing rates shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations, so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water. ". . . The said rates, when so fixed by such board, shall be binding and conclusive for not less than one year after their establishment and until established anew or

abrogated by such board of supervisors as hereinafter provided. And until such rates shall be so established or after they shall have been abrogated by such board of supervisors, as in this Act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this State shall be deemed and accepted as the legally established rates thereof."[3]

Section 6 provides that the rates if found to be unsatisfactory may be changed by the board.

The Act also provides for a record of the rates established; that no person or company could charge rates exceeding those established and fixed by the board; and the liability of persons or companies to a recovery of the whole rate collected and actual damages where the charge was in excess of the rate fixed. And another feature of the Act was a provision that the company should be compelled to sell water upon a tender of the rates established. The text upon this subject reads as follows:

"Section 10. Every person, company, association, or corporation having in any county in the State (other than in any city, city and county, or town therein) appropriated waters for sale, rental, or distribution to the inhabitants of such county, upon demand therefor and tender in money of such established water rates, shall be obliged to sell, rent, or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this Act provided, whether so fixed by the board of supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association, or corporation for such purposes. If any person, company, association, or corporation having water for such use shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability so to do, he or it shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered with costs."

[3] As amended by Act approved Feb. 28, 1901; Stats. & Amdts., 1901, p. 80.

Section 11 relates to the condemnation of land for rights of way, discussed in other sections.[4]

Section 11½ was added by the Act of March 2, 1897,[5] which provides as follows:

"Section 11½. Nothing in this Act shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations described in Section 2 of this Act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."[6]

§ 1746. **Water corporations and companies—Duty to furnish water.**—Upon the subject of water and irrigation corporations and companies, it is provided:

"No corporation formed to supply any city, city and county, or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city, city and county, or town, and the corporation. Contracts so made are valid and binding in law, but do not take from the city, city and county, or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years.[1]

4 See Secs. 1738-1743.

5 Stats. & Amdts., 1897, p. 49; Gen. Laws Cal., Henning, 1908, p. 604.

6 "It is believed that the foregoing Act fully supersedes Stats. 1880, p. 16, Chap. 21." Gen. Laws Cal., Henning, 1905, p. 604.

For the construction of the above Act, see McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397; Hildreth v. Montecito W. Co., 139 Cal. 22, 72 Pac. Rep. 395; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87.

For the general discussion upon water rates, see Chap. 69, Secs. 1368-1385.

1 Civil Code, Sec. 548; 2 Kerr's Cyc. Codes, p. 524.

See, also, State Constitution, Art. 14, Secs. 1, 2, Sec. 1727.

See, also, Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Fitch v. Board of Supervisors San Francisco, 122 Cal. 285, 54 Pac. Rep. 901; People v. Stephens, 62 Cal. 209; Spring Valley Waterworks v. Bartlett, 8 Sawy. 555, 16 Fed. Rep. 615; Jacobs v. Board Supervisors San

"All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The board of supervisors, or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State.[2]

"Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who has cultivated land, on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land from the corporation.[3]

"No person, company, or corporation selling water for irrigation

Francisco, 122 Cal. 285, 54 Pac. Rep. 901; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 6 L. R. A. 756, 16 Am. Ct. Rep. 116; Spring Valley Waterworks v. Bryant, 52 Cal. 132.

2 Civil Code, Sec. 549; 2 Kerr's Cyc. Codes, p. 525.

See, also, State Const., Art. 14, Secs. 1, 2, Sec. 1727.

See, also, cases cited in the last note above.

For general discussion as to fixing water rates, see Secs. 1368-1385.

3 Civil Code, Sec. 552; 2 Kerr's Cyc. Codes, p. 532.

For the compulsory service of water, see Sec. 1506; Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562, 1058; Price v. Riverside etc. Co., 56 Cal. 431; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Dorris v. Sullivan, 90 Cal. 279, 27 Pac. Rep. 216; Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Spurgeon v. Santa Ana etc. Co., 120 Cal. 71, 52 Pac. Rep. 140, 39 L. R. A. 701; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; Atlantic Trust Co. v. Woodbridge, 86 Fed. Rep. 975; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 Pac. Rep. 490; Graham v. Pasadena L. & W. Co., 152 Cal. 596, 93 Pac. Rep. 498; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213; Lowe v. Yolo County Consol. W. Co., 8 Cal. App. 167, 96 Pac. Rep. 379.

shall be permitted to exercise any control as to the use of the water after its delivery to the purchaser."[4]

§ 1747. **Water corporations and companies—Mutual corporations.**—Upon the subject of mutual irrigation companies it is further provided that, whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares are personal property, and may be transferred by indorsement by the signature of the owner, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation; provided, however, that "any corporation organized for, or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes or for domestic use, may in its by-laws provide that water shall only be sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-laws recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto."[1]

The Civil Code also provides for the distribution of surplus stock among the shareholders in companies, by way of a stock dividend, in terms as follows:

"Where a corporation has been heretofore or may hereafter be formed for the purpose, among other things, of acquiring, holding, and selling real estate, water and water rights, the directors of such corporation may, with the consent of the stockholders representing two-thirds of the capital stock thereof, given at a meeting called for that purpose, divide among the stockholders the land, water, or

[4] Act of March 26, 1880; Stats. & Amdts., 1880, p. 16.

[1] Civil Code, Sec. 324; 2 Kerr's Cyc. Codes, p. 348; Weston v. Bear River etc. Co., 5 Cal. 186, 63 Am. Dec. 117; Strout v. Natoma W. Co., 9 Cal. 78; Tregear v. Etiwanda W. Co., 76 Cal. 537, 18 Pac. Rep. 658, 9 Am. St. Rep. 245; Kimball v. Union W. Co., 44 Cal. 173, 13 Am. Rep. 157; Craig v. Hesperia etc. Co., 113 Cal. 7, 45 Pac. Rep. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; *In re* Thomas Estate, 147 Cal. 236, 81 Pac. Rep. 539; National Bank of the Pacific v. Western Pacific R. Co., 157 Cal. 573, 108 Pac. Rep. 676, 27 L. R. A., N. S., 987.

water rights so by such corporation held, in the proportions to which their holdings of such stock at the time of such division entitle them. . . . Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."[2]

§ 1748. Water corporations and companies—Power to contract for services.—By the Act approved March 16, 1901,[1] regulating the power of water corporations and companies to make contracts for the sale and distribution of water, it was provided:

"Section 1. It is and shall be lawful for any person, company, association, or corporation, furnishing for sale, rental, or distribution any appropriated waters for purposes of irrigation, to enter into contracts with individual consumers of such water or with bodies of such consumers, relating to the sale, rental, or distribution of such water, or any thereof, which contracts, subject to the restrictions hereinafter declared, shall be valid to all intents and purposes, any law or rule to the contrary notwithstanding.

"Section 2. No such contract shall provide for the sale, rental, or distribution of any such water at any rate exceeding the established rates fixed and regulated therefor by the board of supervisors of the proper counties, or fixed and established by such person, company, association, or corporation, as provided by law.

"Section 3. Nothing in this Act contained shall be construed to authorize or make valid any contract not made for a valuable consideration; but an agreement on the part of such person, company, association, or corporation to sell, rent, or distribute any water to a consumer, without payment in advance therefor, or upon any other terms to which such consumer is not otherwise lawfully en-

2 Civil Code, Sec. 309; 2 Kerr's Cyc. Codes, p. 328.

See, also, Excelsior etc. Co. v. Pierce, 90 Cal. 131, 27 Pac. Rep. 44; Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 28 Pac. Rep. 1049; South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; Tapscott v. Mexican-Colorado River L. Co., 153 Cal. 664, 96 Pac. Rep. 271; Merced River Elec. Co. v. Curry, 157 Cal. 727, 109 Pac. Rep. 264.

See, also, for mutual companies, Secs. 1479-1489.

1 Stats. & Amdts. 1901, Chap. 156, p. 331; Gen. Laws, Henning, 1905, p. 589.

titled, shall be deemed and taken to be a valuable and sufficient consideration for such contract.

"Section 4. Nothing in this Act contained shall affect any contract made prior to the time that the board of supervisors fix and establish the rates and regulations for and under which water shall be sold and supplied." [2]

§ 1749. Artesian wells and subterranean waters.—In 1877 there was passed an Act to regulate the use of artesian wells, and to prevent the waste of subterranean waters in the State. A new Act was afterward passed in 1901,[1] and still another Act in 1907,[2] entitled: "An Act to prevent the waste and flow of water from artesian wells, and prescribing penalties therefor, and defining waste and artesian wells." [3] This later Act takes the place of the earlier Acts, the same being repealed thereby. So the statute as it now stands, is as follows:

"Section 1. Any artesian well which is not capped, equipped, or furnished with such mechanical appliance as will readily and effectively arrest and prevent the flow of any water from such well, is hereby declared to be a public nuisance. The owner, tenant, or occupant of the land upon which such well is situated, who causes, permits, or suffers such public nuisance, or suffers or permits it to

2 For the fixing of water rates in California, see Secs. 1744, 1745.

For the general discussion upon the subject of water rates, see Chap. 69, Secs. 1368-1385.

See, also, Fresno C. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; San Diego etc. Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; Fresno C. Co. v. Powell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. Rep. 112; Souther v. San Diego Flume Co., 112 Fed. Rep. 228; Fresno C. Co. v. Hart, 152 Cal. 450, 92 Pac. Rep. 1010; Fresno C. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213; San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; *Id.*, 110 Fed. Rep. 706, 89 Fed. Rep. 274.

For the right to fix rates by contract, see, also, Secs. 1381-1383.

1 Gen. Laws Cal., Henning, 1908, p. 55.

2 Stats. & Amdts., 1907, Chap. 101, p. 122; Supp. Kerr's Codes, 1906-1909, pp. 1407, 1408.

3 See Supp. Kerr's Codes, 1906-1909, pp. 1407, 1408.

That the Act is constitutional, see *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

remain, or continue, is guilty of a misdemeanor; and any person owning, possessing, or occupying any land upon which is situated an artesian well, who causes, suffers, or permits the water to unnecessarily flow from such well, or to go to waste, is guilty of a misdemeanor.

"Section 2. For the purposes of this Act, an artesian well is defined to be any artificial hole made in the ground through which water naturally flows from subterranean sources to the surface of the ground for any length of time.

"Section 3. Waste is defined, for the purposes of this Act, to be the causing, suffering, or permitting any water flowing from an artesian well, to run into any river, creek, or other natural water course or channel, or into any bay or pond (unless used thereafter for the beneficial purpose of irrigation of land or domestic use), or into any street, road, or highway, or upon the land of any person, or upon the public land of the United States or of the State of California, unless it be used thereon for the beneficial purposes of the irrigation thereof or for domestic use, or the propagation of fish. The use of any water flowing from any artesian well for the irrigation of land whenever over five per cent of the water received on such land for such purposes is allowed to escape therefrom, is also hereby declared to be waste within the meaning of this Act; provided, that nothing herein shall prevent the running of artesian water into an artificial pond or storage reservoir, if used thereafter for a beneficial use; provided, such beneficial use shall not exceed one-tenth of one miner's inch of water per acre, perpetual flow, but such user of water shall have the right to cumulate the said amount within any period of the year.[4]

"Section 4. Each day's continuance of such waste shall constitute a new offense under this Act.

"Section 5. Any person violating the provisions of the Act shall, for each offense, upon conviction thereof, be punished by a fine of not less than $25, and not more than $500, or imprisoned in the county jail for a period of not more than six months, or by both such fine and imprisonment. The justice of the peace of the county is given jurisdiction of such cases.

[4] The latter portion of the section was amended to read as above by the Act of March 25, 1909, Stats. & Amdts., 1909, Chaps. 427, 749; Kerr's Bien. Supp., 1906-1909, p. 1408.

"Section 6. All Acts and parts of Acts in conflict with this Act are hereby repealed."[5]

§ 1750. **An Act to prevent the waters of the State from being carried into other States.**—By the Act approved March 3, 1911,[1] it was made unlawful to conduct any of the waters of the State into any other State, for use therein. It is also made the duty of the governor of the State to keep a general oversight over the fresh waters of the State and to see that the same are preserved for the use and benefit of the citizens and inhabitants of the State, and to prevent the waters thereof from being carried or transported into other States. When it is brought to the attention of the governor that it is the intention to so carry or transport any of such waters into any other State, then it is made his duty, through the attorney general, to bring such action as may be necessary to prevent such carrying away or transporting of such waters into another State.[2]

See, also, Assembly Joint Resolution Number 8,[3] relative to diverting the waters of the Truckee River from their natural course, and protesting against the government of the United States from constructing an artificial outlet to Lake Tahoe by driving a tunnel from the Nevada side of said lake to tap said lake beneath the water level and divert its waters through the State of Nevada, for the reason that said lake and watershed lie most largely in the State of California, and to the major portion of the waters of which lake the State of California claims to be the owner.[4]

§ 1751. **The use of water for hydraulic mining.**—"The business of hydraulic mining may be carried on within the State of California wherever and whenever the same may be carried on without material injury to the navigable streams, or the lands adjacent thereto.

5 See, also, for the general discussion upon the subject of artesian waters, Chap. 61, Secs. 1166-1184.

1 Stats. & Amdts., 1911, Chap. 104, p. 271; Kerr's Bien. Supp., 1911, p. 1474.

2 See, also, Act of April 8, 1911, Stats. & Amdts., 1911, Chap. 407, p. 821, amending Sec. 1410, Civil Code, Sec. 1729.

3 Stats. & Amdts., 1911, Chap. 18, p. 1550.

4 That California claims the title to all waters within the State, see amendment to Section 1410, enacted in 1911, Stats. & Amdts., 1911, Chap. 407, p. 821; see, also, Sec. 1720.

See, also, Kerr's Bien. Supp., 1911, p. 584.

"Hydraulic mining, within the meaning of this title, is mining by means of the application of water, under pressure, through a nozzle, against a natural bank."[1] We have discussed, in previous sections, the remedies for the pollution of streams by mining debris.[2]

§ 1752. **An Act establishing the conservation commission.**—By the Act approved April 8, 1911,[1] a commission consisting of three persons, to be appointed by the governor, is thereby created and established "for the purpose of investigating and gathering data and information concerning the subjects of forestry, water, the use of water, water power, electricity, electrical or other power, mines and mining, mineral and other lands, dredging, reclamation and irrigation, and for the purpose of revising, systematizing, and reforming the laws of this State, upon, concerning, regarding, or appertaining to these said subjects."

The duties of the said commission are, "to investigate and examine the laws of the United States, of foreign nations, of the States of the Union, and this State, and the reports and recommendations of persons, officials, commissions, societies, and associations," upon the said subjects, "and to prepare and recommend to the legislature laws, statutes, and constitutional amendments revising, systematizing, and reforming the laws of this State," upon said subjects.

The reports of the said commission are authorized, and it is

1 Civil Code, Secs. 1424, 1425; 2 Kerr's Codes, p. 1166.

For the Act of Congress of 1893, entitled, "An Act to create California Debris Commission and regulate hydraulic mining in the State of California," see Sec. 1136.

See, also, United States v. North Bloomfield etc. Co., 81 Fed. Rep. 243; North Bloomfield etc. Co. v. United States, 88 Fed. Rep. 64, 32 C. C. A. 84; County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. Rep. 740; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Woodruff v. North Bloomfield, 18 Fed. Rep. 753; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; North Fork W. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69; Oliver v. Agasse, 132 Cal. 297, 64 Pac. Rep. 401.

2 See Sec. 1136.

For the Act of Congress relating to the California Debris Commission and the regulation of hydraulic mining, see 5 Fed. Stat. Ann., 1905, p. 61; 3 U. S. Comp. Stat., 1901, p. 3553; 27 Stat. L. 507. Section 13 of this Act was amended by Act of Feb. 27, 1907, Supp. Fed. Stat. Ann., 1909, p. 705; 34 Stat. L. 1001.

See, also, for a discussion of this Act, Sec. 1136.

1 Stats. & Amdts., 1911, Chap. 408, p. 822; Kerr's Bien. Supp., 1911, p. 1023.

made the duty of the State officers to assist the said commission; and, for the purpose of carrying out the provisions of the Act, the said commission is authorized to employ such expert, technical, professional, and clerical assistance and upon such terms as they may deem proper. The authority is given to cross all lands in making any investigations. The said commissioners shall receive no salary, but shall be allowed their actual expenses. For the purpose of carrying out the provisions of the Act the sum of $100,000 was appropriated.

§ 1753. **An Act for the protection of the navigability of the State waters.**—By the Act approved May 1, 1911,[1] it was provided that the department of engineering of the State should investigate the practicability of the construction of canals, with dams, locks, and other structures, with the view of determining the utility thereof in aid of commerce and navigation. That said department shall complete such investigations as soon as practicable, consistent with efficiency and accuracy, and make a report thereof to the governor on or before December 1, 1912.[2]

§ 1754. **Acts regulating the extraction of minerals from waters.**—The Act approved April 14, 1911,[1] provided for regulating the extraction of minerals from the waters of any stream or lake within the State, and prohibiting the extraction of such minerals except under lease from, or by express permission of, the State for a period not exceeding 25 years. This Act was further supplemented by the Act of April 27, 1911.[2]

§ 1755. **The irrigation district law.**—One of the most famous irrigation statutes in the country is the Irrigation District Law, which originated in California, where it is commonly known as the "Wright Act," being so named after the author of the bill.[1] This law, forming, as it does, the basis of the irrigation district laws of

1 Stats. & Amdts., 1911, Chap. 742, p. 1445; Kerr's Bien. Supp., 1911, p. 1467.

2 See, also, for the preservation of the navigability of the waters of the United States, Secs. 350-352.

1 Stats. & Amdts., 1911, Chap. 454, p. 904; Kerr's Bien. Supp., 1911, p. 1198.

2 Stats. & Amdts., 1911, Chap. 612, p. 1154; Kerr's Bien. Supp., 1911, p. 1198.

1 For the history of the irrigation district law, see Secs. 1366-1432.

most of the Western States,[2] has even invaded those States which formerly so strenuously adhered to the doctrine of State control, or State administrative laws, as the only true system for the control, regulation, and the distribution of waters, notably Wyoming and Colorado.[3] This law, as adopted in the different States, comes more nearly being uniform than any of the other laws governing the subject of waters and water rights. The main principles are the same in the different jurisdictions—which are the control, regulation, and distribution of the waters among the land owners within certain specified districts by the land owners themselves, through the medium of a local public corporation, in which every land owner has a voice—the only difference being in the details of the organization and operation of the law. This law is specially applicable to thickly settled communities, but in such communities it is probably the best law in theory which can be devised under our form of government, although the practical working of the law has not always been satisfactory.

In our discussion upon the subject of irrigation districts in general, we discussed the general features of these laws. Therefore, in this section we will give but a brief abstract of the California law, as it now stands as amended, and references where the same can be found, without giving the construction by the courts.[4]

Upon the subject of organization, it is provided that it must be instituted by a petition to the board of county commissioners, signed by "a majority in number of the holders of title or evidence of title, including the holders of possessory rights under receipts or other evidence of title of the rights of entrymen or purchasers, under any law of the United States, or of the State, to lands susceptible of irrigation from a common source, . . . and representing a majority in value of said lands."[5] An election must be held upon the organization of a district and for the election of its

[2] For the States adopting the law, see Secs. 1390-1403.

[3] For the law of State control, see Chap. 68, Secs. 1337-1367.

[4] For the construction of the California law, in connection with the other laws upon the subject, see Chap. 70, Secs. 1404-1409.

[5] Gen. Laws, Henning, 1905, p. 559, Sec. 1; as amended, Stats. & Amdts., 1911, Chap. 317, p. 509, Sec. 2; as amended, Stats. & Amdts., 1909, Chap. 22, p. 12; Kerr's Bien. Supp., 1906-1909, p. 1647, and as further amended, Stats. & Amdts., 1911, Chap. 317, p. 509; Kerr's Bien. Supp., 1911, p. 1124.

officers. Any person residing within the district and possessing all the qualifications required of electors, under the general election laws, may vote upon the proposition.[6]

The board of directors of an irrigation district are given the duties and powers heretofore discussed.[7]

The use of all water, for the purposes of the Act, is declared to be a public use; and all water of the district is to be distributed ratably among the users therein.[8] After the organization of a district, general elections for the purpose of electing its officers must be held at stated periods.[9]

The title to all property acquired is to vest in the district.[10] Money may be borrowed and bonds of a district issued therefor to secure the payment thereof, upon the question being submitted to a vote of the district.[11] A special assessment may be made for the completion of the works.[12] In all general and special assessments all real property in the district must be assessed, and the duties of the assessor are prescribed.[13]

All assessments must be equalized.[14] The taxes must be levied and collected.[15] The delinquent notice must be published, in ac-

6 Gen. Laws, Henning, 1905, p. 561, Secs. 6-12; Sec. 10½ inserted by Stats. & Amdts., 1909, Chap. 91, p. 139, relative to indebtedness schedules.

7 See Sec. 1416; Gen. Laws, Henning, 1905, p. 562, Secs. 13-16; Sec. 14, as amended, Stats. & Amdts., 1909, Chap. 660, p. 998; Kerr's Bien. Supp., 1906-1909, p. 1648; Sec. 15 and 15½ as amended and added, Stats. and Amdts., 1911, Chap. 317, pp. 310, 312; Kerr's Bien. Supp., 1911, p. 1125.

8 Gen. Laws, Henning, 1905, p. 564, Secs. 17, 18; Sec. 17, as amended, Stats. & Amdts., 1911, Chap. 317, p. 512; Kerr's Bien. Supp., 1911, p. 1126.

9 Gen. Laws, Henning, 1905, p. 564, Secs. 19-28; Sec. 22, as amended, Stats. & Amdts., 1909, Chap. 692, p. 1062; Kerr's Bien. Supp., 1906-1909, p. 1649, and Secs. 22a and 22b added.

10 Gen. Laws, Henning, 1905, p. 567; Sec. 29, as amended, Stats. & Amdts., 1909, Chap. 698, p. 1075; Kerr's Bien. Supp., 1906-1909, p. 1649.

11 Gen. Laws, Henning, 1905, p. 568, Secs. 30-33; Secs. 30 and 32, as amended, Stats. & Amdts., 1911, Chap. 317, p. 512, 513; Kerr's Bien. Supp., 1911, pp. 1126, 1127.

12 Gen. Laws, Henning, 1905, p. 569, Sec. 34, as amended, Stats. & Amdts., 1911, Chap. 317, p. 514.

13 Gen. Laws, Henning, 1905, p. 570, Secs. 35, 36; Sec. 35, as amended, Stats. & Amdts., 1909, Chap. 303, p. 461; Kerr's Bien. Supp., 1906-1909, p. 461.

14 Gen. Laws, Henning, 1905, p. 571, Sec. 38.

15 Gen. Laws, Henning, 1905, p. 571, Secs. 39-41; Sec. 39, as amended, Stats. & Amdts., 1909, Chap. 55, p. 46; Kerr's Bien. Supp., 1906-1909, p. 1650, and as further amended by

cordance with the special provisions of the Act;[16] and also the sale of the property had for delinquent taxes.[17] A redemption of the property sold for assessments may be made.[18] Provisions are also made for the redemption of bonds issued and for the payment of interest.[19]

The board of directors is authorized and empowered to let contracts for the construction of all necessary works and to acquire property for the district.[20] Provisions are also made for the governing of the board of directors and for their compensation.[21] The board also has the power to provide for special assessments.[22] But the board of directors has no power to incur indebtedness except as specially provided in the Act itself.[23] Full provisions are made for governing the use of the water.[24] All rights are exempted from taxation.[25] Special funds for the purposes of the Act are created.[26]

Confirmatory proceedings may be had for the purpose of validating bonds and all proceedings in the organization of the district.[27]

Land may be excluded from a district,[28] and also included.[29]

Stats. and Amdts., 1911, Chap. 317, p. 514; Kerr's Bien. Supp., 1911, p. 1128.

16 Gen. Laws, Henning, 1905, p. 572, Sec. 42.

17 Gen. Laws, Henning, 1905, p. 572, Secs. 43-46.

18 Gen. Laws, Henning, 1905, p. 574, Secs. 47-51; Sec. 47, as amended, Stats. & Amdts., 1909, Chap. 284, p. 429; Kerr's Bien. Supp., 1906-1909, p. 1651, and Sec. 47½ added, Stats. & Amdts., 1911, Chap. 317, p. 516; Kerr's Bien. Supp., 1911, p. 1128.

19 Gen. Laws, Henning, 1905, p. 575, Sec. 52.

20 Gen. Laws, Henning, 1905, p. 575, Secs. 53-56; Sec. 55, as amended, Stats. & Amdts., 1911, Chap. 317, p. 516; Kerr's Bien. Supp., 1911, p. 1129.

21 Gen. Laws, Henning, 1905, p. 577, Secs. 57, 58; Sec. 57, as amended, Stats. & Amdts., 1909, Chap. 692, p. 1063; Kerr's Bien. Supp., 1906-1909, p. 1651.

22 Gen. Laws, Henning, 1905, p. 577, Secs. 59, 60; Sec. 59, as amended, Stats. & Amdts., 1911, Chap. 588, p. 1111; Kerr's Bien. Supp., 1911, p. 1129.

23 Gen. Laws, Henning, 1905, p. 578, Sec. 61; as amended, Stats. & Amdts., 1911, Chap. 317, p. 517; Kerr's Bien. Supp., 1911, p. 1130.

24 Gen. Laws, Henning, 1905, p. 578, Secs. 62-65.

25 Gen. Laws, Henning, 1905, p. 578, Sec. 66.

26 Gen. Laws, Henning, 1905, p. 579, Sec. 67.

27 Gen. Laws, Henning, 1905, p. 579, Secs. 68-73.

28 Gen. Laws, Henning, 1905, p. 580, Secs. 74-83.

29 Gen. Laws, Henning, 1905, p. 583, Secs. 85-97.

The bonded indebtedness may be redeemed.[30] The board of directors is also given the power to lease water.[31] The destruction of unsold bonds is provided for.[32] Saving clauses are provided.[33]

Since the adoption of the main body of the Act, the legislature of the State has also passed a number of special Acts, which are amendatory and supplemental to the main Act; these will be given in their order.

In 1897 a special Act provided for the issue and sale, or the funding of bonds of irrigation districts, and proceedings to test the validity of the same.[34]

In 1903 provisions were made for the dissolution of irrigation districts, the ascertainment and discharge of their indebtedness, and the distribution of their property.[35]

By the Act of March 18, 1907,[36] it was made the duty of the board of directors to provide for any and all drainage made necessary by irrigation provided for by such laws, "and all laws respecting such irrigation or such irrigation districts shall be so construed, applied, and enforced as to apply to such drainage, as well as such irrigation."

By the Act of March 19, 1909,[37] it was provided for the payment in two installments of the assessments levied under the provisions of the Act.

The Act of April 8, 1911,[38] amending Section 1410 of the Civil Code, excepted the appropriation of water by irrigation districts for power purposes from the 25-year limit, placed by the Act upon appropriations by corporations for such purposes.[39]

30 Gen. Laws, Henning, 1905, p. 586, Secs. 98-99½.

31 Gen. Laws, Henning, 1905, p. 586, Secs. 100-105.

32 Gen. Laws, Henning, 1905, p. 587, Secs. 106-108.

33 Gen. Laws, Henning, 1905, p. 588, Secs. 109, 110.

34 Stats. & Amdts., 1897, Chap. 254, p. 394; as amended, Stats. & Amdts., 1901, Chap. 159, p. 514; Gen. Laws, Henning, 1905, p. 593.

35 Stats. & Amdts., 1903, Chap. 5, p. 3; Gen. Laws, Henning, 1905, p. 590.

36 Stats. & Amdts., 1907, Chap. 298, p. 569; Supp. Kerr's Cyc. Codes, 1906-1909, p. 1655.

37 Stats. & Amdts., 1909, Chap. 274, p. 415; Kerr's Bien. Supp., 1906-1909, p. 165.

38 Stats. & Amdts., 1911, Chap. 407, p. 821.

39 See, also, for the Water Power Act, approved April 8, 1911, Stats. & Amdts., 1911, Chap. 406, p. 813; Kerr's Bien. Supp., 1911, p. 584.

For this Act, see, also, Sec. 1732.

The Act approved May 1, 1911,[40] provides for the release of all claims and liens arising from irrigation bonds and interest coupons voluntarily surrendered for cancellation, and to provide for the establishment of a record of such release by an action in court and a hearing and judgment thereon.

The Act approved March 9, 1911,[41] provides under what circumstances bonds of irrigation districts may become legal investments for funds of banks, banking associations, trust companies, insurance companies, and for State school funds, and providing that such bonds may be deposited as security, and also providing for a commission for approving such bonds.

By the Act approved March 1, 1911,[42] it was provided that the "Turlock Irrigation District, as formed by the board of supervisors of Stanislaus County, State of California, and as now existing, is hereby recognized and declared valid, and all proceedings on organization and formation are hereby approved and declared valid."

Similar validating Acts were also passed relative to the Oakdale Irrigation District,[43] the Modesto Irrigation District,[44] and the San Joaquin Irrigation District.[45]

By the old Act of 1877,[46] the township of Los Nietos was created an irrigation district to be known as "Los Nietos Irrigation District."

§ 1756. **Municipal water districts—Act of April 26, 1909.**—By the Act of April 26, 1909,[1] it was provided that a municipal water district may be organized and incorporated and managed as therein provided and may also exercise the powers expressly granted or necessarily implied.

40 Stats. & Amdts., 1911, Chap. 750, p. 1460; Kerr's Bien. Supp., 1911, p. 1131.

41 Stats. & Amdts., 1911, Chap. 157, p. 322; Kerr's Bien. Supp., 1911, p. 1130.

42 Stats. & Amdts., 1911, Chap. 95, p. 261; Kerr's Bien. Supp., 1911, p. 1133.

43 Stats. & Amdts., 1911, Chap. 96, p. 262; Kerr's Bien. Supp., 1911, p. 1132.

44 Stats. & Amdts., 1911, Chap. 97, p. 262; Kerr's Bien. Supp., 1911. p. 1132.

45 Stats. & Amdts., 1911, Chap. 98, p. 262; Kerr's Bien. Supp., 1911, p. 1133.

46 Stats. & Amdts., 1877, Chap. 300, p. 374; Gen. Laws, Henning, 1905, p. 596.

1 Stats. & Amdts., 1909, Chap. 724, p. 1097; Kerr's Bien. Supp., 1906-1909, p. 1817.

In order to organize such a district, the legislative body of the municipality must pass an ordinance reciting: 1. The name of the city adopting the ordinance; 2. That the public interest requires the incorporation of a municipal water district; 3. The names of the municipalities which it is desired to include within the district; 4. The name of the district, which shall include the words "municipal water district." Notice must be sent to the other municipalities proposed to be included in such district which by ordinance may approve or disapprove of the said ordinance. Within 30 days after the receipt of all the ordinances passed by the municipalities named in the initiatory ordinance, the legislative body of the municipality initiating the proceeding shall fix a day for holding a special election in each of the municipalities approving, at which shall be submitted to the electors thereof the proposition of organizing such municipal water district. Within 30 days after the receipt of the certificate showing the result of the election, if it appears therefrom that the proposition submitted was approved by a majority of the votes cast in each municipality, the legislative body receiving such certificates shall certify to the Secretary of State the passage of the ordinance and the result of the election. Upon the receipt of the certificate mentioned, the Secretary of State shall, within ten days, issue his certificate, reciting that the municipal water district has been duly incorporated.

The powers granted to such municipal water district as enumerated in the Act are: 1. To have perpetual succession; 2. To sue and be sued; 3. To adopt a seal; 4. To take by grant, purchase, gift, devise, or lease, hold, use, enjoy, and to lease or dispose of real and personal property of every kind within or without the district, necessary to the full exercise of its powers; 5. To acquire, or contract to acquire, lands, rights, and privileges, and construct, maintain, and operate conduits, pipe lines, reservoirs, works, machinery, and other property useful or necessary to store, convey, supply, or otherwise make use of water for the benefit of the district; 6. To sell water under the control of the district to the municipalities comprising the same; and when there is a surplus above their needs, it may sell or otherwise dispose of the same outside of the district to persons, firms, public or private corporations; 7. To have and exercise the right of eminent domain in the manner provided by law, "and may condemn any existing water works or system, or any portion

thereof owned by any person or corporation"; 8. To borrow and to issue bonds therefor; 9. To cause taxes to be levied for the purpose of paying any obligation of the district; 10. "To make contracts, to employ labor and to do all acts necessary for the full exercise of the foregoing powers."

The powers enumerated shall, except as therein provided, be exercised by a board of directors. The mayor or president of the board of trustees of each municipality shall be *ex officio* a member of said board. Each municipality having 5,000 legal and registered voters shall choose by and from the members of its legislative body one additional director; and each municipality for each and every 10,000 voters over 5,000 shall choose one additional director. At a meeting of the board of directors, the said board shall choose three commissioners who shall constitute the commissioners of said district, but no director shall be eligible to appointment to such commission. The said commissioners are given the power to make and enter into all contracts, appoint a secretary and such other assistants as may be necessary, and to fix their compensation and prescribe their duties. The commissioners shall receive such compensation as the board of directors shall determine and shall serve during its pleasure.

Whenever the board of directors deems it necessary for the district to incur a bonded indebtedness it shall by resolution so declare and state the purpose and submit the proposition to the electors of the district as in the Act provided. It is made the duty of the commissioners to take charge of the actual construction of the works and to deliver the water to the several municipalities in the district, but they have no supervision of any distributing systems of such municipalities. The commissioners in furnishing the water to any municipality shall fix such rates as will pay the operating expenses. If, from any cause, the revenues of the district shall be inadequate to pay the principal or interest of any bonded debt as it becomes due, then the board of directors may cause a tax to be levied as in the Act provided. Provisions are also made for the exclusion or inclusion of any municipality from the district.[2]

[2] See, also, for the appropriation and ownership of waters by municipalities, Secs. 1731, 1756.

By still another Act approved in 1911 [3] it was provided that:

"Sec. 1. A municipal water district may be organized and incorporated and managed as herein expressly provided and may exercise the powers herein expressly granted or necessarily implied.

"Sec. 2. The people of any county or portion of a county, whether such portion includes unincorporated territory or not, in the State of California, may organize a municipal water district under the provisions of this Act by proceeding as herein provided."

The Act further provides for the organization of such districts by a petition to the board of supervisors of the county, signed by at least 25 per cent of the freeholders within the boundaries of the proposed municipal water district, which petition shall set forth and particularly describe the proposed boundaries and other data as prescribed by the Act. The district must be organized upon the vote upon the proposition. The Act also provides for the election of officers and their duties.

It is further provided that such district have the power to have perpetual succession; to sue and be sued; to adopt a seal; to take by grant, prescription, gift, etc., and to lease and dispose of real and personal property of every kind, within or without the district; to acquire a contract; to acquire land, rights, and privileges; to construct and maintain conduits, pipe lines, reservoirs, and other works; to sell water under the control of the district to the municipalities and precincts comprising the same and to the inhabitants thereof; to have and exercise the right of eminent domain; to borrow money, incur indebtedness, and issue bonds; to cause taxes to be levied for the purpose of paying any obligation of the district; to make contracts and employ labor, and do all acts necessary for the full exercise of the foregoing powers.

"Sec. 28. Nothing in this Act shall be so construed as repealing or in anywise modifying the provisions of any other Act relating to water or the supply of water to, or the acquisition thereof by, municipalities within this State."

§ 1757. **Reclamation districts—Drainage.**—For the purpose of the reclamation of lands by the means of drainage, and for the protection of lands from overflow, the legislature of California has pro-

[3] Stats. & Amdts. 1911, p. 1290; Kerr's Bien. Supp., 1911, p. 1234.

vided a number of important Acts. These Acts resemble in many ways the Acts relating to irrigation districts, discussed in previous portions of this work.[1]

One of the most important of these Acts is that relating to the organization and operation of "Reclamation Districts."[2]

Upon the question of organization of such districts it is provided that: "Whenever the holders of title or evidence of title representing one-half or more of any body of swamp and overflowed, salt-marsh, or tide lands, or other lands subject to flood or overflow susceptible of one mode of reclamation, desire to reclaim the same, they may present to the board of supervisors of the county in which the lands, or the greater part thereof, are situated, at a regular meeting of the board, a petition setting forth that they propose to form a district for the reclamation of the same, a description of the lands by legal subdivisions or other boundaries, the county in which they are situated, the number of acres in the proposed district, and each tract, with the names (if known) of the owners thereof, and designating as unsold any lands not reduced to private ownership."[3]

1 For irrigation districts in general, see Chap. 70, Secs. 1386-1432.

For the California irrigation district law, see Sec. 1755.

2 Pol. Code, Secs. 3446-3493½, 1 Kerr's Cyc. Codes, pp. 816-844; as amended and supplemented by Stats. & Amdts., 1909, p. 933; Kerr's Bien. Supp., 1906-1909, p. 1911, and Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, pp. 149-169.

3 Pol. Code, Sec. 3446; 1 Kerr's Cyc. Codes, p. 816.

For the constitutionality of the Act, see Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.* 66 Cal. 54, 4 Pac. Rep. 945.

The "Sacramento Drainage District," created by the Act of 1905, Stats. & Amdts., 1905, Chap. 368, p. 443, was held to be constitutional as to its organization. People *ex rel.* Chapman v. Sacramento Drainage Dist., 155 Cal. 373, 103 Pac. Rep. 207, Inglin v. Hoppin, 156 Cal. 483, 105 Pac. Rep. 582; Metcalf v. Merritt, 14 Cal. App. 244, 111 Pac. Rep. 505.

See, also, Ralston v. Board of Supervisors, 51 Cal. 592; Reclamation Dist. v. Kennedy, 58 Cal. 124; Cosner v. Board of Supervisors, 58 Cal. 274; Lower Kings River R. Dist. v. Phillips, 108 Cal. 306, 39 Pac. Rep. 630, 41 Pac. Rep. 335; People *ex rel.* Van Loben Sels v. Reclamation Dist., 117 Cal. 114, 48 Pac. Rep. 1016; Angus v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; People *ex rel.* Thisby v. Reclamation Dist., 130 Cal. 607, 63 Pac. Rep. 27; Reclamation Dist. v. County of Sacramento, 134 Cal. 477, 66 Pac. Rep. 668; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Laguna D. Dist. v. Charles Martin Co., 144 Cal. 209, 77 Pac. Rep. 933; People *ex rel.* Marshall v. Parvin, 74 Cal. 545, 16 Pac. Rep. 490; Glide v. Superior Court, 147 Cal. 21, 81 Pac. Rep. 225; Inglin v. Hoppin, 8 Cal. App. 107; Messen-

The petition must be verified and published.[4] The district may be situated partly in different counties.[5] If found to be correct, the board of supervisors may make an order approving the same, and it may reform the district in its order.[6] The petition must be recorded in the office of the county recorder.[7] The register must thereupon forward to the county treasurer a statement showing the names of the purchasers of land in the district, who have paid in full therefor.[8]

After the district has been fully organized, the owners of the lands therein may adopt by-laws for the government of the district.[9] A board of trustees must be elected for the management of the affairs of the district.[10] The board is given the power to acquire

ger v. Kingsbury, 8 Cal. App. 341; Sels v. Greene, 81 Fed. Rep. 555; *Id.* 88 Fed. Rep. 129; Rico v. Snider, 134 Fed. Rep. 953; Swamp Lands Dist. v. Silver, 98 Cal. 51, 32 Pac. Rep. 866; Reclamation Dist. v. Burger, 122 Cal. 442, 55 Pac. Rep. 156.

4 Pol. Code, Sec. 3447; 1 Kerr's Cyc. Codes, p. 818; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 149.

Williams v. Board of Supervisors, 58 Cal. 237; Inglin v. Hoppin, 8 Cal. App 107; People v. Haggin, 57 Cal. 579; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; People v. Reclamation Dist., 121 Cal. 522, 50 Pac. Rep. 1068, 53 Pac. Rep. 1085; Sels v. Greene, 88 Fed. Rep. 129. Rico v. Snider, 134 Fed. Rep. 953; Reclamation Dist v. McPhee, 13 Cal. App. 382, 109 Pac. Rep. 1106.

5 Pol. Code, Sec. 3448, 1 Kerr's Codes, p. 818; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 149; Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663, *Id.* 66 Cal. 54, 4 Pac. Rep. 945.

See, also, cases cited in last note.

6 Pol. Code, 3449; 1 Kerr's Cyc. Codes, p. 818; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 149; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; People v. Reclamation Dist., 121 Cal. 522, 50 Pac. Rep. 1068, 53 Pac. Rep. 1085; Lower Kings R. Dist. v. Phillips, 108 Cal. 306, 39 Pac. Rep. 630, 41 Pac. Rep. 335; Reclamation Dist. v. Burger, 122 Cal. 442, 55 Pac. Rep. 156.

7 Pol. Code, Sec. 3450; 1 Kerr's Cyc. Codes, p. 819; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 150; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Reclamation Dist. v. Superior Court, 151 Cal. 263, 90 Pac. Rep. 545; Sels v. Greene, 88 Fed. Rep. 129; Rico v. Snider, 134 Fed. Rep. 953.

8 Pol. Code, Sec. 3451; 1 Kerr's Cyc. Codes, p. 819.

See cases cited in last note.

9 Pol. Code, Sec. 3452; 1 Kerr's Cyc. Codes, p. 819; People v. Houston, 54 Cal. 536; Swamp etc. Dist. v. Feck, 60 Cal. 403; Reclamation Dist. v. Sherman, 11 Cal. App. 399, 105 Pac. Rep. 277.

10 Pol. Code, Sec. 3453; 1 Kerr's Cyc. Codes, p. 820; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639;

property by purchase, condemnation, or otherwise. Compensation of the members of the board is also provided for.[11] The board of trustees must report plans for reclamation to the board of supervisors of the respective counties, together with estimates for assessments.[12] The board of county supervisors must appoint commissioners to assess the land within the district, which must be paid, and placed by the treasurer to the credit of the district, and paid out on warrants of the trustees, approved by the board of supervisors of the county.[13] Provisions are also made for the presenta-

Kerr's Bien. Supp., 1911, p. 150; People v. Houston, 54 Cal. 536; Reclamation Dist. v. Kennedy, 58 Cal. 124; San Francisco Sav. Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. Rep. 374; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104.

11 Pol. Code, Sec. 3454; 1 Kerr's Cyc. Codes, p. 821; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 151.

See cases in last note.

Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. Rep. 1038; Reclamation Dist. v. West, 129 Cal. 622, 62 Pac. Rep. 272; Lamb v. Reclamation Dist., 73 Cal. 125, 14 Pac. Rep. 625, 2 Am. St. Rep. 775; Lower Kings River Dist. v. McCullah, 124 Cal. 175, 56 Pac. Rep. 887; Reclamation Dist. v. Superior Court of Sacramento, 151 Cal. 263, 90 Pac. Rep. 545; Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. Rep. 1091.

"Granting that the drainage district had procured a right of way to construct the ditch now existing across the plaintiff's lands, it would not at all follow that it or any other person would have the right to cause additional surface water to flow therein sufficient to make it overflow its banks and injure the plaintiff's lands." Heier v. Krull, 160 Cal. 441, 117 Pac. Rep. 530.

12 Pol. Code, Sec. 3455; 1 Kerr's Cyc. Codes, p. 822; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 152; Hagar v. Board of Supervisors, 51 Cal. 474; People v. Houston, 54 Cal. 536; Swamp Land Dist. v. Haggin, 64 Cal. 204, 30 Pac. Rep. 631; Reclamation Dist. v. Kennedy, 58 Cal. 124; Cosner v. Board of Supervisors, 58 Cal. 274; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Swamp etc. Dist. v. Feck, 60 Cal. 403; Hensley v. Reclamation Dist. 121 Cal. 96, 53 Pac. Rep. 401; Reclamation Dist. v. Sels, 117 Cal. 164, *sub nom.* v. Runyon, 49 Pac. Rep. 131; Reclamation Dist. v. Gray, 95 Cal. 601, 30 Pac. Rep. 779; Reclamation Dist. v. Goldman, 65 Cal. 635, 4 Pac. Rep. 676; Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. Rep. 170.

13 Pol. Code, Sec. 3456; 1 Kerr's Cyc. Codes, p. 822; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 153.

See cases in last note.

Also, People v. Ahern, 52 Cal. 208; People v. Haggin, 57 Cal. 579; Reclamation Dist. v. Evans, 61 Cal. 104; Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. Rep. 462; Swamp Land Dist. v. Wilcox, 75 Cal. 443, 14 Pac. Rep. 843, 17 Pac. Rep. 241; Lower Kings River R. Dist. v. Phillips, 108 Cal. 306, 39 Pac. Rep. 630, 41 Pac. Rep. 355; Reclamation Dist v. West, 129 Cal. 622, 62 Pac. Rep. 272; Angus

tion, payment, and the registration of warrants.[14] If the district is situated partly in different counties, the charge must be paid into the treasury of the county in which the particular tract may be situated.[15] If the original assessment is insufficient, further assessments may be made from time to time.[16] The commissioners appointed by the board of supervisors must make a list of the charges assessed against each tract of land, containing a full description of each tract assessed and the names of the owners, which list must be filed with the treasurer of the county wherein the land is situated, and after the filing of which it becomes a lien upon the land.[17]

v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; National Bank v. Greenlaw, 134 Cal. 673, 66 Pac. Rep. 963; Reclamation Dist. v. Clark, 155 Cal. 345, 100 Pac. Rep. 1091; Levee v. Huber, 57 Cal. 41; Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. Rep. 945; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; Reclamation Dist. v. Burger, 122 Cal. 442, 55 Pac. Rep. 156; Kimball v. Reclamation Dist., 45 Cal. 344; People v. Coghill, 47 Cal. 361; Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. Rep. 170; People *ex rel.* Chapman v. Sacramento Drainage Dist., 155 Cal. 375, 103 Pac. Rep. 207; Reclamation Dist. v. Sherman, 11 Cal. App. 399, 105 Pac. Rep. 277.

14 Pol. Code, Sec. 3457; 1 Kerr's Cyc. Codes, p. 824; as amended, Stats. & Amdts., 1909, p. 32, and 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1906-1909, p. 293; Kerr's Bien. Supp., 1911, p. 154; Cosner v. Board of Supervisors, 58 Cal. 274; National Bank of D. O. Mills Co. v. Greenlaw, 134 Cal. 673, 66 Pac. Rep. 963; Angus v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; McCord v. Slavin, 134 Cal. 325, 76 Pac. Rep. 1104.

15 Pol. Code, Sec. 3458; 1 Kerr's Cyc. Codes, p. 825; as amended, Stats. & Amdts., 1909, p. 860; Kerr's Bien. Supp. Codes, 1906-1909, p. 293; Cosner v. Board of Supervisors, 58 Cal. 274; Hensley v. Reclamation Dist., 121 Cal. 96, 53 Pac. Rep. 401; Angus v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104.

16 Pol. Code, Sec. 3459; 1 Kerr's Cyc. Codes, p. 825; Harris v. Board of Supervisors of Colusa County, 49 Cal. 662; Hagar v. Board of Supervisors, 51 Cal. 474; Levee v. Huber, 57 Cal. 41; Reclamation Dist. v. Kennedy, 58 Cal. 124; Angus v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Reclamation District v. Clark, 155 Cal. 345, 100 Pac. Rep. 1091; Swamp Land Dist. v. Haggin, 64 Cal. 204, 30 Pac. Rep. 631; Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. Rep. 866; Hensley v. Reclamation Dist. 121 Cal. 96, 53 Pac. Rep. 401; Swamp Land Dist. v. Blumenberg, 156 Cal. 532, 106 Pac. Rep. 389.

17 Pol. Code, Secs. 3460-3464; 1 Kerr's Cyc. Codes, pp. 826-828; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639, and repealing Sec. 3464; Kerr's Bien. Supp., 1911, pp. 154-157; Swamp etc. Dist. v. Blumenberg, 156 Cal. 532, 106 Pac. Rep. 389; Levee v. Huber, 57 Cal. 41; Lower Kings R. R. Dist. v. McCullah, 124 Cal. 175, 56 Pac. Rep. 887; People v. Houston, 54 Cal. 536; Cosner v. Board of Super-

The assessments may be paid in cash or in warrants of the district.[18] Provisions are made for the collection of unpaid assessments by actions brought in the Superior Court.[19] In cases of invalid assessments, the payments made thereunder are to be credited to the land owner.[20]

The work of reclamation must be done under the direction of the trustees of the district; their accounts must be kept open for inspection, and all subsequent purchasers must be governed by the by-laws of the district.[21]

visors, 58 Cal. 274; Swamp Land R. Dist. v. Wilcox, 75 Cal. 443, 14 Pac. Rep. 843, 17 Pac. Rep. 241; Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. Rep. 103; Weinrich v. Hensley, 121 Cal. 647, 54 Pac. Rep. 254; Lower Kings R. R. Dist. v. Phillips, 108 Cal. 306, 39 Pac. Rep. 630, 41 Pac. Rep. 355; Angus v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. Rep. 462; San Diego v. Higgins, 115 Cal. 170, 46 Pac. Rep. 923.

18 Pol. Code, Sec. 3465; 1 Kerr's Cyc. Codes, p. 828; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 157; Levee v. Huber, 57 Cal. 41; Cosner v. Board of Supervisors, 58 Cal. 274; Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. Rep. 462; Angus v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; National Bank of D. O. Mills & Co. v. Greenlaw, 134 Cal. 673, 66 Pac. Rep. 963; Swamp Land etc. Dist. v. Blumenberg, 156 Cal. 532, 106 Pac. Rep. 389.

19 Pol. Code, Sec. 3466; 1 Kerr's Cyc. Codes, p. 829; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., p. 157; People v. Houston, 54 Cal. 536; Reclamation Dist. v. Goghill, 56 Cal. 607; People v. Haggin, 57 Cal. 579; Swamp Land etc. Co. v. Blumenberg, 156 Cal. 532, 106 Pac. Rep. 389; Reclamation Dist. v. Hagar, 66 Cal. 54, 4 Pac. Rep. 945; Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. Rep. 1038; Swamp Land Dist. v. Glide, 112 Cal. 85, 44 Pac. Rep. 451; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. Rep. 254; Angus v. Browning, 130 Cal. 502, 62 Pac. Rep. 827; Reclamation Dist. v. Hall, 131 Cal. 662, 63 Pac. Rep. 1000; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Swamp Land Dist. v. Haggin, 64 Cal. 204, 30 Pac. Rep. 631; Swamp Land Dist. v. Gwynn, 70 Cal. 566, 12 Pac. Rep. 462; Lower Kings R. R. Dist. v. Phillips, 108 Cal. 306, 39 Pac. Rep. 630, 41 Pac. Rep. 355; Reclamation Dist. v. Evans, 61 Cal. 104; Lower Kings River Dist. v. McCullah, 124 Cal. 175, 56 Pac. Rep. 887; Reclamation Dist. v. Burger, 122 Cal. 442, 55 Pac. Rep. 156; Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. Rep. 1038; Swamp etc. Dist. v. Feck, 60 Cal. 403; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104.

20 Pol. Code, Sec. 3466½; 1 Kerr's Cyc. Codes, p. 831; as amended, Stats. & Amdts., 1911, Chaps. 365, 639; Kerr's Bien. Supp., 1911, p. 159.

21 Pol. Code, Secs. 3467-3470; 1 Kerr's Cyc. Codes, p. 832.

Property may be condemned for reclamation purposes, and material may be taken for construction.[22]

Whenever any district susceptible of one mode of reclamation is entirely owned by parties who desire to reclaim the same, the owners may reclaim the same without the intervention of trustees by presenting a petition to the board of supervisors. If the petition is granted, the owners have all the rights, immunities, and privileges granted to boards of trustees; and in all proceedings the names of the owners may be used instead of the names of trustees.[23]

When the works of reclamation are in progress of construction, the payment of interest by purchasers in such districts is suspended.[24] The trustees, or owners, must certify to the completion of the work.[25] The register must thereupon credit each purchaser in the district with payment in full for such lands, and the purchasers are entitled to patents therefor.[26]

Districts organized under old laws may be reorganized under the provisions of the chapter, and the trustees may compromise any debts of the same.[27]

The owners of certain tracts of unreclaimed lands may, by petition to the board of supervisors, have the land set off in a separate

22 Pol. Code, Sec. 3471; 1 Kerr's Cyc. Codes, p. 832; as amended, Stats. & Amdts., 1909, p. 166; Kerr's Bien. Supp., 1906-1909, p. 295; Reclamation Dist. v. County of Sacramento, 134 Cal. 477, 66 Pac. Rep. 668; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Reclamation Dist. v. Superior Court, 151 Cal. 263, 90 Pac. Rep. 545.

23 Pol. Code, Secs. 3472, 3473; 1 Kerr's Cyc. Codes, p. 833; Carpenter v. San Francisco Sav. Union, 128 Cal. 516, 61 Pac. Rep. 92; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104.

24 Pol. Code, Sec. 3474; 1 Kerr's Cyc. Codes, p. 833; County of Kings v. County of Tulare, 119 Cal. 509, 51 Pac. Rep. 866; Pol. Code, Sec. 3475; 1 Kerr's Codes, p. 833; repealed, Stats. & Amdts., 1911, Chap. 365, p. 639.

25 Pol. Code, Sec. 3476; 1 Kerr's Cyc. Codes, p. 834; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 160; Carpenter v. San Francisco Sav. Union, 128 Cal. 516, 61 Pac. Rep. 92; California etc. Co. v. Whitson, 129 Cal. 376, 62 Pac. Rep. 28; Miller & Lux v. Batz, 142 Cal. 447, 76 Pac. Rep. 42; 131 Cal. 402, 63 Pac. Rep. 680.

26 Pol. Code, Sec. 3477; 1 Kerr's Codes, p. 834.

See cases cited in last note.

See, also, McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; County of Kings v. Tulare, 119 Cal. 509, 51 Pac. Rep. 866; Blakeley v. Kingsbury, 6 Cal. App. 707, 93 Pac. Rep. 129.

27 Pol. Code, Secs. 3478-3480; 1 Kerr's Cyc. Codes, p. 836; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, pp. 160, 161; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104.

district, and excluded from an organized district. The district so set off shall be liable for a just proportion of the debts of the original district.[28] It is made the duty of the register to give all districts a State number.[29] No member of the board shall receive any compensation other than his regular salary. Provisions are made for the payment for the land. Occupants of lands upon the banks of streams are liable for all damages by reason of their making any cut or embrasure in the bank of such stream.[30] Certain lands are excepted from the provisions of the chapter.[31] Districts may be reorganized and consolidated.[32] Regular elections for the trustees of districts are provided for.[33] Provisions are made for the formation of districts including lands already reclaimed or in process of reclamation, and not included in any existing reclamation district;[34] and also for actions for the dissolution of districts, and for filling of vacancies in the board.[35] By a supplementary Act to the above

28 Pol. Code, Secs. 3481, 3482, 1 Kerr's Cyc. Codes, p. 836; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 166; Ferran v. Board of Supervisors, 51 Cal. 307; Ralston v. Board of Supervisors, 51 Cal. 592; People v. Parvin, 74 Cal. 549, 16 Pac. Rep. 490; People *ex rel.* Van Loben v. Reclamation Dist., 117 Cal. 114, 48 Pac. Rep. 1016; People *ex rel.* Thisby v. Reclamation Dist., 130 Cal. 607, 63 Pac. Rep. 27; Lewis v. Dunn, 134 Cal. 291, 66 Pac. Rep. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257; Beach v. Van Detten, 139 Cal. 462, 73 Pac. Rep. 187; People v. Oats, 142 Cal. 12, 75 Pac. Rep. 337; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Glide v. Superior Court, 147 Cal. 21, 81 Pac. Rep. 225; Inglin v. Hoppin, 8 Cal. App. 107.

29 Pol. Code, Sec. 3483; 1 Kerr's Cyc. Codes, p. 837; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 167.

30 Pol. Code, Secs. 3484-3487; 1 Kerr's Cyc. Codes, p. 837; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104.

31 Pol. Code, Sec. 3488; 1 Kerr's Codes, p. 838; Fredericks v. Zumwalt, 134 Cal. 44, 66 Pac. Rep. 38; McNear v. Hutchinson, 31 Cal. 171; Easton v. O'Reily, 63 Cal. 305; Klauber v. Higgins, 117 Cal. 451, 49 Pac. Rep. 466; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104; Williams v. City of San Pedro, 153 Cal. 44, 94 Pac. Rep. 234.

32 Pol. Code, Sec. 3489; 1 Kerr's Cyc. Codes, p. 839; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 167; People v. La Rue, 67 Cal. 526, 8 Pac. Rep. 84; People v. Parvin, 74 Cal. 549, 16 Pac. Rep. 490; Reclamation Dist. v. Goldman, 65 Cal. 635, 4 Pac. Rep. 676; Reclamation Dist. v. Birk, 159 Cal. 233, 113 Pac. Rep. 170.

33 Pol. Code, Sec. 3491; 1 Kerr's Cyc. Codes, p. 841; McCord v. Slavin, 143 Cal. 325, 76 Pac. Rep. 1104.

34 Pol. Code, Sec. 3492; 1 Kerr's Cyc. Codes, p. 842; as amended, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 168.

35 Pol. Code, Sec. 3493; 1 Kerr's Cyc. Codes, p. 842; People v. Reclama-

reclamation Act,[36] it was provided that bonds might be issued by reclamation districts, where, in the opinion of the board of trustees, they were necessary.[37]

§ 1758. **Levee districts.**—Another district organization provided for by the statutes of California is that for levee districts. The procedure for the organization and operation of levee districts is similar to that of reclamation districts, discussed in the previous section.[1]

By the Act of March 20, 1905,[2] it is provided for the formation of districts in the various counties of the State and for the erection of levees, dikes, and other works for the purpose of protecting the lands within such districts from overflow, and to levy assessments to erect and construct and maintain such works, and to pay the necessary costs and expenses of maintaining such districts.

By the supplementary Act of March 8, 1911,[3] levee districts were authorized to borrow money and to issue bonds therefor for the purpose of building, constructing, or repairing levees of a district.[4]

§ 1759. **Protection districts.**—Another district organization was authorized by the recent statutes of California, termed protec-

tion Dist., 53 Cal. 346; Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. Rep. 866; People *ex rel.* Thisby v. Reclamation Dist., 130 Cal. 607, 63 Pac. Rep. 27; People v. Reclamation Dist., 117 Cal. 114, 48 Pac. Rep. 1016; Rico v. Snider, 134 Fed. Rep. 953.

Pol. Code, Sec. 3493½, relative to actions to determine validity of assessments repealed, Stats. & Amdts., 1911, Chap. 365, p. 639; Kerr's Bien. Supp., 1911, p. 169.

See Reclamation Dist. v. Sels, 117 Cal. 164, *sub nom.* Runyon, 49 Pac. Rep. 131; Lower Kings R. R. Dist. v. McCullah, 124 Cal. 175, 56 Pac. Rep. 887; Swamp Land Reclamation Dist. v. Blumenberg, 156 Cal. 532, 106 Pac. Rep. 389; Id. 156 Cal. 539, 106 Pac. Rep. 392.

36 Gen. Laws, Henning, 1905, p. 1117; as amended, Stats. and Amdts., 1909, p. 933; Kerr's Bien. Supp., 1906-1909, p. 1911.

37 Metcalf v. Merritt, 14 Cal. App. 244, 111 Pac. Rep. 505.

1 See Sec. 1757.

2 Stats. & Amdts., 1905, Chap. 310, p. 327; Gen. Laws, Henning, 1905, p. 679; as amended, Stats. & Amdts., 1907, p. 333; Kerr's Bien. Supp., 1906-1909, p. 1679, and Stats. & Amdts., 1911, Chap. 367, p. 1212; Kerr's Bien. Supp., 1911, p. 1171.

3 Stats. & Amdts., 1911, Chap. 139, p. 303; Kerr's Bien. Supp., 1911, p. 1172.

4 See De Baker v. Batcheller, 97 Cal. 472, 32 Pac. Rep. 512; McCarty v. Southern Pac. Co., 148 Cal. 211, 82 Pac. Rep. 615; Levee Dist. v. Huber, 57 Cal. 41.

tion districts. By the Act of February 23, 1907,[1] it was provided for the organization of districts for the protection of lands of farming or other communities or neighborhoods within the State from overflow or damage from the waters of any innavigable stream, water course, canyon, or wash, extending by, through, or over such community or neighborhood, and to provide for the acquisition of lands, rights of way, and other property by purchase, gift, or condemnation, for the extending, straightening, improving and maintaining the channels of such streams, etc., and confining said waters in such channels and preventing overflow thereof, and for the construction by said districts of the necessary works for said purposes. And for the purposes of the Act, money may be borrowed by such district and bonds issued therefor. In the main, the provisions of the Act follow those of reclamation districts, discussed in a previous section of this chapter.[2]

§ 1760. **Overflow districts.**—By a recent statute of the State of California, another district organization is provided for relating to waters termed "overflow districts." By the Act of May 1, 1911,[1] it is provided that whenever one-half or more of the voters residing within a proposed district of swamp, overflow, or other lands lying within the State, one-third of which are liable to be flooded by the waters of any stream or lake, and more than one-half of said lands requiring irrigation during a portion of the year, susceptible of one mode of irrigation and reclamation, desire to reclaim and irrigate the same, they may present to the board of supervisors of the county in which the lands or the greater portion thereof are situated, a petition setting forth that they propose to form an overflow district. The proceedings for the organization of such districts and the man-

1 Stats. & Amdts., 1907, Chap. 25, p. 16; Kerr's Bien. Supp., 1906-1909, p. 1685; as amended, Stats. & Amdts., 1911, Chap. 266, p. 446; Kerr's Bien. Supp., 1911, p. 1257.

2 See Sec. 1757.

The above Act held constitutional in Keech v. Joplin, 157 Cal. 1, 106 Pac. Rep. 222.

Barnes v. Board of Supervisors of Colusa County, 13 Cal. App. 760, 110 Pac. Rep. 820, holding that an earlier Act upon the same subject was constitutional.

See, also, Lamb v. McMullin, 157 Cal. 14, 106 Pac. Rep. 229; Huton v. Woodbridge Protection Dist., 79 Cal. 90, 16 Pac. Rep. 549, 21 Pac. Rep. 435.

1 Stats. & Amdts., 1911, Chap. 718, p. 1397; Kerr's Bien. Supp., 1911, p. 1410.

agement and control of the same are largely similar to those for reclamation districts, discussed in a previous section of this chapter.[2]

§ 1761. **Storm water districts.**—The Act of March 13, 1909,[1] provides for the formation, organization, and government of storm water districts, for the purpose of protecting the land therein from damage from storm water and from the waters of innavigable streams, water courses, canyons, or washes, for the construction of the necessary works of protection by said districts, and for the levying of taxes and assessments to pay the costs of construction and maintaining such improvements. The provisions of the Act are largely identical with the provisions of the Act for the reclamation of swamp lands, discussed in a previous section of this chapter.[2]

§ 1762. **Provisions in aid of the National Reclamation Act.**—There are a number of provisions in the California statutes in aid of the National Reclamation Act. The Act of 1905 [1] provides for the co-operation of the State with the Federal Government relative to irrigation projects under the National Reclamation Act, with the proviso added that it does not "interfere with the water already appropriated or in reservoirs or now in use for irrigation purposes, or domestic purposes, under the laws of this State."

By the Act of June 9, 1906,[2] a right of way was granted to the United States for the construction of works in San Joaquin County, in said State.

The Act of March 11, 1907,[3] provides for the joint investigation with the Federal Government of the water resources of the State.

The Act of March 20, 1907,[4] provides for the recordation of contracts and subscription agreements to stock in Water Users' Associations, by using the printed blank forms therefor.

The Act of March 21, 1907,[5] granted general rights of way over

2 See Sec. 1757.

1 Stats. & Amdts., 1909, Chap. 222, p. 339; Kerr's Bien. Supp., 1906-1909, p. 2029.

2 See Sec. 1757.

1 Stats. & Amdts., 1905, Chap. 157, p. 152.

2 Stats. & Amdts., 1906, Chap. 13, p. 13.

3 Stats. & Amdts., 1907, Chap. 161, p. 194; Kerr's Bien. Supp., 1906-1909, p. 2148.

4 Stats. & Amdts., 1907, Chap. 407, p. 749; Kerr's Bien. Supp., 1906-1909, p. 2147.

5 Stats. & Amdts., 1907, Chap. 461, p. 848; Kerr's Bien. Supp., 1906-1909, p. 1670.

all public lands of the State to the United States for the purpose of constructing all works under the provisions of the National Reclamation Act.

But see the Act approved March 3, 1911,[6] to prevent the waters of the State from being carried into another State, and the protests by Assembly Joint Resolution No. 8[7] against the proposed diverting of the waters from Lake Tahoe, which lake lies partly in California and partly in Nevada, by a Government project for the purpose of irrigating Nevada lands.

§ 1763. Nuisances relating to waters.—The statutes upon the subject of nuisances provide as follows:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or public park, square, street, or highway, is a nuisance.[1]

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[2]

6 Stats. & Amdts., 1911, Chap. 104, p. 271; Kerr's Bien. Supp., 1911, p. 1474.

7 Stats. & Amdts., 1911, Chap. 18, p. 1550.

1 Civil Code, Sec. 3479; 2 Kerr's Cyc. Codes, p. 2304; Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426; People v. Truckee Lum. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Spring Valley W. Co. v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108; Waring v. Crow, 11 Cal. 367; Hillman v. Newington, 57 Cal. 56; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Cardwell v. Sacramento Co., 79 Cal. 347, 21 Pac. Rep. 763; Yuba etc. Co. v. Kate Hayes M. Co., 141 Cal. 360, 74 Pac. Rep. 1049; Jacob v. Day, 111 Cal. 571, 44 Pac. Rep. 243; People v. Elk River etc. Co., 107 Cal. 214, 40 Pac. Rep. 486, 48 Am. St. Rep. 121; Miller v. Highland D. Co., 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; Bowen v. Wendt, 103 Cal. 236, 37 Pac. Rep. 149; Woodruff v. North Bloomfield etc. Co., 18 Fed. Rep. 753; *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811.

2 Civil Code, Sec. 3480; 2 Kerr's Cyc. Codes, p. 2306; People v. Gold Run etc. Co., 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; Woodruff v. North Bloomfield etc. Co., 18 Fed. 753; *Ex parte* Maier, 103 Cal. 476, 37 Pac. Rep. 402, 42 Am. St. Rep. 129; People

The wasting of water from artesian wells is also declared to be a public nuisance.[3]

§ 1764. **The pollution of waters.**—The poisoning of any spring, well, or reservoir, is punishable by imprisonment in the State prison for a term of not less than one year or more than ten years.[1]

The pollution of waters by water-closets or the carcass of dead animals, or offal of any kind, or by live stock of any kind, which waters are drawn for the supply of any portion of the inhabitants of the State, is made a misdemeanor.[2]

The Act of March 23, 1907,[3] an Act for the preservation of the public health of the people of the State, and empowering the State Board of Health to enforce its provisions, and providing penalties for the violation thereof, contains a number of provisions upon the subject of the pollution of waters. And any person violating the provisions of the Act shall be deemed guilty of a misdemeanor.

By the Act of March 6, 1909,[4] the pollution of the waters of rivers and streams is also made a misdemeanor.

§ 1765. **Construction and repair of bridges.**—Upon the subject of the construction and repair of bridges it is provided: "No canal, flume, or other appliance for the conducting of water must be so laid, constructed, or maintained as to obstruct any public highway; and every person or corporation owning, maintaining, oper-

v. Elk River etc. Co., 107 Cal. 214, 40 Pac. Rep. 486, 48 Am. St. Rep. 121.

See, also Penal Code, Sec. 370; 4 Kerr's Cyc. Codes, p. 402; People v. Truckee Lum. Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; County of Yuba v. Kate Hayes M. Co., 141 Cal. 360, 74 Pac. Rep. 1049.

3 Supp. Kerr's Cyc. Codes, 1906-1909, p. 1407; *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. Rep. 811; Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, for artesian wells, Secs. 1166-1184.

1 Penal Code, Sec. 347; 4 Kerr's Cyc. Codes, p. 388.

2 Penal Code, Sec. 374; 4 Kerr's Cyc. Codes, p. 405; People v. Borda, 105 Cal. 636, 38 Pac. Rep. 1110; People v. Elk River etc. Co., 107 Cal. 214, 40 Pac. Rep. 486, 48 Am. St. Rep. 121; Van Horn v. Ricks W. Co., 115 Cal. 448, 47 Pac. Rep. 361; Spring Valley etc. Co. v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108.

3 Stats. & Amdts., 1907, Chap. 492, p. 893; Kerr's Bien. Supp., 1906-1909, p. 1878; as amended, Stats. & Amdts., 1911, Chap. 339, p. 565.

4 Stats. & Amdts., 1909, Chap. 93, p. 140.

ating, or using any such canal, flume, or appliance, crossing or running along any public highway, must construct, maintain, and keep in repair such bridges across the same as may be necessary to the safe and convenient use of such highway by the public; and on failure so to do, the board of supervisors of the county, after seven days' notice in writing to said person or corporation, may construct or repair such bridge or bridges, and recover of such person or corporation the amount of the expenditure made in so doing."[1]

§ 1766. **Taxation of water works.**—Upon the subject of taxation of ditches and canals, it is provided: "Water ditches constructed for mining, manufacturing, or irrigating purposes . . . must be assessed the same as real estate by the assessor of the county at a rate per mile for that portion of such property as lies within the county."[1]

It is provided that: "The rights of way, ditches, flumes, pipe lines, dams, water rights, reservoirs, and other property of like character belonging to any irrigation district shall not be taxed for State and county or municipal purposes."[2]

§ 1767. **Criminal statutes.**—There are a number of provisions throughout the statutes relating to waters, and the Penal Code, which provide for penalties for the violation of the law.

Any person violating the provisions of the Artesian Well Act is punishable by a fine of not less than $25 and not more than $500, or imprisonment in the county jail for a period of not more than six months, or by both.[1]

1 Civil Code, Sec. 551; 2 Kerr's Cyc. Codes, p. 532; City of Fresno v. Fresno etc. Co., 98 Cal. 179, 32 Pac. Rep. 943; County of Fresno v. Fowler etc. Co., 68 Cal. 359, 9 Pac. Rep. 309; City of South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490; South Yuba W. Co. v. City of Auburn, 16 Cal. App. 775, 118 Pac. Rep. 101; City of Madera v. Madera Canal & Irr. Co., 159 Cal. 749, 115 Pac. Rep. 936.

1 Pol. Code, Sec. 3663; 1 Kerr's Cyc. Codes, p. 926; Coonradt v. Hill, 79 Cal. 593, 21 Pac. Rep. 1099; Kern Valley W. Co. v. County of Kern, 137 Cal. 511, 70 Pac. Rep. 476; Western Union Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas., 1190; California etc. Co. v. Los Angeles County, 10 Cal. App. 185, 101 Pac. Rep. 547.

2 Gen. Laws of California, Henning, 1905, p. 578, Sec. 66.

1 Stats. & Amdts., 1907, Chap. 101, p. 122; Kerr's Bien. Supp., 1906-1909, p. 1407.

See, also, Sec. 1947.

Whoever obstructs or injures any highway, or diverts any water course thereon, or drains water from his land upon any highway, to the injury thereof, by means of ditches or dams, is liable to a penalty of $10 for each day such obstruction or injury remains.[2]

The stealing of water is made a misdemeanor;[3] so, also, is the taking of water from any works, with intent to defraud, or the interference with any gate or other apparatus used for the control or measurement of water, or the emptying into any such works any rubbish, filth, or obstruction.[4] The failure to place sufficient screens over the intake pipe, flume, ditch, or canal, when required to do so by the fish commissioners, is also made a misdemeanor.[5]

"Every person who unlawfully prevents, hinders, or obstructs any person from peaceably entering upon or establishing a settlement or residence on any part of the public land of the United States within the State of California, subject to settlement or entry under any of the public land laws of the United States, or who unlawfully hinders, prevents, or obstructs free passage over or through the public lands of the United States within the State of California, for the purpose of entry, settlement, or residence, as aforesaid, is guilty of a misdemeanor."[6]

The destroying or injuring of any bridge, dam, canal, flume, aqueduct, levee, embankment, or other works, or making apertures in the same, or who, between the first day of October and the fifteenth day of April, plows up or loosens the soil in the bed or on the sides of any natural water course or channel, without removing such soil within twenty-four hours, is guilty of a misdemeanor and punishable by a fine of not less than $100 and not exceeding $1000, or by imprisonment in the county jail not exceeding two years, or by both.[7]

2 Pol. Code, Sec. 2737; 1 Kerr's Cyc. Codes, p. 635; County of Fresno v. Fowler etc. Co., 68 Cal. 359, 9 Pac. Rep. 309; County of Sierra v. Butler, 136 Cal. 547, 69 Pac. Rep. 418.

3 Penal Code, Sec. 499; 4 Kerr's Cyc. Codes, p. 507; *Ex parte* Helbing, 66 Cal. 215, 5 Pac. Rep. 103.

4 Penal Code, Sec. 592; 4 Kerr's Cyc. Codes, p. 568.

5 Penal Code, Sec. 629; 4 Kerr's Cyc. Codes, p. 600; People v. O'Leary, 77 Cal. 30, 18 Pac. Rep. 856.

6 Penal Code, Sec. 420; 4 Kerr's Cyc. Codes, p. 432.

7 Penal Code, Sec. 604; 4 Kerr's Cyc. Codes, p. 584; People v. Tisdale, 57 Cal. 104; People v. McNulty, —— Cal. ——, 28 Pac. Rep. 816.

For the interference with water works in cities, see, also, Penal Code, Secs, 624, 625; 4 Kerr's Cyc. Codes, pp. 589, 590.

§ 1768. Riparian rights in California.—By the Act of April 13, 1850,[1] the common law of England was adopted in the following terms:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this State, is the rule of decision in all courts of this State."[2]

The State of California, as we have before discussed, has been one of the most strenuous to adhere to and uphold the common law of riparian rights, both by its statutory provisions and court decisions. At the same time it was the first to adopt the Arid Region Doctrine of appropriation of waters for beneficial uses.[3] Thus the two doctrines have existed, and now do exist, side by side in the same jurisdiction. The strict construction of the common law rule has, however, under the more recent decisions, been modified to a considerable extent, so that at the present time it may be stated to be the law of that State that a riparian owner, without the actual use of the water, can not insist upon the undiminished flow of a stream as against an appropriator applying the water to a beneficial use and purpose.[4] Therefore, it may be also stated that the present rule is that, regardless of by what method, the claimant to water acquired his right, whether as a riparian proprietor or as an appropriator, such right can only be continued by the actual application of the water claimed to some beneficial or useful purpose.[5] It is not, however, without considerable contention and litigation that this

1 Stats., 1850, p. 219; now found in Pol. Code, Sec. 4468; 1 Kerr's Cyc. Codes, p. 1195.

2 See Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, cases cited below.

3 For history of the Arid Region Doctrine, see Secs. 595-626.

4 For a discussion of this subject, see Secs. 509, 549.

5 Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

See, also, Secs. 1611-1615.

"Even if at common law or under the civil law it was a part of the usufructuary right of the riparian owner to have the water flow by for no purpose other than to afford him pleasure in its prospect, such is not the rule of decision in this State." San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182.

Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

rule was adopted, as will be seen from the many decisions of the Supreme Court of the State holding to all sides of the question. These decisions are absolutely impossible to reconcile to any one view of the question, and, therefore, we shall not attempt to do so. In different portions of this work we have discussed this proposition, including the holding of the California Court, and a further discussion here seems to be unnecessary.[6] Not only have the courts of California modified their decisions in regard to the rights of riparian proprietors, but the statute has also been modified. Section 1422 of the Civil Code formerly read as follows: "The rights of riparian proprietors are not affected by the provisions of this title."[7] By Act of the legislature, approved March 15, 1887,[8] this section was repealed, with the following saving clause: "Provided, that the repeal of this section shall not in any way interfere with any rights already vested." This repealing Act was passed by the legislature the year following the decision in the case of Lux v. Haggin,[9] upholding the doctrine of riparian rights in California. So it may be said that in the State of California at the present time there is no statutory law upholding the law of riparian rights, except those which vested prior to the repeal of Section 1422 of the Civil Code as it originally existed.[10]

6 For riparian rights in general, see Secs. 450-551.

For irrigation as a riparian right, see Secs. 498-525.

For right of riparian proprietors to an injunction, see Secs. 1611-1615.

For the right of riparian proprietors to damages, see Secs. 1663-1665.

7 The title provided for the right of the appropriation of water and the procedure to be observed, as abstracted in another section of this chapter. See Sec. 1730.

8 See Stats. & Amdts., 1887, p. 114.

9 69 Cal. 255, 10 Pac. Rep. 674, 4 Pac. Rep. 919.

10 For the assessment of damages in condemnation of riparian rights, see Code of Civil Procedure, Sec. 1248; 3 Kerr's Cyc. Codes, p. 1769.

CHAPTER 87.

COLORADO.

§ 1769. Particular features of the State.
§ 1770. Irrigation in the State.
§ 1771. Criticism of the Colorado laws.
§ 1772. Constitutional provisions.
§ 1773. Title to waters and the right of appropriation and use of waters.
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§ 1784. The distribution and use of water.
§ 1785. Ditch, reservoir, flume, and pipe line corporations—Organization.
§ 1786. Ditch, etc., corporations—Duties, rights, and powers.
§ 1787. Ditch, etc., companies—When compelled to furnish water.
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§ 1793. The adjudication of rights—Appeal—Independent suits—Re-argument and review.
§ 1794. Damages from leakage or overflow.
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§ 1796. The irrigation district law.
§ 1797. The Carey Act in Colorado.
§ 1798. The drainage of lands.
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§ 1800. Acts in aid of the National Reclamation Act.
§ 1801. The pollution of waters.
§ 1802. Criminal statutes.
§ 1803. Taxation of irrigation works.
§ 1804. Riparian rights in Colorado.

§ 1769. Particular features of the State.—Colorado is the summit of the continent. Its waters flow to the north, south, east, and

west. The western two-thirds of the State is traversed with immense mountain ranges. The eastern portion of the State is a continuation of the broad, flat prairies of Western Kansas and Nebraska. These plains stretch from the eastern base of the foothills and by a long and gentle slope fall in the two hundred miles from the mountains to the eastern border from an altitude of from 5,000 to 6,000 feet to 3,500 feet. This section of the country is very dry and arid. Just west of the eastern range lie four mountain valleys, known as North Park, Middle Park, South Park, and San Luis Valleys.

The headwaters of many of the large rivers of the West are in Colorado. The North Platte River rises in North Park; the South Platte River in the mountains west of Denver; the Arkansas River near the mining town of Leadville; the Rio Grande in the San Luis Valley, and many of the largest tributaries of the Colorado River are in the western part of the State.

The State is divided into two portions by the continental divide with different conditions affecting the question of irrigation—the eastern portion with much land and relatively little water, the western portion with these conditions reversed. According to the meteorological report, the rainfall of the State varies according to locality, altitude, and other conditions, from about seven inches at Saguache to about twenty-five inches at Breckenridge. The cold climate in winter and the great altitude of Colorado make it impossible to raise the high-priced citrus or semi-tropical fruit, or to practice the degree of intensive farming for which Arizona and California are noted. The thermometer varies according to the altitude and other conditions from extremely warm weather in summer to twenty degrees or more below zero in winter.[1]

1 Irrigation near Greeley, Colo., by David Boyd, 1897, Water Supply & Irrigation Paper No. 9, U. S. Geological Survey.

Surface Water Supply of the Colorado Rriver Drainage Above Yuma, by R. I. Meeker and H. S. Reed, Dist. Hydrographers, 1908, Water Supply Paper No. 211, U. S. Geological Survey.

Surface Water Supply of the United States, Part IX, Colorado River Basin, prepared under the direction of M. O. Leighton, by W. B. Freeman and R. H. Bolster, 1910, Water Supply Paper No. 249, U. S. Geological Survey.

Same as last above, continued, Water Supply Paper No. 219, 1911.

§ 1770. Irrigation in the State.—The State of Colorado possesses a great variety of physical and climatic conditions, varying from those of the highest mountain regions where vegetation entirely ceases to grow, to those valleys where the more temperate zone fruits can be raised in great profusion. Various sections of the State are especially adapted to certain crops, owing to favorable climatic and soil conditions. It therefore follows that a settler intending to locate in Colorado should first decide what kind of farming he desires to engage in, and then locate in the section best adapted to that particular industry. Since the first edition of this book was written, the science of irrigation has received a great impetus in the State of Colorado, and many systems of great size have been constructed. But, as is the case in many other Western States, the water supply direct from the streams is entirely inadequate to the demand; and, based upon this demand the important movement for storage reservoirs is receiving attention and it may be said that the State of Colorado is well within the reservoir period of irrigation. This movement, formerly most marked in regions where settlements have been made the longest and consequently where the demands for water are the greatest, has spread to other portions of the State and we find that where there was arable land and water sufficient to irrigate the same, even in the less settled portions, great storage reservoirs have been constructed by private enterprises, by the State, and by the Government. Many of these lands are now open for settlement. Colorado has taken advantage of every law available whereby irrigation could be extended throughout the boundaries of the State. It accepted the provisions of the Carey Act, it passed Acts in aid of the National Reclamation Act, the legislature adopted the law for irrigation districts, and, in fact, every law which tended toward the development of the State by this method has been adopted by the legislature.

At this writing, according to the United States census of 1910, Colorado in 1909 had more land under irrigation than had any other State of the Union. The figures given by such report are as follows: The total area irrigated in 1909 was 2,792,032 acres, as against 1,611,271 acres in 1899, an increase of 1,180,761 acres or 73.3 per cent. The total area enterprises were capable of irrigating in 1910 was 3,990,166 acres. The acreage included in enterprises completed or under construction in 1910 was 5,917,457 acres. Of

the area irrigated in 1909, as above stated, according to the report, there were 16,600 acres under the United States Reclamation Service, 1,020 acres under the United States Indian Service, 485 acres under the Carey Act, 115,304 acres under irrigation districts, 1,273,141 acres under co-operative enterprises, 159,457 acres under commercial enterprises, 1,226,025 acres under individual and partnership enterprises.[1]

§ 1771. **Criticism of the Colorado laws.**—The statutory laws of the State of Colorado governing the subject of waters and water rights are as elaborate and complete as those of any of the Western States. They are based upon the law of State control, as provided by Article XVI, Sections 5 and 6 of the State constitution,[1] which provide that the water of the natural streams is thereby declared to be the property of the public and that the same is dedicated to the use of the people of the State, subject to appropriation, and that the right to divert the unappropriated water to beneficial uses shall never be denied. The legislature, with this foundation, has elaborated a most complete system of laws upon the subject. And we will add that the statutory laws and also the court decisions have always been consistent and with the end always in view that the right to the use of water in that State can be acquired and maintained by the actual application of such water to some beneficial use or purpose.

The Colorado constitutional dedication above referred to was the first to be declared by any State, although, since its adoption in 1876 a number of the States either by constitutional provisions or

1 Irrigation near Rocky Ford, Colorado, by A. E. Wright, Irrigation Engineer, 1905, Annual Report of Irrigation and Drainage Investigations for 1904, Separate No. 8, Office of Experiment Stations, U. S. Dept. of Agriculture.

Irrigation in Colorado, by C. W. Beach and P. J. Preston, former Deputy State Engineers of Colorado, prepared under the direction of Samuel Fortier, Chief of U. S. Irrigation Investigations, Office of Experiment Station, Bulletin No. 218, U. S. Dept. of Agriculture.

Seepage, or Return Water from Irrigation, by L. G. Carpenter, Meteorologist and Irrigation Engineer, Bulletin No. 33, State Agricultural College of Colorado.

See, also, the most excellent Fifteenth Annual Report of the State Engineer of Colorado, Mr. Charles W. Comstock, State Engineer, 1911.

1 See Sec. 1772.

For the law of State control, or State administrative laws, see Chap. 68, Secs. 1337-1367.

by legislative enactment have adopted provisions of similar purport. Even California, so hard to break away from ancient precedents, by the Act of April 8, 1911, in amending Section 1410 of the Civil Code, has followed the example of Colorado and has declared that: "All water or the use of water within the State of California is the property of the State of California."[2]

The State of Colorado has ever been jealous and watchful of the claim to the waters flowing within its boundaries, as is indicated by the fight it put up in the case of Kansas v. Colorado and the recent Acts of the legislature relative to the alleged interference by the United States in such waters by the National Reclamation projects, where it is claimed some of the waters arising in Colorado will be diverted into other jurisdictions.[3]

Although Colorado was the first to evolve the system of State control, or the State administration of waters, it has never gone to the extremes that some of the other Western States have later gone in that regard. The State Engineer is at the head of the system, but there are no provisions that in order to appropriate water there must be an application for the same made to him as is the case in those States which follow the Wyoming system.[4] He is, however, given the power to approve or reject the works constructed for the purpose of diverting or storing the water.[5] He is not given the power to in anywise determine or adjudicate existing rights. This is left to the courts, where it properly belongs, in special proceedings provided by the statute for that purpose.[6] The duty devolves upon the State Engineer to supervise the distribution of the water in accordance with the decrees of the courts.

Although the foremost in point of time in the adoption of many important features of water laws, the State of Colorado has never been loth nor has it hesitated to adopt special features of the laws of

2 Civil Code, Sec. 1410, as amended, Stats. & Amdts., 1911, Chap. 407, p. 821; Supp. Kerr's Cyc. Codes, 1911, p. 584.

See, also, for the California statutes, Sec. 1729.

For the dedication of waters by a State, see Secs. 372-389.

3 See Sec. 1800.

4 For the Wyoming statutes upon the subject of appropriation, see Chap. 104.

5 See Sec. 1774.

6 For the adjudication of water rights in Colorado, see Secs. 1790-1793.

For the statutory adjudication of water rights, see Chap. 79, Secs. 1567-1584.

other States where they have been worked out to the satisfaction of the general public, especially among whom are the actual consumers of the water. It adopted the Wright irrigation district law of California,[7] and has gone one step in advance by providing that the State lands may be included within such districts and assessed the same as though they were owned by private parties. Of course, in this respect the State will be the gainer in the sale of these lands by the difference between their value in their raw state plus the cost of reclamation and their value after the same have been reclaimed and provided with a permanent water right.

The State was also quick to accept the Act of Congress known as the Carey Act the same year that it went into effect, and has evolved an elaborate law governing the acquisition of both lands and water under that system.[8] The State has also been foremost in the enactment of provisions for the construction of State reservoirs and canals, both for the reclamation of its own lands and for supplementing the supply of water needed by the settlers.[9] The provisions in aid of the National Reclamation Act are also full and complete.[10]

Take it all in all, the State of Colorado is to be congratulated upon its wise provisions governing the waters and water rights within its boundaries, and especially upon the fact that, at an early date, it absolutely abrogated the common law rule of riparian rights as to the undiminished flow of the natural streams, a rule so inapplicable to the arid condition of the State.[11]

§ 1772. **Constitutional provisions.**—Upon the subject of waters and water rights, Article XVI, Sections 5, 6, 7, and 8, of the constitution, declare:

"Section 5. The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of

7 See Sec. 1796.

For the irrigation district law, see Chap. 70, Secs. 1386-1432.

8 See Sec. 1797.

For the Carey Act, see Chap. 67, Secs. 1312-1336.

9 See Sec. 1782.

10 See Sec. 1800.

For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

11 See Sec. 1804.

the people of the State, subject to appropriation as hereinafter provided."[1]

By Article XVI, Section 6, the right of the appropriation and use of water is guaranteed, as follows:

"Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."[2]

1 1 Colo. Code Ann., Morr. Ed., 1910, p. 269.

See Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 317, 25 Am. St. Rep. 245; Platte Valley W Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Pac. Rep. 275; Lamborn v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241; Crippen v. White, 28 Colo. 298, 64 Pac. Rep. 184; Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Belknap Sav. Bk. v. Lamar Land & C. Co., 28 Colo. 326, 64 Pac. Rep. 212; Fort Lyon C. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Middlekamp v. Bessemer Irr. D. Co., 46 Colo. 102, 94 Pac. Rep. 339, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Rev'g *Id.* 1 Colo. App. 480, 29 Pac. Rep. 906; Peterson v. Durkee, 15 Colo. App. 258, 62 Pac. Rep. 370; Perkins County v. Graff (Neb.), 114 Fed. Rep. 441, 52 C. C. A. 243.

The above provision and the following, Sec. 6, Art. XVI, held to afford no justification for the trespassing by one person on the lands of another in pursuing the statutory right of fishery. Hartman v. Tresise, 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872.

The above section of the constitution, together with Secs. 6, 7, and 8, considered by the Supreme Court, which refused to answer Senate resolution, where it did not appear that such water rights were the subject of any pending Act. *In re* Senate Resolution, 8 Colo. 615, 21 Pac. Rep. 470.

2 1 Colo. Code Ann., Morr. Ed., 1910, p. 270.

See cases cited in last note.

For preference rights, see Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Montrose Canal Co. v. Loutsenhizer, 23 Colo. 233, 48 Pac. Rep. 532; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac.

Article XVI, Section 7, guarantees the right of private parties for ditches, canals, and other works to convey water for domestic, mining, and agricultural purposes, as follows:

"Sec. 7. All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon the payment of just compensation."[8]

Rep. 317, 25 Am. St. Rep. 245; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S. 238.

The provisions for the exchange or loan of water of Sec. 3232, Rev. Stats., 1908, are not in violation of the above provisions, where the conditions are such that they do not affect the vested rights of other appropriators. Bowman v. Virdin, 40 Colo. 247, 90 Pac. Rep. 506.

See, also Cash v. Thornton, 3 Colo. App. 475, 34 Pac. Rep. 268; Hartman v. Tresise, 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872; Schwab v. Beam, 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279, 114 Fed. Rep. 441; Town of Sterling v. Pawnee D. Ext. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S. 238; Larimer County etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 764; *In re* Senate Resolution, 12 Colo. 287, 21 Pac. Rep. 484; Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Bloom v. West, 3 Colo. App. 212, 32 Pac. Rep. 846.

The above provision does not affect rights acquired before its adoption. Colorado etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185.

See, also, Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 317, 25 Am. St. Rep. 245.

The irrigation district law of Colorado is held not to be repugnant to the above provision. Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313.

[8] 1 Colo. Code Ann., Morr. Ed., 1910, p. 272.

See Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Tynon v. Despain, 22 Colo. 240, 43 Pac. Rep. 1039; Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879; Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 348; Denver City etc. Co. v. Middaugh, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; Junction Creek etc. Co. v. Durango, 21 Colo. 194, 40 Pac. Rep. 356; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 Pac. Rep. 322; Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766; Thompson v. De Weese-Dye etc. Co., 25 Colo. 243, 53 Pac. Rep. 507; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S. 418; Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S. 1148; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Ortiz v. Hansen, 35 Colo. 100, 83 Pac. Rep. 964; Knoth v. Barclay, 8 Colo. 300, 6

Article XVI, Section 8, provides as to how the rates and charges for the carrying and use of water shall be fixed:

"Sec. 8. The General Assembly shall provide by law that the board of county commissioners in their respective counties shall have the power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."[4]

Article II, Sections 14, 15, and 25, of the Bill of Rights of the Colorado constitution, provide as follows:

"Sec. 14. That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes.[5]

"Sec. 15. That private property shall not be taken or damaged for public or private use without just compensation. Such com-

Pac. Rep. 924; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Lamborn v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241; Belknap Sav. Bank v. Lamar Land & C. Co., 28 Colo. 326, 64 Pac. Rep. 212.

See, also, for rights of way, in Colorado, Sec. 1778.

For rights of way over private lands, see Chap. 52, Secs. 972-993.

[4] 1 Colo. Code Ann., Morr. Ed., 1910, p. 273; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142.

"The constitution unquestionably contemplates and sanctions the business of transporting water for hire from natural streams to distant consumers. . . . But giving these rights all due significance, I can not consent to the proposition that the carrier becomes a 'proprietor' of the water diverted." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

[5] 1 Colo. Code Ann., Morr. Ed., 1910, p. 135; People *ex rel.* Aspen etc. Co. v. District Court, 11 Colo. 147, 17 Pac. Rep. 298, holding that the taking of private property for a tramway does not fall within the exceptions specified.

For the taking of property for reservoirs, etc., see Denver etc. Co. v. Denver etc. R. Co., 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383; Lamborn v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241; Belknap Sav. Bank v. Lamar Land & C. Co., 28 Colo. 326, 64 Pac. Rep. 212; Hildreth v. City of Longmount, 47 Colo. 79, 105 Pac. Rep. 107; Middlekamp v. Bessemer Irr. D. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S. 795.

pensation shall be ascertained by a board of commissioners or not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into Court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein devested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.[6]

"Sec. 25. That no person shall be deprived of life, liberty, or property without due process of law."[7]

Article VI, Section 11, upon the question of the jurisdiction of the District Courts, provides:

"Sec. 11. The District Courts shall have original jurisdiction of all causes, both at law and in equity, and such appellate jurisdiction as may be conferred by law. They shall have original jurisdiction to determine all controversies upon relation of any person on behalf of the people concerning the rights and liabilities of railroad, telegraph, or toll-road companies or corporations."[8]

[6] 1 Colo. Code Ann., Morr. Ed., 1910, p. 135; Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S. 238; Middlekamp v. Bessemer Irr. D. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Armstrong v. Larimer County D. Co., 1 Colo. App. 49, 27 Pac. Rep. 235; Hartman v. Tresise, 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S. 872; Knoth v. Barclay, 8 Colo. 300, 6 Pac. Rep. 924; San Luis etc. Co. v. Kenilworth C. Co., 3 Colo. App. 244, 32 Pac. Rep. 860; People *ex rel.* Aspen etc. Co. v. District Court, 11 Colo. 147, 17 Pac. Rep. 298; Lamborn v. Bell, 18 Colo. 346, 32 Pac. Rep. 989, 20 L. R. A. 241; Hildreth v. City of Longmount, 47 Colo. 79, 105 Pac. Rep. 107.

[7] 1 Colo. Code Ann., Morr. Ed., 1910, p. 141.

"A priority of right to the use of water, being property, is protected by our constitution so that no person can be deprived of it without 'due process of law.'" Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

See, also, Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Union Colony v. Elliott, 5 Colo. 371; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313.

[8] 1 Colo. Code Ann., Morr. Ed., 1910, p. 192.

"Prior to the irrigation Acts, of 1879 and 1881, the district courts of the State were, by Section 11, Art. 6, of the constitution, clothed with 'orig-

Upon the subject of the taxation of ditches and canals, Article X, Section 3, provides:

"Sec. 3. . . . Ditches, canals, and flumes owned and used by individuals or corporations, for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes."[9]

§ 1773. Title to waters and the right of appropriation and use of waters.—By the constitution of the State the waters within the State of Colorado are declared to be the property of the public, subject to appropriation for beneficial uses, and priority of appropriation gives the better right.[1]

inal jurisdiction of all causes, both at law and in equity,' and therefore had full and complete jurisdiction to hear and determine water priorities. These Acts were passed for the purpose of establishing a system of procedure whereby the appropriators of water on any particular stream could have their priorities and rights determined in one proceeding, and they do not attempt to limit or extend the jurisdiction of the district court as to such rights." Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792.

See, also Presbyterian College v. Poole, 25 Colo. 50, 52 Pac. Rep. 1103; Handy D. Co. v. Southside etc. Co., 26 Colo. 333, 58 Pac. Rep. 30; *In re* Rogers, 14 Colo. 18, 22 Pac. Rep. 1053; Louden Irr. C. Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. Rep. 535; Alamosa etc. Co. v. Nelson, 42 Cal. 140, 93 Pac. Rep. 1112.

[9] 1 Colo. Code Ann., Morr. Ed., 1910, p. 225; Empire etc. Co. v. Board of Comrs. of Rio Grande Co., 21 Colo. 244, 40 Pac. Rep. 449, overruling *Id.*, 1 Colo. App. 205, 28 Pac. Rep. 482; Murray v. Board of Comrs. of Montrose Co., 28 Colo. 427, 65 Pac. Rep. 26, holding that this provision was adopted for the sole benefit of those canals which are exclusively used for irrigation of lands owned by those who own the canals in whole or in part, but not where the water is sold for revenue.

[1] See Constitution, Article XVI, Sections 5 and 6.

See Sec. 1772.

For riparian rights in Colorado, see Sec. 1804.

The right to appropriate water is a property right. Cash v. Thornton, 3 Colo. App. 475, 34 Pac. Rep. 268.

"Property rights in water consist not alone in the amount of the appropriation, but, also, in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

The right of priority of appropriation does not depend upon the *locus* of application. Coffin v. Left Hand D. Co., 6 Colo. 443; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258.

The rights of appropriators on the

Although the common law of riparian rights is abrogated in Colorado by the old Act of 1861, still retained in the statutes, and the owners of lands on streams are given the *special statutory* right "to the use of the water of said stream, creek, or river for the purposes of irrigation, and making said claim available to the full extent of the soil for agricultural purposes."[2]

main stream, when prior, are not subject to those on a tributary of the same stream. Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Platte Valley Irr. Co. v. Buckers, 25 Colo. 77, 53 Pac. Rep. 334; Patterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301.

Water appropriated for a non-absorbing use, such as for power, and discharged into the stream after such use, is subject to further appropriation. Cache La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 331; Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

The appropriation of the underflow of streams is governed by the same rules of law as streams flowing upon the surface. Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

See, also, Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334.

To constitute an abandonment of a water right there must be a concurrence of an intention to abandon with actual relinquishment of the property. Nichols v. Lantz, 9 Colo. App. 1, 47 Pac. Rep. 70.

See, also, Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Platte Valley etc. Co. v. Central etc. Co., 32 Colo. 102, 75 Pac. Rep. 391; Boulder etc. Co. v. Leggett etc. Co., 36 Colo. 455, 86 Pac. Rep. 101; Colorado etc. Co. v. Rocky Ford etc. Co., 3 Colo. App. 545, 34 Pac. Rep. 580; Beaver Brook etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Alamosa Canal Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Fornwald v. Nelson, 42 Colo. 178, 93 Pac. Rep. 1115; Peterson v. Durkee, 15 Colo. App. 258, 62 Pac. Rep. 370; People v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; New Mercer etc. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; North American Exp. Co. v. Adams, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; Lower Latham D. Co. v. Louden Irr. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 Pac. Rep. 205; Butterfield v. O'Neil, 19 Colo. App. 7, 72 Pac. Rep. 807; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49.

[2] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3165; Rev. Stats., 1908, Sec. 3165; Laws 1861, p. 67, Sec. 1, which is still retained in the statutes, unamended.

See, also, Crippen v. White, 28 Colo. 298, 64 Pac. Rep. 184; Sternberger v.

Again, it is provided for the irrigation of meadows that: "All persons who shall have enjoyed the use of the water in any natural stream for the irrigation of any meadow land, by the natural overflow or operation of the water of such stream, shall, in case the diminishing of the water supplied by such stream, from any cause, prevent such irrigation therefrom in as ample a manner as formerly, have right to construct a ditch for the irrigation of such meadow, and to take water from such stream therefor, and his or their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he, she, or they first occupied and used such land as meadow ground."[3]

The priority of right to seepage or spring water is granted in the following terms: "That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage, or spring waters of the State shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams: Provided, that the person upon whose lands the seepage or spring waters first arise shall have the prior right to such waters if capable of being used upon his lands."[4]

Seaton etc. Co., 45 Colo. 401, 102 Pac. Rep. 168; Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Fort Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Cascade etc. Co. v. Empire etc. Co., 181 Fed. Rep. 1011.

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3176; Rev. Stats., 1908, Sec. 3176; Laws 1879, p. 106, Sec. 37.

Means v. Gotthelf, 31 Colo. 168, 71 Pac. Rep. 1117; Means v. Stow, 31 Colo. 382, 73 Pac. Rep. 48; Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093; Broad Run Inv. Co. v. Deuel & Snyder Imp. Co., 47 Colo. 573, 108 Pac. Rep. 755; Cascade etc. Co. v. Empire etc. Co., 181 Fed. Rep. 1011.

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3177; Rev. Stats., 1908, Sec. 3177; Laws, 1889, p. 215, Sec. 1.

La Jara etc. Assn. v. Hansen, 35 Colo. 105, 83 Pac. Rep. 644; Clark v. Ashley, 34 Colo. 285, 82 Pac. Rep. 588; Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Burkhart v. Meiberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S. 1104, 19 Am. St. Rep. 279; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Ogilvy etc. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. Rep. 598.

Upon the subject of the right to water developed through mines, it is provided as follows:

"That hereafter, when any person or persons, or corporation, shall be engaged in mining or milling, and in the prosecution of such business shall hoist or raise water from mines or natural channels, and the same shall flow away from the premises of such persons or corporations to any natural channel or gulch, the same shall be considered beyond the control of the party so hoisting or raising the same, and may be taken and used by other parties, the same as that of natural water courses." [5]

By Article XVI, Section 6, it is declared that those using water for domestic purposes shall have the preference over those claiming the water for any other purpose.[6] In conformity with the provision of the constitution, it is further provided by the statute that: "Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever: Provided, that the provisions of this section shall not prohibit any citizen or town or corporation organized solely for the purpose of supplying water to the inhabitants of such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes." A violation of the above provision is made a misdemeanor, and each day of such improper application of the water shall be deemed a separate offense.[7]

All waters gathered by drainage improvement shall be the property of those from whose lands the same are taken by the drainage canal, and shall be prorated among the different land holders according to the cost of the improvement assessed against each one.[8]

"All persons on the margin, brink, neighborhood, or precinct of any stream of water shall have the right and power to place upon

[5] 4 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 4231; Rev. Stats. of Colo., 1908, Sec. 4231.

[6] For the constitutional provision, see Sec. 1772.

[7] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3178, 3179, Rev. Stats., 1908, Secs. 3178, 3179, Laws, 1891, p. 402, Secs. 1, 2.

"The right to water appropriated for domestic purposes does not depend upon the *locus* of its use for that purpose." Town of Sterling v. Pawnee etc. Co., 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S. 238.

[8] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3201; Rev. Stats., 1908, Sec. 3201, Laws, 1903, p. 213, Sec. 14.

the bank of said stream a wheel or other machine for the purpose of raising water to the level required for the purpose of irrigation, and the right of way shall not be refused by the owner of any tract of land upon which it is required, subject, of course, to the like regulations as required for ditches, and laid down in sections hereinbefore enumerated."[9]

§ 1774. **Division of the State and administrative officers.**—At the head of the Colorado system governing and controlling the distribution of water within the State is the State engineer. He is appointed by the Governor, and draws a salary of $3000 per annum. He has the general supervising control over the public waters of the State. He shall make, or cause to be made, careful measurements of the flow of the streams. He shall also collect all necessary data and information regarding the location, size, cost, and capacity of dams or reservoirs to be constructed and like data regarding the feasibility and economical construction of reservoirs on eligible sites. He shall also collect data and information regarding the snowfall in the mountains each season, for the purpose of predicting the probable flow of water in the streams of the State. He shall approve the designs and plats for the construction and repair of all dams or reservoir embankments which are built within the State which equal or exceed ten feet in vertical height. He is also given the supervision of the work of the division engineers and district water commissioners, and shall require them to report to him at suitable times their official acts, and require of them annual statements. He shall perform all duties which are imposed upon him by law and give his counsel and advice to the Governor when called upon, without extra pay, except actual traveling and other necessary expenses. He has the power, on request of any party interested and on payment of his per diem charges and reasonable expenses, to appoint a deputy or deputies, the pay of such deputies not to exceed six dollars per day for each day employed. He shall prepare and render to the Governor a full and true report regarding all matters devolving upon him by virtue of his office, said report to be delivered before the regular session of the legislature. He must collect all fees in accordance with the schedule and deposit

[9] 3 Colo. Stats., Ann., Morr. Ed., 1911, Sec. 3180; Laws, 1861, p. 68, Sec. 8.

the same with the State treasurer.[1] He is given no powers over the appropriation of waters, except in the matter of the construction of the necessary works; neither is he given any powers in the matter of the adjudication or determination of existing water rights.[2]

Irrigation Division Engineers.—For the better control of the waters, the State is divided into five divisions, as specified by the statutes, and over each division there is appointed by the Governor an irrigation division engineer, at a salary for Divisions 1 and 2 of $2500, and for Divisions 3, 4, and 5 of $1500 per annum. The offices of these division engineers are located within the respective divisions.[3] Any person desiring the appointment of irrigation division engineer may file with the State engineer a request for an examination as to his qualifications, and such an examination must be held whenever a vacancy exists. Such examination shall be for the purpose of determining the qualifications of applicants, and shall comprise: "First, questions on the measurement of water, which shall include tests in the actual measurements of water in the field on a basis of 30 per cent of the total; second, questions on the laws and customs relative to irrigation and water rights in Colorado, and including questions relating to local conditions of the division for

1 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3321-3334; Rev. Stats., 1909, Secs. 3321-3334; Laws, 1889, p. 371, Sec. 1; Laws, 1903, p. 294, Secs. 1-3.

In re question propounded by governor, 12 Colo. 400, 21 Pac. Rep. 488.

2 Chew v. Fremont County, 18 Colo. App. 162, 68 Pac. Rep. 134, 70 Pac. Rep. 764.

A joint resolution for the printing of the State engineer's report did not authorize the secretary of the state to create a debt against the State. Henderson v. Collier etc. Co., 18 Colo. 259, 32 Pac. Rep. 417; affg. *Id.* 2 Colo. App. 251, 30 Pac. Rep. 40.

3 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3335; Rev. Stats., 1908, Sec. 3335; Laws, 1903, p. 281, Sec. 1; as amended, Laws, 1911, Chap. 155, p. 469, Sec. 1.

For irrigation divisions, see Lower Latham D. Co. v. Louden etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80.

By the Act of 1903, the office of division superintendent was abolished, and that of irrigation division engineer created.

See Chew v. Fremont County, 18 Colo. App. 162, 70 Pac. Rep. 764; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; McLean v. Farmers' High Line Co., 44 Colo. 184, 98 Pac. Rep. 16; Montezuma County v. Wheeler, 39 Colo. 207, 89 Pac. Rep. 50; Chapman v. Phillips County, 17 Colo. App. 236, 68 Pac. Rep. 134; Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. Rep. 556.

which the examination is being held, on a basis of 30 per cent of the total; third, questions on his experience and the extent of his practice in matters relating to the use of water in irrigation or for other beneficial purposes, on a basis of 40 per cent of the total." The State engineer shall examine and rate the examination papers of each applicant, and shall certify to the Governor a list of the names of all those receiving a rating of 70 per cent or over, and from this list the Governor shall make his appointment, subject to the confirmation of the senate.[4] The term for which he is appointed is four years, and he is to draw the salary named above and actual expenses.[5] He must take the oath of office and give a bond in the penal sum of $5000.[6]

The powers and duties of the division engineers are to have general supervision and control over the water commissioners of the several districts within his division. He shall, under the general supervision of the State engineer, execute the laws of the State relative to the distribution of water in accordance with the right of priority of appropriation, as established by judicial decrees. He has the authority to make such regulations to secure the equal and fair distribution of water as may, in his judgment, be needed in his division not inconsistent with the law. Any person who may deem himself injured by a decision of the division engineer may appeal to the State engineer, who is given the power to suspend, amend, or confirm the order complained of. He is given the power to call out the water commissioners of his district and to perform the regular duties of a water commissioner. He must devote his entire time to the work of his office. He shall require the water commissioners to make annual reports. He himself must make a complete tabulated report to the State engineer on or before the 15th of November of each year.[7] All division engineers shall be under the control and supervision of the State engineer, and may

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3337-3340; Rev. Stats., 1908, Secs. 3337-3340; Laws, 1903, p. 282, Secs. 2-5.

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3341, 3342; Rev. Stats., 1908, Secs. 3341, 3342; as amended, Laws, 1911, p. 471, Secs. 2, 3.

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3343; Rev. Stats., 1908, Sec. 3343.

[7] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3344; Rev. Stats., 1908, Secs. 3344, 3348; as amended, Laws, 1911, p. 472, Sec. 4; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; McLean v. Farmers' High Line Co., 44

have charges preferred against them for malfeasance in office, neglect of duty, or incompetency, and such charges may be heard and determined by the State engineer.[8]

Water Commissioners.—At present the State is still further divided into seventy water districts, whose boundaries are described by the statute.[9] There is one water commissioner for each of said districts, appointed by the Governor, selected by him from persons recommended by the county commissioners of the counties into which water districts may extend. Said commissioners must take an oath of office and give a bond, and are entitled to $5 per day for each day's service. The said commissioners shall not begin their work until they shall be called upon by two or more owners or managers or persons controlling ditches in their several districts by application in writing, stating that there is a necessity for their action; and they shall not continue such services after the necessity therefor shall cease. When so engaged in such service they shall devote their entire time to the same, and any wilful neglect of duty is punishable by a fine of $50.

It is made the duty of such water commissioners to divide the water in the natural streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten the headgates of any ditch or ditches which, in the time of scarcity of water, shall not be entitled to water by reason of the priority of rights of others below them on the same stream. They are invested with the powers of constables, and may arrest any person violating his orders relative to the opening or shutting down of headgates or the using of water. They may appoint not to exceed two deputies, and

Colo. 184, 98 Pac. Rep. 16; Chew v. Fremont County, 18 Colo. App. 162, 70 Pac. Rep. 764; Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. Rep. 556.

[8] 3 Colo. Stats. Ann., Morr. Ed. 1911, Sec. 3345; Rev. Stats., 1908, Sec. 3345; Laws, 1903, p. 285, Sec. 10.

[9] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3353-3426; Rev. Stats., 1908, Secs. 3353-3426; Secs. 3370-3372; as amended, Laws, 1909, pp. 427, 428.

Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; Clear Creek County v. McLean, —— Colo. ——, 115 Pac. Rep. 525; Presbyterian College v. Poole, 25 Colo. 50, 52 Pac. Rep. 1103; Fravert v. Mesa County, 39 Colo. 71, 88 Pac. Rep. 873; Lake Fork D. Co. v. Haley, 28 Colo. 513, 67 Pac. Rep. 158; Chapman v. Phillips County, 17 Colo. App. 236, 68 Pac. Rep. 134.

may employ assistance in times of necessity. They may make examinations of all ditches in their districts, and suppress all wasteful methods in the use or application of water. It is also made their duty to distribute the waters decreed and to protect the priority of rights of the respective owners of water rights for any beneficial purpose from and after their determination by the Court. "No water commissioner or irrigation official shall make any division or distribution of water between the users thereof from the same ditch or reservoir." [10]

All water commissioners shall make reports to the division engineers of their division.[11] Any water commissioner who fails to perform any of the duties imposed upon him shall be deemed guilty of a misdemeanor and punishable by a fine of not less than $50 nor more than $500.[12] He may also be removed from office for malfeasance, neglect of duty, or incompetency by the division engineer, subject to review by the State engineer.[13]

The above officials have jurisdiction only where the water is taken from the natural streams into the ditches and canals. It is made the duty of all companies furnishing water to appoint a superintendent, who shall measure to each person taking water from any ditch the *pro rata* share of water to which he is entitled.[14]

10 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3283, 3427-3439; Rev. Stats., 1908, Secs. 3283, 3427-3439.

Pueblo County v. Gould, 6 Colo. App. 44, 39 Pac. Rep. 895; Ortiz v. Hansen, 35 Colo. 100, 83 Pac. Rep. 964.

For the duties and powers of commissioners, see Platte Valley Irr. Co. v. Buckers Irr. Co., 25 Colo. 77, 53 Pac. Rep. 334; Chew v. Fremont County, 18 Colo. App. 162, 70 Pac. Rep. 764; Cache La Poudre Irr. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Robertson v. People, 40 Colo. 119, 90 Pac. Rep. 79; Clear Creek County v. McLean, —— Colo. ——, 115 Pac. Rep. 525; Chapman v. Phillips County, 17 Colo. App. 236, 68 Pac. Rep. 134; Gunnison County v. Hider, 47 Colo. 443, 107 Pac. Rep. 1068; Squires v. Livezey, 46 Colo. 302, 85 Pac. Rep. 181.

11 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3350; Rev. Stats., 1908, Sec. 3350. Big Thomson etc. Co. v. Mayne, 36 Colo. 355, 91 Pac. Rep. 44.

12 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3439; Rev. Stats., 1908, Sec. 3439; 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3258; Rev. Stats., 1908, Sec. 3258, making it a misdemeanor for the water commissioner to fail to promptly measure the waters in his district when called upon.

13 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3345; Rev. Stats., 1908, Sec. 3345.

14 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3256; Rev. Stats., 1908, Sec. 3256; Laws, 1897, p. 305, Sec. 3.

§ 1775. **The appropriation of water.**—Although the State of Colorado was the first to adopt the system of State control of the waters within its boundaries governing the distribution and use of the same, it never went to the extent that Wyoming and some of the other States have gone relative to its appropriation by requiring an appropriation to be made by an application to the State engineer. An appropriation is instituted by the commencement of the actual surveys for or the construction of the works necessary for the diversion of the water. It is finally consummated by the actual application of the water to some beneficial use or purpose within a reasonable time after the work was begun. Even the notice of appropriation is not required.[1]

It is, however, required that within sixty days after the commencement of such construction for an original appropriation, or the change of location or the enlargement of an old one, every person, association, or corporation must file a statement under oath in the office of the State engineer for each specific claim, in such form as shall seem sufficient and satisfactory to the State engineer, and accompanied by a map of the proposed works, and showing the point of location of the headgate of the proposed structure, the depth, width, grade, and length of each ditch, canal, or feeder proposed; the carrying capacity of each ditch, canal, or feeder in cubic feet per second; the time of the commencement of work on such structure, which time may be the date of the commencement of the surveys therefor, or of the commencement of actual construction;

White v. Farmers' High Line etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; aff'g. *Id.* 1 Colo. App. 1, 31 Pac. Rep. 345; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317.

1 For the appropriation of water, see Secs. 706-732.

The first appropriator has a prior right to the extent of his appropriation. Schilling v. Rominger, 4 Colo. 100.

"An appropriation is the intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use." Larimer etc. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794.

"While the legislature can not prohibit the appropriation or diversion of unappropriated water for useful purposes, from natural streams upon the public domain, that body has power to regulate the manner of effecting such appropriation or diversion. Larimer etc. Co. v. People, *supra.*

The passive acceptance of water flowing into a canal does not constitute an appropriation. Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

the estimated cost of the project; and, in case of a filing of a reservoir site, the statement shall show the height of the proposed dam, the estimated cost, with the capacity in cubic feet and the surface area for each foot in depth of water stored up to and including the high-water mark.[2]

In case of change, enlargement, or extension, such statement shall show the matters required above, referring to the structure before such change or enlargement, and shall then state, also, the information required in the above items, second, third, fourth, and fifth, referring to the structure as enlarged, and in addition thereto state definitely the increase in capacity to be added. Whenever the surveys require long periods of time, temporary maps and statements may be made, and complete maps and statements may be filed later.[3]

Such statement must be signed and sworn to by the person or persons in whose behalf it is made; and in case of a corporation, by its duly authorized agent or officer. It is made the duty of the

[2] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3181, 3182; Rev. Stats., 1908, Secs. 3181, 3182, as amended Laws, 1911, Chap. 288, pp. 673, 674.

A provision similar to the above found in Laws, 1881, pp. 161, 162, was held unconstitutional for the reason that the title of the Act did not clearly express the subject matter. Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261. This provision was afterward re-enacted by Laws, 1887, p. 315; Laws, 1903, p. 290, Sec. 2, and Laws, 1911, as above indicated.

See, also, Rio Grande etc. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726; Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; O'Riley v. Noxson, 49 Colo. 362, 113 Pac. Rep. 486; Baldridge v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066.

The filing of the requisite plats and notices of an appropriation, the commencement of construction, unless accompanied by a beneficial use of the water, constitutes merely an inchoate right, which is insufficient to bar a junior claimant if his beneficial use of the water antedates that of the one who began first. Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

The joint filing of claim to water and a joint building of a ditch to convey water, but a separate application of the water to individual property do not constitute a tenancy in common. City of Telluride v. Davis, 33 Colo. 355, 80 Pac. Rep. 1051, 108 Am. St. Rep. 101.

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3183; Rev. Stats., 1908, Sec. 3183, as amended, Laws, 1911, Chap. 228, p. 675.

State engineer to examine the map and statement, and if he shall find the data therein contained to be sufficient and satisfactory, he shall endorse on each sheet of the filing "Accepted for filing in the office of the State engineer of Colorado, on the ——— day of ———," and attach thereto his signature and seal. He shall then cause to be prepared a reproduction of each sheet of the filing so endorsed and shall forward such prints to the claimant, who shall cause a copy of the same to be filed in the office of the county recorder of the county in which the headgate of the proposed structure or in which the proposed reservoir shall lie.[4]

The appropriation of water in Colorado is finally consummated by the actual application of the water to the beneficial use or purpose for which it was intended.[5]

§ 1776. The standard of measurement.—The old standard of measurement of water was the miner's inch, and by an old statute it was provided: "Every inch shall be considered equal to an inch square orifice under a five-inch pressure, and a five-inch pressure shall be from the top of the orifice of the box put into the banks of the ditch, to the surface of the water; said boxes, or any slot or aperture through which such water may be measured, shall in all cases be six inches perpendicular, inside measurement, except boxes delivering less than twelve inches, which may be square, with or without slides; all slides for the same shall move horizontally, and not otherwise; and said box put into the banks of ditch shall have a descending grade from the water in ditch of not less than one-eighth of an inch to the foot."[1]

By the Act of 1881, providing for the adjudication of water rights, it was provided that the decrees should describe "such

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3185-3187; Rev. Stats., 1908, Secs. 3185-3187, as amended, Laws, 1911, Chap. 228, pp. 675, 676.

Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

[5] See Secs. 725-727.

Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

"The true test of appropriation of water is the successful application thereof to the beneficial use intended." Thomas v. Guiraud, 6 Colo. 530.

See, also, Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901.

[1] 5 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 7026; Rev. Stats., 1908, Sec. 7026; Laws, 1874, p. 308, Sec. 1.

Note the difference between the miner's inch in California, where it is measured under a four-inch pressure. Sec. 1730.

amount of water by cubic feet per second of time, if evidence shall show sufficient data to ascertain such cubic feet," etc.[2]

By the Act of 1889, providing for the duties of the State engineer, it is provided: "The State engineer shall use in all his calculations, measurements, records, and reports the cubic foot per second as the unit of measurement of flowing water, and the cubic foot as to unit of measurement of volume."[3]

By the Act of 1903, in the statements of construction of works, "the carrying capacity of each ditch, canal, or feeder in cubic feet per second" must be set forth by the appropriator.[4]

§ 1777. Ditches and canals—Measuring devices.—The owner or owners of any ditch for irrigation or other purposes shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch, so as to return the water in such ditch with as little waste as possible into the stream from which it was taken. Vested rights must not be impaired. The owners of ditches must maintain bridges where they cross highways; and if not bridged within three days it is made the duty of the supervisor of the road district to construct such bridges and call upon the owners to pay the expenses for the same. If the owners refuse to pay, suit may be brought by the supervisor in the justice of the peace court for such claim, and the sum of $10 in addition thereto, as damages arising from the delay of such owners.[1] It is also provided that ditch companies must keep highways open for safe and convenient travel.[2] "The owner of any irrigating or mill ditch shall carefully maintain

[2] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3284; Rev. Stats., 1908, Sec. 3284; Laws, 1881, p. 144, Sec. 4.

For the adjudication of rights, see Secs. 1790-1793.

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3330; Rev. Stats., 1908, Sec. 3330; Laws, 1889, p. 374, Sec. 10.

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3182; Rev. Stats., 1908, Sec. 3182; Laws, 1903, p. 290, Sec. 2.

[1] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3233-3237; Rev. Stats., 1908, Secs. 3233-3237.

Old v. Keener, 22 Colo. 6, 43 Pac. Rep. 127; Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; Dis. Op. Garnett etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79.

[2] 4 Colo. Stats., Ann., Morr. Ed., 1911, Sec. 5829; Rev. Stats., 1908, Sec. 5829.

Highline Canal Co. v. Westlake, 23 Colo. 26.

and keep the embankments thereof in good repair and prevent the water from wasting."[3]

"During the summer season it shall not be lawful for any person or persons to run through his or their irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his or their said land, and for domestic and stock purposes, it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water." The violation of this provision is made punishable in a sum of not less than $100.[4]

Ditches and canals running through cities of the first class must be covered, and the heads must be latticed, so that persons or animals can not accidentally enter therein. For the failure to cover or lattice, the owner shall forfeit the sum of $50 for each and every day such failure shall continue.[5] Such penalty to be recovered in a civil action; said action not to be a bar to an action for special damages by any person who shall have suffered such damages.

Good and sufficient headgates must be maintained, and "owners of all ditches shall be liable for all damages resulting from their neglect or refusal to comply" with such provisions.[6] Headgates and wastegates must be constructed and maintained by the owners, and in case of failure or neglect, or refusal to do so, after five days' notice has been given by the water commissioner or the State engineer, then they must be constructed by the commissioner of the district, and the expenses therefor may be collected in the same manner as is provided in case of failure to build and maintain bridges.[7]

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3238; Rev. Stats., 1908, Sec. 3238.

See cases cited in last note; also, Catlin etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391.

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3239, 3240; Rev. Stats., 1908, Secs. 3239, 3240.

Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603; Dis. Op. Garnett etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79.

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3241-3243; Rev. Stats., 1908, Secs. 3241-3243; Laws, 1887, p. 65, Secs. 1-3.

Cities of the first class embrace those with a population over 15,000.

Platte etc. Co. v. Dowell, 17 Colo. 376, 30 Pac. Rep. 68.

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3244, 3245; Rev. Stats., 1908, Secs. 3244, 3245.

Catlin etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391.

[7] See *supra*.

3 Colo Stats. Ann., Morr. Ed., 1911, Secs. 3244, 3246; Rev. Stats., 1908, Secs. 3244, 3246; Laws, 1881, p. 165, Sec. 1; Laws, 1889, p. 161, Sec. 1.

Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. Rep. 612.

Suitable locks and fastenings must also be provided by the owners; if not furnished by the owners the commissioner may furnish them and collect in the same manner the expenses therefor.[8]

Suitable and proper measuring flumes, weirs, and devices for measuring water must be constructed and maintained by the owners, and in the manner and form as prescribed by the State engineer. If not so constructed, the officer in charge may refuse the delivery of water until they are constructed. The owners are also made liable for all damages resulting from their neglect or refusal to comply with the above provision; and any owner who shall divert water from the stream into any such works contrary to the orders of the State engineer, division engineer, or water commissioner shall be deemed guilty of a misdemeanor and be punishable by a fine not to exceed $500, and each day of violation shall be deemed a separate offense. The owners of any ditch, canal, or reservoir transferring water from one natural stream to another, or from a reservoir, ditch, or flume to a stream, must also construct proper measuring flumes or weirs with self-registering devices, if required by the State engineer, for the proper and accurate determination of the amount and flow of water turned into, carried through, and diverted out of the natural stream. The State engineer or division engineer shall rate the measuring flumes and weirs, and the original notes of such rating, together with a complete table compiled therefrom, shall be filed as a part of the records of the State engineer.[9] All headgates, measuring weirs, flumes, and devices are under the supervision at all times of the State engineer, the division engineer of the water division, and the water commissioner of the water district.[10]

The owners or persons in control of any canal or ditch used for irrigating purposes shall maintain the same in good order and re-

[8] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3247, 3248; Rev. Stats., 1908, Secs. 3247, 3248, the last section as amended, Laws, 1911, Chap. 153, p. 463, Sec. 1.

[9] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3248-3250; Rev. Stats., 1908, Secs. 3248-3250, as amended, Laws, 1911, Chap. 153, p. 463, Secs. 1-3.

See, also, 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3329; Rev. Stats., 1908, Sec. 3329, requiring owners of ditches to construct and maintain measuring weirs.

[10] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3252; Rev. Stats., 1908, Sec. 3252, as amended, Laws, 1911, Chap. 153, p. 466, Sec. 5. See, also, 3 Colo. Stats., *supra*, Secs. 3223, 3329; Rev. Stats., Secs. 3223, 3329.

pair, ready to receive water by April 15 in each year, and shall construct the necessary outlets in the banks for the proper delivery of the water to the persons entitled thereto.[11]

§ 1778. Ditches and canals—Rights of way therefor.—Under the early statute of the Territory of 1861,[1] it was held by the Territorial Supreme Court that irrigation being considered a climatic necessity, makes the right of ditch transit, which is essential to its enjoyment, analogous to the case of ways of necessity, and that rights of way for such ditches might be acquired without condemnation or compensation. In other words, one acquiring a tract of real property acquired the title thereto subject to all rights of way necessary for this purpose.[2] But the later Territorial cases questioned this rule as being in violation of the Fourteenth Amendment of the Constitution of the United States.[3] Since the adoption of the State constitution it is held that rights of way for these purposes can not be acquired against the wishes of the land owner except upon condemnation proceedings, and upon the payment of just compensation, and thus making the rule in these cases uniform with the rule in other cases where private property is sought for public uses.[4]

Persons or corporations are entitled to rights of way through

11 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3255; Rev. Stats., 1908, Sec. 3255; Laws, 1887, p. 305, Sec. 2.

Downey v. Twin Lakes etc. Co., 41 Colo. 385, 92 Pac. Rep. 946.

For the duties in case of an extension of a ditch, see Patterson v. Brown etc., 3 Colo. App. 511, 34 Pac. Rep. 769.

1 Laws, 1861, p. 67, Sec. 2.

2 Schilling v. Rominger, 4 Colo. 100; Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Branagan v. Dulaney, 8 Colo. 413, 8 Pac. Rep. 669.

3 Crisman v. Heiderer, 5 Colo. 589, where it was held that the rule in the case of Yunker v. Nichols should be confined "to the narrowest limits."

For the acquisition of rights of way, see Secs. 972-993.

4 See the cases cited in the following notes.

The irrigation laws of the State do not authorize a person to injure the land of others in constructing his ditches without a prior purchase or condemnation, and the payment of compensation. Nippel v. Forker, 9 Colo. App. 106, 47 Pac. Rep. 766; aff'd in 26 Colo. 74, 56 Pac. Rep. 577.

See, also, Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Lamar Canal Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261; Great Plains etc. Co. v. Lamar etc. Co., 31 Colo. 96, 71 Pac. Rep. 1119.

A right of way so acquired is merely an easement. Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

farms and tracts of land for the purpose of constructing ditches, canals, or other works. Such a right of way shall extend only to a ditch, dike, or cutting sufficient for the purpose required. Upon the refusal of the owners of tracts of land through which it is proposed to run a ditch to allow a passage through their property the person or persons desiring to open such ditch may proceed to condemn and take the right of way therefor under the provisions of the statutes concerning eminent domain.[5]

No tract or parcel of improved or occupied land shall, without the written consent of the owner, be subjected to the burden of two or more irrigating ditches, when the same object can feasibly and practically be attained by one ditch. The shortest route must be taken upon which the ditch can be constructed with uniform, or nearly uniform, grade, and discharge the water at a point where it can be conveyed to the lands of the persons constructing such ditch. No person having constructed a ditch shall prohibit or prevent any other person from enlarging or using the same upon the payment of a reasonable proportion of the cost of construction.[6]

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3167-3169; Rev. Stats., 1908, Secs. 3167-3169; Laws, 1861, p. 67, Secs. 2-9.

For proceedings in condemnation, see 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 2415-2434; Rev. Stats., 1908, Secs. 2415-2434.

See, also, for constitutional provisions, Art. II, Secs. 14, 15, 25; also, Art. XVI, Sec. 7; Sec. 1772.

Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Tripp v. Overacker, 7 Colo. 75, 1 Pac. Rep. 695; Junction Creek etc. Co. v. Durango, 21 Colo. 194, 40 Pac. Rep. 356; Downing v. More, 12 Colo. 316, 20 Pac. Rep. 766; Schneider v. Schneider, 36 Colo. 518, 86 Pac. Rep. 347; Ortiz v. Hansen, 35 Colo. 100, 83 Pac. Rep. 964; De Graffenried v. Savage, 9 Colo. App. 131, 47 Pac. Rep. 902; Warner v. Gunnison, 2 Colo. App. 430, 31 Pac. Rep. 238; Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. Rep. 612; Smith etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Thompson v. De Weese etc. Co., 25 Colo. 243, 53 Pac. Rep. 507. The statute requiring that commissioners shall determine the necessity for the taking is constitutional. The constitution recognizes the right of eminent domain, but the legislature may impose such limitations as will not prevent the exercise of the right. Gibson v. Cann, 28 Colo. 499, 66 Pac. Rep. 879.

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3170-3172; Rev. Stats., 1908, Secs. 3170-3172; Laws, 1881, p. 164, Secs. 1, 2.

Tripp v. Overacker, 7 Colo. 72, 1 Pac. Rep. 695; Downing v. More, 12 Colo. 318, 20 Pac. Rep. 766; San Luis etc. Co. v. Kenilworth etc. Co., 3 Colo. App. 244, 32 Pac. Rep. 860; Union

In case the channel of any natural stream becomes changed from any cause, so as to prevent any ditch, canal, feeder, or reservoir from receiving the proper inflow of water to which it may be entitled, the owner thereof has the right to extend the head of such ditch to such distance up the stream as may be necessary to receive such flow, and for that purpose the owner may maintain proceedings in condemnation: Provided, however, that no such extension shall interfere with the complete use or enjoyment of any ditch, canal or feeder.[7]

"This Act shall apply to and affect only ditches, canals, or feeders used for carrying water for the purpose of irrigation, and for no other purpose whatever."[8]

A right of way is given to conduct water through the channels of the natural streams, and of reclaiming an equivalent amount below, with due allowance made for seepage and evaporation, the amount to be determined by the State engineer or the commissioner of the district, under his directions.[9]

Whenever the owner or owners of any parcel or parcels of land desire to construct a drain for the purpose of carrying off surplus water, a right of way for the same may be acquired by condemnation proceedings.[10]

By the Act of April 23, 1909,[11] amending the Act of April 12, 1905,[12] it is provided that the State board of land commissioners may grant the right of way, upon such terms as the board shall de-

Pac. R. Co. v. Colorado etc. Co., 30 Colo. 133, 69 Pac. Rep. 564; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Sand Creek etc. Co. v. Davis, 17 Colo. 326, 29 Pac. Rep. 742; Junction City etc. Co. v. Durango, 21 Colo. 194, 40 Pac. Rep. 356; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

7 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3173; Rev. Stats., 1908, Sec. 3173; Laws, 1881, p. 161, Sec. 1.

See, also, for proceedings for changing point of diversion, Sec. 1779.

Crisman v. Heiderer, 5 Colo. 589; Lamar Canal Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261.

8 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3174; Rev. Stats., 1908, Sec. 3174; Laws, 1881, p. 162, Sec. 3.

9 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3203, 3222-3225; Rev. Stats., 1908, Secs. 3203, 3222-3225; Laws, 1879, p. 107, Sec. 39; Laws, 1897, p. 176, Secs. 1-3.

10 Laws, 1893, p. 258, Sec. 1.

See, also, for drainage, Sec. 1798.

See, for drainage districts, Sec. 1799.

11 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 5196; Laws, 1909, Chap. 207, p. 502, Sec. 1.

12 Laws, 1905, p. 332, Sec. 35.

termine, for any ditch or reservoir, and all conveyances of State lands thereafter made shall contain a reservation of such rights of way.

§ 1779. Ditches and canals—Special proceedings to change point of diversion.—As the rights of a certain ditch or canal taking water from the natural streams in Colorado are finally determined by a decree of the Court under the statutory proceedings therefor,[1] and as in that decree the point of diversion is designated and fixed, any change of that point must also be made by a decree of the Court in proceedings provided specially for that purpose.[2]

By the Act approved March 27, 1903, as amended,[3] every ditch owner desirous of changing in whole or in part the point or points of diversion from any of the streams of the State shall present a petition to the District Court from which the original decree was issued, praying that the change be granted. The practice and procedure, save as in the Act provided, shall be the same as if the petition were for an original statutory decree. The Court shall require proof that all parties who may be affected by the change have been duly notified in the proceedings, and shall hear evidence and determine whether such change will injuriously affect the vested rights of others. A decree shall be entered permitting the change as prayed for, unless it appear that such change will injuriously affect the vested rights of others; and if such injury appear, the Court shall decree the change only upon such terms and conditions as may be necessary to prevent such injurious effect, or to protect the parties affected, or, if impossible to do so, may deny said application. Several applications may be consolidated in one petition. Upon the granting of a decree the petitioner shall cause to be prepared certified copies of the same, and shall cause filings thereof with the county clerk of the county in which the new point of diversion is or is to be located, and also in the office of the State engineer. The State engineer shall immediately issue notices to the water commissioners in the water districts affected, and to the division engineer or superintendents in said division. In case the change

1 See, also, Sec. 1792.

2 For changes which may be made, see Secs. 856-873.

3 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3226-3231; Rev. Stats., 1908, Secs. 3226-3231; Laws, 1903, Chap. 124, p. 278, Secs. 1-6.

is from one district to another, the petitioner shall file a copy of the decree in the court having jurisdiction of the statutory water adjudications in the district of the new point of diversion, and thereupon, on motion, the court in which the copy is so filed shall order a record of the decree of change, and the original decree theretofore entered shall accordingly stand modified as to the matters contained in said decree of change.

Rearguments and reviews of and appeals from decrees so entered may be had as in the case of statutory water adjudications: Provided, however, they be prayed within thirty days from the time of entering the decree complained of.[4]

If in making such change it is found that any vested right will be interfered with, further proceedings must be had in condemnation.[5]

4 Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37; New Cache La Poudre etc. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781; Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Lower Latham D. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. Rep. 483; Fluke v. Ford, 35 Colo. 112, 84 Pac. Rep. 469; Fulton etc. Co. v. Meadow etc. Co., 35 Colo. 558, 86 Pac. Rep. 748; New Cache etc. Co. v. Arthur etc. Co., 37 Colo. 530, 87 Pac. Rep. 799; Ashenfelter v. Carpenter, 37 Colo. 534, 87 Pac. Rep. 800; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Robertson v. Wilmoth, 40 Colo. 74, 90 Pac. Rep. 95; Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Crippen v. Glasgow, 38 Colo. 104, 87 Pac. Rep. 1073; Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guiraud, 6 Colo. 530; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466, 7 Am. St. Rep. 258; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Knowles v. Clear Creek etc. Co., 18 Colo. 209, 32 Pac. Rep. 279; Cache La Poudre etc. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; Handy D. Co. v. Louden etc. Co., 27 Colo. 515, 62 Pac. Rep. 847; Hallet v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317; Diez v. Hartbauer, 46 Colo. 599, 105 Pac. Rep. 868; Vogel v. Minnesota Canal Co., 47 Colo. 534, 107 Pac. Rep. 1108; Fuller v. Swan River M. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; New Cache etc. Co. v. Arthur Irr. Co., 37 Colo. 530, 87 Pac. Rep. 799; Downs v. Reno, —— Colo. ——, 124 Pac. Rep. 582.

Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329, holding that a change may be made from agricultural use to another.

5 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3173; Rev. Stats., 1909, Sec. 3173; Laws, 1881, p. 161, Sec. 1.

§ 1780. Sale and conveyance of water rights.—"In the conveyance of water rights hereafter made in this State, in all cases except where the ownership of stock in ditch companies or other companies constitute the ownership of a water right, the same formalities shall be observed and complied with as in the conveyance of real estate." [1]

§ 1781. Reservoirs and reservoir rights.—Reservoirs may be constructed and water stored therein. Lands may be condemned for the purpose of such reservoirs and for the ditches for carrying such water to and from such reservoirs.[1] No reservoir of a capacity of more than 75,000,000 cubic feet of water, or having a dam or embankment in excess of ten feet in vertical height, and covering an area of more than twenty acres, shall hereafter be constructed in the State, unless the plans and specifications of the same shall be first approved by the State engineer; and the State engineer shall act as the consulting engineer during the construction thereof, and shall have the authority to require the material used and the work of construction to be done to his satisfaction; "and no work shall be deemed complete under the provisions of this Act until the State engineer shall give to the owners of such structure a written statement of the work of construction and the full completion thereof, together with his acceptance of the same, which statement shall specify the dimensions and capacity of such reservoir or reservoirs." [2]

1 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 669; Rev. Stats., 1908, Sec. 669.

Where a sheriff's deed did not purport to convey a water right, and he had not levied upon it, the water right was not conveyed. Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

Whether a water right passes in a deed of land as an appurtenance in the absence of express terms in the deed, depends upon the circumstances of the case, and the intention of the parties. Davis v. Randall, 44 Colo. 488, 99 Pac. Rep. 323.

1 3 Colo. Stats. Ann., Morr. Ed., Sec. 3202; Rev. Stats., 1908, Sec. 3202; Larimer County Res. Co. v. People, 8 Colo. 614, 9 Pac. Rep. 794; Seven Lakes Res. Co. v. New Loveland etc. Co., 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; Newby v. People, 28 Colo. 20, 62 Pac. Rep. 1036; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Hackett v. Larimer & Weld Res. Co., 48 Colo. 178, 109 Pac. Rep. 965, 1 Water & Min. Cas. Ann. 224.

2 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3205; Rev. Stats., 1908, Sec. 3205.

By another section it is provided

The cost of inspection and supervision must be paid by the owners. The State engineer shall annually determine the amount of water which it is safe to impound in the several reservoirs within the State, and it is made unlawful to store water in any reservoir in excess of the amount so determined to be safe. It is made the duty of the water commissioner to draw off the excess water, and he may employ force to do so if necessary.[3]

Upon complaint being made to the State engineer by three or more persons residing or having property in the neighborhood of a reservoir that their homes or property would be in danger of destruction or damage in the event of a flood occurring on the account of the breaking of the embankment of such reservoir, that such reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it is made the duty of the State engineer to forthwith examine such reservoir and determine the amount of water it is safe to impound therein. If the reservoir is found unsafe, the water must be withdrawn to such an extent as will, in the judgment of the engineer, render the same safe. The persons calling upon the State engineer must advance the mileage expenses to the State engineer, but if the reservoir is found unsafe, the owners shall be liable for all expenses incurred in such examination. An appeal may be had from the decision of the State engineer to the County or District Court wherein the reservoir is located, and the Court shall hear and determine the matter summarily at the earliest practical time without written pleadings or the aid of a jury. Appeal may also be had to the Supreme Court, but the judgment of the State engineer shall control until the final determination of the cause.[4]

Any reservoir company failing or refusing, after ten days' notice in writing having been given, to obey the directions of the State engineer as to the construction or filing of any reservoir, shall be subject to a fine of not less than $50 for each day's continuance

that the State engineer shall approve the designs and plans for the construction and repair of all dams or reservoir embankments, which equal or exceed ten feet in vertical height. 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3323; Rev. Stats., 1908, Sec. 3323; Laws, 1889, p. 372, Sec. 3.

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3206-3208; Rev. Stats., 1908, Secs. 3206-3208; Laws, 1899, p. 314, Secs. 2-4.

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3209-3212; Rev. Stats., 1908, Secs. 3209-3212.

after time of notice has expired, such fine to be recovered in a civil action in the name of the people.[5]

By a separate Act, approved April 11, 1903,[6] an Act to promote irrigation of arid lands within the State by water obtained from wells or sources other than the flow from natural sources, it is provided for the construction of small reservoirs: It is made the duty of the county surveyor of each county upon the request of the owner of ten or more acres of arid land to locate and survey an available site for a reservoir upon such land, such reservoir to be used for the storage of water to irrigate the land contiguous thereto, and such reservoir to be of a capacity to hold sufficient water to properly irrigate not less than ten acres of such land. Within thirty days after such location the owner of such land shall begin the construction and work continuously thereon until completion, and the construction of the outlet of such reservoir shall be done under the direction of the county surveyor. Upon completion it is made the duty of the county surveyor to file with the board of county commissioners a map or plat of the land upon which such reservoir is located, with a full description thereof. It is made the duty of the board of county commissioners, within sixty days thereafter, to approve the same by resolution spread upon the records of such board. It is made the duty of the owner or his tenant to keep such reservoir in good repair and in a safe condition. It is also made the duty of the county surveyor to annually inspect such reservoirs, and to order the repairs necessary, the expenses for such inspection to be paid by the owners. County surveyors and members of the board of county commissioners shall not be liable for any act done by them in pursuance of the provisions of the Act.

Upon the subject of the distribution and use of waters stored in reservoirs, it is provided that: The owners of any reservoir may conduct the water therefrom into and along any of the natural streams, but not so as to raise the water above ordinary high-water mark, and may take out the same at any point desired, without regard to the prior rights of others to the water from such stream; but due allowance must be made for evaporation and seepage, the

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3214; Rev. Stats., 1908, Sec. 3214.

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3215-3221; Rev. Stats., 1908, Secs. 3215-3221; Laws, 1903, Chap. 122, p. 262, Secs. 1-7.

amount to be determined by the water commissioners of the district, or, if there are no such commissioners, then by the county commissioners.[7]

When the rights of others are not injured thereby, it shall be lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations, and take in exchange therefor an equal amount of water, less reasonable deduction for loss, if there be any, to be determined by the State engineer. The person or company desiring such exchange must construct and maintain, under the direction of the State engineer, measuring flumes or weirs and self-registering devices.[8]

The owners or possessors of reservoirs shall not have the right to impound any water in such reservoirs during the time that such water is required in senior ditches for immediate use for direct irrigation or for storage in reservoirs holding senior rights. A gauge rod, marked in feet and tenths and one-hundredths of a foot, shall be permanently fixed and maintained at the outlets of all reservoirs, under the supervision of the State engineer, and if not so maintained the owner shall not be entitled to impound any water whatever until these provisions are complied with.[9]

The owner or owners of any reservoir situate upon or in the bed of any natural stream or through which any natural stream flows, shall, at their expense, cause a complete survey of the contour lines of said reservoir to be made, which survey may be approved by the State engineer, or made under his direction. There shall also be

7 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3203; Rev. Stats., 1908, Sec. 3203; Laws, 1879, p. 107, Sec. 39.

8 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3225; Rev. Stats., 1908, Sec. 3225; Laws, 1897, p. 177, Sec. 4.

The change of place of storage or use of water appropriated for irrigation from one reservoir to another, so far as rights of appropriators are concerned, is analogous to a change of place of use from one tract of land to another. Windsor Res. etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

The priority for direct irrigation can not be changed for that of storage. Finley v. New Cache etc. Co., 44 Colo. 234, 98 Pac. Rep. 173.

9 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3251; Rev. Stats., 1908, Sec. 3251; as amended, Laws, 1911, Chap. 153, p. 465, Sec. 4.

"A senior reservoir is entitled to but one filling during the same season on the same priority before junior reservoirs are filled once." Windsor Res. etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729.

See, also, for reservoirs and reservoir rights, Secs. 837-846.

prepared a table, to be filed in triplicate with and approved by the State engineer, showing the capacity of said reservoir, a copy of which table shall be furnished to the division engineer and the water commissioner of the district. Gauge rods must also be constructed at the outlet of such reservoir, also suitable and permanent measuring devices, all under the direction of the State engineer. Upon the failure and neglect of the owner to comply with these provisions, it is made the duty of the State engineer or the division engineer to refuse to allow any water whatsoever to be taken into or diverted from said reservoir. The State engineer and division engineer must investigate any complaints received as to the violation of the above provisions.[10]

§ 1782. State canals and reservoirs and the control thereof.—By the Act of 1889 [1] it is provided that, for the purpose of reclaiming, by irrigation, State and other lands, and for the purpose of furnishing work for the convicts confined in the State penitentiary, the board of commissioners of the State penitentiary is authorized to locate, acquire, and construct, in the name of and for the use of the State of Colorado, ditches, canals, reservoirs, and feeders for irrigating and domestic purposes, and for that purpose may use convict labor of persons confined in the State pentitentiary.[2]

It is made the duty of the State engineer to survey and locate such works. Power is given the board to condemn lands for rights of way. The title to all works shall vest in the State, and the proceeds thereof shall be paid into the State treasury. When any part of such works is completed, the said board may lease water rights upon such terms and under such rules and regulations as may be adopted by the board and approved by the Governor of the State. For the purpose of aiding in the construction, subscriptions may be received from persons owning lands along the line of the proposed ditch, and certificates issued therefor, to draw interest at the rate of 7 per cent per annum, and both principal and interest to be payable in water.[3]

10 Rev. Stats., 1908, Sec. 3253; as amended, Laws, 1911, Chaps. 153, 466, Sec. 6.

1 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3499-3504; Rev. Stats., 1908, Secs. 3499-3504; Laws, 1889, p. 285, Secs. 1-6.

2 *In re* Canal Certificates, 19 Colo. 64, 34 Pac. Rep. 274.

3 *In re* Canal Certificates, 19 Colo. 64, 34 Pac. Rep. 274.

A supplemental Act was subsequently passed relating to the management and control of the first canal constructed, to be known as "State Canal No. 1," and placing the management and control of such canal in the State board of land commissioners.[4] Similar Acts were afterward passed relative to other State works constructed in the same manner and by the same means. By the Act of 1891 [5] the "Mesa County State Ditch" was provided for and constructed thereunder, and the Governor authorized to appoint a competent person to manage and superintend the said ditch. By the Act of 1901 [6] "State Canal No. 3" was authorized.[7]

By a number of independent Acts other separate works were authorized to be constructed at the expense of the State, and which, when constructed, were to be the property of the State. By the Act of 1889 [8] feeders from the Grand, Laramie, and North Platte systems into and through the tributaries of the South Platte and Arkansas systems were authorized for the purpose of supplying deficiencies of water for appropriations theretofore made, the said works to be the property of the State. And the State engineer was authorized to determine, regulate, and provide for the delivery of such waters to such ditches, canals, and reservoirs, "according to their several appropriations, decrees of court, capacities, and necessities."

By the Act of 1889 [9] the "Coal Creek Reservoir" was authorized and constructed, and the State engineer authorized to distribute the water to those entitled thereto. By the Act of 1891 [10] the Apishapa

[4] See 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3505-3513; Rev. Stats., 1908, Secs. 3505-3513; Laws, 1893, p. 441, Secs. 1-15.

The Act of 1893 was held partly constitutional and partly not. *In re* Certificates, 19 Colo. 64, 34 Pac. Rep. 274.

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3514-3525; Rev. Stats., 1908, Secs. 3514-3525; Laws, 1891, p. 335, Secs. 1-12.

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3526; Rev. States., 1908, Sec. 3526; Laws, 1901, p. 369, Sec. 2.

[7] This canal was afterward ceded to the United States. 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 6928; Rev. Stats., 1908, Sec. 6928.

[8] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3527, 3528; Rev. Stats, 1908, Secs. 3527, 3528; Laws, 1889, p. 208, Secs. 1, 4.

[9] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3529-3532; Rev. Stats., 1908, Secs. 3529-3532; Laws, 1899, p. 215, Secs. 1, 6-8.

[10] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3533-3538; Rev. Stats, 1908, Secs. 3533-3538; Laws, 1891, p. 345, Secs. 1-4, 7, 8.

Creek Reservoir was authorized and a board of control created to sell or lease the waters as would bring the most revenue to the State. By another Act of 1891 [11] the Hardscrabble Creek Reservoir was authorized, and a board created for the disposition of its waters. Also, by another Act of 1891 [12] the Saguache Creek Reservoir was authorized and a board created for its management and control and for the distribution of its waters. By another Act of 1891 [13] the Monument Creek Reservoir was authorized and a board created to manage and control the same and to distribute its waters. By still another Act of 1891 [14] the Chaffee County Reservoir was authorized and a board created for its management, control, and the distribution of its waters.

Other reservoirs had been constructed by previous Acts, and their management and control, until further disposition, was left to the State board of land commissioners. By the Act of 1897 [15] the Boss Lake Reservoir, in Chaffee County, was turned over to the county commissioners of that county for management and control and for the distribution of its waters, the said waters to be distributed *pro rata,* without reference to dates of priorities and without expense to the consumers thereof.

It was provided in all of such Acts that all reservoirs and other works were to be and remain the property of the State. And, until otherwise directed by law, the State board of land commissioners were directed to regulate the distribution of their waters, "and to charge and collect rental for the carriage of water therein." [16]

By the Act approved April 7, 1899,[17] it was provided for the leasing and distribution of the waters stored or to be stored in State reservoirs under the charge and control of the county commission-

11 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3539-3545; Rev. Stats., 1908, Secs. 3539-3545; Laws, 1891, p. 350, Secs. 1-3, 6-9.

12 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3546-3550; Rev. Stats., 1908, Secs. 3546-3550; Laws, 1891, p. 354, Secs. 1, 2, 5-8.

13 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3551-3554; Rev. Stats., 1908, Secs. 3551-3554; Laws, 1891, Secs. 1, 6-8.

14 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3555-3559; Rev. Stats., 1908, Secs. 3555-3559; Laws, 1891, p. 347, Secs. 1, 3, 7-9.

15 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3560; Rev. Stats., 1908, Sec. 3560; Laws, 1897, p. 119, Sec. 1.

16 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3561; Rev. Stats., 1908, Sec. 3561; Laws, 1893, p. 404, Sec. 1.

17 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3562; Rev. Stats., 1908, Sec. 3562; Laws, 1899, p. 350, Sec. 1.

ers of any county wherein such reservoirs are situated, without expense to the State, the said waters to be distributed by the water commissioner *pro rata* without reference to priority of rights and without expense to the consumers thereof; the counties in which said reservoirs are situated to assume and shall be held responsible for any damages resulting from breakage of dams or water discharges therefrom. The provisions of the Act not to apply to any State reservoir constructed primarily for the purpose of irrigating State lands.

§ 1783. The sale of State land to secure irrigation on other lands.—By the Act approved April 12, 1905,[1] it was provided that for the purpose of furnishing irrigation for State lands the State board of land commissioners is authorized to sell at public sale, at not less than the appraised value thereof, and in no case less than $3.50 per acre, any tract of land belonging to the State: Provided, that not more than one-half section of land shall be sold, and in alternate half-sections, to any responsible person or persons, on condition that they construct an irrigating ditch in such locality and of sufficient capacity to furnish water for the entire tract. And in no case shall the title of any of said lands pass from the State until the ditch shall have been completed and accepted by the board.

Also, by the supplemental Act of June 2, 1911,[2] for the purpose of furnishing water and securing water rights for State lands, the State board of land commissioners is authorized to enter into contracts with any person, corporation, or irrigation district, providing for such irrigation. All assessments or other payments for the cost of so irrigating such land shall be paid by the lessees or purchasers thereof. And the board may agree that whenever any State land for which irrigation is provided is leased or sold, the lessee or purchaser, as the case may be, shall pay the agreed value therefor, and the board shall have full power to secure such person, corporation, or district so furnishing water for irrigation of State lands, the payment of the cost of the water rights upon such lands being leased or sold by the lessee or purchaser thereof.

1 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 5197; Rev. Stats., 1908, Sec. 5197; Laws, 1905, p. 333, Sec. 36.

2 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 5218-C; Laws, 1911, Chap. 86, p. 211, Secs. 1-3.

§ 1784. The distribution and use of water.—Under the Colorado system the distribution of water between the main ditches, canals, or reservoirs which take the water direct from the natural streams, comes directly under the supervision of the water commissioners of the respective districts,[1] under the supervision of the division engineers,[2] who in turn are under the supervision of the State engineer.[3] The division of the water from the ditches to the consumers comes under the supervision of a superintendent appointed or elected for that purpose.[4]

There are a number of miscellaneous provisions relative to the distribution of water which we will set forth in this section.

If at any time any ditch or reservoir from which water is or shall be drawn for irrigation shall not be entitled to a full supply of water from the natural stream which supplies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, to each his share *pro rata*, according to the amount he, she, or they shall then be entitled to, so that all the owners shall suffer from the deficiency each in proportion to the amount of water which he, she, or they should have received in case no such deficiency of water had occurred.[5]

1 See Sec. 1774.

2 The Act of 1887, Laws, 1887, p. 295; 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3344; Rev. Stats., 1908, Sec. 3344, held constitutional. McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Farmers' Ind. D. Co. v. Agricultural etc. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

3 See Sec. 1774.

For the distribution and use of water, see the following:

"After the defendants' appropriation has done duty to their own land, they can not, even by grant, confer upon plaintiff the right to use it, or any of it, as against the superior claims of other appropriations from the same stream." Burkhart v. Meiberg, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279.

See, also, Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725.

The use of water upon a larger acreage does not presumptively establish an enlarged use of such water. Fulton etc. Co. v. Meadow Island etc. Co., 35 Colo. 558, 86 Pac. Rep. 748.

4 See Sec. 1774; 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3256; Rev. Stats., 1908, Sec. 3256; Laws, 1887, p. 305, Sec. 3; White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828.

5 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3175; Rev. Stats., 1908, Sec. 3175; Laws, 1879, p. 97, Sec. 4; Coffin v. Left Hand D. Co., 6 Colo. 443; Larimer etc. Co. v. Wyatt, 23

Whenever any person or company shall divert water from one public stream and turn it into another public stream, such person or company may take out the same amount of water again, less reasonable deduction for seepage and evaporation, to be determined by the State engineer. For this purpose measuring flumes or weirs and self-registering devices must be maintained at the expense of the owner and under the direction of the State engineer. The water commissioner of the district must keep a record of the amount of water so turned into his district from any other district.[6]

Upon the subject of rotation, it is made lawful for the owners of ditches and water rights taking water from the same stream to exchange with and to loan to each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner: Provided, that the owner or owners making such loan or exchange shall give notice in writing of the same, whereupon the water commissioner shall recognize the same in his distribution of water.[7]

It is made the duty of every person to see that he receives no more water than he is entitled to; and upon finding that he is receiving more water than he is entitled to, to take steps to prevent the same; and if he knowingly permits such extra water to come to his land, and does not immediately notify the owner of the ditch, canal, or reservoir, or take steps to prevent its further flowing upon his land, he shall be liable to any person who may be injured by such extra

Colo. 480, 48 Pac. Rep. 528; Farmers' High Line v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Brown v. Farmers' High Line etc. Co., 26 Colo. 66, 56 Pac. Rep. 183; Farmers' High Line etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 415; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

6 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3222-3224; Rev. Stats., 1908, Secs. 3222-3224; Laws, 1897, p. 176, Secs. 1-3; Hartman v. Tresise, 36 Colo. 146, 84 Pac. Rep. 685, 4 L. R. A., N. S., 872.

7 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3232; Rev. Stats., 1908, Sec. 3232; Laws, 1899, p. 236, Sec. 3; Ft. Lyon C. Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37, holding that the burden of proof is on the party seeking the change to show that the exchange of water will not operate to the injury of vested rights.

See, also, Lower Latham D. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. Rep. 483; Squires v. Livesey, 36 Colo. 302, 85 Pac. Rep. 181; Bowman v. Virdin, 40 Colo. 247, 90 Pac. Rep. 506.

appropriation of water for the actual damages sustained, with costs and reasonable attorney's fees, to be fixed by the Court and to be taxed with the costs.[8]

The owners of ditches and canals must prevent the water from being wasted, and from running excess water during the summer season.[9]

§ 1785. Ditch, reservoir, flume, and pipe line corporations—Organization.—There are special provisions in the Colorado statutes for the incorporation and government of ditch, canal, flume, and pipe line corporations.

When any three or more persons associate, under the provisions of the chapter of the Colorado statutes relative to corporations, for the purpose of constructing a ditch, reservoir, pipe line, or any part thereof, for the purpose of conveying water from any natural or artificial stream, channel, or source whatever, to any mines, mills, or lands, or storing the same, they shall, in their certificate, in addition to the matters required in Section 2 of this chapter, specify as follows, viz.: "The stream, channel, or source from which the water is to be taken, the point or place at or near which the water is to be taken out, the location, as near as may be, of any reservoir intended to be constructed, the line, as near as may be, of any ditch or pipe line intended to be constructed, and the use to which the water is intended to be applied."[1]

When any corporation shall organize for the purpose of constructing a flume, in addition to the matters required in Section 2 of the Act, the certificate shall specify as follows: "The place of beginning, the terminus, and the route, so near as may be, and the purpose for which such flume is intended," etc.[2]

[8] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3260, 3261; Rev. Stats., 1908, Secs. 3260, 3261; Laws, 1887, p. 312, Secs. 1, 2.

[9] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3238-3240; Rev. Stats., 1908, Secs. 3238-3240; Laws, 1876, p. 78, Secs. 1-3.

See, also, criminal statutes, Sec. 1802; Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603.

[1] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 988; Rev. Stats., 1908, Sec. 988; Laws, 1891, p. 97, Sec. 1.

The stock in such companies is personal property and subject to execution and sale. Struby-Estabrook Mer. Co. v. Davis, 18 Colo. 93, 31 Pac. Rep. 495, 36 Am. St. Rep. 266.

[2] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 998; Rev. Stats., 1908, Sec. 998; Laws, 1864, p. 59, Sec. 35, as amended.

When any corporation shall organize for the purpose of constructing a pipe line for the conveyance of gas, water, or oil, they shall in their certificate, in addition to the matters required in Section 2 of the Act, specify as follows: "The places from and to which it is intended to construct the proposed line or lines," etc.[3]

Companies so organized holding ditches or canals which derive their supply of water for their respective ditches from the same headgate or gates, or from the same source or sources of supply, may consolidate their interests and unite their respective companies under one name and management by filing a certificate of that fact in the office of the Secretary of State, and in the office of the recorder of the respective counties in which such ditches or canals are situated, which certificates shall be signed by the presidents of the companies so uniting, with the common seals of the companies affixed thereto, and shall set forth the fact of such union of interests and give the name of the new company thus formed.[4]

When the term of years for which any incorporation has been, or may hereafter be, incorporated as a ditch company for the purpose of carrying water for irrigation purposes, or as a reservoir company for the purpose of storage of water for irrigation purposes, has expired, or is about to expire by lawful limitation, and such corporation has not been administered upon as an expired corporation or gone into liquidation, it may have its term of incorporation extended and continued, the same as if originally incorporated, as provided as follows: The stockholders may vote upon the question of extending the life of such corporation for another twenty years, or less, by first giving notice of such intention, by publication, for two successive weeks, in the newspaper printed nearest the place where the principal operations of such corporation are carried on, such notice to be signed by stockholders owning at least 10 per cent of the capital stock. A majority of the stock must be represented, and, in order to renew, a majority of the votes cast must be in favor of the same.[5]

[3] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 999; Rev. Stats., 1908, Sec. 999; Laws, 1891, p. 94, Sec. 1.

[4] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 995; Rev. Stats., 1908, Sec. 995; Laws, 1876, p. 68, Sec. 1.

[5] 2 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 996, 997; Rev. Stats., 1908, Secs. 996, 997; Laws, 1891, p. 96, Secs. 1, 2.

§ 1786. Ditch, etc., corporations—Duties, rights, and powers.—Any company formed for such purposes shall, within ninety days from the date of their certificate, commence work on such ditch or other works, and shall prosecute the same with due diligence until the same is completed, and the time of the completion of such works shall not extend beyond a period of two years from the time work was commenced as aforesaid, and any company failing to so commence work within ninety days, or failing to complete the same within said two years, shall forfeit all right to the water so claimed by any other company; the time for the completion of any flume shall not extend beyond a period of four years; provided, this section shall not apply to any ditch or flume for mining or other purposes constructed through and upon any grounds owned by the corporation; and, further, that any company formed to construct a ditch for domestic, agricultural, irrigating, milling, and manufacturing purposes, or any or either thereof, shall have three years from the time of the commencement of work within which to complete the same, but no longer.[1]

Such a company shall have the right of way over the line named in the certificate, and shall also have the right to run water from the stream or water source through its works, and to store the same in any reservoir of the company when not needed for immediate use: Provided, that the line proposed shall not interfere with any ditch, pipe line, or reservoir having prior rights, except the right to cross by pipe or flume; nor shall the water of any stream or other water source be diverted from its original channel to the detriment of any person having a prior right thereto, but this shall not be construed to prevent the appropriation and use of any water not theretofore utilized and applied to beneficial uses.[2] Flume com-

1 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 989; Rev. Stats., 1908, Sec. 989; Laws, 1864, p. 61, Sec. 42, as amended.

See Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505.

A stockholder in a mutual ditch corporation has the right to change the point of diversion, so long as the rights of others are not injured thereby. Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060.

For proceedings to change point of diversion, see Sec. 1779.

For changes which may be made, see Secs. 856-873.

2 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 990; Rev. Stats., 1908, Sec. 990; Laws, 1891, p. 98, Sec. 2, as amended from Laws, 1864, p. 58, Sec. 32; Coffin v. Left Hand D. Co., 6 Colo. 443; Central City etc. Co. v. Kimber, 1 Colo. 475.

panies shall have the right of way over the line proposed in their certificate for such flume, provided it does not conflict with the rights of any former fluming, ditching, or other company.[3] Pipe line companies "shall have the right of way over the line or lines named in the certificate, and shall also have the right to convey gas, water, or oil by said lines as stated in such certificate through the lands of the State of Colorado, and lands of individuals, with the right to erect thereon pump stations, storage tanks, and other buildings necessary for such business, if it shall be unable to agree with the individuals owning any of such lands for the purchase of any real estate required," such corporation may acquire such title by condemnation in the manner provided by law.[4]

Any such corporation, with its capital stock fully subscribed and paid up, and when it shall have no income sufficient to keep its works in good repair, shall have the power to levy an assessment on the capital stock thereof, payable in money or labor or both. But no such assessment shall be levied unless the question shall be first submitted to the stockholders, and a majority of the same voting in favor thereof.[5]

Every ditch company is required to keep its ditch in good repair, so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property; and whenever it is necessary to convey any ditch over any lode mining claim it must be flumed so far as necessary to protect such claim from the water of the ditch.[6] Every ditch company must also have its ditch in such repair that it is ready to receive the water by

[3] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 998; Rev. Stats., 1908, Sec. 998.

[4] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 999; Rev. Stats., 1908, Sec. 999; Laws, 1891, p. 94, Sec. 1.

[5] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 991; Rev. Stats., 1908, Sec. 991; Gen. Laws, 1877, p. 172, Sec. 276; Callahan v. Chilcott D. Co., 37 Colo. 331, 86 Pac. Rep. 123, holding that a stockholder holding fully paid stock can not object to the validity of an assessment, where at the time not all the authorized stock had been subscribed, and where he had participated in the stockholders' meeting at which such an assessment was levied.

[6] 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 993; Rev. Stats., 1908, Sec. 993; Gen. Laws, 1877, p. 172, Sec. 278; 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3233, 3238; Rev. Stats., 1908, Secs. 3233, 3238.

See ditches and canals, Secs. 1777-1779; Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; Garnett etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water & Min. Cas. Ann. 610.

April 15 of each year, and construct the necessary outlets for the delivery of water.[7]

It is also made the duty of those owning or controlling such canals or ditches to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlets to those entitled thereto according to his or her *pro rata* share.[8]

It is made a misdemeanor for any person to wilfully or maliciously damage or interfere with any ditch or other works or personal property of any such company, punishable by a fine of not to exceed $500 or by imprisonment, or both.[9]

§ 1787. Ditch, etc., companies—When compelled to furnish water.—"Any company constructing a ditch under the provisions of this Act [1] shall furnish water to the class of persons using the water in the way named in the certificate, in the way the water is designed to be used, whether miners, millmen, farmers, or for domestic use, whenever they shall have water in their ditch unsold, and shall at all times give preference to use of the water in said ditch to the class named in the certificate; the rates at which water shall be furnished to be fixed by the county commissioners, as soon as such ditch shall be completed and prepared to furnish water." [2]

7 3 Colo. Stats. Ann., 1911, Secs. 3254, 3255; Rev. Stats., 1908, Secs. 3254, 3255; Laws, 1887, p. 305, Secs. 1, 2.

For an action for damages by a stockholder against his corporation for the failure to furnish water, see Rocky Ford etc. Co. v. Simpson, 5 Colo. App. 30, 36 Pac. Rep. 638; Downey v. Twin Lakes etc. Co., 41 Colo. 385, 92 Pac. Rep. 946.

See, also, for ditches and canals, Secs. 1777-1779.

8 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3256; Rev. Stats., 1908, Sec. 3256; Laws, 1887, p. 305, Sec. 3; White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; affirming *Id.*, 5 Colo. App. 1, 31 Pac. Rep. 345.

9 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 994; Rev. Stats., 1908, Sec. 994; Laws, 1864, p. 62, Sec. 45.

See, also, for criminal statutes, Sec. 1802.

1 See last two sections, Nos. 1785, 1786.

2 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 992; Rev. Stats., 1908, Sec. 992; Gen. Laws, 1877, p. 172, Sec. 277, as amended; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, holding that this section was not repealed by Section 3264.

See, also, Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; Townsend v. Fulton etc. Co., 17 Colo. 142, 29 Pac. Rep. 453.

A provision in a water contract that

Any person or persons, acting jointly or severally, who shall have purchased and used water for irrigation for lands occupied by him, her, or them, from any ditch or reservoir, and shall not have ceased to do so for the purpose or with the intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount on paying or tendering the price thereof fixed by the county commissioners,[3] or if no price shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water, or did sell water, during the last preceding season. This section does not apply to the case of those who may have taken water as stockholders or shareholders after they have sold or forfeited their shares of stock, unless they shall have retained a right by contract, agreement, or understanding, and use between themselves and the owners of such ditch, and not then to the injury of other purchasers in the same ditch.[4]

It is also made a misdemeanor for any person owning or controlling, or claiming to own or control, any ditch, canal, or reservoir who shall, after demand in writing, made upon him for the supply or delivery of water for irrigation or other beneficial uses, and after the tender of the lawful rate of compensation therefor in lawful

upon refusal of the carrier to furnish water, the consumer may take it himself, is void. White v. Farmers' etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828.

[3] For fixing water rates, see Sec. 1788.

[4] 3 Colo. Stats., Ann., Morr. Ed., 1911, Sec. 3264; Rev. Stats., 1908, Sec. 3264; Laws, 1879, p. 96, Sec. 3.

See, also, cases cited under last note.

Also Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423; Grand Junction Irr. Co. v. Fruita etc. Co., 37 Colo. 483, 86 Pac. Rep. 324.

See, also, 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3254; Rev. Stats., 1908, Sec. 3254; Laws, 1893, p. 299, Sec. 1.

See, also, for water right contracts, Rockwell v. Highland D. Co., 1 Colo. App. 396, 29 Pac. Rep. 285; Pawnee etc. Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. Rep. 381; Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290; Rocky Ford etc. Co. v. Simpson, 5 Colo. App. 30, 36 Pac. Rep. 638; Cache La Poudre Irr. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Blakeley v. Ft. Lyon etc. Co., 31 Colo. 224, 73 Pac. Rep. 249; Chicosa Irr. D. Co. v. El Moro D. Co., 10 Colo. App. 276, 50 Pac. Rep. 731; People *ex rel.* Standart v. Farmers' etc. Co., 25 Colo. 202, 54 Pac.. Rep. 626; Grand Junction etc. Co. v. Grand Junction, 14 Colo. App. 425, 60 Pac. Rep. 196.

money, to refuse to furnish or carry and deliver from such works any water so applied for, which water may be, by use of reasonable diligence in that behalf, and within the carrying or storage capacity of such ditch, canal, or reservoir, be lawfully furnished and delivered without infringement upon prior rights, and punishable by a fine of not less than $100 nor more than $5000, or imprisonment for not less than three months nor more than one year, or both.[5]

When any corporation, in defiance or by attempted evasion of the provisions of the Act, shall, after tender of compensation, refuse to deliver water to any person lawfully entitled to apply therefor, it shall be the duty of the attorney-general, upon request of the county commissioners of the proper county, or upon his otherwise receiving due notice thereof, to institute and prosecute to judgment, proceedings in *quo warranto* for the forfeiture of the corporate rights, privileges, and franchises of any such corporation so offending, or by mandamus or other proper proceedings to compel it to do its duty in that behalf. The word "person" as used in the Act shall include corporations and associations, and the plural as well as the singular.[6]

§ 1788. Regulating rates and charges for water.—The first act of the Colorado legislature, in compliance with Article XVI, Section 8, of the State constitution, regulating the rates and charges which might be made for the furnishing of water by corporations or other owners of ditches, canals, and reservoirs, was the Act of February 19, 1879.[1] And although Sections 1 and 2 of this Act were un-

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3273; Rev. Stats., 1908, Sec. 3273; Laws, 1887, p. 309, Sec. 3; Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369.

See, also, 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3257; Rev. Stats., 1908, Sec. 3257; Laws, 1887, p. 305, Sec. 4.

[6] 3 Colo. Stats., Ann., Morr. Ed., 1911, Secs. 3274, 3275; Rev. Stats., 1908, Secs. 3274, 3275; Laws, 1887, p. 310, Secs. 4, 5.

The rights and duties of a company relative to the delivery of water are fixed by the statute and not by the rules of the company. Downey v. Twin Lakes etc. Co., 41 Colo. 385, 92 Pac. Rep. 946.

A contract between a consumer and a ditch company limiting the application of the water to particular lands is valid. Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603.

[1] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3262, 3263; Rev. Stats., 1908, Secs. 3262, 3263; Laws, 1879, p. 95, Secs. 1, 2.

For Art. 16, Sec. 8, of the constitution, see Sec. 1772.

doubtedly superseded by the later Act of April 4, 1887, they are still retained in the Colorado statutes.[2]

The Act of 1887 [3] provides that the county commissioners of each county shall, at their regular sessions in each year, and at such other sessions as they in their discretion may deem proper, in view of the irrigation and harvesting season, and the convenience of all parties interested, hear and consider all applications which may be made to them by any party or parties interested, either in furnishing and delivering for compensation in any manner, or in procuring for such compensation water for irrigation or other beneficial uses, from any ditch, canal, conduit, or reservoir, the whole or any part of which shall lie in such county, which application shall be supported by affidavits showing reasonable cause for such board to proceed to fix a reasonable maximum rate of compensation for water to be thereafter delivered from such works within the county.[4]

Every such board of commissioners, if they find the facts sworn to to be in good faith and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such works, shall enter an order fixing a day, not sooner than twenty days thereafter, nor later than the third day of the next regular session of their board, when they will hear all parties interested in such water works, or in procuring water therefrom, for any of said uses, as well as all documentary or oral evidence or depositions, taken according to law, touching the

This Act was construed in the following cases: Union Colony v. Elliott, 5 Colo. 371; Northern Colo. Irr. Co. v. Poupprit, 47 Colo. 490, 108 Pac. Rep. 23; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; South Boulder D. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Grand Junction Irr. Co. v. Fruita Imp. Co., 37 Colo. 483, 86 Pac. Rep. 324.

2 See citations, *supra*.

3 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3265-3270; Rev. Stats., 1908, Secs. 3265-3270; Laws, 1887, p. 291, Secs. 1-6.

Board of County Commissioners of Montezuma Co. v. Montezuma etc. Co., 39 Colo. 167, 89 Pac. Rep. 794, holding that "reasonable compensation" implies that something must be given for the service, and that a rate fixed affording no profit to the ditch owner may be enjoined.

4 Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Montezuma County v. Montezuma Water Co., 39 Colo. 166, 89 Pac. Rep. 794; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142.

said ditch or other works, and the cost of furnishing water therefrom. At the time so fixed all persons interested on either side of the controversy may appear by themselves, their agents, or attorneys. The applicant, if the application be made by a party desirous of procuring water, shall, within ten days from the time of entering of such order, cause a certified copy of such order to be served upon the owners of such works, or upon the president, secretary, or treasurer, if they be owned by a corporation having such officers. If the applicant be the owner or party controlling such works, such notice shall be given by causing printed copies of such order in handbill form, in conspicuous type, to be posted securely in ten or more public places throughout the district watered from such works (if the water is used for irrigation), and one copy shall be posted for every mile in length of such ditch; but if such ditch or other works be for the supply of water for milling or mining, it shall be sufficient to serve one copy on the parties taking water therefrom.

The said board may adjourn or postpone any hearing from time to time as may be found necessary; and they shall hear and examine all legal testimony or proofs offered by any party interested concerning the original cost of such works, and the cost and expense of maintaining and operating the same; they may issue subpoenas for witnesses and for the production of all books and papers required for evidence before them. The District Court of the proper county may compel obedience to subpoenas or punish for refusal to obey.

"Upon hearing and considering all the evidence and facts and matters involved in the case, said board of commissioners shall enter an order describing the ditch, canal, conduit, reservoir, or other work in question with sufficient certainty and fixing a just and reasonable maximum rate of compensation for water to be thereafter delivered from such ditch or other work as last aforesaid, within the county in which such commissioners act, and such rate shall not be changed within two years from the time when they shall be so fixed, unless upon good cause shown."

Every person who swears falsely in such proceedings shall be deemed guilty of perjury.

"All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed, but such repeal shall not work any

interference with any proceeding by any board of county commissioners now pending, saving that any such proceeding may, at the request of either party, be carried on to completion under the provisions hereof."[5] This repealing section undoubtedly repealed all provisions as to the procedure in such matters as provided for in the Act of February 9, 1879, but it did not repeal Section 3 of said Act relating to the right of persons to continue to purchase water.[6]

§ 1789. **Anti-royalty Act.**—It shall not be lawful for any person owning or controlling any ditch, canal, or reservoir carrying or storing water for compensation for any of the beneficial uses named, to demand, bargain for, accept, or receive from any person who may apply for water for any of the aforesaid purposes any money or other valuable thing whatsoever, or any promise or agreement therefor, directly or indirectly, as a royalty, bonus, or premium prerequisite or condition precedent to the right or privilege of applying, or bargaining for, or procuring such water. "But such water shall be furnished, carried, and delivered upon payment or tender of the charges fixed by the county commissioners of the proper county as is, or may be, provided by law. Any and all moneys, and every valuable thing, or consideration of whatsoever kind, which shall be so, as aforesaid, demanded, charged, bargained for, accepted, received, or retained, contrary to the provisions of this section, shall be deemed and held an additional and corrupt rate, charge, or consideration for the water intended to be furnished and delivered therefor, and wholly extortionate and illegal; and when paid, delivered, or surrendered may be recovered back, . . . together with costs of suit, including reasonable attorneys' fees, by proper action in any court having jurisdiction. And in addition thereto, every person so collecting or demanding illegal rates shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $100 nor more than $5000, or by imprisonment for not less than three months nor more than one year, or by both."[1]

[5] 3 Colo. Stats. Ann., Morr. Ed., Sec. 3270; Rev. Stats., 1908, Sec. 3270.

[6] Sec. 3 of said Act is now found in 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3264; Rev. Stats., 1908, Sec. 3264.

See ditch, etc. companies—When compelled to furnish water, Sec. 1787.

[1] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3271, 3272; Rev. Stats., 1908, Secs. 3271, 3272; Laws, 1887, p. 308, Secs. 1, 2.

Northern Colo. Irr. Co. v. Richards,

§ 1790. The adjudication of rights—Jurisdiction.—In a previous chapter of this work we have discussed the statutory adjudication of water rights.[1] The Colorado statutes provide for full special proceedings for the adjudication of such rights. These proceedings are more elaborate than those found in any of the other States, and are the result of various Acts of the legislature. The provisions for these statutory adjudications, as determined by the Supreme Court of the State, only apply to actions as between main ditches which take their water directly from the natural streams, and do not apply to controversies between the actual consumers under those ditches. The adjudication as between the rights of the latter is left to the ordinary proceedings in equity.[2]

For the purpose of the adjudication of such rights, the Act of 1879 [3] provides that jurisdiction is thereby vested exclusively in the District Court of the proper county; but when any water district shall extend into two or more counties, the District Court of the county in which the first regular term after the first day of December in each year shall soonest occur, according to the law then

22 Colo. 450, 45 Pac. Rep. 423; Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369.

For the duty of companies to furnish water, see Secs. 1785-1787.

1 See Chap. 79, Secs. 1567-1584.

2 For the adjudication of water rights in equity, see Chap. 78, Secs. 1530-1566.

"That the question of the title of sundry owners and users of water covered by the priorities awarded to the same ditch can not be litigated or settled in the adjudication proceedings is well settled in this State." Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406.

"The rights, if any, which plaintiff asserts, must be determined in an appropriate action brought for that purpose." Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149.

See, also, Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 Pac. Rep. 849; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Hallet v. Carpenter, 37 Colo. 30, 86 Pac. Rep. 317; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

"The Acts of 1879 and 1881 are in the nature of police regulations to secure the ordinary distribution of water for irrigation purposes, and to this end they provide a system of procedure for determining the priority of rights as between carriers. . . . The authority of the general assembly to enact laws regulating the distribution of water to actual appropriators, provided they do not substantially affect the constitutional or vested rights, is undoubted." Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

3 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3276; Rev. Stats., 1908, Sec. 3276; Laws, 1879, p. 99, Sec. 19.

in force, shall be the proper court in which the proceedings shall be commenced; "but where said proceedings shall be once commenced, by the entry of an order appointing a referee in the manner and for the purpose hereinafter in this Act provided, such Court shall thereafter retain exclusive jurisdiction of the whole subject until final adjudication thereof is had, notwithstanding any law to the contrary now in force." [4]

The Act of 1881 [5] provides that all parties may be protected in their lawful rights to the use of water for irrigation, who should, on or before the first day of June, 1881, file with the clerk of the district court a statement of claim, under oath, giving a complete description of the right and the ditch, canal, or reservoir through which the water was taken or in which it was stored and if such ditch was without a name the owners must choose and adopt one, and the name of the natural stream from which the water was taken and the present capacity of the works and also the number of acres

4 Platte Valley etc. Co. v. Northern Colo. etc. Co., 12 Colo. 525, 21 Pac. Rep. 711; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Ft. Morgan Land Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Presbyterian College v. Poole, 25 Colo. 50, 52 Pac. Rep. 1103; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Crawford Clipper D. Co. v. Needle Rock D. Co., 50 Colo. 176, 114 Pac. Rep. 655; Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Rollins v. Fearnley, 45 Colo. 319, 101 Pac. Rep. 345; Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Combs v. Farmers' etc. D. Co., 38 Colo. 420, 88 Pac. Rep. 396; Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149; Laguna etc. Co. v. Rocky Ford etc. Co., 42 Colo. 522, 95 Pac. Rep. 287; Farmers' etc. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120; Central Trust Co. v. Culver, 35 Colo. 93, 83 Pac. Rep. 1064; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231.

See, also, for the statutory adjudication of rights, Secs. 1567-1584.

5 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3277; Rev. Stats., 1908, Secs. 3277-3279; Laws, 1881, p. 142, Secs. 1-3.

of land lying under and being or proposed to be irrigated from such ditch, canal, or reservoir.[6]

By the Act of 1903 [7] it was further provided that the owner or owners of any water rights derived from any natural stream, acquired by appropriation and used "for any beneficial purpose other than irrigation," may have his or their right established and decreed by petitioning the district court and by complying with the procedure and requirements of the law now applicable to the adjudication of water rights for irrigation purposes.[8] In determining such rights it is the duty of the court to recognize and protect, as far as possible under the constitution of the State and the decisions of the appellate courts applicable thereto, the vested right of all appropriations of water for irrigation purposes, especially where such rights have been duly adjudicated by the court in statutory proceedings for the determination of the priority of rights to the use of water for irrigation purposes.[9]

§ 1791. The adjudication of rights—Procedure.—When at any time any one or more persons, associations, or corporations interested as owners of any ditch, canal, or reservoir shall present to the district court of the proper county a motion, petition, or application in writing, praying said court to adjudicate the priorities of rights to use of water for irrigation or other purposes [1] between the several ditches, canals, and reservoirs in such districts, the court shall appoint a day for commencing to hear and take evidence in such adjudication at which time it shall be the duty of the court to hear all evidence which may be offered by or on behalf of any one interested.[2]

6 Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Broadmoor D. Co. v. Brookside W. Co., 24 Colo. 541, 52 Pac. Rep. 792; Great Plains W. Co. v. Lamar etc. Co., 31 Colo. 96, 71 Pac. Rep. 1119; Combs v. Farmers' High Line etc. Co., 38 Colo. 420, 88 Pac. Rep. 396; Gunnison County v. Hider, 47 Colo. 443, 107 Pac. Rep. 1068; Ft. Lyons etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

7 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3280; Rev. Stats., 1908, Sec. 3280; Laws, 1903, p. 297, Sec. 1.

8 For decrees adjudicating rights other than for irrigation, see Sec. 1792; Napier v. Glenwood etc. Co., 49 Colo. 208, 112 Pac. Rep. 323.

9 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3282; Rev. Stats., 1908, Sec. 3282; Laws, 1903, p. 289, Sec. 3.

1 See preceding section, No. 1790.

2 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3284; Rev. Stats., 1908,

Upon the subject of notice it is provided that upon the making of such order, the clerk must publish a copy of the same and shall notify all persons interested to appear at such court at the time so appointed. Ten printed copies shall also be posted in ten public places in such water district, not less than 20 days before the day so appointed. Proof of publication and posting the said notices must be made and filed with the clerk. In addition thereto, the party or parties moving such adjudication shall cause a written or printed copy of the notice to be served on every person, association, or corporation shown by the statement of claim on file.[3] In case any party is not served as provided, the clerk must mail a copy directed to the address of the party, shown in the statement of claim. After a general decree has been entered in such water district, no further publication or posting of such notice or any notice of such individual subsequent proceedings shall be required unless by order of the court upon good cause shown therefor; and in all such proceedings subsequent to the entry of such general decree, written notice shall be given in such manner as is now or may hereafter be provided for the service of summons in other civil cases.[4]

If for any cause the judge of said court shall deem it impracticable or inexpedient to proceed to hear such evidence in open court, he shall, instead of the order mentioned above, make and cause to be entered of record an order appointing some discreet person, prop-

Sec. 3284; Laws, 1881, p. 144, Sec. 4; Platte etc. Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 Pac. Rep. 711; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729; Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Broadmoor D. Co. v. Brookside W. Co., 24 Colo. 541, 52 Pac. Rep. 792; Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231; New Loveland etc. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Lake Fork D. Co. v. Haley, 28 Colo. 513, 67 Pac. Rep. 158; Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Gunnison County v. Hider, 47 Colo. 443, 107 Pac. Rep. 1068.

[3] For such statement, see Sec. 1790.

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3286-3289; Rev. Stats., 1908, Secs. 3286-3289; Laws, 1881, p. 147, Secs. 6-8; Laws, 1905, p. 344, Sec. 1; Napier v. Glenwood etc. Co., 49 Colo. 208, 112 Pac. Rep. 323; Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770.

erly qualified, a referee of said court, to whom shall be referred the entire matter of the taking of the testimony and of reporting the same to the court. The referee must then cause the notice as above set forth to be published, posted, and served of the time and the place of the hearing. The said referee, at the times and places mentioned in his notice, must take all evidence offered. He is given full power to administer oaths and subpoena witnesses and to adjourn the hearing from time to time. Upon the closing of the testimony the referee shall proceed to carefully examine the same and to make an abstract of all testimony and proofs in his possession concerning each ditch, canal, and reservoir separately and shall number each ditch and canal in order, and likewise each reservoir, each class consecutively, and also number the several appropriations, and shall make a separate findings of fact connected with each ditch, canal, and reservoir, and he shall prepare a draft of a decree in accordance with his said findings; which decree so prepared by him shall be returned with his report to the court. Upon the filing of said report the court, or judge thereof in vacation, shall cause an order to be entered setting some day when the court shall proceed to hear and determine the report, at which time any party may appear and move exceptions to any matter in the finding or decree made by the referee and after hearing the same the court shall, if the decree reported be approved, cause the same to be entered of record or he may make such modifications thereof or other decree as shall be found just and conformable to the evidence and the true intent of the law.[5]

The district court shall have power to make all orders and rules consistent with this Act, which may be found necessary and expedient, as well as touching the proceedings in court as of the acts and doings of the referee; "and this Act shall be construed liberally in all courts in favor of securing to all persons interested the just determination and protection of their rights. No person, associa-

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3291-3306; Rev. Stats., 1908, Secs. 3291-3306; Laws, 1881, p. 149, Secs. 10-21, 33; Laws, 1885, p. 259, Sec. 28; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Napier v. Glenwood etc. Co., 49 Colo. 208, 112 Pac. Rep. 323; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Dorr v. Hammond, 7 Colo. 79, 1 Pac. Rep. 693; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Rio Grande etc. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

tion, or corporation representing any ditch, canal, or reservoir shall be permitted to offer any evidence before said referee until he, she, or they shall have filed a statement of claim in substance the same in all respects as is required to be filed under the provisions of Section 1 hereof."[6] No claim of priority of any person on account of any ditch, canal, or reservoir as to which he, she, or they shall have failed or refused to offer evidence under any adjudication herein provided for, shall be regarded by any water commissioner in times of scarcity of water, or until a decree adjudging such priority shall have been made.[7]

§ 1792. The adjudication of rights—The decree and judgment.—Upon the subject of decrees in such actions, the Court must consider all such evidence, together with any and all evidence, if any, which may have been theretofore taken in said district by any referee, and also the arguments of the parties or their counsel, and shall ascertain and find from such evidence as near as may be the date of the commencement of such ditch, canal, or reservoir, together with the original size and carrying capacity thereof, the time of the commencement of each enlargement or extension thereof, if any, with the increased capacity thereby occasioned, the time, spent, severally, in such construction and enlargement and extension, if any, the nature of the work, and all such facts as may tend to show the compliance with the law. And the court shall determine the matters put in evidence "and make and cause to be entered a decree determining and establishing the several priorities of right, by appropriation of water of the several ditches, canals, and reservoirs in such water district concerning which testimony shall have been offered, each according to the time of its said construction and enlargement or enlargements or extensions, with the amount of water which shall be held to have been appropriated by such construction and enlargements or extensions, describing such amount by cubic feet per second of time, if the evidence shall show sufficient

[6] See Sec. 1574; 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3315; Rev. Stats., 1908, Sec. 3315; Windsor Res. Co. v. Lake Side D. Co., 44 Colo. 214, 98 Pac. Rep. 729; Broadmoor D. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Union Colony v. Elliott, 5 Colo. 371.

[7] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3316; Rev. Stats., 1908, Secs. 3315, 3316; Laws, 1881, p. 155, Secs. 24, 25.

data to ascertain such cubic feet, and if not by width, depth, and grade, and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal, or reservoir in such decree. Said court shall further order that each and every party interested or claiming any such ditch, canal, or reservoir shall receive from the clerk, on payment of a reasonable fee therefor to be fixed by the court, a certificate under seal of the court showing the date or dates and amount or amounts of appropriations adjudged in favor of such ditch, canal, or reservoir under and by virtue of the construction, extension, and enlargements thereof severally; also specifying the number of said ditch and of each priority to which the same may be entitled by reason of such construction, extension, and enlargements."[1]

In case of the appropriation of water for irrigation, the court, in making its decree shall also number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order according to the priority of appropriation of water thereby made by the original construction thereof, as near as may be, having reference to the date of each decree as rendered, and shall also number the reservoirs in like manner, separately from the ditches and canals, and shall further number each several appropriation of water consecutively beginning with the oldest appropriation without respect to the ditches or reservoirs by means of which such appropriations were made, whether such appropriation shall have been made by means of construction, extension, or enlargement, which number of each ditch, canal, or reservoir together with the number or numbers of any appropriations of water held to have been made by means of construction, extension, or enlargement thereof, shall be incorporated in said decree and certificate of

1 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3284; Rev. Stats., 1908, Sec. 3284; Laws, 1881, p. 144, Sec. 4; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; Lake Fork D. Co. v. Haley, 28 Colo. 513, 67 Pac. Rep. 158; Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

A decree embraces rights of both consumers and carriers and operates as an estoppel upon consumers in establishing their separate rights. Combs v. Farmers' etc. Co., 38 Colo. 420, 88 Pac. Rep. 399.

An erroneous decree not void is not subject to collateral attack. Lake Fork D. Co. v. Haley, 28 Colo. 513, 67 Pac. Rep. 158; Water Supply etc. Co. v. Larimer etc. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Water Supply etc. Co. v. Tenney, 24 Colo 344, 51 Pac. Rep. 505.

the clerk to be issued to the claimants, so as to show the order of priority of such ditch or canal and of such reservoir and also such successive appropriations of water pertaining thereto, for the information of the water commissioner of the district in distributing the water.[2]

In the decrees in cases of appropriations for purposes other than that of irrigation the said district court shall number consecutively and chronologically all such water rights, similar to the system of numbering priorities for irrigation purposes, designating the amount of each appropriation in cubic feet per second of time, and shall specifically state the particular purpose for which said appropriation is granted, that is, whether the same be for power or manufacturing purposes, domestic use, storage purposes, or any other beneficial use of said waters. All of such appropriations other than appropriations for irrigation purposes shall be designated by and in one series of consecutive numbers herein provided for.[3]

Each party upon the payment of the fee therefor is entitled to receive a certificate under the seal of the court showing the date or dates, the amount or amounts of the appropriations adjudged to his particular ditch. The holder of such certificate shall exhibit the

[2] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3290; Rev. Stats., 1908, Sec. 3290; Laws, 1881, p. 149, Sec. 9.

See cases cited in last note.

Also, Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79; Gunnison County v. Hider, 47 Colo. 443, 107 Pac. Rep. 1068; Ft. Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505.

A consumer of water under a decree may by contract waive priority and be compelled to prorate with consumers. O'Neil v. Ft. Lyon C. Co., 39 Colo. 487, 90 Pac. Rep. 849.

"A senior reservoir is entitled to but one filling during the same season on the same priority before junior reservoirs are filled once." Windsor Res. etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729; Colorado Mill etc. Co. v. Larimer etc. Co., 26 Colo. 47, 56 Pac. Rep. 185.

The Court has the power of determining the date of priority of an uncompleted canal. Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891.

See, also, Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261.

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3281; Rev. Stats., 1908, Sec. 3281; Laws, 1903, p. 297, Sec. 2; Napier v. Glenwood etc. Co., 49 Colo. 208, 112 Pac. Rep. 323.

same to the water commissioner who shall be guided thereby in his distribution of the water. Said certificate must also be recorded in each county into which the ditch, canal, or reservoir shall extend, and said certificate shall be *prima facie* evidence of so much of said decree as shall be recited therein, in any suit or proceeding in which the same may be relevant.[4]

The clerk of any court of the State issuing judicial decrees fixing the priorities of appropriation of water for irrigation and other beneficial purposes shall, within ten days after such decrees have been entered, forward one certified copy to the State Engineer and one copy to the irrigation division engineer having jurisdiction over the water district in which said decree shall have been entered. Upon the receipt of such copies both the State Engineer and the division engineers shall file and preserve the same and make a tabulated statement of such decrees.[5]

§ 1793. The adjudication of rights—Appeal—Independent suits—Re-argument and review.—Any party or parties representing any ditch, canal, or reservoir, or any number of parties representing two or more which are affected in common with each other by any portion of such decree, may have an appeal from said district court to the Supreme Court. The appellants must file a statement in writing, under oath, which statement shall show that they claim a valuable interest in ditch, canal, or reservoir, or two or more of such which are affected in common with each other by some portion of the decree, also stating the name or names, or otherwise, the description of any one or more ditches, canals, or reservoirs, which by said decree derive undue advantage in respect of priority as against that of those represented by the appellants. An order may then be made by the judge allowing the appeal, who shall fix the amount of the appeal bond. This order shall then be entered of record, a copy of which must be served upon each of the appel-

4 2 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3283-3285; Rev. Stats., 1908, Secs. 3283-3285.

See cases cited above.

Also, Gunnison County v. Hider, 47 Colo. 443, 107 Pac. Rep. 1068.

5 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3284, 3346, 3349; Rev. Stats. Ann., 1908, Secs. 3284, 3346, 3349; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; New Loveland etc. Co. v. Consolidated etc. Co., 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266.

lees and also published and posted. The transcript of the record must be filed with the clerk of the Supreme Court within six months after said appeal shall have been allowed. "Only so much of the decree appealed from and so much of the evidence as shall affect the appropriations of water by means of the construction or enlargement or re-enlargement of the several ditches, canals, and reservoirs mentioned in the order allowing the appeal, need be copied into the bill of exceptions.

"The Supreme Court, in all cases in which judgment is rendered, and any part of the decree appealed from is reversed, and in which it may be practicable, shall make such decree in the matters involved in the appeal as should have been made by the district court, or direct in what manner the decree of that court shall be amended." Costs on appeal shall be awarded as the court in its discretion shall hold to be equitable.[1]

Independent actions are provided for and nothing in the Act or in any decree rendered under the provisions thereof shall prevent any person, association, or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this Act in the water district in which such rights may be

1 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3307-3312; Rev. Stats., 1908, Secs. 3307-3312; Laws, 1881, p. 156, Secs. 27-31; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Kerr v. Dudley, 26 Colo. 457, 58 Pac. Rep. 610; Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. Rep. 142; Means v. Gotthelf, 31 Colo. 168, 71 Pac. Rep. 1117; Rio Grande etc. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726; Farmers' Union D. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Needle Rock D. Co. v. Crawford-Clipper D. Co., 32 Colo. 209, 75 Pac. Rep. 424; Randall v. Rocky Ford D. Co., 29 Colo. 430, 68 Pac. Rep. 240; Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794; Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Finley v. Cache La Poudre etc. Co., 44 Colo. 234, 98 Pac. Rep. 173; Windsor etc. Co. v. Lake Supply etc. Co., 44 Colo. 214, 98 Pac. Rep. 729; Napier v. Glenwood etc. Co., 49 Colo. 208, 112 Pac. Rep. 323; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Catlin etc. Co. v. Burke, 22 Colo. 418, 45 Pac. Rep. 387; Kerr v. Dudley, 26 Colo. 457, 58 Pac. Rep. 610; Miller v. Taylor, 6 Colo. 41; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901.

claimed, save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall affect the distribution and use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner shall continue to distribute the water according to the right of priority determined by such decree until in such suit it shall be otherwise determined and such water commissioner have official notice of the same. After four years from the rendering of the final decree in any water district all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in the case of suits before then brought, "and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree."[2]

The district court shall have the power to order, for good cause shown, and upon terms just to all parties a re-argument or review, with or without additional evidence, of any decree made under the provisions of the Act, whenever said court or judge shall find from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted; but no review or re-argument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of.[3]

[2] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3313, 3314; Rev. Stats., 1908, Secs. 3313, 3314; Laws, 1881, p. 159, Secs. 34, 35; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Peck Lateral D. Co. v. Pella Irr. D. Co., 19 Colo. 222, 34 Pac. Rep. 988; Broad Run etc. Co. v. Duel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794; Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Fort Lyon C. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Boulder etc. Co. v. Lower Boulder etc. Co., 22 Colo. 115, 43 Pac. Rep. 540; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891.

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3318; Rev. Stats., 1908, Sec. 3318; Laws, 1881, p. 156, Sec. 26; Greer v. Heiser, 16 Colo. 306, 26 Pac.

§ 1794. Damages from leakage or overflow.—The owners of reservoirs are made the insurers against all damages caused thereby, in the following language:

"The owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom or by floods caused by breaking of the embankments of such reservoirs.[1]

"None of the provisions of this Act shall be construed as relieving the owners of any such reservoir from the payment of such damages as may be caused by the breaking of the embankments thereof, but in the event of any such reservoir overflowing, or the embankments, dams, or outlets breaking or washing out, the owners thereof shall be liable for all damages occasioned thereby."[2]

Also, under the Act of April 7, 1899,[3] where the charge and control of State reservoirs were left to the county commissioners wherein the same were situated, it is provided that the county shall assume and be held responsible for any damages resulting from breakage of dams or water discharges therefrom.

Rep. 770; Kerr v. Dudley, 26 Colo. 457, 58 Pac. Rep. 610; Sterling D. Co. v. Iliff etc. Co., 24 Colo. 491, 52 Pac. Rep. 669; Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Broad Run etc. Co. v. Duel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Daum v. Conley, 27 Colo. 56, 59 Pac. Rep. 753; Crippen etc. Co. v. Burroughs, 27 Colo. 155, 60 Pac. Rep. 487; Peterson v. Durkee, 15 Colo. 258, 62 Pac. Rep. 370; Child v. Whitman, 7 Colo. App. 117, 42 Pac. Rep. 601; Ft. Lyon Canal Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891; Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794; Rio Grande etc. Co. v. Prairie D. Co., 27 Colo. 225, 60 Pac. Rep. 726; Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Magill v. Hyatt, 20 Colo. App. 542, 80 Pac. Rep. 472.

1 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3204; Rev. Stats., 1908, Sec. 3204; Laws, 1879, p. 107, Sec. 40; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Canyon City etc. R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. Rep. 1127; Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water & Min. Cas. Ann. 610; Larimer County D. Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. Rep. 1111.

See, also, Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

2 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3213; Rev. Stats., 1908, Sec. 3213; Laws, 1899, p. 316, Sec. 9; Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79.

3 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3562; Rev. Stats., 1908, Sec. 3562; Laws, 1899, Chap. 140, p. 350, Sec. 1.

§ 1795. Liens on ditches, canals, and other works.—Upon the subject of liens the Colorado statute provides that mechanics, material-men, contractors, subcontractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any ditch, flume, aqueduct, reservoir, or tunnel, also engineers who have furnished plans for the same, shall have a lien upon the property upon which they have rendered service or bestowed labor or for which they have furnished materials, which lien may be foreclosed upon following the proceeding prescribed by the statute.[1] "Such liens shall alike attach to rights of water and rights of way that may in any manner pertain to any kind of property hereinbefore specified and to which such liens attach. In case of corporations such liens shall attach to all the franchises and charter privileges that may in any manner pertain to said specified property."[2]

The owners of ditches and canals must carefully maintain the embankments thereof, "so that the waters of such ditch may not flood or damage the premises of others," etc.[3]

Any person or company who performs labor or furnishes material or supplies for constructing, altering, or repairing any well, by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same upon such well and upon the materials and machinery and equipment and supplies so furnished, and upon the interest that the owner has in the real property upon which such well is situated; said lien may be foreclosed according to the laws relating to mechanics' liens.[4]

By the Act of May 29, 1911,[5] it was provided for the protection

[1] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 4025-4047; Rev. Stats., 1908, Secs. 4025-4047; Laws, 1899, p. 261, Secs. 1-20; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. Rep. 806; Empire etc. Co. v. Engley, 18 Colo. 388, 33 Pac. Rep. 153.

[2] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 4031; Rev. Stats., 1908, Sec. 4031.

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3233; Rev. Stats., 1908, Sec. 3233; Greeley Irr. Co. v. House, 14 Colo. 549, 24 Pac. Rep. 329; Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985; Platte etc. Co. v. Lee, 2 Colo. App. 184, 29 Pac. Rep. 1036.

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 4049, 4050; Rev. Stats., 1908, Secs. 4049, 4050; Laws, 1903, p. 355, Sec. 1.

[5] Laws, 1911, Chap. 163, p. 490, Secs. 1-3.

of laborers, mechanics, ranchmen, farmers, merchants, and other persons furnishing work or labor, material, ranch or farm products, provisions, goods, or supplies to contractors or subcontractors in the construction of railroads, reservoirs, and irrigation canals, by compelling the owners to require a bond for such protection from the contractors.

"No remedy given in this Act shall be construed as preventing any person from enforcing any other remedy which he otherwise would have had, except as otherwise herein provided. The practice under this Act shall be in accordance with the Code of Civil Procedure of the State of Colorado. In case of two or more owners, contractors, or subcontractors interested in the same contract, the rule of procedure shall be the same as in the case of one such."[6]

All co-owners of irrigating ditches shall pay for the necessary cleaning and repairing, the proportion that their respective interests bear to the total expense. Upon the failure of one or more co-owners, upon the written request of the owners of one-third of the carrying capacity to board of directors to assist in cleaning and repairing such ditch, the other co-owners shall proceed to clean the same and shall have a lien upon the interest in such ditch owned by such delinquent owner for his proportion of such cost and expenses. This lien may be foreclosed as provided by the statute.[7]

§ 1796. The irrigation district law.—By the Act approved May 3, 1905,[1] the legislature of Colorado enacted an irrigation district law based largely upon the "Wright Act" of California.[2]

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 4048; Rev. Stats., 1908, Sec. 4048.

[7] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 4051-4060; Rev. Stats., 1908, Secs. 4051-4060; Laws, 1893, p. 312, Secs. 1-10; Strang v. Osborne, 42 Colo. 187, 94 Pac. Rep. 320.

[1] This Act as subsequently amended is found in 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3440-3494g; Rev. Stats., 1908, Secs. 3440-3494, as afterward amended and supplemented by the Act of April 5, 1909, Laws, 1909, Chap. 178, p. 429; Laws, 1905, pp. 246-274, as afterward amended and supplemented as herein indicated.

Previous to the enactment of the above, the Act approved April 12, 1901, Laws, 1901, Chap. 87, p. 198, provided for the organization of such districts; but by the Act of 1905 the earlier Act with its amendments was repealed, and this Act substituted in lieu thereof.

The Act of 1901 was held constitutional. Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313.

[2] For a full discussion of this law, see Chap. 70, Secs. 1386-1432.

Upon the subject of organization of such districts and the election of their officers, it is provided that it must be by a petition to the board of county commissioners, "filed by a majority of the resident freeholders within said proposed district, and who shall also be the owners in the aggregate of a majority of the whole number of acres belonging to the resident freeholders within said proposed district."[3] Such petition must be considered by the board and the boundaries fixed; and, if allowed, the board must call for an election upon the proposition. At all elections held under the provisions of the Act all persons shall be entitled to vote who are resident freeholders of agricultural lands within the district, or who are owners of lands to the extent of forty acres or more and reside within any county in which part of such district shall extend, and who are qualified electors under the laws of the State. If it appears at such election that at least a majority of the legal voters have voted "yes," the said board, by an order entered on their minutes, shall declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall also declare officers who have been duly elected. And the regular election thereafter of the officers of such district shall be held on the first Tuesday after the first Monday in December in each year.[4]

The powers and duties of the board of directors are to make all necessary contracts, to acquire the necessary property and rights by conveyance or by condemnation if necessary; but no contract exceeding the consideration of $10,000 and not exceeding $25,000 shall

Upon the proposition of irrigation districts, Mr. Charles W. Comstock, state engineer of Colorado, in his reports for the years 1909-1910, page 21, makes the following statement: "It is believed that the organization and financing of irrigation districts should be subject to some sort of State control. The present irrigation district law, while facilitating the formation of mutual enterprises in which each man in securing the irrigation of his own land helps to irrigate that of his neighbor, unfortunately lends itself to the manipulation of shrewd and unscrupulous promoters who do not hesitate to take advantage of ignorance on the part of many land owners with regard to financial and engineering problems to promote districts which may or may not have within them the elements of success."

3 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3441; Rev. Stats., 1908, Sec. 3441.

Such petition must be properly signed. Ahern v. High Line Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963.

4 2 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3440-3449; Rev. Stats., 1908, Secs. 3440-3449; Laws, 1905, p. 246, Secs. 1-10; Secs. 4, 6, as amended, Laws, 1907, p. 488, secs. 1, 2.

be binding unless the same shall be authorized by the legal electors in writing, and no contract in excess of $25,000 shall be binding until such contracts shall have been ratified at an election in the manner as provided for the issue of bonds. The said board may also adopt necessary rules and regulations for the distribution of water. "All waters distributed shall be apportioned to each land owner *pro rata* to the lands assessed under this Act within such district." The said board may rent or lease water for the use of the land owners in the district. The board may also lease or rent water to settlers or occupants of the public domain.[5] The board shall hold regular meetings, all of which shall be public. The title to all property acquired shall vest in the district. The district may sue and be sued.[6]

Provisions are made for the issuance of bonds by holding an election therefor, also for their sale and payment.[7] "Said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district and the real property of the district shall be and remain liable to be assessed for such payments as herein provided."[8]

It is made the duty of the board on or before September first of each year to determine the amount of money required to meet the maintenance, operating, and current expenses for the ensuing year and to certify such amount to the county commissioners. It is made the duty of the county assessor to assess "all real estate, exclusive of improvements," lying within any district. "All lands within the district for the purposes of taxation under this Act shall be valued by the assessor at the same rate per acre: *Provided,* that in no case shall any land be taxed for irrigation purposes under this Act, which from any natural cause can not be irrigated or is incapable of cultivation."

The county commissioners must then levy the amount of the assessment or rate. For the purpose of the collection of the assess-

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3450; Rev. Stats., 1908, Sec. 3450; Laws, 1905, p. 253, Sec. 11; as amended, Laws, 1909, p. 422, Sec. 1.

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3451-3453; Rev. Stats., 1908, Secs. 3451-3453; Laws, 1908, p. 254, Secs. 11-14.

[7] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3454-3456; Rev. Stats., 1908, Secs. 3454-3456; Laws, 1905, p. 256, Secs. 15-17.

[8] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3456; Rev. Stats., 1908, Sec. 3456.

ment the county treasurer is made *ex officio* district treasurer. And for this purpose the revenue laws of the State are applicable.[9]

The board of directors may let all contracts and authorize the payment of all claims against the district. No indebtedness must be incurred except such as is expressly authorized by law.[10]

In case of insufficient supply of water, the board may distribute the water as they may in their judgment think best for the interest of all parties concerned. No property must be taken without just compensation.[11]

Provisions are made for the changing of boundaries of districts, either by the annexation of contiguous territory [12] or by the exclusion of lands from such district.[13] Such districts may be dissolved upon an election being held for that purpose, provided that all claims and bills have been fully satisfied.[14] Special proceedings are provided for the judicial examination and confirmation of all proceedings as to the organization of a district or any proceedings of the board.[15]

By the supplemental Act of April 5, 1909,[16] it was provided that State Agricultural College and public school lands might be included within irrigation districts, and that all such lands so included may be assessed for irrigation purposes and such assessments paid by the State treasurer.

9 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3457-3461; Rev. Stats., 1908, Secs. 3457-3461; Laws, 1905, p. 259, Secs. 18-22; Sec. 21, as amended, Laws, 1907, p. 490, Sec. 3.

See, also, Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313.

10 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3462-3467; Rev. Stats., 1908, Secs. 3462-3467; Laws, 1905, p. 262, Secs. 23-28.

11 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3468, 3469; Rev. Stats., 1908, Secs. 3468, 3469; Laws, 1905, p. 264, Secs. 29, 30.

12 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3471-3479; Rev. Stats., 1908, Secs. 3471-3479; Sec. 3471, as amended, Laws, 1911, p. 468, Sec. 1, and Sec. 3475, as amended, Laws, 1909, p. 425, Sec. 2.

13 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3480-3486; Rev. Stats., 1908, Secs. 3480-3486; Laws, 1905, p. 268, Secs. 41-47.

14 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3487, 3488; Rev. Stats., 1908, Secs. 3487, 3488; Laws, 1905, p. 270, Secs. 48, 49.

15 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3489-3493; Rev. Stats., 1908, Secs. 3489-3493; Laws, 1905, p. 271, Secs. 49-54; Ahern v. High Line Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963.

16 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-a-g; Laws, 1909, Chap. 178, p. 429, Secs. 1-7.

By the Act of June 2, 1911,[17] it was provided that for the purpose of furnishing water and securing water rights for State lands, the State board of land commissioners may petition all such lands into irrigation districts at the time or after the formation of such districts. And for this purpose the State board of land commissioners shall be considered in all respects a freeholder, so long as such lands remain unsold; but, after sale, the purchaser shall be entitled to all the rights of a freeholder. The State board shall have full power to secure to such irrigation district so furnishing the water for the irrigation of such State lands, the payment of the cost of the water rights upon the lands.

§ 1797. **The Carey Act in Colorado.**—The State of Colorado also accepted the provisions of the Carey Act and its legislature provided a complete law for the operation and enforcement of said Act.[1] "The selection, management, and disposal of said lands and all such lands as may hereafter be granted to the State of Colorado by the United States shall be vested in the State board of land commissioners of the State of Colorado, as now or hereafter constituted," etc.

It is further provided that any person, company of persons, associations, or incorporated company desiring to construct ditches, canals, or other irrigation works to reclaim land under the provisions of the Act, shall file with the board a request for the selection on behalf of the State by the board of the land to be reclaimed, designating said land by legal subdivisions. This request must be accompanied by a proposal to construct the ditch, canal, or other works necessary for the complete reclamation of said lands, and such proposal must be prepared in accordance with the rules of the board.

The person, company of persons, associations, or incorporated companies making an application to the board for the selection of such lands shall file with the State Engineer an application to appropriate water for the reclamation of the lands described in the request to the board. This application shall be of form prescribed by the State Engineer. The board must examine the said proposal

[17] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 5218-a to 5218-c; Laws, 1911, Chap. 85, p. 211, Secs. 1-3.

[1] 4 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 5138-5160; Rev. Stats., 1908, Secs. 5138-5160.

and, if feasible in all respects, it must be approved by the board, which shall instruct the register to file in the local land office a request for the withdrawal of the land described in said proposal. "No request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, or capacity of the works, or as to the character of the land sought to be irrigated, shall be approved by the board." In case of the rejection of the proposal a second one may be made.

Upon the withdrawal of the land by the Department of the Interior it is made the duty of the board to enter into a contract submitting the proposal for the construction of the said proposed works.

No proposal shall be considered by the board which requests a greater time than five years for the construction of the works and all proposals shall state that the work shall begin within six months from the date of the contract, and that at least one-tenth of the construction shall be completed within two years from the date of the contract; that the construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract for a period of six months after the second year, without the sanction of the board, will forfeit to the State all rights under said contract, provided that upon good cause extensions of time may be made by the board. Provisions are also made for the forfeiture of the rights acquired under the contract in case of default and the sale of the property.

The State is exempted from liability for any work constructed under any contract made within the provisions of the Act.

Immediately upon the withdrawal of any land and the inauguration of the work by the contractors, it is made the duty of the board to give public notice that said land is open for settlement and the price and terms upon which said land will be sold to settlers by the State. Any citizen of the United States may make application to the board to enter any of said land in an amount not exceeding 160 acres. Such application must be accompanied by a certified copy of the contract for a perpetual water right made and entered into by the party making application, with the person, company, or association who have been authorized by the board for reclamation of said lands. All applications for entry shall be accompanied by the payment of 25 cents per acre, which shall be paid as a partial pay-

ment on the land if the application is allowed. "The board shall dispose of all lands accepted by the State under the provisions of this Act, at a uniform price of 50 cents per acre." It is made the duty of the settlers within one year to cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two years after his notice that the company is prepared to furnish water, the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from said notice the settler shall appear before the register or judge or clerk of the district court to make final proof of reclamation.

A lien is given for deferred water right payments which may be foreclosed and sold. The State board of land commissioners is given power to provide suitable rules for the filing of proposals for construction of irrigation works, and for entry and payment of the land by settlers. The board is required to issue on or before the 13th day of November of each year, setting forth in detail the names, location, and character of the irrigation works in process of construction, the acreage and legal subdivisions of land intended to be reclaimed, and other necessary facts prescribed by the Act.

§ 1798. **The drainage of lands.**—By the Act approved April 11, 1903,[1] whenever any person, company, or corporation desires the construction, enlargement, or extension of any ditch, drain, or water course for the purpose of draining and reclaiming seeped or marshy land, they shall file with the board of county commissioners a petition signed by one or more of the land owners who own or represent the major portion of the land which would be affected by the proposed improvement. The petition must set forth the necessity for such improvement and the full details relative thereto. A bond must be given by the petitioner, conditioned to pay all expenses incurred by the county or counties on account of such improvement. The county commissioners must then appoint a board of viewers of three disinterested persons, residents of the county, who in turn shall select a competent engineer to assist them. The board shall notify all resident land holders 20 days prior to the date

1 3 Colo. Stats. Ann., Morr. Ed., 1911; Secs. 3188-3200; Rev. Stats., 1908, Secs. 3188-3200; Laws, 1903, p. 209, Secs. 1-13.

See, also, for drainage districts, Sec. 1799.

of a meeting set by them of such meeting. All persons whose lands are affected may appear and be heard. If the viewers find that the proposed improvement is not feasible, they shall so report to the county commissioners, and the costs and expenses incurred shall be paid by the original petitioners.

If, however, the improvements shall be found feasible and of use and benefit and to be desired by the owners representing a major portion of the lands affected, the board shall so report and shall include in their report a detailed recommendation of the methods to be pursued in prosecuting the work; they shall also fix and recommend the proportionate assessment for each tract of land affected. The plan so recommended may be adopted by the board, but any person may appeal from such order of the board to the district court. The work must be then let by contract to the lowest responsible bidder, and the assessments for the payment therefor must be collected by the county treasurer in the same manner as for other taxes. The right of eminent domain shall extend to all improvements constructed under the Act.

"All waters gathered by such drainage improvement shall be the property of those from whose lands the same is taken by such drainage canal, and the same shall be prorated among the different land holders from which such water is taken, according to the cost of improvement assessed against each one."

§ 1799. **Drainage districts.**—Colorado has also adopted a drainage district law modeled somewhat upon the irrigation district law [1] and somewhat upon the California drainage district law.[2]

The Act approved April 24, 1909,[3] provided for the organization, management, and control of such drainage districts. By the Act approved June 2, 1911,[4] the earlier Act of 1909 was repealed and an entirely new Act to provide for the organization and government of drainage districts was substituted in lieu thereof.

The latter Act, for the purpose of the organization of such a drainage district, provides that upon the presentation of a petition signed by a majority of the owners, whether residents or non-residents of

1 See Sec. 1798.

2 See Sec. 1757.

3 Laws, 1909, Chap. 161, p. 345, Secs. 1-23.

4 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-h to 3494-o3; Laws, 1911, Chap. 124, p. 311, Secs. 1-82.

such lands requiring drainage, to the board of county commissioners of the county where the greater portion of said lands lie, and accompanied with a map and full details thereof and praying that the board cause the question of the organization of the district to be submitted to a vote of such owners and accompanied by a bond or the cash to cover the costs of such organization, such commissioners shall cause the publication of such petition and a time to be set for the hearing upon the same. The board has the power to fix the boundaries of such district and shall make an order allowing the prayer of said petition. When the prayer of such petition is that such district may be established without an election such petition may be granted, and the county commissioners will then act as the district directors. When the petition prays that an election be held, the board shall order the same and cause notice to be published stating the time and place. At such an election three directors of the district must be elected and every owner of land within the district, who is a citizen of the United States and is a resident of the State of Colorado shall be entitled to vote at such election. And if it shall appear that a majority of the votes cast are in favor of the organization the board of county commissioners shall make an order declaring such drainage district to be duly organized under the name theretofore designated and shall cause a certified copy of such order to be filed with the county clerk of each county in which any portion of such district lies. From and after the date of such filing the organization of said district shall be complete, and "no action shall be brought or maintained or defense made affecting the validity of the organization of said district, unless the same shall have been commenced or made within one year after the entry of said order."[5]

The board of directors shall elect a president from the members and shall appoint a secretary and adopt a seal. The board shall have the care and management of the affairs and business of the district, and shall fix the compensation of all employees. The board may cause surveys to be made and let contracts for the works, and may acquire rights of way for the same, by condemnation or otherwise, but they shall have no power to authorize any expenditure involving more than $5,000 without the written consent of the land

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-h to 3494-bl; Laws, 1911, Chap. 124, p. 311, Secs. 1-20.

owners, or more than $10,000 without submitting the same to an election in said district. The meetings of the board shall be held quarterly, and shall be public. The right is given to enter all lands to make surveys and examinations. The title to all property acquired shall vest in the district, and shall be exempt from taxation. The district may sue and be sued. The directors shall each receive $2.50 per day for the time actually expended in the business of the district. There shall be an annual election of the directors of such districts. An oath of office must be taken and a bond given by the directors, and a general office of the district must be established. Full proceedings are provided for the holding of the annual elections, and the filling of vacancies.[6]

The county treasurer shall be *ex officio* treasurer of the drainage district. He shall receive all moneys and pay out the same only upon warrants ordered by the board of directors. After such warrants have been presented and there are no funds, they shall draw interest at the rate of 6 per cent per annum. The secretary of the district shall keep a register of all warrants drawn.[7]

The board of directors, on or before July 1 of each year, shall determine the amount of money required to meet the current expenses of the coming year, and shall fix the amount per acre necessary to be assessed against the lands of the district to pay the same, and shall cause an order to be entered that each tract of land within said district shall be assessed at said rate per acre. Such assessment must be levied by the county assessor, and collected by the treasurer, under the State law for the collection of taxes.[8]

Contracts may be let by the board for the construction of the works to the lowest responsible bidder, and a bond must be given by the contractor of not less than 10 per cent of the contract price, conditioned upon the faithful performance of the contract.[9] Provisions are made for the issuance of bonds of a district upon holding an election therefor, also for their sale and redemption.[10]

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-c1 to 3494-b2; Laws, 1911, p. 316, Secs. 21-44.

[7] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-b2 to 3494-j2; Laws, 1911, p. 320, Secs. 45-52.

[8] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-k2 to 3494-p2; Laws, 1911, p. 322, Secs. 53-58.

[9] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-q2 to 3494-r2; Laws, 1911, p. 324, Secs. 59, 60.

[10] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-s2 to 3494-a3; Laws, 1911, p. 324, Secs. 61-69.

Rights of way are granted across water courses, streets, highways, railway, canal, or ditch. Such rights may be acquired by condemnation over private property. The right of way is also given over all State lands. No director or officer of a district must be interested in any contracts. "Water gathered or developed by drainage systems shall be the property of the drainage district."[11] Judicial notice must be taken of the organization and existence of any drainage district from and after the filing for record in the office of the county clerk of the certified copy of the order of the board of county commissioners declaring such district formally organized.[12] The board of directors may also bring proceedings in the District Court for the confirmation of all proceedings, the same as in the case of irrigation districts.[13] Upon petition of the owner thereof and the payment of a sum of all assessments per acre theretofore made upon the lands comprising such district, the board of directors may authorize the inclusion of any contiguous tract of land.[14]

Provisions are also made for the organization of voluntary drainage districts by the owners of lands unanimously agreeing upon a system of drainage in writing. They shall submit such agreement to the board of county commissioners, who may authorize the organization of such a district.[15] Provisions are also made for the dissolution of all drainage districts.[16]

§ 1800. Acts in aid of the National Reclamation Act.—There are a number of Acts passed by the Colorado legislature in aid of the National Reclamation Act of June 17, 1902.[1]

Upon the subject of water users' associations, by the Act of 1905,[2] all such associations should be exempt from income and annual

11 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-b3 to 3494-e3; Laws, 1911, p. 327, Secs. 70-73.

12 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3494-g3; Laws, 1911, p. 328, Sec. 74.

13 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3494-j3; Laws, 1911, p. 329, Sec. 76.

14 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3494-h3; Laws, 1911, p. 328, Sec. 75.

15 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-k3 to 3494-l3; Laws, 1911, p. 329, Secs. 77, 78.

16 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3494-m3 to 3494-n3; Laws, 1911, p. 330, Secs. 79, 80.

1 For a full discussion of this Act, see Chap. 65, Secs. 1235-1286.

2 2 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 1000, 1001; Rev. Stats., 1908, Secs. 1000, 1001; Laws, 1905, p. 360, Secs. 1, 2.

tax, but shall be required to pay, as preliminary to their incorporation, only a fee of $20 for the filing and recording of their articles. That such associations, with the consent of the county commissioners, furnish the clerk and recorder of any county in the State a book, or books, containing printed copies of its articles of incorporation and forms of subscription for stock, and the charges for the recording thereof shall be made on the basis of the number of words actually written therein.

A statute provides that users of water under the Carey Act may join water users' associations and be entitled to additional water for the reclamation of their lands.[3]

By the Act of 1903[4] the State Canal No. 3 was ceded to the United States, without cost, to the end that the United States may have full and complete authority to construct, maintain, operate, and dispose of said canal, and any and all water and rights in connection therewith.

The Act approved April 7, 1905,[5] authorized the appropriation of $1,500 to make investigations, preliminary surveys, and maps for reservoir sites on the Rio Grande River and its tributaries, and presenting the same to the United States Government.

The Act approved April 12, 1905,[6] provided for the sale of any State lands needed by the United States for irrigation works, other than for rights of way, at a price not to exceed $3.50 per acre.

This Act also provided that no lands belonging to the State, under any reclamation project of the United States, shall be sold except in conformity with the classification of farm units by the United States, and that the title to such lands shall not pass from the State until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water, and shall produce evidence thereof duly issued.

Under the same Act rights of way were granted over the State

[3] Laws, 1905, p. 360.

For the Carey Act in Colorado, see Sec. 1797.

[4] 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 6928; Rev. Stats., 1908, Sec. 6928; Laws, 1903, p. 292, Secs. 1, 2.

[5] Laws, 1905, p. 307, Secs. 1, 2.

[6] 4 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 5183, 5184; Rev. Stats., 1908, Secs. 5183, 5184; Laws, 1905, p. 328, Secs. 22, 23, 35.

lands. But by the Act approved April 23, 1909,[7] the last provision was amended to read as follows: "The right of way is hereby given, dedicated, and set apart to the United States to locate, construct, and maintain such roads, bridges, canals, ditches, tunnels, pipe lines, telephone and transmission lines as may be constructed for the purpose of irrigation, by the authority of the United States, over and through any of the lands which are now, or may be, the property of the State. All conveyances of State lands shall contain a reservation of such rights of way."

But the legislature of the State of Colorado seems to have gotten nervous as to the acts of the Federal Government under the National Reclamation Act, as is indicated by the Act of May 2, 1909,[8] which Act authorized the attorney-general of the State to investigate the acts of the Federal Government in relation to the public lands in and waters of the State; to institute or appear in such suits as he may deem advisable to determine the respective rights of the United States and the State of Colorado and the citizens thereof; to authorize him to employ special counsel to assist him in the discharge of the duties thereby imposed, and making the appropriation of the sum of $20,000, or so much thereof as may be necessary, to carry out the purposes of the Act, and said fund to be under the control and direction of the attorney-general and upon his voucher the auditor of the State shall draw warrants in the usual and ordinary manner. To this the emergency clause was attached.

Again, by the Act of May 11, 1911,[9] the legislature evidently deemed that a further investigation was necessary, and authorized the appointment of a joint legislative committee to investigate the interference by the acts of the Federal Government or of any State, corporation, or individual, with the right of the State to control the waters thereof within its borders; to authorize legal action concerning the same, and making the appropriation of $50,000 for the purposes of the Act; said committee to make a full report to the next session of the General Assembly.

[7] 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 5196; Laws, 1909, Chap. 207, p. 502, Secs. 1-3.

[8] Laws, 1909, Chap. 83, p. 199, Secs. 1-4.

[9] Laws, 1911, Chap. 227, p. 671, Secs. 1-7.

§ 1801. **The pollution of waters.**—Any person who shall in anywise pollute any water course, lake, or pond so as to render the same offensive or unwholesome to the county, town, village, or neighborhood thereabouts, is punishable by a fine not exceeding $300.[1]

If any person shall throw or discharge into any stream of running water, or into any ditch or flume of the State, any obnoxious substance, it is made punishable by a fine of not less than $100 nor more than $500 for each and every offense so committed.[2]

If any person or corporation shall empty or cause to be emptied, or allow the emptying or flowing of oil, petroleum, or other oleaginous substance into any of the waters of the State, it is punishable by a fine of not exceeding $1,000, or imprisonment not exceeding six months, or both.[3]

§ 1802. **Criminal statutes.**—It is made a misdemeanor to wilfully or maliciously damage or interfere with any ditch or other works, or any personal property of any company, punishable by a fine of not to exceed $500, or by imprisonment not to exceed one year, or both.[1]

It is made a misdemeanor to collect, or attempt to collect, any royalty, bonus, or premium, for the furnishing of water over and above the rate fixed by the county commissioners, and punishable by a fine of not less than $100 nor more than $5,000, or imprisonment not less than three months nor more than one year, or both.[2]

Every person owning or controlling any ditch, canal, or reservoir who shall, after demand in writing, made upon him for the supply or delivery of water for any beneficial purpose, and after tender of the lawful rate, refuse to furnish or carry and deliver from such works any water so applied for, which water can or may be, by use

1 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 1816; Rev. Stats., 1908, Sec. 1816; Laws, 1861, p. 314, Sec. 114, as amended; Eaton v. People, 30 Colo. 345, 70 Pac. Rep. 426.

For injunction against pollution, see Fairplay etc. Co. v. Weston, 29 Colo. 125, 67 Pac. Rep. 160, 21 Morr. Min. Rep. 725.

2 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 1817; Rev. Stats., 1908, Sec. 1817; Laws, 1874, p. 99, Sec. 1.

3 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 1817; Rev. Stats., 1908, Sec. 1817; Laws, 1889, p. 287, Sec. 1.

1 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 994; Rev. Stats., 1908, Sec. 994; Laws, 1864, p. 62, Sec. 45.

2 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3272; Rev. Stats., 1908, Sec. 3272; Laws, 1887, p. 308, Sec. 2.

of reasonable diligence in that behalf, and within the carrying or storage capacity of such works, be lawfully furnished and delivered, without infringement of prior rights, shall be deemed guilty of a misdemeanor, and punishable by a fine of not less than $100 nor more than $5000, or imprisonment for not less than three months nor more than one year, or both.[3]

Every person who shall testify falsely in any matter in proceedings before the county commissioners to fix water rates shall be deemed guilty of perjury.[4]

Any person claiming the right to divert water for domestic purposes who shall apply or knowingly permit the water so diverted to be applied to other than domestic purposes, to the injury of any person, shall be deemed guilty of a misdemeanor, and punishable by a fine not less than $50 nor more than $200 for each day of such improper application.[5] Any person guilty of wilfully wasting water is punishable by a fine of not less than $100.[6] It is made a misdemeanor for a water commissioner to wilfully neglect to do his duty in the matter of the distribution of water.[7] The wilful cutting or breaking of any gate, bank, flume, or other works is made a misdemeanor, and punishable by a fine of not less than $5 nor more than $300, or by imprisonment not more than 90 days.[8] It is also made a misdemeanor to interfere with any headgate adjusted by any water commissioner, and punishable by a fine not more than $300, or imprisonment not more than 60 days, or both. "Any person who shall be found using water taken through any such headgate, water box, or measuring device so unlawfully interfered with,

[3] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3273; Rev. Stats., 1908, Sec. 3273; Laws, 1887, p. 308, Sec. 2; Schneider v. People, 30 Colo. 493, 71 Pac. Rep. 369.

See, also, 3 Colo. Stats. Ann., Morr. Ed., Sec. 3257; Rev. Stats., 1908, Sec. 3257; Laws, 1887, p. 305, Sec. 4.

[4] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3269; Rev. Stats., 1908, Sec. 3269; Laws, 1887, p. 291, Sec. 5.

[5] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3178, 3179; Rev. Stats., 1908, Secs. 3178, 3179; Laws, 1891, p. 402, Sec. 2.

[6] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3240; Rev. Stats., 1908, Sec. 3240; Laws, 1876, p. 78, Sec. 3.

[7] 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3258, 3439; Rev. Stats., 1908, Secs. 3258, 3439; Laws, 1887, p. 305, Sec. 5.

[8] 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3495; Rev. Stats., 1908, Sec. 3495; Laws, 1881, p. 163, Sec. 1.

shall *prima facie* be deemed guilty of a violation of this section." The justice of the peace is given jurisdiction of such cases.[9]

It is made a misdemeanor for any water commissioner to receive a bribe, or for any person to give or offer a bribe to a water commissioner, and punishable in each case in any sum not less than $50 nor more than $300.[10] "No trees needed to conserve the snows, ice, or water of any irrigation district shall be cut from any part of the public domain," and it is made a misdemeanor for so doing.[11]

§ 1803. **Taxation of irrigation works.**—Article X, Section 3 of the State constitution provides:

"Ditches, canals, and flumes owned and used by individuals or corporations for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes.[1]

"Fifth. Ditches, canals, and flumes owned and used by individuals or corporations exclusively for irrigating lands of such individuals or corporations, or the individual members of such corporations, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes.[2]

"That all ditches used for the purpose of irrigation, and that only where the water is not sold for the purpose of deriving a revenue therefrom, be and the same are hereby declared free from all taxation, whether for state, county, or municipal purposes."[3]

9 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3497, 3498; Rev. Stats., 1908, Secs. 3497, 3498; Laws, 1901, p. 196, Secs. 1, 2; Robertson v. People, 40 Colo. 119, 90 Pac. Rep. 79.

10 2 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 1723; Rev. Stats., 1908, Sec. 1723; Laws, 1889, p. 39, Sec. 1.

11 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 2626, 2641; Rev. Stats., 1908, Secs. 2626, 2641; Laws, 1901, p. 85, Secs. 1, 16.

1 See Sec. 1772.

2 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 5545, Subd. 5th; Rev. Stats., 1908, Sec. 5545, Subd. 5th.

If a canal is owned by a corporation and individuals and is exclusively used to irrigate their lands, it is exempt from taxation. Empire Canal Co. v. Rio Grande County, 21 Colo. 244, 40 Pac. Rep. 449; reversing *Id.*, 1 Colo. App. 205, 28 Pac. Rep. 482.

Exemptions are to be strictly construed. So long as a ditch company has water rights unsold it is not exempt. Murray v. Montrose County, 28 Colo. 427, 65 Pac. Rep. 27.

3 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 5546; Rev. Stats., 1908, Sec. 5546.

§ 1804. **Riparian rights in Colorado.**—The Act of the Territorial legislature of Colorado of 1861,[1] re-enacted by the Act approved January 10, 1868,[2] in adopting the common law of England, provides as follows: "The common law of England, so far as the same is applicable and of a general nature, and all Acts and statutes of the British Parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First (excepting the second section of the 6th chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and ninth chapter of thirty-seventh Henry Eighth), which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

But by the Act of the Territorial legislature of 1864[3] it was provided: "Nor shall the water of any stream be diverted from its original channel to the detriment of any miner, millman, or others along the line of said stream, *who may have a priority of right,* and there shall be at all times left sufficient water in said stream for the use of miners and agriculturists along said stream." This provision remained in force until the adoption of the constitution. It was held by the Supreme Court that: "The priority of right mentioned in this section is acquired by priority of appropriation," and therefore the common law doctrine of riparian rights was abrogated by the section.[4]

It will also be noticed that the language of the section adopting the common law is different from that of some of the similar sections of the statutes of other States.[5] It was adopted, "so far as the same is applicable." And upon this subject, in the same case referred to above, the common law of riparian rights was held not to have been adopted, upon the ground that the same was inapplicable to the conditions of Colorado, the Court saying: "We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is

1 Laws, 1861, p. 35, Sec. 1.

2 4 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 6295; Rev. Stats. 1908, Sec. 6295; Laws, 1861, p. 35, Sec. 1.

3 Laws, 1864, p. 68, Sec. 32. This Act was repealed in 1868, but re-enacted *verbatim.*

4 Coffin v. Left Hand D. Co., 6 Colo. 443.

5 For the statutes of California, see Sec. 1768.

inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith."[6] There are also other cases holding that even before the adoption of the State constitution the common law of riparian rights was abrogated, upon the ground that the same was inapplicable to the peculiar arid conditions of Colorado.[7]

The provisions of the Colorado constitution, adopted in 1876,[8] absolutely abrogated the common law of riparian rights within the State, so far as the right of a riparian proprietor to claim the undiminished flow of a stream by or over his lands is concerned, either with or without the actual use of the waters, and substituted in lieu thereof the Arid Region Doctrine of appropriation of waters by the diversion thereof from their natural channels and their application to some beneficial use or purpose.[9] This rule has been

[6] Coffin v. Left Hand D. Co., 6 Colo. 443.

[7] See Yunker v. Nichols, 1 Colo. 551, 8 Morr. Min. Rep. 64; Schilling v. Rominger, 4 Colo. 100; Crisman v. Heiderer, 5 Colo. 589; Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Fuller v. Swan River etc. Co., 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252.

[8] Article 14, Secs. 5-7; see Sec. 1772.

[9] "The doctrine in this State, that the common law rule of continuous flow of natural streams is abolished, is so firmly established by our constitution, the statutes of the Territory, and the State, and by many decisions of this Court that we decline to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance." Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

"Thus it appears that the constitution has, to a large extent, obliterated the common law doctrine of riparian rights, and substituted in lieu thereof the doctrine of appropriation." Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854.

"Our constitution dedicates all unappropriated water in the natural streams of the State 'to the use of the people,' the ownership thereof being vested in the 'public.' The same instrument guarantees in the strongest terms the right of diversion and appropriation for beneficial uses." Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Crippen v. White, 28 Colo. 298, 64 Pac. Rep. 184; Cascade etc. Co. v. Empire etc. Co., 181 Fed. Rep. 1011; Snyder v. Colo. etc. Co., 181 Fed. Rep. 62, 104 C. C. A. 136.

adopted by the State courts, and the Supreme Court of the United States gave its sanction to the rule in the case of Kansas v. Colorado[10] by holding that each State "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control." But prior to that decision some of the inferior Federal courts did not follow the rule to the full extent that it was followed by the State courts.[11] However, the Circuit Court of Appeals, in a case decided in 1910,[12] in criticising some of these early Federal decisions, said: "In Schwab v. Beam[13] a different conclusion was announced, but that decision stands alone, is not in accord with the decisions of the Supreme Court of Colorado respecting the application of the doctrine of appropriation as there prevailing to the use of water, for purposes other than irrigation, and is not sustained by what seems to be the better reasoning." In a late case decided by the Supreme Court of the State[14] it is said: "The doctrine in this State, that the common law rule of continuous flow of natural streams is abolished, is so firmly established by our constitution, the statutes of the Territory, and the State, and by many decisions of this Court, that we decline to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance."[15]

There are some of the incidents of riparian ownership which may be cited, outside of the question of the undiminished flow of a stream. For instance, there is the case of the pollution of a stream to the injury of a riparian owner. In a recent case the Court intimated that this might be the case in the following language: "Whether the riparian owner, as against others, has still some rights which the law recognizes, and, if so, what they are, the exi-

10 Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

11 See Mason v. Cotton, 2 McCrary 82, 4 Fed. Rep. 792; Schwab v. Beam, 86 Fed. Rep. 41, 19 Morr. Min. Rep. 279.

12 Snyder v. Colorado Gold Dredging Co., 181 Fed. Rep. 62, 104 C. C. A. 136.

13 86 Fed. Rep. 41.

14 Sternberger v. Seaton Mountain etc. Co., 45 Colo. 401, 102 Pac. Rep. 168.

15 Citing Coffin v. Left Hand D. Co., 6 Colo. 443; Thomas v. Guirard, 6 Colo. 530; Crippen v. White, 28 Colo. 298, 64 Pac. Rep. 184; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

gencies of the pending case do not require us to determine," and leaving the question unsettled for the reason that the plaintiff in the case based his right upon the ground that, under the statute, he had the right to the use of the water which was polluted by the acts of the defendant under the Meadow Act.[16]

And as to this Act and that of 1861, granting to the owners upon streams the right to the use of water for irrigation purposes,[17] it may be said that, although they may embody some of the elements of common law rights, they are mere statutory enactments granting such rights, and each permitting the diversion of the water from the natural channels for the irrigation of lands; and, therefore, an action for the infringement of such rights can not be based upon the common law.[18]

16 Humphreys etc. Co. v. Frank, 46 Colo. 524, 105 Pac. Rep. 1093.

For the Meadow Act, see 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3176; Rev. Stats., 1908, Sec. 3176. See, for this Act, Sec. 1773.

17 3 Colo. Stats. Ann., Morr. Ed., 1911, Sec. 3165; Rev. Stats., 1908, Sec. 3165; Laws, 1861, p. 67, Sec. 1. See, also, Sec. 1773.

See Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792.

18 Coffin v. Left Hand D. Co., 6 Colo. 443.

See, also, cases cited under Sec. 1773.

CHAPTER 88.

HAWAII.

§ 1805. Particular features of the Territory.
§ 1806. Irrigation in the Territory.
§ 1807. Criticism of the Hawaiian laws.
§ 1808. Title to waters—Taxing of water.
§ 1809. The appropriation of water.
§ 1810. Eminent domain—Rights of way for ditches and canals.
§ 1811. Commissioners—Powers of.
§ 1812. The adjudication of water rights—Procedure.
§ 1813. The adjudication of water rights—Hearing—Decision and record.
§ 1814. The adjudication of water rights—Appeal.
§ 1815. Artesian wells of the Island of Oahu.
§ 1816. Riparian rights in Hawaiian Islands.

§ 1805. **Particular features of the Territory.**—The Hawaiian or Sandwich Islands compose the group of eight inhabited and four uninhabited islands in the North Pacific Ocean, lying between 18 deg. 54 min. and 22 deg. 2 min. north latitude, and 155 deg. and 161 deg. west longitude. We have related in a previous section how this group of islands was acquired by the United States.[1]

The islands are exceedingly mountainous and of volcanic origin. The climate is generally warm, but very salubrious. The temperature is equable, and the sky usually cloudless. The northeast trade winds blow for nine months of the year, and the leeward coast, being protected by high mountains, is refreshed by regular land and sea breezes. Very much more rain falls on the windward side of the islands than on the leeward. Thus at Hilo the rainfall ranges between 160 inches and 210 inches per annum,[2] while at Honolulu, on the south coast of Oahu, out of reach of the windward rains, the mean annual rainfall is about 38 inches.

The temperature during the coldest months averages about 62 degrees, F., and that of the hottest months about 81 degrees, F.

1 See Sec. 401.

2 See Irrigation in Hawaii, by Walter Maxwell, Director and Chemist, Hawaiian Station, 1900, Office of Experiment Stations, Bulletin No. 90, U. S. Dept. of Agriculture.

See, also, the Water Resources of Molokai, Hawaiian Islands, by Waldemar Lindgreen, 1903, Water Supply and Irrigation Paper No. 77, U. S. Geological Survey.

§ 1806. **Irrigation in the Territory.**—Irrigation, in spite of the great rainfall, is practiced to a large extent upon the Hawaiian islands. The primary source of water upon the islands is the rainfall, but there are two unfavorable conditions which attend its precipitation: (1) The maximum rain falls during the coolest season, when the crops are in such a condition that the water is not needed; and (2) the chief precipitation is over the mountain areas, where the water falls, soaks down into rocky strata, and quickly runs to the sea, unless arrested by artificial works and returned to the land.

The principal crops grown upon the islands are rice and sugar cane. The lands used for the growing of rice are the lowest flats found at the outlets of the valleys and close to the sea. The lands used for the growing of sugar cane are those higher up and further back from the sea.

The apparently disadvantageous circumstance of a heavy precipitation at a considerable elevation has been turned into special advantage by engineering means. In certain districts the water is collected by small ditches over the mountain areas, where it falls, and is conducted down to the cane-bearing lands below, over which it is distributed by gravity. Where the rainfall can not be easily collected over the mountain areas, the water which sinks down into deep substrata is tapped and arrested at or near sea level, where it is found running toward the sea. From this point the water is lifted and forced up to considerable elevation by high power pumping plants, where it is distributed over the fields.

§ 1807. **Criticism of the Hawaiian laws.**—It can be said that the Hawaiian Islands have a system of laws governing waters and water rights that is largely peculiar to themselves. It is based upon the common law of riparian rights, but by adverse and continuous user for the prescriptive period of twenty years, by others than riparian owners, has limited and restricted the rights of those owners to the extent of the prescriptive rights. It is thus that individual exclusive rights have been acquired. There is no statute in terms which permits the appropriation of waters as the same is known under the Arid Region Doctrine of appropriation. But prescriptive rights have gradually been acquired until it can be said that there are but few streams on the islands that the rights of the riparian owners

thereon are not subject to the exclusive prescriptive rights of others.[1]

Under the authority of the Organic Act, as amended in 1910, the right of eminent domain for ditches and canals was granted by the Act of the Terrritorial legislature of 1911. But this right was limited for ditches and canals used to conduct water for the purposes of irrigation and domestic uses only. Just why it should be so limited we are unable to see.[2]

The adjudication of existing water rights by the commissioners, in the first instance, somewhat resembles the procedure of Wyoming, where the adjudication or determination is, in the first instance, by the board of control, with right of appeal to the courts.[3]

§ 1808. **Title to waters—Taxing of water.**—Where the landlords have obtained, or may hereafter obtain, allodial titles to land, the people on each of their lands shall have a right to drinking water, and running water, and the right of way. "The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water courses which individuals have made for their own use."[1]

The taxing of water as the property of a ditch company, and again as giving increased value to the land irrigated by it is double taxation.[2]

§ 1809. **The appropriation of water.**—There are no provisions of the Hawaiian statutes which in express terms either give to any party the right to appropriate water, as that right is known in the arid region of the States, for his exclusive use, or the method by which an exclusive right to the use of a certain amount of water may be acquired. The right, however, to the exclusive use of water for domestic purposes or irrigation is given, resting upon long-continued custom, prescription, or by grant,[1] and afterwards confirmed by the decisions of the water commissioners and the courts.

1 For riparian rights in Hawaii, see Sec. 1816.

2 See Sec. 1810.

3 For adjudication of rights in Wyoming, see Secs. 2111-2114.

1 Rev. Laws, Hawaii, 1905, Sec. 366.

2 Haiku Sugar Co. v. Fornander, 6 Hawn. 532.

1 That it may be by lease, see Oahu etc. Co. v. Armstrong, 18 Hawn. 258.

It is the well-settled law of the Territory that the exclusive right to the use of water for these purposes can be acquired by adverse and continuous user.[2] Exclusive rights to the use of water acquired by any of the above methods are usually deemed appurtenant to the land for which they were originally acquired; but if no one is injured thereby, the use may be transferred to other lands, without the loss of the right or any portion thereof.[3]

§ 1810. **Eminent domain—Rights of way for ditches and canals.**—The amended Organic Act of the Territory of Hawaii provides as follows:

"The legislature may by general Act provide for the condemnation of property for public uses, including the condemnation of rights of way for the transmission of water for irrigation and other purposes."[1]

In conformity with the above provisions, by the Act of the Territorial legislature, approved April 24, 1911,[2] it was provided that corporations now or hereafter organized to develop, store, convey, distribute, and transmit water for irrigation, and which shall have at least $50,000 of fully paid in capital, represented by cash or by tangible property of a market value equal to the amount at which such property is entered as assets on the books of the company, are

See, also, Kahookiekie v. Keanini, 8 Hawn. 310; Horner v. Kumulilii, 10 Hawn. 174.

Grant in lease held not to give the right to generate electricity with the water conveyed. Cross v. Hawaiian Sugar Co., 12 Hawn. 415.

"The right to use water is an easement in land to be gained only by grant or prescription." Cleghorn's Appeal, 3 Hawn. 216.

2 Hecia etc. Co. v. Henry, 8 Hawn. 447; Kaoloea v. Stewart, 4 Hawn. 416; Wong Kim v. Kioula, 4 Hawn. 504; Ing Choi v. Ung Sing, 8 Hawn. 498; Lonoaea v. Wailuku Sugar Co., 9 Hawn. 651; Palolo etc. Co. v. Wong Quai, 15 Hawn. 554; Wong Leong v. Irwin, 10 Hawn. 265; Yick Wai Co. v. Ah Soong, 13 Hawn. 378.

Riparian rights are subject to prescription. Peck v. Bailey, 8 Hawn. 658.

3 Kaoloea Mill Co. v. Stewart, 4 Hawn. 416; Lonoaea v. Wailuku Sugar Co., 9 Hawn. 651; Palolo etc. Co. v. Wong Quai, 15 Hawn. 554.

See, also, Hawaiian etc. Co. v. Wailuku Sugar Co., 15 Hawn. 675, where it was held that there were certain surplus rights which were not appurtenant to any land.

1 Organic Act, Sec. 55, as amended by Act of May 27, 1910, 36 Stat. L. 443.

For condemnation of rights of way, see Secs. 1093-1097.

2 Laws, 1911, Chap. 124, p. 182.

thereby given the right to exercise the power of eminent domain as therein provided. Such corporation shall have the right to condemn rights of way over lands and property for ditches, tunnels, flumes, and pipe lines necessary or proper for the construction and maintenance of a system for conveying, distributing, and transmitting water for irrigation; provided, however, that no such corporation shall exercise such right of condemnation in more than one county. That in the exercise of such powers of eminent domain the procedure shall be, as near as may be, in accordance with the provisions of Chapter 64 of the Revised Laws of Hawaii as now or hereafter amended.

Any right of way which shall be obtained under the provisions of this Act shall lapse and immediately revert to the previous owner or owners thereof, in either of the following events, viz.: (1) If such corporation shall fail during a period of one year, at any time after acquiring the same, to use such right of way for the purposes herein set forth; (2) if such corporation shall use or divert any of the water which shall be conducted through such right of way for any purposes other than irrigation and domestic purposes.

§ 1811. **Commissioners—Powers of.**—Under the various forms of government of Hawaii during the last fifty years, the Kingdom, the Republic, and Territory, from the year 1860 down to the time of the Act of the Territorial legislature of 1907,[1] the authority to adjudicate existing water rights was vested in commissioners, first appointed by the Minister of the Interior, and, after the formation of the Territory, by the Governor. But by the Act of 1907 [2] the authority was taken away from the commissioners and this power vested in the Circuit Judge, sitting in chambers. The commissioners were originally vested with judicial powers for the purpose of these adjudications, and all hearings upon this subject were in the first instance had before them, the right of appeal being granted to the courts.[3] And, as most of the existing water rights in the

1 Laws, 1907, Chap. 56, p. 66.

2 *Supra.*

3 That the commissioners had judicial authority, see Cleghorn's Appeal, 3 Hawn. 216; Waikulu etc. Co. v. Cornwell, 10 Hawn. 476; Davis v. Afong, 5 Hawn. 216.

The jurisdiction of the commissioner to adjudicate rights was concurrent with that of the Circuit Court. Wai-

islands were determined and adjudicated under this mode of procedure, it will be necessary to give a brief abstract of the same. And as the same procedure is practiced before the Circuit Judge, we will make our abstract of the laws in the present tense. We do this for the reason that the construction of the laws by the courts construes the same relative to the acts of the commissioners.

This law provides that there shall be appointed by the Governor, in each election district of the Territory, one competent person to act as commissioner of private ways and water rights; provided, however, that nothing herein shall prevent the appointment of one person for two or more districts, if the same can be done without prejudice to the rights of the inhabitants thereof. No person shall act as commissioner in any case in which he shall have a direct personal interest, or where he shall have direct business relations with either party, or shall be connected with either by ties of relationship of blood or marriage. In case of disability from these or other causes, a commission *pro tem.* shall be appointed at once by the Governor. Any vacancy shall be filled as soon as possible by the said Governor.[4]

The commissioners are given large powers and discretion, which are specified as follows: They have the power to administer oaths, to punish for contempts, to grant adjournments, to subpoena and compel the attendance of witnesses, to issue execution for costs, to enforce a specific performance of a judgment, and to generally exercise the same authority in regard to their special jurisdiction as is by law conferred upon district magistrates.[5]

kulu Sugar Co. v. Cornwell, 10 Hawn. 476.

A water commissioner has no jurisdiction over suits *in rem.* Palolo etc. Co. v. Territory, 18 Hawn. 30.

4 Rev. Laws, 1905, Secs. 2199, 2200.

A commissioner *pro tem.*, legally appointed, has complete jurisdiction over the case, and the regular commissioner could not resume jurisdiction of the case on the removal of his disqualifications. Spreckels v. Wailuku Sugar Co., 8 Hawn. 537.

5 Rev. Laws, 1905, Sec. 2205. On powers of district magistrates, see *Id.*, Sec. 1663.

Davis v. Afong, 5 Hawn. 216, holding that the commissioner can only adjudicate or determine rights, and can not render judgment for past violations against such rights.

See, also, Kahai v. Rose, 7 Hawn. 270; Lum Ah Lee v. Ah Soong, 16 Hawn. 163.

For the general duties of the water commissioner, see Loo Chit Sam v. Wong Kim, 5 Hawn. 130.

§ 1812. **The adjudication of water rights—Procedure.**—It was made the duty of said commissioners within their several districts to hear and determine all controversies respecting rights of private ways and water rights, between private individuals, or between private individuals and the Territory. Any person or persons interested,[1] or the Territory, might apply for the settlement of any rights involved thereunder, whereupon the commissioner should issue summons in like form as that used in the District Court to the party or parties defendant. The summons must be personally served upon each land owner or occupant having an interest in the controversy, whenever such owner or occupant can be found. If, however, such owner or occupant can not be found for such service, the commission shall cause notices in the Hawaiian or English language, as the case may be, to be published either by posting upon the premises, the owners or occupants whereof can not be found, or by insertion in one or more newspapers, which publication shall continue for at least two full weeks prior to the date set for hearing. Such notice shall designate the time and place of hearing, shall indicate the nature of the application made, and shall notify all parties interested to attend and prove their rights, or they will be adjudicated without such attendance, besides any other matter deemed important by the commissioner. Such notice may be published in any case in the discretion of the commissioner. No summons shall be set aside or dismissed because of any technical informality, provided it shall set forth the time and place of hearing and the nature of the right claimed, in terms sufficiently clear for the apprisal of the parties interested. Parties may appear personally or by properly authorized attorney.[2]

The jurisdiction of the commissioner over the adjudication of water rights is not exclusive, but is concurrent only with that of the Circuit Court.[3]

1 A person in possession under a claim of title to land to which an alleged water right is appurtenant is a party "interested." Wailuku Sugar Co. v. Hale, 11 Hawn. 475.

Held, that plaintiff being merely the reversioner of a water right, he could not maintain an action on it, it not being for an injury to the inheritance. Long v. Wai Fong, 9 Hawn. 628.

2 Rev. Laws, 1905, Sec. 2201.

A commissioner has no right to decide a person's rights in water without notifying him of a hearing. Cleghorn's Appeal, 3 Hawn. 216; Lishman v. Perry, 7 Hawn. 266; Palolo etc. Co. v. Territory, 18 Hawn. 30.

3 Wailuku Sugar Co. v. Cornwell, 10 Hawn. 476.

§ 1813. The adjudication of water rights—Hearing—Decision and record.—At the time set for the hearing, service of summons or publication of notice having been proved, the commissioner shall hear the evidence relative to the right in controversy, and shall, as far as possible, ascertain the rights of the absent parties not served where notice as provided shall have been published. He may, if deemed desirable, or conclusive to the rendering of a correct decision, visit the locality where the controversy arose. He shall give such decision as may in each particular case appear to be in conformity with vested rights, and shall be just and equitable between the parties.[1] The decision shall state expressly the findings of fact on the evidence, and shall, in cases of right of way, clearly indicate the location and nature of the way; if on a water right, it shall state the proportion or time for use, and any other things necessary to the right. It may also regulate the methods by which the water may be obtained, and by which its supply can be controlled. All the testimony and the decision shall be recorded in books of record to be kept and preserved by the commissioner. The said books, when filled, shall be deposited with the clerks of the respective courts.

"The decisions of the several commissioners shall be final and binding upon all parties except those who may be absent from the

1 That the commissioner's decision must be in accordance with vested rights, and shall be just and equitable, see Calaca v. Caldeira, 13 Hawn. 214; Palolo etc. Co. v. Wong Quai, 15 Hawn. 554; Achi v. Poni, 5 Hawn. 176; Davis v. Afong, 5 Hawn. 216; Wailuku Sugar Co. v. Widemann, 6 Hawn. 185; Hawaiian Sugar Co. v. Waikulu Sugar Co., 14 Hawn. 50; *Id.*, 15 Hawn. 675.

That it must be responsive to prayer, see Kohala Sugar Co. v. Wight, 11 Hawn. 645.

It must be based upon the pleadings. Un Wo Sang Co. v. Alo, 7 Hawn. 661.

Where irrigation water was originally apportioned by time only, to change the allotment by time to a new system of apportionment by extent of land is to change the water rights themselves. Wilfong v. Bailey, 3 Hawn. 479.

It must be in accordance with the evidence. Liluokalani v. Pang Sam, 5 Hawn. 13; Maikai v. Hastings, 5 Hawn. 133; Wailuku Sugar Co. v. Widemann, 6 Hawn. 185; Mele v. Ahuna, 6 Hawn. 346; Kahookiekie v. Keanini, 6 Hawn. 310; Ing Choi v. Ung Sing, 8 Hawn. 498; Chun Lai v. Mang Young, 10 Hawn. 133; Kaleiopu v. Booth, 10 Hawn. 453; Kohala Sugar Co. v. Wight, 11 Hawn. 645; Loo Chit Sam v. Wong Kim, 5 Hawn. 200; Long v. Wai Fong, 9 Hawn. 628.

A judgment by the water commissioners signed by only one of them is void. Maikai v. Hastings, 5 Hawn. 1, 133.

Territory during the whole time of the pendency of such suit, subject to the right of appeal."[2]

The costs may, in the discretion of the commissioner, be divided or taxed to the losing party. In case of appeal the final award as to costs shall abide the decision of the court.[3]

§ 1814. **The adjudication of water rights—Appeal.**—Any party aggrieved by the decision of the commissioner may appeal therefrom to the Circuit Court within ten days from the rendition of the decision, and within said period shall pay all costs accrued and for certificate and record on appeal, and shall deposit with the commissioner a good and sufficient bond to the clerk of the court in the sum of $100, conditioned for the payment of costs further to accrue in case of defeat. In case of appeal the commissioner shall promptly transmit to the clerk of the court a copy of the record, together with any exhibits filed, the bond for costs, and all costs not strictly retainable by him or actually disbursed. The Court may permit the introduction of new evidence which could not with due diligence have been obtained before, and its decision shall be final and binding, except as aforesaid.[1] The right of appeal from the judgment of the Circuit Court is also given, under the regular mode of procedure, to the Supreme Court of the Territory. And the Supreme Court on appeal is authorized to render such a decision as shall be just and equitable between the parties.[2]

§ 1815. **Artesian wells of the Island of Oahu.**—By Act of the legislature of 1884,[1] applicable only to the Island of Oahu, it was provided that every flowing artesian well on the island shall be capped by the owner or owners thereof in such a manner as to give complete control over the flow of the water from the pipe of such

2 Rev. Laws, 1905, Sec. 2202.

3 Rev. Laws, 1905, Sec. 2203.

Chun Lai v. Mang Young, 10 Hawn. 133.

1 Rev. Laws, 1905, Sec. 2204.

The court has only appellate jurisdiction from a decision of the commissioners, and will not on appeal complete a decision which was never made. Loo Chit Sam v. Wong Kim, 5 Hawn. 130.

See, also, on questions on appeal, Kaanaana v. Richardson, 5 Hawn. 235; Cha Fook v. Lau Piu, 10 Hawn. 308.

2 Lonoaea v. Wailuku Sugar Co., 9 Hawn. 651; Horner v. Kumuliilii, 10 Hawn. 174.

1 Rev. Laws, 1905, Secs. 3197-3200; Laws, 1884, Chap. 49.

well. No person having the right to the use of water from any such artesian well shall allow the same to run to waste, but may use it for irrigation, domestic, and other useful purposes, except for driving machinery; provided, however, that such water may be used for driving machinery in case it can be utilized afterward for irrigation or other useful purposes.

Any person violating the provisions of the Act shall, upon conviction thereof, be fined not more than fifty dollars. For the more effectual carrying out the provisions of the Act, the high sheriff of the Territory and all policemen of the Island of Oahu may at all times of night or day enter without warrant any premises whereon artesian water is used.

§ 1816. **Riparian rights in Hawaiian Islands.**—It can be said that the common law of riparian rights is in force in the Hawaiian Islands, or such of them as have not been lost by grant or prescription. The common law of England has been adopted by express statutory enactment. The Supreme Court of the then Kingdom in 1867 rendered a decision to the effect that a riparian proprietor has a right, as an incident to his estate, to use the water for irrigation and domestic purposes, provided he does not materially diminish the supply of water or prevent its like application by others on the same stream, but that his superior rights are subject to prescription by others.[1] There is no statute or decision which has abrogated the statute adopting the common law; there is also no decision which has overruled the above decision referred to.[2]

1 Peck v. Bailey, 8 Hawn. 658.

2 But see Wong Leong v. Irwin, 10 Hawn. 265.

CHAPTER 89.

IDAHO.

§ 1817. Particular features of the State.
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§ 1817. **Particular features of the State.**—The State of Idaho lies within the very heart of the Rocky Mountain region. The topography of the State, in its broad features, consists of a great range of mountains, extending in a northwesterly and southeasterly direction, and from which main range spurs of smaller ranges run. These mountain ranges are interspersed with valleys of greater or less extent. The greater portion of the State lies well within the arid region; however, the northern part, adjacent to Canada, ex-

tends into a comparatively humid region, this portion having a rainfall of twenty inches or more per annum. A portion of the State adjacent to Utah lies within the Great Basin, the waters from which flow into Great Salt Lake. The great drainage basin of the State is that of the Snake River and its tributaries. This river has its source in the Yellowstone National Park, and flows entirely across the State, and finally empties into the Columbia. The Snake Valley may be described as a broad, lava-covered plain, and naturally covered with a dense growth of sagebrush and similar woody shrubs. The surface is composed of a soil of volcanic origin, which, when irrigated, possesses wonderful fertility. In the central portion of the State are vast fields of lava, covered in places by a thin, sandy soil, which is also highly productive when watered. The water supply of the State is large, but in some places attended with great difficulties, as far as its utilization is concerned, from the fact that it is far below the lands upon which it might be used. The altitude in the State is a most important factor in determining the temperature or rainfall conditions. As a general rule, one finds lower temperatures and heavier precipitation as the altitude increases. In the mountains the climate is characterized by cold, snowy winters and cool, short summers. Somewhat warmer than the mountainous regions are the extensive plateaus and higher valleys that form a large part of the central portions of the State. In the Snake River Basin the climate is characterized by moderately cold winters and moderately warm summers. Here the staple grains and fruits grow in abundance, and there is little danger of the fruit being winter-killed, although at times protection has to be had from spring frosts. In very few instances has any great loss resulted when protective measures have been thoroughly and intelligently resorted to. As has been stated, the precipitation varies with the altitude. It is the greatest in the northern part of the State, varying from thirty-five to twenty-five inches annually. The driest part of the State is to be found along the Snake River, from below Shoshone Falls nearly to the western boundary. Throughout the northern and western portions of the State the prevailing winds coming from the warm regions of the Pacific Ocean have their influence upon the climate. The most of the precipitation occurring during the winter months, the result is that over the greater portion of the State the summer rainfall is not sufficient to permit successful farming without irrigation.

But the irrigable lands are boundless, with water sufficient to irrigate a large portion of the same, when properly developed.[1]

§ 1818. **Irrigation in the State.**—During the last fifteen years the State of Idaho has taken greater strides and made greater gains in the actual construction of irrigation works and in the reclamation and settlement of arid lands than almost any other State of the Union. It was this work by the State, private corporations, and by the National Government that largely contributed to the increase in the population of the State during the last decade of 102 per cent. There being a large supply of water in the State and an almost boundless amount of fertile lands upon which it can be applied, extensive irrigation projects have sprung up in many portions of the State and especially is this true along the Snake River and its tributaries.

Especially has the State gone far ahead in the reclamation of its lands under the Carey Act. At the present time projects completed, in process of construction, or financed contemplate the irrigation of almost two million acres. According to the last report of the State Engineer of the State there are forty-six of these projects, either completed and the water actually being used thereunder or in various stages of construction. And as the result of these enterprises the State Engineer says: "Although minor mistakes may have occurred, as might be expected in connection with irrigation development on so mammoth a scale, yet such mistakes are dwarfed into insignificance in contemplation of the incalculable benefit accruing to the State of Idaho by reason of a State policy, which makes pos-

1 For information upon the general subject of the State, see the Report of the State Engineer, 1909-1910, D. G. Martin, State Engineer.

Distribution of Water From Canals in Idaho, U. S. Dept. of Agriculture, Experiment Stations Bulletin No. 119.

Water Supply of the Great Basin Drainage, by E. C. La Rue, Thomas Grive, and Henry Thurtell, 1908, Water-Supply Paper No. 212, U. S. Geological Survey.

The Great Basin, by E. C. La Rue and F. F. Henshaw, 1911, Water-Supply Paper No. 270, U. S. Geological Survey.

See, also, Irrigation in Idaho, by James Stephenson, Jr., State Engineer, prepared under the direction of Samuel Fortier, Chief of Irrigation Investigations, 1909, Office of Experiment Stations, Bulletin No. 216, U. S. Dept. of Agriculture.

Water Right Problems of Bear River, by Clarence T. Johnson and Joseph E. Breckons, 1899, Office of Experiment Stations, Bulletin No. 70, U. S. Dept. of Agriculture.

sible the final reclamation of the ultimate acre of land available for reclamation."[1]

The General Government has also been active in the State of Idaho in constructing works for the reclamation of arid lands, under the National Reclamation Act.[2] The Minidoka project is largely constructed, the Payette-Boise project and the Dubois project are in the process of construction, while other projects are contemplated.[3]

Again, under the State Irrigation District law, the State Engineer reports the organization and active operation of nineteen districts.[4] And, as a general thing, these irrigation districts appear to be in a prosperous condition.

Besides the operation under these Acts, there are many private enterprises by corporations and individuals which have been projected, many of which have been carried through to completion and are now in active operation. And as the direct result of this work many settlers are making Idaho their homes, cities and towns are springing up, and the welfare of the State is prospering to a most wonderful degree. And during the next decade the State will continue to prosper, even to a greater degree than it did in the last.

According to the United States census report for 1910, the total acreage under irrigation in the State of Idaho in 1909 was 1,430,848 acres, against 608,718 acres in 1899 and 217,005 acres in 1889. The percentage of increase from 1889 to 1899 was 180.5 per cent and from 1899 to 1909 was 135.1 per cent. The absolute increase during the latter decade was 822,130 acres, and that between 1889 and 1899 was 391,713 acres.

The above irrigated area is divided into 16,439 farms, as against 9,188 farms in 1900, an increase in the number of farms of 7,251, or

1 Report of the State Engineer of Idaho, 1909-1910, p. 179.

For a description of the various projects, see, also, *Id.*, pp. 180-187.

See, also, for the Carey Act in Idaho, Sec. 1837.

For a full discussion of the Carey Act, see Chap. 67, Secs. 1312-1336.

2 For the National Reclamation Act and a full discussion thereof, see Chap. 65, Secs. 1235-1286.

3 For a description of these projects, see Fourth Annual Report of the Reclamation Service, 1904-1905, pp. 128-167; Fifth Annual Report, 1906, pp. 115-136; Eighth Annual Report, 1908-1909, pp. 70-84.

Report of the State Engineer of Idaho, 1909-1910, pp. 188-192.

4 For a full description of these districts, see Report of the State Engineer, 1909-1910, pp. 271-288.

78.9 per cent. The census further shows that in 1910 there were existing enterprises ready to supply water to 958,111 acres, not irrigated in 1909, or, in other words, the acreage that enterprises already constructed were capable of irrigating in 1910 was 2,388,959 acres and the acreage included in enterprises completed or under construction in 1910 is given as 3,549,573 acres. This acreage represents the area which will be available for the extension of irrigation within the next few years, upon the completion of the projects now under construction. It indicates in a general way the area available for settlement, although much of this unirrigated land is in farms already settled.

The acreage irrigated in 1909, classified by the character of the enterprise, is as follows: 47,500 acres under the United States Reclamation Service, 3,426 under the United States Indian Service, 162,418 under the Carey Act projects, 140,930 included in irrigation districts, 628,102 under co-operative enterprises, 44,872 under commercial enterprises, and 403,600 acres in individual and partnership enterprises.

§ 1819. **Criticism of the Idaho laws.**—The laws of the State of Idaho governing and controlling the waters within its jurisdiction are numerous and cover the various phases of the subject. It has evidently been the policy of the legislature to enact every law that would tend toward the reclamation of the arid lands within the State. Over all these systems of laws, there is also a wise policy of State control, so that the rights of the investing public, the State at large, and the settlers are fully protected. The settler coming into the State to make it his home may have his choice of the system of law which he may prefer to govern and protect his rights. He may settle under one of the many Carey projects and his rights may be governed and protected under the laws for its operation. Again, if he prefers, he may settle in one of the many irrigation districts; or, again, under one of the reclamation projects of the Government. Or, again, if he can find unappropriated water in any part of the State he may work alone and appropriate sufficient water for his actual beneficial use. But, whichever system he chooses, he may depend upon it that there are laws which will fully protect his rights. As to the wisdom of the legislature in enacting these laws,

we can only point to their results, as discussed in the previous section.[1]

The physical conditions of the different States require different laws governing the subject of waters. The legislature has met those conditions in the State of Idaho fairly and squarely, and when we wrote the first edition of this work we had occasion to state that "Idaho has not kept up with the majority of the other States in the arid region in her legislation upon the subject of irrigation," and suggested that new laws should be enacted, we can not say that today. The State of Idaho has a system of statutory laws governing the subject of waters and irrigation second to no State in the West.

§ 1820. **State constitutional provisions.**—The State of Idaho probably has more constitutional provisions upon the subject of water and water rights than any other State of the Union; and, as these provisions are the foundation of all legislative enactments, we will quote them in full.

In Article 15 it is provided:

"Sec. 1. The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution; also all the water originally appropriated for private use but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use and subject to the regulation and control of the State in the manner prescribed by law.[1]

"Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise and can not be exercised except by authority of and in the manner prescribed by law.[2]

1 See Sec. 1818.

1 For the construction of the above, see Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25; Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Boise etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79; Brose, v. Board of Directors of Nampa & Meridan Irr. Dist., 20 Idaho 281, 118 Pac. Rep. 504; Pocatello v. Murray, —— Idaho ——, 120 Pac. Rep. 812. See, also, Walbridge v. Robinson, —— Idaho ——, 125 Pac. Rep. 812.

2 See Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Boise City v.

"Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the waters for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes, or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public or private use as are referred to in Section 14 of Article I of this constitution.[3]

"Sec. 4. Whenever any waters shall have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such water so dedicated shall have once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes, with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and the times of use, as may be prescribed by law.[4]

Artesian etc. Co., 4 Idaho 351, 39 Pac. Rep. 562.

See, also, cases cited *supra*.

[3] Hard v. Boise City etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907; Brose v. Nampa & Meridan Irr. Dist., 20 Idaho 281, 118 Pac. Rep. 504; Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488; Montpelier Mill. Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

[4] Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Bardsley v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Hard v. Boise City Irr. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R.

"Sec. 5. Whenever more than one person has settled upon, or improved land with a view to receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement may by law prescribe.[5]

"Sec. 6. The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose."[6]

The right of eminent domain is provided for in Article I as follows:

"Sec. 14. The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for the rights of way for the construction of canals, ditches, flumes, or pipes to convey water to the place of use, for any useful, beneficial, or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the State, or the preservation of the health of its inhabitants, is hereby de-

A. 407; Gerber v. Nampa etc. Dist., 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296; Boise etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670.

5 Wilterding v. Green, *supra;* Hard v. Boise City etc. Co., *supra;* Mellen v. Great Western Beet Sugar Co., —— Idaho ——, 122 Pac. Rep. 30.

6 Wilterding v. Green, *supra;* Boise City v. Artesian etc. Co., *supra;* Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617; Jack v. Village of Grangeville, 9 Idaho 291, 74 Pac. Rep. 969; City of Pocatello v. Murray, —— Idaho ——, 120 Pac. Rep. 812.

clared to be a public use and subject to the regulation and control of the State.

"Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor." [7]

And by Article II it is further provided:

"Sec. 8. The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchise of incorporated companies, and subjecting them to public use, the same as property of individuals; and the police powers of the State shall never be abridged nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

§ 1821. **Water rights—Defined—Nature of property in water—Standard of measurement.**—The nature of property in water within the State of Idaho is defined as follows:

"Water being essential to the industrial prosperity of the State, and all agricultural development throughout the greater portion of the State depending upon its just apportionment to and economical use by those making a beneficial application of the same, its control shall be by the State, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the State, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, are declared to be the property of the State, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for any beneficial purpose, and the right to the use of any of the waters of the State for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of

[7] See Idaho etc. Co. v. Oregon etc. R. Co., 8 Idaho 175, 67 Pac. Rep. 318; Baillie v. Larson, 138 Fed. Rep. 177; Potlatch etc. Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, 11 Am. St. Rep. 233; Hollister v. State, 9 Idaho 8, 71 Pac. Rep. 541; Latah etc. Co. v. Peterson, 3 Idaho 398, 29 Pac. Rep. 1098; Latah etc. Co. v. Hasfurther, 12 Idaho 797, 88 Pac. Rep. 433; Montpelier Mill. Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water."[1]

The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters may be acquired by appropriation. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.[2] As between appropriators, the first in time is the first in right.[3] Ditches for the utilization of seepage, waste, or spring waters shall be governed by the same law relative to priority.[4]

The water appropriated may be turned into the channel of another stream and mingled with its water and then reclaimed; but in reclaiming the water so mingled or diverting the water in lieu

1 Rev. Codes, 1908, Sec. 3240.

That the use of water is a public use, see, also, Const., Art. 15, Sec. 1.

For construction of above, see, also, Ada County etc. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

That water can not be made an inseparable appurtenance to land, see Hard v. Boise City etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

See, also, Walbridge v. Robinson, —— Idaho ——, 125 Pac. Rep. 812.

2 Rev. Codes, 1908, Secs. 3242, 3243; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Sand Point etc. Co. v. Panhandle etc. Co., 11 Idaho 405, 83 Pac. Rep. 347; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

For the Act of the legislature of 1911, Laws, 1911, p. 782, prohibiting the appropriation of waters wholly within private lands, see Sec. 1827.

3 Rev. Codes, 1908, Sec. 3245.

See, also, constitutional provisions, Sec. 1820; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Malad Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. Rep. 52; Geertson v. Barrack, 2 Idaho 1066, 3 Idaho 344, 29 Pac. Rep. 42; Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho 367, 29 Pac. Rep. 40; McGinness v. Stanfield, 6 Idaho 372, 55 Pac. Rep. 1020; Mahoney v. Neiswanger, 6 Idaho 750, 59 Pac. Rep. 651; Hillman v. Hardwick, 3 Idaho 255, 28 Pac. Rep. 438; Hall v. Blackman, 8 Idaho 272, 68 Pac. Rep. 19; Brown v. Newell, 12 Idaho 166, 85 Pac. Rep. 385; Moe v. Harger, 10 Idaho 302, 77 Pac. Rep. 645; Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488. See, also, Walbridge v. Robinson, —— Idaho ——, 125 Pac. Rep. 812.

4 Rev. Codes, 1908, Sec. 3246; Gerber v. Nampa Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; Saunders v. Robison, 14 Idaho 770, 95 Pac. Rep. 1057.

As to changes which may be made, see Rev. Codes, 1908, Sec. 3247; Bennett v. Nourse, —— Idaho ——, 125 Pac. Rep. 1038.

thereof, the amount to which the prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage.[5] The point of diversion may be changed if the prior rights of others are not injured thereby, but not otherwise.[6]

"A cubic foot of water per second of time shall be the legal standard for the measurement of water in this State, and it shall be the duty of the State engineer to devise a simple, uniform system for the measurement and distribution of water."[7] Such measurement shall be at the point of diversion.[8]

The phrase, "domestic purposes," shall be construed to include water for household purposes, and a sufficient amount for the use of domestic animals kept with and for the use of the household.[9]

By completion of an appropriation is meant conducting the waters to the place of intended use.[10]

"All persons, companies, and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed."[11]

§ 1822. Administrative officers—State board of irrigation.—There is also constituted a State board of irrigation, composed of the State engineer and the water commissioners of the three water divisions of the State. The State engineer is *ex officio* president of the board. The meetings of the board may be held in any part of the State, which may be selected by the State engineer. The board shall provide rules and regulations in relation to the making of

5 Rev. Codes, 1908, Sec. 3244; as amended, Laws, 1911, p. 454.

6 Rev. Codes, 1908, Secs. 3247, 3248. See, also, Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Walker v. McGinness, 8 Idaho 540, 69 Pac. Rep. 1003; Hill v. Standard etc. Co., 12 Idaho 223, 85 Pac. Rep. 907; Last Chance M. Co. v. Bunker Hill etc. Co., 49 Fed. Rep. 430.

7 Rev. Codes, 1908, Sec. 3241.

8 Rev. Codes, 1908, Sec. 3249.

9 Rev. Codes, 1908, Sec. 3250.

10 Rev. Codes, 1908, Sec. 3251; Sand Point etc. Co. v. Panhandle etc. Co., 11 Idaho 405, 83 Pac. Rep. 347.

11 Rev. Codes, 1908, Sec. 3299.

In the dissenting opinion in Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541, Mr. Justice Berry cited the above section in support of the application of the doctrine of riparian rights to the irrigation law, but the majority of the Court, without citing this section, declared in effect that the doctrine of riparian rights has no place in the jurisprudence of the State.

final proof of the completion of the construction of works, and such other rules relative to the appropriation and the distribution of water in accordance with the priorities of the rights of the users thereof as may be necessary.[1]

§ 1823. **Administrative officers — State engineer, his powers and duties.**—Under the laws of State control [1] the State of Idaho has a full complement of administrative officers, and chief among these is the State engineer, who is to be appointed by the Governor, and to receive a salary of $3600.[2] His duties as prescribed by the statute are similar to those of other State engineers.[3] He must also collect facts and make surveys to ascertain suitable locations for reservoirs, make stream measurements and keep a record of the same; he must examine the plans of all dams of more than ten feet in height and approve or reject the same; must inspect all dams after construction, and, if the same are found unsafe, order the repair of the same. He shall also, free of charge, give any information desired by any person as to the proper method of measuring water, or the construction of measuring apparatus; and shall give special instructions to all water masters as to the measurement of waters so as to secure a just distribution thereof.[4] He must also examine and report on the plans of proposed irrigation districts and projects under the Carey Act.[5] He has the supervision of the water commissioners,[6] and all applications for the appropriation of waters must be made to him, and he must issue all permits therefor.[7] Besides this, he must perform all duties of a professional nature which naturally appertain to his office or which are requested by the Governor; and he must also prepare all maps required for use by the State board of land commissioners. The State engineer is also *ex officio* president of the State board of irrigation.[8] He must make and render to the Governor, biennially, or oftener, if required, a full and true report of his work performed by virtue of his office, which report shall contain any recommendations he may have in

1 Rev. Codes, 1908, Sec. 3273.

1 For the laws of State control, see Chap. 68, Secs. 1337-1367.

2 Rev. Codes, 1908, Secs. 149-153.

3 See Sec. 1343.

4 Rev. Codes, 1908, Secs. 149-160, 3266.

5 See Secs. 1837, 1838.

6 See Sec. 1824.

7 See Sec. 1827.

8 Rev. Codes, 1908, Sec. 3273. See, also, Sec. 1822.

reference to legislation affecting his office, or in reference to matters in interest in regard to irrigation that his experience and information may cause him to make.[9]

§ 1824. **State administrative officers—Water divisions—Water commissioners and their powers and duties.**—The State of Idaho is divided by statute into three water divisions.[1] One water commissioner for each of such water divisions is appointed by the Governor. Such water commissioners shall possess such theoretical knowledge of the science of hydraulics as will enable them to supervise the construction of measuring devices for the proper measuring of water. The commissioner of each water division shall have immediate direction and control of the water masters, and of the distribution of the water, and shall perform such other duties as shall devolve upon him as a member of the board of irrigation. He shall also perform such other duties as may be directed by the State engineer; he shall also receive proof of the beneficial use of the waters in his division. The salary of each water commissioner is fixed at $2000.[2]

The water commissioners shall, on or before the first day of December of each year, submit to the State engineer a report of the work done by them in their districts, and shall recommend such changes in the irrigation laws and rules and regulations governing the diversion of waters as would, in their judgment, be beneficial to the people of the State.[3]

§ 1825. **State administrative officers—Water districts—Water masters and their powers and duties.**—The board of irrigation shall divide the State into water districts in such a manner that each public stream and tributary, or independent source of water supply, shall constitute a water district. But when the distance between extreme points of diversion therein is more than forty miles, a stream may be divided into two or more districts. Any tributary may also be constituted into a separate district.[1]

9 Rev. Codes, 1908, Sec. 159.

1 Rev. Codes, 1908, Sec. 3268.

2 Rev. Codes, 1908, Secs. 3269-3272, 3283.

3 Rev. Codes, 1908, Sec. 3273.

See, also, Walbridge v. Robinson, —— Idaho ——, 125 Pac. Rep. 812.

1 Rev. Codes, 1908, Secs. 3274, 3275, as amended by Laws, 1909, p. 327.

The superintendents or water masters are elected by the water users of the ditch or canals. If they can not agree as to who shall serve in this capacity, the judge of the District Court upon petition is given authority to make such appointment. The water master shall receive such compensation as the Court may fix.[2]

It is made the duty of the water masters to distribute the waters of the public streams, or water supply, comprising his district among the several ditches taking water therefrom according to the prior rights of each respectively. Unadjudicated rights to be subsequent to adjudicated rights in such distribution.[3] He shall begin his work only when two or more owners, by application in writing, state that there is a necessity for the use and control of such waters in the district, and he shall not continue after the necessity therefor shall cease. He shall have the power in case of necessity to employ assistants.[4] The pay for the services of the water master and his assistants shall be a charge against the land of the users to which the water was so delivered, a statement of which must be rendered as provided to the board of county commissioners, and collected along with the other taxes of the users.[5]

All water masters shall make reports to the water commissioner of their division as often as may be deemed necessary by said commissioner. The reports must contain the amount of water necessary to supply all the ditches, canals, and reservoirs in the district, the amount of water actually coming into the district to supply such works, what works are without their proper supply, and the probability of future supply. The reports of water masters to the water commissioners shall be filed and kept in the office of the State engineer.[6]

§ 1826. **Headgates and measuring devices.**—The appropriator of any of the waters of the State shall maintain, to the satisfaction of the water commissioner of the district a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be kept locked by the water master; and the

2 Rev. Codes, 1908, Sec. 3284, as amended by Laws, 1909, p. 105.

See, also, Stetham v. Skinner, 11 Idaho 374, 82 Pac. Rep. 451.

3 Rev. Codes, 1908, Sec. 3277.

4 Rev. Codes, 1908, Secs. 3278, 3279; Walker v. Elmore County, 16 Idaho 696, 102 Pac. Rep. 389.

5 Rev. Codes, 1908, Secs. 3280, 3281.

6 Rev. Codes, 1908, Sec. 3276.

appropriator shall also construct a rating flume or other measuring device as near the head of such ditch as practicable. If such device is not constructed by the owner, the water commissioner may construct the same, at the expense of the county, and if the owner refuses or neglects to pay the charge therefor, the water commissioner shall cause the headgate of such ditch to be closed and locked, and remain closed until such charges shall be paid.[1]

Any person, association, or corporation delivering water under any fixed or annual charge, shall also provide the necessary headgates and measuring devices so as to measure the quantity of water delivered to any consumer.[2]

§ 1827. **The appropriation of water.**—All appropriations of water must be made in conformity with the law of State control in the State of Idaho, a subject which has been largely discussed in a preceding chapter of this work.[1]

It is provided that all rights to divert and use the waters of the State for beneficial purposes shall hereafter be acquired and confirmed under the provisions of the statute.[2] The application to appropriate must be made to the State engineer, in the usual form.[3] And it is made the duty of the State engineer "to approve all applications made in proper form which contemplate the application of water to a beneficial use." The approval of the application must be endorsed thereon and so approved. The application constitutes a permit to proceed with the construction of the works. But under the Act of 1911 [4] the State engineer is prohibited from issuing permits to appropriate water from any lake not exceeding five acres, pond, pool, or spring, which is located wholly upon the lands of another, except to the one owning such lands, or with his written permission.[5]

1 Rev. Codes, 1908, Sec. 3228.

2 Rev. Codes, 1908, Sec. 3286.

1 For State administrative laws, see Chap. 68, Secs. 1337-1367.

2 Rev. Codes, 1908, Secs. 3252-3266, as amended by Laws, 1911, p. 184.

See, also, Sand Point etc. Co. v. Panhandle etc. Co., 11 Idaho 405, 83 Pac. Rep. 347; Conant v. Jones, 3 Idaho 606, 32 Pac. Rep. 250; Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. Rep. 189.

3 Rev. Codes, 1908, Sec. 3253.

4 Laws, 1911, p. 782.

5 Youngs v. Regan, 20 Idaho 275, 118 Pac. Rep. 499; King v. Chamberlin, 20 Idaho 504, 118 Pac. Rep. 1099; Gard v. Thompson, —— Idaho ——, 123 Pac. Rep. 497; Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488;

The engineer must require that the construction be completed within five years, but he may limit the period to a less time. When so limited an extension of time may be granted, provided that it can not be extended for longer than the five years set by the statute. He must also fix a date when the water must be applied. An appeal from the endorsement may be had to the District Court. The work must be prosecuted diligently and uninterruptedly to completion. A bond must be filed by the applicant, conditioned upon the faithful carrying to completion the works of diversion as specified in the permit.[6]

On or before the date set for the completion of the works proof of such completion must be made to the State engineer, in the manner as provided by the statute.[7] An examination must be made by the State engineer, and if the works are found to comply with the law, he shall issue a certificate to the holder of such permit or his assigns, which certificate shall contain the name of the holder, the number of the permit, the date of application, the address of the holder, the condition of such works, the purpose of appropriation, the quantity of water which can be diverted by the works and conducted to the place of use, a description of the lands to be irrigated.[8] Within the time set for the application of the water to the beneficial use further proof must be made of such actual application.[9] And upon the receipt by the State engineer of such final proof he shall issue a license to such user or users confirming such use. All licenses which relate to the same permit shall bear the same date of priority, shall be numbered alike, and all rights relating to the same source of supply shall be numbered numerically in the order of the priority of such rights. Such license shall be binding upon the

Marshall v. Niagara etc. Co., decided by the Supreme Court of Idaho on June 8, 1912.

6 Rev. Codes, 1908, Sec. 3254; as amended, Laws, 1911, Chap. 64, p. 184.

For permits and their cancellation, see Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295, holding that vested rights to the use of water can not be taken away, and the right to the use of such water granted to a subsequent locator by the State engineer.

7 Rev. Codes, 1908, Sec. 3257.

See, also, Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

8 Rev. Codes, 1908, Sec. 3258.

See, also, Boise etc. Co. v. Stewart, *supra*.

9 Rev. Codes, 1908, Sec. 3260.

State and shall be *prima facie* evidence as to such right.[10] Non-use of the water under any license constitutes an abandonment: Provided, that any person owning land to which water has been appurtenant may transfer the use of the water to other land upon making the proper application to the State engineer and obtaining his approval to the same.[11]

Protests may be made against the issuance of any license to the State engineer, and an appeal may be had from his decision to the District Court.[12]

By the Act approved March 11, 1909,[13] special proceedings are provided for the cancellation of permits to appropriate water where there has been a failure of the applicant to comply with the requirements of his permit. It must be upon a petition to the State engineer, and a hearing must be had by him, and any decision rendered by the engineer may be appealed to the District Court; or the complainant may elect to bring his action in the first instance in the District Court.

§ 1828. **The adjudication of existing rights.**—The adjudication of existing water rights in the State of Idaho, in the first instance, unlike the States of Wyoming and Nevada, is by the District Court.[1]

Whenever such an action is filed in the District Court and before such adjudication is made, the judge of such court shall request the State engineer to make an examination of such stream and the canals and ditches diverting water therefrom, and of all the land irrigated thereby, and the lands susceptible of reclamation. He shall also prepare a map and plat and a statement of the conditions, which map and statement shall be accepted as evidence in the determination of such rights by the Court, the cost of such map and statement to be apportioned among the claimants and parties to the suit.[2]

After a hearing in such an action, in allotting the waters of any

10 Rev. Codes, 1908, Secs. 3261, 3262.

11 Rev. Codes, 1908, Sec. 3264.

12 Rev. Codes, 1908, Sec. 3265.

13 Laws, 1909, p. 299.

1 For the determination of existing water rights in Wyoming and Nevada, see Secs. 2111-2114.

2 Rev. Codes, 1908, Sec. 4620; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

See, also, Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179; Le Quime v. Chambers, 15 Idaho 405, 98 Pac. Rep. 415; Lockwood v. Freeman, 15 Idaho

stream by the Court according to the rights and priorities of those using such water, such allotment shall be made to the use to which such water is beneficially applied, and when such water is used for irrigation the right confirmed by such decree shall be appurtenant to and shall become a part of the land which is irrigated by such water. In the case of works capable of diverting more water than is applied to a beneficial use at the time of such adjudication, the right only to the water beneficially applied at the time of making such allotment shall be confirmed by the Court, and the Court shall further ascertain the amount of water which can be diverted through such works in excess of such quantity beneficially applied, and shall set a time when such amount shall be applied to the beneficial purpose for which it is intended, which time shall not exceed four years from the date of the decree, and before the expiration of the time set proof of such application must be made.[3]

It is then made the duty of the clerk of the court to prepare and transmit to the State engineer a certified copy of the allotments made, which must be recorded in the office of the State engineer. The engineer shall then send a copy of such allotments to each of the water commissioners. The water commissioners must then have such allotments printed in pamphlet form and supply each water user with a copy of the same.[4]

By the recent Act approved March 13, 1911,[5] it is provided that where the priority of the rights of any stream, canal, or reservoir shall have been determined by the Court, and thereafter it shall appear that any person or corporation having the right to the use of any of the water was not included in the decree, or that any person who subsequently thereto has acquired any right to the use of such waters, such person may bring an action in the proper District Court against the water master having in charge the distribution of the water, or against the water commissioners of the district. Such party shall in his complaint set out his own right, and he shall further set forth his acceptance as binding upon him of the said decree and the findings of fact and conclusions of law upon which it is based. Summons must issue and be served; also a notice must be

395, 98 Pac. Rep. 295; Farmers' etc. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

3 Rev. Codes, 1908, Sec. 4621; Lee v. Hanford, —— Idaho ——, 121 Pac. Rep. 558.

4 Rev. Codes, 1908, Secs. 4622, 4623.

5 See Laws, 1911, p. 708.

published of the action and the claim set up. Any party interested may appear and defend. The Court, by its decree in said action, shall determine the right of the plaintiff, but subject to the terms of the original decree.

§ 1829. **Reservoir rights.**—The right of the owners of reservoirs to use the beds of streams is also given by the Act approved March 13, 1909.[1] The Act also provides for the appointment of a special deputy to supervise the use of reservoir waters in such a manner that those having the right in their use shall secure the volume to which they are entitled.

It is also made a misdemeanor for any one to unlawfully interfere with the headgates along the stream adjusted by such deputy, in such a manner as to misappropriate any of the waters to which he is not entitled.[2]

§ 1830. **Fixing water rates.**—The county commissioners of each county are empowered, at their regular session in January of each year, to hear and consider all applications of parties interested either in the furnishing or the using of water for hire, and proceed to fix a maximum compensation for the waters thereafter to be delivered to consumers from such works. A date for the hearing of the same must be set and notice to all parties interested must be given. At such hearing proof may be taken of the present value of such works, as well as the cost of operating and maintaining the same, and all matters which may affect the establishment of reasonable maximum rates. "Upon hearing and considering all the evidence and facts and matters involved in the case, said board of county commissioners shall enter an order describing the ditch, canal, or conduit, or other water works in question, with sufficient certainty and fixing a just and reasonable maximum rate of compensation for water thereafter delivered from such ditch or other works as last aforesaid, within the county in which such commissioners act; and such rate shall not be changed within one year from the time when such rate shall be so fixed: *Provided*, that an appeal may be taken to the District Court from any act, order, or proceed-

[1] Laws, 1909, p. 151. The above Act is similar to that of Wyoming. See Sec. 2128.

[2] See, also, for rights of way for reservoirs, Secs. 839, 840.

ings of the board by any person or corporation aggrieved thereby, as in other cases under the general statute of the State of Idaho governing appeals from an order or proceeding of the board of county commissioners."[1]

Full provisions are also made for the fixing of the maximum water rates which may be charged by companies furnishing cities or towns. Said rates to be fixed by commissioners, two of which shall be selected by the city or town authorities, or if there be none such, then by the county commissioners, and two to be selected by the taxpayers of such town or city.[2]

§ 1831. **Rights of way—Condemnation proceedings.**—A right of way for ditches, canals, or other works is given over the lands of others and over the lands of the State; provided, that no property shall be taken for such purpose until just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for a public use.[1] Rights of way are also given over other ditches or canals, and the person seeking such right of way shall be liable for all damages that may accrue from crossing the works of another.[2]

The uses for which property may be taken[3] and the property which may be taken are fully set forth in the statute.[4] Before

1 Rev. Codes, 1908, Secs. 3294-3298.

See, also, Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617; Rust v. Stewart, 7 Idaho 558, 64 Pac. Rep. 222; Boise Irr. Co. v. Clarke, 131 Fed. Rep. 415, 65 C. C. A. 399; Nampa etc. Co. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993.

For the general discussion upon the subject, see Chap. 69, Secs. 1368-1385.

2 Rev. Codes, 1908, Secs. 2838, 2839.

See, also, Boise etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Jack v. Grangeville, 9 Idaho 291, 74 Pac. Rep. 969; Boise City v. Artesian etc. Co., 4 Idaho 351, 39 Pac. Rep. 562; Bellevue W. Co. v. Bellevue, 3 Idaho 739, 35 Pac. Rep. 693; City of Pocatello v. Murray, —— Idaho ——, 120 Pac. Rep. 812.

1 Rev. Codes, 1908, Secs. 1635, 2840, 3299-3304.

The statute authorizes the condemnation of State lands for a public use. Hollister v. State, 9 Idaho 8, 71 Pac. Rep. 541; Boise City v. Artesian etc. Co., 4 Idaho 351, 39 Pac. Rep. 562; Jack v. Grangeville, 9 Idaho 291, 74 Pac. Rep. 969.

2 Rev. Codes, 1908, Sec. 3305.

3 Rev. Codes, 1908, Secs. 1635, 1638, 2422, 3299-3305, 5210.

See, also, Postal Tel. etc. Co. v. Oregon etc. R. Co., 111 Fed. Rep. 842, 104 Fed. Rep. 623; Hollister v. State, 9 Idaho 8, 71 Pac. Rep. 541; Potlatch etc. Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, 118 Am. St. Rep. 233.

4 Rev. Codes, 1908, Secs. 5211, 5212.

See, also, Hollister v. State, 9 Idaho 651, 77 Pac. Rep. 339.

any property can be taken it must appear: That the use to which it is to be applied is a use authorized by law; that the taking is necessary to such use; if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.[5] An accurate survey of the property proposed to be taken may be made without incurring damage, and such property must be located in the manner which will be most compatible with the greatest public good and the least private injury.[6]

For all proceedings of this nature, jurisdiction is conferred upon the District Court of the proper county, and the proceedings prescribed by the statute must be strictly followed.[7] The damages for such taking may be assessed by the Court, a jury, or a referee, and shall be deemed to have accrued at the date of the summons, and the actual value of the property at that date shall be the measure of compensation.[8] The damages must be paid within thirty days after judgment, and execution may issue therefor, and if the money can not be made on execution, the Court may annul the entire proceedings. In the details of the proceedings the California code is largely followed, heretofore discussed.[9]

Rights of way for ditches and reservoirs are granted to any persons desiring to construct the same over or upon any of the lands owned or controlled by the State upon an application duly made therefor to the State board of land commissioners, and approved by it. Payment must be made therefor as may be deemed reasonable of not less than $10 per acre. All lands thereafter sold for such rights of way must be marked on the plats.[10]

§ 1832. **Liability for injuries.**—Upon the question of injuries it is provided: "That in the making, constructing, keeping up, and maintenance of such ditch, canal, or conduit through the lands of

[5] Headrick v. Larson, 152 Fed. Rep. 93, 81 C. C. A. 317; Oregon etc. R. Co. v. Postal Tel. etc. Co., 111 Fed. Rep. 842, 49 C. C. A. 663.

[6] Rev. Codes, 1908, Sec. 5214.

[7] Rev. Codes, 1908, Secs. 5215-5229. For what the complaint must contain, see Rev. Codes, Sec. 5216. See, also, Hollister v. State, *supra;* Postal Tel. etc. Co. v. Oregon etc. R. Co., 104 Fed Rep. 623; Canyon County v. Toole, 8 Idaho 501, 69 Pac. Rep. 320.

[8] Rev. Codes, 1908, Secs. 5220, 5221; Spokane etc. R. Co. v. Lieuallen, 3 Idaho 381, 29 Pac. Rep. 854.

[9] See, for proceedings in condemnation in California, Secs. 1738-1743.

[10] Rev. Codes, 1908, Secs. 1635-1638.

others the person, company, or corporation proceeding under this section, and those succeeding to the interests of such person, company, or corporation must keep such ditch, canal, or other conduit in good repair, and are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct."[1]

§ 1833. **Maintenance and repair of works.**—All ditches, canals, or other works must be kept in good repair by the owner thereof in order that such owner may furnish its consumers with water for the purpose of irrigation from the first day of April to the first day of November of each year, and to prevent the wasting of water and the incurring of damage to others.[1] All ditches and canals must be bridged where the same cross roads.[2] Where a ditch is common property, the water master of the district may make a *pro rata* assessment against the users according to the benefits received; and if any person refuses for the period of three days after notice to pay the same, the water master may bring an action in his own name for the same.[3] Any lateral ditch may be changed to another location if the rights of others are not injured.[4]

§ 1834. **Corporations—General powers and duties—Statements.**—It is made the duty of any corporation owning or controlling any canal or irrigation works for the distribution of water for sale or rental to file, before the first Monday in January in each year, in the office of the county recorder of every county in which such company distributes water, and a duplicate copy thereof with the State engineer, a full statement showing the condition of the business of said corporation on December 31 of the preceding year.

Said statement to contain the following: A general description of its property; its cost and estimated present value; total amount and character of all indebtedness; total amount due the company

1 Rev. Codes, 1908, Sec. 3300.

See, also, Arave v. Idaho etc. Co., 5 Idaho 68, 46 Pac. Rep. 1024.

1 Rev. Codes, 1908, Secs. 3306-3309.

2 Rev. Codes, 1908, Sec. 3310.

It is the duty of the owner of such works to construct bridges. MacCammelly v. Pioneer Irr. Dist., 17 Idaho 415, 105 Pac. Rep. 1076.

3 Rev. Codes, 1908, Sec. 3311.

See, also, Shelby v. Farmers' D. Co., 10 Idaho 723, 80 Pac. Rep. 222.

4 Rev. Codes, 1908, Sec. 3311a.

and from what source; the income of the company during the preceding year and from what sources; the expenditures by the company during the same period and for what purposes; the total area of land watered from its works during the preceding year; the number of acres of land said ditch is susceptible of irrigating; the capacity of its works and the quantity of water carried during the said season as nearly as known; the amounts of recorded appropriations, and the date of each.

The said statement shall be sworn to by the proper official of said corporation. And a failure by the proper official or principal accounting officer for thirty days after notification by the recorder to file such statement renders him guilty of a misdemeanor, and subjects him to a fine of not exceeding $300 and imprisonment in the county jail for not more than six months, or both.[1]

§ 1835. **Corporations—License required before selling water.**—By an Act of 1909 it is provided that all persons, copartnerships, associations, companies, and corporations shall, before selling any water right therein, file with the State engineer a map showing the location of their works and the lands to be reclaimed therefrom, duly certified under oath as true and correct by a licensed engineer, and such other information as may be necessary to enable the State engineer to determine the capacity of such irrigation works and the number of acres which may be irrigated therefrom; and shall also file a duplicate with the register of the State board of land commissioners, together with a petition for a certificate of authority to sell water rights in such works. The register must then forward said petition to the State engineer, who, after an examination of such works, must make a full report thereon. The report of the engineer shall be filed with the board of land commissioners, and said board shall thereupon determine the number of water rights, units or shares of water which may be sold under such system, and the number of acres which may be irrigated therefrom, and the form of contract or deed which shall be given to the purchasers thereof; and the board shall issue to the owners of such works a certificate containing the above facts, which shall be recorded in the office of the county recorder of each county where such rights are sold. All contracts and deeds for the sale of water shall be of the

[1] Rev. Codes, 1908, Sec. 2844.

form so approved, and numbered consecutively. And any pretended deed or contract or other instrument pretending to convey water rights, prior to such filing of the certificate, shall be absolutely null and void, and the persons issuing the same be personally and severally liable for any damages sustained by the purchasers, and be further liable to fine and imprisonment.[1]

Parties constructing irrigation works under the provisions of the Carey or National Reclamation Acts are exempted from the provisions of the Act. Reports of the sale of water rights must be filed annually.[2]

§ 1836. Corporations—Distribution of water to consumers.—It is made the duty of all those owning or controlling any ditch, canal, or lateral to appoint a superintendent or water master, whose duty it shall be to measure the water from such ditch to those entitled thereto, according to his or her *pro rata* share. For this purpose headgates and measuring devices must be constructed by such company or owner. Any one or more of the joint users of the water may petition the judge of the District Court for the appointment of a water master, and upon notice to all of the water users such water master may be appointed to so distribute the water, and any person who without the consent of the water master interferes with, shuts off or opens any ditch, gate, or dam, with the intent to divert the water, or who cuts any ditch or the banks thereof, or breaks or destroys any gate or flume, is made liable to any person injured in three times the actual damage sustained in consequence of any such act or wrongful acts.[1]

In the distribution of the water it is provided that when any ditch, canal, or reservoir delivering water to several users has one or more rights or priorities, by reason of the enlargements made from time to time, the right of the lands being irrigated shall be divided into classes, the rights of the first class belonging to those lands reclaimed between the dates of the first and second priorities or rights of such works; rights of the second class belonging to those lands reclaimed between the dates of the second and third priorities; rights of any other class being determined in like manner; "but

1 Laws, 1909, p. 335.

2 Act approved March 13, 1909, Laws, 1909, p. 338.

1 Rev. Codes, 1908, Secs. 3284-3286.

all the rights belonging to the same class shall be equal and subject alike to the regulations of their respective class."[2]

Any person, association, or corporation which may contract to deliver a certain quantity of water to any party or parties shall deliver the same to such party or parties, together with a reasonable and necessary allowance for loss by evaporation and seepage, at some convenient point on the main ditch or other works or on any branch or lateral thereof. Where two or more parties take water from said works, to be conveyed to their respective premises, such parties shall, on or before the first of April of each year, select some person, to be known as the manager of such distributing lateral, to have charge during the succeeding season of the distribution of the water among the parties entitled thereto. It is also made the duty of such person to see that the person or company contracting to furnish the water shall deliver the proper amount; and in case of dispute as to the quantity of water to be delivered by such contracting party, the matter shall be referred to the State engineer for his decision. The consumers must keep their ditches and laterals in good condition for carrying the water; and in case they do not do so, they shall have no cause for damage against the company furnishing the water for the failure to furnish the water. The manager is given the power to require each user of such lateral to contribute his proportion of the amount of labor, material, or money to keep such lateral in proper repair. And in case of default in so doing the manager may employ other labor and sue such consumer for his proportion, including costs and attorney's fees.[3] The amount to be paid by said parties for the delivery of said water may be fixed by contract, or as provided by law, and constitutes a first lien on the land for which the water is furnished. But if the title to said land is in the United States or the State, then the amount shall be a first lien upon any crops which may be raised upon said tract of land, which may be collected as provided by law for other liens. And any mortgage or other lien upon such tracts that may be here-

2 Rev. Codes, 1908, Sec. 3287.

Any classification made by an irrigation company under the provisions of Section 3287 of the Revised Codes can in no way affect and control the question of priorities between users and in no way prohibits or limits any user of water in having the question of priorities between users settled and adjudicated in the proper court of the State. Brose v. Nampa & Meridan Irr. Dist., 20 Idaho 281, 118 Pac. Rep. 504.

3 Laws, 1909, p. 108.

after given shall, in all cases, be subject to the lien for the price of the water.[4]

It is made the statutory duty of any person, company, or corporation owning or controlling any irrigation works for the distribution of water for sale or rental thereof to furnish water to any person or persons owning or controlling any land under such works for the purpose of irrigation or for domestic purposes upon proper demand being made and reasonable security being given for the payment thereof: Provided, that no person or company shall contract to deliver more water than they have title to.[5] Such application must be made on or before the first of January of any year, for the water during the succeeding season, and must also state the quantity of water needed. Preference shall be given to those who used the water during the preceding season. No unreasonable conditions must be imposed by the company as precedent to the delivery of the water. "But no demand for the purchase of a so-called 'perpetual water right' or any contract fixing the annual charges or the quantity of water to be used per acre shall be imposed as a condition precedent to the delivery of water annually as provided in this chapter."[6]

Whenever any waters have been appropriated or used for agricultural or domestic purposes, under a sale or rental thereof, such sale or rental shall be deemed an exclusive dedication to such use, and such consumer, his heirs, executors, administrators, successors, or assigns, shall not be thereafter deprived of the annual use of the

4 Rev. Codes, 1908, Sec. 3288.

5 Rev. Codes, 1908, Sec. 3289.

For penalty for the neglect to deliver water, see, also, Sec. 7149.

See, also, Bardsly v. Boise Irr. Co., 8 Idaho 155, 67 Pac. Rep. 428; Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Boise etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Gerber v. Nampa etc. Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670.

6 Rev. Codes, 1908, Sec. 3290.

See, also, Bardsly v. Boise Irr. Co., 8 Idaho 155, 67 Pac. Rep. 428; Helphrey v. Perrault, 12 Idaho 451, 86 Pac. Rep. 417; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

water.[7] And the right of a consumer to so use the water is not affected by a sale or transfer of the ditch or other works.[8]

The consumer is made the judge of the amount and the duty of the water required for the irrigation of his land; and the annual charges must be made upon the quantity furnished, and not in any case upon the number of acres irrigated.[9] But no person entitled to the use of water from any such ditch or canal must, under any circumstances, use more water than good husbandry requires for the crop or crops he cultivates; and any person using an excess of water is liable to the owner of such ditch or canal for the value of such excess; and in addition thereto is liable for all damages sustained by any other person who shall have been entitled to the use of such excess water.[10]

§ 1837. **The Carey Act in Idaho.**—The Carey Act of Congress was accepted in Idaho, and to date greater progress has been made and correspondingly greater benefits derived from that Act than in any other State.

Full proceedings are set forth in the statutes for the operation under the Carey Act.[1] The selection, management, and disposal of such lands is vested in the State board of land commissioners, which has the power to make necessary rules. The statute relating to the selection of the land and the proposals is largely the same as that of Wyoming.[2] An application must also be filed with the State engineer for a permit to appropriate water for the reclamation of the lands, the same as in other cases.[3] The proposal must be submitted to the State engineer, and he must report back to the board as to whether the proposed works are feasible or not, and other details of the said project in full. Upon receipt of the report of the

7 Rev. Codes, 1908, Sec. 3291.

8 Rev. Codes, 1908, Sec. 3292; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Nampa etc. Irr. Dist. v. Gess, 17 Idaho 552, 106 Pac. Rep. 993; Idaho Fruit Co. v. Great Western etc. Co., 17 Idaho 273, 105 Pac. Rep. 562; Hewitt v. Great Western etc. Co., 20 Idaho 235, 118 Pac. Rep. 296.

9 Rev. Codes, 1908, Sec. 3290.

10 Rev. Codes, 1908, Sec. 3293.

1 See Rev. Codes, 1908, Secs. 1613-1634, as amended by the Acts of the legislature hereafter referred to.

For the general discussion of the Carey Act, see Chap. 67, Secs. 1312-1336; State v. Twin Falls Canal Co., —— Idaho ——, 121 Pac. Rep. 1039.

2 See Sec. 2124; Rev. Codes, 1908, Secs. 1615, 1616, 1631, 1632.

3 Rev. Codes, 1908, Sec. 1617.

State engineer the board must make its decision, and in case of approval it shall instruct the register to file in the local land office a request for the withdrawal of the land. "No request on which the State engineer has reported adversely, either as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board.[4] But, after notice of the adverse report of the engineer, the parties may have sixty days in which to submit a satisfactory proposal, which time may be extended by the board to six months.[5]

Upon approval of the project the usual contract may be made with the contracting company, but no contract shall be made by the board which requires more than five years for the construction of the works; but such time may be extended by the board not exceeding three years. A failure to complete the works within the time required by the contract, or an extension thereof, shall forfeit to the State all rights under the same.[6] And after such forfeiture the board may receive proposals, and may award a new contract for the completion of such works.[7]

Notice must be given of the opening of the lands for settlement.[8] Any citizen of the United States over the age of 21, excepting married women, and further excepting the register of the board, or any public officer or agent in charge of the filing and entering of such lands, may enter any of said lands in any amount not to exceed 160 acres. The application must be accompanied with a water right contract with the constructing company.[9] The uniform price of 50 cents per acre is charged for the lands, the proceeds from the sale of which shall constitute a trust fund in the hands of the State

4 Rev. Codes, 1908, Secs. 1618, 1619.

5 Rev. Codes, 1908, Sec. 1620.

6 Rev. Codes, 1908, Secs. 1621, 1622; as amended, Laws, 1911, Chap. 35, p. 75.

7 Rev. Codes, 1908, Sec. 1623.

8 Rev. Codes, 1908, Sec. 1625.

9 Rev. Codes, 1908, Sec. 1626; as amended, Laws, 1911, p. 116, also providing that any of the officers above named who shall violate the provisions of the Act shall be punished by a fine not to exceed $1000, or by imprisonment in the penitentiary not exceeding five years.

For the measure of damages for the failure of the contracting company to comply with a contract with a settler and furnish the water, see Summerville v. Idaho Irr. Co., —— Idaho ——, 123 Pac. Rep. 302.

See, also, Hanes v. Idaho Irr. Co., —— Idaho ——, 123 Pac. Rep. 859.

treasurer, to be used only for the reclamation of other lands.[10] Proof of settlement, reclamation, and occupation must be made by the settler; that he has been an actual settler thereon, and has cultivated and irrigated not less than one-eighth of said tract.[11] In case of death of the entryman, the proof may be made by the executor, administrator, heir, or devisee.[12] The usual lien is given the contracting company for furnishing the water rights and provisions for foreclosure of the same.[13] All lands filed upon shall be subject to the rights of way for the canals of the project.[14]

The Act of January 26, 1911,[15] authorized the State board of land commissioners to expend money from the Cary Act trust fund for the protection of life and property, or either of them, in or affected by Carey Act projects, and the granting of a lien for such expenditure.

The Act of March 7, 1911,[16] prohibited State officers, employees, or appointees from having anything to do, directly or indirectly, with the sale or disposal of Carey Act or other public lands.

§ 1838. Irrigation district law.—Idaho has also adopted the irrigation district law, modeled largely upon that of California, and discussed at large in a previous chapter of this work.[1]

[10] Rev. Codes, 1908, Sec. 1627; as amended, Laws, 1911, p. 701.

[11] Rev. Codes, 1908, Sec. 1628; as amended, Laws, 1911, p. 666.

[12] Laws, 1911, p. 30.

[13] Rev. Codes, 1908, Sec. 1629.

[14] Rev. Codes, 1908, Sec. 1630.

[15] Laws, 1911, Chap. 3, p. 5.

[16] Laws, 1911, Chap. 51, p. 116.

[1] For irrigation districts, see Chap. 70, Secs. 1386-1432.

See, also, Rev. Codes, 1908, Secs. 2372-2443, as amended by the Acts of 1911, hereinafter referred to.

As to the constitutionality of irrigation district law in Idaho, see Nampa Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499; Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. Rep. 829; Oregon etc. R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904, 1 Water & Min. Cas. Ann. 1; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Pioneer Irr. Dist. v. Bradbury, 8 Idaho 310, 68 Pac. Rep. 295, 101 Am. St. Rep. 201; Emmett Irr. Dist. v. Schane, 19 Idaho 332, 113 Pac. Rep. 444; City of Nampa v. Nampa etc. Irr. Dist., 19 Idaho 779, 115 Pac. Rep. 979; Progressive Irr. Dist. v. Anderson, 19 Idaho 504, 114 Pac. Rep. 16; Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. Rep. 328; Gem Irr. Dist. v. Johnson, 18 Idaho 386, 109 Pac. Rep. 845; Gerber v. Nampa etc. Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; Black Canyon Irr. Dist. v. Marple, 19 Idaho 176, 112 Pac. Rep. 776; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254; Snake River Irr. Dist. v. Stephens, 18 Idaho

The organization of such districts is similar to proceedings for the same in California.[2]

The section upon the subject of the notice of an election for the organization of a district and the qualifications of voters at the same was amended by the Act of March 6, 1911. Every person over the age of 21 who is a citizen of the United States and a resident of the State of Idaho, and an owner of lands in the proposed district, is entitled to vote at such an election.[3] Such election shall be conducted as nearly as possible in accordance with the general laws of the State.[4] After the organization of the district the election of the board of directors of the same must be had, the proceedings for which are similar to that in California.[5]

The powers and duties of the board are also similar.[6] At least, as often as once a year the board of directors shall make a report to the State engineer of the condition of the work of construction, as to capacity, stability, and permanency, and whether or not the plan is being successfully carried out, and as to whether or not the funds available will complete the works. Upon receipt of such report the State engineer shall make such suggestions and recommendations to the board as he may deem advisable for the best interests of the board. A statement of the financial condition of the district must be published.[7] Money may be borrowed and bonds issued for the same by following the usual proceedings,[8] including the confirmation proceedings by the Court.[9] Assessments may be levied and

541, 110 Pac. Rep. 1033; Teeter v. Nampa etc. Dist., 19 Idaho 355, 114 Pac. Rep. 8; Sunnyside Irr. Dist. v. Stephens, —— Idaho ——, 120 Pac. Rep. 169; Russell v. Irish, 20 Idaho 194, 118 Pac. Rep. 501; Brose v. Nampa etc. Irr. Dist., 20 Idaho 281, 118 Pac. Rep. 504.

2 Rev. Codes, 1908, Secs. 2372-2374.

3 Rev. Codes, 1908, Secs. 2375, 2375a, as amended and added to by Laws, 1911, p. 462.

4 Rev. Codes, 1908, Sec. 2376; as amended, Laws, 1911, p. 464, and Rev. Codes, Sec. 2377.

5 Rev. Codes, 1908, Secs. 2378, 2379; as amended, Laws, 1911, p. 465; also, Secs. 2380-2384; Hertle v. Ball, 9 Idaho 193, 72 Pac. Rep. 953.

6 Rev. Codes, 1908, Sec. 2385; as amended, Laws, 1911, p. 472, Sec. 2386; as amended, Laws, 1911, pp. 194, 466; also 2386a-2386g, Laws, 1911, pp. 468-472; Laws, 1911, pp. 195-199. See, also, Rev. Codes, Secs. 2388-2395.

7 Rev. Codes, Secs. 2393, 2394.

8 Rev. Codes, 1908, Secs. 2396-2398, 2399; as amended, Laws, 1911, pp. 199, 472; also, Secs. 2400-2406.

See, also, Pioneer Irr. Dist. v. Campbell, 10 Idaho 159, 77 Pac. Rep. 328; Nampa etc. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499.

9 Rev. Codes, 1908, Secs. 2401-2403; Black Canyon Irr. Dist. v. Fallon, —— Idaho ——, 122 Pac. Rep. 850.

collected for the usual purposes. But no State lands shall be assessed.[10] All assessments must be made according to benefits and not according to acreage within the district, and proceedings are allowed to contest the question of benefits.[11] Contracts may be let for the construction of the works.[12] The right is given to cross streets and railroads with ditches and canals, and state lands.[13] The right is given to condemn, for the use of said districts, "all lands, water rights, reservoirs, canals, and works constructed or being constructed by private owners, and lands for reservoirs for the storage of needful waters, and all necessary appurtenances and other property necessary for the construction, use, and supply, maintenance, repair, and improvement of said canal or other works."[14]

The boundaries of districts may be changed.[15] Under certain circumstances money will be advanced by the State from the Carey Act trust fund to aid in the organization and surveys of a proposed irrigation district.[16]

§ 1839. Provisions in aid of the National Reclamation Act.—Provisions are made for rights of way for projects constructed under the National Reclamation Act; also that the lands belonging to the State under such projects shall be sold only in conformity with the classification of farm units by the United States, and that in all contracts for the sale of lands under such works it shall be provided that the purchaser shall apply for a water right from the Government works and subscribe such lands in the Water Users' Association of the project under which they are located, within one year after said contract is made, or if there be no such association at the time within one year after such association is organized, and

10 Rev. Codes, 1908, Secs. 2407-2415, as amended by Laws, 1911, pp. 200, 415, 473, Sec. 2439.

11 Rev. Codes, 1908, Secs. 2399, 2400; as amended, Laws, 1911, pp. 199, 472.

See, also, Pioneer Irr. Dist. v. Bradbury, 8 Idaho 310, 68 Pac. Rep. 295, 101 Am. St. Rep. 201; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

12 Rev. Codes, 1908, Secs. 2416-2419; as amended, Laws, 1911, pp. 201, 474.

13 Rev. Codes, 1908, Secs. 2420, 2421.

14 Rev. Codes, 1908, Sec. 2422.

15 Rev. Codes, 1908, Secs. 2423-2433, 2434-2437; as amended, Laws, 1911, Chap. 46, p. 102, Sec. 2438.

16 See Act of Feb. 27, 1911, Laws, 1911, Chap. 22, p. 47.

upon failure of the purchaser to comply with these provisions, the lands so purchased shall revert to the State, together with the payments made thereon, as fully and completely as if no sale had ever been made.[1]

Provisions are also made for the organization of water users' associations in compliance with the requirements of the United States.[2]

Provisions are also made for irrigation districts to contract with the United States for the construction of the works and the repayment of the money advanced by the United States.[3]

And by the Act approved March 13, 1909,[4] provisions are made for the State land board to contract with the Secretary of the Interior to provide for the irrigation of State lands within or adjacent to National reclamation projects.

Any water users' association which is organized in conformity with the National Reclamation Act,[5] and which, under its articles of incorporation, is authorized to furnish water only to its stockholders, is made exempt from the payment of any incorporation tax and from the payment of any annual franchise tax.[6] It is made the duty of all county recorders in which such water users' associations are organized to provide books and keep a full record of the same.[7]

The Act of February 14, 1911,[8] authorizes the county commissioners to secure data, surveys, estimates, etc., for the purpose of procuring Government aid to irrigation enterprises.

§ 1840. **Floating logs and timber upon streams.**—No dam or boom must be hereafter constructed or permitted on any creek or river unless such dam or boom has connected therewith a sluiceway, lock, or fixture sufficient and so arranged as to permit timber to pass around, through, or over such dam or boom without unreasonable delay or hindrance.[1] Any boom or weir not so constructed is

1 Rev. Codes, 1908, Secs. 1583, 1584.
2 Rev. Codes, 1908, Secs. 2842, 2843.
3 Rev. Codes, 1908, Secs. 2397, 2398.
4 Laws, 1909, p. 335.
5 For a full discussion of this Act, see Chap. 65, Secs. 1235-1286.
6 Rev. Codes, 1908, Sec. 2842.
For the license fees of other corporations, see Sec. 2785.
7 Rev. Codes, 1908, Sec. 2843.
8 Laws, 1911, Chap. 9, p. 25.
1 Rev. Codes, 1908, Sec. 872.
See, also, Potlatch etc. Co. v. Peterson, 12 Idaho 769, 88 Pac. Rep. 426, 118 Pac. Rep. 233.

declared to be a public nuisance, and may be abated, and the owner thereof be liable to a fine of $5 per day for each day the same remains in such condition, and is also liable for any damages sustained by persons by reason thereof.[2]

§ 1841. **Qualifications of engineers.**—The statute as to the examination of the qualifications of engineers and surveyors and the granting licenses thereto largely follows that of California.[1] But all persons who have been granted diplomas as civil engineers by the University of Idaho may be licensed without examination.

"No survey of land, or plat, or subdivision shall be legal after June 1, 1903, unless made by a licensed surveyor.[2]

§ 1842. **Criminal statutes.**—Besides the offenses mentioned in the preceding sections, it is made a misdemeanor for any person to wantonly waste the waters of any stream, to the detriment of any claimant, for irrigation purposes.[1] Any one interfering with the flow of water as regulated by the water master is guilty of a misdemeanor;[2] so, also, the unlawful diversion of water, or the interference with headgates or cutting the banks of a stream.[3] It is made an indictable misdemeanor to injure ditches and appurtenances, measuring devices, or to change a lateral so as to injure the rights of another person.[4] Any person who shall wilfully waste water for irrigation, or who shall wilfully open, close, change, or disturb, or interfere with, any headgate or water box or measuring device, without authority, shall be fined in a sum not exceeding $100, or be imprisoned in the county jail not to exceed six months, or both.[5] It is also made a misdemeanor to neglect to deliver water, or to interfere with its delivery.[6]

2 Rev. Codes, 1908, Sec. 873; Powell v. Springston Lbr. Co., 12 Idaho 723, 88 Pac. Rep. 97.

1 See Gen. Laws of Cal., Henning, p. 661.

2 Rev. Codes, 1908, Secs. 1401-1410.

For the qualifications of engineers in Wyoming, see Sec. 2121.

1 Rev. Codes, 1908, Sec. 7144.

See, also, Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. Rep. 189.

2 Rev. Codes, 1908, Sec. 7144a.

3 Rev. Codes, 1908, Secs. 7144b, 7144c.

4 Rev. Codes, 1908, Secs. 7146-7148.

5 Rev. Codes, 1908, Sec. 7148a.

6 Rev. Codes, Sec. 7149.

§ 1843. **Riparian rights in Idaho.**—As far as the right to the use of the waters of the natural streams in the State of Idaho is concerned, the doctrine of riparian rights may be considered abrogated by constitutional and statutory law, and by Court decision, although there is no statute in terms directly abrogating the same.[1] And upon this subject it was recently held that, where riparian owners desire to use the water of natural streams for beneficial purposes, they must comply with the provisions of the law governing appropriations, the same as those who are not riparian owners.[2] But upon the subject of the ownership of the soil under natural streams, the common law rule is followed, and a riparian owner upon the streams of the State, both navigable and non-navigable, takes to the thread of the stream, regardless of meander lines, subject, however, to an easement for the use of the public.[3]

1 Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321; Krall v. United States, 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351; Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

The common law doctrine of riparian rights, in so far as those rights conflict with the right of an appropriator of the waters of a stream, is repugnant to and in conflict with the constitution and the statutes of the State, and to that extent is abrogated thereby. Hutchinson v. Watson Slough D. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

2 Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; Hutchinson v. Watson etc. Co., 16 Idaho 484, 101 Pac. Rep. 1059, 133 Am. St. Rep. 125.

3 Johnson v. Johnson, 14 Idaho 561, 95 Pac. Rep. 499, 24 L. R. A., N. S., 1240; Lattig v. Scott, 17 Idaho 506, 107 Pac. Rep. 47; Fischer v. Davis, 19 Idaho 493, 116 Pac. Rep. 412.

CHAPTER 90.

KANSAS.

§ 1844. Particular features of the State.
§ 1845. Irrigation in the State.
§ 1846. Criticism of the Kansas laws.
§ 1847. Constitutional provisions—Title to water.
§ 1848. The right of appropriation of water—Transfer of right.
§ 1849. The appropriation of water—Standards of measurement.
§ 1850. The adjudication of rights.
§ 1851. Ditches and canals and rights of way therefor.
§ 1852. Corporations and companies.
§ 1853. The condemnation of water rights.
§ 1854. The right to the use of water—Distribution of water.
§ 1855. Reservoir rights.
§ 1856. Water rates.
§ 1857. Irrigation district law.
§ 1858. Board of irrigation survey and experiment—Experiments.
§ 1859. Artesian well Acts.
§ 1860. Criminal statutes.
§ 1861. Riparian rights in Kansas.

§ 1844. Particular features of the State.—Forty years ago one-half of the State of Kansas was considered agricultural and the other half pastoral, and successful agricultural enterprises were not expected beyond the 100th meridian. But, in spite of that idea, the settler gradually moved westward. He had been told that a year of drought and starvation would come. Still he pushed on, breaking and subduing the soil, and showing by his improvements that he had come to stay; and notwithstanding his many disappointments, either he or his children are there yet. The eastern half of Kansas is within the rain belt, and the western portion is within what is known as the semi-arid region.

Generally speaking, the State is one great plain, extending from its eastern boundary to the boundary line between it and Colorado. The State has a rich and deep soil, and an abundance of sunshine. In its eastern half it has sufficient natural moisture to raise crops, but in the western half the rainfall is only sufficient, without irrigation, to lure the hopeful settler to take up his abode there and to struggle against Nature in that unequal contest of dry farming in a semi-arid region.

Among the great sources of water supply in Western Kansas is the underflow or sheet water, which is that vast underground store from which the ordinary wells of the region obtain their supply. There are also a number of natural streams of considerable size, such as the Arkansas, the Republic, Smoky Hill, Solomon, and Cimmarron, and a number of smaller streams. Besides this, there is the opportunity to save up and store the storm waters by means of reservoirs. These storm waters come in considerable quantities, and usually at the time when they are not needed for crop production. These waters can be utilized with small cost, and with an entire immunity from the risks of dangerous floods.[1]

§ 1845. **Irrigation in the State.**—Irrigation is indispensable to the success of an annual production of crops in the western half of Kansas. It has been generally adopted throughout this portion of the State as an adjunct to the rainfall, and would greatly enhance the general prosperity if adopted in the eastern half of the State. Kansas is peculiarly an agricultural State. The farmer is not the only person who would favor the adoption of irrigation there. It is equally important to merchants, bankers, and owners of town property. They have all suffered keenly from the failure of crops without irrigation, and they would all be benefited when an annual crop is insured. The people of Kansas, seeing the great benefits to be derived from the practice of irrigation, have, through their State legislature, adopted for that part of Kansas which lies west of the 99th meridian a very elaborate and even drastic code of control over the natural waters, culminating in the provisions allowing the formation of irrigation districts, which last provisions, in a more or less modified form, have followed the lines laid down by the State of California in this respect.[1]

1 See Irrigation Practice on the Great Plains, by E. B. Cowgill, 1897, Water-Supply and Irrigation Paper No. 5, U. S. Geological Survey; Underground Waters of Southwest Kansas, by E. Haworth, 1897, Water-Supply and Irrigation Paper No. 6, U. S. Geological Survey; Windmills for Irrigation, by E. C. Murphy, 1897, Water-Supply and Irrigation Paper No. 8, U. S. Geological Survey; The Underflow of the South Platte Valley, by Charles S. Slichter and Henry C. Wolff, 1906, Water-Supply and Irrigation Paper No. 184, U. S. Geological Survey.

1 See Irrigation Experiments at Fort Hays, Kansas, 1903-1904, by J. G. Haney; Irrigation in Garden City, Kansas, 1904, by A. E. Wright and

A great many small reservoirs have been constructed by individual farmers and groups of farmers for the irrigation and other uses of the water upon their respective farms. These reservoirs are usually small, being constructed for the purpose of furnishing water to one or more farms. For the purpose of inducing the construction of reservoirs, the legislature of the State enacted a law in 1911 [2] reducing the assessed value of the land of the person who would construct such a reservoir under certain specifications.

According to the census of 1910 the total number of farms irrigated in 1909 was 1006, as against 929 in 1899, an increase of only 77, or 8.3 per cent. The total acreage irrigated in 1909, as given by the same report, was 37,479 acres, against 23,620 acres in 1899, an increase of 13,859 acres, or 587 per cent. The total acreage which all enterprises were capable of supplying with water in 1910 was 139,995 acres. The acreage included in projects completed or under construction in 1910 was 161,300 acres. The acreage irrigated in 1909 has been classified by the census as follows: Under United States Reclamation Service, 6,953 acres; under co-operative enterprises, 27,372 acres, and under individual and partnership enterprises, 3,154 acres.

§ 1846. **Criticism of the Kansas laws.**—The statutory law of the State of Kansas covers a great deal of space, and is nowhere as effective as the laws of some of the other States. This may be due largely to the fact that the greater portion of the State does not depend upon irrigation for the raising and maturity of crops. This portion of the State also has the greater population, and it has evidently been hard work upon the part of the legislators from the western portion to induce their brothers from the other part to enact a simple and effective water or irrigation code. Then, again, there has been the tendency upon the part of the legislators, and especially of the courts, to adhere to the common law doctrine of riparian rights, and at the same time to grant the right of appropriation—a dual system that always brings about confusion. The

A. B. Collins; Pumping Plants in Colorado, Nebraska, and Kansas, by O. V. P. Stout, all found in Separate No. 8, Annual Report of the Irrigation and Drainage Investigations for 1904, Office of Experiment Stations, Bulletin No. 158, U. S. Dept. of Agriculture.

2 See Laws, 1911, Chap. 211, p. 374. See, also, Sec. 1857.

general scheme of the law upon the subject follows that of California.[1] The method prescribed for the appropriation of water is antiquated, which method has been replaced by many of the States by applications to the State engineer. The method of the adjudication of existing rights is the proper one, it being left entirely to the courts at all stages of the proceedings. Riparian rights and other rights to the use of water may be condemned. The irrigation district law is modeled somewhat upon the California law, but is briefer and contains many important changes.[2] The Artesian Well Act of 1911 [3] follows largely that of New Mexico of 1909.[4] The law is very effective, especially as to the sinking of wells and the suppression of waste of waters therefrom. Good results should come from the law. The Carey Act does not apply to the State, so there are no provisions for its operation. The National Reclamation Act does apply to the State, but there has been no legislation in aid of the same. The law of State control has never been adopted, and there are therefore no State administrative officers.

Generally speaking, the State of Kansas needs a new water or irrigation code. Owing to the fact that riparian rights are recognized in the State, probably a water code somewhat on the order of the one adopted by the State of Oregon would be most suited to the conditions in the State.[5] But if the present principles are adhered to the statutes upon the subject at least need recodifying.

§ 1847. Constitutional provisions—Title to water.—The State of Kansas has no constitutional provisions upon the subject of waters and water rights.

Neither are there any statutory provisions or declarations as to the ownership or title to waters within the jurisdiction.

§ 1848. The right of appropriation of water—Transfer of right.—"The right to the use of running water flowing in a river or stream in this State for the purposes of irrigation may be acquired by appropriation. As between appropriators, the one first in time is the first in right."[1]

1 For the statutes of California, see Chap. 86, Secs. 1724-1768.

2 See Sec. 1857.

3 See Sec. 1859.

4 See Sec. 1935.

5 See Chap. 97, Secs. 1973-1997.

1 General Statutes of Kansas, 1909, Sec. 4405.

"In all that portion of the State of Kansas situated west of the 99th meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted, first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses; and, secondly, to other industrial purposes, and may be diverted from natural beds, basins, or channels for such purposes and uses"; provided, that vested rights shall not be interfered with.[2] The right to appropriate water flowing in well-defined subterranean channels is also given.[3]

"Every person complying with the provisions of the Act and applying the waters obtained by means of any artesian well to beneficial uses, shall be deemed to have appropriated such waters to the extent to which the same shall be so applied within a reasonable time after the commencement of the works, and such appropriation shall have effect as of the day of commencement of such works, provided the same be prosecuted with reasonable diligence; otherwise from the time of the application of the waters to a beneficial use.[4]

"The appropriation of water hereafter shall in every case be deemed and be taken to be accomplished and effectual only as to so much water as shall have been actually applied to beneficial uses within a reasonable time after the commencement of the works by means of which such appropriation is intended to be made, or afterward where no appropriation has in the meantime been initiated by others, together with the reasonable amount necessary to supply losses by waste, seepage, and evaporation; all the residue of the water within the capacity of the canal or other works shall be deemed to be derelict, and liable to appropriation by any subsequent appropriator.[5]

"All waters flowing in subterranean channels and courses, or flowing or standing in subterranean sheets or lakes south of Township 18 and west of the 99th meridian, shall belong and be appurtenant to the lands under which they flow or stand, and shall be devoted, first, to the irrigating of such lands in aid of agriculture, subject

The future references in this chapter will be to the General Statutes of Kansas, 1909, by Dassler, published by Crane & Co., Topeka, Kansas, 1910.

[2] Gen. Stats., 1909, Sec. 4423.

[3] Gen. Stats., 1909, Sec. 4427; as amended, Laws, 1911, p. 377.

For subterranean waters, see, also, Secs. 1148-1211.

[4] Gen. Stats., 1909, Sec. 4429.

See, also, the Artesian Well Act of 1911, Sec. 1859.

[5] Gen. Stats., 1909, Sec. 4424.

to ordinary domestic use; second, subject to such use, may be devoted to other industrial purposes; provided, however, that nothing herein contained shall in any way affect appropriations heretofore made."[6]

By the Act approved March 3, 1911,[7] it was declared that all water rights of every kind, or shares in irrigation companies, entitling the owners thereof to the use of water for irrigation, shall be appurtenant to the land upon which they are established, by the use of water thereon, and shall pass with any and all conveyances of such land, whether mentioned in the deeds or not, unless the same is expressly excepted; provided, however, that such water rights or shares may be subject to separate transfers by deed.

§ 1849. **The appropriation of waters—Standards of measurement.**—Upon the subject of the appropriation of water the statute of Kansas follows largely that of California, with some modifications.[1] It provides that a notice in writing must be posted at a conspicuous place at the point of diversion, stating therein: First, that such person, company, or corporation claims the water there flowing to the extent of (giving the number of inches), measured under a four-inch pressure, and describing and defining as accurately as may be the place of diversion; second, the means by which such person or company intends to divert it, and the size of the canal, ditch, or flume or aqueduct in which he intends to divert it. A copy of such notice must, within ten days after it is posted, be also posted in a conspicuous place in the office of the county clerk of the proper county, and be recorded by the clerk in a book kept for that purpose.[2]

By the Act of 1891 [3] it was provided that the county clerks should turn over all records relative to the appropriation of water to the register of deeds of the county; and that such notices and proof of posting thereof shall be recorded by such register; and that thereafter any one posting any notice of the appropriation of water shall specify the amount appropriated in cubic feet per second, instead of inches, as above stated.

6 Laws, 1911, Chap. 212, p. 376, amending Gen. Stats., 1909, Sec. 4427.

For the Artesian Well Act, see Sec. 1859.

7 Laws, 1911, Chap. 215, p. 379.

1 For California, see Sec. 1730.

2 Gen. Stats., 1909, Sec. 4407; Act of 1886, Laws, 1886, Chap. 115, Secs. 1-3.

3 Gen. Stats., 1909, Sec. 4526.

Within six months after such notice is posted the claimant must commence the construction of his works and must prosecute the same diligently and uninterruptedly to completion, unless interrupted by stress of weather or other unavoidable circumstances. By compliance with the above the claimant's right to the use of the water relates back to the time the notice was posted. A failure to comply with the above conditions shall deprive the claimant of the right to the use of water as against a subsequent claimant who complies therewith.[4]

"Any prior right of appropriation shall exist and continue only by the exercise thereof in a lawful manner, and any failure of such appropriator to apply such water to lawful and beneficial uses, without due and sufficient cause shown for such failure, shall be deemed an abandonment and surrender of such right."[5]

Seepage water may be drained from the lands where it rises, or, at the election of the owner thereof, may be conveyed to other lands and applied to beneficial uses at his pleasure. Rights of way for conducting such waters may be acquired by condemnation.[6]

§ 1850. **The adjudication of rights.**—The exclusive jurisdiction for the ascertainment and settlement of the several rights and priorities of right of persons interested, either as carrier or consumer, in water at any time appropriated is conferred upon the several District Courts, in the proper equitable actions therefor.[1] The Court is given the authority to appoint a water bailiff to prevent the waste of water, and to enforce the priority of appropriation, according to the rights and priorities of the parties entitled to receive the same.[2]

§ 1851. **Ditches and canals and rights of way therefor.**—Any person may conduct water into and along any of the natural streams of the State, and may withdraw all such waters at any point desired, without regard to prior appropriations of water from such stream, due allowance being made for evaporation and seepage.[1]

[4] Gen. Stats., 1909, Sec. 4408; as amended, Laws, 1911, Chap. 216, p. 380.

[5] Gen. Stats., 1909, Sec. 4430.

[6] Gen. Stats., 1909, Secs. 4475, 4476.

[1] For the adjudication of rights in equity, see Chap. 78, Secs. 1530-1566.

[2] Gen. Stats., 1909, Secs. 4523-4525.

[1] Gen. Stats., 1909, Sec. 4425.

Where the channel of a natural stream has from any cause been changed, the ditch or canal may be extended to such stream, and embankments may be erected so that the water may be turned therein; provided that no such extension shall be allowed to interfere with the operation and enjoyment of any other ditch, conduit or other works.[2]

Where any canal, ditch, or other works have been located or constructed on or over any tract of land with the knowledge and consent of the owner thereof, or upon or over lands owned by the United States and prior to the occupation by any settler, such location and construction shall be *prima facie* evidence that the same was rightful; provided, however, that such works have been constructed for a period of at least two years prior to January 1, 1886.[3]

Any person or company who has heretofore constructed any canal or other works for purposes of irrigation upon or over lands unoccupied at the time of such construction, and who shall maintain the same for a period of five years, without objection in writing from the owner of such land, shall be deemed and held to have acquired a permanent right of way for such works, not exceeding the total width of three times the width of such canal, ditch, flume, or aqueduct. Damages, however, may be allowed the owner of such land not exceeding the value of the land occupied at the date of such construction.[4]

The statute provides that all necessary rights of way and sites for any works for diverting, storing, or conveying water to be applied to industrial uses shall be allowed on, over, and through any lands, and on, over, across, and under any ditch, canal, conduit, railroad, street or highway by the nearest and most practical route and method commensurate with the least damage to the property condemned; provided, that no owner of real estate shall be compelled to grant a right of way over his property if there shall be already in operation over said property irrigating works sufficient to properly irrigate the same land intended to be irrigated by the canal for which such condemnation is sought. It provides that the procedure for condemnation shall be in the manner prescribed by the laws regulating the right of eminent domain which are or may hereafter be enforced.

2 Gen. Stats., 1909, Sec. 4426.
3 Gen. Stats., 1909, Sec. 4410.
4 Gen. Stats., 1909, Secs. 4411, 4412.

It provides that should any of the works for diverting or storing the waters cease for a period of two years to be in operation, the right of way or site shall cease, and it shall be deemed to have been wholly abandoned and all right, title, and interest in and to the lands theretofore so occupied and used shall revert to and vest in the owners at the time of such reversion of the several tracts and parcels of land of which the lands embraced in such right of way or site formerly constituted a part.[5]

The proprietors of all works shall construct and always maintain in good order and repair the dams, locks and gates, embankments, and all other appurtenances thereof, so that the water may not flood or damage the premises of others, or any highway, or unnecessarily run to waste, and shall be liable for all damages resulting from their wilful or negligent failure to comply with any of the provisions of the statute, or from their negligence in the construction, maintenance, or operation of any such works.[6] The canals and ditches must be cleaned and repaired at certain seasons of the year,[7] headgates, rating flumes, and measuring devices must be constructed, so also waste gates, sand gates, and tail races where necessary.[8] They shall also construct and maintain necessary outlets and gates for the convenient delivery of water to the persons entitled to the same.[9] Bridges and viaducts must be constructed and maintained at road crossings.[10]

A right of passage is given over the private lands of others to and from such works, and the proprietor shall cause to be placed in any fence obstructing such passage suitable gates for that purpose.[11] Every dam or embankment constructed for the purpose of holding, impounding, storing, collecting, or conveying water must be constructed in accordance with the specifications prescribed by the statute.[12] Unsafe works may be abated by injunction.[13]

§ 1852. Corporations and companies.—Corporations may be organized for the purpose of storing and conveying water to consum-

[5] Gen. Stats., 1909, Secs. 4438-4442.
[6] Gen. Stats., 1909, Sec. 4443.
[7] Gen. Stats., 1909, Sec. 4444; as amended, Laws, 1911, p. 377.
[8] Gen. Stats., 1909, Sec. 4445-4447.
[9] Gen. Stats., 1909, Sec. 4449.
[10] Gen. Stats., 1909, Secs. 4473, 4474.
[11] Gen. Stats., 1909, Sec. 4472.
[12] Gen. Stats., 1909, Secs. 4457-4463.
[13] Gen. Stats., 1909, Secs. 4519-4522.

ers for hire or profit. Where water is furnished for irrigation a lien is given upon the whole crop grown upon any tract or parcel of land during the year the water was so furnished for the full amount of the contract price.[1]

Any and all irrigating, ditch, and canal companies organized for the purpose of furnishing water for irrigation "may condemn the right to take such water from any stream in the State of Kansas."[2] It is also made the duty of all companies, provided they have sufficient water, to furnish water upon a proper application therefor and upon the tender of the proper price therefor.[3]

Under a law enacted in 1911[4] it is made the duty of all companies and owners of ditches and canals to keep such works in repair so as to properly deliver the water when needed.

Every person, association, or corporation owning or controlling any ditch, canal, or reservoir, or officer or agent of such association or corporation who shall, after demand in writing made upon him for the carriage or delivery of water for irrigation, milling, sanitary, or domestic purposes, to be carried in or delivered from the said works, and after tender of the lawful rate of compensation therefor, refuse to furnish and deliver from such works any water so applied for, or carry therein any water, the carriage whereof is so applied for, which water can or may be, by use of reasonable diligence in that behalf, and with the carrying or storage capacity of such ditch or other works, lawfully carried and furnished and delivered without infringement on prior rights, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $100 or more than $5000, or imprisonment for a term of not less than three months or more than one year, or both such fine and imprisonment, in the discretion of the Court.[5]

§ 1853. The condemnation of water rights.—The right to the use of water, or water rights, may be condemned by virtue of the

1 Gen. Stats., 1909, Sec. 4403.

2 Gen. Stats., 1909, Secs. 4413-4422.

See, also, for the condemnation of water rights, Sec. 1853.

See, also, Lake Keon etc. Co. v. Klein, 63 Kan. 884, 65 Pac. Rep. 684; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

See, also, Sec. 1851.

3 Western Irr. etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098.

4 See Laws, 1911, Chap. 213, p. 377.

5 Gen. Stats., 1909, Sec. 4505.

power of eminent domain. This right also includes the right of riparian proprietors who claim the water by virtue of their ownership of the land bordering on a stream.

"Every vested right of prior appropriation or diversion of water for industrial uses shall be subject as to the right of eminent domain, and may be condemned and compensated for, for public and beneficial uses, in the same manner and under the same restrictions and regulations as govern the condemnation of other private property.[1]

"Any and all irrigating ditch and canal companies which have been heretofore organized or incorporated, or which may hereafter become organized and incorporated for the purpose of procuring or furnishing water for the purpose of irrigation, which shall desire to condemn the right to take such water from any stream in the State of Kansas, shall have the right to procure such condemnation for such purpose in the following manner."

The Act further provides that a petition must be presented to the judge of the District Court of the county, signed by the company or by its authority, stating the number of miles of ditch built, or to be built, and a specific description of the dimensions of the same, and describing the stream and the place where the ditch company proposes to take water from such stream, and asking the appointment of commissioners to condemn such right. And the judge shall then appoint three disinterested freeholders of such county to make such condemnation. The commissioners must meet after having given notice, at the time and place specified in said notice, and hear all claims for damages presented to them in writing by any person or persons for the condemnation of the right to take the water; and shall allow and award such damages as shall seem just, reasonable and fair, as compensation to the persons presenting such claims; and after having heard all claims shall make a report to the clerk of the District Court, stating the facts of their investigation. The right of appeal is granted from the decision of the commissioners to the District Court. The party making application shall, within sixty days from the filing of such report, file with the county treasurer of the county a certified copy of such report, and shall pay the

1 Gen. Stats., 1909, Secs. 4431, 4437. See Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Lake Keon etc. Co. v. Klein, 63 Kan. 884, 65 Pac. Rep. 684.

amount of damages awarded by the commissioners in said report, except in cases where an appeal has been taken.

It provides that in all cases where the amount of damages awarded has been paid, the right of the company to take the amount of water condemned for such purposes shall become absolute, and all persons shall be forever barred from claiming damages or any right to interfere with the taking of such waters except only such as may have appealed; and such persons shall only have the right to contest the amount of damages.[2]

§ 1854. The right to the use of water—Distribution of water.—Any person having by lease, purchase, or agreement, written or oral, procured from any carrier water for the irrigation of lands or other uses, and having actually applied such water to beneficial uses, shall thereafter, upon payment of the reasonable rate prescribed by the county commissioners, be entitled to continue in the enjoyment of water from the works of such carrier to the same amount. It also provides that water may be taken for domestic uses from any natural stream at any public road crossing or at any place upon the lands of others where such lands are unenclosed and uncultivated.

Any person entitled to the use of waters for irrigation or for any other purpose whatsoever, may collect and store up the same for use presently thereafter, and any person transferring, selling, leasing, assigning, or bargaining with reference to the transfer, sale, lease, or assignment of water, or any right he may have acquired to the use thereof, and any person receiving any money or any other valuable thing whatsoever in consideration of the prorating or rotating of water shall be deemed and taken to have abandoned all right to the use or enjoyment of such water.

"Sec. 6. Every right of use of water under this Act shall be subject to the right of eminent domain, and, as public interest and economy may require, may be condemned and compensated for as any other private right or property.

"Any person transferring, selling, leasing, assigning, or bargaining with reference to the transfer, sale, lease, or assignment of any water, or any right he may have acquired to the use thereof, and any person receiving any money or other valuable thing whatsoever in consideration of the prorating or rotating of water, or in consid-

2 Gen. Stats., 1909, Secs. 4413-4422, 4437.

eration of his agreement to prorate or rotate water, shall be deemed and taken to have abandoned all right to the use or enjoyment of such water; provided, however, such abandonment shall not operate to the prejudice of the rights of any incumbrancer or equitable owner of the lands, mill, manufactory, or other works to which such water is appurtenant."[1]

Upon the subject of the distribution of waters from the natural streams among the several ditches taking water therefrom, it is provided that the proprietors of any ditch, conduit, reservoir, or other works may procure the water to which they are entitled through like works of any other proprietor upon such terms as may be agreed upon between them without in any manner impairing or affecting their right or priority; provided, however, that thereby the waters supplied to any consumer be not diminished.[2] And the proprietors of two or more canals, ditches, reservoirs, or other works may, by consent in writing of those entitled to the use of water therefrom, agree for the rotation of the water.[3] But no such agreement shall go into effect if it shall be manifestly injurious to the proprietors of other ditches, and proceedings may be had to annul such agreement.[4] In like manner an agreement to rotate may be made between the consumers under any particular ditch.[5]

The proprietors of every ditch, conduit, or reservoir shall immediately, upon the construction of the works, cause to be chosen a superintendent of such works, upon whom process may be served in actions, and it is made the duty of such superintendent of such works to measure the water therefrom to those entitled thereto, and in times of scarcity the water must be apportioned ratably.[6] The several consumers under any lateral, by vote of the majority thereof, may also appoint a superintendent of such lateral to distribute the water among the consumers, and in times of scarcity the water must also be apportioned ratably among them. "And if the proprietors of any such works having such excess and being subsequent in right shall fail or refuse to turn out such supply of water when requested by the party entitled to receive the same so to do, the headgate or wastegate of the works receiving such excess shall be so set and locked by the officer authorized by law to perform such duty as to

1 Gen. Stats., 1909, Secs. 4432-4437.
2 Gen. Stats., 1909, Sec. 4448.
3 Gen. Stats., 1909, Secs. 4465-4467.
4 Gen. Stats., 1909, Secs. 4468-4471.
5 Gen. Stats., 1909, Secs. 4464, 4465.
6 Gen. Stats., 1909, Sec. 4450.

permit a sufficient amount of said water to pass and flow to the party having the right to receive the same."[7]

§ 1855. **Reservoir rights.**—By the Act approved March 13, 1911,[1] it was provided that any land owner residing and owning land in the State not within corporate limits of any city who shall by the construction of a dam across any dry water course form upon his own land one or more reservoirs for the collection and storage of surface waters, and shall maintain the same, shall be entitled to compensation therefor as therein provided; provided, that the specification for any dam shall be drawn by the county engineer or surveyor, at the expense of the county. If such reservoir is built of earth, and if during the major portion of the year preceding the first day of March in any year there shall have been stored in such reservoir not less than one acre-foot of water, the land owner shall be entitled to a reduction of $100 on the assessed valuation of each piece of land; provided that not more than three such reservoirs shall be so compensated for in any one year for each 160 acres. If such reservoir is built of stone, and during the same period not less than four acre-feet are stored, the owner shall be entitled to a reduction of $200 on the assessed valuation of the land, not less than twenty acres; not more than five such reservoirs shall be compensated for for each 160 acres. If constructed of concrete, and during the same period, will store not less than one acre-foot, on not less than ten acres, a reduction of $200 is allowed, not more than three reservoirs to be compensated for for each 160 acres; and if such reservoir shall store not less than four acre-feet a reduction of $300 is allowed, not more than five such reservoirs on each 160 acres.

To be entitled to such reduction the land owner must file a plat giving full details of such reservoirs with the register of deeds. Such plat must be certified to by a competent engineer. It is also made the duty of the township trustee to certify to the board of county commissioners to the facts concerning such reservoirs, and the county commissioners may make additional investigations.[2]

§ 1856. **Water rates.**—Upon the subject of fixing water rates, the statute provides that whenever the purchasers of water from

7 Gen. Stats., 1909, Secs. 4450, 4451.
1 Laws, 1911, Chap. 211, p. 374.
2 See, also, Gen. Stats., 1909, Secs. 4554-4556.

any irrigation company shall consider the rate of charges of such company to be unreasonable, extortionate, or unjust they may appeal to the board of railroad commissioners; and if that board shall consider the complaint just they shall proceed to notify the company and the complainants that thirty days from the date of such notice they will hear testimony in relation thereto; and if after hearing such testimony they shall decide that such rates are extortionate and unjust, they shall fix a rate of compensation for the use of the water, which rate shall be binding upon the irrigation company for one year from the date of such decision, and until the further order of said board therein.

The board of railroad commissioners shall have the same powers in relation to irrigation companies that they have in relation to railroad companies.[1]

In the penal portion of the same Act as the above is found [2] it is made unlawful for any person, association, or corporation to demand, bargain for, accept, or receive from any person who may apply for water any royalty or bonus; "but such water shall be carried or stored and delivered according to the right of the person entitled to the enjoyment thereof, upon the payment or tender of charges fixed by the *county commissioners of the proper county* as is or may be provided by law."

By an Act of 1911 [3] the jurisdiction of the railroad commission in the matters of fixing rates was transferred to the public service commission created by the Act.

§ 1857. Irrigation district law.—The irrigation district law was first enacted in Kansas by the Act of May 20, 1891,[1] and was afterward supplemented by the Act of May 1, 1901.[2] The two Acts together make a very concise and effective district law, and are based upon the California law upon the subject with a number of material changes.

1 Gen. Stats., 1909, Secs. 4477, 4478. See, also, Laws, 1911, Chap. 238, p. 417; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098.

2 Act of May 20, 1891, Chap. 133, Art. 8, Sec. 1; Gen. Stats., 1909, Sec. 4503.

3 Laws, 1911, Chap. 238, p. 417.

1 Laws, 1891, Chap. 133, Art. 7; Gen. Stats., Secs. 4479-4502. See for the validity of the Drainage District Act, Roby v. Shunganunga Drainage Dist., 77 Kan. 754, 95 Pac. Rep. 399.

2 Laws, 1901, Chap. 234; Gen. Stats., Secs. 4527-4534.

The authority for organizing such districts is conferred upon the board of county commissioners, upon petition signed by not less than three-fifths of the resident land owners of such proposed district. Districts may be organized where the contiguous territory is located in two or more counties, in which case the board of county commissioners of the county in which the greater part of the territory of such district is located has jurisdiction.[3] And to the petition must be attached an outline map showing only the tracts of territory that are proposed to be included in such district.[4] It is made the duty of the board to call an election for the purpose of organization of the district, it requiring three-fifths majority of the qualified voters of such proposed district to create the same.[5] The officers of such a district comprise the "board of irrigation commissioners," consisting of a president, secretary, and treasurer, and shall hold their offices for a period of one year.[6] The issuance of bonds may be provided for at a special election called therefor, upon a petition of not less than three-fifths of the resident land owners of the district; and in order to authorize the issuance of bonds, three-fifths of the votes cast at such election must be in favor of the same.[7] Such bonds must be sold at not less than par.[8] An election must also be held to determine upon the purchase of existing works and rights, and where an issue of bonds is for such purchase, such elections may be held together.[9] Irrigation works may be constructed by contract.[10] Rights of way may be acquired. But it is provided "that nothing herein shall be so construed as to grant to such corporation power to condemn or acquire in any other manner than by purchase any irrigation works belonging to any other person, company, or corporation." [11]

The said board has the power to make all necessary rules and regulations for the operation of the district and for the distribution of the waters therein to those entitled thereto, and shall have the power to dispose of the waters in its ditches to all persons in the district, and charge therefor such rates as the board may fix from

3 Gen. Stats., 1909, Secs, 4479, 4527, 4528.

4 Gen. Stats., 1909, Sec. 4529.

5 Gen. Stats., 1909, Secs. 4481-4486.

6 Gen. Stats., 1909, Sec. 4485.

7 Gen. Stats., 1909, Secs. 4487-4492, 4527.

8 Gen. Stats., 1909, Sec. 4492.

9 Gen. Stats., 1909, Secs. 4493, 4550.

10 Gen. Stats., 1909, Secs. 4494, 4495.

11 Gen. Stats., 1909, Sec. 4484.

time to time, subject to the rates fixed by the county commissioners. If the income from the rental of water is not sufficient, then it is made the duty of the board to levy and collect a tax "on all real estate dependent upon such works for irrigation in said district." The members of the board shall draw $3 per day for the time actually employed, and not to exceed the sum of $100 per annum. The said board may appoint a superintendent of the district, who shall in no event be a member of the board, who shall receive such compensation as may be agreed upon, not to exceed $1000 per annum.

§ 1858. **Board of irrigation, survey, and experiment—Experiments.**—By the Act of March 5, 1895,[1] there was created a board to be known as a Board of Irrigation Survey and Experiment, composed of five members, two of whom shall be the geologist of the State University at Lawrence and the president of the Agricultural College at Manhattan, who shall be advisory members of said board, and three members to be appointed by the Governor, by and with the advice and consent of the senate of Kansas. The last named members shall be persons versed in practical irrigation and to be active members thereof. The active members of said board shall take an oath of office and give a bond in the sum of $5,000. And the president shall be known as the State engineer of irrigation.

The duties of said board are prescribed as being to locate irrigation wells, and to determine upon the kinds of pumps to be used; to make practical tests of the underflow waters of the State, for the purpose of utilizing such water for irrigation purposes; to make stream measurements; to prepare drainage maps; to make observations of the rainfall, temperature, evaporation, and soil percolation; to make borings for artesian water, and to keep a complete record of all surveys and investigations and to make biennially a full report of the same.

By the Act approved March 4, 1911,[2] it was provided that the Agricultural Experiment Station of the Agricultural College is authorized to conduct experiments on the proper use of irrigation waters and in co-operation with the irrigation investigations of the office of the experiment stations of the United States Department of Agriculture.

[1] Laws, 1895, Chap. 162; Gen. Stats., 1909, Secs. 4535-4552.

[2] Laws, 1911, Chap. 214, p. 378.

§ 1859. **Artesian well Acts.**—By the Act approved March 13, 1911,[1] an elaborate and effective artesian well law was enacted, based largely upon that of New Mexico of 1909, although differing somewhat in details.[2]

For the purposes of the Act, an artesian well is defined to be "an artificial well which is sunk to the artesian stratum or basin, over 400 feet deep, and from which water is raised to or above the surface of the earth by natural pressure, or from which water is raised to or above the surface of the earth by artificial means: Provided, nothing in this Act shall apply to water flowing from mineral shafts."[3]

To provide for the carrying out of the provisions of the Act, the board of county commissioners of each county having artesian wells therein, shall constitute the county artesian well board, until the county artesian well board is elected as provided. When ten artesian wells have been drilled in any county, the board of county commissioners shall issue a call for the convention of the owners of artesian wells, and at said convention there shall be elected three commissioners to be known as the "County Artesian Well Board," and each well shall be entitled to one vote at such election. And such board is given the power to appoint a county artesian well supervisor. The powers granted the board and to the supervisor are largely the same as those of the same officials in New Mexico.[4] All decisions relative to matters relating to wells lie first with the supervisor, and, second, to the board upon appeal.

To pay the necessary expenses of administration, an annual license fee is imposed upon each artesian well as follows: For each well from which water is used for irrigation, and from which water has to be raised by mechanical means, $2.50 per year; for flowing wells an "equitable and just sum to be based upon the amount of flow"; for each and every reservoir, $2.50 per year. Said amounts to be levied and collected as taxes.[5]

To construct or repair any artesian well, a permit must be granted by the supervisor, upon application for the same. All persons owning, controlling, or using artesian wells must file a sworn statement

1 Laws, 1911, Chap. 210, p. 363, Secs. 1-31.

2 For the artesian well law of New Mexico, see Sec. 1935.

3 Laws, 1911, p. 363, Sec. 1.

4 See Sec. 1935.

5 Laws, 1911, p. 369, Sec. 15.

of the same with the county clerk. When reservoirs are constructed to be used for the storage of waters in connection with artesian wells, the same shall not be greater in size than sufficient to hold the maximum flow of the waters from such wells in a continuous run for 48 hours, except when the maximum flow is less than 300 gallons per minute, in which case the flow may be for 96 hours. All such reservoirs are subject to inspection by the supervisor who may order repairs on the same. The maximum amount of water that may be used on each acre under cultivation must not exceed 1½ acre feet during the year. Repairs may be made upon wells and reservoirs by the supervisor, and the expenses for the same shall become a lien upon the land, which may be foreclosed according to law.[6] The owners of such wells must take the pressure reading of the same. The Cippoletti weir and the tables therefor must be used for measuring the flow.[7] All wells must be constructed according to specifications set forth in the Act, and must be so constructed as to confine and to conduct to the surface all flows encountered.[8] Any well that is not tightly and securely cased, capped, and furnished with such mechanical appliances as will arrest and prevent the entire flow of water from such well, is declared to be a public nuisance and may be abated.[9] Severe penalties are prescribed for the wasting of water from wells, and for other violations of the Act, similar to those prescribed by the Act of New Mexico.[10]

By the Act approved March 10, 1911,[11] the county commissioners of certain counties were authorized to levy an additional tax for the purpose of drilling artesian wells.

§ 1860. **Criminal statutes.**—It is made a misdemeanor to wilfully or maliciously injure any canal or other works.[1] It is made unlawful to make any excess charge for the furnishing of water, where the rate for the same has been fixed, under a penalty of a fine of not less than $100 nor more than $5000 or imprisonment for a term of not less than three months nor more than one year or both.[2] The refusal to furnish water upon proper application for the same and

[6] Laws, 1911, p. 370, Secs. 18-28.
[7] Laws, 1911, p. 364, Sec. 3.
[8] Laws, 1911, p. 365, Secs. 8-11.
[9] Laws, 1911, p. 363, Sec. 2.
[10] See Sec. 1935.
See, also, Gen. Stats., 1909, Secs. 4452-4456.
[11] Laws, 1911, Chap. 322, p. 584.
[1] Gen. Stats., 1909, Sec. 4404.
[2] Gen. Stats., 1909, Secs. 4503, 4504.

where the ditch owners have a surplus is made punishable the same as last above.[3] The wilful neglect of any superintendent of works is punishable by a fine of not less than $10 nor more than $100 or imprisonment for not less than one month, or both.[4] The wilful wasting of water is punishable by a fine of not less than $5 nor more than $300.[5]

The unlawful interference with any works, or with any one in charge thereof in the discharge of his duties, is punishable by a fine or not less than $50 nor more than $300 and by imprisonment not to exceed 90 days.[6] For a second offense, a punishment of not less than $20 nor more than $1,000, or imprisonment for not exceeding one year, may be inflicted.[7] The failure to construct rating flumes or measuring devices, headgates, and tail races is punishable by a fine not exceeding $10 nor more than $300.[8] The failure to construct works in accordance with the provisions of the statute is punishable by a fine of not less than $25 nor more than $5000, or by both; and in addition thereto it is provided, "that if loss of human life be caused or occasioned by such wilful or negligent conduct, the person so offending shall be amenable to all the laws and subject to all the penalties provided by the statutes of the State of Kansas in respect of unlawfully, maliciously, wilfully, or negligently causing the death of any person."[9]

It is made a misdemeanor to waste water from artesian wells.[10] So, also, to permit wells to remain not tightly and securely cased, and furnished with mechanical appliances to shut off the entire flow.[11]

§ 1861. **Riparian rights in Kansas.**—Kansas is one of the States of the semi-arid region that has endeavored to adhere to the common law theory of riparian rights, and at the same time has adopted by statute the right of appropriation for the western portion of the State. In that portion of the State east of the 99th meridian the common law of riparian rights undoubtedly exists as to the right to

3 Gen. Stats., 1909, Sec. 4505.

For liability for damages for failure to supply water, see Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098.

4 Gen. Stats., 1909, Sec. 4508.

5 Gen. Stats., 1909, Sec. 4508.

6 Gen. Stats., 1909, Sec. 4509.

7 Gen. Stats., 1909, Sec. 4510.

8 Gen. Stats., 1909, Secs. 4514-4516.

9 Gen. Stats., 1909, Sec. 4518.

10 Laws, 1911, p. 364, Secs. 4, 7.

11 Laws, 1911, p. 363, Sec. 2.

the waters of the same stream as between the different owners thereon.[1] But in that portion west of the 99th meridian, by the very adoption of the doctrine of appropriation certain features of the common law must be held to have been modified, especially as to the right of a riparian proprietor to the undiminished flow of a stream past his premises. And, so too, where the water was appropriated in that portion of the State or in another State where the right of appropriation is allowed, and the stream continues its flow into the other portion of the State. This was illustrated in the Kansas-Colorado case,[2] where it was contended "that Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith," but in reference to which claim Mr. Justice Brewer in rendering the opinion of the Court, said: "As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she can not complain if the same rule is administered between herself and a sister State." It is certain that as to all streams which rise in that portion of the State where the right of appropriation is allowed, or in other States where allowed, that the rights of riparian proprietors to the undiminished flow of the streams, without use, by the decision in the Kansas-Colorado case, received a decided backset.

1 Upon the subject of raparian rights in Kansas, see Shamleffer v. Council Grove etc. Co., 18 Kan. 24, 26 Am. Dec. 765; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971, where it is held that the doctrine of prior appropriation may exist in the same State with the common law doctrine of riparian rights.

See, also, Johnston v. Hyre, 83 Kan. 38, 109 Pac. Rep. 1075; Missouri etc. R. Co. v. Keyes, 55 Kan. 205, 40 Pac. Rep. 275, 49 Am. St. Rep. 249; Campbell v. Grimes, 62 Kan. 503, 64 Pac. Rep. 62; Parker v. City of Atchison, 58 Kan. 29, 48 Pac. Rep. 631; Montague v. Board of Com'rs of Jefferson County, 7 Kan. App. 160, 53 Pac. Rep. 145.

2 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

CHAPTER 91.

MONTANA.

§ 1862. Particular features of the State.
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§ 1866. Water rights defined, etc.—The right to appropriate water.
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§ 1862. Particular features of the State.—Montana is the most northerly State of the arid region. In certain portions of the State, particularly in the northwestern part, crops are often raised without irrigation. Also about one-half of all the grain crops in the State are raised by dry farming. For an arid State, Montana has a large water supply. Occupying the crest of the continent, many rivers have their sources in the elevated ranges of mountains which are found in different portions of the State. More than two-thirds of the State is on the eastern slope of the main range of the Rocky Mountains and consists of table lands. The greater portion of this area lies in the drainage basins of the Missouri and Yellowstone Rivers, which basins have an approximate area of 36,312 square miles in the State of Montana. The northeast portion of this basin is an extension of the Great Plains Region in which the streams have cut great channels.

The climate of Montana is arid and is typical of much of the Rocky Mountain region. The annual precipitation is about 15

inches annually, but about 70 per cent of this falls during the crop-growing season. The precipitation, however, varies greatly, as is the case in all mountainous countries, with the altitude, the mountains receiving 30 inches or more, usually in the form of snow, while the lower plains receive only ten inches or even less. There is also the liability of extreme cold in winter. From the farmer's standpoint, the worst feature of the climate is the comparatively short season between the late spring and the early autumn frosts. The character of the crops raised is largely influenced by this feature. All kinds of grain and forage can be raised, but, except in certain favored localities, the raising of fruit is uncertain. The soil is of the best, and any crop can be raised which can withstand the climate.

§ 1863. **Irrigation in the State.**—It is stated by Professor Fortier that the largest amount of land in the State of Montana which can be irrigated from the water available from all sources including stream flow, storage reservoirs, and wells is about 6,000,000 acres. The amount which is arable land, but which can not be irrigated is a much larger area.[1] Without extensive reservoir systems, on account of the short irrigation seasons, the full flow of the streams can not be utilized for more than a third of the year. And the State has fairly entered upon the storage period of its waters.

The United States, under the provisions of the National Reclamation Act,[2] has undertaken the construction of several projects. The Blackfeet Indian Project in Teton County is well under construction and has an irrigable area of 132,000 acres. The Flathead Indian Project is also under process of construction, and has an irrigable area of 150,000 acres. The Fort Peck Indian Project is in the same condition, with an irrigable area of 130,000. The Huntley Project is in the same condition, with an irrigable area under the main unit of 28,921 acres. The Milk River Project is nearly completed, with an irrigable area of 248,000 acres under the whole project. The St. Mary Project is in the same condition, with an irrigable area of 100,000 acres. So, also, the Sun River Project, with an irrigable area of 276,000 acres. The Lower Yellowstone

1 Irrigation in Montana, by Samuel Fortier, 1906, Office Expr. Stations, Bulletin No. 172, p. 507.

2 For full discussion of this Act, see Chap. 65, Secs. 1235-1286.

Project, partly in Montana and partly in North Dakota, is also well toward completion, with an irrigable area of 64,622 acres.[3] Under a number of the projects the lands are open to entry and are rapidly being settled upon.

The State of Montana has also taken advantage of the Carey Act and enacted laws for its enforcement. It has also adopted the irrigation district law, and a number of districts are reported as being in a prosperous condition.[4]

According to the Census Report for 1910, the total number of farms irrigated in 1909 was 8,970, as against 8,043 in 1899, an increase of 927, or 11.5 per cent. The total acreage irrigated in 1909 was 1,679,084 acres, as against 951,154 acres in 1899, an increase of 727,930 acres, or 76.5 per cent. The total acreage which all enterprises were capable of irrigating in 1910 was 2,205,155 acres. The acreage included in projects, either completed or under construction in 1910 was 3,515,602. This indicates the area which will be available within the next few years for the extension of irrigation and shows that the area irrigated can be more than doubled without the construction of additional works.

§ 1864. **Criticism of the Montana laws.**—The State of Montana has not kept pace with her sister States as far as legislative enactments are concerned governing waters, their appropriation, and distribution. The method of appropriation is somewhat antiquated, and no water or irrigation code, as the same is known in other States, has been enacted. There is a State engineer, but his powers and duties are limited and prescribed practically to that of chairman of the Carey Land Act Board, reporting upon irrigation propositions, and to co-operating with the United States Geological Survey in making stream measurements. It would be better to confer more powers upon the State engineer especially relative to the appro-

[3] See Annual Reports of the Reclamation Service, subject, Montana.

[4] For works upon the subject, see Irrigation in Montana, by Samuel Fortier, 1906, Office Exper. Stations, Bulletin No. 172, U. S. Dept. of Agriculture; Irrigation Investigations in Montana, by Samuel Fortier, 1900; *Id.*, Bulletin No. 104, Separate No. 4; Investigations in Montana, by Samuel Fortier; *Id.*, Bulletin No. 119, Separate No. 3; Geology and Water Resources of the Great Falls Region, Montana, by Cassius A. Fisher, 1909, Water-Supply Paper No. 221, U. S. Geological Survey; the various Reports of the Reclamation Service, subject, Montana.

priation of water and its distribution to those entitled thereto. As the law now stands he has nothing to do with either of these subjects, an appropriation being instituted by the posting and filing of a notice, and the distribution being made by means of commissioners appointed by the district court. The appropriation of waters of streams which have been adjudicated is also through the courts.[1] The special proceedings for this purpose are unique to the State of Montana. As time moves on and the population of the State becomes more dense, it will be found that the courts will have plenty to do, other than to attend to the details of the appropriation and distribution of waters. This phase of the question should also be left to a hydraulic engineer as he has the theoretical knowledge and practical experience to enable him to properly perform these duties. One of the greatest objections to the Montana law as it now stands is that the record of all appropriations are scattered throughout the State with the clerks of the various district courts, and that there is no central office where both the stream measurements and at the same time the appropriations of a certain stream may be ascertained.

As far as the adjudication or determination of existing water rights are concerned, it is properly left to the courts.

The Act of 1911, upon the subject of the distributing of decreed waters by the court through commissioners appointed for that purpose, simply enacts into statutory law the powers of a court of equity to enforce its judgments and decrees. The Act, however, specified the exact mode of the enforcement.[2]

§ 1865. **State constitutional provisions.**—Article III, Section 15, of the Montana constitution provides as follows:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or any other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, as well as sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."[1]

1 See Sec. 1867.

2 Laws, 1911, p. 72.

See, upon the distribution of water, Sec. 1872.

1 For the construction of the above, see State *ex rel.* Coleman v. District Court, 14 Mont. 476, 37 Pac. Rep. 7; Ellinghouse v. Taylor, 19 Mont. 462,

Also, relative to the classification and sale of lands, in Article XVII, Section 1, it is provided: "That any of said lands may be re-classified whenever, by reason of increased facilities for irrigation or otherwise, they shall be subject to different classification."

§ 1866. **Water rights defined, etc.**—The right to appropriate water.—The right to the use of any unappropriated water of any natural stream, water course, spring, dry coulee, or other natural source of supply, and of any running water flowing in the streams, rivers, canyons, and ravines of this State, may hereafter be acquired by appropriation.[1]

"The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successors in interest abandons and ceases to use the water for such purpose the right ceases; but the question of abandonment shall be a question of fact, and shall be determined as other questions of fact.[2]

48 Pac. Rep. 757; Smith v. Denniff, 23 Mont. 65, 57 Pac. Rep. 557, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798; Helena etc. Co. v. Spratt, 35 Mont. 108, 88 Pac. Rep. 773, 8 L. R. A., N. S., 567; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334; Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

1 Rev. Codes Montana, 1907, Sec. 4840. The citations in this chapter will be to the above unless otherwise indicated.

See Power v. Switzer, 21 Mont. 523, 55 Pac. Rep. 32; Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798; *Id.*, 27 Mont. 135, 69 Pac. Rep. 709; Quinlan v. Calvert, 31 Mont. 115, 77 Pac. Rep. 428; Chessman v. Hale, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R. A. 410; Norman v. Corbley, 32 Mont. 195, 79 Pac. Rep. 1059; Prentice v. McKay, 38 Mont. 114, 98 Pac. Rep. 1081; Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Ryan v. Quinlan, —— Mont. ——, 124 Pac. Rep. 512.

2 Rev. Codes, 1907, Sec. 4841.

See cases cited *supra*.

See, also, Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396; Miles v. Butte etc. Co., 32 Mont. 56, 79 Pac. Rep. 549; Sayre v. Johnson, 33 Mont. 15, 81 Pac. Rep. 389; Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137; Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. Rep. 334; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; Creek v. Bozeman, 15 Mont. 121, 38 Pac. Rep. 459; Anderson v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; Hilger v. Zabel, 38 Mont. 93, 98 Pac. Rep. 881; Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

"As between appropriators the one first in time is first in right."[3]

The State law of appropriation also applies to the State lands of Montana.[4]

§ 1867. The appropriation of water—Appropriation from adjudicated streams.—Any person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: 1. The number of inches claimed, measured as hereinafter provided. 2. The purpose for which it is claimed and the place of intended use. 3. The means of diversion, with size of flume, ditch, pipe, or aqueduct, by which he intends to divert it. 4. The date of appropriation. 5. The name of the appropriator. A notice must be filed with the county clerk, which, in addition to the facts required to be stated in the posted notice, shall contain the name of the stream, if such stream has a name, and if not, such a description of the point of diversion on such stream, with reference to some natural object or permanent monument. The notice must be verified by affidavit which must state that the matters and facts contained in the notice are true.[1]

Within 40 days after posting such notice the appropriator must commence the construction of his works, and must prosecute the same with reasonable diligence to completion. And a failure to comply with the above provisions deprives the appropriator of the right to the use of the water as against a subsequent claimant who complies therewith, but by complying with these provisions the right to the use of the water shall relate back to the date of the posting of the notice.[2]

The State intended to provide a method for the appropriation of water in addition to that fixed by any custom, and after it was

3 Rev. Codes, 1907, Sec. 4845; Thorpe v. Freed, 1 Mont. 651; Alder Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581; Woolman v. Garringer, 1 Mont. 535, 1 Morr. Min. Rep. 675; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741; Toohey v. Campbell, 24 Mont. 13, 60 Pac. Rep. 396.

4 Laws, 1911, Chap. 118, p. 254; Laws, 1911, Chap. 123, p. 338.

1 Rev. Codes, 1907, Secs. 4847, 4869. See, also, Murray v. Tingley, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137; Floyd v. Boulder etc. Co., 11 Mont. 435, 28 Pac. Rep. 450.

2 Rev. Codes, 1907, Secs. 1848, 1849. See, also, Murray v. Tingley, *supra;* Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

passed an appropriation might be made either by actual diversion or by compliance with its requirements.[3]

The record provided for and records of declarations of rights as provided for, when duly made, shall be taken and received in all courts of the State as *prima facie* evidence of the statements therein contained.[4]

By the Act approved March 9, 1907, provisions were made for the appropriation from adjudicated streams, subject to the decision of the court. A notice must be posted at the point of the intended diversion, stating therein: 1. The flow claimed, expressed in cubic feet per second. 2. The purpose for which said water is claimed and the place of intended use. 3. The name of the stream, creek, spring, canyon, river, or ravine. 4. The name of the appropriator or appropriators. 5. The date of posting said notice. The work must be prosecuted with reasonable diligence, and no appropriator shall acquire any rights to water in excess of the carrying capacity of the ditch, nor in excess of the amount actually needed by the appropriator for some useful or beneficial purpose.[5] Within 40 days from the date of completion of the works, the appropriator shall file with the clerk of the district court in the proper county an application in writing to have such ditch measured and the capacity determined. The clerk upon the receipt of such application shall enter the same of record, and thereupon issue an order directing a competent civil engineer to proceed to measure and determine the capacity of said ditch and to report the results of such measurement, with all data relative to the same, and make returns to the court within 30 days from the receipt of said order. Publication of said application must be made for a period of three weeks, and any person interested in the waters of said stream may file with the clerk written objections to such appropriation. The clerk of the court, immediately after the expiration of the period of publication, on receipt of the report of the surveyor, and proof of publication, shall file the same, and on the first day of the regular or special term of court thereafter, shall present all papers to the court for consideration. If no objections are filed, the court shall enter an order allowing said appropriation. If objections are made, the court shall fix a day for hearing, and on such hearing witnesses may testify, and

3 Bailey v. Tintinger, —— Mont. ——, 122 Pac. Rep. 575.

4 Rev. Codes, 1907, Secs. 4850, 4851.

5 Rev. Codes, 1907, Sec. 4871.

the court after hearing may make any order deemed proper in the premises. All costs and expenses of such proceedings must be paid by the applicant, and the said water right shall be of no force and effect until the same shall have been paid. The clerk of the court must keep complete and accurate record of all surveys and reports made in accordance with the above provisions. A failure to comply with the provisions of the Act deprives the appropriator of the right to such decree, as against a subsequent appropriator who complies therewith. Any person appropriating water under the provisions of the Act shall be subject to, bound by, and shall comply with any decree of the court adjudicating the waters of such stream, as fully and to the same extent as if said person or persons were original parties to the action wherein said decree was made, and any water commissioner, appointed by the court, to distribute waters under any decree shall have jurisdiction over, and shall distribute any waters appropriated under the provisions of the Act, according to priority.[6]

"In all streams, creeks, springs, canyons, rivers, and ravines, in which the water rights therein have not been adjudicated by a court of competent jurisdiction, water shall be appropriated in the same manner as provided by law, at the time of the passage of this Act."[7]

§ 1868. **The adjudication of existing rights.**—The adjudication of existing water rights is left entirely to the courts. And it is provided that in any action for this purpose the plaintiff may make any or all parties who have diverted water from the same stream parties to such action, and that the courts may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts, and the judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more several defendants. In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same kind is asked by parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint.[1]

[6] Rev. Codes, 1907, Secs. 4871-4880.
[7] Rev. Codes, 1907, Sec. 4869.
[1] Rev. Codes, 1907, Sec. 4852; Beach v. Spokane Ranch Co., 25 Mont. 367,

Decrees adjudicating the rights of a certain stream after the date thereof, in any action relating to such waters, are *prima facie* evidence of the facts therein found.[2] And all appropriations made after such a decree shall be subject to the same.[3] So, also, with appropriations pending litigation.[4]

Subsequent appropriations from streams formerly adjudicated are made and adjudicated in the same proceedings through the court, as discussed in another section.[5]

§ 1869. Standard of measurement.—By the Act approved March 3, 1899, it was provided that, "hereafter a cubic foot of water (7.48 gallons) per second of time shall be the legal standard of the measurement of water in this State."[1] "Where water rights expressed in miner's inches have been granted, 100 miner's inches shall be considered equivalent to a flow of two and one-half cubic feet (18.7 gallons) per second; 200 miner's inches shall be considered equivalent to a flow of five cubic feet (37.4 gallons) per second, and this proportion shall be observed in determining the equivalent flow represented by any number of miner's inches. Provided, that the provisions herein shall not affect or change the measurement of water heretofore decreed by a court, but such decreed water shall be measured according to the law in force at the time such decree was made and entered."[2]

And by the Act approved March 9, 1907, it was further provided: "Where water rights have been decreed in statutory or miner's inch measurement, the measurement shall be by cubic feet per second, and 100 miner's or statutory inches shall be equivalent to a flow of two and one-half cubic feet per second, and this proportion shall be ob-

65 Pac. Rep. 106; McNinch v. Crawford, 30 Mont. 297, 76 Pac. Rep. 698; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Ames Realty Co. v. Big Indian etc. Co., 146 Fed. Rep. 166; Ryan v. Quinlan, —— Mont. ——, 124 Pac. Rep. 512; Custer Con. M. Co. v. City of Helena, —— Mont. ——, 122 Pac. Rep. 567; Hansen v. Larsen, 44 Mont. 350, 120 Pac. Rep. 229; Bielenberg v. Eyre, 44 Mont. 397, 120 Pac. Rep. 243; Boyd v. Huffine, —— Mont. ——, 120 Pac. Rep. 228.

2 Rev. Codes, 1907, Sec. 4867.

3 Rev. Codes, 1907, Sec. 4868.

4 Rev. Codes, 1907, Sec. 4870.

5 Rev. Codes, 1907, Secs. 4871-4880. See, for appropriations from adjudicated streams, Sec. 1867.

1 Rev. Codes, 1907, Sec. 4854.

2 Rev. Codes, 1907, Secs. 4855, 4856. See Salzar v. Smart, 12 Mont. 395, 30 Pac. Rep. 676; Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388.

served in determining the equivalent flow of any number of miner's or statutory inches."[3]

§ 1870. **Administrative officers—State engineer.**—The office of a State engineer is created by the statute of Montana,[1] but, as compared with other States, the duties and powers of that official are very much limited and prescribed. He is to be appointed by the Governor and confirmed by the senate, receive a salary of $2500 per annum, and keep his office in the State capitol building.

His powers and duties are prescribed as follows: He is to be the chairman of the Carey Land Act Board; and, with the approval of the State board of land commissioners, he shall examine tracts of land belonging to the State or to State institutions, and ascertain how much of the same it is practicable to irrigate and report to said commissioners the probable cost of an irrigation system for the same; and when directed to do so by said commissioners shall prepare plans and specifications for any irrigation system. He shall become conversant with the waterways of the State and the needs of the State as to irrigation matters, shall make the measurements of stream flow, co-operating as much as possible with the United States Geological Survey, and keep records of the same in his office, all of which is the property of the State. He shall also make a biennial report to the Governor.

§ 1871. **Ditches and canals and rights of way therefor.**—The person entitled to the use of water may change the place of diversion, and may use the water for other purposes than that for which it was originally appropriated, if others are not injured thereby.[1]

[3] Rev. Codes, 1907, Sec. 4877.

[1] Rev. Codes, 1907, Secs. 2243-2247.

See, also, Laws, 1911, Chap. 128, p. 152.

[1] Rev. Codes, 1907, Sec. 4842.

See, also, Smith v. Denniff, 23 Mont. 65, 57 Pac. Rep. 557, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408; Helena v. Rogan, 26 Mont. 452, 68 Pac. Rep. 798; *Id.*, 27 Mont. 135, 69 Pac. Rep. 709; Hayes v. Buzard, 31 Mont. 74, 77 Pac. Rep. 423; Columbia M. Co. v. Holter, 1 Mont. 296; Alder Gulch etc. Co. v. Hayes, 6 Mont. 31, 9 Pac. Rep. 581; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451; Middle Creek D. Co. v. Henry, 15 Mont. 558, 39 Pac. Rep. 1054; Carlson v. City of Helena, 43 Mont. 1, 114 Pac. Rep. 110; Hansen v. Larsen, 44 Mont. 350, 120 Pac. Rep. 229; Featherman v. Hennessey, 43 Mont. 310, 115 Pac. Rep. 983.

Water may be turned into the channel of a stream and then reclaimed; but in reclaiming it, water already appropriated by another must not be diminished in quantity, or deteriorated in quality.[2]

Provisions are made for the public survey of ditches, upon notice, by a competent civil engineer, and the map made by the surveyor, with his affidavit, shall be filed within thirty days in the office of the clerk and recorder of the proper county and shall be *prima facie* evidence of the facts therein stated in all courts in the State in actions relating to said ditch and water rights.[3]

All water users using water under any decree are required to construct and maintain suitable headgates and measuring devices. And in case of failure to do this, it is made the duty of the water commissioner not to apportion or distribute any water through such ditch.[4]

Highways must be protected by bridges or other works, and the flooding of roads is prohibited.[5]

The right of condemning rights of way for ditches, canals, or other works is given, also for reservoir sites necessary for the collection and storing of water.[6] General condemnation proceedings are provided, applicable to all cases.[7]

§ 1872. **Reservoir rights.**—The right is given to construct reservoirs and to condemn rights of way for the same.[1] "No person shall hereafter fill, or procure to be filled, with water, any dam or reservoir which is not so thoroughly and substantially constructed as that it will safely and securely hold the water to be turned therein.[2]

"No person shall hereafter construct, or cause to be constructed, on a stream, any dam or reservoir to accumulate the waters thereof, except in a thorough, secure, and substantial manner."[3]

2 Rev. Codes, 1907, Sec. 4843; Beaverhead etc. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Kelly v. Hynes, 41 Mont. 1, 108 Pac. Rep. 785; Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

3 Rev. Codes, 1907, Sec. 4866.

4 Rev. Codes, 1907, Sec. 4890.

5 Rev. Codes, 1907, Secs. 4858, 4859.

6 Rev. Codes, 1907, Sec. 7331.

7 Rev. Codes, 1907, Secs. 7330-7355.

1 Rev. Codes, 1907, Sec. 4857.

2 Rev. Codes, 1907, Sec. 4864.

See Hollenbeck v. Dingwell, 16 Mont. 335, 40 Pac. Rep. 863, 50 Am. St. Rep. 502.

3 Rev. Codes, 1907, Sec. 4865.

§ 1873. **The distribution of water.**—In all cases where, by virtue of prior appropriation, there shall be at any time a surplus of the water diverted, "over and above what is actually and necessarily used by the prior appropriators, such appropriator is required to turn such surplus back into the stream for the use of subsequent appropriators; and, upon failure to do so within 24 hours after demand, the person so diverting the water shall be liable to the person injured for the damage resulting therefrom.[1]

By the Act approved February 23, 1911,[2] it is provided that the water of adjudicated rights may be distributed, not by administrative officers as is the case in States which have adopted the law of State control,[3] but by commissioners appointed by the court, which commissioners are officers of such court. It is provided that whenever the rights to the use of water have been adjudicated, upon application of the owners of at least 10 per cent of the water rights affected by any decree or decrees, to the district court having jurisdiction, the court is given the authority, in the exercise of its discretion, to appoint one or more commissioners who shall have authority to measure and distribute the water to the parties entitled thereto as fixed by such decree or decrees. Where two or more commissioners are appointed he may appoint one of them chief commissioner and empower him with authority over the others. Each commissioner so appointed must take an oath of office, and shall hold office during the irrigating season of each year as may be designated by the judge. Authority is given to distribute the water and to incur the necessary expenses in making headgates, such expense to be assessed against the respective parties. And upon the written request of the owners of at least 51 per cent of the water rights of any adjudicated ditch or single water system the court may empower the commissioner to maintain and keep in reasonable repair such water ditch or water system at the expense of the owners thereof. The same powers as sheriff or constable is conferred upon a commissioner to arrest any and all persons interfering with the distribution made by him. Each commissioner must keep a daily record of the amount of water distributed to each water user, and file a summary with the clerk of the court monthly. The judge may

1 Rev. Codes, 1907, Sec. 4844.

2 Laws, 1911, p. 72, repealing Secs. 4881-4889, Rev. Codes, 1907.

3 For the laws of State control, see Chap. 68, Secs. 1337-1367.

allow as a charge any expenses necessarily incurred by the commissioner in the discharge of his duties, in the employment of extra labor when necessary. Such expenses must be reported and shall be taxed against the party or parties for whose benefit the same were incurred. Expenses are also allowed the commissioner in telephoning to the judge for instructions; these expenses to be reported and taxed against the water users in proportion to their relative rights. Upon filing the monthly report of the commissioners, the judge shall make an order apportioning all expenses to the persons using water during such month proportionately. The clerk is to notify each user of his proportion of the costs, which may be modified upon motion. After the order of the court fixing the fees and compensation of the water commissioners is final, it shall have all the force and effect of a judgment as against the person to whom the water was admeasured and for whose benefit it was used. Execution may issue upon the order as upon a judgment. Provisions are made for the judge to hear complaints of the water users, and the judge may give proper instructions for distribution. The judge may remove a commissioner and appoint another at his discretion. If any commissioner shall fail to perform any of the duties imposed upon him by order of the judge of the district court he shall be deemed guilty of contempt of court.[4]

§ 1874. **Corporations and companies.**—Corporations may be organized for the purpose of selling and disposing of water to others. And any one having the right to use, sell, or dispose of water, who has a surplus of water not used or sold, or any person having a surplus of water, and the right to sell and dispose of the same, is required, upon the payment or tender to the persons entitled thereto an amount equal to the customary rates per inch, to convey and deliver to the person such surplus or unsold water. It is made the duty of any person desiring water and to avail himself of the above to construct and maintain the necessary ditches or other works to receive and convey the surplus water so desired by him. Appropriate actions at law or in equity may be brought to enforce

4 See State *ex rel.* Flynn v. District Court, 33 Mont. 115, 82 Pac. Rep. 450; State *ex rel.* Pool v. District Court, 33 Mont. 267, 86 Pac. Rep. 801.

the above provisions. The purchaser can not sell or otherwise dispose of the water so furnished to others.[1]

The Civil Code contains the following sections:

"Any person having the right to use, sell, or dispose of water, and engaged in using, selling, or disposing of the same, who has a surplus of water not used, or sold, or any person having a surplus of water, and the right to sell or dispose of the same, is required, upon the payment or tender to the person entitled thereto an amount equal to the usual and customary rates per inch, to convey and deliver to the person such surplus of unsold water, or so much thereof for which said payment or tender shall have been made, and shall continue so to convey and deliver the same weekly so long as said surplus of unused or unsold water exists and said payment or tender be made as aforesaid.

"Any person desiring to avail himself of the provisions of the preceding section must, at his own cost and expense, construct or dig the necessary flumes or ditches to receive and convey the surplus water so desired by him, and pay the tender to the person having the right to the use, sale, or disposal thereof, an amount equal to the necessary cost and expense of tapping any gulch, stream, reservoir, ditch, flume, or aqueduct, and putting in gates, gauges, or other proper and necessary appliances usual and customary in such cases, and until the same shall be so done the delivery of the said surplus water shall not be required as provided in the preceding section.

"Any person constructing the necessary ditches, aqueducts, or flumes, and making the payments or tenders as hereinbefore provided, is entitled to the use of so much of said surplus water as said ditches, flumes, or aqueducts have the capacity to carry, and for which payment or tender is made, and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same.

"Nothing in the three preceding sections shall be so construed as to give the person acquiring the right to the use of water as therein provided the right to sell or dispose of the same after being so used by him, or prevent the original owner or proprietor from

1 Rev. Codes, 1907, Secs. 4860-4863; Helena etc. Co. v. Lynch, 25 Mont. 497, 65 Pac. Rep. 919.

retaking, selling, and disposing of the same in the usual and customary manner, after it is so used as aforesaid."[2]

In the case of Helena Power Transmission Co. v. Spratt[3] it was held that a foreign corporation authorized by the laws of its domicile to construct a dam and electric power plant on a river in Montana did not have the power of eminent domain.[4] Later in the case between the same parties[5] the constitutionality of the law newly enacted giving this power was upheld.

A corporation to supply water to its stockholders for irrigation and domestic purposes is only liable for injuries caused by its works when guilty of negligence.[6]

§ 1875. **Irrigation districts.**—The statutes of Montana provide for the organization and operation of irrigation districts, largely following the irrigation district laws of California.[1] The organization of such irrigation districts in the State of Montana has always differed from the California Act in this, that under the old law[2] it was provided that the petition should be presented to the county commissioners for that purpose, and that no election was required for the organization of a district, as is usually the case. The county commissioners were granted full powers to organize the same and specify its boundaries upon the presentation of the proper petition.

By the Act of 1909[3] the method for organization is still further changed in this, that the petition is presented to the District Court and the following proceedings had:

Section 1 of the Act provides that a majority in number of the holders of title or evidence of title to lands susceptible of irrigation from the same general source, and by the same general system of works, such holders of title also representing a majority in acre-

2 See Civil Code of Montana, Secs. 1897-1900; State *ex rel.* Crawford v. Minnesota, 20 Mont. 198, 50 Pac. Rep. 420.

3 35 Mont. 108, 88 Pac. Rep. 773, 8 L. R. A., N. S., 567.

4 Laws 1907, Chap. 23, p. 38.

5 Spratt v. Helena P. Transmission Co., 37 Mont. 60, 94 Pac. Rep. 631.

6 Billings Realty Co. v. Big D. Co., 43 Mont. 251, 115 Pac. Rep. 828.

1 For irrigation district laws, see Chap. 70, Secs. 1386-1432.

2 Rev. Codes Montana, 1907, Secs. 2309-2402.

3 Laws 1909, Chap. 146, p. 254.

age, may propose the establishment and organization of an irrigation district.

Section 2 provides that the proceedings for the establishment of such district shall be enacted by filing with the clerk of the District Court a petition signed by the requisite number of owners, setting forth (1) the name of the proposed district; (2) a general description of the lands to be included; (3) the names of the owners; (4) the source from which the lands included are to be irrigated, and the character of the works, water rights, canals, and other property which it is proposed to acquire; (5) and a prayer that the lands described be organized as an irrigation district. The petition must be accompanied by a map or plan of the district, and a bond or undertaking, to be approved by the District Court or judge, conditioned to pay all costs of the proceeding in case the organization of the proposed district is not effected.

Section 3 provides that the Court or Judge shall fix the time or place for the hearing of the petition and direct a notice to be given by the clerk by publication in a newspaper in the county and a notice of the same. The clerk is required to mail copies of the petition and notice to all non-resident owners of lands lying within the district.

Section 4 provides that the Court may make adjournments from time to time. And at the hearing all persons interested may appear and contest the necessity or utility of the proposed district or any part thereof. The Court is required to hear and determine whether all the requirements of Sections 1, 2, and 3 of the Act have been complied with, and for that purpose shall hear all competent and relevant testimony. It must determine what lands shall be included and what excluded. If it is found that the petition substantially complies with the requirements of the Act, an order must be made as follows: (1) Setting forth the finding and allowing the petition; (2) establishing the district; (3) giving an accurate description of the lands included; (4) dividing the district into three divisions; and (5) appointing three competent persons as commissioners, one for each division, to conduct the affairs of the district. This order is made conclusive upon all the owners of land in the district, and is "final unless appealed from to the Supreme Court within sixty days from the date of entry." Within thirty days a copy of the order must be recorded with the county

clerk and recorder of the county wherein the lands included within such district are situated. It is further declared that the district so established is a public corporation for the promotion of the public welfare, and that the lands included therein shall constitute all the taxable and assessable property of such district for the purposes of the Act.

The following sections declare the qualifications which the commissioners must possess: Prescribe the manner of their organization; fix their compensation; define their duties and powers; and embody directions as to the course to be pursued in electing commissioners from time to time; in levying taxes for the maintenance of the district or for the purchase or acquisition of such property as may be necessary to effect the purposes of the corporation, and the mode to be pursued in the issuance and sale of bonds whenever it becomes necessary to obtain funds for the immediate use of the district. The provisions of these latter sections, in general, follow those of the California law.[4]

§ 1876. The Carey Act in Montana.—The State of Montana comes within the provisions of the Carey Act, has accepted the same, and provided for operation thereunder.[1]

For the purpose of the operation under the Act the Carey Land Act Board is created, consisting of three members, the State Engineer, Secretary of State, and the State Examiner, and of which board the State engineer is chairman. Full powers are granted the board to take all steps necessary to comply with the provisions of the Act of Congress.[2] It is also made the duty of the board to co-operate with the National Reclamation Service where possible.[3] Contracts may be let to construction companies in the usual manner.

When the lands are opened for settlement any citizen of the United States, or a person having declared his intentions, over the age of 21 years, may make application for not to exceed 160 acres. The application must be accompanied with the usual water right contract and 25 cents per acre. The selling price of the land is

4 The Act has been declared constitutional by the Supreme Court of Montana. O'Neill v. Yellowstone Irr. Dist., —— Mont. ——, 121 Pac. Rep. 283.

1 Rev. Codes, 1907, Secs. 2238-2282.
2 Rev. Codes, 1907, Secs. 2255-2282.
3 Rev. Codes, 1907, Sec. 2266.

fixed by the board, and must not be less that 50 cents nor more than $2.50 per acre. The claimant first settling upon the land has the prior right to file upon the same within sixty days after the lands are opened for settlement. The usual lien is given the contracting company to secure the payments for the water right.

§ 1877. **Provisions in aid of the National Reclamation Act.**—The Government of the United States is authorized to appropriate the water of streams within the State of Montana in the same manner and subject to general conditions applicable to the appropriation of waters by individuals. Such appropriations shall be held valid for a period of three years after the filing of the appropriation notice, but shall be null and void after such period unless the work shall have been commenced.[1] The right of condemnation of rights of way and existing ditches, canals, or reservoirs is given as provided by law.[2]

Rights of way are also granted over State lands.[3] Provisions are also made for the disposal of State lands in accordance with the farm units as fixed by the United States, and that no title to lands under such projects shall pass from the State until the purchaser shall produce evidence of the acquisition of the right to the use of water for the irrigation of such lands duly issued by the United States Government.[4]

§ 1878. **The pollution of waters.**—The poisoning of the waters of any well, spring, or reservoir is made punishable by imprisonment in the penitentiary not less than one or more than ten years.[1]

The putting the carcass of any dead animal, or offal of any kind in or upon the banks of any stream, pond, lake, or reservoir from which water is drawn to supply the inhabitants of any city or town is a misdemeanor.[2] The depositing of sawdust, bark, or debris from sawmills is punishable by a fine not exceeding $500.[3] The emptying of any rubbish or filth into a canal, ditch, or reservoir is made a misdemeanor.[4]

1 Rev. Codes, 1907, Sec. 4846.
2 Rev. Codes, 1907, Sec. 4891.
3 Rev. Codes, 1907, Sec. 2212.
4 Rev. Codes, 1907, Sec. 2211.

1 Rev. Codes, 1907, Sec. 8442.
2 Rev. Codes, 1907, Sec. 8484.
3 Rev. Codes, 1907, Secs. 8797, 8798.
4 Rev. Codes, 1907, Sec. 8739.

§ 1879. **Criminal statutes.**—The failure to construct proper bridges over roads, or the injury in anywise of any roads or highways is made punishable for every offense of a fine of not less than $25 nor more than $100; one-half of the fine to go to the benefit of the common schools and the other half to the person informing the nearest magistrate.[1] Also, the overflowing of highways from a ditch is made punishable by a fine not exceeding $100.[2] Every person who shall, without authority of the owner, take water from any ditch, flume, or reservoir, or who interferes with any gate or other appurtenance is guilty of a misdemeanor.[3]

§ 1880. **Riparian rights in Montana.**—The statutes of the State of Montana leave one in doubt as to whether riparian rights are abrogated in Montana or not. Certain it is that the riparian right of an owner to the undiminished flow of a stream, without use, is abrogated, by the very fact that the right of appropriation by non-riparian owners is granted. Again, the decisions upon the subject are by no means decisive. In the first decision upon the subject two of the judges were not able to agree, and the third did not sit in the case.[1] But it seems to be the weight of authority that a riparian owner, by virtue of such ownership, has the right to a use of so much of the water flowing by his lands as he actually applies to a beneficial use or purpose, and that the inception of that right is the inception of his title to the land.[2] The Federal cases upon the subject have left the question entirely to the State, evidently upon the theory that it is the right of the State, either by express statute or by Court decision, to decide this question for itself.[3]

1 Rev. Codes, 1907, Secs. 4858, 4859.
2 Rev. Codes, 1907, Sec. 8835.
3 Rev. Codes, 1907, Sec. 8739.
1 Thorp v. Freed, 1 Mont. 651.
2 Smith v. Denniff, 24 Mont. 20, 60 Pac. Rep. 398, 50 L. R. A. 737, 81 Am. St. Rep. 408.
3 See, upon the subject: Winters v. United States, 143 Fed. Rep. 740, 74 C. C. A. 546; Winters v. United States, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 208; Morris v. Bean, 146 Fed. Rep. 423; Cruse v. McCauley, 96 Fed. Rep. 369; Howell v. Johnson, 89 Fed. Rep. 556.

CHAPTER 92.

NEBRASKA.

§ 1881. Particular features of the State.
§ 1882. Irrigation in the State.
§ 1883. Criticism of the Nebraska laws.
§ 1884. Water rights—Defined—Title to water—Priority.
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§ 1881. Particular features of the State.—The State of Nebraska lies wholly within the Great Plains region. In general, as far as the precipitation is concerned, it may be considered semi-arid. In the eastern portion of the State there is plenty of rainfall, and there is seldom a season but that crops can be brought to maturity without the artificial application of water. In the central and western portions of the State there is less rainfall, and here, again, there are often seasons when irrigation is not needed. But in these portions of the State at times there occur a number of seasons in succession when in the summer time there is very little rainfall, and many of the crops are destroyed on account of the drought. The Platte River and its tributaries form the principal water courses in the State. The North Platte, rising in the mountains in Colorado and flowing north through a portion of Wyoming, unites with the South Platte, which also rises in Colorado, in Lincoln County, Nebraska. There are also a number of smaller streams which flow into the Missouri River. The soil of the State is rich and deep and capable of raising immense crops.

§ 1882. **Irrigation in the State.**—Although there are a great many irrigation enterprises in the State of Nebraska, irrigation has been looked upon in that State more as a means of protection in seasons of drought than as an absolute necessity, as is the case in the States that are strictly arid. In seasons of plenty of rainfall the ditches and canals have been allowed to get out of repair, and very little use was attempted to be made of them. Then would come seasons of drought, and perhaps when it was too late there would be a rush to repair the ditches and canals in order to utilize the waters of the streams. At times the works would be repaired only in time to find that there was no water in the streams to fill them. It is this uncertainty that has made the life of irrigation enterprises precarious.[1]

The Carey Act does not apply to the State of Nebraska, the lands not being considered sufficiently arid.

Under the National Reclamation Act the Government has constructed what is known as the North Platte Project. The lands to be irrigated from this project lie in the eastern part of Wyoming and the western part of Nebraska. The Pathfinder Reservoir has been constructed, with an area of 21,774 acres. The irrigable area in Nebraska is 107,000 acres, and 22,000 in Wyoming. The average rainfall on the irrigable area is fifteen inches per annum.[2]

Under the irrigation district law a number of districts have been organized and are in successful operation.[3]

According to the Census Report for 1910 the total number of farms irrigated in 1909 was 1852, as against 1932 in 1899, a decrease of 80, or 4.1 per cent.

The total acreage irrigated in 1909 was 255,950 acres, as against 148,538 acres in 1899, an increase of 107,412 acres, or 72.3 per cent.

1 See Eighth Biennial Report of the State Board of Irrigation, 1908-1910.

2 See the annual reports of the Reclamation Service, subject: Nebraska. See, also, report of Andrew Weiss, project engineer of the North Platte project, in the Eighth Biennial Report of the State Board of Irrigation, 1908-1910, p. 19.

3 For further information upon the subject, see the above reports and Geology and Water Resources of the Republican River Valley and Adjacent Areas, Nebraska, by G. E. Condra, 1907, Water-Supply Paper No. 216, U. S. Geological Survey; Geology and Water Resources of a Portion of the Missouri River Valley in Northeastern Nebraska, by G. E. Condra, 1908, Water-Supply Paper No. 215; Surface Water Supply of Nebraska, by J. C. Stevens, 1909, Water-Supply Paper No. 230.

The total acreage which all enterprises were capable of irrigating in 1910 was 429,225 acres. The acreage included in projects completed or under construction in 1910 was 680,133 acres.

The above acreage under cultivation is classified by the type of enterprise as 30,536 under the United States Reclamation Service, 300 acres under the United States Indian Service, 76,448 under irrigation districts, 78,605 in co-operative enterprises, 24,834 in commercial enterprises, and 45,227 in individual and partnership enterprises.

§ 1883. **Criticism of the Nebraska Laws.**—The laws governing the subject of irrigation and water rights would be considered inadequate in an arid State. There is considerable dissatisfaction expressed relative to the same in the last report of the State board of irrigation.[1] One difficulty appears to be that the authorities have attempted to adhere too closely to the common law doctrine of riparian rights as to the use of the waters of natural streams and at the same time to allow the right of appropriation. In this, as in other States, where there is not a sufficient water supply for all, the right to the use of the waters of natural streams should be based upon the actual applications of the water to some beneficial use or purpose. The law also has been defective as to abandoned projects. Upon this subject the last report of the State board of irrigation has this to say: "More than 500 claims for water previous to the law of 1895 have been adjudicated. In several cases no physical work has been performed. Upon perhaps one-fourth of this number excavation and construction has not been prosecuted beyond turning a few furrows. Few, if any, can be considered fully completed. Vast areas of land, aggregating thousands and thousands of acres, have been listed in these claims, to which water has never been applied; yet, under the law, this land can not be included in any other application, and the board is powerless to grant relief. The Attorney-General should be directed to institute proceedings in the proper courts to remove this restriction. Claimants who can not, or will not, water the land listed in the appropriations should be forced to step aside and give some one else a chance."[2] But by

1 See Eighth Biennial Report, 1908-1910.

2 Eighth Biennial Report, *supra*, p. 25.

the Act of the legislature approved April 10, 1911,[3] a procedure was provided for the forfeiture of abandoned rights, and thus following the recommendations of the State board.

The listing of private lands and giving a person or corporation to whom an appropriation has been allowed the exclusive right to irrigate such lands is wrong in principle. It gives the appropriator an interest in such lands without the consent of the owners of the title.

The irrigation district law in Nebraska has given considerable satisfaction. As stated by the State board of irrigation in their last report: "The district irrigation system, properly conducted, is one that is the most permanent and economical and the one which experience has shown will, in time, control the most of the irrigation in this State."[4] The law, however, is defective in not having sufficient State control, and some power to determine the feasibility of such projects for the protection of all parties interested.[5]

§ 1884. Water rights—Defined—Title to water—Priority.—The State constitution of Nebraska contains nothing upon the subject of irrigation or water rights.

It was declared by the Act of 1895, upon the subject of the title to the water within the State: "The water of every natural stream not heretofore appropriated within the State of Nebraska is hereby declared to be the property of the public, and is dedicated to the use of the people of the State, subject to appropriation as hereinbefore provided.[1]

"Any canal constructed for the purpose of developing power or any other useful purpose, and from which water can be taken for irrigation, is hereby declared to be an irrigation canal, and all laws relating to irrigation canals shall be deemed applicable thereto.[2]

3 Laws, 1911, p. 503; Comp. Stats., 1911, Sec. 6426, Chap. 93a, Art. II, Sec. 18.

4 Eighth Biennial Report, *supra*, p. 24.

5 For irrigation districts in Nebraska, see Sec. 1896.

1 Comp. Stats. 1911, Sec. 6450, Chap. 93a, Art. II, Sec. 42; Laws, 1895, Chap. 69, p. 260, Sec. 42.

That the use of water for irrigation is a public use, see Paxton etc. Co. v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585.

2 Comp. Stats. 1911, Sec. 6401, Chap. 93a, Art. I, Sec. 2a.

See, also, State *ex rel.* Patterson v. County Commrs. of Douglas Co., 47 Neb. 428, 66 N. W. Rep. 434.

"The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.[3]

"All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successors in interest ceases to use it for such purpose, the right ceases."[4]

All ditches constructed for the purpose of utilizing waste, seepage, swamp, or spring waters of the State are governed by the same laws relative to priority as other ditches: Provided, that the person upon whose lands such waters first arise shall have the prior right to the use of the same for all purposes upon his lands.[5]

"Canals and other works constructed for irrigation or water power purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canal and irrigation works.[6]

[3] Comp. Stats. 1911, Sec. 6451, Chap. 93a, Art. II, Sec. 43.

"As between appropriators the one first in time is first in right." Cobb, A. S., Sec. 6778; Comp. Stats., Chap. 93a, Art. I, Sec. 7.

See, also, Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Plattsmouth W. Co. v. Smith, 57 Neb. 579, 78 N. W. Rep. 275; McCook Irr. Co. v. Crews, 70 Neb. 115; 102 N. W. Rep. 249; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Dunn v. Thomas, 69 Neb. 683, 96 N. W. Rep. 142; Topping v. Cohn, 71 Neb. 559, 99 N. W. Rep. 372; Court House Rock Irr. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463; Burson v. Percy, 77 Neb. 654, 110 N. W. Rep. 544; Brinegar v. Copass, 77 Neb. 241, 109 N. W. Rep. 173; Farmers' etc. Co. v. Brambaugh, 81 Neb. 641, 116 N. W. Rep. 512; Radford v. Wood, 83 Neb. 773, 120 N. W. Rep. 458; Farmers' etc. Co. v. Cozad Irr. Co., 65 Neb. 3, 90 N. W. Rep. 951; McCook v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Kinkead v. Turgeon, 74 Neb. 580, 109 N. W. Rep. 744, 7 L. R. A., N. S., 316.

[4] Comp. Stats. 1911, Sec. 6426, Chap. 93a, Art. II, Sec. 18, as amended, Laws 1911, p. 503.

[5] Comp. Stats., Chap. 93a, Art. II, Sec. 44.

[6] Comp. Stats. 1911, Sec. 6456, Chap. 93a, Art. II, Sec. 48; Paxton

"Water for the purpose of irrigation in the State of Nebraska is hereby declared to be a natural want."[7]

§ 1885. **Administrative officers.**—In general, as to the division of the State and the administrative officers controlling, determining the right to the use and distribution of waters, the State of Nebraska follows the scheme of the State of Wyoming, hereinafter discussed.[1]

State Board of Irrigation, Highways, and Drainage.—At the head of the system is the State board of irrigation, which is composed of the Governor, Attorney-General and the Commissioner of Public Lands and Buildings. The duties of this board are similar to the duties of the board of control in Wyoming.[2] The Governor is the president of the board, the office of which is to be at the State Capitol. The secretary of the board is the State engineer. By the Act approved March 29, 1911, the board was also declared to be the State board of supervision for bridges.[3] And by the Act approved April 8, 1911, the name of the board was changed from that of State board of irrigation to the above,[4] both of which Acts conferred additional duties.[5]

State Engineer.—The State board is empowered to elect a secretary, who shall be a civil engineer of general theoretical knowledge and practical skill and experience, who shall be known as the State engineer. He shall hold office for a term of two years, and be paid a salary of $2500 per annum. The secretary, by and with the con-

v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Crawford County v. Hathaway, 60 Neb. 754, 84 N. W. Rep. 271; *Id.*, 61 Neb. 317, 85 N. W. Rep. 303; *Id.*, 67 Neb. 325, 93 N. W. Rep. 781.

Irrigation canals, etc., are works of internal improvement. Cummings v. Hyatt, 54 Neb. 35, 74 N. W. Rep. 411.

7 Comp. Stats. 1911, Sec. 6473, Chap. 93a, Art. II, Sec. 65.

1 For Wyoming, see Chap. 104, Secs. 2097-2129.

See, also, for State administration, Chap. 68, Secs. 1337-1367.

2 See Sec. 2102.

3 Laws 1911, p. 392.

4 Laws 1911, p. 521.

5 Comp. Stats. 1911, Sec. 6412, Chap. 93a, Art. I, Secs. 4-10; as amended, Laws 1911, pp. 498-500.

See, also, Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. Rep. 271; *Id.*, 61 Neb. 317, 85 N. W. Rep. 303; *Id.*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. Rep. 411.

sent of the board, shall have the power to employ an assistant State engineer, to draw a salary of $1500 per annum.[6]

Division Superintendents.—The State is divided into two water divisions, the boundaries of which are given.[7] There is one superintendent for each water division, elected by the board; said superintendents to be paid a salary of $6 per day for every day actually consumed in the performance of their duties. "The superintendent of each water division acting for the State board shall have the immediate control and direction of the acts of the water commissioners and of the distribution of water in his water division."[8]

By the Act approved April 8, 1911,[9] it was provided that every person, corporation, or association owning or controlling any irrigation works must furnish, by the first of April of each year, the superintendent of each division a list of all lands to be watered through each headgate and measuring device. The superintendent shall use such lists and reports as a basis in the distribution of waters until the first of April of the year following.

Water Commissioners.—The State board is required to divide each water division into subdivisions, the boundary lines of which shall conform to the division lines of watersheds. For each district there shall be appointed by the board one water commissioner for a term of two years, at a salary of $5 per day for the time actually engaged in such duties. It is made the duty of the water commissioner to divide the waters of his district according to the priority of each claimant, under the direction of the division superintendent.[10]

§ 1886. The measurement of water—Standard of measurement.—It is made the duty of the State engineer, as soon as practicable, to measure the quantity of water flowing in the streams of the State and to keep a record thereof.[1]

6 Comp. Stats. 1911, Secs. 6415-6417; as amended, Laws 1911, pp. 499, 500.

7 Comp Stats. 1911, Secs. 6409-6411; as amended, Laws 1911, pp. 497, 498.

8 Comp. Stats. 1911, Secs. 6419-6422, Chap. 93a, Art. II, Secs. 11-14; as amended, Laws 1911, pp. 500-502.

9 Laws 1911, p. 522.

10 Comp. Stats. 1911, Secs. 6441-6444, Chap. 93a, Art. II, Secs. 33-36; as amended, Laws 1911, pp. 511, 512.

1 Comp. Stats. 1911, Sec. 6425, Chap. 93a, Art. II, Sec. 17; as amended, Laws 1911, p. 502.

"The standard of measurement for flowing water shall be a cubic foot per second of time, both for determining the flow of water in natural streams and for the purpose of distributing therefrom when appropriations have been made for direct flow. The standard of measurement of the volume of water shall be an acre-foot, equivalent to 43,560 cubic feet, and when water is stored in any natural or artificial reservoir, it shall be used for determining the capacity of such storage reservoirs, the amount stored and the amount used therefrom. What is known as the miner's inch shall be regarded as one-fiftieth of a cubic foot per second in all cases." [2]

§ 1887. The appropriation of water.—"The United States of America and every person, association, or corporation hereafter intending to appropriate any of the public waters of the State of Nebraska shall, before commencing the construction, enlargement, or extension of any works for such purpose, or performing any work in connection with the same, or before taking any water from any constructed works, make an application to the State board for a permit to make such appropriation." The proceedings upon such application are similar to those in Wyoming.[1]

"If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the State board, through its secretary, shall approve the same." If there is no unappropriated water, or if a prior appropriation has been made to water the same land, the application shall be refused. If approved, the usual certificate must be issued to the appropriator. The date of the priority of such appropriation shall be from the filing of the application.[2]

By the Act approved April 8, 1911,[3] a further appropriation may be made for lands which already have an appropriation, but which, in times of scarcity, have not enough water to supply their needs. Such appropriations are made in the same manner as above. Right of appeal from the decision of the board is allowed to the proper District Court.

2 Comp. Stats. 1911, Sec. 6440, Chap. 93a, Art. II, Sec. 32; as amended, Laws 1911, p. 510.

1 See Secs. ——.

2 Comp. Stats. 1911, Secs. 6436-6439, Chap. 93a, Art. II, Secs. 28-31; as amended, Laws 1911, pp. 507-510.

See, also, Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Radford v. Wood, 83 Neb. 773, 120 N. W. Rep. 458.

3 Laws 1911, p. 493.

Upon the subject of the prosecution of the work to perfect an appropriation, it is provided that within six months after the approval of an application the construction of the work must be commenced, and the work must be prosecuted vigorously, diligently, and uninterruptedly to completion, unless interrupted by some unavoidable and natural cause, and a failure to comply with this section shall work a forfeiture of the appropriation and all rights thereunder.[4]

§ 1888. **Determination of existing priorities.**—The determination of all existing water rights is left entirely to the State board, both as to the method and amount of the appropriation, in the following language:

"It shall be the duty of the State board to make proper arrangements for the determination of priorities of right to use the public waters of the State and determine the same. The method of determining the priority shall be fixed by said board."[1] The method pursued in this respect has been discussed in a previous chapter.[2]

A complete record must be made and kept by the board of all adjudications.[3]

Each appropriation must be determined in its priority and amount, by the time at which it was made, and the amount of water which the works are constructed to carry: Provided, that such appropriator shall at no time be entitled to more water than he can beneficially use: Provided, that no allotment for irrigation shall exceed one cubic foot per second of time for each seventy acres nor three acre-feet in the aggregate during one calendar year for each acre of land; "neither shall it exceed the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry."[4] Within thirty days after the determination of the priorities it is the duty of the board to issue a certificate to the owner. An appeal may be had

4 Comp. Stats. 1911, Sec. 6470, Chap. 93a, Art. II, Sec. 62.

1 Comp. Stats. 1911, Sec. 6424, Chap. 93a, Art. II, Sec. 16; as amended, Laws 1911, p. 502.

2 See determination by boards, Chap. 80, Secs. 1585-1595.

3 Comp. Stats. 1911, Sec. 6427, Chap. 93a, Art. II, Sec. 19; as amended, Laws 1911, p. 505.

4 Comp. Stats. 1911, Sec. 6428.

See opinions, Atty.-Gen., 1901-2, p. 310.

from the order of the board to the District Court of the proper county in the manner provided by the law.[5]

§ 1889. **Proceeding for the forfeiture of rights.**—Following the recommendations of the State board, the Act of the legislature approved April 10, 1911,[1] provided that when the use for which an appropriation was made ceased, that the right ceased. It was also made the duty of the State board to examine into the condition of every water appropriation in the State, and into the condition of all ditches and canals constructed or partially constructed, and if it appears that any appropriation in the State has not been used for some useful purposes, or having been used at one time has ceased to be used, then, in that case, the State board shall appoint a place and time of hearing, and shall serve notice upon the parties interested to show cause at such time and place why such appropriation should not be declared forfeited and annulled. And if it appears that such appropriation has not been used, as above stated, the same shall be declared canceled and annulled. An appeal may be taken in such cases from the decision of the board to the District Court of the proper district.

§ 1890. **Reservoir rights.**—Reservoir rights are granted by the statute under applications for a permit for the same as in other cases.[1] Upon the approval of such application the applicant is given the right to impound any and all water not otherwise appropriated, and may condemn rights of way as in other cases.[2] "The owner or owners of such storage reservoirs shall be liable for all damages arising from leakage or overflow of the water therefrom or from the breaking of the embankment of such reservoir." The water from reservoirs may be turned into the natural stream and again taken out, "less a reasonable deduction for seepage and evaporation, to be determined by the State engineer, provided no prior appropriator for beneficial use shall be prejudiced by such diversion.

5 Comp. Stats. 1911, Secs. 6428-6435, Chap. 93a, Art. II, Secs. 20-27; as amended, Laws 1911, p. 506.

1 Laws 1911, p. 503; Comp. Stats. 1911, Sec. 6426, Chap. 93a, Art. II, Sec. 18.

1 For the appropriation of water, see Sec. 1887.

2 For condemnation proceedings, see Sec. 1892.

Rights to the use of the water by consumers may be acquired by applications to the State board.[3]

§ 1891. **Distribution of water.**—The division superintendents and water commissioners are given the authority to supervise the distribution of water in the State between the different ditches and canals.[1] It is also provided that it is the duty of the owners of the main ditches and canals to appoint a superintendent, whose duty it shall be to measure the water through the outlets of such ditches to all those who are entitled to the use of the same. In case no such appointment is made the State engineer may make it. It is also made the duty of every person entitled to take water from any ditch to see that he receives no more water than he is entitled to. And if he knowingly permits such extra water to come to his land from such works, he is made liable in damages to any person who shall be injured by such extra appropriations of water.[2]

§ 1892. **Ditches and canals—Rights of way—Condemnation proceedings.**—Rights of way are granted over State lands or over, through, and across any highway in the State without compensation: Provided, that bridges or crossings over such ditches or canals are constructed at the expense of the owner.[1] A right of way is also given to conduct water into or along any of the natural streams of the State, due allowance being made for evaporation and seepage, and subject in all cases to the State board.[2]

The right of condemnation is also given all persons, companies, or associations of rights of way over the private lands of others for all ditches, canals, or other works of this nature, and full proceedings provided therefor.[3]

"No tract of land shall be crossed by more than one ditch, canal,

3 Comp. Stats. 1911, Sec. 6464, Chap. 93a, Art. II, Sec. 56; as amended, Laws 1911, p. 516.

1 See Sec. 1895.

2 Comp. Stats. 1911, Secs. 6461-6463, Chap. 93a, Art. II, Secs. 53-55.

1 Comp. Stats. 1911, Sec. 6448, Chap. 93a, Art. II, Sec. 40.

2 Comp. Stats. 1911, Sec. 6453, Chap. 93a, Art. 11, Sec. 45.

That the water must be returned to the stream from which it was taken, except in certain instances, see Cobb. A. S., 1909, Sec. 6777; Comp. Stats., Chap. 93a, Art. I, Sec. 6.

3 Comp. Stats. 1911, Secs. 6447-6449; Chap. 93a, Art. II, Secs. 39-41.

or lateral without the written consent and agreement of the owner thereof if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended."[4]

By the Act approved April 8, 1911, the right was granted to procure rights of way for laterals across intervening lands and irrigation canals.[5]

The point of diversion may be changed and extensions may be made to other lands, provided others are not injured thereby, upon petition to the State board.[6] The line of the ditch or canal must not be changed so as to interfere with the use of its waters by those entitled thereto, without rendering the owner liable to damages.[7] Substantial bridges must be constructed at the expense of all ditch owners at the intersection of the same and roads;[8] also bridges must be made for the convenience of land owners, and also sufficient outlets in the ditches for the delivery of water, with substantial headgates, and measuring devices must be constructed.[9]

"All ditches, canals, laterals, or other works used for irrigation purposes shall be exempt from all taxation, whether State, county or municipal."[10]

§ 1893. Irrigation corporations and companies—Duties and powers of.—Corporations or associations may be organized under the general laws of the State of Nebraska for the express purpose of constructing and operating canals, reservoirs, and other works for irrigation and water power purposes. They are given the power to borrow money and to mortgage their property and franchises in the same manner and for the same purpose as railroad corporations.[1] Mutual irrigation companies may be organized, where there

4 Comp. Stats. 1911, Sec. 6402, Chap. 93a, Art. I, Sec. 3.

See, also, Rasmussen v. Blust, 83 Neb. 678, 120 N. W. Rep. 184; Paxton v. Farmers' etc. Co., 45 Neb. 884, 64 N. W. Rep. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585.

5 Laws 1911, p. 496.

6 Comp. Stats. 1911, Sec. 6403, Chap. 93a, Art. I, Sec. 5; as amended, Laws 1911, p. 494.

Farmers' etc. Co. v. Gothenburg, 73 Neb. 223, 102 N. W. Rep. 487.

7 Comp. Stats. 1911, Sec. 6454, Chap. 93a, Art. II, Sec. 46; as amended, Laws 1911, p. 514.

8 Comp. Stats. 1911, Sec. 6466, Chap. 93a, Art. II, Sec. 58; as amended, Laws 1911, p. 518.

9 Comp. Stats. 1911, Secs. 6459, 6460, Chap. 93a, Art. II, Secs. 51, 52.

10 Comp. Stats. 1911, Sec. 6469, Chap. 93a, Art. II, Sec. 61.

1 Comp. Stats. 1911, Sec. 6455, Chap. 93a, Art. II, Sec. 47.

is no purpose of deriving a revenue, but for the purpose of irrigating the lands of its shareholders.[2] Any corporation or association may, through its board of directors, assess the shares, stock, or interest of the stockholders for the purpose of obtaining funds to defray the necessary running expenses.[3]

"Irrigation works constructed under the laws of this State are hereby declared to be common carriers."[4]

By the Act approved April 10, 1911,[5] it was provided that the owner or operator of any works for the storage, carriage, or diversion of water, except irrigation districts, must deliver all water legally appropriated to parties entitled to the use of the same for beneficial purposes, at a reasonable rate, to be fixed by the State railway commission, according to the law relating to common carriers.

§ 1894. Sale and conveyance of water rights.—"Whenever any person, persons, or corporation owning any irrigation ditch or canal shall convey by deed or contract the right to use the water from such ditch or canal for any tract of land for irrigation purposes, such deed or contract shall be recorded in the county where such land is situated, in the same manner and under the same conditions as deeds for real estate are recorded. And such deed or contract, from the date of recording thereof, shall be binding upon the grantor of such deed or contract, his, their, or its successors or assigns, and all persons, companies, or corporations claiming any interest in such ditch or canal, and no foreclosure or other proceedings to collect money from or to subject the sale of the property of the owners of such ditch or canal shall in any manner impair the right of such grantee, his heirs, administrators, or assigns to the use of the water from such ditch or canal in the quantity and manner provided in such deed or contract."[1]

2 Comp. Stats. 1911, Sec. 6474; Chap. 93a, Art. II, Sec. 66.

3 Comp. Stats. 1911, Sec. 6475, Chap. 93a, Art. II, Sec. 67.

But see Enterprise D. Co. v. Moffit, 58 Neb. 642, 79 N. W. Rep. 560, 45 L. R. A. 647, 76 Am. St. Rep. 122, where it was held that the legislature could not so change the law as to make stock bought and fully paid assessable.

4 Comp. Stats. Neb. 1911, Sec. 6475b.

5 Laws 1911, p. 523; Comp. Stats. Neb. 1911, Sec. 6475c.

1 Compiled Stats. Neb. 1911, Sec. 6471.

§ 1895. **Provisions in aid of the National Reclamation Act.**—By the Act approved April 10, 1911,[1] rights are given to the United States to appropriate, develop, and store any unappropriated waters within the State: Provided, that when it is determined by the officers of the Reclamation Service that any water so developed or stored is in excess of the needs of the project, it shall be lawful for the United States to enter into contracts to rent or sell such water under the terms and conditions imposed by Act of Congress and the rules and regulations of the United States to any person, association, firm, or corporation who have theretofore been granted a permit to appropriate water.

Rights of way are also provided for over all State lands for the construction of the necessary works for these projects.[2] Also, provision is made for the organization of water users' associations.[3]

§ 1896. **Irrigation district law in Nebraska.**—Nebraska is one of the States which has adopted the irrigation district law,[1] taking the same largely from that of California, with the more important amendments.[2] In this section we will discuss only such phases of the Nebraska district law as are peculiar or that have been construed by the Court.

Upon the subject of the organization of such districts the statute provides that: Whenever a majority of the electors "owning not less than ten acres of land or holding leasehold estates of not less than 40 acres" susceptible of irrigation from a common source and by the same system of works they may present a petition to that effect to the board of county commissioners, the organization of the district is then proceeded with in the usual manner.[3]

After the organization of the board such board has the power to

1 Laws 1911, p. 496.

2 Comp. Stats. Neb., 1911, Chap. 83, Art. 13, Sec. 6047a.

3 Comp. Stats. Neb., 1911, Chap. 18, Art. 1, Sec. 2453a.

1 For a full discussion of this law, see Chap. 70, Secs. 1386-1432.

2 Comp Stats. 1911, Secs. 6476-6542a, Chap. 93a, Art. 3, Secs. 1-64; as amended, Laws 1911, pp. 519, 520, 524, 527, 529, 535, 537.

3 The Act has been held valid by the Supreme Court of the State.

Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; State v. Several Parcels of Land, 81 Neb. 770, 114 N. W. Rep. 282; Kearney v. Woodruff, 115 Fed. Rep. 90, 53 C. C. A. 117; Keith Co. v. Citizens Sav. & Loan Assn., 116 Fed. Rep. 13, 53 C. C. A. 525; Perkins v. Graff, 114 Fed. Rep. 441, 52 C. C. A. 243.

enact by-laws, rules, and regulations for the distribution and use of the water.

"It is hereby expressly provided that all waters distributed for irrigation purposes shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district, and the water right so above apportioned shall attach to and follow the tract of land to which it is so apportioned either under lease or sale."

Provisions are also made for the exclusion of lands which become sub-irrigated.[4] The board is given the power to acquire, by purchase or otherwise, or by the right of eminent domain, all necessary rights of way, works already constructed, and water rights.[5] Money may be borrowed by the district after the same has been properly organized, and bonds voted therefor and sold as provided.[6] "Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and all the real property of the district shall be and remain liable to be assessed for such payments as herein provided." Town lots are also included.[7] These assessments may be levied and collected in the usual way. Contracts may be let for the construction of the necessary works.[8] The board of directors or other officers of the district are prohibited from incurring any debt or liability in excess of the express provision of the Act. Any district is given the authority to drain lands sub-irrigated by reason of the lawful use of

4 Comp. Stats. 1911, Sec. 6484, Chap. 93a, Art. 3, Sec. 9; as amended, Laws 1911, p. 534.

See, also, Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336.

5 Comp. Stats. 1911, Sec. 6485, Chap. 93a, Art. 3, Sec. 10; as amended, Laws, 1911, p. 527.

See, also, Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. Rep. 83.

6 Comp. Stats. 1911, Sec. 6488, Chap. 93a, Art. 3, Sec. 13; as amended, Laws 1911, p. 529.

See, also, Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. Rep. 83; Willow Springs Irr. Dist. v. Wilson, 74 Neb. 269, 104 N. W. Rep. 165.

7 Comp. Stats. 1911, Secs. 6490, 6491, Chap. 93a, Art. 3, Secs. 15, 16.

8 Comp. Stats. 1911, Sec. 6498, Chap. 93a, Art. 3, Sec. 22; as amended, Laws 1911, p. 533.

See, also, Lincoln etc. Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. Rep. 847; Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. Rep. 83; Willow Springs Irr. Dist. v. Wilson, 74 Neb. 269, 104 N. W. Rep. 165.

the water from its canals.[9] In times of high water it is made the duty of the board of directors to keep the water flowing through the ditches and canals to their full capacity, when the water can be applied beneficially to the lands thereunder. It is further provided that upon the filing of a petition signed by a majority of the land owners requesting that certain rules and regulations be adopted it becomes the duty of such board to provide for the adoption and enforcement of the same upon the following subjects: Automatic measuring devices both at the main gate and laterals; also for the interchange of water from one tract to another.[10] Provisions are made for the changing of the boundaries of districts.[11] Also, provisions are made for the disorganization of districts.

By the Act approved April 8, 1911,[12] it was provided that irrigation districts shall be liable in damages for negligence in delivering or failure to deliver water to the users from its canal to the same extent as private persons and corporations.

§ 1897. **Pollution of waters.**—Any person erecting any dam or other obstruction in any stream causing stagnant water thereby, which is injurious to the public health, is punishable by a fine not exceeding $500.

Putting the carcass of any animal in any spring, branch, or stream is punishable by a fine of not less than $2 nor more than $40.

The putting or leaving any offensive matter of any kind in any creek, river, bay, pond, or canal is punishable in any sum of not less than $1 nor more than $50. And if such nuisance is not abated within twenty-four hours after notice to abate the same, it is deemed a second offense, and every like neglect of each twenty-four hours thereafter is considered an additional offense.[1]

§ 1898. **Criminal statutes.**—Every officer of any corporation or association, or person owning or in control of any ditch, reservoir,

9 Comp. Stats. 1911, Sec. 6505, Chap. 93a, Art. 3, Sec. 29; as amended, Laws 1911, p. 535.

10 Comp Stats. 1911, Sec. 6507, Chap. 93a, Art. 3, Sec. 31; as amended, Laws 1911, p. 536.

11 Comp. Stats. 1911, Secs. 6514-6519, Chap. 93a. Art. 3, Secs. 38-43.

See, also, Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336; State v. Several Parcels of Land, 81 Neb. 770, 114 N. W. Rep. 282.

12 Laws 1911, p. 538; Comp. Stats. 1911, Sec. 6542a.

1 Comp. Stats. 1911, Secs. 7896-7899.

or other device, for appropriating or using water, and any person who shall wilfully open or close, change or interfere with any head-gate or controlling gate, or by any method or means take any water, without authority of the State board, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not less than $100 nor more than $1000, or imprisonment in the county jail not exceeding six months, at the discretion of the Court, and an additional fine of $500 for each day that the water is so allowed to run.[1]

Any superintendent having charge of a ditch or canal used for irrigation purposes who shall neglect or refuse to deliver water as in the Act provided, or any person who shall prevent or interfere with the proper delivery of water, is guilty of a misdemeanor.[2]

The flooding of roads subjects the owner of the works to a penalty of $10 per day for each day such road is obstructed by water.[3]

The wasting of mutual artesian waters is prohibited under severe penalty.[4]

§ 1899. **Riparian rights in Nebraska.**—As regards the common law of riparian rights in the State of Nebraska the California rule is adhered to, that the two doctrines of water rights, one the right of a riparian proprietor and the other the right of appropriation and application of the water to a beneficial use by a non-riparian owner, may exist and do exist concurrently in the State.[1] It is

1 Comp. Stats. 1911, Sec. 6458, Chap. 93a, Art. 2, Sec. 50; as amended, Laws 1911, p. 515.

2 Comp. Stats. 1911, Sec. 6465, Chap. 93a, Art. 2, Sec. 57.

3 Comp. Stats. 1911, Sec. 6468, Chap. 93a, Art. 2, Sec. 60.

4 Comp. Stats. 1911, Secs. 6406-6408, Chap. 93a, Art. 1, Secs. 16-18.

1 Crawford Co. v. Hathaway (Hall), 60 Neb. 754, 84 N. W. Rep. 271, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Dunn v. Thomas, 69 Neb. 683, 96 N. W. Rep. 142; Courthouse etc. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463; Kinkead v. Turgeon, 74 Neb. 580, 109 N. W. Rep. 744, 7 L. R. A., N. S., 316; Clark v. Cambridge etc. Co., 45 Neb. 798, 64 N. W. Rep. 239; Eidemiller Ice. Co. v. Guthrie, 42 Neb. 238, 60 N. W. Rep. 717, 28 L. R. A. 581; Slatterly v. Harley, 58 Neb. 575, 79 N. W. Rep. 151; Plattsmouth W. Co. v. Smith, 57 Neb. 579, 78 N. W. Rep. 275; McCook etc. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Gill v. Lydick, 40 Neb. 508, 59 N. W. Rep. 104; Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. Rep. 454, 7 L. R. A. 457, 26 Am. St. Rep. 340.

therefore held that a riparian owner's right to the use of the flow of a stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right and entitled to protection as such, the same as private property generally; that the legislature has not abolished, nor does it possess the power to abolish, the right of riparian proprietors which have become vested, except as such rights may be taken or impaired for a public use in the exercise of the power of eminent domain, for which compensation must be paid.[2]

2 Crawford Co. v. Hathaway, *supra*.

CHAPTER 93.

NEVADA.

§ 1900. Particular features of the State.
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§ 1900. Particular features of the State.—The State of Nevada lies almost wholly within the "Great Basin," which also extends on the east beyond Nevada, and includes nearly one-half of the State of Utah, as well as small portions of Idaho and Wyoming. The Great Basin, as the name implies, comprises a vast area, characterized by the fact that within its rim are no surface streams which empty their waters either into the ocean or into other streams which flow to the ocean. The precipitation falls within irregular lines throughout the State, depending largely upon the topography. The Great Basin is by no means a single broad valley. On the contrary, it is broken by irregular mountain ranges, which rise abruptly from nearly level plains. Streams of water issue from some of these mountain ranges and flow down into the plains below,

which are, for the most part, the bottoms of ancient lakes, in which thick deposits of gravel, sand, and clay have accumulated. These streams are small, and empty into saline lakes, or sink into the ground and disappear. The precipitation varies according to locality from four inches to much higher in the upper altitudes. Over hundreds and even thousands of square miles of lower mountains and arid plains there may not be any precipitation at all during the greater portion of the year. The climate is hot and dry in the daytime, although the nights are generally cool. The altitude ranges from about 4,000 to 11,000 feet above the sea.

The rivers and streams of the State are small, and those which flow continuously throughout the year may be regarded as exceptional. The Truckee, Carson, Walker, and Humboldt Rivers comprise practically the main water supply of the State. There are, however, many small streams and many springs, both hot and cold. These are all utilized to the greatest possible extent. The soil in many places is good and adaptable to the many crops usually grown in a temperate zone. In many places, however, the soil is impregnated with alkalies to such an extent as to render it almost valueless. The winters, as a general thing, are mild in the valleys, with, however, considerable cold in the higher altitudes. The entire State may be said to lie strictly within the arid region of the country.

§ 1901. **Irrigation in the State.**—Owing to the scanty water supply, the topography of the State, being a succession of ranges of mountains, and the great tracts of alkali soil, upon which nothing at all can be grown, the cultivation of land by means of irrigation in the State of Nevada may be described as patchy. There are a number of localities in the State, however, which have been developed to a very high degree. But out of 70,233,600 acres of the land comprised in the State of Nevada, only about 800,000 acres are improved, and but about 90 per cent of this area is irrigated. In 1900 there were 504,168 acres irrigated, but this area has been increased considerably since. The trouble has been in the past that, owing to the large area of the State and its small and scattered water supply, much of which comes from springs, the ranches and farms are at considerable distance from each other, except on the western border. Whenever a spring of water has appeared in the broad, barren valleys of the State some ranchman has bought or

has taken up a small tract of land, sufficient to cover the source of the water, and, owning this, he can practically control thousands of acres of grazing land and at the same time he irrigates but a small tract of his land. As for the cultivation of lands without the means of irrigation, except in a few small and favored localities, it is practically out of the question. Even dry farming, under the new scientific methods, is not considered a success, owing to the fact of the insufficient rainfall during the winter and spring seasons. Again, owing to the multiplicity of small ditches taking their water from the small streams, many conflicts have in the past arisen between the irrigators as to the distribution of the water, especially during the summer season when the supply was reduced. Disputes of this character have been sometimes settled by private agreements, but more often recourse has been had to the courts. The expense of lawsuits for the adjudication and protection of water rights has been a heavy burden to the farmer and tended to a widespread complaint of the insecurity of property. As the land is practically worthless without a water right, the main value depends upon an unimpeachable claim to sufficient water to irrigate. If this claim is liable to be called in question, the value of the property will fluctuate correspondingly. Up to a recent period irrigation has grown up in the State without any order or system, each man or group of irrigators taking all the water to be had, regardless of the use of the same, and caring little for the needs of others. The chief interest of the State has been in mines, and until during the last fifteen years very little attention has been given to the development of agriculture, so that wasteful methods of water distribution have grown up and fastened themselves upon the communities, and the legislature was slow to adopt new laws for radical improvements along these lines.[1]

Now, with a comprehensive water right law, with the acceptance of the provisions of the Carey Act, and with the operations of the Government under the National Reclamation Act, irrigation development in the State of Nevada within the next decade is liable to progress more rapidly. The State is just entering upon its storage period of this development. There are many reservoir sites throughout the State, and in many localities plenty of flood waters to fill them, and vast tracts of fertile land needing the water. But

1 For criticism of the Nevada law, see Sec. 1902.

as all of the water flowing in the natural surface streams has been long since appropriated, the only method of an extended development of agriculture by the means of irrigation is by the construction of reservoirs and storing the flood waters now permitted to run to waste.

The Government, under the provisions of the National Reclamation Act, at this date has completed a portion of the Truckee-Carson project, and the land is rapidly being settled upon. With the entire project completed, it is contemplated to irrigate 206,000 acres. Under the first unit there are 90,723 acres. During the season of 1909 there were 32,000 acres irrigated. Besides this, there is the Walker River project proposed.[2]

Owing to the fact that the State did not accept the provisions of the Carey Act until 1909, very little has been accomplished in this direction.[3]

According to the United States Census Report for 1910 the total number of farms irrigated in 1909 was 2,406, as against 1,906 in 1899, an increase of 500, or 26.2 per cent.

The total acreage irrigated in 1909 was 701,833 acres, as against 504,168 in 1899, an increase of 197,665, or 39.2 per cent.

The total acreage which all enterprises were capable of supplying with water in 1910 was 840,962 acres. The acreage included in projects, either completed or under construction in 1910, was 1,232,142 acres.

The acreage irrigated in 1909, classified by type of enterprise, was: United States Reclamation Service, 30,000 acres; United States Indian Service, 2,597 acres; co-operative enterprises, 78,966 acres; commercial enterprises, 8,864 acres, and individual and partnership enterprises, 581,406 acres. It will be noticed from the

2 For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

3 For the Carey Act, See. Sec. 1918.

For the general discussion of the Carey Act, see Chap. 67, Secs. 1312-1336.

See, also, upon the general subject the biennial report of the State engineer of Nevada, Emmet D. Boyle, State Engineer, 1910-1911; Surface Water Supply of the Great Basin Drainage, 1906, Water-Supply Paper No. 212, by E. C. La Rue, Thomas Grieve, and Henry Thurtell, U. S. Geological Survey, 1908; Water Storage in the Truckee Basin, Water-Supply Paper No. 68, by Taylor, U. S. Geological Survey, 1902; The Great Basin, 1911, by E. C. La Rue and F. F. Henshaw, Water-Supply Paper No. 270, U. S. Geological Survey.

above that no acreage is reported under Carey Act projects or irrigation districts.

§ 1902. **Criticism of the Nevada laws.**—Our criticism of the Nevada laws does not extend so much to the present laws as they now exist, but to the great delay of the legislature in the enactment of any laws. In this respect matters were permitted to run to loose ends for a great many years. It was not until 1907 that a comprehensive water law was adopted by the legislature; and it was not until 1909, fifteen years after the passage of the Carey Act by Congress, that the legislature of the State of Nevada saw fit to accept its provisions, and to provide for operation thereunder.[1]

The powers given to the State engineer may be considered by some to be too great to intrust to the hands of one man. They are even greater than those granted to the State engineer of Wyoming, in that he has the arbitrary power to determine existing rights upon his own personal examination and the verified statements of the claimants upon the stream, the rights of which he is determining. The saving clause, however, is that his determination must be of record, and the right is given any dissatisfied party to bring an independent action in the court, and have the whole subject adjudicated by the Court. Resort is also had to the criminal statutes against any person failing after notice to make out and send the State engineer his statement of claim.

With the new irrigation district law[2] and the new law accepting the provisions of the Carey Act, and a detailed plan for its operation within the State,[3] as well as the main features of the Irrigation Code of 1907, we can find no great fault. At least, they are much better than the State had before.

§ 1903. **State constitution—Water rights—Standard of measurement.**—There are no constitutional provisions relating to waters in the State of Nevada.

From the time of the Act of March 3, 1866, the legislature of the State of Nevada from time to time passed certain Acts attempting to regulate and control the appropriation of waters within the

1 For the Carey Act in Nevada, see Sec. 1918.

2 See Sec. 1919.

3 See Sec. 1918.

State.[1] But it was not until the Act of the legislature, approved February 26, 1907, that a comprehensive water code was enacted, which Act also created the office of State engineer.[2] This code was also amended in 1909 to a considerable extent.[3]

Upon the subject of water rights and the appropriation of water within the State the Act of 1907, as amended by the Act of 1909, provides:

"Section 1. All natural water courses and natural lakes, and the waters thereof which are not held in private ownership, belong to the State and are subject to appropriation for beneficial uses.

"Sec. 2. All existing rights to the use of water, whether acquired by appropriation or otherwise, shall be respected and preserved, and nothing in this Act shall be construed as enlarging, abridging, or restricting such rights.

"Sec. 3. There is no absolute property in the waters of a natural water course or natural lake. No right can be acquired to such waters, except a usufructuary right—the right to use it or to dispose of its use for a beneficial purpose. When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of a natural water course or lake, except at such times as the water is required for a beneficial purpose.[4]

1 For Act of 1866, see Laws Nevada, 1866, p. 202; Gen. Stat. 1885, p. 108.

For the general construction of the Act of 1866, see Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Dalton v. Bowker, 8 Nev. 190; Mosier v. Caldwell, 7 Nev. 363; Lake v. Tolles, 8 Nev. 285; Brown v. Ashley, 16 Nev. 311, 13 Nev. 251; Strait v. Brown, 16 Nev. 317, 40 Am. St. Rep. 497; Barnes v. Sabron, 10 Nev. 217, 4 Morr. M. Rep. 673.

2 For the full text of the Act of 1907, see Laws Nevada, 1907, p. 30, Secs. 1-34.

3 See Laws Nevada, 1909, p. 31, Secs. 1-11; Rev. Laws Nevada, 1912, Secs. 4672-4705.

4 For the subject of the appropriator's right being limited to the amount actually beneficially used, see Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Berry v. Equitable etc. Co., 29 Nev. 451, 91 Pac. Rep. 537; Simpson v. Williams, 18 Nev. 432, 4 Pac. Rep. 1213; Roeder v. Stein, 23 Nev. 92, 42 Pac. Rep. 867; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Rodgers v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; Gotelli v. Gardelli, 26 Nev. 382, 69 Pac. Rep. 8.

A prior appropriator of water for irrigation did not employ a reasonable and economical method of diverting the water where he permitted two-thirds of the water diverted to become lost in a swamp without any good excuse therefor, and such surplus water was subject to appropriation by a sub-

"Sec. 4. No person shall be permitted to divert or use any more of the waters of a natural water course or natural lake than sufficient, when properly and economically used, to answer the purpose for which the diversion is made; nor shall any person be permitted to waste any such water, and all surface water remaining after use, unavoidable wastage excepted, shall be returned to the channel by the persons diverting the same without unreasonable delay or detention.

"Sec. 5. (As amended by the Act of 1909, Section 1.) The maximum quantity of water which may hereafter be appropriated for irrigation purposes in the State of Nevada shall be as follows: In all parts of the State where the water can not be beneficially used for irrigation for a greater period than six months each year, the maximum quantity appropriated for each acre shall not exceed three acre-feet per annum. In all parts of the State where water is beneficially used for irrigation for a period of nine months or more in each year, the maximum quantity of water that may be appropriated shall not exceed three acre-feet for the five months beginning May 15th and extending to October 15th of each year for each acre of land supplied, and the maximum quantity of water that may be appropriated for each acre during the remainder of each year shall not exceed one-half of one acre-foot multiplied by the number of months of each year other than the five months hereinbefore named during which water is so beneficially used.

"Sec. 6. In all measurements of water in this State a cubic foot of water per second of time shall be the standard of measurement.

"Sec. 7. The prior right to the use of the unappropriated waters of the natural water courses and natural lakes, as defined in this Act, may be acquired in the manner provided in this Act, and not otherwise." [5]

§ 1904. Administrative officers—State board of irrigation.—Under the Act of the legislature approved March 16, 1901,[1] there was created a State board of irrigation, consisting of the Governor, Surveyor-General, and the Attorney-General. By the Act of February 26, 1907, the State engineer was also made a member of the

sequent appropriator. Doherty v. Pratt, —— Nev. ——, 124 Pac. Rep. 574.

5 Laws Nevada, 1907, p. 30, Secs. 1-7; Rev. Laws Nevada, 1912, Secs. 4672-4678.

1 Laws Nev., 1901, p. 72.

board, and the Act also provided that he should keep the record thereof in his office.[2] It is made the duty of this board to subdivide the State into water divisions and districts, as may seem to it to be advisable, and may change the same from time to time. It may appoint water commissioners and fix their compensation.[3] The board of irrigation may make such rules and fix such penalties as it shall deem advisable for the proper and economical administration of the waters of the State.[4] It is also made the duty of the board to determine the irrigation possibilities of the State, and the best methods of controlling the water resources of the State in co-operation with the United States Geological Survey and the United States Department of Agriculture and the Nevada Experiment Station.

§ 1905. **Administrative officers—State engineer—His powers and duties.**—The Act of 1907 then proceeds to create the office of State engineer, said engineer to be appointed by the Governor at a salary of $3,600 per year. He shall keep his office at the State Capitol. "No person shall be appointed as State engineer who does not have such training in hydraulic engineering and such practical skill and experience as shall fit him for the position."[1] He must give a bond in the sum of $5000 for the faithful performance of his duties.[2]

The duties of the State engineer are prescribed as follows: He shall become conversant with the State and the needs of the State as to irrigation matters, and in his reports to the Governor he shall make such suggestions as to the amendment of existing laws or the enactment of new laws as his information and experience shall suggest; and he shall keep in his office full and proper records of his work, observations, and calculations, all of which shall be the property of the State. He shall co-operate with the Secretary of the Interior in all work of construction, operation, maintenance, and

2 Laws Nev., 1907, p. 30, Sec. 21; Rev. Laws Nev., 1912, Secs. 4692, 4706.

3 For water commissioners and their duties, see Sec. 1906.

Laws Nev., 1907, p. 30, Secs. 22, 23; Rev. Laws Nev., 1912, Secs. 4693, 4694.

4 Laws 1903, p. 18.

1 Laws Nev., 1907, Sec. 8, p. 30, as amended by Act of 1909, Laws 1909, p. 32, Sec. 2; Rev. Laws Nev., 1912, Sec. 4679.

2 Laws Nev., 1907, p. 30, Sec. 9; Rev. Laws Nev., 1912, Sec. 4680.

management of irrigation works under the National Reclamation Act.[3] He may also employ an assistant engineer and office clerks, and he and his assistants are entitled to traveling expenses.[4] He is also given the power, in the first instance, and without the aid of any board of control, to determine existing water rights.[5]

§ 1906. Administrative officers—Water commissioners.—Water commissioners may be appointed by the State board of irrigation,[1] whose duty it shall be to measure and divide amongst the appropriators the water of the streams according to the priority of right and the amount to which each is entitled.[2] The number and compensation of the water commissioners must be determined by the board, and said commissioners shall be and act under the direction of the State engineer.[3]

§ 1907. The appropriation of water—Applications and protests.—Any one desiring in the future to appropriate any of the public waters or to change the place of diversion or manner of use of water already appropriated shall, performing any work toward such end, make an application to the State engineer for permission to make the same; the statute providing that the prior right to such waters may be "acquired in the manner provided in this Act, and not otherwise."[1]

Said application shall set forth the name and address of the applicant, the source from which such appropriation is proposed to be made, the amount thereof, the location of the proposed works, the purpose for which the appropriation is desired, and if for irrigation a description of the land and the area thereof, and any additional facts required by the State engineer. The application must be on a form furnished by the State engineer, and must be made of record in his office, and must set forth all facts necessary to determine the nature and amount of the proposed appropriation. If the applica-

3 For the National Reclamation Act, see Secs. 1235-1286.

4 Laws Nev., 1907, p. 30, Secs. 10, 11, 12; Rev. Laws Nev., 1912, 4681-4683.

5 For the determination of existing rights, see Sec. 1911.

1 For powers and duties of this board, see Sec. 1904.

2 Laws Nev., 1907, p. 30, Sec. 22; Rev. Laws 1912, Sec. 4693.

3 Laws Nev., 1907, p. 30, Sec. 23; Rev. Laws 1912, Sec. 4694.

1 Laws Nev., 1907, p. 30, Sec. 7; Rev. Laws, 1912, Sec. 4678.

tion is defective it must be returned for correction, and then take priority as of the date of the original filing.[2] If said application is not corrected and refiled within sixty days no further proceedings shall be had on the same, and it is made the duty of the State engineer to cancel the same.[3]

When any application is filed in compliance with the Act the State engineer shall, within thirty days, at the expense of the applicant, publish the same in some newspaper of general circulation in the county; the said notice to contain the essential facts relating to the proposed appropriation; said publication to continue for a period of at least once a week for four successive weeks. Any one interested may at any time within thirty days after the completion of the publication file with the State engineer a written protest against the granting of said application, stating the reasons therefor, and thereupon the State engineer shall fix a time for the hearing of such application and protest. "Upon such hearing the State engineer may, in his discretion, hear evidence in support of or against such application, and shall take such action thereon as he may deem proper and just; but vested rights to the use of water shall in nowise be lost, prejudiced, or impaired by failure to protest against an application to appropriate under the provisions of this Act."[4]

§ 1908. The appropriation of water—The permit or refusal thereof.—If there is no unappropriated water in the source of supply, or such change of place of diversion or manner of use will in any substantial way invade or impair the rights of other appropriators, the State engineer shall refuse such appropriation and make a record of the same, and return the application so endorsed to the appellant, who shall not prosecute the work under his application so long as such refusal shall be in force, under penalty of being deemed guilty of and punished for a misdemeanor. If there is any unappropriated water in the source of supply named, "and the appropriation is not detrimental to the public welfare, or the

2 Laws Nev., 1907, p. 30, Sec. 24; Rev. Laws 1912, Sec. 4695.

3 Laws Nev., 1907, p. 30, Sec. 25, as amended by Laws 1909, p. 31, Sec. 5; Rev. Laws 1912, Sec. 4696.

4 Laws Nev., 1907, p. 30, Sec. 25, as amended by Laws 1909, p. 31, Sec. 5; Rev. Laws 1912, Sec. 4696.

proposed change will not injure the rights of others, the State engineer shall approve the application, and set a date prior to which the work of diversion must begin, and a date prior to which it must be completed, make a record of the same in his office, and return the application so endorsed to the applicant, who is then authorized to take such measures as may be necessary to perfect his appropriation or change: Provided, however, the State engineer may approve an application for a less amount of water than that named in the application." Any applicant who shall receive a permit shall file with the State engineer, within thirty days after the time required by such permit for the commencement of the work, an affidavit stating the time when, the place where, and the amount of such work which has been done under said permit. "If such affidavit shall not be so filed the State engineer shall, unless good cause for extension of time within which to file such affidavit be shown, cancel said permit."[1]

The fees which may be charged by the State engineer are specified, certified copies of all records appertaining to an application may be furnished the applicant, and the State engineer is directed to use the seal of his office.[2]

Upon approval of an application in whole or in part the applicant, within six months thereafter, shall furnish the State engineer a map showing the location of the works, the source of appropriation, and if for irrigation the land upon which the water is to be applied.[3]

§ 1909. The appropriation of water—Independent suits.—As is the case with the determination of rights,[1] any one feeling himself aggrieved by the decision of the State engineer in refusing his application in whole or in part, or in allowing such application against his protest, may bring an action in any court having jurisdiction against the State engineer to compel him to reverse or modify his decision, and all parties having adverse interests to the party bringing the action shall be joined therein with the State engineer as defendants. Such action must be commenced within sixty days

1 Laws Nev., 1907, p. 30, Sec. 26, as amended by Laws 1909, p. 31, Sec. 6.

2 Laws 1909, p. 31, Secs. 7-9, adding Secs. 26a-26c to the Act of 1907, *supra;* Rev. Laws 1912, Sec. 4697.

3 Laws Nev., 1907, p. 30, Sec. 28; Rev. Laws 1912, Sec. 4702.

1 See Sec. 1912.

after notice in writing of the decision of the State engineer, and shall be begun and prosecuted in all respects like ordinary civil actions in the State, and shall be tried *de novo* by the Court. The right is also given for further appeal from the decision of the Court to any appellate court having jurisdiction.[2]

§ 1910. **The appropriation of water—The certificate.**—Upon satisfactory proof being made to the State engineer that any application to appropriate water has been perfected, the State engineer shall issue to the applicant a certificate setting forth the name of the appropriator, date, source, and proposed amount of appropriation, and if for irrigation a description of the land to be irrigated, which certificate shall, within thirty days after its issuance, be recorded in the county in which the point of diversion is made, as well as in the county where the water is to be used. The priority of such new appropriation shall date from the filing of the application in the State engineer's office.[1]

§ 1911. **The determination of existing rights.**—The determination of existing water rights, in the first instance, is left entirely to the State engineer in decidedly summary proceedings by the following method:

The State engineer is required to prepare for each stream in the State a list of the appropriations of water according to priority, and in order to make such a list he shall enclose to each person having a claim to the waters of any stream the rights to the waters of which he is about to determine, a blank form, on which said claimants shall present in writing all the particulars, showing the amounts and dates of their appropriations; the said statement to include the following: The name and address of the claimant; the nature of the use on which the claim for an appropriation is based; the time of the commencement of such use, and if distributing works are required; the year of beginning of survey; the year of beginning of construction; the year when completed; the year of beginning and completion of enlargements; the dimensions of the ditch as originally constructed and as enlarged; the year when the water was first used for irrigation or other beneficial purposes, and, if for

2 Laws Nev., 1907, p. 30, Sec. 27; Rev. Laws 1912, Sec. 4701.

1 Laws Nev., 1907, p. 30, Sec. 29; Rev. Laws 1912, Sec. 4703.

irrigation, the amount of land reclaimed or irrigated the first year, the amount in subsequent years, with the dates of reclamation, and the amount of land such ditch is capable of irrigating; the character of the soil; and such other facts as will show a compliance with the law in acquiring the appropriation, and the rank of priority claimed. The statement must be sworn to by the claimant. "The failure of any claimant to make such sworn statement within ninety days after notice that such statement is required by the State engineer shall be punishable as a misdemeanor on the complaint of the State engineer or any of his assistants."[1]

It is then made the duty of the State engineer to make a personal examination of such stream and the works diverting therefrom, to include the measurement of flow, unless adequate proof is available from the measurements made by the General Government, also an examination of the irrigated lands and the lands susceptible of irrigation, which observations and measurements shall be reduced to writing and made a matter of record in his office. A plat of the stream showing the location of each ditch and the legal subdivisions of the lands must also be made.[2]

Within thirty days after the preparation of the list of priorities of the appropriation of the use of the waters of any stream it is made the duty of the State engineer to issue to each person, association, or corporation therein a certificate setting forth the name and address of the appropriator, the priority number of such appropriation, the amount of water appropriated, and the amount of prior appropriations, and if such appropriation be for irrigation, a description of the legal subdivisions to which said water is to be applied. And he shall also send such certified list to the county recorder of the county in which such appropriations shall have been made, as well as to the county recorder in which such waters are used, where such lists must be recorded.[3]

§ 1912. Determination of existing rights—Independent suits.—There is no appeal allowed by the statute from the decision or

1 Laws Nev., 1907, p. 30, Secs. 14-16; Rev. Laws 1912, Secs. 4685-4687.

2 Laws Nev., 1907, p. 30, Sec. 17; Rev. Laws 1912, Sec. 4688.

3 Laws Nev. 1907, p. 30, Sec. 18; Rev. Laws 1912, Sec. 4689.

See, also, for the State control of waters, Chap. 68, Secs. 1337-1367.

For the adjudication of water rights by boards, see Chap. 79, Secs. 1567-1584.

determination of the State engineer, to either the State board of irrigation or to the courts, as is allowed in Wyoming,[1] but the determination of the State engineer as to existing rights is by no means final, and the saving clause of this seemingly arbitrary method for the determination of such rights is in the right given to claimants to bring an independent action in the courts for the adjudication of such rights, by the following provision:

"Any party, or number of parties acting jointly, who may feel themselves aggrieved by the determination of the State engineer, may bring an action in any court having jurisdiction against such State engineer and all persons having adverse interests to the party or parties bringing the action, to have their respective rights determined. Such action must be brought within one year after the record of such list of priorities of appropriation has been recorded. Such action shall be tried as speedily as possible, and the court is authorized to employ a hydraulic engineer or other expert to examine and make report under oath upon any subject-matter in controversy, the cost of such employment to be equitably apportioned by the Court and charged to the parties to the suit as costs."[2]

§ 1913. **Ditches, canals, and rights of way for the same.**—It was provided that any person or persons desiring to construct and maintain a ditch or flume within any one or more counties of the State shall make, sign, and acknowledge before some officer entitled to take acknowledgments a certificate specifying: First, the name by which the ditch or flume shall be known; and, second, the names and places which shall constitute the termini of said ditch or flume. Such certificate shall be accompanied with the plat of the ditch or flume, and shall be recorded in the office of the county recorder of the county or counties within or through which the said ditch or flume is proposed to be located; and the records of such certificate or plat shall give constructive notice to all persons of the matters therein contained. The work of constructing such ditch or flume shall be commenced within thirty days of the time of making the certificate above mentioned and shall be continued with all reasonable dispatch until completed.

It is further provided that any such person shall have the right

1 See Sec. 2114.

2 Laws Nev., 1907, p. 30, Sec. 19; Rev. Laws 1912, Sec. 4690.

to enter upon private lands for the purpose of examining or surveying the same, and where such lands can not be obtained by the consent of the owner or owners thereof, so much of the same as may be necessary for the construction of said ditch or flume may be appropriated by the said person or persons, after making compensation therefor, as follows: "Said person or persons shall select one appraiser, and said owner or owners shall select one, and the two so selected shall select a third. In case the owner or owners shall from any cause fail for the period of five days to select an appraiser as hereinbefore provided, then it shall be the duty of the appraiser selected by the person or persons proposing to construct said ditch or flume to select a second appraiser, and the two so selected shall select a third; and in either case the three selected shall, within five days after their selection, meet and appraise the lands sought to be appropriated, after having been first duly sworn by some officer entitled to administer oaths, to make a true appraisement thereof, according to the best of their knowledge and ability. If such person or persons shall tender to such owner or owners the appraised value of such land, they shall be entitled to proceed in the construction of the ditch or flume over the lands so appraised, notwithstanding such tender may be refused: *Provided,* that such tender shall always be kept good by such person or persons; *and, provided further,* that an appeal may be taken by either party from the findings of the appraisers to the district court of the district within which the lands so appraised shall be situated, at any time within ten days after such appraisement."

The person or persons constructing or maintaining such ditch or flume are given the right to the undisturbed use of the same. The Act is made to apply to ditches and flumes already constructed and extensions already made.[1]

It is also provided that any person or persons owning or controlling any ditches diverting the waters of any stream in and onto the lands for purposes of irrigation may construct and maintain

1 Rev. Laws Nev., 1912, Secs. 4710-4713.

See, also, Barnes v. Sabron, 10 Neb. 217, 4 Morr. Min. Rep. 673; Hobart v. Ford, 6 Nev. 77; Thorn v. Sweeney, 12 Nev. 251; Robinson v. Imperial S. M. Co., 5 Nev. 44, 10 Morr. Min. Rep. 370.

In regard to proceedings for condemnation of land and rights of way, see Rev. Laws Nev., 1912, Secs. 5606, *et seq.*

waste ditches and flumes, and the right of way for the same is given through the lands of others.[2]

"Any water stored for irrigation or other beneficial purposes may be turned into the channel of any natural stream or water course, and mingled with its waters, and then be reclaimed, but in reclaiming it, water already appropriated by others shall not be diminished in quantity."[3]

§ 1914. The installation of measuring devices.—It is made the duty of any parties using any of the public waters under the laws of the State to install and maintain at or near the point of diversion a good, substantial headgate and measuring weir, through which said waters shall flow, and constructed according to the uniform plan and specifications prepared and furnished free of charge by the State engineer; and it is made the duty of the State engineer to so prepare and furnish such plans and specifications. If this is not done by the owner, it may be done by the water commissioner, acting under the instructions of the State engineer. And it is further provided that the owner shall be deemed guilty of a misdemeanor for so failing to construct such devices.[1]

§ 1915. Protecting highways from damage.—By the Act of March 19, 1911,[1] all persons conducting water across any highway for any purpose are required to construct and maintain at their own expense good and substantial culverts or bridges over such crossing and shall in no case allow any stream of water, diverted from the natural channel, to flood or wash away any public road or any street or alley in any unincorporated town of the State. For failure to comply with the provisions of the Act, such owner is subject to fine and imprisonment.[2]

§ 1916. Administrative officers—Bureau of industry, agriculture, and irrigation.—By the Act approved March 17, 1911,[1] there was created a bureau of Industry, Agriculture, and Irrigation, to be

2 Rev. Laws Nev., 1912, Sec. 4714.
3 Rev. Laws Nev., 1912, Sec. 4715.
1 Laws Nev., 1909, p. 86, Secs. 1-4; Rev. Laws 1912, Secs. 4707-4709.
1 Laws Nev., 1911, p. 96, Secs. 1, 2.
2 See Rev. Laws 1912, Secs. 3045, 3046.
1 Laws Nev., 1911, p. 75, Secs. 1-29; Rev. Laws 1912, Secs. 4486-4494.

composed of the Governor, surveyor general, attorney general, State engineer, and one other member to be appointed by the Governor, the office of which was thereby created, who shall be entitled the Commissioner of Industry, Agriculture, and Irrigation, and of which board the Governor shall be chairman and the said commissioner the secretary. The duties of said board are prescribed, as far as this work is concerned, as follows: First, to be made a bureau of information for outside inquirers, concerning avenues, openings, and opportunities for industrial, agricultural, irrigation, and reclamation enterprises in the State; third, to initiate an exhaustive study of industrial, agricultural, irrigation, and reclamation problems of the State; fourth, to undertake and conduct reasonable and practical explorations and experiments to determine the feasibility of reclaiming favorable portions of the State by utilizing the subsurface waters; fifth, to have control of the selection, management, and disposal of all lands granted the State under the provisions of the Carey Act. For the purpose of carrying out the provisions of the Act, there was appropriated the sum of $25,000.[2]

§ 1917. Corporations and companies—Water rights.—By the Act of March 23, 1911,[1] a public service commission was created, to be known as and styled "Public Service Commission of Nevada." The terms "public utility," within the meaning of the Act, shall embrace every corporation, company, individual, association of individuals, and lessees, trustees, or receivers appointed by any court, which may now or hereafter operate and control any plant or equipment, or part of a plant or equipment within the State for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, among other things, "water for business, manufacturing, agricultural, or household use, or sewerage service, whether within the limits of municipalities, towns, or villages, or elsewhere."

Upon complaint a hearing is provided for. "If, upon such hearing and due investigation, the rates, tolls, charges, schedules, or joint

2 NOTE.—It seems to the author from the above Act that the State of Nevada has just awakened to its possibilities. One of the best advertisements that the State could have had would have been to have passed the law accepting the provisions of the Carey Act about fifteen years earlier.

1 Laws 1911, p. 322; Rev. Laws Nev., 1912, Secs. 4515-4548.

rates shall be found to be unjust, unreasonable, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this Act, the commission shall have the power to fix and order substituted therefor such rate or rates, tolls, charges, or schedules as shall be just and reasonable."

§ 1918. **The Carey Act in Nevada.**—The Carey Act, granting to the States containing desert lands such lands upon certain conditions, was approved by the President on August 18, 1894.[1]

By the Act of the legislature of March 20, 1895, the State of Nevada merely "accepted the provisions and conditions of Section 4 of the Act of Congress, . . . approved August 18, 1894, together with all grants of lands to the State of Nevada under the provisions of the said Act," but the State made no provisions for the operation of the Act. Through some local prejudices the State took no steps to provide for its operation, until the Act of the legislature of March 23, 1909; and at that time but a meager and unsatisfactory Act was passed.[2] Then, after seventeen years of accumulated wisdom, the legislators, after seeing the benefits which were being derived from the operation of the Act in other States, saw fit to pass an Act, approved March 17, 1911, for the complete enforcement of the Act.[3]

Under the provisions of the Act of 1911, greater things may be expected of the State of Nevada during the next decade.

Under this Act the State formally accepted the terms of the grant and placed the selection, management, and disposal of said land in the State Commission of Industry, Agriculture, and Irrigation,[4] and the surveyor general was designated as State register of lands.

[1] For the Act and discussion thereunder, see Chap. 67, Secs. 1312-1336.

[2] "The Carey Act in this, as in other States, has been the means of creating a sort of irrigation 'wildcatting,' to borrow a coined word from the mining vocabulary, extravagant claims being made by promoters which are calculated to deceive and invariably do work injury, not only to the investing public, but to legitimate irrigation development." Biennial Report of the State Engineer, 1909-1910, p. 30.

NOTE.—Without the protection of an adequate State law, the above statement may be true; but with such protection, from the experience in other States, just the reverse is the result.

[3] Laws Nev., 1911, p. 84; Rev. Laws 1912, Secs. 3064-3092.

[4] For the Act creating this commission, see Sec. 1916.

The method for the selection of the lands is in the usual form, as discussed in a previous section of this work, and also the method of contracting with the companies constructing the works is similar to that in other States. As a safeguard it is provided that all applications shall be referred to the State engineer, who shall submit a written report thereon, and which shall cover such information regarding the water supply, feasibility of the project, status of the water right, and other data necessary. "No application on which the State engineer has reported adversely shall be approved by the commission."

The price fixed by the Act for the disposal of the lands is not less than 50 cents and not more than $1 per acre. Any citizen of the United States, over the age of 21 years, including married women, may make application to enter such land not to exceed 160 acres for any one person. The application must be accompanied by a certified copy of a contract for a perpetual water right, between the applicant and the company authorized by the commission to furnish water for the reclamation of said lands. Within three years after the water right is available for irrigation, the applicant must make his final proof of reclamation, settlement, and occupation in such form as may be prescribed by the commission and the Department of the Interior. The usual lien is given the constructing company upon the lands and water right for the payment thereof by the applicant.

§ 1919. Irrigation district law.—After the California irrigation district law, commonly known as the "Wright Law," was passed in that State, Nevada was one of the first States to enact a similar law. On March 23, 1891, there was approved such an Act.[1] This Act was amended from time to time, and on March 20, 1911, there was approved an entirely new Act governing the subject.[2] This Act contains the usual provisions for the organization of irrigation districts, defining its boundaries, the issuance and sale of bonds, the powers and duties of the board of directors, the levy and collection of assessments, the changing the boundaries of any district, and the other usual provisions that are to be found in other Acts upon this particular branch of the subject, and discussed at length in another

1 See Laws Nev., 1891, p. 106.

2 Laws Nev., 1911, p. 248, Secs. 1-71; Rev. Laws 1912, Secs. 4723-4791.

chapter of this work.[3] All surveys, examinations, maps, plans, and estimates shall be made under the direction of a competent engineer and certified by him. The board must then submit a copy of the same to the State engineer, and within 90 days thereafter, "the State engineer shall file a report upon the same with said board, which report shall contain such matters as, in the judgment of the State engineer, may be desirable."[4] An election may then be called and bonds voted upon. At least as often as once a year after the approval of the plans, the board of directors shall make a report to the State engineer of the progress of the work of construction and reclaiming, and whether or not the plan of irrigation is being successfully carried out, and whether or not the funds available will complete the proposed construction. Upon the receipt of such reports, the engineer shall make such suggestions and recommendations to the board of directors as may be necessary to conserve the best interests of the district. Once a year the board must publish a full, true, and correct statement of the financial standing of the district.[5]

The board of directors of the districts are given the power to acquire, "either by purchase, condemnation, or other legal means, all lands, rights, and other property necessary for the construction, use, and supply, maintenance, repair, and improvement of said canal or canals or works, including canals and works constructed and being constructed by private owners, lands for reservoirs for storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district, hereinafter provided for, may be used to their par value in payment. Said board may appropriate waters in accordance with the law and also construct the necessary dams, reservoirs, and works for the collection of water for said district; and do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner in said district for irrigation purposes. The use of all water required for the irrigation of lands of any district formed under the provisions of this Act, together with rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this Act, is hereby declared to be a public use and

[3] For irrigation districts, see Chap. 70, Secs. 1386-1432.

[4] Laws Nev., 1911, p. 248, Sec. 23.

[5] Laws Nev., 1911, p. 248, Secs. 20, 21; Rev. Laws 1912, Secs. 4742, 4743,

subject to the regulation and control of the State in the manner prescribed by law."

It will be noticed that, by the above provision, the right is given a district to condemn, among other property, existing water rights. This is a change from the original Act, wherein this right was denied.[6]

"None of the provisions of this Act shall be construed as repealing or in anywise modifying the provisions of any other Act relating to the subject of irrigation or water distribution. Nothing herein contained shall be deemed to authorize any person or persons to divert the water of any river, creek, stream, canal, or ditch from its channel to the detriment of any person or persons having any interest in such river, creek, stream, canal, or ditch, or the waters therein, unless previous compensation be ascertained and paid therefor, under the laws of this State authorizing the taking of private property or rights for public uses.

"All irrigation districts heretofore organized under the laws of this State shall hereafter be governed in all respects by the provisions of this Act."[7]

§ 1920. Provisions in aid of the National Reclamation Act.—Right of way was granted over all State lands to the United States for works constructed under the National Reclamation Act.[1] Also provisions for the incorporation of water users' associations as required by the Government.[2]

It was also made the duty of the State engineer, by the Act of February 26, 1907,[3] to co-operate with the Secretary of the Interior in all work of construction, operation, maintenance, and management of irrigation works constructed under the Reclamation Act.

§ 1921. Prohibiting the pollution of waters.—By the Act approved March 10, 1911,[1] it was provided that any person or company, or any duly elected, appointed, or lawfully created State officer of the State, or of any county, city, town, or municipal gov-

6 See Laws 1891, p. 106, Sec. 12.

7 Rev. Laws Nev., 1912, Secs. 4790, 4791.

1 Laws Nev., 1905, p. 93; Rev. Laws 1912, Sec. 3108.

2 Laws Nev., 1905, p. 93; Rev. Laws 1912, Sec. 3109.

3 Laws Nev., 1907, p. 30, Sec. 10; Rev. Laws 1912, Sec. 4681.

1 Laws Nev., 1911, Chap. 56, Sec. 1.

ernment, who shall deposit in any of the waters of the lakes, rivers, streams, and ditches in the State any sawdust, rubbish, filth, or poisonous, or deleterious substances, liable to affect the health of persons, fish, or live stock, or place or deposit any such substances in any place where the same may be washed or infiltrated into any of the waters named, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than $50 or more than $500: Provided, that in case of public institutions and municipalities, when, owing to the magnitude of the work, immediate correction of the evil is impracticable, then in such cases the authorities shall adopt all new work, and as rapidly as possible reconstruct old systems of drainage sewerage so as to conform with the provisions of the Act; and, provided further, that all such new reconstructed systems shall be completed before March 20, 1917: Provided, that nothing in this Act shall be so construed as to permit mining or milling companies to dump tailings directly into any stream of this State so as to prevent or impede the natural flow of such stream. Nothing in this Act shall be so construed as to apply to any quartz mill or ore reduction works in this State.[2]

§ 1922. **Criminal statutes.**—Any person interfering with, obstructing or resisting the State engineer, assistant engineer, or any water commissioner, in the performance of his duties, as prescribed by the Act, or by any rules or regulations adopted by the board of irrigation, shall be deemed guilty of a misdemeanor, and upon conviction thereof be punishable by a fine not exceeding $500, or by imprisonment in the county jail not more than three months, or by both, in the discretion of the court.[1]

It is also made a misdemeanor for any claimant to fail to make out a statement of his claim, within 90 days after the same is required by the State engineer.[2]

Any person, association, or corporation interfering with or injuring or destroying any works for the diversion, storage, apportionment, measurement, conveyance, or delivery of water, without authority from the owner of the same, or under the authority of the

2 Laws Nev., 1911, Chap. 56, Sec. 1; Rev. Laws 1912, Sec. 6547. See, also, Secs. 2047, 4716, 4718.

1 Laws Nev., 1907, p. 30, Secs. 30, 31; Rev. Laws, 1912, Secs. 4704, 4705.

2 Laws Nev., 1907, p. 30, Sec. 16; Rev. Laws, 1912, Sec. 4687.

State engineer, shall be guilty of a misdemeanor and subject to a fine of not exceeding $100.[3]

The failure to establish measuring devices is a misdemeanor punishable by a fine not exceeding $100, or by imprisonment in the county jail not exceeding 60 days or both.[4]

It is made unlawful to waste water by diverting the same from any natural source and allowing it to run to waste on sagebrush or greasewood land. "Such diversion shall be deemed an unlawful use and waste of the water."[5] The penalty for so wasting the water is fixed at a fine not exceeding $500 or by imprisonment in the county jail for not exceeding six months and by both such fine and imprisonment.

§ 1923. **Riparian rights in State.**—By court decisions the common law of riparian rights is entirely abrogated in the State of Nevada,[1] and the Arid Region Doctrine of appropriation adopted in lieu thereof. The term "Common Law of England" was employed in the statute adopting it, in the sense it is generally understood in this country, that only so much was adopted as was applicable to the condition of the State and the needs of the people therein, and it was further held that the common law doctrine of riparian rights was unsuited to the condition of the State. As was said by the Court in the case of Bliss v. Grayson:[2] "The conditions of this State, the demands and necessities of agriculture, mining, and

[3] Laws Nev., 1909, p. 48, Sec. 1.

[4] Laws Nev., 1909, p. 86, Sec. 3; Rev. Laws, 1912, Sec. 4709.

[5] See Comstock M. & M. Co. v. Allen, 21 Nev. 325, 31 Pac. Rep. 434.

[1] Jones v. Adams, 19 Nev. 78, 6 Pac. Rep. 442, 3 Am. St. Rep. 788; Reno etc. Co. v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Anderson v. Bassman, 140 Fed. Rep. 14; Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231; Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

In Nevada the doctrine of riparian ownership as a foundation for rights to water has been abandoned. Anderson Land & Stock Co. v. McConnel, 133 Fed. Rep. 581.

But see the early cases of Vansickle v. Haines, 7 Nev. 249, 15 Morr. Min. Rep. 201; Union etc. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; Union etc. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370, 8 Morr. Min. Rep. 113.

[2] 24 Nev. 422, 56 Pac. Rep. 231.

milling, and the prosperity of its people, have entirely swept away this doctrine of riparian rights as unsuited; and this Court by a line of decisions based upon the requirements of the State, its industries, and necessities, has adopted a rule suited to these conditions and necessities."

CHAPTER 94.

NEW MEXICO.

§ 1924. Particular features of the State.
§ 1925. Irrigation in the State.
§ 1926. Criticism of the New Mexico laws.
§ 1927. Constitutional provisions.
§ 1928. Title to water—Right of appropriation—Abandonment.
§ 1929. The appropriation of water.
§ 1930. Administrative officers.
§ 1931. Ditches, canals, and other works—Rights of way.
§ 1932. The standard of measurement—Distribution of water.
§ 1933. The adjudication of existing rights.
§ 1934. Reservoir rights.
§ 1935. Artesian wells and their regulation.
§ 1936. Provisions in aid of the National Reclamation Act.
§ 1937. Corporations and companies—Water users' associations.
§ 1938. Irrigation district law.
§ 1939. The Carey Act in New Mexico.
§ 1940. Criminal statutes.
§ 1941. Riparian rights in New Mexico.

§ 1924. Particular features of the State.—The State of New Mexico can be divided into three great geological divisions. In the eastern portion are the broad plains which are a continuation of Llano Estacado, or Staked Plains of Texas. These plains, extending nearly one-third across the State, gradually rise to form the plateau, which is the base of the Rocky Mountains. On the western side of the mountain ranges is the long narrow valley of the Rio Grande, which traverses the State from north to south, being confined for a great portion of its way by lofty mountain ranges. In the central and southern parts of the State are elevated table lands, arid in the extreme, which are useless even for grazing in their natural condition, although the soil can be rendered extremely productive by the application of water. Taking the State as a whole, the water supply is comparatively well distributed, nearly all of the counties having their small rivers, and some of them large ones. In the eastern portion of the State are the headwaters of the Canadian and Pecos Rivers. The Rio Grande River, rising in Southern Colorado, enters the State from the north through deep canyons. These widen in

places allowing room for bottom lands, and again the walls die down to low mesas. In the southern part of the State, where the principal cities and agricultural communities are found, the proportion of low land increases. Here the river tends to spread out over the bottom lands, losing the greater part of its water by evaporation or seepage through the sandy soil, and in the lower part, above El Paso, the channel in summer is frequently dry. There are many artesian basins scattered throughout the State from which water can be secured.[1]

§ 1925. **Irrigation in the State.**—The Rio Grande Valley has from the earliest times been the home of agriculture and irrigation. The original pre-historic inhabitants, the modern Indians, and subsequently the Spanish invaders, all took water from the river and its tributaries, not only in very much the same manner as now prevails, but even to some extent in the same ditches. Every town or group of farmers has its own ditch. Owing to lack of system, there has heretofore been a great loss of water, which might often have been avoided by the construction of a single well-built canal, in lieu of many poorly constructed ditches.

Many of the farmers in the State are of mixed Spanish and Indian descent, and have followed traditional customs, and show little energy or skill. The small ditches are constructed by communities and are called community ditches. Under the community system each ditch is held and controlled by the owners of the land it irrigates, these living usually together in a village or pueblo. In the fall of each year a *majordomo* is elected, who has full control of the ditch for the following season. He assesses the land for the labor necessary to clean the ditch and keep it in repair during the irrigation season, apportions the water to each consumer, and, in general, supervises all matters pertaining to irrigation. The ditches have

[1] See Preliminary Report on the Geology and Underground Waters of the Roswell Artesian Area, New Mexico, by Cassius A. Fisher, 1906, Water-Supply and Irrigation Paper No. 158; Surface Water Supply of the Western Gulf of Mexico and Rio Grande Drainages, by T. U. Taylor and W. A. Lamb, district hydrographers, 1907, Water-Supply and Irrigation Paper No. 210, U. S. Geological Survey; Geology and Water Resources of the Stancia Valley, New Mexico, with Notes on Ground-Water Conditions in Adjacent Parts of Central New Mexico, by Oscar E. Meinzer, 1911, Water-Supply Paper No. 275, U. S. Geological Survey.

no regulating gates or sluices and flooding is the only method of irrigation; consequently the use of the water is extremely wasteful.

As is the case of Arizona it may also be said that in New Mexico nearly all the water that can be taken out upon the arable land by the efforts of individuals or by farmers acting in partnership has now been appropriated, and further agricultural growth can only be developed by the conservation of the flood waters which require the construction of large and expensive works.

New Mexico was late in adopting the provisions of the Carey Act, and also the irrigation district law, which have been operated so successfully in other States.

The National Reclamation Service has constructed several projects within the State, notably the Carlsbad project, the Hondo project, and the New Mexico, Texas, Rio Grande project.[1]

According to the Census Report for 1910, the total number of farms irrigated in 1909, was 11,399, as against 7,884 in 1899, an increase of 3,515, or 44.5 per cent.

The total acreage irrigated in 1909 was 461,718 acres, as against 203,893 acres in 1899, an increase of 257,825, or 126.5 per cent.

The total acreage which all enterprises were capable of supplying with water in 1909 was 644,970 acres. The acreage included in enterprises completed or under construction in 1910, was 1,102,251 acres.

The acreage actually irrigated in 1909, classified by type of enterprise, was as follows: Under United States Reclamation Service 13,398 acres, under United States Indian Service 24,007 acres, under co-operative enterprises 264,411 acres, under commercial enterprises 15,690 acres, and under individual and partnership enterprises 144,212 acres.

[1] See Irrigation in New Mexico, by W. M. Reed, special agent, Report of Irrigation Investigations, 1909, Separate No. 1, Reprint from U. S. Dept. of Agriculture, Office of Experiment Stations, Bulletin No. 119; Irrigation Investigations in New Mexico, Experiment Station, Mesilla Park, by J. J. Vernon, professor of agriculture, New Mexico Agricultural College, 1905, Separate No. 5, Annual Report of Irrigation and Drainage Investigations, 1904, Reprint from Office Experiment Stations, Bulletin No. 158; The Use of Water in Irrigation in the Pecos Valley, Reprint from U. S. Dept. of Agriculture, Office of Experiment Stations, Bulletin No. 86.

See, also, the most excellent report of the territorial engineer for 1908-1910, by Vernon L. Sullivan, territorial engineer.

§ 1926. **Criticism of the New Mexico laws.**—Originally many of the laws governing the subject of waters in New Mexico were based upon the Spanish and Mexican laws upon the subject.[1] But by the adoption of the Water Code, in 1907, many of these laws, especially as to future operations, were abrogated. The Water Code referred to is based largely upon State control of the waters within the boundaries of the State. This code became a part of the State laws when New Mexico was admitted to the Union. The code is modern and up to date and embodies many of the best features of water codes of the other States. Future appropriations of water must be made by application to the State engineer, and the adjudication of existing rights, in the first instance, was properly left to the courts.

The Act upon the subject of artesian wells and their regulation is, in a way, unique, but it seems to govern the subject completely and seems to give complete satisfaction.[2] New Mexico is one of the States which is given the benefits of the Carey Act. The usual provisions for its acceptance and operation have been made.[3] A number of provisions have also been enacted in aid of the National Reclamation Act.[4] The irrigation district law was not enacted until 1909, and the results of its operations have not yet been fully ascertained.[5]

§ 1927. **Constitutional provisions.**—New Mexico has recently become a State; its constitutional convention has been held and adopted by the people, and the following provisions relative to waters adopted in the constitution:

Article XVI provides:

"Section 1. All existing rights to the use of any waters in the State for any useful or beneficial purposes are hereby recognized and confirmed.

"Sec. 2. The unappropriated waters of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation

1 For a discussion of the Spanish and Mexican laws, see Secs. 570-584.

2 For artesian wells, see Secs. 1166-1184.

3 See Sec. 1939.

4 See Sec. 1936.

5 Laws, 1909, Chap. 109, p. 295; see, also, Laws, 1909, Chap. 140, p. 383.

See, also, Sec. 1938.

for beneficial use. In accordance with the law of the State, priority of appropriation shall give the better right.

"Sec. 3. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.

"Sec. 4. The legislature is authorized to provide by law for the organization and operation of drainage districts and systems."

Article XXI, Section 7, provides:

"Sec. 7. There are hereby reserved to the United States, with full acquiescence of the people of this State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress, entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June 17, 1902, and Acts amendatory thereof or supplementary thereto, to the same extent as if this State had remained a Territory."

Article II, Sections 18 and 20, also provide:

"Sec. 18. No person shall be deprived of life, liberty, or property without due process of law; nor shall any person be denied the equal protection of the laws.

"Sec. 20. Private property shall not be taken or damaged for public use without just compensation."

Article XXII, Section 4, provides:

"Sec. 4. All laws of the Territory of New Mexico in force at the time of its admission into the Union as a State, not inconsistent with this constitution, shall be and remain in force as the laws of the State until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts, liabilities, and obligations shall continue and remain unaffected by the change in the form of government."

Section 5 of the Organic Act of the Territory of New Mexico also grants to the Territorial legislature the power to enact incorporation laws, providing for the incorporation of companies to construct and operate irrigation works.[1]

By Section 10 of the Enabling Act, there was reserved to the United States, and exempted from operation from any and all grants made or confirmed by the Act to the proposed State, all land

1 Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

actually or prospectively valuable for the development of water power and hydro-electric use or transmission, which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State.[2]

§ 1928. Title to water — Right of appropriation — Abandonment.—By the Water Code Act, approved March 19, 1907,[1] upon the subject of waters within the State, and of the right of appropriation, it is declared:

"All natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the State of New Mexico, belong to the public and are subject to appropriation for beneficial use.[2]

"Beneficial use shall be the basis, the measure, and the limit of the right to the use of water,[3] and all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir, or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm, or corporation having the right to use the water, so long as water can be beneficially used thereon, or until the severance of such right from the land, in the manner hereinafter provided. Priority in time shall give the better right.[4] In all cases of claims to the use of water initiated prior to the passage of this Act, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys, and construction for the application of the water to a beneficial use. All claims to the use of water

2 This was also the case with Arizona. See Sec. 1713.

1 Laws New Mexico, 1907, p. 73.

2 It will be noticed that in all quotations from the Act we have changed the words "Territory" and "Territorial" to that of "State."

See Jaquez Ditch Co. v. Garcia, — N. M. ——, 124 Pac. Rep. 891, where it was held that where surface water in a hilly region seeks an outlet through a gorge or ravine during the rainy season, and by its flow assumes a definite and natural channel, and such has always been the case, as the memory of man runs, such accustomed channel through which the water flows possesses the attributes of a natural water course, the water of which may be appropriated.

3 Millheiser v. Long, 10 N. M. 99, 61 Pac. Rep. 111; Hagerman v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

4 Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567, 1 Water & Min. Cas. Ann. 351.

initiated after the passage of this Act shall relate back to the date of the receipt of an application therefor in the office of the State engineer, subject to the compliance with the provisions of this Act and the rules and regulations established thereunder."[5]

When the party entitled to the use of water fails to beneficially use all or any part claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, except water for storage reservoirs, for a period of four years, such unused water shall revert to the public and be regarded as unappropriated public water.[6]

§ 1929. **The appropriation of water.**—Upon the subject of the appropriation of water within the State, the Wyoming law is largely followed. Any person, association, or corporation intending to acquire a right to the beneficial use of water, shall, before commencing construction for such purposes, make an application to the State engineer for a permit to appropriate, in the form required by the regulations established by him.[1]

Complete maps, field notes, plans, and specifications must be furnished by the applicant, and, if not sufficient in the first instance, must be corrected. A notice of the proposed appropriation must be published, giving all the essential facts of the same. If the applicant complies with the law and the regulations and the project is feasible, the State engineer may endorse his approval on the application, which shall thereupon become a permit to appropriate water, and shall state in such approval the time within which the works must be completed, not exceeding five years from the date of approval, and the time within which the water shall be applied for a beneficial purpose, not exceeding four years in addition thereto: Provided, that the engineer may, in his discretion, approve any application for a less amount of water, or may vary the periods of

[5] Laws N. M., 1907, p. 73, Secs. 1, 2.

[6] Laws, 1907, p. 86, Sec. 42; Hagerman v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

[1] Laws, 1907, p. 80, Sec. 24.

For appropriation under the laws of Wyoming, see Secs. 2106-2109.

By the Act approved March 17, 1909, it was provided that the water code of 1907 "shall not be construed to apply to stockmen or stock owners who may build or construct water tanks or wells for watering stock." See Laws, 1909, p. 149.

annual use. "If, in the opinion of the State engineer, there is no unappropriated water available, he shall reject such application."[2]

The construction of the work must be diligently prosecuted, and if one-fifth of the work shall not be completed within one-half the time allowed, as determined by the State engineer, he may accept and approve an application for the use of all or any of the waters included in the permit issued to the prior applicant, and the right to use such waters shall thereupon be forfeited: Provided, that the State engineer shall allow an extension of time on request of the prior applicant equal to the time during which work was prevented by the operation of law or other causes, beyond the power of the applicant to control.

And by the Act approved March 18, 1909,[3] any person or company claiming rights or priorities, and whose work in perfecting such rights was in progress, prior to the adoption of the Water Code of March 18, 1907, and who had expended more than $40,000 in necessary surveys and construction, shall have a reasonable time as determined by the State engineer within which to complete such works.

On the date set for the completion of the work, or prior thereto, upon notice from the owner, the State engineer shall cause the work to be inspected. If not properly and safely constructed the engineer may require the necessary changes to be made. Failure to make such changes shall cause the postponement of the priority under the permit for such time as may elapse from the date for completing such changes until made to the satisfaction of the State engineer, and applications subsequent in time shall have the benefit of such postponement. When the works are found satisfactory, after inspection, the State engineer shall issue his certificate of construction, setting forth the actual capacity of the works and such limitations on the water right as shall be warranted by the condition of the works, but in no manner extending the rights described in the permit.[4]

On or before the date set for the application of the water to a beneficial use the State engineer shall again cause the works to be inspected, and upon the completion of which he shall issue a license to appropriate water to the extent and under the condition of the

[2] Laws, 1907, p. 80, Secs. 24-28.
[3] Laws, 1909, p. 373.
[4] Laws, 1907, p. 83, Secs. 30-33.

actual application thereof to a beneficial use, but in no manner extending the rights described in the permit. Any permit or license may be assigned, but in order to be binding such assignment must be filed with the State engineer. Any question involving the validity of rights so acquired may be taken in the court.[5]

In case of seepage water from any constructed works, the owner of such works shall have the first right to the use thereof upon filing an application to the State engineer, but if such application is not filed within one year after the completion of such works, any party desiring to use the same may make application.[6]

§ 1930. **Administrative officers.**—Under the Water Code of New Mexico of 1907, the following administrative officers and their powers and duties were provided for:

Board of Water Commissioners.—A board of water commissioners is created, consisting of three members, to be appointed by the Governor, by and with the advice and consent of the legislative senate, from different sections of the State, and to hold office for a term of four years: "It shall be the duty of said board to hear and determine appeals from the actions and decisions of the State engineer in all matters affecting the rights, priorities, and interests of water users and owners of, or parties desiring to construct canals, reservoirs, or other works for the conveyance, storage, or appropriation of waters in this State."[1] The said board may adopt and use a seal and make rules for the hearing and the determination of appeals not inconsistent with the law. Any member of said board or the clerk thereof is empowered to take testimony and to administer oaths; and the board is also given the power to summon witnesses. Each member of the board shall receive $5 per day while in attendance at meetings thereof; provided, that no member shall receive pay for more than sixty days' service in any one year. The board shall also appoint a clerk.[2]

5 Laws, 1907, p. 84, Secs. 34-38.

6 Laws, 1907, p. 89, Sec. 53.

For appropriation of water under the old laws of New Mexico, see De Baca v. Pueblo of Santo Domingo, 10 N. M. 38, 60 Pac. Rep. 73; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 9 N. M. 303, 51 Pac. Rep. 674; Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312.

1 Laws, 1907, p. 92, Sec. 63.

2 Laws, 1907, p. 93, Secs. 67-69.

Appeals may be had from all decisions of the board to the District Court of the proper district. If no such appeal is taken, the decision of the board upon any question is final.[3]

State Engineer.—A State engineer is provided for, who shall be a technically qualified and experienced hydraulic engineer, to be appointed by the Governor and confirmed by the legislative council. He shall hold office for four years and draw a salary of $2000 per annum. "He shall have the general supervision of the waters of the State, and of the measurement, appropriation, and distribution thereof." His office shall be at the seat of government. He may employ assistants. He must give a bond in the sum of $10,000. He shall prepare and deliver to the Governor a biennial report. A schedule of fees to be charged by his office is provided. All records in his office are public. He shall, subject to the approval of the board of water commissioners, make all necessary rules and regulations to carry into effect the duties devolved upon his office. "He shall have the supervision of the apportionment of water in this State according to the licenses issued by him and his predecessors, and the adjudication of the courts." He shall from time to time, as may be necessary for the economical and satisfactory apportionment of water, divide the State into water districts.[4] An appeal is allowed from all decisions of the State engineer to the board of water commissioners.

It is also made his duty, whenever requested by any boards of commissioners of any counties, to co-operate with said commissioners in the engineering work required to establish and construct any drain.[5]

Water Masters.—Over the water districts, as designated by the State engineer, upon written application of a majority of the water users therein, the State engineer must appoint a water master. The water master has the immediate charge of the apportionment of the waters of his district under the general supervision of the State engineer, "and he shall also appropriate, regulate, and control the waters of the district as will prevent waste." He is allowed $4 per day for the actual time spent in the performance of his duties, and

[3] For procedure on appeal from decision of board, see Laws, 1907, p. 92, Secs. 63-66.

[4] Laws, 1907, p. 74, Secs. 4-13.

[5] Laws, 1907, p. 78, Sec. 18; as amended, Laws, 1909, p. 372.

For jurisdiction of State engineer, see Young v. Hinderlider, 15 N. M. 666, 110 Pac. Rep. 1045, 1 Water & Min. Cas. Ann. 338; Vanderwork v. Hewes, 15 N. M. 439, 110 Pac. Rep. 567, 1 Water & Min. Cas. Ann. 351.

each water master shall report to the State engineer. An appeal is allowed from all decisions of a water master to the State engineer.[6]

§ 1931. Ditches, canals, and other works—Rights of way.—If the State engineer shall in the course of his duties find that any works used for the storage, diversion, or carriage of water are unsafe and a menace to life or property, he shall at once notify the owner or agent, specifying the changes necessary and allowing a reasonable time for putting the works in a safe condition. An inspection of any works may be requested by other parties. The use of such works contrary to the instructions of the engineer is made a misdemeanor.[1] Bridges must be constructed on highways.[2] So, also, headgates and measuring devices at the expense of the owner, under the direction of the State engineer.[3]

The right of condemnation is granted to acquire rights of way over private lands for all such works, including reservoirs for the storage of water.[4] Such land to be acquired in the manner provided by law for the condemnation and taking of private property for public uses.

The right to the use of natural streams is granted for the purpose of conducting water, and the right to recapture the water, less proper deduction for evaporation and seepage, to be determined by the State engineer.[5]

The right to enlarge and use the canals and other works of others is permitted.[6]

Rights of way are also granted over all State lands upon application to the State engineer.[7]

§ 1932. The standard of measurement—Distribution of water.—"The standard of measurement of the flow of water shall be the cubic foot per second of time; the standard of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet. The miner's inch shall be regarded as one-fiftieth of a cubic foot

[6] Laws, 1907, p. 77, Secs. 13-17.
[1] Laws, 1907, p. 83, Secs. 32, 33.
[2] Laws, 1907, p. 88, Sec. 49.
[3] Laws, 1907, p. 87, Sec. 46.
[4] Laws, 1907, p. 74, Sec. 3.
[5] Laws, 1907, p. 91, Sec. 60.
[6] Laws, 1907, p. 91, Sec. 61.
[7] Laws, 1907, p. 94, Sec. 70.

For ditches and canals on public lands, see United States v. Lee, 15 N. M. 382, 110 Pac. Rep. 601, 1 Water & Min. Cas. Ann. 479.

per second in all cases except when some other equivalent of the cubic foot per second has been specifically stated by contract, or has been established by actual measurement or use." [1]

"In the issuance of permits to appropriate water for irrigation or in the adjudication of rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of one cubic foot of water per second for each seventy acres, or the equivalent thereof, delivered on the land." [2]

The distribution of the water in the State comes under the direction of the State engineer, and under him the water masters. In all cases where local or community customs, rules, and regulations have been adopted and are in force by a majority of the water users under any irrigation system, and have for their object the economical use of water and are not detrimental to public welfare, such rules and regulations shall govern, subject to the authority of the State engineer.[3]

The owner or owners of any works for the storage, diversion, or carriage of water which contain water in excess of their needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus at uniform rates to parties entitled to use the same under like conditions and circumstances.[4]

All water for irrigation shall be considered appurtenant to the land upon which it is used, and the right to the use of the same upon said land shall never be severed from the land without the consent of the owner thereof; but by and with his consent it may be transferred for other purposes without losing priority upon the approval of an application of the owner to the State engineer.[5]

§ 1933. The adjudication of existing rights.—The adjudication of existing water rights under any stream system in the State of New Mexico starts out with the hydrographic surveys and stream measurements by the State engineer. Upon the completion of such surveys the Attorney-General of the State must enter suit on behalf of the State for the determination of all existing rights under such system, in order that the amount of unappropriated water subject to disposition may become known. If the suit has been begun by

1 Laws, 1907, p. 86, Sec. 41.
2 Laws, 1907, p. 85, Sec. 43.
3 Laws, 1907, p. 90, Sec. 57.
4 Laws, 1907, p. 85, Sec. 39.
5 Laws, 1907, p. 86, Secs. 44, 45.

private parties the Attorney-General shall intervene on behalf of the State, in which case he is not required to bring an action. The entire adjudication of water rights is left to the Court, which is given exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved. The Court may submit any question of fact arising therein to a jury or to one or more referees, at its discretion. Upon the final adjudication of the rights a certified copy of the decree shall be prepared and filed in the office of the State engineer at the cost of the parties. Such decree shall in every case declare as to the water right adjudged to each party, the priority, amount, purpose, periods, and place of use, and as to water used for irrigation, except as otherwise provided in the Act, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.[1]

All rights vested prior to the enactment of the Water Code are protected; however, they are subject to regulation, adjudication, and forfeiture for abandonment, as provided by the code.[2]

All decrees granting, defining, or limiting water rights must be recorded in the office of the probate clerk and *ex officio* recorder of the proper county.

§ 1934. **Reservoir rights.**—By the Act approved March 18, 1909,[1] the right to construct reservoirs was granted, subject, however, to the provisions of the Water Code of 1907. In cases of applications for permits to impound and utilize waters of any stream or flood waters under conditions which would cause or permit a considerable return flow of such waters into their natural channels above the diversion or storage works of other appropriators or of others using or who have acquired rights to the use of water from said stream or stream system, the State engineer is authorized to approve such applications whenever such storage or use would not result in depriving such lower users or appropriators of water to the extent of their reasonable requirements. By this means vested rights must not be impaired. The owners of works proposing to store water may make the usual application to the State engineer, "and shall be held as trustees of such right for the parties applying

1 Laws, 1907, p. 79, Secs. 19-23.
2 Laws, 1907, p. 90, Sec. 59.

1 Laws, 1909, p. 371.

the water to a beneficial use, and shall be required to sell water rights for a reasonable price and to furnish the water for such parties at reasonable rates for storage, or carriage, or both, as the case may be."[2]

§ 1935. **Artesian wells and their regulation.**—By the Act approved March 17, 1909,[1] outside of those of South Dakota and Kansas, New Mexico enacted probably the most elaborate law upon the subject of artesian wells and their regulation, and of the waters therefrom of any of the States.[2]

For the purpose of the Act an artesian well is defined to be "an artificial well which is sunk to the artesian stratum or basin, and from which water is raised to or above the surface by natural pressure, or from which water is raised to or above the surface of the earth by artificial means."

The operation under the Act is by counties, and to provide for the carrying out of the terms of its provisions the board of county commissioners of each county is required to issue a call to the owners of artesian wells for a convention for the purpose of electing three members of the "county artesian well board," each well within the county being entitled to one vote in all proceedings in such convention. And the county artesian well board at its first meeting shall appoint a county artesian well supervisor, who shall continue in office at the pleasure of such commissioners. Such supervisor shall be qualified by education and experience in artesian well matters. The compensation of the members of such board shall not exceed $5 per day; that of the supervisor to be fixed by the board, but not to exceed $2000 per annum.

It is made the duty of each artesian well supervisor to inspect such artesian wells in such counties at least once in three months, and to inspect each well put down to the artesian basin, but outside the district of flowing wells, at least once in six months, and to keep a record of such inspection in his office, which records shall be at all times open to the inspection of any person. It is made his further duty to see that all provisions of the Act are carried out,

2 Laws, 1907, p. 80, Sec. 24.

1 Laws, 1909, p. 177.

2 For artesian wells, see Secs. 1166-1184.

For the artesian law of South Dakota, see Sec. 2035.

For artesian law of Kansas, see Sec. 1859.

and to make complaint against any violation of the same. He must give a bond in the sum of $5000 for the faithful performance of the carrying out of the duties of his office. It is also made the duty of the supervisor to inspect all reservoirs which receive their supply from artesian wells, and to order the repair of the same if defective. Wells and reservoirs may also be repaired by the supervisor whenever necessary to stop waste, plugging the well if necessary. All expenses for the same to become a lien upon the land, which lien may be foreclosed the same as mortgages.

It is made the duty of the county artesian well board to act as a board of arbitration and to decide all disputes that may arise between the supervisor and the owner or occupant of the land, or the person drilling or repairing a well with whom such dispute has arisen. Such dispute coming to the board by way of an appeal from the supervisor, "unanimous decision of the county artesian well board upon matters before said board on appeal shall be deemed final, and if the parties to the dispute shall each state his contentions in writing, and shall in writing agree to submit such disputed questions to the county artesian well board, the unanimous decision of such board upon such question shall be final, and have the force and effect of a judgment of Court upon the parties thereto."

For the purpose of creating a fund for the payment of the salary of the supervisors and their expenses, a license tax is imposed of $5 per annum on each well, to be collected by the county treasurer of the county in the same manner as county taxes. And it is made the duty of the supervisor to report to the treasurer monthly as wells are completed.

All persons, prior to the commencement of the construction or repair of any artesian wells, or any other wells entering the artesian basin, must make a written application to the well supervisor in the county. And no permit shall be issued by such supervisor unless the work proposed and the materials proposed to be used shall conform in all respects to the provisions of the Act. "All wells of every description and for every purpose that shall be put down to the artesian basin shall be cased with standard pipe or drive pipe of the following weights and dimensions: Six-inch pipe to be of not less than 18 pounds to the foot; eight-inch pipe to be of not less than 28 pounds to the foot; ten-inch pipe, when used for main casing, to be not less than 40 pounds to the foot." All wells must be

constructed so as to confine and so as to conduct to the surface any and all flows encountered. Contractors engaged in the drilling of artesian wells must give a bond conditioned for the faithful construction of each well, and when such well is completed it shall conform to and comply with the provisions of the Act. A complete record of each well must also be kept by such contractor.

Upon the subject of the appropriation of water from such wells it is provided that all persons or corporations now owning, controlling, or using such artesian wells shall file a sworn statement in the office of the probate clerk in the county setting forth the date when such well is commenced, the date when completed, and the amount of water flowing therefrom. The maximum amount of water that may be used on each acre of land under cultivation must not exceed three acre-feet during the year, to be measured and allotted by the supervisor. "It is further provided that water shall not be used from an artesian well for irrigating purposes, either day or night, unless the person using the water or some one for him shall personally and at all times attend to the application of the same to the land." It is also made unlawful for any owner or person using water from artesian wells to conduct the water from such well to a distance greater than one and one-half miles from such well when such water is conducted through any earth ditch, or two and one-half miles when such water is conducted through any concrete ditch. All owners of a well must provide suitable appliances to enable the well supervisor to readily take the pressure reading of such well.

The wasting of water of artesian wells is declared to be a public nuisance, and the person who suffers the same is deemed guilty of a misdemeanor. The watering of stock must be conducted without wasting the water. Any person violating any of the provisions of the Act shall, upon conviction, be fined upon each offense not less than $5 nor more than $100, and costs of prosecution. Each day in which any of the provisions of the Act shall be violated shall be considered a separate offense. It is made the duty of the county commissioners, road supervisors, city engineers, city and town officers, upon complaint of any citizen within their respective counties, cities, or towns, to institute criminal action for the violation of the Act.

§ 1936. Provisions in aid of the National Reclamation Act.—The right of eminent domain is granted the United States for the acquisition of the necessary rights of way for the construction of all works under the provisions of the National Reclamation Act.[1] Also a right of way is granted over all State lands.[2] No works constructed by the United States are subject to inspection by the State engineer.[3]

The right of the United States to appropriate waters is granted, and such waters shall not be subject to further appropriation for a period of three years from the date of the notice of the proper official; but in case of failure to file plans of the proposed work within three years, the water specified in the notice shall become public waters, and subject to general appropriation. All evidence of the right of the United States must be filed in the office of the State engineer, upon assignment.[4] The sale of all State lands under National reclamation projects must conform to the farm units in conformity with the classification by the United States.[5]

By the Act approved March 17, 1909,[6] provisions were made for the organization of water users' associations, which associations may act in conjunction with a National reclamation project or independently, depending upon the provisions of its articles.[7]

§ 1937. Corporations and companies — Water users' associations.—By the Act approved March 17, 1909,[1] a general law for the incorporation of water users' associations was provided. The Act provides that whenever the owners of lands, reservoirs, or irrigation ditches in any county or adjoining counties in the State may desire to enter into a mutual undertaking to construct, maintain, and operate storage reservoirs, diverting dams, irrigation ditches, canals, or other irrigation works, or to combine their several works or systems, or to improve, enlarge, or add to the same, for their mutual advantage, they may organize a water users' association under the provisions of the Act. It must be noted that corporations organized under this Act may or may not be organized for operation in con-

1 Laws, 1907, p. 74, Sec. 3.
2 Laws, 1907, p. 89, Sec. 54.
3 Laws, 1907, p. 83, Sec. 32.
4 Laws, 1907, p. 85, Secs. 36-40.
5 Laws, 1907, p. 89, Sec. 55.
6 Laws, 1909, p. 210.
7 For water users' associations, see Secs. 1281-1286.
1 Laws, 1909, p. 210.

nection with the National Reclamation Service.[2] It depends entirely on what may be contained in the articles of association. Parties desiring to organize such an association must execute a certificate setting forth: (1) The name of the association; (2) the names of the incorporators; (3) the location of its principal office in the State; (4) the objects and purposes of the association, the county or counties in which its operations are to be carried on, and the general description of the lands to be irrigated, and the reservoirs or other works to be constructed, enlarged, combined, or used under the management of the association; (5) the amount of capital stock and number and denomination of the shares, or, if the incorporators do not desire to issue shares, the plan and manner of acquiring membership and of providing funds or means for the acquisition, construction, improvement, and maintenance of its works and for its necessary expenses; (6) the period, if any, limited for the duration of the association; (7) the number and manner of electing the board of directors, trustees, or governing board of said association, and may name the persons who shall serve as such for the first three months; (8) the certificate, or any amendment thereof, made as in the Act provided may also contain any provision not inconsistent with the Act or other law of the State which the incorporators may choose to insert for the regulation and conduct of the business and affairs of the association, extending its membership, enlarging or changing the scope of its operations, creating and enforcing a lien upon the lands, reservoirs, or other works, and water rights of the association or its members for the acquisition, construction, repair, improvement, and maintenance of reservoirs or other works, collecting the necessary funds for expenses and purposes of the association, defining or limiting its powers, and for its dissolution and the distribution or other disposition of its property.

The certificate must be acknowledged as required for deeds of real estate, and shall be filed in the office of the Secretary of State, and a copy thereof duly certified by said secretary shall be recorded in the office of the recorder where the lands or works are located, and such certificate shall "be evidence in all courts and places." Upon the filing of such certificate as aforesaid, such persons constitute a body corporate, and are empowered to do any act or thing necessary

2 For water users' associations in connection with the National Reclamation Act, see Secs. 1281-1286.

or proper for carrying out the purposes of their organization. Provisions are made for making amendments, changes, or alterations as may be desired. The power is given its shareholders or members to make or alter by-laws or rules and regulations for the management and operation of the works, the distribution of the waters thereof, and the control and conduct of its business and affairs. Such associations shall have the right of way over all lands owned by the State, and the right of condemnation for the same as provided by the Water Code of 1907.[3]

§ 1938. **Irrigation district law.**—By the Act of 1909 [1] the legislature of the then Territory of New Mexico adopted the irrigation district law, based mainly upon the provisions of the California law, with some of the important amendments.

The Act provides that upon a petition of a majority of the resident freeholders owning more than one-half of the lands included within the proposed district to the county commissioners that said commissioners must take up the matter, and upon publication of the petition determine at a hearing set for that purpose whether such a district should be established or not. If the county commissioners decide that it should be, they must make a call for an election of the qualified electors of the district. At such election, if two-thirds of the legal electors vote in the affirmative, the county commissioners shall declare said district duly organized.

The remainder of the Act is very similar to the California Act.[2]

§ 1939. **The Carey Act in New Mexico.**—By the Act approved March 18, 1909,[1] the then Territory of New Mexico accepted the provisions of the Carey Act, and also provided for its operation. The selection, management, and disposal of the land is vested in the Carey Act land board, which board consists of the governor, commissioner of public lands and the State engineer. The usual powers and duties of said board are provided for. No application shall be granted on which the State engineer has reported adversely, either

[3] Laws, 1907, p. 74, Sec. 3.

[1] Laws, 1909, Chap. 109, p. 295; see, also, Laws, 1909, Chap. 140, p. 383.

[2] For irrigation districts in California, see Sec. 1755.

For the irrigation district laws, see Chap. 70, Secs. 1386-1432.

[1] Laws, 1909, p. 260.

as to the water supply or feasibility of the undertaking. Upon the withdrawal of the land by the Interior Department the contract between the State and the constructing company may be entered into. Upon the completion of the works and the opening of the land for settlement any citizen of the United States, or any person having declared his intention, over the age of 21 years, may make application for not to exceed 160 acres of land. Such application must be accompanied with the usual water right contract with the construction company and 25 cents per acre. The full price fixed for the land is 50 cents per acre. Final proof of reclamation, settlement, and occupation must be made by the settler. The usual forfeiture for non-compliance with the law and for the non-payment upon the water contract is provided, and the usual lien given to the constructing company.

§ 1940. **Criminal statutes.**—It is made misdemeanors to use works declared to be unsafe by the State engineer;[1] to destroy any headgate or measuring device;[2] to use the water of another person without his consent; to carry on the construction of any works without the permit of the State engineer, except in the case of the United States;[3] for any person to fail to appear and testify at the order of the board or referee.[4]

It is also made unlawful for any person, company, or corporation to divert the waters of any public stream in New Mexico for use for reservoirs or other purposes in a valley other than that of any such stream, to the impairment of valid and subsisting prior appropriations, and punishable by a fine of not less than $100 nor more than $500, or imprisonment in the county jail for not less than one month nor more than three months, or both.[5]

Any violation of the provisions of the Artesian Well Act of 1909 is also made a misdemeanor.[6]

§ 1941. **Riparian rights in New Mexico.**—The law of riparian rights in the State of New Mexico may be regarded as entirely abro-

1 Laws, 1907, p. 84, Sec. 33.
2 Laws, 1907, p. 87, Sec. 47.
3 Laws, 1907, p. 88, Sec. 48.
4 Laws, 1907, p. 93, Sec. 67.
5 Laws, 1907, p. 95, Sec. 72.
6 See Sec. 1935.

gated by statute and Court decisions. "Beneficial use shall be the basis, the measure, and the limit of the right to the use of water." [1] "It is declared that, on the ground of imperative necessity, no settler can claim any right aside from appropriation." [2]

[1] Laws, 1907, p. 73, Sec. 2.

See, also, Trambley v. Luterman, 6 N. M. 15, 27 Pac. Rep. 312; Gutierres v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; United States v. Rio Grande etc. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 9 N. M. 303, 51 Pac. Rep. 674; Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823, where it is held that the common law doctrine of riparian rights in natural streams has been superseded in New Mexico by that of prior appropriation and application to beneficial use of water.

See, also, Keeney v. Carillo, 2 N. M. 480.

[2] Hagerman Irr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823.

CHAPTER 95.

NORTH DAKOTA.

§ 1942. Particular features of the State.
§ 1943. Irrigation in the State.
§ 1944. Criticism of the North Dakota laws.
§ 1945. State constitutional provisions—Water courses defined.
§ 1946. Water rights defined—Abandonment.
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§ 1955. The pollution of waters.
§ 1956. Criminal statutes.
§ 1957. Riparian rights in the State.

§ 1942. Particular features of the State.—The State of North Dakota is in the "Great Plains" region of the United States, and the most northerly of the five States which are included within what is known as the semi-arid region. As stated by the State engineer for the State in his last report, the total area of land which is susceptible of irrigation is 1,540,000 acres. The climate of the State is well adapted to the raising of all small fruits and grains. In the eastern portion of the State there is generally plenty of rainfall to mature crops, while in the western part the rainfall is not usually sufficient to provide for the proper growth of plant life. The Missouri River and its tributaries constitute the principal waters of the State; but for the reason that the Missouri River is from three to four hundred feet lower than the surrounding prairie, very little use up to the present time has been made of its waters, except upon what are called the first and second bench lands.[1] There is, however, plenty of flood water which may be utilized with the proper works. The climate, at times, in the winter is severely cold; but the

1 Fourth Biennial Report of the State Engineer, 1909-1910, T. R. Atkinson, State Engineer, p. 20.

growing season in the summer, computed from the average date of the last killing frost in spring to the average date of the first killing frost in autumn, is 138 days.

§ 1943. **Irrigation in the State.**—Out of the 1,540,000 acres of land in the State of North Dakota, according to the report of the State engineer, about 75,000 acres were irrigated in 1911.[1] From these figures there is still room for considerable development along this line. But, as is the case in all semi-arid States, the people are slow to take up this work, relying more upon the uncertain rainfall to mature their crops. But the people are finding out that this dependency upon the annual rainfall is, at times, doomed to disappointment. This is bound to force the use of water for irrigation in the future as a necessary adjunct to the rainfall. In many portions of the State there is the question of the drainage of lands. According to the State engineer the total area of land which can be improved by drainage is 2,780,000 acres, and out of this 475,000 acres have been improved by the construction of ditches.[2]

The Water Code of 1905 and the establishment of the office of State engineer has done much to promote irrigation in the State.

While the original Territory of Dakota, now comprising the States of North and South Dakota, came within the provisions of the Carey Act, the State of North Dakota has not accepted its provisions, and, therefore, no work has been done in this respect.[3]

Under the National Reclamation Act the Government has taken up a number of projects, notably the Williston, Buford-Trenton, and the Lower Yellowstone projects, and these have been largely constructed. A number of others were surveyed and lands under them withdrawn from entry, but these have been given up and the lands restored to entry.[4]

The State has never adopted the irrigation district law as the same has been adopted by other States, following the California law.

1 Fourth Biennial Report of the State Engineer, 1909-1910, T. R. Atkinson, State Engineer, p. 15.

2 See Report on the Drainage of Certain Counties in North Dakota, by John T. Stewart, 1907, Office Experiment Stations, Bulletin No. 189, U. S. Dept. of Agriculture.

3 For the Carey Act, see Secs. 1312-1336.

4 See the various reports of the Reclamation Service, subject: North Dakota.

See, also, the Fourth Biennial Report of the State Engineer, 1909-1910, p. 21.

However, there is a simple district law by townships and counties, and a number have taken advantage of this law, which provides simply for the levy and collection of a tax within the respective township or county for the development of irrigation.

Considerable land has been irrigated by the means of artesian wells in various portions of the State.[5]

According to the Census Report of 1910, the total number of farms irrigated in 1909 was 69, against 54 in 1899, an increase of 15, or 27.8 per cent.

The total acreage irrigated in 1909 was 10,248 acres, as against 4,872 acres in 1899, an increase of 5,376 acres, or 110.3 per cent.

The total area enterprises were capable of irrigating in 1910 was 21,917 acres. The acreage included in enterprises completed or under construction in 1910 was 38,173 acres. The area irrigated in 1909 classified by type of enterprise, shows that there were under United States Reclamation Service 1,610 acres, and under individual and partnership enterprises 8,638 acres.

§ 1944. Criticism of the North Dakota laws.—Our criticism of the irrigation and water right laws of the State of North Dakota is not so much in regard to the laws which are in effect, but the absence of laws. The Irrigation Code of 1905, which is still in force without any important amendments, follows the Wyoming Code, with some important changes.[1] This code, providing for the office of the State engineer and the board of water commissioners, was certainly an improvement upon the old statutes of the State governing the subject. This code is much more simple and probably just as effective as some of the more elaborate codes of other States. The provision of the code relative to the adjudication of rights by the courts, in the first instance, was, in our opinion, a wise one. If rights are of value, their adjudication eventually gets to the courts, and it is better to have them adjudicated in the first instance by the Court than to duplicate such proceedings by having them determined in the first instance by some board, and then appealed to the

[5] For information upon various phases of the subject, see: First-Fourth Biennial Reports of the State Engineer of North Dakota; the various Reclamation Service annual reports, sub.: North Dakota.

[1] For the Wyoming laws, see Chap. 104, Secs. 2097-2129.

Court. In this respect the code of North Dakota has adopted the Colorado system rather than that of Wyoming.[2]

The legislature of the State is to be criticised for not accepting the provisions of the Carey Act and providing laws for its operation. Also, with thickly populated communities in different portions of the State, an irrigation district Act would undoubtedly add to their prosperity.

§ 1945. State constitutional provisions—Water courses defined.—Article XVII, Section 210, of the constitution of the State of North Dakota, provides as follows:

"All flowing streams and natural water courses shall forever remain the property of the State for mining, irrigation, and manufacturing purposes."[1]

The water courses as referred to in the above constitutional provision were further defined by an Act of the legislature of 1907,[2] as follows:

"A water course entitled to the protection of the law is constituted, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or form a perennial living source. It is enough if the water arises periodically from natural causes and reaches a plainly defined channel of a permanent character."

§ 1946. Water rights defined—Abandonment.—By the State Irrigation Code of 1905 it is provided: "All waters within the limits of the State from all sources of water supply belong to the public, and, except as to navigable waters, are subject to appropriation for beneficial use.[1]

"Beneficial use shall be the basis, the measure, and the limit of the right to use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specified lands owned by the person claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better

2 For the adjudication of water rights in North Dakota, see Sec. 1949.

For the adjudication of rights in Colorado, see Secs. 1790-1793.

1 Bigelow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570.

2 Laws, 1907, p. 444.

1 Rev. Codes, 1905, Sec. 7604.

right. In all cases of claims to the use of water initiated prior to the passage of this Act the right shall relate back to the initiation of the claim upon the diligent prosecution of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated after the passage of this Act shall relate back to the date of the receipt of an application therefor in the office of the State engineer, subject to compliance with the provisions of this Act and the rules and regulations established thereunder."[2]

When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public, and shall be regarded as unappropriated water.[3]

§ 1947. **Division of the State and administrative officers.**—For administrative purposes the State of North Dakota is divided into four water divisions, the boundaries of which are defined by the statute. These divisions, in turn, are divided into water districts by the State engineer.[1]

Board of Water Commissioners.—The board of water commissioners is composed of the water commissioners of the four water divisions, together with the State engineer, who is the president thereof. It is made the duty of this board to supervise the apportionment of the waters of the State. The board has the power to make rules and regulations to govern its proceedings and the operations in the various divisions. The State engineer has a vote on all matters except appeals authorized by law from his acts. The general duties of this board are similar to those prescribed by the board of control in Wyoming, with the exception of matters relating to the determination of water rights.[2]

State Engineer.—As is the case in all States adopting the laws of State control of the waters flowing within their jurisdiction, the most important administrative office is that of the State engineer.

2 Rev. Codes, 1905, Sec. 7605.

3 Rev. Codes, 1905, Sec. 7651.

1 Rev. Codes, 1905, Sec. 7640. See, also, *Id.*, Sec. 7644.

2 Rev. Codes, 1905, Sec. 7643. For the duties of the Board of Control in Wyoming, see Sec. 2102.

The State engineer is appointed by the Governor and confirmed by the senate. He holds office for a term of four years, and draws a salary of $2500. He has the power to appoint an assistant engineer at a salary of $1800. He must be a technically qualified and experienced hydraulic engineer, and must make a biennial report to the Governor and recommendations for legislation. Complete records of his work must be kept in his office for public inspection. He has the power to make all necessary rules and regulations to carry into effect the duties of his office. He is required to modify such rules if the same is ordered by a vote of at least three of the four water commissioners. It is made his duty to make the hydrographic surveys of each stream system and source of water supply in the State, obtaining and recording all available data for the determination, development, and adjudication of the water supply of the State. In this he may co-operate with the agencies of the Federal Government.[3]

Water Commissioners.—The water commissioners of the respective water divisions are appointed by the Governor and confirmed by the senate. The general duty of a commissioner is to supervise the apportionment of the water in his division according to the licenses issued by the State engineer. His pay is fixed at $10 per day for the time actually consumed in his duties. He is also a member of the board of water commissioners.[4]

Water Masters.—The water masters of each water district are appointed by the water commissioners of their respective divisions. They have the immediate charge of the apportionment of the water under the supervision of the commissioners. His pay is fixed at $4 per day for the time actually consumed. He may also employ assistants in cases of emergency. He must make reports to the water commissioner, and these reports at the end of each irrigation season must be filed in the office of the State engineer.[5]

§ 1948. **The appropriation of water.**—In the appropriation of water the general scheme of that provided by the statute of Wyoming is followed.[1] It is provided that the person, association, or corporation must file an application with the State engineer to a permit. If the application is approved the work must be completed

3 Rev. Codes, 1905, Secs. 7608-7617.
4 Rev. Codes, 1905, Secs. 7641-7644.
5 Rev. Codes, 1905, Secs. 7645-7649.
1 See Secs. 2106-2109.

within the time allowed by the State engineer, not exceeding five years from the date of the approval, and the time within which the water shall be applied to a beneficial use must not exceed four years thereafter. "If, in the opinion of the State engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve an application or order the publication of notice thereof if, in his opinion, the approval thereof would be contrary to public interest." The works must be completed within the time allowed, and must be approved by the State engineer as to their safety and efficiency. When the works are found in a satisfactory condition the State engineer shall issue his certificate for the appropriation, setting forth the actual capacity of the works and such limitations upon the water right as shall be warranted by the condition of the works, but in no manner extending the rights described in the permit.

Upon the actual application of the water to the beneficial purpose the State engineer shall issue a license to appropriate water to the extent and under the conditions of the actual application of the water to such use. The time may be extended in which to apply the water. Any permit or license may be assigned.

Appeals may be had from the decision of the State engineer to the District Court.[2]

In the case of seepage waters the usual application must be made to the State engineer.[3]

By the Act approved March 13, 1909,[4] the State engineer was authorized to grant permits for the appropriation of flood waters of draws, coulees, or streams, and water sources, which for the greater part of the year flow less than one-third of one cubic foot per second. An application must be filed by the claimant with the State engineer, setting forth the full nature of the claim, and notice of the same must be published. If no objections to the same are filed within thirty days the State engineer shall endorse his approval on the application, and the claimant may then proceed with his construction of works. "The amount of water allowed to any person,

2 Rev. Codes, 1905, Secs. 7622-7629. See, also, Secs. 7632-7634.

3 Rev. Codes, 1905, Sec. 7662.

4 Laws, 1909, p. 179.

association, or corporation under this Act shall not be in excess of two acre-feet per acre for any one irrigation season, and in no case more than can be beneficially used."

§ 1949. **The adjudication of existing rights.**—The adjudication of all existing water rights is made by the courts in the first instance. Upon the completion of the hydrographic survey of any stream system by the State engineer he must deliver a copy thereof, together with all data, to the Attorney-General of the State, who shall, within sixty days thereafter, enter suit on behalf of the State for the determination of all rights to the use of such water. Such suit must be diligently prosecuted to a final adjudication. Such suit may be begun by private parties, in which case the Attorney-General shall intervene on behalf of the State. All claimants must be made parties. The costs in such actions are to be charged to the respective parties in proportion to the amount of water right allotted.

Upon the final adjudication of such rights two certified copies of the decree shall be prepared and one filed in the office of the State engineer, and the other in the office of the water commissioner of the proper water division. "Such decree shall in every case declare as to the water right adjudged to each party the priority, amount, purpose, place of use, and as to water used for irrigation, the specific tracts to which it shall be appurtenant, together with all other conditions as may be necessary to define the right and its priority."[1]

In any water suit the Court may appoint a referee or referees, not exceeding three, to take testimony and report upon the rights of the parties as in other cases.[2]

§ 1950. **Water rates.**—The owner of any works for the storage, diversion, or carriage of water which contain water in excess of their needs for irrigation or other beneficial purposes for which it has been appropriated, shall be required to deliver such surplus "at reasonable rates for storage, or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. In case of the refusal of such owner or owners to deliver any such surplus water at reasonable rates as determined by the

1 Rev. Codes, 1905, Secs. 7617-7621. 2 Rev. Codes, 1905, Sec. 7636.

State engineer, they may be compelled to do so by the District Court" of the proper county.[1]

§ 1951. The standard of measurement of water—The distribution of water.—The standard of measurement of the flow of water is one cubic foot per second of time; the standard of measurement of the volume of water shall be the acre-foot, equivalent to 43,560 cubic feet. The miner's inch shall be regarded as one-fiftieth of a cubic foot, except when otherwise stated in a contract.[1]

In the issuance of permits for irrigation or the adjudication of rights for such purpose, the amount allowed shall not be in excess of one cubic foot of water per second for each eighty acres.[2]

All water used in the State for irrigation shall remain appurtenant to the land upon which it is used, but by application to the State engineer the right to its use may be transferred to other lands.[3] The change of use or the place of diversion may also be made.[4]

"The water master shall have immediate charge of the apportionment of the waters in his district under the general supervision of the water commissioner, and he shall so apportion, regulate and control the waters of the district as will prevent waste."[5]

§ 1952. Ditches and canals—Rights of way and condemnation proceedings therefor.—Rights of way are granted over all lands owned by the State for the works under discussion, and all conveyances of State lands thereafter made shall contain a reservation of such rights of way.[1]

The United States, the State, or any person, corporation, or association may exercise the right of eminent domain to acquire for public use "any property or rights" now or hereafter existing when found necessary for the application of water to beneficial uses. "Such property or rights may be acquired in the manner provided by law for the taking of private property for public use." No special proceedings for the condemnation of these particular rights are provided.[2]

1 Rev. Codes, 1905, Sec. 7638.
1 Rev. Codes, 1905, Sec. 7650.
2 Rev. Codes, 1905, Sec. 7652.
3 Rev. Codes, 1905, Sec. 7653.
4 Rev. Codes, 1905, Sec. 7654.
5 Rev. Codes, 1905, Sec. 7646.
1 Rev. Codes, 1905, Sec. 7663.
2 Rev. Codes, 1905, Sec. 7606.

Water appropriated may be turned into any natural or artificial water course by any party entitled to the use thereof, and may be reclaimed below by such party, subject to existing rights, due allowance being made for losses, as determined by the State engineer.[3] All works may be inspected by the State engineer and ordered repaired if found defective.[4]

Measuring devices must be constructed in[5] and bridges over ditches and canals at roads, at the expense of the owners.[6]

§ 1953. Irrigation works constructed by townships.—On February 11, 1890, there was approved an Act which had been passed by the legislature of the State of North Dakota, entitled, "An Act to allow organized townships to raise a tax for irrigation purposes."

"Section 1. Whenever ten legal voters of any organized township petition the town board fifteen days previous to an annual town meeting to submit the subject of irrigation, by building dams to create ponds or reservoirs on any of the creeks or coulees in said township, it shall be the duty of said town board to submit the question to the voters at the next annual town meeting, and the town clerk shall cause three notices to be posted specifying the place and nature of said improvements."

The Act provides that whenever two-thirds of the legal voters of any town shall agree at their town meeting that the water supply should be increased for the purpose of irrigation it shall be lawful that a tax be levied for the purpose of constructing the works necessary by and under the directions of the board of supervisors of said town: *Provided,* such improvements shall be wholly in said town. And the Act authorizes a tax to be levied, which shall not exceed two mills on the dollar, upon the assessed valuation of the property.[1]

§ 1954. Provisions in aid of the National Reclamation Act.—The authority is given the United States to appropriate water under the National Reclamation Act, and whenever the officers of the service shall notify the State engineer that the United States intends to utilize certain specified waters, the waters so described and unappropriated at the date of the notice shall not be subject to further

3 Rev. Codes, 1905, Sec. 7607.
4 Rev. Codes, 1905, Secs. 7630, 7631.
5 Rev. Codes, 1905, Sec. 7655.
6 Rev. Codes, 1905, Sec. 7658.
1 Rev. Codes, 1905, Secs. 3206-3208.

appropriation for a period of three years thereafter. Such waters may be restored to appropriation upon the abandonment of the project by the Government.[1] Any lands belonging to the State under Government projects shall be sold only in conformity with the classification of farm units by the United States.[2] The right of condemnation is also given the United States to acquire any property or rights necessary for these projects.[3]

§ 1955. **The pollution of waters.**—Every person who deposits or places or causes to be deposited or placed any dead animal, offal, or refuse matter offensive to sight or smell or deleterious to health upon the banks or in the waters of any lake or stream within the State is guilty of a misdemeanor, punishable by a fine of not less than $20 and not exceeding $100.[1]

§ 1956. **Criminal statutes.**—The unlawful interference with rights to the use of water, the unlawful use of water, or the waste of water, and the unlawful obstruction of any works, are made misdemeanors, and punishable by a fine of not more than $250 nor less than $20, or by imprisonment in the county jail not exceeding six months, or both.[1] Unlawfully diverting water from any irrigation ditch is punishable by a fine of not less than $25 nor more than $50.[2]

By an Act of 1911 [3] it is further provided that if any person, municipality, or corporation, without authority of law, wilfully obstructs any ditch, drain, or water course, or diverts water therein from its natural or artificial course, such person shall be liable to the party suffering injury from such obstruction or diversion for the full amount of the injury occasioned thereby; and in addition thereto shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $100, or imprisonment in the county jail not exceeding three months.

§ 1957. **Riparian rights in the State.**—As to the common law of riparian rights in the State of North Dakota, it can be said that they are recognized, but to a limited extent. As far as the right of the

1 Rev. Codes, 1905, Sec. 7639.
2 Rev. Codes, 1905, Sec. 7664.
3 Rev. Codes, 1905, Sec. 7606.
1 Rev. Codes, 1905, Secs. 9423-9425.

1 Rev. Codes, 1905, Secs. 7656, 7658-7660.
2 Rev. Codes, Secs. 9313, 9314.
3 Laws, 1911, p. 590.

riparian proprietor to the undiminished flow of a stream, without actual use is concerned, the common law may be considered abrogated by the Irrigation Code of 1905, in which it is declared that all waters within the limits of the State belong to the public, and, except as to navigable waters, are subject to appropriation for beneficial use; and that beneficial use shall be the basis, the measure, and the limit of the right to use of water.[1]

It is further provided by the statute that: "The owner of the land owns water standing thereon or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by Nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue the same."[2]

However, as far as rights of riparian owners are concerned which had vested prior to the adoption of the code of 1905 as to the actual use of the waters of the natural streams, as we view the law of the State, they remain intact only to the extent of the actual use of the water for a beneficial purpose. The old common law rule as laid down in the case of Sturr v. Beck,[3] to the effect that a riparian owner in the old Territory of Dakota had a right to the undiminished flow of a stream running by his lands, as a part and parcel thereof, regardless of use, may be considered as far as North Dakota is concerned to be abrogated by the provisions of the code if not overruled by later decisions of the Supreme Court of the United States.[4]

1 Rev. Codes, 1905, Secs. 7604, 7605.

2 Rev. Codes, 1905, Sec. 4798.

3 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

See, also, Bigelow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570.

4 For right to the undiminished flow, see Sec. 549. See, also, Secs. 1612, 1613.

CHAPTER 96.

OKLAHOMA.

§ 1958. Particular features of the State.
§ 1959. Irrigation in the State.
§ 1960. Criticism of the Oklahoma laws.
§ 1961. State constitutional provisions.
§ 1962. Title to water—Water rights defined.
§ 1963. The right of appropriation—Condemnation of rights.
§ 1964. Administrative officers.
§ 1965. The appropriation of water.
§ 1966. The adjudication of existing rights.
§ 1967. Ditches and canals, etc., and rights of way therefor.
§ 1968. Corporations and companies.
§ 1969. The standard of measurement and the distribution of water.
§ 1970. Provisions in aid of the National Reclamation Act.
§ 1971. Criminal statutes.
§ 1972. Riparian rights in Oklahoma.

§ 1958. **Particular features of the State.**—Oklahoma is a semi-arid State. In the eastern portion there is ample rainfall for the maturity of crops. The soil is rich, deep, and enduring. The climate of the western part of the State is similar to that of Kansas and Nebraska—dry and arid. The Cimarron River, which rises in the mountains in the eastern part of New Mexico, flows across the northwestern part of the State into Kansas. This stream and its numerous spring-fed branches, including that of Beaver Creek, furnish an ample supply of water to the ditches taken from them. Its valley is narrow, but fertile, and the soil when watered is well adapted to the cultivation of all the crops of the temperate zone.

§ 1959. **Irrigation in the State.**—In the State of Oklahoma the necessity for irrigation is not so imperative as in other States west of the 100th meridian. The irrigated tracts of land are principally confined to the counties in the extreme northwestern part of the State. And although no great amount has been irrigated as compared to other States, a considerable start has been made along that line.

As reported by the census of 1910, the number of farms irrigated in 1909 was 137, as against 124 in 1899, an increase of 13, or 10.5 per cent.

The total acreage irrigated in 1909 was 5402 acres, as against 2,759 in 1899, an increase of 2,643 acres, or 95.8 per cent.

The total acreage which all enterprises were capable of irrigating in 1910 was 7,411. The area included in projects then completed or under construction was 9,442.

The acreage irrigated in 1909, classified by type of enterprise, was as follows: Under co-operative enterprises, 2,000 acres, and under individual and partnership enterprises, 3,402 acres. No irrigation enterprises in the State are reported as operated under the National Reclamation Act, the Carey Act, or irrigation district laws.

§ 1960. **Criticism of the Oklahoma laws.**—Very little criticism can be made adverse to the Oklahoma Water Code. It is based largely upon those of North and South Dakota, and is simple and effective. The appropriation of water must be by application to the State engineer, and the adjudication of rights is left at all stages to the courts, where it properly belongs. Special favors seem to have been given to corporations appropriating water for sale or rental, and at the same time the rights of communities to organize themselves into irrigation districts seem to have been ignored. This seems to be somewhat peculiar, owing to the general tendency of the Oklahoma constitution and laws. An irrigation district law should be enacted, and thus enable those under the same water system to organize themselves into a public corporation and govern and regulate their own affairs. Ample provisions are enacted in aid of the National Reclamation Act. The Carey Act does not apply to the State, hence there are no provisions for its operation.

§ 1961. **State constitutional provisions.**—Article XVI, Section 3, of the constitution of Oklahoma provides:

"The legislature shall have the power and shall provide for a system of levees, drains, and ditches and of irrigation in this State when deemed expedient, and provide for a system of taxation on the lands affected or benefited by such levees, drains, and ditches, and irrigation, or on crops produced on such land, to discharge such bonded indebtedness or expenses necessarily incurred in the establishment of such improvements, and to provide for compulsory issuance of bonds by the owners or lessees of the lands benefited or affected by such levees, drains, and ditches, or irrigation."

Article II, Section 23, also provides:

"No private property shall be taken or damaged for private use without compensation unless by consent of the owner, except for private ways of necessity, or for drains and ditches across the lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law."

§ 1962. Title to water—Water rights defined.—"The unappropriated waters of the ordinary flow or underflow of every running stream or flowing river, and the storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State of Oklahoma in which, by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided." [1]

§ 1963. The right of appropriation—Condemnation of rights.—In 1905 the legislature of the then Territory of Oklahoma adopted a Water or Irrigation Code, the provisions of which are largely the same as those of North and South Dakota, discussed in other chapters of this part.[1] And in that code the right of the appropriation of waters was granted, upon the following conditions:

"Beneficial use shall be the basis, the measure, and the limit of the right to the use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specific lands owned by the person or persons claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to the passage of this Act the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water after the

1 Comp. Laws of Oklahoma, 1909, Sec. 3915.

The future references in this chapter, unless otherwise indicated, will be to the above.

Gay v. Hicks, —— Okla. ——, 124 Pac. Rep. 1077.

1 For the laws of North Dakota, see Chap. 95, Secs. 1942-1957.

For laws or South Dakota, see Chap. 100, Secs. 2024-2039.

passage of this Act shall relate back to the date of the receipt of an application therefor in the office of the State engineer, subject to compliance with the provisions of this Act and the rules and regulations established thereunder."[2]

The right to appropriate storm or rain waters and to store the same is also granted.[3] The failure to use the water appropriated for a period of two years forfeits the right.[4]

"The appropriation of water must be either for irrigation, mining, milling, construction of water works for cities and towns, or stock raising."[5]

The right is given to condemn water rights under the following conditions: "The beneficial use of water is a public use, and every person, corporation, or association may exercise the right of eminent domain to acquire any right now or hereafter existing to the use of water for beneficial purposes."[6]

§ 1964. Administrative officers. — *State Engineer.* — The law upon the subject of the State engineer is in a peculiar condition in the State of Oklahoma. All through the Water Code the State engineer is referred to and certain duties prescribed. But there is no statutory provision for the creation and maintenance of the office of the State engineer. However, by statute it is made the duty of the secretary of the state board of agriculture to perform all the duties assigned to the State engineer in the code: Provided, that the said secretary is empowered by and with the advice and consent of the Governor to temporarily employ the services of a technically qualified and experienced civil engineer for the purpose of examining, investigating, or determining upon any professional engineering question, the salary of such engineer not to exceed $6 per day.[1] The usual duties are assigned to the State engineer, similar to those assigned to the engineers of North and South Dakota, and in the meantime these duties are being performed by the secretary of the state board of agriculture. He may make all necessary rules, and his records are public.[2]

2 Comp. Laws, 1909, Secs. 3923, 3929.

Gay v. Hicks, —— Okla. ——, 124 Pac. Rep. 1077.

3 Comp. Laws, 1909, Sec. 2916.

4 Comp. Laws, 1909, Sec. 3956.

5 Comp. Laws, 1909, Sec. 3920.

Upon the right to appropriate water, see Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856.

6 Comp. Laws, 1909, Sec. 3924.

1 Comp. Laws, 1909, Sec. 3982.

2 Comp. Laws, 1909, Secs. 3979, 3980.

Water Masters.—It is not provided by the statute for the dividing of the State into water divisions, as is the case in many of the States. Hence there is no officer provided for such divisions. But it is provided that the State engineer shall from time to time, as may be necessary for the economical and satisfactory apportionment of the water, divide the State in conformity with drainage areas into water districts, to be designated by name, and to comprise, as far as possible, one or more distinct stream systems. The State engineer may, with the approval of the Governor, appoint a water master for each district, who may be removed by the State engineer. "Each water master shall have the immediate charge of the apportionment of the waters in his district under the general supervision of the State engineer, and he shall so apportion, regulate, and control the waters of his district as will prevent waste. Each water master must report directly to the State engineer, and appeals are allowed from his decisions to the State engineer.[3]

§ 1965. **The appropriation of water.**—The appropriation of water under the code also follows the codes of North and South Dakota.[1] An application must be made to the State engineer in accordance with the forms prescribed by the statute and the rules and regulations prescribed by the State engineer.[2] Notice must be published of the application and a hearing had at which all parties interested may be heard. "If, in the opinion of the State engineer, there is no unappropriated water available, he shall reject the application." Any applicant may appeal from the decision of the State engineer to the District Court. The time allowed for the completion of the work of construction shall not exceed five years, and the time within which the water must be applied to a beneficial purpose shall not exceed four years in addition. An inspection of the works must be made by the State engineer upon notice of their completion; and if the works are satisfactory, the State engineer shall issue his certificate of completion. Unsafe works must be changed to the satisfaction of the State engineer. The use of works declared unsafe by the State engineer is made a misdemeanor. Before the application of the water to a beneficial use the State engineer shall cause the works to be again inspected, and if the same

3 Comp. Laws, 1909, Secs. 3960-3964.
2 Comp. Laws, 1909, Secs. 3937, 3938.
1 See Secs. 1946, 2029.

are satisfactory he shall issue his license to appropriate. Any permit or license may be assigned.[3]

An application to appropriate seepage water must also be made to the State engineer.[4]

§ 1966. The adjudication of existing rights.—The adjudication of existing rights in the State of Oklahoma is entirely with the courts, and the procedure prescribed by the statute is largely based upon that of North and South Dakota.[1] The first step to be taken is by the State engineer, who shall make hydrographic surveys of each stream system; and after such surveys all data necessary for the determination of rights must be delivered to the Attorney-General of the State, who, within sixty days thereafter, must bring suit on behalf of the State and make all parties interested parties to such suit. The suit may be begun by private parties, in which case it is made the duty of the Attorney-General to intervene on behalf of the State. Copies of all decrees in such actions must be filed in the office of the State engineer and the register of deeds of the proper county. The decree must set forth all facts necessary to define the right and its priority, and the specific tract of land to which the right is appurtenant if the appropriation was for irrigation.[2]

§ 1967. Ditches and canals, etc., and rights of way therefor.—Rights of way over all State lands are granted for ditches, canals,

3 Comp. Laws, 1909, Secs. 3937-3950.

Gay v. Hicks, —— Okla. ——, 124 Pac. Rep. 1077.

4 Comp. Laws, 1909, Sec. 3973.

1 See Sec. 1949.

2 Comp. Laws, 1909, Secs. 3932-3936.

For the adjudication of rights, see Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856.

A petition for an injunction to restrain action by the State engineer and an applicant for water rights on a certain stream until hydrographic survey could be made under the statute and the rights of all claimants determined, and which shows that petitioners had previous to the date of filing of the application duly and lawfully appropriated to a beneficial use all of the waters of a stream, but that no hydrographic or judicial determination of their rights had ever been made, and which petition of applicant would be to destroy a long established irrigation system erected at a cost of $50,000, and that the applicant was not acting in good faith in seeking such water rights for the purpose of putting the water applied to a beneficial purpose, but merely for speculative purposes, states a cause of action. Gay v. Hicks, —— Okla. ——, 124 Pac. Rep. 1077.

and other works, and the right of condemnation of private lands given for the same purpose.[1] Water turned into any natural or artificial water course by any party entitled to the use of the same may be reclaimed below and diverted therefrom by such party, subject to existing rights, due allowance for losses being made by the State engineer.[2] Headgates, measuring devices, and bridges must be constructed at the expense of the owners.[3]

Unless the owners of ditches and canals or other works shall fence such works, "then there shall accrue in their favor no cause of action against the owners of live stock for any trespass thereon.[4]

§ 1968. Corporations and companies.—The organization of corporations is encouraged for the purpose of constructing all necessary works and of conducting water to all persons entitled to the same. All such corporations are given full power to make contracts for the sale of permanent water rights, and to have the same secured by liens on the land or otherwise, and also to lease or rent such water rights for such terms as they may see fit. All persons owning land adjoining any canal or other works are entitled to receive water. In case of a shortage of water it must be divided *pro rata* among those entitled thereto.[1] Such corporations also have a preference lien on the land or crops raised upon the land irrigated under a lease or contract.[2] Such corporations may borrow money and acquire lands.[3]

§ 1969. The standard of measurement and the distribution of water.—"The standard of measurement of the flow of water shall be the cubic foot per second of time; the standard of measurement of volume of water shall be the acre-foot."[1] One cubic foot per second may be allowed to each seventy acres.[2]

Water appropriated for irrigation, although declared to be appurtenant to specific tracts, may be changed to other lands upon application to the State engineer, without losing the priority of

1 Comp. Laws, 1909, Secs. 3918, 3924.
2 Comp. Laws, 1909, Sec. 3931.
3 Comp. Laws, 1909, Secs. 3966, 3969.
4 Comp. Laws, 1909, Sec. 3926.

1 Comp. Laws, 1909, Sec. 3917.
2 Comp. Laws, 1909, Secs. 3927, 3972.
3 Comp. Laws, 1909, Sec. 3928.
1 Comp Laws, 1909, Sec. 3955.
2 Comp. Laws, 1909, Sec. 3953.

right.[3] So, also, may the use of the water, by the same method, be changed from that for which it was originally appropriated to some other use.[4]

The distribution of the water in the State is assigned to the State engineer for general supervision,[5] and under him the water masters.[6]

The owner or owners of any works which contain water in excess of their needs for irrigation or other beneficial purposes are required to deliver such surplus, at reasonable rates for storage, or carriage, or both, to the parties entitled to the use of the water. In case of refusal of such owners to deliver such surplus water at reasonable rates as determined by the State engineer, they may be compelled to do so by the District Court of the proper county.[7]

All water not used must be conducted back to the natural stream.[8]

§ 1970. Provisions in aid of the National Reclamation Act.—Water may be appropriated by the United States under the provisions of the National Reclamation Act.[1] And for this purpose water may be reserved from private appropriation for a period of three years from the date of a notice by the proper official that certain specified waters are about to be utilized: Provided, that in case of failure of the Government to file plans for the proposed works within three years the waters shall become public water, subject to general appropriation.[2] A right of way is granted the Government over all State lands, and all State lands under such projects shall be sold only in conformity with the classification of the farm units by the United States. Water users' associations are provided for, and the county commissioners are authorized to accept from such associations books containing printed copies of their articles and forms of subscription to stock, and to use such books for recording the same. Where unappropriated waters have been filed upon prior to the action of the Government, any water users' association is authorized and empowered to reimburse such person, association, or corporation for any and all actual outlays or moneys expended in making necessary surveys, securing title to sites, and right of way,

3 Comp. Laws, 1909, Sec. 3958.
4 Comp. Laws, 1909, Sec. 3965.
5 Comp. Laws, 1909, Sec. 3959.
6 Comp. Laws, 1909, Sec. 3961.
7 Comp. Laws, 1909, Sec. 3953.
8 Comp. Laws, 1909, Sec. 3921.
1 For full discussion of this Act, see Chap. 65, Sec. 1235.
2 Comp. Laws, 1909, Sec. 3954.

either by condemnation or by purchase, and for all work of construction actually done upon such irrigation system, together with interest upon the same from the date of expenditure to the time of settlement: Provided, that in case of dispute when the matter shall be referred to the State engineer for determination, such determination shall be final.[3]

§ 1971. **Criminal statutes.**—It is made unlawful for others to divert water already appropriated.[1] The unlawful interference with or injury to any irrigating canal or other works is made a misdemeanor.[2] The use of works declared unsafe by the State engineer is also made a misdemeanor.[3] So, also, the waste of water to the detriment of another.[4] The placing or maintaining of any obstruction that will interfere with the use of works is also made a misdemeanor.[5] All violations of the law declared to be a misdemeanor shall be punished by a fine not exceeding $250 nor less than $20, or by imprisonment in the county jail not exceeding six months, or by both. The justices' courts are given jurisdiction.[6]

§ 1972. **Riparian rights in Oklahoma.**—Riparian rights in the State of Oklahoma are recognized, but not to the extent that they are enforced under the strict rule of the common law. By the adoption of the Water Code, which is applicable to those portions of the State in which, by reason of the insufficient rainfall, irrigation is beneficial, the rights of riparian owners are very much limited and restricted. "Beneficial use shall be the basis, the measure, and the limit of the right to the use of water," is the provision of the code.[1] By another section, "the owner whose land abuts on a running stream may use such water therefrom as may be necessary for domestic purposes." This provision also limits the right of riparian owners to the use of water for such purpose alone by virtue merely of his ownership. The common law rule as to the undiminished flow of a stream, without use, may be deemed as abrogated by statute in the State. As to other rights of riparian owners, such as the

3 Comp. Laws, 1909, Secs. 3974-3978.

1 Comp. Laws, 1909, Sec. 3919.

2 Comp. Laws, 1909, Secs. 3922, 3925, 3967.

3 Comp. Laws, 1909, Sec. 3949.

4 Comp. Laws, 1909, Sec. 3968.

5 Comp. Laws, 1909, Sec. 3970.

6 Comp. Laws, 1909, Sec. 3971.

1 Comp. Laws, 1909, Secs. 3923, 3929.

right to prevent pollution of streams flowing by their lands or for damages therefrom, it is held that such owners have such a property right in the flow of the stream undeteriorated in quality as will give them a right of action therefor.[2]

[2] Markwardt v. City of Guthrie, 18 Okla. 32, 90 Pac. Rep. 26, 9 L. R. A., N. S., 1150, 11 Ann. Cas. 581.

CHAPTER 97.

OREGON.

§ 1973. Particular features of the State.
§ 1974. Irrigation in the State.
§ 1975. Criticism of the Oregon laws.
§ 1976. Water rights defined—Right to collect water rates a franchise.
§ 1977. The preservation of rights acquired under old laws.
§ 1978. Administrative officers, and duties.
§ 1979. Appropriation of water prior to Act of 1909.
§ 1980. Appropriation of water pursuant to Act of 1909.
§ 1981. Rights to waste and seepage water.
§ 1982. The appropriation of water for power purposes—License fees.
§ 1983. Corporations and companies.
§ 1984. Water rates.
§ 1985. Rights of way and water rights—Condemnation.
§ 1986. The determination of existing water rights.
§ 1987. The protection of highways.
§ 1988. Mechanics' liens.
§ 1989. The distribution of water under the code of 1909.
§ 1990. The location of artesian wells.
§ 1991. The floating of logs and timber.
§ 1992. The Carey Act in Oregon.
§ 1993. Irrigation district law in Oregon.
§ 1994. Provisions in aid of the National Reclamation Act.
§ 1995. The pollution of waters.
§ 1996. Criminal statutes.
§ 1997. Riparian rights in Oregon.

§ 1973. Particular features of the State.—The State of Oregon is divided by the Cascade range of mountains into two divisions, which are very dissimilar in climate, topography, and soil. The western division has a very heavy rainfall, and, therefore, irrigation is not practiced to a great extent, although in the southern portion, in order to mature late crops, there is some use of water for this purpose. That portion of the State lying east of the Cascade range may be properly classed within the arid region, although some portions are really semi-arid. The formation of the soil is largely volcanic, and when supplied with sufficient moisture is among the most productive in the world. There are a number of rivers of considerable size, and the available water supply upon the whole is large. In this section the climate is mild and there are few portions of the

State where crops can not be matured before the fall frosts. But, as in other mountainous States, the climate depends largely upon the altitude. In this portion of the State, water, next to the land, is the greatest asset; and, the two combined, constitute a resource which, fully developed, it is now impossible to foretell the result.

There are a number of artesian basins which have been exploited and from which good results are expected.[1]

§ 1974. **Irrigation in the State.**—In the greater portion of the eastern division of the State of Oregon, irrigation may be deemed a necessity to the full development of the State. Yet with millions of acres of land and a water supply that is the envy of other States, up to the last few years, irrigation in the State has been developed in a rather small way, as compared with some of the other States, where the water supply is much smaller. The greater portion of the population living west of the Cascade range of mountains, where irrigation was considered more as a luxury than as a necessity, very little attention was paid to the subject as relating to the eastern division of the State. As a result the development of this division of the State was hampered by inadequate laws governing the subject of waters and water rights. And it was not until the Act of 1909 that there was enacted an adequate water code. The legislature was also slow in providing funds for stream measurements and topographical surveys, and although great things have been accomplished in the past, with the adoption of the new Water Code of 1909, hereafter discussed in this chapter, more can be expected in the future.[1]

Oregon also has upon its statute books an irrigation district law.[2] But as yet few districts have been organized. This is partially due to a defect in the law, rendering it difficult to secure sufficient money to organize the project and prepare the necessary plans and

1 See Geology and Water Resources of the Harney Basin, Oregon, by Gerald A. Waring, 1909, Water-Supply Paper No. 231, U. S. Geological Survey.

1 Oregon is one of the States to be benefited by the provisions of the Carey Act, and according to the last report of the State engineer, contracts have been executed by the State where the cost to future settlers amounts to over $22,000,000. Third Biennial Report of the State engineer of the State of Oregon, 1909-1910, pp. 89-93.

2 For irrigation districts, see Chap. 65, Secs. 1235-1286.

For Oregon district law, see Sec. 1993.

specifications.[3] However, by the Act of 1911, the board of directors is given the power to incur an indebtedness not exceeding $5000 for this purpose.[4]

The United States Reclamation Service, under the provisions of the National Reclamation Act,[5] is also constructing the Umatilla project, and several other projects have been surveyed.[6] Besides this there is the Klamath project, located partly in Oregon and partly in California, which is largely constructed and under operation.[7]

Besides the above, a great many private enterprises have been projected, and many of which have been completed. With the present projected enterprises completed, in addition to those in operation, the reclamation of arid lands in Oregon will be greatly increased during the next decade. This will be aided greatly by the construction of the railroads now being built to reach many of the arid lands of the State. These lands heretofore have been inaccessible, and the settlers were slow to come where they could have no market for their crops.[8]

According to the Census Report of 1910, the total number of farms irrigated in 1909 was 6,669, as against 4,336 in 1899, an increase of 2,033, or 43.9 per cent.

The total acreage irrigated in 1909 was 686,129 acres, as against 388,310 acres in 1899, an increase of 297,819 acres, or 76.7 per cent.

The total acreage which all enterprises were capable of irrigating in 1910 was 830,526 acres. The acreage included in projects, either completed or under construction in 1910 was 2,527,208 acres, an excess of 1,841,079 acres over the area irrigated in 1909. This indicates the area which will be available within the next few years

[3] State Engineer's Report, *supra*, p. 94.

[4] Laws, 1911, Chap. 223.

[5] For this Act, see Chap. 65, Secs. 1235-1286.

[6] Eighth Annual Report of the Reclamation Service, 1908-1909, p. 160.

[7] Eighth Annual Report, *supra*, p. 169.

[8] For works upon the subject of irrigation in Oregon see Irrigation in Oregon, by John H. Lewis, Experiment Stations, U. S. Dept. of Agriculture, Bulletin No. 209; Irrigation Experiments and Investigations in Western Oregon, by A. P. Stover; *Id.*, Bulletin No. 226; Irrigation Practice Among Fruit Growers on the Pacific Coast, by E. G. Wickson; *Id.*, Bulletin No. 108; Third Biennial Report of the State Engineer of Oregon for 1909-1910, John H. Lewis, State engineer; the various Reports of the Reclamation Service, subject, Oregon.

See, also, the water laws of Oregon, published by authority, 1911.

for the extension of irrigation, and shows that the area irrigated can be almost tripled without the construction of additional works.

The acreage irrigated in 1909, classified by type of enterprise, was as follows: Under the United States Reclamation Service, 22,000 acres; under United States Indian Service, 429 acres; under the Carey Act, 24,750 acres; under irrigation districts, 1,500 acres; under co-operative enterprises, 149,985 acres; under commercial enterprises, 77,387 acres; under individual and partnership enterprises, 410,078 acres.

§ 1975. **Criticism of the Oregon laws.**—The State of Oregon was late in adopting a comprehensive code of water laws, and it was not until the year 1909 that such a code was enacted by the legislature that was in any way fitted to the utmost development of her water resources. While today Oregon has a system of water laws equal in effectiveness to any State in the West, it was a struggle to bring this about. Starting in with the adoption of the strict rule of the common law theory of riparian rights even as to the undiminished flow of the water in the natural streams, the statutes enacted at various times as the needs and necessities of the State became more and more apparent, have gradually invaded that rule until, as to the use of the waters for all beneficial purposes, there is very little left of that ancient exposition of the law of waters in the State. The late decisions of the Supreme Court, especially that of Hough v. Porter, have aided materially in defining and limiting the rights of riparian proprietors to the flow of the stream.[1] While the rights of riparian proprietors in the State are not entirely abrogated, they are so limited that they can not claim the waters of the natural streams, except for actual use. A proprietor can not lay claim to the undiminished flow of a stream, without actual use, simply because it adds beauty to the outlook.

Upon the subject of water rights and the appropriation of water for beneficial uses and purposes, the Water Code of 1909,[2] as compared with the old laws upon the subject was decidedly revolutionary in character. Theretofore, riparian rights were considered

1 For riparian rights in Oregon, see Sec. 1997; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

2 Laws, 1909, Chap. 216, p. 319, Secs. 1-73; also, Chap. 6, Title 43 of Lord's Oregon Laws, Secs. 6594 *et seq.*

paramount to all other rights, and that, too, regardless of the use of the water by the riparian owner. But, by the new code, as will be seen in our abstract of the same, just the reverse is the law at the present time. The right to the use of water by appropriation as specially provided for by the code is paramount to any other rights, including the common law of riparian rights. Vested riparian rights, however, are protected, but then only under the limitation and restrictions, as imposed by the code, that the riparian owner, in order to preserve his right must actually use the water for some beneficial use or purpose, and that such use must not be abandoned for a period of two years, and when he has made the proper filing of his claim in the office of the Secretary of State. This rule practically places the riparian owner and the appropriator upon the same footing as to the use of the water of the natural streams, the basis of the right being the application of the water to some beneficial use or purpose.

Upon the subject of the adjudication of existing water rights, the Oregon statute differs from that of Wyoming, Nevada, and Nebraska, in that, instead of allowing an appeal to the court from the determination, all orders of the board must be confirmed or modified by proceedings in the circuit court. The adjudication of the court, as indicated by the statute, must be upon the evidence presented before the board, with such other evidence as the court may direct the superintendent of the division to take. The chief aim of this statute, evidently, was to expedite the proceedings of adjudicating these rights, as considerable fault had been found against the Oregon courts for the delay in these actions. But, whether the object of the law will be accomplished or not in this respect, remains to be seen. The law is now of too recent origin to determine. In the last report of the State engineer he, by way of recommendation, says: "In making the determination of the board of control final and eliminating the circuit court from the proceedings altogether, the time occupied in completing a determination will be reduced considerably."[3] This idea of eliminating the courts we believe to be wrong. The right of review by the courts in these determinations, in some mode of procedure, can not, nor should it be, denied. To turn over the final determination and adjudication of one of the greatest property rights of individuals, within a State, to a

[3] Third Biennial Report of the State Engineer of Oregon, 1909-1910, p. 68.

board of engineers, without the right, in some manner, of review by the courts, is beyond the constitutional power of a legislature. Besides, it is better that there should be some delay in these adjudications than that a single individual should be devested of his vested property rights in an unconstitutional and unlawful manner.

The provisions for the acceptance and operation of the Carey Act, are in the usual form, and by the system of State control and supervision, fully protect all interests.

The irrigation district law, although imperfect at first, is now ample for the organization of these public corporations, for the irrigation of lands in thickly settled communities.

In general, upon the subjects of the adjudication of existing water rights, the appropriation of water, and its distribution, the statutes follow largely those of Wyoming, hereinafter discussed.[4]

§ 1976. Water rights defined—Right to collect water rates a franchise.—The State of Oregon has no constitutional declarations relative to the subject of waters.

Upon the subject of the title to the waters, by the statute it is declared:

"All water within the State from all sources of water supply belongs to the public."[1]

The right to collect water rates is declared to be a franchise in the following terms:

"The use of the water of the lakes and running streams of the State of Oregon, for general rental, sale, or distribution, for the purposes of irrigation, and supplying water for household and domestic consumption, and watering live stock upon dry lands of the State, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. A use shall be deemed general within the purview of this Act when the water appropriated shall be supplied to all persons whose lands lie adjacent to or within the reach of the line of the ditch or canal or flume in which said water is conveyed, without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply."[2]

4 For the laws of Wyoming, see Chap. 104, Secs. 2097-2129.

1 Lord's Oregon Laws (hereinafter cited as L. O. L.), Sec. 6575.

2 L. O. L., Sec. 6525; Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 Pac. Rep. 37.

The use of water for mining and electric power is declared a public use in the following terms:

"The use of the water of the lakes and running streams of the State of Oregon for the purposes of developing the mineral resources of the State and to furnish electric power for all purposes, is declared to be a public beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for any such public and beneficial use is hereby granted." [3]

By the Water Code of 1909, it was declared, as to the right of appropriation:

"Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water." [4]

§ 1977. The preservation of rights acquired under old laws.—In the Water Code of 1909, which provided for a new method as to the appropriation, distribution, and determination of existing water rights, it was especially provided that all existing rights, which had been acquired under former laws, should be preserved, subject to the following limitations and conditions:

"1. Nothing in this Act contained shall impair the vested right of any person, association, or corporation to the use of water.

"2. Actual application of water to beneficial use prior to the passage of this Act by or under authority of any riparian proprietor, or by or under authority of his predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use: Provided, such use has not been abandoned for a continuous period of two years.

"3. And where any riparian proprietor, or under authority of any riparian proprietor or his predecessor in interest, any person or corporation shall, at the time this Act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to

[3] L. O. L., Sec. 6551.

See, also, Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031; McMinnville v. Howenstein, 56 Ore. 451, 109 Pac. Rep. 81.

[4] L. O. L., Sec. 6594.

take and use such water shall be deemed vested in such riparian proprietor: Provided, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this Act. The board of control, in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the board of control.[1]

"4. Nor shall anything in this Act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this Act.

"5. Nor shall the right of any person, association, or corporation to take and use water be impaired or affected by any of the provisions of this Act where appropriations have been initiated prior to the filing of this Act in the office of the Secretary of State, and such appropriators, their heirs, successors, or assigns shall, in good faith, and in compliance with laws existing at the time of filing this Act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this Act."

6. The board of control is also given the authority, in the cases mentioned in subdivisions 3 and 5, above, to prescribe the time within which the full amount of water shall be applied to a beneficial use, and in so doing shall take into consideration the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for the water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the board of control shall direct the State engineer to issue a certificate showing such determination. For good cause shown the board of control may extend the time by granting further certificates.

1 Where the defendants made no appropriation of the water in controversy, and all parties based their rights thereto as riparian owners, the decree will be predicated on that ground, since L. O. L., Sec. 6595, recognizes the doctrine of riparian ownership. Pacific Live Stock Co. v. Davis, —— Ore. ——, 119 Pac. Rep. 147.

"7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided in proceedings under this Act because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

"8. All rights granted or declared by this Act shall be adjudicated and determined in the manner and by the tribunals as provided in this Act. This Act shall not be held to bestow upon any person, association, or corporation any riparian rights where no such rights existed prior to the time this Act takes effect." [2]

§ 1978. Administrative officers, and duties.—By the Act of 1909, the State of Oregon was divided into two water divisions, and administrative officers provided and their powers and duties defined. In this respect the statutes of Wyoming were closely followed, which will be fully discussed under the statutes of that State.[1]

The administrative officers and their duties are as follows:

Board of Control.—The State engineer and the superintendents of the two water divisions constitute the board of control, which, under the regulations as may be prescribed by law, "have the supervision of the waters of the State and of their appropriation, distribution, and diversion, and of the various officers connected therewith." The decisions of the board are subject to appeal to the circuit and Supreme Courts. The said board has its office at Salem, and shall hold two regular meetings each year, with power of adjournment. The State engineer is *ex officio* president of the board, and has the right to vote on all questions coming before it. A majority of said board constitutes a quorum to do business.[2] The board is given the authority to appoint a secretary and other assistants. The members of the board may administer oaths in the performance of their official duties. The attorney general and the district or prosecuting

2 L. O. L., Sec. 6595.

1 L. O. L., Sec. 6609.

For the administrative officers of the State of Wyoming, see Secs. 2102-2105.

See, also, for the laws of State control, Chap. ——, Secs. ——.

For the adjudication of water rights by boards, see Chap. 80, Secs. 1585-1595.

2 L. O. L., Sec. 6603.

attorney of the county are the legal advisers of the board and of the State engineer.[3]

State Engineer.—The State engineer is elected by the voters of the State, to hold office for a term of four years, and draws a salary of $3,000 per annum. He must be technically qualified and experienced as an hydraulic engineer. He is given general supervision of all the measurements and records of appropriation of waters of the State, and of all surveys and engineering work in which the State may be interested. He may employ assistants and purchase supplies necessary. His office is located in the Capitol Building at Salem. On or before November 30, of the year preceding the regular session of the legislature, he must give a full report of the work of his office, with such recommendations for legislation as he may deem advisable. He must, before entering upon the duties of his office, give a bond in the sum of $5000, and take an oath of office. The records of his office are public and are open to inspection. A schedule of fees of his office is also provided.[4]

Division Superintendents.—The division superintendents of each water division are elected by the voters of the respective divisions, to hold office for a term of four years at a salary of $2,400 per annum. Each of said superintendents shall have knowledge and experience relative to the irrigation law and its administration, and measurement of flowing water, evaporation, seepage, and common alkalies, drainage, and the hydrographic features of the water division in which he may reside. He shall have the general control of the water masters, execute the laws relative to the distribution of water, and perform such other functions as may be assigned to him. He may also make such reasonable regulations as to the distribution of waters as are not inconsistent with law. An appeal may be had from his decisions to the board of control.[5]

Water Masters.—The board of control shall divide each water division into water districts, and over each district appoint a water master. It is made the duty of the water master to divide the waters of the streams among the several ditches and reservoirs entitled to the same. He shall take all necessary steps to prevent waste of the water. He has the power to employ assistants in case of

[3] L. O. L., Secs. 6604-6608.

[4] L. O. L., Secs. 6598-6602. Amended as respects to the salary, Laws, 1911, p. 422.

[5] L. O. L., Secs. 6609-6614.

emergency. He shall not begin his work except upon written notice given him by one or more water users, and his compensation is $5 per day for the actual time employed. He is given the power of arrest.[6]

§ 1979. Appropriations of water prior to Act of 1909.—It will be noticed in the preceding section,[1] the rights to the appropriations of water under existing laws prior to the enactment of the Water Code of 1909 [2] were preserved. It therefore follows that there are two sets of laws governing the appropriations of water in the State of Oregon: First, those relating to appropriations made prior to the time that the Water Code went into effect; and, second, those governing appropriations made after it went into effect. As there are many existing rights acquired under the old laws, these laws are still preserved in the statute. It is necessary, therefore, that we give a brief abstract of the same.

By the Act of 1905 [3] it was provided that any person, association, or corporation intending to acquire the right to the beneficial use of any waters for the reclamation of arid lands, shall post in a conspicuous place a notice containing the name of the applicant and the source of water supply, the beneficial use to which the water is to be applied, the exact date of posting, and shall within fifteen days thereafter file in the office of the clerk of the proper county a duplicate of such notice, and shall also file a certified copy of the same with the State engineer, which copy shall be accompanied by such information, maps, field notes, plans, and specifications as may be necessary to show the method of construction.[4] The notice of appropriation must be posted, and a copy of the same filed for record in the office of the county clerk.[5] Such corporation is then given the right to condemn lands for its right of way.[6] It was also provided that the work must begin within six months of the posting of the notice and must be prosecuted without intermission until completed; all existing appropriations must be respected; ditches and

6 L. O. L., Secs. 6615-6623.

1 See Sec. 1978.

2 Laws, 1909, Chap. 216.

3 L. O. L., Sec. 6625; Laws, 1905, Chap. 228, p. 401.

4 L. O. L., Sec. 6625.

It must be noted that the above was superseded as to future appropriations by the Act of 1909, L. O. L., Secs. 6624, 6626.

5 L. O. L., Secs. 6528, 6529; Laws, 1891, as amended.

6 L. O. L., Secs. 6530, 6531; Laws, 1891, as amended.

feeders may be extended; the shortest possible route must be selected; a second corporation may use the same ditch; natural depressions in the earth may be used for a ditch; headgates must be maintained; the owner is liable for all damages for injuries sustained; bridges must be constructed at road crossings; embankments must be maintained; right of way for distributing ditches may be acquired; a lien on crops is given the company for the water furnished for irrigation; ditches are declared to be real property; the right to appropriate the water may be lost by abandonment; wilfully breaking or opening a gate or embankment is made a misdemeanor; all persons interested are to be made parties to any suit to adjudicate water rights; the right of way over State lands was granted, and that the legislature should have the power to fix the water rates, or to provide for commissioners for that purpose.[7]

As to the appropriation of water for mining and electrical power, the right is given to all persons, companies, and corporations, to appropriate waters for those purposes.[8] And, in general, the same rights were given, and subject to the same liabilities, as stated above, where the appropriation was for general purposes and for irrigation.[9]

By the special Act of 1901,[10] the right was given the board of public building commissioners to appropriate water to provide for the supplying of State institutions with water and water power.[11] The right to the use of the water might also be acquired by purchase or by condemnation proceedings. And for this purpose all actions must be brought in the name of the State.[12]

§ 1980. Appropriation of water in pursuance of Act of 1909.—According to the Water Code of 1909 [1] water can thereafter be appropriated in the State of Oregon in the following manner: [2]

7 L. O. L., Sec. 6533-6550; Act of 1891, as amended.

8 L. O. L., Sec. 6552.

See, also, Grande Ronde Elec. Co. v. Drake, 46 Ore. 243, 78 Pac. Rep. 1031; McMinnville v. Howenstein, 56 Ore. 451, 109 Pac. Rep. 81.

9 L. O. L., Secs. 6553-6574; Act of 1899, as amended.

10 Laws, 1901, p. 307.

11 L. O. L., Sec. 6581.

See, also, Salem Mills Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832.

12 L. O. L., Secs. 6582-6587; Act of 1901, as amended.

1 L. O. L., Secs. 6624-6634; Laws, 1909, Chap. 216, p. 332, Secs. 45-54.

2 For the appropriation of water according to laws existing prior to the Act of 1909, see the preceding section, No. 1979.

"Any person, association, or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement, or extension of any ditch, canal, or other distributing or controlling works, or performing any work in connection with said construction, or proposed appropriation, make an application to the State engineer for a permit to make such appropriation. Any person who shall wilfully divert or use water to the detriment of others without compliance with law, shall be deemed guilty of a misdemeanor. The possession or use of water, except when a right of use is acquired in accordance with law, shall be *prima facie* evidence of the guilt of the person using it." [3]

As to the filing and form of the application the Wyoming statute is largely followed.[4] And it is made the duty of the State engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, "but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, the application shall be referred to the board of control for consideration. It shall be the duty of the board to enter an order directing the refusal of such application, if, after full hearing, the public interest demands." [5] If the application is approved, the applicant may proceed with the construction of his works. Work must begin within one year thereafter and be completed within five years. The procedure for a reservoir permit is the same. When the appropriation is perfected the board of control shall issue a certificate. Certificates for power purposes shall be limited to forty years. The right acquired by an appropriation shall date from the filing of the application.[6]

[3] L. O. L., Sec. 6624.

See, also, Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Carns v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Ison v. Sturgill, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535; Shaw v. Proffitt, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092; Cookinham v. Lewis, 58 Ore. 584, 114 Pac. Rep. 88, 115 Pac. Rep. 342; Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

[4] For applications to appropriate water in Wyoming, see Secs. 2106, 2107; L. O. L., Secs. 6626, 6627.

[5] L. O. L., Sec. 6627.

See, also, Cookinham v. Lewis, 58 Ore. 584, 114 Pac. Rep. 88, 115 Pac. Rep. 342.

[6] L. O. L., Secs. 6628-6634.

See, also, Cookinham v. Lewis, *supra*.

An applicant may appeal to the board of control from any decisions of the State engineer.[7]

By the Act of 1911 [8] no permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application may be situated in some other State, but where the place of intended use is in the State of Oregon: Provided, however, that a permit may be denied, where the point of diversion is in the State of Oregon, but the place of beneficial use is in some other State, unless under the laws of such State water may be lawfully diverted within such State for beneficial use in the State of Oregon.

§ 1981. **Rights to waste and seepage water.**—All ditches constructed for the purpose of utilizing waste, spring, or seepage waters of the State shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing waters of running streams: Provided, that the person upon whose lands the seepage or spring water first arises shall have the right to the use of such waters.[1]

§ 1982. **The appropriation of water for power purposes—License fees.**—Owing to the many opportunities in the State of Oregon for the development of power, the legislature has enacted special laws governing the appropriation of water for that purpose. And, in addition to the usual conditions, the legislature has wisely provided that the use of the water for this purpose is also conditioned upon the payment to the State of certain graduated fees, according to the amount of power developed.

By the Act of 1909 [1] it is provided that every person, firm, or corporation might appropriate water for the purpose of the development of power, upon the payment annually in advance of certain fees to the State, as therein specified. "For the purpose of this

[7] L. O. L., Sec. 6631.

[8] Laws, 1911, Chap. 224, p. 404.

[1] L. O. L., Sec. 6673; Laws, 1893, p. 150, Sec. 1.

See, also, Brosnan v. Harris, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649; Morrison v. Officer, 48 Ore. 569, 87 Pac. Rep. 896; Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88; Borman v. Blackmon, —— Ore. ——, 118 Pac. Rep. 848.

[1] L. O. L., Secs. 6575-6580; Laws, 1909, Chap. 221, p. 370, Secs. 1-6.

Act, a horsepower is hereby defined to be 550 pounds of water per second of time for each foot of available fall."[2]

And by the Act of 1911[3] it was provided that every person, firm, corporation, or association, claiming the right to the use of water for power development, where said water was applied to the development or generation of power, and the power generated thereby prior to the 22d day of May, 1909, shall, on or before the first day of January, 1912, and on or before the first day of January of each year thereafter, pay to the State in advance "an annual license fee" based upon the theoretical water horsepower claimed under each and every separate claim to water, graduated as follows, to wit: Ten cents for each and every theoretical water horsepower up to 100, inclusive; 5 cents for each and every theoretical water horsepower in excess of 100, up to and including 1,000; and 1 cent for each in excess of 1,000. Provided, however, upon filing the statement as herein provided, the United States, or the State, or any municipal corporation, to any extent, or any other claimant to the right to the use of water for the generation of 25 theoretical horsepower, or less, shall be exempted from the payment of all fees herein provided. The fees provided shall be paid to the State engineer, and shall be accompanied by a written statement showing the extent of such claim. The amount of theoretical water horsepower upon which fees shall be paid, shall be computed by multiplying the maximum amount of the water claimed, expressed in cubic feet per second, by the average total fall utilized, expressed in feet, and dividing the product by 8.8. The filing of a claim to water in excess of the amount to which the claimant is legally entitled shall not operate to vest in such claimant any right to the use of such excess water, nor shall the payment of the annual license fees operate to vest in any claimant any right to the use of such water beyond the amount to which the claimant is legally entitled. The filing of such claim to water shall be conclusive evidence as to the abandonment by the claimant of all rights to water in excess of the claim as filed.[4]

Upon the completion of the appropriation, as provided by law, the appropriator for this purpose shall own and enjoy all the uses thereof, so long as he pays the annual license fees therefor, for a term not exceeding forty years from the date of the appropriation,

[2] L. O. L., Sec. 6576.
[3] Laws, 1911, Chap. 236, p. 418.
[4] Laws, 1911, Chap. 236, p. 418, Secs. 1-4.

and shall have a preference right to reappropriate such water, under such conditions as may be prescribed by law at the expiration of such term of years, provided that all fees have been paid.[5]

Should any claimant fail or neglect to file such statement within the time specified, or fail or neglect to pay such fees within the time specified, the fees due and payable shall be the amount specified above, increased by 25 per cent, and the State shall have a preference lien therefor, together with interest at the rate of 10 per cent per annum from the date of delinquency, upon the property of the claimant, and upon notice from the State engineer, the attorney general shall proceed to foreclose the lien and collect the amount due, in the same manner as other liens on real property are foreclosed.[6]

By an Act of 1911 [7] all license fees paid as above provided are created a "survey fund," in the hands of the State treasurer to be used by the State engineer in making surveys and investigations looking to the gathering of data concerning topographic features, stream flow, and water power within the State.

§ 1983. **Corporations and companies.**—Upon the subject of the appropriation of water for general uses and irrigation by corporations, it is provided:

"A corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, and other purposes above described,[1] may appropriate and divert water from its natural bed or channel and condemn a right of way for its ditch or canal or flume, and may condemn the rights of riparian proprietors upon the lake or stream upon which the appropriation is made, upon complying with the terms of this Act." [2] Such corporation is given the right to enter private lands and make surveys.[3]

A corporation which is organized merely to facilitate distribution of water among individual proprietors, though they do not surrender their rights to it, is yet in such a privity of estate with them as to enable it to defend in their behalf in litigation affecting their rights to the use of water.[4]

5 L. O. L., Sec. 6578.

6 Laws, 1911, Chap. 236, p. 418, Sec. 2.

7 Laws, 1911, Chap. 237, p. 419.

1 For these purposes, see L. O. L., Sec. 6525.

2 L. O. L., Secs. 6526, 6532; Act of 1891, as subsequently amended.

3 L. O. L., Sec. 6527; Act of 1891, as amended.

4 Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731.

§ 1984. **Water rates.**—By the Act of 1891, it was provided that "this Act may at any time be amended by the legislative assembly and commissioners for the management of water rights and the use of water may be appointed and rates for the use of water may be fixed by the legislative assembly or by such commissioners; but rates shall not be fixed lower than will allow the net profits of any ditch or canal or flume or system thereof to equal the prevailing legal rate of interest on the amount of money actually paid in and employed in the construction and operation of said ditch or canal or flume or system thereof." [1]

By the Act of 1911 [2] the Railroad Commission of Oregon was vested with the power and jurisdiction to supervise and regulate every public utility of the State, and the charges made by any public utility for heat, light, water, or power produced, transmitted, or furnished. It was provided that such charges should be reasonable and just and every unjust or unreasonable charge for such service was prohibited, and declared unlawful.

Every public utility shall file with the commission within a time to be fixed by the commissioner a schedule which shall be open to public inspection, showing rates, tolls, and charges, which it has established, and which are in force at the time, for any service performed by it within the State. All rules and regulations that in any manner affect the rates charged or to be charged for any service must be filed with the schedule.

A copy of so much of said schedule as the commission shall deem necessary for the use of the public shall be printed in plain type and kept on file in every office of such public utility where payments are made by consumers so as to be readily accessible and conveniently inspected. Copies of all new schedules must be filed in the office of the utility where payment is received ten days prior to their taking effect. It is made unlawful to collect any greater rate than provided in the schedule.

Upon complaint made against any public utility by any mercantile, agricultural, or manufacturing system, or by any political or municipal organization, or by three persons, firms, or associations, that any or all rates are in any respect unreasonable or unjustly discriminatory or that any regulations, measurements, practice, or

1 L. O. L., Sec. 6550.

2 Laws, 1911, Chap. 279, p. 483.

act, whatsoever, affecting or relating to the production, transmission, or furnishing of, among other things, water or any service connected therewith in any respect unreasonable, insufficient, or unjustly discriminatory, the commission shall proceed with or without notice to make such investigations as it may deem necessary, but no order affecting the rates shall be entered by the commission without a formal hearing. The hearing and procedure is then provided for upon which the commission must make the order fixing such rates.

§ 1985. **Rights of way and water rights—Condemnation.**—Rights of way are given over all State lands for the purpose of constructing ditches, canals, or other works; and the lands afterward sold over which the same has been previously granted, shall be sold subject to such rights of way.[1]

For the exercise of the right of eminent domain it is also provided:

"The United States, the State, or any person, firm, or corporation, shall have the right of way across and upon public, private, and corporate lands, or other rights of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing, and conveying water for irrigation and drainage, or any other beneficial purpose, upon payment of just compensation therefor." Rights of way are also granted through works already constructed.[2] Such rights of way may be acquired in the manner provided by law for the taking of private property for public use.

By the right of eminent domain a corporation organized for the purpose of the construction of any ditch or flume for conducting water for domestic or irrigation purposes, or for the selling of the same to the public, or for the manufacture and sale of electricity, may condemn the necessary right of way over private property.[3] Special proceedings are provided therefor.[4]

Relative to the condemnation of water rights, it is provided that whenever it is necessary that the State of Oregon shall require any

[1] L. O. L., Secs. 2940-2942.

[2] L. O. L., Sec. 6596, Subds. 1, 2; as amended, Laws, 1911, Chap. 238, p. 421.

[3] L. O. L., Secs. 6838, 6839.

See, also, Bridal Veil Lum. Co. v. Johnson, 30 Ore. 210, 46 Pac. Rep. 790.

[4] L. O. L., Secs. 6838-6873.

real property, water, water courses, and water and riparian rights, or any right or interest therein for any public use, the necessity for such acquisition to be decided and determined in the first instance by the State board of commissioners, trustees, or other State board having direction of the State institution or department for which the same is desired, or by the State Land Board, said board is authorized to institute condemnation proceedings for such property.[5]

§ 1986. The determination of existing water rights.—Under the Water Code of Oregon of 1909 [1] the Wyoming procedure is largely followed.[2] There are, however, some changes.

Such a determination must be instituted by a petition to the board of control, signed by one or more water users upon any stream. In case suit is brought in the circuit court for the determination of rights, the case may, in the discretion of the court, be transferred to the board of control.[3] Notice of the intended proceedings must be published and notice to the individual claimants to the water must be mailed to them 30 days before the hearing. A statement of each claimant under oath must be filed with the division superintendent, setting forth his claim to the water and the purpose for which it is used.[4] The division superintendent is to take the testimony, unless

5 L. O. L., Sec 6872.

As to the right of incorporated cities and towns to appropriate land and water rights, see L. O. L., Sec. 6874, as amended by Acts filed Feb. 18 and 21, 1911, Laws, 1911, Chaps. 104, 145.

1 L. O. L., Secs. 6635-6679; Laws, 1909, Chap. 216, p. 321, Secs. 11-35.

2 For the determination of rights in Wyoming, see Secs. 2111-2114.

For the determination of rights by boards, see Chap. 80, Secs. 1585-1595.

3 L. O. L., Sec. 6635.

"The intent of the Act seems to be to place the control of irrigating water under the jurisdiction of the board of control as rapidly as rights are determined by it, and become a matter of record in its office. When the board convenes to determine such rights, prior decrees, made independent of action by the board, are conclusive upon it as between the parties to such decrees, and thereafter the rights established thereby may be enforced by the water master, the same as though they had been originally determined by the board. But, in the absence of such determination in accordance with the water code, such rights must be enforced by the Court making the decree." Wattles v. Baker County, 59 Ore. 255, 117 Pac. Rep. 417.

Decree affects parties only. Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170, 1 Water and Min. Cas. Ann. 207.

For extent of riparian rights, see State *ex rel.* Olding v. Stampfly, —— Ore. ——, 25 Pac. Rep. 148.

4 L. O. L., Secs. 6636-6639.

he is interested, in which case it may be taken by some other member of the board of control. The fees as specified must be paid by each claimant. Notice must be given by mail to each claimant of the completion of the taking of testimony.[5]

Any one claiming any interest in the stream may institute a contest against the claims of any other claimant or claimants. After notice, a hearing of such contest must be had before the division superintendent.[6]

The evidence in the original hearing, and the evidence taken in all contests, must be transmitted to the board of control. It is then made the duty of the State engineer to make an examination of the stream and ditches, canals, and other works, and of the lands, and to make a map showing the same. As soon as practicable after the compilation of such data, it is made the duty of the board of control to make an order determining and establishing the several rights to the waters of such stream, and to issue certificates for the same.

The Oregon law differs from that of Wyoming, in this: Instead of claimants being given a right of appeal from orders of the board of control to the court, the court in Oregon must in each instance confirm the order of the board or make a new adjudication. Upon the filing of the evidence with the clerk of the circuit court of the proper county, the court must fix a time at which the determination shall be heard in said court. From and after the filing of the evidence and order of determination in the circuit court, the proceedings are as nearly as may be like those in a suit of equity. Within 30 days from such filing, any party may file exceptions to the determination by the board. If no exceptions are filed, the court on the day set shall make a decree affirming the determination of the board. All parties may be heard by counsel upon the considerations of the exceptions. The court may, if necessary, remand the case for such further evidence to be taken by the superintendent as it may direct. After the hearing the court shall enter a decree affirming or modifying the order of the board of control. Appeals may be had to the Supreme Court as in other cases.[7]

It is made the duty of all claimants to present their claims, otherwise they "shall be barred and estopped from subsequently asserting any right theretofore acquired upon the stream or other body

[5] L. O. L., Secs. 6640-6642.
[6] L. O. L., Secs. 6643-6645.
[7] L. O. L., Secs. 6648, 6650.

of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed."[8] The disbursements made in litigating the rights in such actions shall be taxed by the court as in other equity cases.[9]

"Such decree shall in every case declare as to the water right adjudged to each party, whether riparian or by appropriation, the extent, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority." A certified copy of such decree shall be filed in the office of the State engineer.[10]

"The determination of the board of control as confirmed or modified as provided in this Act in proceedings shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination."[11]

"In suits for injunction affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed."[12]

§ 1987. The protection of highways.—It is made the duty of all road supervisors to ascertain whether or not there is any water running or flowing in or upon any county road, as overflow or seepage from any irrigation or other ditch. If such is found, he must notify the owner or user of such ditch to, within six hours from the hour of service of such notice, have the water diverted from such road and to keep the water from again flowing or seeping upon such road. If the owners fail to remove such water, it is the duty of the supervisor to remove the same and to take such steps as will prevent the water from coming upon such road. The expense for doing this work is made a lien upon the ditches and lands of the owner,

8 L. O. L., Sec. 6656.
9 L. O. L., Sec. 6658.
10 L. O. L., Sec. 6559.
11 L. O. L., Sec. 6655.
See Porter v. Small, —— Ore. ——, 120 Pac. Rep. 393.
12 L. O. L., Sec. 6667.

prior and superior to all other liens except taxes. This lien may be foreclosed.[1]

Bridges and embankments must also be constructed and maintained by the owners of ditches and canals.[2]

§ 1988. **Mechanics' liens.**—Every person who shall perform any labor upon or furnish any material for the working or development of any mine, and who shall do work or furnish material for any flume, ditch, or pipe line, in connection with the working or development of any mine, or do any freighting therefor, or furnish any provisions, materials, or supplies therefor, is given a lien upon such mine, flume, ditch, or pipe line, and all structures used in connection with said mine. The lien claimed must be filed with the county clerk of the proper county within 60 days after he has ceased to labor thereon or to furnish such material. The lien may be foreclosed as in other cases.[1]

§ 1989. **The distribution of water under the code of 1909.**—The owners of ditches and canals must construct and maintain to the satisfaction of the division superintendent substantial headgates and measuring devices.[1] The State engineer has the authority to inspect all works and order such alterations as he may deem necessary for the security of the work or the safety of any person residing on or owning lands in the vicinity of such works.[2] And the inspection of such works may be required by any such persons.[3]

The use of water from reservoirs is regulated similar to that of Wyoming and Idaho, by the water master closing all headgates on the streams of those not entitled to the water, as will enable those having the right to the water to secure the volume to which they are entitled.[4] All joint owners of works are liable for their proportionate share of the work necessary for the proper maintenance and operation of the same, and the one, who after notice, does such work has a lien against the interest of the person or persons in default

1 L. O. L., Secs. 6427-6431.
2 L. O. L., Secs. 6541, 6542.
1 L. O. L., Secs. 7444, 7445.
See, also, Lewis v. Beeman, 46 Ore. 311, 80 Pac. Rep. 417; Durkheimer v. Copperopolis Copper Co., 55 Ore. 37, 104 Pac. Rep. 895.
1 L. O. L., Sec. 6660.
2 L. O. L., Sec. 6661.
3 L. O. L., Sec. 6662.
4 L. O. L., Sec. 6663.

and may enforce the same by foreclosure.[5] The water master may take charge of partnership ditches in cases of dispute and distribute the water.[6]

Water for irrigation purposes shall be appurtenant to the land upon which it is used, but said right may be severed from said land and simultaneously transferred to and become appurtenant to other land without losing priority, on approval of an application of the owner by the board of control.[7]

Where there is not sufficient water for all, a preference right is given to those using the water for domestic purposes.[8]

"Said water master shall, as near as may be, divide, regulate, and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water master shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water."[9]

§ 1990. The location of artesian wells.—The opportunity of securing artesian wells in the State of Oregon called for the enactment of a special law upon that subject.[1]

Whenever the majority of the owners of real estate representing also the majority of the number of acres of land of any proposed district in any county of the State desire to bore for the purpose of securing artesian water, they shall present a petition to the county court asking the court to create a district for that purpose. The court is then authorized to order an election for that purpose. And if it be found that a majority of the votes cast at such election are in

5 L. O. L., Secs. 6664, 6665.

6 L. O. L., Sec. 6666.

7 L. O. L., Sec. 6668.

See Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88.

8 L. O. L., Sec. 6675.

9 L. O. L., Sec. 6618; Little Walla Walla Irr. Union v. Finis Irr. Co., —— Ore. ——, 124 Pac. Rep. 666; Cantrall v. Sterling Min. Co., —— Ore. ——, 122 Pac. Rep. 42; Caviness v. La Grande Irr. Co., —— Ore. ——, 119 Pac. Rep. 731; McCoy v. Huntley, —— Ore. ——, 119 Pac. Rep. 481.

1 See L. O. L., Secs. 6232-6244.

favor of a tax for boring for artesian water, the county court will then place in the next general levy the number of mills necessary to create such tax upon the assessed value of the property within the district.

After 50 per cent of the special tax has been paid into the county treasury the county court shall call into consultation the State engineer, who, together with the county court and county commissioners, shall proceed to locate the well in the proposed district, which shall be ascertained in the following manner: 1. Centralization of location; 2. Location with reference to altitude and the possibilities of its serving the greatest number of people within the district; 3. Location relative to indications for securing water; 4. After ten days' notice by posting in three conspicuous places within the district, bids from the various property owners as a bonus for location, provided the well be a success; 5. Location with reference to the bids for the well if it is not artesian, provided it furnishes a sufficient supply of water for pumping for the land upon which it is located. With reference to the above, contracts may be let to sink such a well.[2]

Provisions are made for the reservation of water for public use, and for the distribution of the water, which latter must be for the best interests of the whole district.[3]

For the purpose of the Act, an artesian well is defined to be "any artificial hole made in the ground not less than six inches in diameter at the bottom, through which water naturally flows from subterranean sources to the surface of the ground for any length of time."[4]

§ 1991. **The floating of logs and timber.**—Upon the application of any individual, association, or corporation the county court of any county in the State may declare all or any portion of any river or stream within the county, which is not in fact navigable for commercial purposes, to be a public highway for floating and transporting logs, timber, and lumber, and the court may also direct the widening, deepening, straightening, removing obstructions from, building of dams and booms in, and otherwise improving such stream as may be necessary for such purpose.[1]

2 L. O. L., Sec. 6238.
3 L. O. L., Secs. 6239, 6240.
4 L. O. L., Sec. 6241.

1 L. O. L., Sec. 6453.
See, also, Hood River Lumber Co., 35 Ore. 498, 57 Pac. Rep. 1017.

Rights of way may be acquired over private lands, either by contract or by special condemnation proceedings.[2]

The right to the use of such streams may be leased to parties desiring to use the same for the purposes named, the tolls for the same being fixed by the court.[3]

§ 1992. **The Carey Act in Oregon.**—The provisions of the Carey Act apply to the State of Oregon and were accepted by the legislature of that State. The selection, management, and disposal of the land is vested in the desert land board, consisting of the Governor, Secretary of State, treasurer, attorney general and the State engineer.[1] The usual provisions are made for the application for the withdrawal of lands and for the contracts with the applicants, and for the lien of the contracting company for the reclamation of the land.[2] "If the application is made in proper form, and it is made to appear that the proposed plan is feasible, that the applicant is financially able to complete the work, and that its completion will be to the best interests of the State, then it shall be the duty of the board, at the expense and cost of the applicant, to make proper application for the selection and withdrawal of the lands included in such application."[3]

Upon the subject of the transfer of the control of the irrigation system there is a somewhat unusual provision. It is provided that for such time as specified in the contract and not to exceed ten years from the date thereof the control and management of the reclamation works shall be vested in the person, association, or corporation having contract with the State. At the expiration of such time the clear and unincumbered title to the reclamation works and all franchises thereunto pertaining, also the control and management thereof, shall pass to the purchasers of water rights from the reclamation works in the manner to be prescribed in the contract, the contractor retaining an interest in such works proportional to the amount of water rights unsold.[4]

No land shall be open to entry and no water rights shall be sold

2 L. O. L., Secs. 6454, 6455.
3 L. O. L., Secs. 6455-6457.
1 L. O. L., Secs. 3860-3863.
For full discussion of the Carey Act, see Chap. 67, Secs. 1312-1330.
2 L. O. L., Secs. 3864-3866, 3868-3870.
3 L. O. L., Sec. 3864.
4 L. O. L., Sec. 3867.

until the construction of the works is sufficiently advanced to insure a water supply.[5] Any citizen of the United States over the age of 21 years may make application for land. Each application must be accompanied with a water contract. Each application shall be accompanied by a payment of not less than $1 per acre included in the application, which payment shall be made by the contractor out of the first payment by the applicant. Upon filing with the board a release of the construction lien, accompanied by satisfactory proof of reclamation, cultivation, and settlement, it is made the duty of the board to deed to the applicant, or to his assignee, the land.[6]

All moneys received by the board constitute a "reclamation fund," to be used in securing the reclamation of other lands.[7]

§ 1993. **Irrigation district law in Oregon.**—Oregon has also adopted the irrigation district law, following that of California with the more recent amendments.[1] The proceedings for the organization of such a district is instituted upon the petition of 50, or a majority of the holders of lands susceptible of irrigation from a common source of supply, and do not differ materially from the proceedings for the organization of such districts in other States.[2] The board is also given "the right to acquire, either by lease, purchase, condemnation, or other legal means, all lands and waters and water rights, rights of way, and other property, including works constructed and being constructed by private owners," which may be necessary.[3] The board is authorized to enter into contracts with the United States, for the construction of the necessary works, under the provisions of the National Reclamation Act.[4]

The board is also authorized to borrow money and to issue bonds of the district covering the same. All plans, surveys, and estimates must be submitted to the State engineer, who shall make and file a report upon the same with the board, "which report shall contain

5 L. O. L., Sec. 3871.

6 L. O. L., Secs. 3872, 3873.

7 L. O. L., Sec. 3874.

1 For irrigation districts, see Chap. 70, Secs. 1366-1432.

For the irrigation district laws of Oregon, see L. O. L., Secs. 6167-6217, amended by Laws, 1911, Chap. 223, p. 378.

2 L. O. L., Secs. 6168-6178; as amended, Laws, 1911, Chap. 223, p. 378.

3 L. O. L., Sec. 6179; as amended, Laws, 1911, Chap. 223, p. 383.

4 L. O. L., Sec. 6181, 6183.

such matters as in the judgment of the State engineer may be reasonably necessary."[5]

Assessments may be levied and collected sufficient to pay all charges and expenses: Provided, "that in no case shall any land be taken for irrigation purposes under this Act which from any natural causes can not be irrigated or which is incapable of cultivation.[6] In no event shall the board of directors incur an indebtedness in excess of $200 per acre in the aggregate of the land situated in the district, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void," except the sum of $5000, which is allowed for the organization of the district.[7] The boundaries of a district may be changed in the usual manner.[8] The circuit court is given jurisdiction to confirm all proceedings.

The law has been declared to be constitutional by the Supreme Court of the State.[9]

§ 1994. Provisions in aid of the National Reclamation Act.—Whenever the proper officers of the United States, as authorized by the National Reclamation Act,[1] shall file in the office of the State engineer a written notice that the United States intends to utilize certain specified waters, such waters shall not be subject to further appropriation under the laws of the State, but shall be deemed appropriated by the United States: Provided, that within three years from the date of such notice final plans of the proposed works by the United States shall be filed in the office of the State engineer, and that within four years from said notice the United States shall authorize the construction of such proposed works. Such water rights may be adjudicated.

The State engineer is authorized to make topographic and hydrographic surveys in co-operation with the officers of the United States Government. No lands belonging to the State within the areas to be irrigated from such works, shall thereafter be sold except

5 L. O. L., Secs. 6182-6185; as amended, Laws, 1911, Chap. 223, p. 285.

6 L. O. L., Secs. 6186-6204; as amended, Laws, 1911, Chap. 223, p. 388.

7 L. O. L., Sec. 6213; as amended, Laws, 1911, Chap. 223.

8 L. O. L., Sec. 6213; as amended, Laws, 1911, Chap. 223.

9 Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982. See, also, Hall v. Hood River Irr. Dist., 57 Ore. 69, 110 Pac. Rep. 405, 1 Water and Min. Cas. Ann. 151.

1 See Chap. 65, Secs. 1235-1236.

in conformity with the classification of farm units by the United States. The right of way for the above purposes is given over State lands.[2] The right of condemnation of rights of way for the necessary works is granted, as is the case with others.[3]

§ 1995. **The pollution of waters.**—Any person who shall put any sewage, drainage, or refuse, or polluting matter, as either by itself or in connection with other matter which will corrupt or impair the quality of any well, spring, brook, creek, branch, or pond of water, which is used or may be used for domestic purposes or for livestock, shall be deemed guilty of a misdemeanor, and punishable by fine or imprisonment, or both.[1] The pollution of any waters from which any city or municipal corporation of any adjoining State obtains its water supply is made a misdemeanor and punishable by a fine in any sum not exceeding $500.[2] Any person who puts a carcass of any dead animal into any river, creek, or pond is punishable by a fine of not less than $2 nor more than $25.[3] Any one exploding any giant powder, dynamite, or other explosives, or casting any gas, lime, *cocculus indicus,* or any other substance poisonous to fish, is punishable by a fine of not less than $200 or imprisonment in the county jail not less than 30 days nor more than one year.[4] The casting of sawdust, planer shavings, or waste of this nature is punishable by a fine of not less than $50 nor more than $500 for each and every offense.[5]

§ 1996. **Criminal statutes.**—It is made a misdemeanor for any owner of any dam or other obstruction in any stream to fail to pro-

2 L. O. L., Secs. 6588-6593.

See, also, the Act of 1911, Chap. 71, p. 110, providing for the co-operation with the United States in making topographic maps within the State of Oregon, and in the investigation of its water resources.

3 L. O. L., Sec. 6596, Subds. 1, 2; as amended, Laws, 1911, Chap. 238, p. 421.

1 L. O. L., Secs. 2237-2240.

See, also, for the general discussion on the pollution of waters, Chap. 58, Secs. 1174.

2 L. O. L., Sec. 2241.

3 L. O. L., Sec. 2243.

4 L. O. L., Secs. 2337, 5269, 5270.

5 L. O. L., Sec. 2338.

See, also, special Acts to prevent the pollution of the waters of the North Umpqua and Deschutes rivers, Laws, 1911, Chap. 8, p. 27; Laws, 1911, Chap. 45, p. 66.

See Provolt v. Bailey, —— Ore. —, 121 Pac. Rep. 961.

vide a passageway for fish.[1] It is also made a misdemeanor for any owner, or other person in charge of any mill race, irrigating ditch, or canal to fail to place at the intake thereof a wire netting so as to prevent the passage of fish into the same.[2]

Any person wilfully injuring or destroying any water ditch, canal, or other works of this nature is punishable by a fine of not less than $10 nor more than $500.[3]

Any person who shall wilfully divert or use water to the detriment of others, without compliance with law, shall be deemed guilty of a misdemeanor.[4] The willful waste of water to the detriment of another is a misdemeanor. Also the unlawful obstructing of any works of another.[5]

§ 1997. **Riparian rights in Oregon.**—Prior to the decision of the Supreme Court of Oregon in the case of Hough v. Porter, on January 5, 1909,[1] the strict rule of the common law of riparian rights as to the use of the waters of the natural streams was adhered to by the decisions of the courts.[2] By that decision, however, the common law doctrine of the right of a riparian proprietor to the undimin-

1 L. O. L., Sec. 5288.

2 L. O. L., Sec. 2356.

3 L. O. L., Sec. 1975.

See, also, for the pollution of waters, Secs. 1129-1147.

4 L. O. L., Sec. 6624.

5 L. O. L., Secs. 6669-6671.

1 Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083.

2 See Taylor v. Welch, 6 Ore. 198; Oregon Iron Co. v. Trullenger, 3 Ore. 1; Shively v. Hume, 10 Ore. 76; Moor v. Willamette etc. Co., 7 Ore. 355; Hayden v. Long, 8 Ore. 244; Shaw v. Oswego Iron Co., 10 Ore. 371, 45 Am. Rep. 146; Shook v. Colohan, 12 Ore. 239, 6 Pac. Rep. 503; Weiss v. Oregon Iron Co., 13 Ore. 496, 11 Pac. Rep. 255; Faull v. Cooke, 19 Ore. 455, 26 Pac. Rep. 662, 20 Am. St. Rep. 836; Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Salem Mills Co. v. Lord, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Brown v. Gold Coin M. Co., 48 Ore. 277, 86 Pac. Rep. 361; Morton v. Oregon etc. R. Co., 48 Ore. 444, 87 Pac. Rep. 151, 7 L. R. A., N. S., 344, 120 Am. St. Rep. 827; Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Little Walla Walla Irr. Union v. Finis Irr. Co., —— Ore. ——, 124 Pac. Rep. 666; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154; Micelli v. Andrus, —— Ore. ——, 120 Pac. Rep. 737; Eastern Oregon Land Co. v. Willow River etc. Co., 187 Fed. Rep. 466.

See, also, State *ex rel.* Olding v. Stampfly, —— Ore. ——, 125 Pac. Rep. 148; Sherred v. City of Baker, —— Ore. ——, 125 Pac. Rep. 826.

ished flow of a stream without use was utterly repudiated, and his rights limited to actual use of the water, sufficient for his domestic demands and to water his stock and to irrigate his garden. Also by the United States Circuit Court for Oregon, it was said in a recent case: "The modern tendency is to make the beneficial use of water the test of the right, and unless it is put to a beneficial use by a riparian proprietor or is of sole substantial benefit to him, he ought not to be allowed to prevent its use by others."[3] But the subject was not allowed to remain at rest here simply by court decisions. By the Water Code of 1909[4] the right to the water of natural streams by riparian proprietors was limited to the quantity actually applied to a beneficial use within the time fixed by the board of control and further that the extent of such right to the use of the water must be adjudicated as provided by the Act.[5] In view of the above it may be said that the State of Oregon has by court decision and by statutory law abrogated the common law of riparian rights as to the use of the waters of natural streams, making the right to use such waters by all dependent upon the actual application of all the water claimed to some beneficial use or purpose.

[3] Eastern Ore. Land Co. v. Willow River etc. Co., 187 Fed. Rep. 466.

[4] L. O. L., Sec. 6595, Subds. 2, 3.

[5] L. O. L., Sec. 6595, Subd. 8.

CHAPTER 98.

PHILIPPINE ISLANDS.

§ 1998. Particular features of the islands.
§ 1999. Irrigation on the islands.
§ 2000. Criticism of the Philippine laws.
§ 2001. The right to appropriate waters—Statute of the United States.
§ 2002. The title to waters—Spanish-Philippine law.
§ 2003. The use of public waters—Spanish-Philippine law.
§ 2004. Subterranean waters—Spanish-Philippine law.
§ 2005. Rights of way—United States statute.
§ 2006. Rights of way and condemnation therefor—Spanish-Philippine law.
§ 2007. General provisions—Spanish-Philippine law—Defensive works—Expenses of construction—Eminent domain of waters—Sale.
§ 2008. Easements with regard to waters—Spanish-Philippine law.
§ 2009. Riparian rights in the Philippines.

§ 1998. Particular features of the islands.—The Philippine Islands constitute a portion of the most recent acquisition of territory by the United States. As we have seen in a previous portion of this work, these islands were acquired from Spain as the result of the treaty which ended the Spanish-American War.[1]

The Islands consist of an archipelago in the southeast of Asia, extending from 4° 40′ to 20° north latitude, and from 116° 40′ to 126° 30′ east longitude. On the west and northwest they are separated from China and the Indo-Chinese Peninsula by the China Sea; toward the east lies the Pacific; on the north a number of smaller islands stretch out toward Formosa. The number of islands of the archipelago is something in excess of 1400. Before the treaty referred to above, for three centuries, the greater part of the territory had been nominally in Spanish possession, although some of the tribes of the interior had never been conquered. All of the islands may be described in general as mountainous and hilly. Volcanic forces have had a great share in shaping the archipelago, and a large number of mountains bear the stamp of their former activity.

The northern islands lie in the region of typhoons. Three seasons are usually recognized—a cold, a hot, and a wet. The cold extends from November to February or March; the hot lasts from March to

1 See Sec. 398.

June, and the heat becomes very oppressive before the beginning of the southerly monsoon; the wet season is usually ushered in by heavy rains, locally known as "collas." During July, August, September, and October the rain comes down in torrents, and large tracts of the lower country are flooded.

The temperature of the cold season ranges from 72° to 86° F., the hot season from 82° to 88° F., and the wet season from 75° to 87° F.

§ 1999. **Irrigation on the islands.**—For many years irrigation has been practiced in the Philippine Islands under the Spanish systems and laws. When the United States acquired the territory it very soon began an investigation of the subject and many new features, both upon the practical side of the question and the laws, have been adopted. Many irrigation projects have been instituted and consummated by private capitalists and are now in active operation. The laws are still somewhat unsatisfactory. The Philippine Commission seems to be somewhat at variance with the legislative assembly of the Islands, and although the commission has suggested a number of bills tending toward the regulation and control of the waters of the Islands, for irrigation and other useful purposes, as yet no satisfactory law has been enacted.

On the 28th of March, 1910, the Governor General of the Islands submitted to the Philippine legislature the following:

"The last legislature passed a law providing for a continuing annual appropriation of 750,000 pesos for the purposes of irrigation. A division of irrigation has been created in the bureau of public works, a competent engineer placed in charge of this division, and a number of experienced engineers brought to the Islands and set to work making studies on the various projects submitted for consideration. Money has already been allotted for the construction of many of these systems, and the work has begun on more than one.

"It appears, however, that there is no provision of the law providing for the manner of collecting from the people benefited the cost of construction and expense of operation and maintenance of the system as provided under the terms of the law, so that the Islands are being deprived of the benefits of early construction pending the completion of the agreements with property owners to take water and pay for it at the rate fixed by the Government. . . .

"The study of experts on the Islands has also revealed the fact that there is an urgent necessity for a law fixing the terms upon which parties may use the water of rivers passing through or near their estates, and enable the Government to assure property owners who have established irrigation systems, of legal and indisputable rights to the continued use of water, fixing a method by which prior claims shall be recognized and new claims established." [1]

At that assembly a bill was proposed, entitled "An Act to provide a system for the regulation, control, distribution, use, and right of the public waters and for the determination of existing rights thereto within the Philippine Islands and to provide for surveys and for the construction, maintenance, and operation of irrigation projects by the Government of the Philippine Islands and for repayment of the money expended therein."

The bill was based somewhat upon the laws of State control, discussed in a previous chapter.[2] The bill failed of passage for the reason that the assembly could not agree to some of the amendments proposed by the Philippine Commission.

§ 2000. **Criticism of the Philippine laws.**—The laws governing the right to the use of water in the Philippine Islands are based largely upon the civil law, except as the same is modified by the Philippine Civil Code, discussed in subsequent sections of this chapter.[1] Upon the acquisition of jurisdiction by the United States over the Islands, the right to water was made conditional upon its application to some beneficial use. In the meantime the Spanish-Philippine laws are still in full force and effect, except where modified by the Statutes of the United States and by the new Philippine Assembly.[2]

§ 2001. **The right to appropriate waters—Statute of the United States.**—Although there are no provisions as to how waters may be appropriated, the right of appropriation is given by the statutes of the United States applicable to the Philippine Islands.

1 Philippine Legislative Journal, 1910, p. 17.

2 For the laws of State control, see Chap. 68, Secs. 1337-1367.

1 See Secs. 2001-2004.

2 See Secs. 2001-2004.

By the Act of Congress of July 1, 1902, the same being an Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands,[1] Section 19, it was provided: "That the beneficial use shall be the basis, the measure, and the limit of all rights to water in said Islands, and the Government of said Islands is hereby authorized to make such rules and regulations for the use of water, and to make such reservations of public lands for the protection of the water supply, and for other public purposes not in conflict with the provisions of this Act, as it may deem best for the public good."

By Sections 50 and 51 of the above Act it was also provided:

"Sec. 50. That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 51. That all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section."

It will be noticed that the last two sections are but a re-enactment of Sections 2339 and 2340 of the Revised Statutes of the United States, heretofore discussed in previous sections.[2]

§ 2002. **The title to waters—Spanish-Philippine law.**—By the old Spanish laws in force in Cuba, Porto Rico, and the Philippines, governing the subject of waters on those islands, up to the time of

[1] 5 Fed. Stats. Ann., 1905, pp. 718-742; 32 Stat. L. 691-712.

[2] See Revised Statutes of the United States, 1878, Secs. 2339, 2340; 7 Fed. Stats. Ann., 1905, pp. 1090-1096; 14 Stat. L. 253.

the Treaty with Spain after the Spanish-American War, it was provided, upon the subject of the ownership of waters as follows:[1]

"Art. 407. The following are of public ownership:

"1. Rivers and their natural beds.

"2. Continuous or intermittent waters from springs or brooks running in their beds and the said beds.

"3. Waters rising continuously or intermittently in lands of said public ownership.

"4. Lakes and ponds formed by Nature on public lands and their beds.

"5. Rain waters running through ravines or sandy beaches, the beds of which shall also be public property.

"6. Subterranean waters on public lands.

"7. Waters found within the zone of operation of public works, even when they are made by a concessionaire.

"8. Waters flowing continuously or intermittently on estates belonging to private parties, to the State, to Provinces, or to towns, from the moment they leave said estates.

"9. The overflow of fountains, sewers, and public institutions.

"Art. 408. The following are of private ownership:

"1. Waters, either continuous or intermittent, rising on private estates as far as they run through them.

"2. Lakes and ponds and their beds when formed by Nature on said estates.

"3. Subterranean waters found on the same.

"4. Rain waters falling thereon as long as they remain within their boundaries.

"5. The beds of flowing waters, continuous or intermittent, formed by rain water, and those of brooks crossing estates which are not public property.

"In every drain or aqueduct the water, the bed, the sloping bank, and the sideways are considered as an integral part of the estate or building to which the waters are destined. The owners of estate through or along the boundaries of which the aqueduct passes can allege no ownership over it, nor any right to make use of its bed or sideways, unless they base their claim on title deeds specifying the right or the ownership claimed."

[1] Articles 407, 408, Civil Code in force in Cuba, Porto Rico, and the Philippines, Washington, 1899, as translated.

§ 2003. The use of public waters—Spanish-Philippine law.—That the use to public waters may be acquired by individuals is declared in the following language:[1]

"Art. 409. The use of public waters is acquired:

"1. By administrative concession.

"2. By prescription of twenty years.

"The limits of the rights and obligations of these uses shall be those appearing, in the first case, from the terms of the concession; and, in the second, from the manner and form in which the waters have been used.

"Art. 410. Every concession of use of waters is understood without prejudice to third parties.

"Art. 411. The right to make use of public waters is extinguished by the forfeiture of the concession, and by non-user for twenty years."

The regulations as to the use of private waters are in the following terms:[2]

"Art. 412. The owner of an estate containing a spring or source of a brook, continuous or intermittent, may use its waters as far as they run through the estate; but the overflow is public and the use thereof is governed by the special law of waters.

"Art. 413. Private ownership of beds of rain waters does not give a right to make works and constructions which may divert their course to the prejudice of a third party, nor those the destruction of which by the force of floods, may cause such deviation.

"Art. 414. No one may enter private property in search of waters or make use of them without permission from their owners.

"Art. 415. The ownership which the proprietor of an estate has in the waters rising on the same can not prejudice the rights which owners of lower estates may have legally acquired to their use.

"Art. 416. Every owner of an estate has a right to construct on his property receptacles for rain water, provided he does not prejudice the public or a third party thereby."

1 Articles 409-411, Civil Code in force in Cuba, Porto Rico, and the Philippines, Washington, 1899, as translated.

2 Articles 412-416, Civil Code, *supra*.

§ 2004. **Subterranean waters — Spanish-Philippine law.**—The rights in and to subterranean waters in the Philippine Islands are declared to be as follows:[1]

"Art. 417. Only the owner of an estate or another person with his permission may search for subterranean waters thereon.

"The search for subterranean water on lands of public ownership can only be made with the permission of an administrative authority.

"Art. 418. Artesian waters, according to the special law of waters, belong to the persons who discover the same.

"Art. 419. When the owner of artesian waters abandons the same to their natural course, they become public property."

§ 2005. **Rights of way—United States statute.**—Under Sections 50 and 51 of the Act of Congress of July 1, 1902,[1] it is provided that the right of way for the construction of ditches and canals for the purposes of the use of water as specified by the Act is acknowledged and confirmed, but that whenever any person, in the construction of such works, injures or damages the possession of any settler, the party committing such injury or damage shall be liable to the party injured for such injury or damage, and that all patents thereafter granted shall be subject to the rights to ditches and reservoirs as may have been theretofore acquired or recognized.

In Section 74 of the above Act it is provided that the government of the Philippine Islands may grant franchises, privileges, and concessions, "including the authority to exercise the right of eminent domain for the construction and operation of works of public utility and service, and may authorize said works to be constructed and maintained over and across the public property of the United States, . . . Provided, that no private property shall be taken for any purpose under this section without just compensation paid or tendered therefor, and that such authority to take and occupy land shall not authorize the taking, use, or occupation of any land except such as is required for actual necessary purposes for which the franchise is granted. . . ."

1 Articles 417-419, Civil Code in force in Cuba, Porto Rico, and the Philippines, Washington, 1899.

1 5 Fed. Stats. Ann., 1905, pp. 718-742; 32 Stat. L. 704.

§ 2006. **Rights of way and condemnation therefor—Spanish-Philippine law.**—Under the Spanish-Philippine law, under which many of the existing rights were acquired, relative to the acquisition of rights of way for ditches and canals, it was provided:[1]

"Art. 557. Whosoever wishes to make use of water, of which he may dispose for an estate belonging to him, has the right to cause it to pass through the intermediate estates, with the obligation of indemnifying their owners, as well as those of the lower estates, upon which the water may filter or descend.

"Art. 558. A person desiring to make use of the right granted in the foregoing article is obliged:

"1. To prove that he has the right to dispose of the water, and that it is sufficient for the use to which it is destined.

"2. To show that the right of way he requests is the most convenient and least onerous to a third person.

"3. To indemnify the owner of the servient estate in the manner prescribed by the laws and regulations.

"Art. 559. The easement of an aqueduct for an object of private interest can not be imposed on buildings nor their yards or dependencies, nor on gardens or orchards already in existence.

"Art. 560. The easement of an aqueduct does not prevent the owner of the servient estate from closing and fencing it, nor from building over the aqueduct in such manner that the latter suffers no damage nor renders impossible necessary repairs and cleanings.

"Art. 561. The easement of an aqueduct for its legal effects shall be considered as continuous and apparent, even though the passage of the water is not continuous, or even if its use depends on the requirements of the dominant estate, or periods consisting of days and hours.

"Art. 562. A person who for the purpose of irrigating his estate or improving it has to construct a stop lock or a sluice gate in a millrace through which it is to receive the water, may demand that the owners of the margins allow their construction, after paying all loss and damage, including those caused by the new easement to the said owners and to the other irrigators.

"Art. 563. The establishment, extent, form, and conditions of the easements of waters to which this section refers shall be gov-

[1] Articles 557-563, Civil Code in force in Cuba, Porto Rico, and the Philippines, Washington, 1899.

erned by the special laws relating thereto in everything not provided for in this code."

§ 2007. **General provisions—Spanish-Philippine law—Defensive works—Expenses of construction—Eminent domain of waters—Sale.**—Upon the subject of defensive works, the Spanish-Philippine Code provides: [1]

"Art. 420. The owner of an estate on which there are defensive works to check waters, or on which, by reason of the variation of their course, it should be necessary to reconstruct them, is bound, at his option, to make the necessary repairs or constructions or to permit that, without injury to him, they be made by the owners of the estates who suffer or are clearly exposed to suffer damages.

"Art. 421. The provisions contained in the preceding article are applicable to the cases in which it may be necessary to clear an estate from the material, the accumulation, or fall of which may obstruct the course of waters with injury or danger to a third party."

Upon the subject of the contribution by joint owner of the expenses of construction and maintenance of works the following terse clause is provided: [2]

"Art. 422. All owners who participate in the benefits arising from the works, referred to in the two foregoing articles, are obliged to contribute to the cost of their construction in proportion to their interest. Those who by their own fault have caused damage shall be liable for the expenses."

The condemnation of water rights is allowed in the following language: [3]

"Art. 423. The ownership and use of waters belonging to corporations or private parties are subject to the law of eminent domain."

The sale and exchange of water rights is also provided for: [4]

"Art. 424. The provisions of this title shall not prejudice the rights previously acquired nor the private ownership which the owners of waters, drains, fountains, or springs have to use, sell, or exchange them as private property."

1 Articles 420, 421, Civil Code in force in Cuba, Porto Rico, and the Philippines, Washington, 1899.

2 Art. 422, *supra.*

3 Art. 423, *supra.*

4 Art. 424, *supra.*

§ 2008. **Easements with regard to waters.—Spanish-Philippine law.**—There are certain easements in regard to waters that are provided for in the Spanish-Philippine Code, as follows: [1]

"Art. 552. Lower estates must receive the waters which naturally and without intervention of man descend from the higher estates, as well as the stone and earth which they carry with them.

"Neither may the owner of the lower estate construct works preventing this easement, nor the one of the higher estate works increasing the burden.

"Art. 553. The banks of the rivers, even when they are of private ownership, are subject in their entire length and in their margins for a zone of three meters to the easement of the public use in the general interest of navigation, floatage, fishing, and salvage.

"The estates of adjoining banks of navigable or floatable rivers are furthermore subject to the easement of a towpath for the exclusive service of river navigation and floatage.

"Should it be necessary to occupy, for such purpose, lands of private ownership, the proper indemnity must first be paid.

"Art. 554. If for the diversion or taking of waters from a river or brook or for the use of other continuous or intermittent streams it should be necessary to construct a dam, and the person who is to do so is not the owner of the banks or land upon which to support it, he may establish the easement for abutment of the dam by previously paying proper indemnity.

"Art. 555. Obligatory easement for drawing water and for watering animals may be imposed only for a cause of public utility in favor of a town or village after the proper indemnity.

"Art. 556. The easements for drawing water and for watering animals carry with them the obligation on the servient estates of giving the right of way to the persons and animals to the point where it can be utilized, and the indemnity must include this service." [2]

§ 2009. **Riparian rights in the Philippines.**—The common law of riparian rights never did exist in the Philippine Islands. The law governing the right of those who owned lands upon the banks

1 Articles 552-563, Civil Code in force in Cuba, Porto Rico, and the Philippines, Washington, 1899.

2 See, also, for rights of way and condemnation therefor, Sec. 2006.

of streams or bodies of water was the civil law as modified by the Philippine Civil Code.[1] These lands were subject to certain easements which never were allowed under the common law of England governing riparian rights.

Again, after the acquisition of jurisdiction over the islands by the United States it was provided by the Act of Congress of July 1, 1902:[2] Section 19. "That the beneficial use shall be the basis, the measure, and the limit of all rights to water in said islands." This in effect abrogates the common law right of riparian owners and grants the rights in waters to those actually applying the water to some beneficial use or purpose, regardless of the ownership upon the banks of streams.

1 See Secs. 2001-2004.
For the civil law, see Chap. 29, Secs. 552-569.

2 6 Fed. Stats. Ann., 1905, pp. 718-742; 32 Stat. L. 691-712.

CHAPTER 99.

PORTO RICO.

§ 2010. Particular features of the island.
§ 2011. Irrigation on the island.
§ 2012. Criticism of the Porto Rican laws.
§ 2013. The Spanish Porto Rican laws.
§ 2014. Decree of April 28, 1886—Ownership of waters.
§ 2015. Decree of April 28, 1886—Beds or channels of waters—Banks, margins, accretions, protective works, and drainage of lands.
§ 2016. Decree of April 28, 1886—Easements with regard to waters.
§ 2017. Decree of April 28, 1886—Common utilizations of public waters.
§ 2018. Decree of April 28, 1886—Utilization of public waters for irrigation.
§ 2019. Decree of April 28, 1886—Communities of irrigators and their syndicates.
§ 2020. Decree of April 28, 1886—Irrigation boards of arbitrators.
§ 2021. Decree of April 28, 1886—Duties of the administration.
§ 2022. Decree of April 28, 1886—Jurisdiction of courts in questions relating to waters.
§ 2023. Riparian rights in Porto Rico.

§ 2010. **Particular features of the island.**—Part of the territory acquired through the treaty ending the Spanish-American War was that of the Island of Porto Rico, formerly one of the Spanish West India Islands, and lying 70 miles east of Hayti, between 17° 50′ and 18° 30′ north latitude, and 65° 35′ and 67° 10′ west longitude. The island forms an irregular parallelogram 108 miles long and 37 miles broad, and has an area of 3,530 square miles. From west to east it is traversed by a range of hills or mountains, so situated that the streams flowing northward are longer than those flowing south. The soil of the island is rich, fertile, and enduring, the climate mild, although the precipitation at some periods is heavy. The island is well watered, many streams being enumerated, of which 47 are considered rivers.

§ 2011. **Irrigation on the island.**—As the hills crossing the island from east to west intercept the northeast trade winds, with their rain clouds and draw the moisture therefrom, there is sometimes a superabundance of precipitation in the northern lowlands,

while during the same period on the southern portion of the island severe droughts may occur. Therefore, on the southern portion particularly the only surety of maturing crops is by means of irrigation, which, under Spanish rule, was carried on with too little co-operation and system. Since the island was acquired by the United States better systems have been and are being adopted, and the work is rapidly progressing along these lines.

§ 2012. **Criticism of the Porto Rican laws.**—The right to the use of water in the Island of Porto Rico is based upon the civil law, which, by Act of Congress of April 12, 1900,[1] was continued in full force and effect.[2]

Since the island has been owned by the United States the Spanish laws have been continued in full force and effect under the provisions of the statute quoted below.

By the Act of Congress of April 12, 1900,[3] Section 8, it was provided: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not consistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States," etc. By this Act the laws governing waters on the island were continued in force.

§ 2013. **The Spanish-Porto Rican laws.**—Under the chapter upon the Philippine laws [1] we devoted certain sections to the abstracting of the old Spanish-Philippine laws, under which many of the existing water rights and rights of way were acquired in the Philippine Islands. These old Spanish laws were made equally applicable to Porto Rico and Cuba while those islands belonged to Spain, and under which laws certain rights to the use of water and

1 5 Fed. Stats. Ann., p. 762; 31 Stat. L. 77.

2 For a discussion of the Civil Law upon the subject of waters, see Secs. 552-584.

3 5 Fed. Stats. Ann., 1905, p. 762; 31 Stat. L. 77.

1 See Chap. 98, Secc. 1998-2009.

rights of way for ditches and canals were also acquired and are now existing as vested rights. The statutes in which these laws are found were originally enacted in the Spanish language, and in that language are identical to all of the islands named above. But the translations of these statutes from the Spanish language to the English language differs somewhat in the Philippine Civil Code of 1899, from that of the Porto Rican Revised Statutes and Civil Code of 1902, but the meaning is the same. The numbering of the articles of the two codes is also different. These statutes have been sufficiently set out in the chapter upon the Philippine Islands;[2] therefore, in our footnote we will simply give a comparative table of reference to the subject matter covered by the two codes.[3]

§ 2014. **Decree of April 28, 1886—Ownership of waters.**—By the decree promulgated by the Spanish Crown on April 28, 1886, the laws governing the waters of Porto Rico were amended to a considerable extent.[1]

This decree provides for the ownership of terrestrial waters.[2] Pluvial waters are defined and their ownership set forth.[3] The ownership of running waters, springs, and streams is also defined.[4]

And after so defining, the following are public or of public ownership: (1) Waters which rise continuously or intermittently on

2 *Supra.*

3 Subject.	Philippine Code, 1899.	Porto Rican Code, 1902.	
Title to waters	Secs. 407-408.	Secs. 414-415.	See Sec. 2002
Use of public waters	Secs. 409-411.	Secs. 416-418.	See Sec. 2003
Use of private waters	Secs. 412-416.	Secs. 419-423.	See Sec. 2003
Subterranean waters	Secs. 417-419.	Secs. 424-426.	See Sec. 2004
General provisions	Secs. 420-421.	Secs. 427-428.	See Sec. 2007
Expenses of construction	Sec. 422.	Sec. 429.	See Sec. 2007
Condemnation of rights	Sec. 423.	Sec. 430.	See Sec. 2007
Sale and exchange of rights	Sec. 424.	Sec. 431.	See Sec. 2007
Easement with regard to waters	Secs. 552-563.	Secs. 559-570.	See Sec. 2008
Rights of way	Secs. 557-563.	Secs. 564-570.	See Sec. 2006

1 See translation of the Law of Waters in force in the Island of Porto Rico, adapted from translation of the Law of Waters in force in the Island of Cuba by Division of Customs and Insular Affairs, War Department, Washington, D. C., with annotations of amendments made thereto by Acts of March 12, 1903, and March 9, 1905, Bureau of Printing and Supplies, San Juan, Porto Rico.

2 Title 1, Chaps, 1-4, Arts. 1-27.

3 Title 1, Chap. 1, Arts. 1-3.

4 Title 1, Chap. 2, Arts. 4-16.

lands of public ownership;(2) continuous and intermittent waters of springs and creeks which flow through their natural beds; (3) rivers.

"Art. 5. Waters which rise continuously or intermittently on estates of private ownership, as well as on the property of the State, provinces, or towns, belong to the respective owners for their use and benefit while they flow through said property.

"As soon as water not utilized leaves the estate where it originated it shall be considered public for the purposes of this law. But if after leaving the estate in which it originated it naturally flows through another private estate, either before reaching public channels or after flowing through the same, the owner of said estate may temporarily utilize it, and afterward the owner of the estate situated immediately below, should there be one, and thus successively."

Provisions are made for the temporary utilization of the waters of springs and creeks, and the order of the preference for such use given.

"Art. 8. The right to utilize indefinitely the waters of springs and brooks is acquired by the owners of lower estates, and, in a proper case, by those of the adjacent estates, when they have been utilized without interruption for a term of twenty years."

The ownership of dead or stagnant waters is provided for as follows:

"Art. 17. Lakes and ponds formed by Nature, occupying public lands, are of public ownership.

"Lakes, ponds, and pools on lands belonging to private individuals, municipalities, the provinces, and to the State, are of their respective ownership. Those situated on communal property belong to the respective towns." [5]

The ownership of subterranean waters is also provided for as follows: [6]

"Art. 18. The subterranean waters obtained on an estate by means of ordinary wells are the full property of the owner of said estate."

"Art. 22. When it is desired to bring to the surface subterranean waters by means of artesian wells, tunnels, or galleries, the person finding the same and causing them to rise to the surface shall be the owner thereof in perpetuity, without losing his right thereto, even

[5] Title 1, Chap. 3, Art. 17.

[6] Title 1, Chap. 4, Arts. 18-27.

though they leave the estate in which they rose, whatever be the diversion which the discoverer may give to such waters as long as he retains the ownership of same.

"If the owner of the waters brought to the surface should not construct an aqueduct to carry the same through the lower estates which they cross, but leaves them to take their natural course, the owners of the latter shall enjoy the temporary right granted them."

§ 2015. Decree of April 28, 1886—Beds or channels of waters—Banks, margins, accretions, protective works, and drainage of lands.—The law provides for the control and ownership of beds or channels of streams, banks, margins, and accretions as follows:[1]

"Art. 28. The natural bed or channel of intermittent streams formed by pluvial waters is the ground which they cover during ordinary flows in the ravines or hollows which receive the same.

"Art. 29. The channels referred to in the foregoing article which cross private estates are private property.

"Art. 30. Channels which are not private property are of public ownership.

"Art. 31. The private ownership of channels of pluvial waters does not grant authority to perform labor or construct works which might divert the natural course thereof, to the prejudice of a third person, or whose destruction by reason of the force of the flow might injure estates, factories, or establishments, bridges, roads, or towns situated lower down."

The natural channel or bed of a river is defined as the ground covered by its waters during the greatest ordinary swells. The beds of all brooks belong to the owners of the estates they cross.

"Art. 34. The following are of public ownership:

"1. The beds or channels of the brooks which are not included in the foregoing article.

"2. The land covered by the natural beds or channels of rivers during the greatest ordinary swells.

"Art. 35. By banks are understood the lateral banks of the beds of rivers included between the low-water line and the line reached by the greatest ordinary swells, and by margins, the lateral zones which adjoin the banks."

[1] Title 1, Chap. 5, Arts. 28-51.

The banks of all rivers, even though they be of private ownership, are subject for their entire length and margins, for a zone of three meters, to the easement of public use in the general interest of navigation, flotation, fishing, and salvage.

It is also provided that the beds and edges of lakes, ponds, and pools are those which are covered by waters during their greatest ordinary height. These may belong to the State, to the provinces, or to municipalities, or other riparian owners.

Accretions, debris, and sediment of waters are also provided for and regulated;[2] also protective works along public waters,[3] and the drainage of lakes and swamp land.[4]

§ 2016. **Decree of April 28, 1886—Easements with regard to waters.**—Natural easements are provided for as follows:

"Art. 69. The lower lands must receive the waters which naturally, and without the work of man, flow from the higher estates, as well as the stones or earth carried by them in their course. But if the waters are brought to the surface by artificial works, or are the overflow from irrigating ditches, or emanate from industrial establishments which have not acquired this easement, the owner of the lower estate shall be entitled to recover losses and damages.

"The owners of lower estates or establishments may refuse to receive the overflow from industrial establishments which contain or carry with them in solution noxious substances introduced by the owners of the latter."[1]

The legal easements are divided into sections, and provide:

Section 1. The Aqueduct Easement.

"Art. 75. The compulsory easement for aqueducts may be imposed for carrying waters destined to some public service not requiring the condemnation of lands. It is the duty of the Minister of the Colonies to impose such easement for works in charge of the State, and the Governor of the province for provincial and municipal works, in accordance with the proceedings prescribed in the regulations."

"Art. 77. A compulsory easement for an aqueduct may also be imposed for private purposes in the following cases:

"1. Establishment or increase of irrigation.

[2] Title 2, Chap. 5, Arts. 40-51.
[3] Title 2, Chap. 6, Arts. 52-59.
[4] Title 2, Chap. 7, Arts. 60-68.
[1] Title 3, Chap. 8, Arts. 69-74.

"2. Bathing establishments and factories.

"3. Drainage of lakes and marsh lands.

"4. The vent or outlet of waters from artificial wells.

"5. Outlet of stagnant waters or drainage works.

"In the first three cases the easement may be imposed not only for the purpose of taking the necessary waters, but also for the outlet of the surplus."

Section 2. The Easement of Dam Abutments, Stop Locks, or Sluice Gates.

"Art. 102. A compulsory easement for dam abutments may be imposed when the person who intends to build a dam is not the owner of the banks or soil where they are to be placed, and the water to be taken is destined to a public service or a private purpose."

Section 3. The Easement of Watering Troughs and of Drawing Water.

"Art. 107. Obligatory easement of watering troughs and of drawing water may be imposed only for causes of public utility, in favor of some town or hamlet after the proper indemnity."

Section 4. Easements of Towing Paths and Others Inherent to Riparian Estates are provided for.

§ 2017. Decree of April 28, 1886—Common utilizations of public waters.—*Section 1. Utilization of Public Waters for Domestic, Agricultural, and Manufacturing Purposes.*

While waters run along their natural and public channels any person may make use thereof for drinking, washing clothes, vessels, and other objects, bathing, and watering or bathing horses or cattle, subject to the regulations and municipal police ordinances.

Section 2. Utilization of Public Waters for Fishing.

It is provided that any person may fish in public channels, subject to the law and police regulations relating especially to fishing, provided that navigation or flotation is not thereby obstructed.

Section 3. Utilization of Waters for Flotation and Navigation.

"Art. 134. The Government, by means of proceedings, shall declare, through royal decrees, the rivers which are to be considered navigable and floatable in whole or in part." [1]

[1] See, also, Arts. 135-146.

The special utilization of public waters is also provided for as follows:

Section 1. Concessions of Utilizations.

"Art. 147. Authority is necessary for the utilization of public waters specially destined to enterprises of public or private interest, excepting," etc.

"Art. 153. The waters granted for a given utilization shall never be applied to a different purpose without the proceedings corresponding to the granting of a new franchise: Provided, that the waters granted for irrigating purposes may also be used for industrial preparation of the products of the land to be irrigated: Provided, that the original volume of water granted shall not be altered and the waters granted to produce power which subsequently must be returned to the stream, may also be used for any other industrial purposes which will not render them unfit to be returned to the stream."

Section 2. Utilization of Public Waters for the Supply of Towns is provided for.

Section 3. Utilization of Public Waters for Supply of Railroads is provided for.

"Art. 172. Railroad companies may utilize, after competent authorization, such public waters as they may require. Authorization shall be granted by the Governor of the province when the consumption of water does not exceed 100 cubic meters per day; if above this amount, the Minister of the Colonies shall decide."

§ 2018. **Decree of April 28, 1886—Utilization of public waters for irrigation.**—Title IV, Chapter 10, Section 4, of the decree of April 28, 1886, provides for the utilization of public waters for irrigation as follows:

The owners of estates adjoining public roads may collect pluvial waters coursing along the same, and make use thereof in irrigation of their estates; the owners of estates adjoining public channels having an intermittent supply may utilize in their irrigation the pluvial waters coursing through the same, and construct for such purposes dikes and movable dams. Such dams must be removed when they are liable to cause inundations or any other damage to the public. Any person who shall have made use for a term of twenty years of pluvial waters may object to the owners of the up-

per estates depriving him of said use. When it is desired to build permanent dikes or dams for factories in order to use in irrigation pluvial waters or intermittent springs which course through public channels, the authorization of the Governor of the province shall be required. An authorization is also required to construct reservoirs. In navigable rivers the riparian owners may without restriction establish on their respective margins pumps or any other apparatus for the extraction of the water required for the irrigation of their estates, provided that they do not hinder navigation.

"Art. 185. Authorization from the Minister of the Colonies is necessary for the use of public waters for irrigation purposes which are to be taken or secured by means of dams, dikes, or other permanent works constructed in rivers, hollows, brooks, or in any other kind of permanent natural currents, provided more than 200 liters of water per second are to be taken therefrom.

"Art. 186. If the amount of water to be secured or diverted from its natural course does not exceed 200 liters per second, the Governor of the province shall grant the concession after the proper proceedings, but the petitioner may appeal to the Minister of the Colonies.

"The Governor shall also authorize the rebuilding of old dams for irrigation or other purposes. When the works to be executed in the dams consist of repairs or works for the maintenance thereof, and do not change the conditions of the grant, they may be made without previous authorization, but a report of the same shall be made to the Governor of the province.

"Art. 187. The Governor-General can not grant more than one concession for the same intake, of which the dam forms a part."

Applications for concessions referred to above must be made in accordance with the provisions of the decree.

§ 2019. **Decree of April 28, 1886—Communities of irrigators and their syndicates.**—"Art. 228. In collective rights to public waters for irrigation a community of irrigators shall necessarily be organized, subject to the provisions of its ordinances:

"1. When the number of irrigators is not less than ten and when the irrigable land is not less than 200 hectares.

"2. When in the judgment of the Governor of the province the local interests of agriculture shall require it.

"With the exception of those cases the organization of a community shall be at the will of a majority of the irrigators.

"Art. 229. Irrigators whose estates take the water either before or after a community, and are contiguous to one another, or make payment without interruption, are under no obligation to belong to the community, and may withdraw therefrom or organize another, as the case may be, notwithstanding the provisions of the preceding article.

"Art. 230. Every community shall have a syndicate elected by the same and entrusted with the execution of the rules and regulations of the respective community."

It is also provided that the communities of irrigators shall draft rules for irrigation in accordance with the basis established in the law, submitting them for the approval of the Government. All expenses incurred by the communities in the building of dams or channels, or for their repair, preservation, or cleaning, shall be defrayed by the irrigators in equitable proportion.

"Art. 237. The community shall make the regulations for the syndicate. The following shall be the duties of the syndicate:

"1. To watch over the interests of the community, promote its development, and defend its rights.

"2. To make proper provision for the best distribution of the waters, respecting acquired rights and local customs.

"3. To appoint and remove its employees in the manner established in the regulations.

"4. To prepare the budgets and assessments and audit the accounts, submitting both for the approval of the community at the general meeting.

"5. To recommend to the meeting the rules and regulations or any changes which they may consider advisable to introduce into those in force.

"6. To establish strict terms for receiving water, conciliating the interests of different cultivations among the irrigators, and taking care that in years of drought the water be distributed in the most convenient manner for said interests.

"7. All the duties and powers granted by the rules of the community, or by the especial regulations of the syndicate themselves.

"The decisions rendered by the irrigation syndicates within their rules, when they act as delegates of the administration, may be ap-

pealed from to the municipal councils or to the Governor-General, as the case may be."

Every syndicate shall elect from among its members a president and vice-president, with such powers as may be fixed by rules and regulations. The community irrigators shall hold general stated meetings at fixed periods. These meetings may be attended by all the irrigators of the community and all industrials interested. When there are several communities and syndicates in the course of a river one or more central or common syndicates may be established by mutual consent for the protection of all rights.[1]

§ 2020. **Decree of April 28, 1886—Irrigation boards of arbitrators.**—"Art. 242. In addition to the syndicate there shall be one or more boards of arbitrators in every community, according to the amount of irrigation.

"Art. 243. Every board shall be composed of a president, who shall be a member of the syndicate, designated by the latter, and of the number of members and alternates fixed by the regulations of the syndicate, all of whom shall be appointed by the community.

"Art. 244. It is the duty of the board of arbitrators:

"1. To take cognizance of questions of fact which arise on irrigation between the persons interested therein.

"2. To impose upon the violators of the irrigation ordinances such penalties as may be proper in accordance therewith.

"Art. 245. The proceedings of the board shall be public and oral, in the manner prescribed in the regulations. Its decisions, which shall be final, shall be entered in a book, with a statement of facts and of the provision of the ordinances on which the decision is based.

"Art. 246. The penalties which may be established in irrigation ordinances by reason of infractions or abuses in the utilization of waters, obstruction of channels or sluices, or other violations shall be pecuniary, and shall accrue to the person injured and the funds of the community, in the manner and proportion established in said regulations.

"Should the act constitute a crime, the culprit may be complained against by the irrigator or industrial injured or by the syndicate.

1 See Title 5, Chap. 13, Sec. 1, Arts. 228-241.

"Art. 247. Where boards of arbitrators of irrigation exist since former times they shall continue under their present organization until the respective communities decide to recommend the reorganization thereof to the Minister of the Colonies."

§ 2021. Decree of April 28, 1886—Duties of the administration.—"Art. 248. It is the duty of the Minister of the Colonies, as the person intrusted with the execution and enforcement of this law:

"1. To issue such rules and regulations as may be necessary therefor.

"2. To make concessions of such water rights as are the object of this law, either by himself or through the authorities under him, provided that the granting of same is not a function of other authorities or of the legislative power under the expressed provisions of this Act.

"3. To definitely pass upon all questions which may arise in the application of this law, when the decisions of his delegates are not final, with the exception of such remedies as may be proper in accordance with the same.

"4. To order and execute the demarcation and survey of all property belonging to the public domain under the provisions of this law, without prejudice to the jurisdiction of the courts as to questions of ownership and possession."

The approval of plans, for which authority is vested in the Governor-General, and the granting of concessions for which he is empowered, shall be completed within a period of six months.

"Art. 252. The courts of justice shall not permit any injunctions in the decisions rendered by the central administration within its powers with regard to waters. The courts may only take cognizance at the instance of a party when in the cases of condemnation prescribed in this law, the proper indemnity has not been paid before the dispossession."

§ 2022. Decree of April 28, 1886—Jurisdiction of courts in questions relating to waters.—"Art. 253. In appeals from the decisions rendered by the administration in matters relating to waters contentious administrative jurisdiction shall lie in the following cases:

"1. When a concession granted to individuals or companies in the terms prescribed in the general laws of public works is declared forfeited.

"2. When rights acquired under the decisions of the administration are impaired by orders emanating therefrom.

"3. When a compulsory easement or any limitation or encumbrance is imposed on private property in the cases provided by this law.

"4. In questions which arise with regard to the payment of damages and losses in consequence of the limitations and encumbrances referred to in the foregoing paragraph.

"Art. 254. Civil courts are of competent jurisdiction in matters relating to:

"1. The ownership of public waters and the ownership of private waters and their possession.

"2. The ownership of shores, channels, or beds of rivers, and the ownership or possession of the banks, without prejudice to the powers of the administration to survey and fix the boundaries of public property.

"3. The assessment of waters and rights of way over margins, based on title of civil law.

"4. The right to fish.

"Art. 255. Questions arising between private individuals with regard to a preferred right of utilization according to this law are also within the jurisdiction of the courts as to

"1. Pluvial waters.

"2. Other waters out of their natural channels, where such preference is based on titles of civil law.

"Art. 256. The courts shall also have jurisdiction of questions relating to losses and damages occasioned to a third person with regard to his rights of private ownership, the alienation of which is not compulsory.

"1. By digging of ordinary wells.

"2. By the boring of artesian wells and by the execution of subterranean works.

"3. By any kind of utilizations in favor of individuals."

§ 2023. **Riparian rights in Porto Rico.**—As is the case with the Philippine Islands, the common law of riparian rights never existed in Porto Rico. The basis of the law governing waters is the civil law as modified by Spanish legislation.[1]

[1] For riparian rights in the Philippines, see Sec. 2009.

CHAPTER 100.

SOUTH DAKOTA.

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§ 2024. Particular features of the State.—In general what has been said about the particular features of North Dakota will also apply to the State of South Dakota.[1] The greater portion of the State lies within the Great Plains and semi-arid regions of the United States. The supply of surface water in rivers, streams and lakes is large, and there are enormous tracts of irrigable lands. One of the features of the State is the great supply of subterranean waters, which, when tapped by artesian wells, also furnishes a large supply of water which can be utilized for all purposes.[2]

The precipitation in the State is considerable, but varies in different portions. At Aberdeen the annual precipitation for the last twenty years is 27.54 inches, while at Ashcroft it is only 13.68 inches. As in North Dakota, in many portions of the State it is more a question of drainage than of the application of the water to

1 See Secs. 1942-1957.

2 See Geology and Underground Waters of South Dakota, by N. H. Darton, 1909, Water-Supply Paper No. 227, U. S. Geological Survey; Small Reservoirs in Wyoming, Montana, and South Dakota, by F. C. Herrmann, 1907, Office Experiment Stations, Bulletin No. 179, U. S. Dept. of Agriculture.

the land for irrigation. The climate is warm in the summer and there is a sufficient period to mature all crops of grain, hay, and fruits. In the winter time there is considerable severe cold weather. In general it may be said that the State is one of the most prosperous of the semi-arid region.

§ 2025. **Irrigation in the State.**—While the State of South Dakota can not be classed strictly as an irrigation State, in the sense that irrigation is an absolute necessity, as is the case in the more arid States, but as an adjunct to the rainfall and as a safeguard to the production of crops, there are many irrigation enterprises within the State. The situation in the State is peculiar because of the great variation of the local requirements in different portions of the State. In the eastern portion of the State there is great need for the reclamation of lands by drainage, while in the western portion, especially in the region adjacent to the Black Hills, irrigation is extensively practiced. In this section of the State irrigation was first practiced on a commercial scale. According to the last report of the State engineer 72,901 acres were actually supplied with water for irrigation in the State in the year 1910, while 142,173 acres would be reclaimed under works under the process of construction, thus making a total of 215,074.[1] The most of the water used for irrigation is taken directly out of the streams, very little being used from reservoirs. Apparently the State has not yet entered upon the period of storage of waters to any great extent. There are, however, many smaller dams constructed on the so-called dry draws, for the purpose of storing small quantities of flood water, and by the means of which many gardens and fields of alfalfa are kept in a flourishing condition.

Under the National Reclamation Act the General Government has constructed the Belle Fourche project, in Butte and Meade Counties. The irrigable area of the whole project is 100,000 acres. Other projects have been surveyed.

By the Act of the legislature of 1909 the provisions of the Carey Act were accepted by the State and measures taken for its operation. But nothing appears to have been accomplished in this respect. The State engineer in his last report says: "On account of the enor-

[1] See the Report of the State Engineer, 1909-1910, Samuel H. Lea, State Engineer, pp. 69-85.

mous influx of settlers during the past two years, it appears that it is almost impossible to find any tract of land of suitable extent for reclamation as provided by the Carey Act. Numerous inquiries have been received concerning the matter of settlement and colonization of a tract of land under the Carey Act law, but up to the present time nothing has been done in the matter."[2] But, under date of September 6, 1911, the State engineer writes the author: "This law has been inoperative, however, for the reason that there are no areas of public land in this State of sufficient size to warrant the reclamation of same under the provisions of the Carey Act."

The State never adopted the irrigation district law, as the same is known in California and other States, so nothing has been done in that respect.

Throughout the western and middle portions of the State there are many private projects of small capacity, as compared with those of other States, operated by individuals and corporations.[3]

According to the United States census for 1910 the total number of farms irrigated in 1909 was 500, against 606 irrigated in 1899, a decrease of 106, or 17.5 per cent.

The total acreage irrigated in 1909 was 63,248 acres, against 43,676 acres in 1899, an increase of 19,572 acres, or 44.8 per cent. The total acreage which all enterprises were capable of irrigating in 1910 was 128,481 acres. The acreage included in projects now completed or under construction is 201,685 acres.

The acreage irrigated in 1909, classified by the type of enterprises, is given as follows: Under the United States Reclamation Service, 5,613 acres; under the United States Indian Service, 50 acres; under co-operative enterprises, 13,601 acres, under commercial enterprises, 6,300, and under individual and partnership enterprises, 37,684 acres.

2 Third Biennial Report of the State Engineer, 1909-1910, p. 154.

3 For information upon the subject, see Irrigation in South Dakota, Bulletin No. 210, Office of Experiment Stations, U. S. Dept. of Agriculture; Third Biennial Report of the State Engineer of South Dakota, 1909-1910; Geology and Underground Waters of South Dakota, by N. H. Darton, 1909, Water-Supply Paper No. 227, U. S. Geological Survey; Small Reservoirs in Wyoming, Montana, and South Dakota, by F. C. Herrmann, 1907, Office of Experiment Stations, Bulletin No. 179, U. S. Dept. of Agriculture.

See, also, the various reports of the Reclamation Service, subject, South Dakota.

§ 2026. Criticism of the South Dakota laws.—There is very little adverse criticism that can be made of the statutes of South Dakota governing the waters within the State. The State legislature seems to have met every condition, and to have provided laws governing the same, except, possibly, the enactment of a general irrigation district law following that of California. As it seems to us, the conditions are favorable and the time ripe for the enactment of such a law. The legislature of 1911 enacted an irrigation district law, but it was vetoed by the Governor on the grounds of unconstitutionality.[1] The citizens of the State seem satisfied with the present laws governing the control and distribution of waters within the State, based as the laws are primarily upon those of State control. The State engineer in his last report says: "The experience of the past four years of the administration of the Water Code has demonstrated that in the main the present laws relating to water appropriations are satisfactory."[2] In the main this Water Code and that of North Dakota are similar,[3] and although not as extensive as the codes of some of the States, it is very effective. The adjudication of water rights is left, in the first instance, to the courts, where it properly belongs.[4] The laws are liberal and the conditions of the State favorable for a more rapid development of the water resources of the State during the next ten years than there has been during the past twenty.

§ 2027. Water rights defined—The water code.—There are no constitutional provisions relative to the subject of waters in the State of South Dakota.

By statute, relative to the ownership of waters within the State and the right to the use thereof, it is declared:

"All the waters within the limits of the State from all sources of

1 The State engineer, under date of Sept. 6, 1911, writes the author: "It is a matter of regret that we have no adequate irrigation district law in this State, for the reason that such a law could be made use of to advantage at the present time. It is probable that an effort will be made to formulate an adequate law of this nature for submission to the legislature of 1913."

2 Third Biennial Report of the State Engineer of South Dakota, 1909-1910, p. 185.

3 For Code of North Dakota, see Secs. 1946-1952.

4 See Sec. 2030.

water supply belong to the public, and except as to navigable waters, are subject to appropriation for beneficial use." [1]

Relative to water rights based upon the appropriation of waters and the abandonment of the same, the statutes of South Dakota are identical with those of North Dakota, heretofore discussed.[2]

The Water Code in which the above provisions are found was first adopted by the legislature of South Dakota in 1905.[3] Owing to the fact that it was found defective in some portions, two years after, by the Act of 1907 a new code was adopted, and for a time there were two Water Codes upon the statutes.[4] It being found that in the two codes there was considerable conflict, by the Act approved March 9, 1909, the first code of 1905 was repealed,[5] so that now the later code of 1907, with its subsequent amendments, is in full force and effect, and in many respects is identical with the provisions of the Irrigation Code of North Dakota, heretofore discussed.[6]

"The owner of the lands owns the waters standing thereon or flowing over or under its surface, but not flowing in a definite stream. Water running in definite streams formed by Nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream or of the natural springs from which it commences its definite course, nor pursue nor pollute the stream." [7]

"Any person or persons, corporation or company, who may have or hold a title or possessory right to any mineral or agricultural lands within the limits of this State shall be entitled to the usual enjoyment of the waters of the streams or creeks in said State for mining, milling, agricultural, or domestic purposes: Provided that the right to such use shall not interfere with any prior right or claim

1 Laws South Dakota, 1907, p. 373, Sec. 1.

The above section is identical with the Rev. Codes of North Dakota, 1905, Sec. 7604. See Sec. 1946.

2 Laws S. D., 1907, p. 373, Secs. 2, 46.

For law of North Dakota on same subject, see Sec. 1948; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Edgemont Co. v. N. S. Tubbs Co., 22 S. D. 142, 115 N. W. Rep. 1130.

3 Laws, 1905, pp. 201-215.

4 See Laws, 1907, pp. 373-389.

5 Laws, 1909, p. 262.

6 For the irrigation code of North Dakota, see Secs. 1946-1951; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. Rep. 352.

7 Revised Code of 1903, Sec. 278.

to such waters when the law has been complied with in doing the necessary work."[8]

§ 2028. **Division of the State and administrative officers.**—For administrative purposes the State of South Dakota is divided into three water divisions, the boundaries of which are defined by the statute. These divisions, in turn, are divided into water districts by the State engineer.[1]

Board of Water Commissioners.—The water commissioners of the three water divisions, together with the State engineer, form this board. The powers and duties of the board are identical with those of the board in North Dakota.[2]

State Engineer.—The office of the State engineer is provided for. The engineer to receive a salary of $2000. The powers and duties are identical with those of the State engineer of North Dakota.[3]

Water Commissioners.—Water commissioners shall be appointed by the Governor for each water division for a term of six years, and shall be subject to removal by the Governor. The pay is $5 per day for each day serving. Their powers and duties are similar to those of North Dakota.[4]

Water Masters.—Although the law provides that the State engineer may divide each division into water districts, no provisions are made for water masters or other official to supervise these districts, as is the case in North Dakota, this work being left to the water commissioners.[5]

§ 2029. **The appropriation of water.**—The procedure for the appropriation of water is almost identical with that in the State of North Dakota, which, in turn, follows that of Wyoming.[1] The State engineer may, in his discretion, approve any application for a

8 Ann. Stats. of 1899, Sec. 2687.

See Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. Rep. 352.

1 Laws, 1907, pp. 384, 385, Secs. 38, 43.

For North Dakota, see Sec. 1947.

2 Laws, 1907, p. 385, Sec. 41.

For North Dakota, see Sec. 1947.

3 Laws, 1907, pp. 374-376, Secs. 5-14.

For North Dakota, see Sec. 1947.

4 Laws, 1907, p. 384, Sec. 39.

For North Dakota, see Sec. 1947.

5 Laws, 1907, p. 385, Sec. 43.

1 Laws, 1907, p. 378, Secs. 19-30.

For that of North Dakota, see Sec. 1948.

less amount of water than that applied for, or may vary the periods of annual use. The usual appeal to the District Court is allowed.

The right is also given to appropriate flood waters, and for that purpose to construct dams across any dry draw or water course. A notice of such appropriation must be filed with the register of deeds, and posted at or near the head of the ditch or flume. The words "dry draws" and "water courses" are defined to mean any ravine or water course not having a flow of at least twenty miner's inches of water during a greater part of the year. Work must begin within sixty days after the posting of the notice, and be completed with diligence. Should a certificate of appropriation be desired, a petition for the same must be filed with the State engineer, setting forth the full facts of such appropriation. If the petition complies with the notice and the law, it is the duty of the State engineer to issue the certificate to the owner. "Said certificate, signed by the State engineer under the seal of his office, is hereby declared to be a water right under the laws of this State, and shall be accepted as *prima facie* evidence in all the courts of this State that the petitioner therein named, or the lawful holder thereof, has complied with the laws of this State in obtaining the same."[2] Both permits and licenses may be assigned.[3]

§ 2030. **The adjudication of existing rights.**—All adjudications and determinations of existing rights are made by the courts. And for this purpose the State engineer shall make hydrographic surveys and shall co-operate with the agencies of the United States engaged in similar surveys and investigations. The proceedings are somewhat similar to those in North Dakota, although they differ in certain particulars.[1] Whenever a suit is brought for this purpose a copy of all pleadings must be mailed to the State engineer immediately after service thereof on the opposite party; and if in his judgment the public interest requires action adverse thereto, then he may call upon the Attorney-General of the State to intervene in such action; and no adjudication can be had until proof of the service of the pleading at least thirty days prior to the final adjudication upon the State engineer is made. It is also made the duty

[2] Laws, 1907, p. 382, Sec. 31, as amended by Laws, 1911, Chap. 263, p. 468, Subds. a-f.

[3] Laws, 1907, p. 383, Sec. 32.

[1] For the adjudication of rights in North Dakota, see Sec. 1949.

of the Attorney-General to enter original suit on behalf of the State for the purpose of determining such rights when in the judgment of the State engineer the public interests require such action. All persons interested must be made parties, and the costs of such actions charged against the respective parties thereto in proportion to the amount of the water allotted. The Court in which any action is properly brought is given exclusive jurisdiction to determine all questions necessary for the adjudication of such rights within the stream system involved. The final decree must be the same as that in North Dakota, and duplicate copies filed with the State engineer and the water commissioner.[2]

§ 2031. Water rates—Standard of measurement—Distribution.—As is the case in North Dakota, the owner of works may be compelled to deliver any surplus water to applicants "at reasonable rates as determined by the State engineer."[1]

The standard of measurement is also the same: For flow, the cubic foot per second of time; for volume, the acre-foot. The miner's inch, one-fiftieth of a cubic foot per second.[2] The amount allowed for irrigation shall not exceed one cubic foot per second for each seventy acres.[3]

The water right is made appurtenant to the land, but its use may be transferred to other lands, or the place of use or point of diversion may be changed by application to the State engineer.[4]

§ 2032. Ditches and canals—Rights of way and condemnation proceedings therefor.—Rights of way are granted over all State lands.[1] The right of condemnation is granted for rights of way over private lands in the following language:

"The United States, the State, or any person or any private or public corporation, or any association of persons may exercise the right of eminent domain to acquire as a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and to use the same in common with the former

2 Laws, 1907, p. 376, Secs. 14-18. For North Dakota, see Sec. 1949.

1 Laws, 1907, p. 383, Sec. 36. For North Dakota, see Sec. 1951.

2 Laws, 1907, p. 385, Sec. 45.

3 Laws, 1907, p. 386, Sec. 47.

4 Laws, 1907, p. 386, Secs. 48, 49.

1 Laws, 1907, p. 388, Sec. 58; as amended, Laws, 1911, p. 467.

owner. Any canal right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public use."[2] The natural or artificial water courses may be used for the conducting of the water of any party.[3] All works are subject to the inspection of the State engineer.[4] Measuring devices and bridges must be constructed by the owners of works.[5]

§ 2033. Corporations and companies—Duty to furnish water.—Corporations are also given the power to appropriate water, condemn lands and other powers relative to the control and use of waters within the State. It is also provided that they must sell or lease water or water rights at a reasonable figure, and must also deliver to parties entitled to the use of water such quantity as they may need and which is still within the capacity of their works.

By the Act of 1907 [1] among other things it is provided: "The owner of works proposing to store or carry water in excess of their needs for beneficial use may make application for such excess and shall be held as trustees of such right for the parties applying the water to a beneficial use, and shall be required to sell water rights for a reasonable price and to furnish the water for such parties at reasonable rates for storage, or carriage, or both, as the case may be.

"The owner or owners of any works for the storage, diversion, or carriage of water, which contain water in excess of their needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus at reasonable rates for storage, or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. In the case of the refusal of such owner or owners to deliver any such surplus water at reasonable rates as determined by the State engineer, they may be compelled to do so by the Circuit Court for the county in which the surplus water is to be used."

2 Laws, 1907, Chap. 180, Sec. 3.
3 Laws, 1907, p. 373, Sec. 4.
4 Laws, 1907, p. 381, Secs. 27, 28.
5 Laws, 1907, p. 386, Sec. 52, p. 387, Sec. 53.
1 Laws, 1907, Chap. 180, Secs. 1935, 1936.

§ 2034. The construction of reservoirs.—Provisions are also made for the construction of reservoirs by private parties or corporations, or by civil townships, for the storage of surface or flood waters.[1]

§ 2035. Artesian wells.—Owing to the great possibilities in the State of South Dakota for obtaining artesian wells,[1] as early as 1890 there was approved an Act to encourage the sinking of such wells.[2]

Corporations for Sinking Artesian Wells.—The Act provides: "It shall be lawful for any person or persons, corporation, or corporations, company, or companies to construct artesian wells upon any lands owned or leased by such person, company, or corporation for the purpose of power and the irrigation of land for agricultural purposes, and for any and all purposes for which said water from said well may be utilized."

The Act provides that a right of way may be obtained for ditch purposes, but that improved lands shall not be crossed by more than one ditch where one can be made to serve the purpose. It also provides for disposing of the surplus water; penalties are prescribed for interfering with or injuring any of the works; the owners must keep all ditches and waterways in good repair; and when the ditch crosses the lands of a person, such person may apply to the owner of the ditch for a right to use the surplus water flowing therein to irrigate his lands, and such owner shall allow him to do so on payment of a just rental. Water rates are to be fixed by the county commissioners.[3]

Sinking Artesian Wells by Counties.—By an Act approved March 6, 1893,[4] it is provided that the sinking of artesian wells may be done by counties, upon taking proper proceedings therefor, upon a petition signed by not less than fifty resident freeholders of any county, of whom fifteen shall each be the owner of not less than eighty acres of land, located on any water course on which an artesian well is sought to be located. A vote upon the proposition

1 See Rev. Codes S. D., 1903, Secs. 2735-2754.

1 See Third Biennial Report of the State Engineer, 1909-1910, pp. 96-149.

For artesian wells, see Secs. 1166-1184.

2 Laws, 1890, p. 245.

3 Rev. Codes S. D., 1903, Secs. 2628-2647.

4 Rev. Codes, 1903, Secs. 2648-2679, 2755-2760.

must be taken, and, if carried, contracts may be let for the sinking of such wells, assessments levied and collected for the payment of the expenses thereof. And it is further provided that: "All artesian wells constructed under the provisions of this article shall be owned by the county and controlled by the board of county commissioners."

Sinking of Artesian Wells by Civil Townships.—By the Act of 1891 it is also provided that artesian wells may be sunk by civil townships.[5]

General provisions are also made for the distribution of the water from artesian wells, for the prevention of waste, and the interference with the same.

§ 2036. **The Carey Act in South Dakota.**—It was not until 1909 that the State of South Dakota accepted the provisions of the Carey Act. By the Act of February 24 of that year [1] the provisions of the Carey Act were accepted and measures taken for its operation. But, as reported by the State engineer, these operations as yet have not been very extensive.[2] By the Act a board was created, consisting of three members, the State engineer, State Auditor, and the Commissioner of Schools and Public Lands; the board to be known as the Carey Land Act Board, said board to serve without compensation, and of which the State engineer is *ex officio* chairman. The usual powers are granted the board to request the withdrawal of the lands from entry and to make contracts for the construction of the reclamation works. The contracting company may sell water rights and maintain and operate the works until 90 per cent of the lands for which such works are constructed have been sold and paid for, when such works shall be turned over to the settlers, who shall have the right thereafter to maintain and operate them. The contractor is given the right, so long as he maintains and operates the works, to charge not to exceed $1 per annum per acre for the cost of maintenance, operation, and delivery of the water.

It is also made the duty of the board to aid co-operative projects. To this end parties desiring to incorporate as a co-operative irrigation association for the purpose of reclamation of arid lands by their

5 Rev. Codes, 1903, Secs. 2680-2730.

1 Laws, 1909, Chap. 79, p. 135.

For the full discussion of the Carey Act, see Secs. 1312-1336.

2 See Sec. 2025.

own labor may organize for that purpose. Each member shall subscribe to one share of stock for each forty-acre tract of land to be filed upon and reclaimed by him, and the total number of shares shall be limited to one share for each forty acres. The works may then be constructed by such association, and the usual reclamation proceeded with by the settler, upon proof of which the patents issue direct to each stockholder.

"Water rights for said lands shall be appurtenant to and inseparable from the legal subdivisions for which it is appropriated."

The feasibility of all projects must be passed upon by the State engineer and by the board before the same will be ratified and the selection made.

Any citizen of the United States over the age of 21 years may make application. The application must be accompanied with 25 cents per acre for the land entered; the balance must be paid upon final proof. The price fixed for the land is not less than 50 cents nor more than $2.50 per acre, except to mutual associations, when the additional payment shall not exceed $1 per acre. The application must also be accompanied with a water right contract with the contracting company, which is given the usual lien for the payment thereof.

§ 2037. Provisions in aid of the National Reclamation Act.—The right is also given the United States to appropriate the waters in the State under the provisions of the National Reclamation Act.[1] And the sale of all State lands under such projects must conform to the farm units as specified by the Reclamation Service.[2] Also, the Act approved February 26, 1909,[3] provides for the organization of water users' associations under the laws of the State and in conformity with the requirements of the United States under the Reclamation Act.[4]

§ 2038. Criminal statutes—The pollution of water.—The criminal statutes of the State are almost identical with those of the State of North Dakota upon the subject.[1]

1 Laws, 1907, p. 384, Sec. 37.
2 Laws, 1907, p. 389, Sec. 59.
3 Laws, 1909, p. 155.
4 For water users' associations, see Secs. 1281-1286.
1 Laws, 1907, Secs. 51, 52, 54, 55. For North Dakota, see Sec. 1956.

Upon the subject of the pollution of water it is provided that the throwing of any gas, tar, or refuse of any gas house or factory, or the placing or causing to be placed any manure, offal, carcasses of animals, or other deleterious substances into any river, stream, or lake in the State, or upon the banks thereof, is a misdemeanor and punishable by a fine of not less than $10 nor more than $100, or by imprisonment in the county jail.

It is further provided: "This Act shall not be construed as to interfere with or prevent any necessary or legitimate mining operations or sewage system."[2]

§ 2039. **Riparian rights in the State.**—What has been said relative to riparian rights in North Dakota apply with equal force to those rights in South Dakota.[1] The old common law as to the right of a riparian owner to the undiminished flow of a stream running by his lands, without the actual use thereof, may be deemed as abrogated by the Water Code of 1907, with the exception of such rights as had vested prior to that date. That section of the Water Code which declares: "Any person, association, or company who may have or hold any possession, right, or title to any agricultural lands within the limits of this State shall be entitled to the usual enjoyment of the waters of the streams or creeks in said State," etc., should be construed with previous sections of the same code, wherein it is declared that all waters within the State belong to the public, and are subject to appropriation for beneficial use, and that such use shall be the basis, the measure, and the limit of the right.[2] Even two years before the Water Code was adopted it was held by the Supreme Court of the State that the right of a riparian owner to appropriate the water of a stream for irrigation purposes was limited to the amount actually used by him for proper irrigation purposes within a reasonable time after his settlement on the land.[3]

[2] Rev. Codes S. D., 1903; Penal Code, Secs. 445-448.

[1] For riparian rights in North Dakota, see Sec. 1957.

[2] See Laws, 1907, p. 382, Sec. 31, as amended by Laws, 1911, p. 468, in connection with Laws, 1907, p. 373, Secs. 1, 2.

[3] Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402.

See, also, Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; Metcalf v. Nelson, 8 S. D. 87, 65 N. W. Rep. 911, 59 Am. St. Rep. 746; Lone Tree D. Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W.

This decision was in itself a repudiation of the common law doctrine that a riparian owner was entitled to the undiminished flow of the stream that flowed by his land, as a part and parcel thereof, and that regardless of the question of use.

Rep. 650; Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402; Redwater etc. Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702; Redwater etc. Co. v. Jones Co., —— S. D. ——, 130 N. W. Rep. 85; Driscoll v. Rebb, 22 S. D. 242, 117 N. W. Rep. 135.

But see Sturr v. Beck, 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350, decided before the adoption of the water code.

CHAPTER 101.

TEXAS.

§ 2040. Particular features of the State.
§ 2041. Irrigation in the State.
§ 2042. Criticism of the Texas laws.
§ 2043. Title to waters and right of appropriation and use of waters.
§ 2044. The appropriation of water.
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§ 2048. Regulating the mode of irrigation in commissioners' court.
§ 2049. Irrigation district law.
§ 2050. Drainage and drainage districts.
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§ 2052. Duties of the commissioners of agriculture relative to irrigation.
§ 2053. Riparian rights in Texas.

§ 2040. Particular features of the State.—Strictly speaking, the western part of Texas is included within the arid region, but since the greater portion of that State is semi-arid, the State is properly placed in that class. The State, with its vast area and greatly diversified topography and climate, contains lands well adapted to the cultivation of a wide variety of agricultural products. The arid portion of the State may be described as belonging to the drainage basins of the Rio Grande and Pecos Rivers. The elevation of this portion of the State varies from two to six thousand feet, and the annual precipitation ranges from eight to seventeen inches. The soil, particularly in the valley of the Rio Grande, is of exceeding fertility, and when sufficiently watered is adapted to the cultivation of almost all the agricultural products of the temperate and sub-tropical climate. The water of this territory can not be said to be distributed with any degree of equality, and in many localities there is practically no water for the vast tracts of arid lands.[1]

[1] See Report of Progress on Stream Measurements for the Calendar Year 1902, by F. H. Newell, 1903, Part III, Western Mississippi and Western Gulf Drainage, Water Supply and Irrigation Paper No. 84, U. S. Geological Survey; Surface Water Supply of the Western Gulf of Mexico and Rio Grande Drainages, by T. U. Taylor and W. A. Lamb, District Hydrographers, 1907, Water Supply and Irrigation Paper No. 210, U. S. Geolog-

§ 2041. **Irrigation in the State.**—Irrigation along the Rio Grande Valley, as is the case in Arizona and New Mexico, is of ancient origin.[1] On many of the canals now in use the methods of irrigating have undergone little change in the last two centuries. In some portions of Texas irrigation is indispensable, while in others it is found to be a very useful adjunct to the rainfall for the cultivation of crops of all kinds, including those of cotton and rice. The soil in general is fertile, and where there is water it is easily accessible. The science of irrigation being absolutely essential in the arid portion of the State, is more appreciated there, but in the semi-arid region of Central Texas, where the land has considerable value without irrigation, the value of the waters of the natural streams, while none the less great, is not so fully appreciated, although irrigation would double the already munificent productiveness of the soil.[2]

According to the census of 1910 the total number of farms irrigated in 1909 within the State was 4,907, as against 1,325 in 1899, an increase of 3,582, or 270.3 per cent. The total acreage irrigated in 1909 was 450,971 acres, against 49,652 in 1899, an increase of 401,319 acres, or 808.3 per cent. The total acreage which all enterprises were capable of supplying with water in 1910 was 693,496 acres. The area included in projects either completed or under construction in 1910 was 1,252,935 acres. The above figures include acreage in the cultivation of rice.

The acreage irrigated has been classified according to the character of enterprise by which it was controlled as follows: Co-operative enterprises, 41,186 acres; rice irrigation enterprises, other

ical Survey; The Geology and Water Resources of the Western Portion of the Panhandle of Texas, by Charles N. Gould, 1907, Water Supply and Irrigation Paper No. 191, U. S. Geological Survey; Underground Waters of Coastal Plain of Texas, by Thomas U. Taylor, 1907, Water Supply and Irrigation Paper No. 190, U. S. Geological Survey; Geology and Underground Waters of Northeastern Texas, by C. H. Gordon, 1911, Water Supply Paper No. 276, U. S. Geological Survey.

1 For ancient irrigation in Arizona, see Secs. 81, 1712.

For irrigation in New Mexico, see Secs. 83, 1925.

2 See Irrigation of Rice in United States, by Frank Bond and George H. Keeney, 1902, Office of Experiment Stations, Bulletin No. 113, U. S. Dept. of Agriculture; Irrigation in South Texas, by Aug. J. Bowie, Jr., Separate No. 6, Reprint from Office of Experiment Stations, Bulletin No. 158, U. S. Dept. of Agriculture.

than private and partnership, 198,622 acres; other commercial enterprises, 73,440 acres; private and individual rice enterprises, 88,065 acres; private and partnership enterprises, 49,658 acres. By this classification 286,687 acres, or 63.6 per cent of the total irrigated area in 1909, is shown to have been in the rice belt. No lands were reported irrigated in Texas in 1909 by the United States Reclamation Service, United States Indian Service, Carey Act, or irrigation district enterprises.

There is nothing upon the subject of waters and water rights in the constitution of Texas.

§ 2042. **Criticism of the Texas laws.**—The State of Texas, although in the forefront as to most subjects, has not kept pace with her sister States upon the subjects of irrigation and water rights. This may be from the fact, as stated before, that the cultivation of crops by irrigation is not as necessary in Texas as in some of the other States. Although some of the laws upon the subject are admirable, others are inadequate and out of date, and then, again, there is a great deficiency of laws which should have been passed, but which do not appear in the statutes of the State. A State with the natural resources and the many streams as has Texas, should have years ago adopted the law of State control or the State administration of the waters flowing within its boundaries. There should be a State engineer, and a State board of irrigation or control.

The State has adopted the irrigation district law, but in the census of 1910 no acreage is reported as having been irrigated by that mode of enterprise.

The regulating of irrigation by the Commissioners' Court is peculiar to the laws of the State. However, this law seems to be giving satisfaction, especially as to regulating the distribution of the waters among consumers thereof.[1]

§ 2043. **Title to waters and right of appropriation and use of waters.**—There are no constitutional provisions of the State of Texas governing or regulating waters or water rights. By the Act of 1895 [1] the following was provided:

1 For regulating the mode of irrigation in commissioners' court, see Sec. 2048.

1 Laws, 1895, p. 25.

"The unappropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State of Texas in which, by reason of the insufficient rainfall or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided." [2]

By the Irrigation District Act of 1905 it is also provided:

"The use of all water required for the irrigation of the land of any district formed under the provisions of this law, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this law, is hereby declared to be a public use, subject to the regulation and control of the State in the manner as may be prescribed by law." [3]

"The storm or rain waters, as described in the preceding article, may be held or stored in dams, lakes, or reservoirs built and constructed by a person, corporation, or association of persons for irrigation, mining, milling, the construction of water works for cities and towns or stockraising, within those portions of Texas described in the foregoing article; and all such waters may be diverted by the person, corporation, or association of persons owning or controlling such dam, reservoir, or lake for irrigation, mining, milling, the construction of water works for cities and towns, and stockraising.[4]

"The ordinary flow or underflow of running water of every natural river or stream within those portions of Texas described in Article 4991 may be diverted from its natural channel for irrigation, mining, milling, the construction of water works for cities and towns, or stockraising: Provided, that such flow or underflow shall

[2] Rev. Civil Stats. Tex., 1911, Art. 4991.

See, also, Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540; Flemming v. Davis, 37 Tex. 173; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Brown v. Baker, 55 Tex. 57; McGhee etc. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 389; rev'd *Id.*, 22 S. W. Rep. 967; Hall v. Carter, 33 Tex. Civ. App. 230, 77 S. W. Rep. 19; Biggs v. Leffingwell, —— Tex. Civ. App. ——, 132 S. W. Rep. 902.

[3] Rev. Civil Stats. Tex., 1911, Art. 5088.

[4] Rev. Civil Stats. Tex., 1911, Art. 4992.

not be diverted to the prejudice of the rights of the riparian owner without his consent, except after the condemnation thereof in the manner as hereinafter provided.[5]

"The appropriation of water must be either for irrigation, mining, milling, the construction of water works for cities and towns, or stockraising.[6]

"As between appropriators, the first in time is the first in right."[7]

It is also provided that the owner whose land abuts on a running stream may use such water therefrom as may be necessary for domestic purposes. The remainder of the waters of rivers and streams can only be appropriated by the lawful appropriator.[8]

"All surplus water of a running stream not used or disposed of as provided in the preceding articles shall be conducted back to the stream from which it was taken through a ditch or canal constructed under the provisions of this chapter, or through a natural channel leading back to the stream."[9]

§ 2044. The appropriation of water.—"Any person, firm, association of persons, or corporation may acquire the right to and appropriate for irrigation purposes the unappropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain water of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State referred to in Article 4991, by filing a sworn statement in writing, to be recorded as provided in Article 4996, declaring his or its intention of appropriation of such water." Said statement shall also show approximately the number of acres of land proposed to be irrigated; the name of such ditch or canal, the point at which the headgate will be situated; the size of the ditch in width and depth, and carrying capacity thereof in cubic feet per second of time; the name of the appropriator; the name of the stream, and other facts set forth by the statute.[1]

5 Rev. Civil Stats. Tex., 1911, Art. 4993.

6 Rev. Civil Stats. Tex., 1911, Art. 4994.

7 Rev. Civil Stats. Tex., 1911, Art. 4995.

8 Rev. Civil Stats. Tex., 1911, Art. 5001.

9 Rev. Civil Stats. Tex., 1911, Art. 5005.

1 Rev. Civil Stats. Tex., 1911, Art. 4998.

"Within ninety days next after filing of said statement referred to in the foregoing articles the party or corporation claiming the right to appropriate the water shall begin actual construction of the proposed ditch, canal, dam, lake, or reservoir, and shall prosecute the work thereon diligently and continuously to completion.

" 'Completion,' as used in Article 4998, is hereby defined to be the conducting of the water in the main canal to the place of intended use." [2]

§ 2045. **Corporations and companies.**—"Corporations may be formed and chartered under the provisions of this chapter and of the general corporation laws of the State of Texas for the purpose of constructing, maintaining, and operating canals, ditches, flumes, feeders, laterals, reservoirs, dams, lakes, and wells, and of conducting and transferring water to all persons entitled to the same for irrigation, mining, milling, to cities and towns for water works, and for stockraising, and for the purpose of building storage reservoirs for the collection and storage water for the purposes before mentioned." All such corporations are given full power and authority to make contracts for the sale of permanent water rights and to have the same secured by liens on the land or otherwise, and to lease, rent, or otherwise dispose of the water controlled by such corporation for such time as may be agreed upon. "All persons who own or hold a possessory right or title to land adjoining or contiguous to any canal, ditch, flume, or lateral constructed and maintained under the provisions of this chapter, and who shall have secured a right to the use of water in said canal, ditch, flume, lateral, reservoir, dam, or lake, shall be entitled to be supplied from such canal, ditch, flume, lateral, dam, or lake with water for irrigation of such land, and for mining, milling, and stockraising, in accordance with the terms of his or their contract." [1]

It is further provided that the sale of a permanent water right shall be an easement to the land and pass with the title thereof.[2]

"Every canal corporation, for the purpose of irrigation, shall have power to cause such examination and survey for its proposed

2 Rev. Civil Stats. Tex., 1911, Arts. 4999, 5000.

1 Raywood etc. Co. v. Erp, —— Tex. ——, 146 S. W. Rep. 155.

2 Rev. Civil Stats. Tex., 1911, Art. 5002.

canal to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers, agents, or servants, to enter upon the land or waters of any person."[3]

"Every person, corporation, or association of persons which has heretofore constructed, or which may hereafter construct, any ditch, canal, dam, lake, or reservoir for the purpose of irrigation, and who shall lease or rent the water from said ditch, canal, dam, lake, or reservoir to any person or association of persons or corporation owning any lands subject to irrigation from any such ditch, canal, lake, dam, or reservoir, such person, corporation, or association of persons owning such ditch, canal, lake, dam, or reservoir shall have a preference lien, superior to every other lien, upon the crop or crops raised upon the land thus irrigated under such lease or contract."[4]

Any corporation organized under the above provisions for the purpose of irrigation shall have the power to acquire lands by voluntary donation or purchase or in payment of stock or water rights and to dispose of all such land and other property and to borrow money, issue bonds, and to mortgage all its property for the payment of any debts contracted for the same.[5]

§ 2046. **Ditches and canals and rights of way therefor.**—"Every person, corporation, or association of persons who have constructed, or may hereafter construct, any ditch, canal, reservoir, dam, or lake for the purposes named in this chapter, and taking the water from any natural stream, storage reservoir, dam, or lake, within ninety days after commencement of such construction, must file and cause to be recorded in the office of the county clerk of the county where the headgate of such ditch or canal may be situated, or to which said county may be attached for judicial purposes, in a well-bound book to be kept by said clerk for that purpose, a sworn statement in writing," showing approximately the number of acres of land that will be irrigated, the name of such ditch or canal, the point at which the headgate thereof is situated, the size of the ditch or canal, and carrying capacity thereof in cubic feet per second of time, the name

[3] Rev. Civil Stats. Tex., 1911, Art. 5003.

[4] Rev. Civil Stats. Tex., 1911, Art. 5009.

[5] Rev. Civil Stats. Tex., 1911, Art. 5010.

of the stream from which said water is taken, and other essential facts prescribed by the statute.[1]

"By compliance with preceding articles the claimant's right to the use of water relates back to the time when the work of excavation or construction was commenced on said ditch, canal, reservoir, dam, or lake; provided, that a failure to file such statement shall in nowise work a forfeiture of such heretofore acquired rights, nor prevent such claimants of such heretofore acquired rights from establishing such rights in the courts."[2]

All corporations and associations formed for the purpose of irrigation and other useful purposes involving the right to the use of water are given the right of way over the public lands of the State for the construction of the necessary works.[3]

Rights of way are also given across highways, "provided, that if any public road or highway or public bridges should be upon the ground necessary for the damsite, reservoir, or lake, it shall be the duty of the commissioners' court to change said road and to remove such bridges that the same may not interfere with the construction of the proposed dam, reservoir, or lake; provided, further, that the expense of making such change shall be paid by the person, firm, or corporation owning such damsite, lake, reservoir, or canal.[4]

"Unless such person, association of persons, or corporation shall fence their said ditch, canal, reservoir, dam, or lake and keep the same securely fenced, then there shall accrue in their favor no cause of action against owners of live stock for any trespass thereon.

"Such canal corporation, for the purpose of irrigation, shall have power to construct its canal across, along, or upon any stream of water."[5]

§ 2047. Adjudication of existing rights.—Under the law of Texas the adjudication of existing water rights between claimants under the doctrine of appropriation and between such claimants and those claiming the water by virtue of riparian ownership is entirely left to the courts under the equity procedure.

1 Rev. Civil Stats. Tex., 1911, Art. 4996.

2 Rev. Civil Stats. Tex., 1911, Art. 4997.

3 Rev. Civil Stats. Tex., 1911, Art. 5004.

4 Rev. Civil Stats. Tex., 1911, Art. 5006.

5 Rev. Civil Stats. Tex., 1911, Arts. 5007, 5008.

§ 2048. Regulating the mode of irrigation in commissioners' courts.—Texas has a law peculiar to itself, regulating the mode of the distribution of waters for irrigation, through the means of the "commissioners' court." This court consists of four commissioners of each county, together with the County Judge.[1]

Relative to the regulating of the mode of irrigation, it is provided:

"The commissioners' courts are authorized to order, regulate, and control the time, mode, and manner of erecting, repairing, cleaning, guarding, and protecting the dams, ditches, roads, and bridges belonging to any irrigation farms and property, and the fences or other like protection in and around such farms; provided, that such farms, dams, ditches, and fences be owned conjointly by two or more different persons; and, further provided, that the same be situated outside of a corporation having jurisdiction thereof.

"Said courts shall have power to establish all needful police regulations for the government and control of irrigation farms and property; and said courts may assess and collect fines for breaches of any regulations established by them or by the joint owners of such farms and property, or recognized by said court as consistent with ancient usage and the law of the State; said courts may order meetings of joint owners for the election of commissioners and other officers, and for the consideration of any of their other interests, and the said court may proceed and elect said officers, and may regulate the right of way, the stoppage and passage of the water, and the right distribution of the shares of said water; they may forbid the running of stock at large on the common farm; they may fine for taking water out of turn and for carelessness and wantonness in overflowing roads and neighboring lands, and generally they may do, or cause to be done, what they may consider just and needful or beneficial to the joint owners.

"If any owner of a suerte or subdivision lot in said farm shall fail or refuse to do or pay his proportion of labor and expense in and on any dam, ditches, fences, bridges, or other needful appurtenances to such irrigation farms, the commissioners' court may lease said suerte; provided, that such leasing shall be at public outcry, after ten or more days of due public notice, and to the persons

[1] For the organization, powers, and duties of said court, see Rev. Civil Stats. Tex., 1911, Arts. 2236-2282.

bidding the shortest term, not to exceed four years, who shall give good security to discharge faithfully all such charge and work.

"Upon the application of the owners of any suitable lands and water, and the assurance and proper security given to the county, if required by said court, that no injury will result to the public health, the commissioners' courts are authorized by decree to license and permit any such owners to proceed and dam the water, and to ditch, fence, and irrigate their lands; provided, that joint owners of all irrigation farms shall be liable for damages done to the public, or to any person, by reason of the overflow of such irrigation water; suit to be brought against the person occasioning the injury, or in such other way as may be sanctioned by said court."[2]

The right of eminent domain is granted under the provisions of the Act and the court given the power to proceed and assess the damages.

Where the health of the community may be injured by irrigation or the damming up of water, the commissioners' courts, after due and mature hearing and consideration, may decree the discontinuance, "and they shall proceed and break up and discontinue all such dams, ditches, and irrigation whether the same have been heretofore ever so long in existence or may hereafter be started."

In counties where the commissioners' courts may decree and adjudge that fences around immigration farms may be dispensed with, they may make all fair, equal, and proper regulations for the keeping up or herding of cattle and other stock for the security and protection of the crops and farms.[3]

§ 2049. Irrigation district law.—Texas has also adopted the irrigation district law, based largely upon the Wright Law of California, although according to the reports of the last census, there was no area irrigated under these districts.[1]

Relative to the organization of such districts it is provided:

"A majority in numbers of the holders of title, or evidence of title, to lands susceptible of irrigation from a common source and by the same system of works, such holders of title, or evidence of

[2] Rev. Civil Stats. Tex., 1911, Arts. 4984-4987.

[3] Rev. Civil Stats. Tex., 1911, Arts. 4988-4990.

[1] For the irrigation district Act, see Rev. Civil Stats. Tex., 1911, Arts. 5012-5107.

title, representing a majority in value of said land, according to the county assessment roll or rolls for the year last preceding, may propose the organization of an irrigation district under the provisions of this law."

A petition must be presented to the commissioners' court of the county [2] in which the lands within the proposed district or the greater portion thereof are situated, signed by the required number of holders of title, and representing the requisite majority in value of said lands, which petition shall set forth the facts in general as prescribed by the California law.[3] The commissioners' court must upon notice, hear said petition and grant or refuse the same. If granted, an election must be called and held in the usual manner. The other provisions of the Act relative to officers, general elections, the issue and sale of bonds, and taxation and assessments are largely the same as the California law.

It is provided that assessments must be made on all property in the district, in the following language: "The assessor must, between the first Monday in March and the first Monday in June in each year, assess all property in the district, to the persons who own, claim, have the possession or control thereof, at its full value. Any property which may have escaped the payment of assessment for any year shall, in addition to the assessment for the then current year, be assessed for such year with the same effect and with the same penalties as are provided for such current year." [4]

It is also provided that the boundaries of the district may be changed by including or excluding certain territory.[5]

Relative to the regulation and use of water it is provided:

"The use of all water required for the irrigation of the land of any district formed under the provisions of this law, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this law, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner as may be prescribed by law." [6]

2 For commissioners' courts, see Sec. 2048.

3 For California irrigation district laws, see Sec. 1755.

For a full discussion upon irrigation districts, see Chap. 70, Secs. 1386-1432.

4 Rev. Civil Stats. Tex., 1911, Art. 5054.

5 Rev. Civil Stats. Tex., 1911, Arts. 5065-5087.

6 Rev. Civil Stats. Tex., 1911, Art. 5088.

It is also provided that the water shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon said district. In times of scarcity water must be apportioned according to the amounts necessary to the different localities as the water commissioners may in their judgment think best. Navigation must not be impaired through any of the projects under the Act. The remaining provisions of the Act are practically the same as those of California.[7]

§ 2050. Drainage and drainage districts.—Under the proper proceedings had, the commissioners' court is authorized to construct drains for the drainage of the lands within their respective counties.[1]

There are also provisions for the organization of drainage districts included in one or more counties, and also one or more of such districts in each county.[2] These Acts largely follow the California Reclamation District Act.[3]

§ 2051. Acts in aid of the National Reclamation Act.—In aid of the National Reclamation Act it is provided:

"Where, in the examination, survey, or construction of any irrigation or reclamation project under the provisions of the Act of Congress, approved June 17, 1902, thirty-second statutes, 388, known as the Reclamation Act, it shall be found advisable or necessary to irrigate or reclaim lands within limits of the State of Texas, the Secretary of the Interior is authorized to make all necessary examinations and surveys for, and to locate and construct irrigation or reclamation works within said State, and to perform any and all acts necessary to carry into effect the provisions of the Reclamation Act as to such lands, subject to all the provisions, limitations, charges, terms, and conditions of the said Reclamation Act."[1]

7 Rev. Civil Stats. Tex., 1911, Arts. 5089-5107.

1 Rev. Civil Stats. Tex., 1911, Arts. 2477-2541.

2 Rev. Civil Stats. Tex., 1911, Arts. 2542-2625.

3 See Sec. 1757; Wharton Drainage Dist. v. Higbee, —— Tex. Civ. App. ——, 149 S. W. Rep. 381; Parker v. Harris, —— Tex. Civ. App. ——, 148 S. W. Rep. 351; Spalding v. Haley, —— Tex. Civ. App. ——, 142 S. W. Rep. 172.

1 Rev. Civil Stats. Tex., 1911, Art. 5011.

§ 2052. Duties of the commissioner of agriculture relative to irrigation.—By the Act of 1909,[1] it is provided: "It shall be the duty of the commissioner of agriculture to prepare and make public reports on the present system of irrigation now in operation in this State, the cost of maintenance and operation of the same, the character and kind of irrigation plants which result in the greater saving to the users of water, the class and character of water contracts entered into by the various canal companies; he shall also inquire into the reasonableness and fairness of rates being charged for water by the various canal companies in this State, and, from time to time, shall make public the result of his inquiries; he shall collect and publish statistics and other information regarding the irrigation of rice and other crops as may be of benefit in developing and collaborating a more efficient system of laws safeguarding and defining the rights of users and sellers of water for irrigating purposes; and he shall make up and file an annual report on same with such recommendations as he may deem beneficial to the industry, which report shall be filed with the Governor and transmitted to the legislature.

"The commissioner of agriculture is hereby empowered and authorized to employ a competent engineer and expert, possessing a practical knowledge of the application of irrigation to the raising of rice and other crops, for the purpose of assisting him in performing the duties required of him in the preceding article."

§ 2053. Riparian rights in Texas.—Riparian rights are recognized and protected to a certain extent in the State of Texas, although in the arid portion of the State, these rights are not as strictly enforced against appropriators for irrigation as they are enforced in the eastern and more humid portions of the State. There is a different rule governing the arid and humid portions of the State.[1]

1 Rev. Civil Stats. Tex., 1911, Arts. 4448, 4449.

1 See Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. Rep. 758; Watkins L. Co. v. Clements, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; Santa Rosa v. Pecos etc. Co., —— Tex. Civ. App. ——, 92 S. W. Rep. 1014; Cape v. Thompson, 21 Tex. Civ. App. 681, 53 S. W. Rep. 368; Baker v. Brown, 55 Tex. 377; Mud Creek Irr. Dist. v. Vivian, 74 Tex. 170, 11 S. W. Rep. 1078; Rhodes v. Whitehead, 27 Tex.

It will also be noticed that the laws of Texas under the authorities cited, give the upper riparian proprietor a sort of preference right to the use of water, especially if the inception of his right was prior in time.

304, 84 Am. Dec. 631; Fulton v. Frandolig, 63 Tex. 330; McGhee etc. Co. v. Hudson, 85 Tex. 587, 22 S. W. Rep. 398; Haas v. Chusard, 17 Tex. 588.

CHAPTER 102.

UTAH.

§ 2054. Particular features of the State.
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§ 2056. Criticism of the Utah laws.
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§ 2054. Particular features of the State.—We must take into consideration in this connection the fact that Utah in its natural state and condition was considered but little less than a desert. Its streams capable of being utilized are in general small; and its valleys, hemmed in as they are by lofty ranges of the Rocky Mountains which draw the moisture from the clouds, are naturally most arid. The northern and western parts of the State lie within the Great Basin of the continent from which no water escapes except by evaporation. In general, the Great Basin has an elevation of over 4200 to 6000 feet above the sea level and is surrounded by mountains attaining altitudes of over 8000 to 13,000 feet. It is a broad area of arid surface, containing many independent drainage districts. Within its territories are a number of mountain ridges of no great length, having a general northerly direction. Between these ranges are smooth valleys, the floors of which are built of the debris washed down from the surrounding mountains.

The eastern portion of the State is, in general, better watered, its principal streams being Green River and its tributaries. This is a portion of the drainage basin of the Colorado River and is usually distinguished by lofty plateaus and deep canyons, with the water itself many hundred feet below the surrounding country. The Wasatch Range of mountains runs in a general north and south direction through the center of the northern half of the State, wringing from the clouds the moisture, thus preventing any great precipitation in the valleys. But in the winter, the moisture in the shape of snow, being stored up in the mountains until needed, renders the farming communities in the valleys very prosperous. The small streams issuing from this great range have cut through the mountains and as a general rule pour their waters toward the west, ultimately flowing into the Great Salt Lake. This lake is but the remnant of a great body of fresh water which occupied all the valleys of western Utah, and from whence came the rich sediment which renders the broad bottom lands so fertile. The valleys situated at the base of this range of mountains, although exceedingly arid in climate, receive many streams which carry a large part of the precipitation which has fallen upon the highest summits, and are thus most favorably situated for cheap and effective irrigation. The valleys farther to the west, however, though equally fertile, do not receive streams as large or permanent from the fact that the mountains bounding them are of less altitude.[1]

§ 2055. **Irrigation in the State.**—A peculiar interest attaches to the Great Basin in Utah from the fact that it is the location of the first irrigation enterprise in this country, by English speaking peo-

[1] See Seepage Water in Northern Utah, by Samuel Fortier, Water Supply and Irrigation Paper No. 7, U. S. Geological Survey; Surface Water Supply of the Great Basin Drainage, by E. C. La Rue, Thomas Grieve, Jr., and Henry Thurtell, District Hydrographers, 1908, Water Supply Paper No. 212, U. S. Geological Survey; The Colorado River Basin, by W. B. Freeman and R. H. Bolster, 1910-1911, Water Supply Papers Nos. 249 and 269, U. S. Geological Survey; The Great Basin, by E. C. La Rue and F. F. Henshaw, 1910-1911, Water Supply Papers Nos. 250 and 270, 1910-1911, U. S. Geological Survey; Ground Water in Juab, Millard, and Iron Counties, Utah, by Oscar Meinzer, 1911, Water Supply Paper No. 277, U. S. Geological Survey; Underground Water in Sanpete and Central Sevier Counties, Utah, by G. B. Richardson, Water Supply Paper No. 199, U. S. Geological Survey.

ple. In 1847, the Mormon pioneers turned the waters of City Creek over the arid soil upon what is now Salt Lake City. In an earlier portion of this work, we have related something of the history of irrigation by the Mormon settlers.[1]

Utah also occupies the central position in the arid region and, therefore, the details of irrigation therein possess more than ordinary interest, from the fact that they represent conditions intermediate between those of the north and south, the east and the west. Besides this, the irrigation methods and systems were developed by men who, unaided by capital or previous experience, introduced methods of their own, and, taught by repeated failures, finally achieved success. The country being arid in the highest degree, the value of the land is dependent wholly upon the amount of water to which it is entitled, the most fertile areas being almost valueless without water. In the early days, Utah offered a striking contrast to the rest of the arid region in the details of the customs of the distribution of waters according to priority of rights and also in the regulation and control by the irrigator. Prior to the year 1900, with few exceptions, the canals and systems of ditches had been built by farmers and were controlled by them in every minute detail. The majority of the water disputes between the Mormons were settled in an arbitrary manner by the bishops' courts.

The point has long since been reached in the State, when all the easily available water has been appropriated and the increase of the cultivated area has been due to the storage of the flood waters and a more careful utilization of the available supply. In nearly every valley in Utah there is now more land under cultivation than there is water to mature the crops in all years. The principle was early established among the farmers of the then Territory, that those who first made use of the water should ever afterward be entitled to a sufficient amount to irrigate the area of land originally cultivated by them; and the later comer, whenever scarcity occurred, could not take the water until those enjoying prior rights had satisfied their needs, the later comer being the first to be deprived and those settling before him losing their water supply in succession in the converse order of their acquisition as the flow of the stream became less and less.[2]

1 See Secs. 243-246.

2 See Duty of Water on Big Cottonwood Creek, Utah, by Special Agent R. C. Gemmell, State Engineer, Office

According to the Census Report for 1910 the total number of farms irrigated in the State of Utah in 1909 was 19,709, against 17,924 in 1899, an increase of 1,785, or 10 per cent.

The total area irrigated in 1909 was 999,410 acres, against 629,293 acres in 1899, an increase of 370,117 acres, or 58.8 per cent. The total acreage which all enterprises were capable of supplying with water in 1910 was 1,250,240 acres. The acreage included in projects either completed or under construction in 1910 was 1,947,625 acres. This indicates the area which will be available within the next few years for the extension of irrigation, and shows that the area irrigated can be almost doubled without the construction of additional works.

The acreage irrigated in 1909, classified by the type of enterprises, is reported as follows: Under United States Indian Service, 11,520 acres; under the Carey Act, 5000 acres; under co-operative enterprises, 681,760 acres; under commercial enterprises, 70,227 acres, and under individual and partnership enterprises, 222,448 acres.

§ 2056. **Criticism of the Utah laws.**—The strong feature of the Utah statutory law governing the appropriation and use of the waters within the State is that of State administrative control. This law is based somewhat upon the Wyoming and somewhat upon the Colorado statutes. The board of control, or State irrigation board, and State divisions are entirely dispensed with, and correspondingly greater powers are conferred upon the State engineer. The State engineer of Utah has greater powers in these matters than has the State engineer of any other State outside of that of Nevada. Whether or not the concentration of such powers in any one man, involving as it does the greatest industry of the State, is a wise provision still remains a serious question. In the hands of a wise, competent, honest, and skillful engineer upon whom these powers have been conferred it may work to the best interests of all

of Experiment Stations, Bulletin No. 86, U. S. Dept. of Agriculture; Water Right Problems of Bear River, by Clarence T. Johnson and Joseph A. Breckons, 1899, Office of Experiment Stations, Bulletin No. 70, U. S. Dept. of Agriculture; Irrigation Under Canals from the Logan River, by George L. Swendsen, Professor of Irrigation Engineering, Utah Agricultural College. See, also, Water Administration in Utah, by R. C. Gemmell, State Engineer, Office of Experiment Stations, Bulletin No. 104, U. S. Dept. of Agriculture.

concerned; but, upon the other hand, where the situation is to the contrary in any one particular, all sorts of havoc and complications may be the result. The State of Utah has been especially fortunate in securing the right kind of men for this important position, but there has been trouble in some of the other States in this respect.[1]

The matter of the adjudication of existing rights in the State is properly left to the courts. But to date practically all adjudications have been by actions in equity brought for that purpose. The provisions relative to the statutory adjudication of rights has been practically inoperative from the fact of the failure of the legislature to provide the necessary expenses for these actions. But by the Act of January 31, 1911,[2] providing for the "adjudication of water rights fund," it is expected that hereafter the statutory procedure will be largely followed.[3]

The provision of the statute relative to the appropriation of water that in case the State engineer is convinced that an application to appropriate water for a designated purpose is not for the most beneficial use, he shall file such application with his findings with the District Court, and on the filing of such statement such court shall have the exclusive jurisdiction to determine the merits of the question and instruct the engineer to approve or reject the application, is decidedly unique to the Utah statute.[4] As to how this provision will work, it is too early as yet to determine.

The legislature has been derelict in its duty in the failure to enact an artesian well law, especially as relating to the suppression of the wasting of water from such wells. In the meantime there are many of such wells running continually day and night, summer and winter, and no attempt made to suppress their flow during times when their waters are not needed.

§ 2057. State constitutional provisions.—Upon the subject of the sale of water rights and water works the constitution of the State, by Article XI, Section 6, provides:

"No municipal corporation shall, directly or indirectly, lease, sell,

1 See Secs. 1343, 1344.

2 Laws, 1911, p. 3.

3 For this procedure, see Sec. 2062.

4 See Comp. Laws, 1907, Sec. 1288x10, as amended, Laws, 1909, p. 86, and Laws, 1911, p. 143. See, also, Sec. 2061.

alien, or dispose of any water works, water rights, or sources of water supply now or hereafter to be owned or controlled by it; but all such water works, water rights, and sources of water supply now owned or hereafter to be acquired by any municipal corporation shall be preserved, maintained, and operated by it for supplying its inhabitants with water at reasonable charges: Provided, that nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water rights or sources of water supply for other water rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants." [1]

By Article XVII, Section I, existing rights to the use of water was confirmed in the following language:

"All existing rights to the use of any of the waters in this State for any useful or beneficial purpose are hereby recognized and confirmed." [2]

In the declaration of rights, Article I, Section 22, it is provided: "Private property shall not be taken or damaged for public use without just compensation." [3]

[1] A conditional exchange of water rights by a city is held not to be a violation of this section. State *ex rel.* Ellerbeck v. Salt Lake City, 29 Utah 361, 81 Pac. Rep. 273.

It was held that, although a city was forbidden to lease or sell its waterworks, yet, where a so-called lease was made and acted upon for a number of years by both parties, at a great expenditure by the lessee, the contract would not be set aside by the court. Ogden City v. Bear Lake etc. Co., 28 Utah 25, 76 Pac. Rep. 1069; but see same case, 16 Utah 440, 52 Pac. Rep. 697.

The above provision of the constitution does not prohibit the acquisition of a secondary water right against a municipality. Salt Lake City v. Salt Lake City etc. Co., 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

Neither does the section forbid the acquisition by a power company of the right to connect its flume with the water canal of a city for the purpose of discharging water into the same. Salt Lake City etc. Co. v. Salt Lake City, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

[2] "It will be thus observed that the organic law of this State has put it beyond the power of any party to lawfully go upon a stream of water in which he has acquired no right, and interfere with existing rights, or destroy or cut off the source of supply of such stream because it happens to be a pond or lake." Cole v. Richards Irr. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962.

[3] For a municipality to assume control of a private water system and to levy taxes on land of owners thereof, to maintain it, is to deprive them of property without due process of law. Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Bartholomew v.

Upon the subject of taxation of irrigation works, the Utah constitution provides in Article 13, Section 3, as follows: "Ditches, canals, reservoirs, pipes, and flumes owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed as long as they shall be owned and used exclusively for such purpose."

§ 2058. **Title to water.**—Upon the subject of the title to waters within the State of Utah, the statutes provide:

"The water of all streams and other sources in this State, whether flowing above or under the ground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof." [1]

§ 2059. **The right to appropriate waters—Abandonment.**—By express statute the right to appropriate water within the State of Utah is given in the following language:

"Rights to the use of the unappropriated water in the State may be acquired by appropriation in the manner hereinafter provided and not otherwise. The appropriation must be for some beneficial or useful purpose, and as between appropriators, the one first in time shall be first in right; provided, that when a use designated

Fayette Irr. Co., 31 Utah 1, 86 Pac. Rep. 481.

Section 3597, providing that plaintiff may enter into possession of property in condemnation proceedings upon filing sufficient bond is not in conflict with the provisions of the above section. Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 67 Pac. Rep. 672.

Property is taken for a public use within the provision of the constitution declaring that private property shall not be taken for public use without just compensation, when the taking is for a use that will promote the public interest, and will tend to develop the resources of the State, as is the case of a right of way through an irrigation ditch of another claim by a single individual, for the purpose of conducting water to irrigate his own land. Nash v. Clark, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953; affirmed, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676.

For a city to repudiate a contract of leasing its water system after lessee had expended large sums of money thereon, would be the taking of private property for a public use without just compensation. Ogden City v. Bear Lake etc. Co., 28 Utah 25, 76 Pac. Rep. 1069.

1 Compiled Laws of Utah, 1907, Sec. 1288x18.

The future references in this chapter will be to the above unless otherwise indicated.

by an application to appropriate any of the unappropriated waters of the State would materially interfere with a more beneficial use of such water, then the application shall be dealt with as provided in Section 1288x10."[1]

The right of the appropriation of waters for all beneficial uses has always been given since the first settlement of the territory now included in the State by the Mormon pioneers in 1847. The right was first acquired by custom, afterward by the many statutes passed by the legislatures of the Territory and State which preceded the above Act, and the right has always been upheld by the courts.[2]

1 Comp. Laws, 1907, Sec. 1288x5, as amended, Laws, 1911, p. 143.

Under the statutory appropriation it is provided that the priority shall be determined by the date of receiving the application in the State engineer's office. Comp. Law, 1907, except as provided in Sec. 1288x16; Sec. 1288x17, as amended, Laws, 1909, p. 90.

2 See Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290; Cole v. Richards etc. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962.

For the rights as between prior and subsequent appropriators, see Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; Crane v. Winsor, 2 Utah 248; Nephi Irr. Co. v. Vickers, 29 Utah 315, 81 Pac. Rep. 144; Howcroft v. Union Irr. Co., 25 Utah 311, 71 Pac. Rep. 487.

It was held that, under Section 2339, Revised Statutes of the United States, a vested right to any of the unappropriated waters might be acquired by the appropriation of the same, for the operation of machinery, irrigation, or other useful purposes, and to construct reasonable dams and reservoirs, so far as necessary for the utilization of the same, but that the defendant was not authorized to oust the plaintiff, who had first appropriated and taken possession of the land in dispute for its right of way. Rio Grande W. R. Co. v. Telluride etc. Co., 16 Utah 125, 51 Pac. Rep. 146; appeal dismissed, 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; see *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 338.

Known underground waters of a stream, flowing in well defined channels, are subject to appropriation, and can not thereafter be diverted by the wrongful act of another. Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764.

Springs belong to the owner of the land, where no prior adverse rights have been acquired. Willow Creek Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Orient M. Co. v. Freckleton, 27 Utah 125, 74 Pac. Rep. 652.

As to rights in percolating waters, see Sullivan v. Northern Spy M. Co., 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186; Crescent M. Co. v. Silver King M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; Her-

The extent of the right is defined by statute in the following language: "Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this State."[3]

Also, by the Act approved March 20, 1911,[4] it was provided that: "Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes, irrespective of the carrying capacity of the ditch, and all the balance of the water not so appropriated shall be allowed to run in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby."

The loss of the right to the use of water by abandonment is prescribed as follows: "When the appropriator or his successor in interest abandons or ceases to use water for a period of seven years, the right ceases, and thereupon such water reverts to the public, and may be again appropriated as provided in this title; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact."[5] And the same period of

riman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Willow Creek Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Howcroft v. Union Irr. Co., 25 Utah 311, 71 Pac. Rep. 487. But, see Garnes v. Rollins, —— Utah ——, 125 Pac. Rep. 867.

[3] Comp. Laws, 1907, Sec. 1288x20.

That the right of a prior appropriator is fixed by the extent of his actual application of the water to a beneficial use, see Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; Munroe v. Ivie, 2 Utah 535; Manning v. Fife, 17 Utah 232, 54 Pac. Rep. 111; Elliot v. Whitmore, 23 Utah 342, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah 456, 27 Pac. Rep. 578; Nephi Irr. Co. v. Vickers, 29 Utah 315, 81 Pac. Rep. 144; Sowards v. Meagher, 37 Utah 212, 108 Pac. Rep. 1112.

A party, to acquire a right to the use of unappropriated waters for irrigation, is required to take, divert, and use the waters. Coray v. Holbrook, —— Utah ——, 121 Pac. Rep. 572.

[4] Laws, 1911, p. 149.

[5] Comp. Laws, 1907, Sec. 1288x23.

Upon questions of abandonment of water rights, see Promotory Ranch Co. v. Argile, 28 Utah 398, 79 Pac. Rep. 47; Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; Herriman v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Gill v. Malan, 29 Utah 431, 82 Pac. Rep. 471.

Upon the question of abandonment of ditches, see Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Morrison v. Winn, 17 Utah 484, 54 Pac. Rep. 761; Stalling v. Ferrin, 7 Utah 477, 27 Pac. Rep. 686.

the adverse user of seven years is required in order to acquire a right by prescription.[6] But the adverse use of the water must have been accompanied with all of the essential elements to make out an adverse possession.[7]

§ 2060. **Administrative officers.**—Following a sort of a combination of the laws of Colorado and Wyoming, the legislature of the State of Utah has adopted the system of State control or State administration for the purpose of governing and controlling the waters within its boundaries, divided the State into water districts, and provided for water commissioners having jurisdiction over the same, and at the head of which system is the State engineer.[1]

The State Engineer.—The statute provides for the appointment of the State engineer by the Governor, to be confirmed by the senate. He shall hold his office for a term of four years, and draws a salary of $3000. "He shall have the general supervision of the waters of the State and of their measurement, apportionment, and appropriation," and over the district commissioners. He is also given the power to make and publish such rules and regulations as he may deem necessary from time to time to fully carry out the provisions of the law, and to secure an equitable and fair apportionment of the water according to the respective rights of the ap-

6 That the right to the use of water may be acquired by an adverse user of the same for seven years or more, see Springville City v. Fullmer, 7 Utah 450, 27 Pac. Rep. 577; Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Holman v. Pleasant Grove, 8 Utah 78, 30 Pac. Rep. 72.

7 Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Center Creek Irr. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559; Minnie Maud Res. Co. v. Grames, 29 Utah 225, 81 Pac. Rep. 693; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. Rep. 205; Monroe v. Ivie, 2 Utah 535; Bartholomew v. Fayette Irr. Co., 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912.

The use of land for a ditch does not become adverse without a claim of right. Yeager v. Woodruff, 17 Utah 361, 53 Pac. Rep. 1045.

1 It will be noted that at first the State was divided into water divisions and these divisions into districts, over which there were provided superintendents and supervisors. But by the Act of March 20, 1911, these provisions were repealed and authority given to the State engineer to divide the State into water districts only, over which there may be appointed a water commissioner. See Act of March 20, 1911, Laws, 1911, p. 145, repealing Secs. 1286-1288x4, Comp. Laws, 1907.

propriators. "No person shall be appointed to the office of State engineer who has not such theoretical knowledge and practical experience and skill as shall fit him for the position." He shall keep his office at the State Capitol. He shall take an oath of office and give a bond in the penal sum of $5000. He must make a biennial report to the Governor on or before the 31st day of December preceding the regular session of the legislature, and in such reports he shall make such suggestions as to the amendment of existing laws or the enactment of new laws as his information and experience shall suggest. He shall keep on file in his office full and proper records of his work, which shall be the property of the State, and which shall be opened to the public for inspection. He shall make a complete hydrographic survey of each river system and water source in the State. He shall have the general supervision of the appropriation of water. He may co-operate with the agencies of the National Government engaged in similar work within the State for the purpose of interchanging information and avoiding the unnecessary duplication of work.[2]

Before commencing the hydrographic survey of any river system the State engineer must give notice by publication. He is given the authority to inspect all dams exceeding five feet in height, and must approve the plans of the same before construction may be commenced on new dams, and order repairs on those constructed, if found defective. He may also inspect ditches and canals and order the parties to make any alteration which he considers necessary for the security of such works, the safety of persons, or the protection of property. He is also given the power to bring actions to adjudicate existing rights.

In addition to the duties above prescribed by the Act of March 20, 1911,[3] it was also provided that the State engineer shall divide the State into water districts, said districts to be so constituted as to secure the best protection to the claimants for water, and the most economical supervision on the part of the State; said districts not to be created until a necessity therefor shall arise.[4]

[2] Comp. Laws, 1907, Secs. 1261-1266.

[3] Laws, 1911, p. 145, Sec. 1.

[4] For fees of the State engineer, see Comp. Laws, 1907, Sec. 970x, as amended, Laws, 1911, p. 5.

Water Commissioners.—The Act of March 20, 1911,[5] provides that there shall be appointed by the Governor one water commissioner for each water district, who shall be selected from persons recommended by the State engineer, each commissioner to hold office until his successor is appointed and qualified. He must give a bond in the sum of $1000. "Water commissioners provided for shall receive such compensation as shall be fixed by the State engineer, and the same shall be determined with reference to the extent and character of the service performed by each, to be paid by the county in the interest of which the work is performed."

The water commissioners are made *ex officio* officers of the court, and they are given the powers and duties to divide the water according to decrees, or according to priority; they may employ assistants when necessary; they may make arrests for the violation of the water laws; they have superintendency of headgates and measuring devices; and they must make their reports to the State engineer.[6]

§ 2061. **The appropriation of water.**—Although the majority of the existing water rights in the State of Utah were acquired by the old methods of appropriation by a notice, and by the application of the water to some beneficial use or purpose,[1] since the Act of 1903 [2] appropriations must be made by application to the State engineer, and in accordance with the usual procedure for that purpose as adopted by those States wherein the law of State control or State administration is in force.[3]

The application for this purpose must be in the usual form,[4] and if it is for irrigation it must show, in addition, the total area and description of the land proposed to be irrigated; if it is for the

5 Laws, 1911, Chap. 104, p. 145, Secs. 1-14, and repealing Secs. 1286-1288x4, Comp. Laws, 1907.

6 For the distribution of water, see Sec. 2064.

1 See Rev. Stats., 1898, Secs. 1268-1272.

For the acquisition of primary and secondary rights, see Comp. Laws of Utah, 1888, Secs. 2780-2782.

2 Laws, 1903, p. 98.

3 For the appropriation of water under the laws of State control, see Secs. 1349-1353.

See, also, Comp. Laws, 1907, Secs. 1288x6-1288x17, as amended by Laws, 1909, p. 84, and by Laws, 1911, pp. 3, 143.

4 For all forms for this and other purposes in connection with the appropriation and use of waters in Utah, send to the State engineer, Salt Lake City, Utah.

development of power, it must also show the number, size, and kind of wheels to be employed, the head, the extent of power to be produced, and the purposes for which and the places where it is to be used, and where the water is to be returned to the natural stream; if the proposed use is for mining, it must also show the name of the mine and where situated, the nature of the material mined, and where the water is to be returned to the natural stream. The storage of water by means of a reservoir shall be regarded as a diversion, and the points of diversion in such case shall be deemed to include the point where the water is taken from the stream and the center of the impounding dam or reservoir. In this case the lands to be inundated by the reservoir must also be described.[5] The application must be filed by the State engineer, but if found to be incorrect an opportunity is given for correction; if, however, this is not done, no further proceedings shall be had thereon. Notice of the application must then be published.[6] Any one interested may, at any time within thirty days after the completion of the publication of the notice, file with the State engineer a written protest against the granting of the application, stating the reasons therefor, which shall be duly considered by said engineer, who shall approve or reject said application.[7] It is made the duty of the State engineer "to approve all applications where the proposed use will not impair the value of existing rights, or will not interfere with the more beneficial use of said water"; provided, however, that an application made by a homesteader or other entryman, such water to be exclusively used upon the land of such person, may be approved without reference to prior conflict; "but the State engineer, upon information furnished by the State conservation commission,[8] or upon his own investigations, or by information in his possession to the effect that there is reason to believe that applications to appropriate water from any stream or other source of supply within the State will interfere with its more beneficial use for irrigation, domestic, culinary, stock, power, mining, or other purposes, it shall be the duty to withhold the approval or rejection of such application until he shall have investigated the matter."

[5] Comp. Laws, 1907, Sec. 1288x6, as amended, Laws, 1909, p. 84.

[6] Comp. Laws, 1907, Secs. 1288x7, 1288x8, as amended by Laws, 1909, pp. 85, 86.

[7] Comp. Laws, 1907, Sec. 1288x9.

[8] See Sec. 2069.

The cost of such inquiry shall be paid by the applicant. "When the State engineer is convinced that an application to appropriate water for a designated purpose is not for the most beneficial use, he shall file the application, together with a statement of his findings, in the District Court in the county where the proposed appropriation is to be made." On the filing of such statement such court shall have exclusive jurisdiction to determine the merits of the case and instruct the engineer to approve or reject such application. But where there is no unappropriated water in the proposed source of supply, or where the proposed use will conflict with prior applications or existing rights, it shall be the duty of the State engineer to reject such application.[9]

The approval or rejection of an application shall be endorsed thereon, and the application so endorsed shall be returned to the applicant. If it is approved, the applicant may proceed with the construction of his works to perfect the proposed appropriation; if it is rejected, no further steps must be taken so long as such rejection shall continue in force. Before the approval or rejection the State engineer may require further information as to the financial ability of the applicant to carry out the proposed work.[10]

In his endorsement of approval on any application the State engineer shall require that actual construction work must begin within six months from the date of the approval, and shall state the time within which it must be completed, not exceeding five years from said date; [11] and in case the application is for irrigation, shall state the time within which water shall be applied to a beneficial use, not exceeding four years in addition thereto. An appeal from the decision of the engineer may be had to the district Court.[12]

The construction of the works shall be diligently prosecuted to completion, and if one-fifth of the work is not completed within one-half the time allowed, as determined by the State engineer, he

[9] Comp. Laws, 1907, Sec. 1288x10, as amended, Laws, 1909, p. 86, and as further amended, Laws, 1911, p. 143.

[10] Comp. Laws, 1911, Secs. 1288x11, 1288x12.

[11] Pool v. Utah etc. Co., 36 Utah 508, 105 Pac. Rep. 289, where it was held that the time might be extended by the State engineer, although the application was made after the time first fixed by him had expired, as long as the time was kept within the limit fixed by the statute of five years.

[12] Comp. Laws, 1907, Sec. 1288x13, as amended, Laws, 1909, p. 86, and Laws, 1911, p. 3.

may accept and approve an application of the use of all or any of the waters included in said prior application, and upon notice the right to use such water under such application shall thereupon be forfeited. "Provided, that the State engineer shall have the power for good cause shown to extend the time for completion of construction or for application to beneficial use, but in no case shall extensions of time be made that would place the date of proof of completion of construction and proof of beneficial use more than fourteen years from the date of approval, except that the State engineer shall allow extensions of time during which work was prevented by the operation of law beyond the power of said applicant to avoid." [13]

Any applicant or protestant who is dissatisfied with the action of the State engineer may bring an action in the District Court; or in case "a decision of the State engineer is involved," shall have sixty days to appeal therefrom to the said court. In either case no further action must be taken by the engineer until said action is finally decided.[14]

Proof of the completion of the works must be made to the satisfaction of the State engineer, and maps and plats filed of the same, upon which the engineer shall issue his certificate of completion, after which proof of the application of the water to a beneficial use must be made and the certificate of the appropriation issued, which certificate must contain a full description of the right.[15]

"The priority number of an appropriation shall be determined by the date of receiving the written application in the State engineer's office." Rights claimed under applications may be transferred or assigned.[16]

§ 2062. **The adjudication of existing rights.**—The adjudication of existing water rights in the State of Utah is left entirely to the courts, where the power properly belongs. This adjudication may

13 Comp. Laws, 1907, Sec. 1288x13, as amended by Laws, 1909, p. 86, and Laws, 1911, p. 4.

14 Comp. Laws, 1907, Sec. 1288x14, as amended by Laws, 1909, p. 87, and Laws, 1911, p. 4.

15 Comp. Laws, 1907, Secs. 1288x15, 1288x16, as amended, Laws, 1909, pp. 88, 89.

16 Comp. Laws, 1907, Sec. 1288x17, as amended, Laws, 1909, p. 90.

be by the regular proceedings in equity [1] or it may be by the procedure prescribed by the statute.[2]

The statutory proceedings are as follows: When the State engineer has completed the hydrographic survey of any stream system or water source, he shall file a statement with the clerk of the District Court of the county in which the same is situated, or if the system extends into more than one county, the statement shall be filed in any county which embraces any part of such system "that the State engineer shall select as most convenient for the water users of the system or source." The said statement shall set forth the fact of the completion of such survey, the names and addresses of all persons, corporations, and associations using water of said system, so far as known, and shall contain such other facts and information as the State engineer may deem necessary. "On the filing of such statement the District Court in the county where the same is filed shall have exclusive jurisdiction to determine all water rights on the river system or water source, in accordance with the provisions of this title." [3] Within thirty days after the filing of such statement the clerk of the court must give public notice that all persons claiming the right to the use of any of the water of such river system must file a written statement of their claims, which notice shall be published as prescribed; and the clerk must also mail by registered letter to each of the persons, corporations, or associations whose names and addresses are given by the State engineer a copy of such notice, and a blank form on which said claimant shall present in writing all particulars relating to the appropriation of the water of said river system to which he lays claim.

Each claimant shall, within six months after the first publication as above, file in the office of the clerk his verified statement, setting forth the full particulars of his claim, as in the statute prescribed. If the water claimed to have been appropriated is used for irrigation, in addition he must set forth the area of land irrigated the first and each subsequent year; the total area at present irrigated, and its full description and the kind of crops raised. If the water claimed is for the development of power, in addition he must show

1 For the adjudication of rights in equity, see Chap. 78, Secs. 1530-1566.

2 For the statutory adjudication of rights, see Chap. 79, Secs. 1567-1584. See, also, Comp. Laws, 1907, Secs. 1271-1285, as the latter section was amended by Laws, 1911, p. 2.

3 Comp. Laws, 1907, Sec. 1271.

the number, size, and kind of water wheels employed; the head under which each wheel is operated; the extent of power produced, and the purposes for which and the places where it is used, and the point where the water is returned to the stream. If the water claimed to have been appropriated is used for mining, the statement shall show, in addition, the name of the mine and the mining district in which it is situated, the nature of the material mined, and the place where the water is returned to the natural channel of the stream. Within sixty days after the expiration of the six months allowed for filing statements the State engineer shall tabulate the facts contained in the different statements filed; a copy of such tabulation shall be filed with the clerk of the court, and also with the county recorder of each county which embraces any part of such river system.[4] The failure of any claimant to make a statement of his claim forever bars and estops him from thereafter asserting any claim to the water; provided, that any claimant upon whom no other service of notice was had other than by publication in the newspaper may apply to the Court for the permission to file his statement after the time therefor has expired, and the Court or Judge thereof may extend the time for filing, not exceeding one year from the first publication of said notice; but the applicant must also give notice by publication to the other claimants.[5] The statements filed by the claimants shall stand in the place of pleadings, and issue be made thereon.[6]

At the expiration of six months after the first publication the Court may appoint a referee or referees, not exceeding three, to take testimony and determine the rights of the respective parties, or the judge may hear the case himself. "The referee or referees, before proceeding to hear any testimony, must be sworn well and truly to hear and determine the facts and issues referred to them, and true findings render according to the evidence."[7] After a reference the referee has the power to allow amendments to any statements or pleadings, as the Court might do.[8]

After at least fifteen days' notice the Court, referee, or referees must take all the testimony presented in the case, and the maps

[4] Comp. Laws, 1907, Secs. 1272, 1273.

[5] Comp. Laws, 1907, Sec. 1274.

[6] Comp. Laws, 1907, Sec. 1277.

[7] Comp. Laws, 1907, Secs. 1275, 1276.

[8] Comp. Laws, 1907, Sec. 1278.

and record in the State engineer's office are admissible as evidence. If the referee is a claimant, all testimony pertaining to his claim shall be taken by the Court; and if the district judge is a claimant, he shall file his statement in the District Court of the adjoining district, and a copy of the statement in the District Court of his own county. In such case the Court of the adjoining district shall receive and act upon the referee's report and enter decree in the matter.[9]

Any parties interested may contest the rights of any other party. "On the completion of the evidence, the referee or referees shall state in writing the facts found by him or them as to each claim submitted and the conclusions of law in relation thereto, separately, and shall report the same, with a form of decree, to the Court, and said Court may review said report and enter decree thereon or set aside, alter, or modify the same and enter decree thereon so altered or modified." The effect of the decree in such an action is that it shall determine and establish the rights of the several claimants to the use of the water of said river system, and it must give full details relative thereto. The decree may be appealed from to the District Court.[10]

Upon the final determination of the case a certificate must be issued to each claimant, setting forth the substance of the decree, which certificate must be recorded in the office of the county recorder of the proper county, and a copy thereof filed in the office of the State engineer.[11]

Although the above Act was originally passed in 1903, it has not proven effective for the reason that no allowance for the expenses of the district judges, referees, or stenographers was provided. But by the Act of January 31, 1911,[12] a fund known as "adjudication of water rights fund" was provided which shall be a permanent fund and which shall be used only for the payment of expenses in the enforcement of the Act. It was also provided that the Court, at the time of the entry of final judgment, shall adjudge and determine the proportionate amount of such costs of adjudication, to be paid by each of the parties to said action, and that the respective

9 Comp. Laws, 1907, Sec. 1285, as amended by Laws, 1911, p. 2.

10 Comp. Laws, 1907, Secs. 1275-1283.

11 Comp. Laws, 1907, Sec. 1284.

12 Laws, 1911, p. 3.

sums so apportioned are declared to be a lien upon the lands and water rights of said parties, to be assessed and collected as taxes, and the sums so collected to be remitted to the State Treasurer, and to be placed by him in the "adjudication of water rights fund."

Upon the question of the protection of water rights and for damages for injuries, it is provided:

"In any action hereafter commenced for the protection of rights acquired to water under the laws of this State, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the Court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdict, or by the Court, if the case is tried without a jury, and judgment thereon entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights or joint rights in water ditches, unless partition of the same is asked by the parties to the action, the Court shall hear and determine such controversy as if the same were several as well as joint." [13]

§ 2063. Ditches and canals, and condemnation of rights of way therefor.—Substantial headgates and measuring devices must be constructed by the owners of ditches and canals, and of such pattern as the State engineer or water commissioner shall approve.[1] The ditches and canals must also be kept in repair, so as to prevent the waste of water or damage to the property of others.[2] Bridges must also be constructed and kept in repair by the owners of the works.[3] Each person, association, or corporation is liable for the proportion-

[13] Comp. Laws, 1907, Sec. 1288x40. As to parties, see Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. Rep. 628.

[1] Comp. Laws, 1907, Sec. 1288x26. See, also, Laws, 1911, p. 147, Sec. 10.

[2] Comp. Laws, 1911, Sec. 1288x29. See, also, North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Belknap v. Widdison, 32 Utah 246, 90 Pac. Rep. 393; Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 Pac. Rep. 1008, 72 Am. St. Rep. 784.

[3] Comp. Laws, 1907, Sec. 1288x29.

ate expense of maintaining, operating, and controlling their works where used in common.[4]

The place of diversion of water may be changed, provided it does not impair vested rights, upon application and a permit by the State engineer.[5]

"Any appropriated water may be turned into the channel of any natural stream, or into a reservoir constructed across the bed of any natural stream, and commingled with its waters and then be taken out, either above or below the point where emptied into the channel, but in so doing the original water in such stream or reservoir must not be diminished in quantity or deteriorated in quality."[6]

Upon the subject of the exercise of the right of eminent domain for ditches and canals, the State of Utah has taken an advanced position. The statute provides, by the Act of 1903,[7] as follows: "The use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use. Any person, corporation, or association shall have the right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing, and conveying water for irrigation or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use.

"When any person, corporation, or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to con-

4 Comp. Laws, 1907, Sec. 1288x30.

5 Comp. Laws, 1907, Sec. 1288x24, as amended, Laws, 1909, p. 90; Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

6 Comp. Laws, 1907, Sec. 1288x25, as amended, Laws, 1911, p. 60.

See Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. Rep. 719; Fuller v. Sharpe, 33 Utah 431, 94 Pac. Rep. 813; Herriman etc. Co. v. Butterfield Min. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930.

7 Laws, 1905, p. 103.

vey the required quantity of water, then such person, corporation, or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said ditch or canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged for the damage, if any, caused by said enlargement; provided, that said enlargement shall be done at any time from the first day of October to the first day of March, or at any time that may be agreed upon with the owner of said ditch or canal." [8]

In an action brought by a single individual to condemn a right of way for the purpose of conducting water to his own land, the above statute was upheld, both by the Supreme Court of the State and also by the Supreme Court of the United States.[9]

§ 2064. Distribution of water.—Upon the subject of the distribution of water, it is provided: That appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive the whole supply to which his certificate entitles him before any subsequent appropriator shall have any right; "provided, that whenever the natural flow of any stream shall have receded in volume in the annual low-water stage, then the rights of all users to such flow at such stage shall be deemed equal as to priority, and the water, when at or below such stage, shall be apportioned *pro rata* among such users. But in times of scarcity, while priority of appropriation shall give the better rights as between those using water for the same purpose, the use for domestic purposes shall have pref-

[8] Comp. Laws, 1907, Secs. 1288x21, 1288x22.

For condemnation proceedings generally, see Comp. Laws, 1907, Secs. 3588-3608.

[9] Nash v. Clark, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953; affirmed, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676.

See, also, upon the general subject of rights of way over private lands, Secs. 972-993.

See, also, Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; Maple Orchard Co. v. Marshall, 27 Utah 215, 75 Pac. Rep. 369.

There is no title against the Government in a person taking possession of public land for the purpose of procuring water or digging ditches for canals, without the performance of any work thereon. Bear Lake Irr. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; affirming *Id.*, 9 Utah 350, 34 Pac. Rep. 363.

erence over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use."[1]

It is made the duty of the water commissioners of their respective water districts to regulate the distribution of the water among the various ditches and the users thereunder according to the rights of the respective parties, as the same are established by decrees or otherwise.[2]

§ 2065. **Reservoir land grant—Reservoir rights.**—By the enabling Act there was granted to the State of Utah, by the United States, "for the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres" of the public lands.[1] To take advantage of the benefits of the grant it was provided by the State legislature, and there was thereby created a fund to be known as the reservoir land grant fund, said fund to consist of all moneys received from the sale of land selected under the grant for the establishment of permanent water reservoirs for irrigation purposes.[2] The State board of land commissioners is authorized and directed to select suitable sites for reservoirs and to cause the same to be constructed for the purpose of storing water to be supplied to the State and other lands.[3]

The right of eminent domain is granted for the purpose of constructing reservoirs.[4] Reservoirs constructed by private parties are subject to inspection by the State engineer, and if defective must be repaired by the owners.[5]

§ 2066. **Corporations and companies—Taxation of property.**—Corporations may be organized under the laws of Utah for the express purpose of irrigating the lands of its stockholders or for the purpose of selling or otherwise disposing of water rights to consumers.

Ditches, canals, and other works owned by such corporations, or

1 Comp. Laws, 1907, Sec. 1288x27.
2 Laws, 1911, p. 145, Secs. 4, 5, 12.
1 Comp. Laws, 1907, p. 31, Sec. 12.
2 Laws, 1909, Chap. 116, p. 269, Secs. 1-11, as amended, Laws, 1911, p. 82, and repealing Secs. 2389-2400, Comp. Laws, 1907.
3 Laws, 1909, p. 269, Sec. 2, as amended, Laws, 1911, p. 82.
4 Comp. Laws, 1907, Secs. 3588-3608.
5 Comp. Laws, Secs. 1268, 1269.

by individuals, for the irrigation of the lands of such corporations or individuals shall not be separately taxed so long as they shall be owned and used exclusively for such purposes.[1] "And all private water corporations organized for culinary purposes, and furnishing water exclusively to members of such corporations, and all canal and irrigation corporations engaged exclusively in furnishing water to or for lands owned by the members thereof, all water users' associations organized to comply with the rules of the United States Reclamation Service," are exempted from the payment of the annual license tax.[2] Another notable exception is made in favor of irrigation corporations, and that is that they may purchase or subscribe for the capital stock of any other similar corporation when the same is permitted by the articles of incorporation.[3]

§ 2067. **General provisions—Standard of measurement—Transfer of rights.**—"The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as the second foot; and the standard unit of measurement of volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet."[1]

"A right to the use of water appurtenant to the land shall pass to the grantee of such land, and in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof, subject, however, in all cases to payment by the grantee of any such conveyance of all amounts unpaid on any assessment then due upon any such right; provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such

[1] See Const. of Utah, Art. 13, Sec. 3, Sec. 2057; Laws, 1909, p. 208.

The water system of a corporation organized for selling water to the inhabitants of a city is not exempt from taxation. Bear Lake etc. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135.

[2] Laws, 1909, p. 226, Sec. 2.

[3] Comp. Laws, 1907, Sec. 1288x28.

Water rights represented by shares of stock in a water company are personal property, and may be sold and transferred independent of any land. George v. Robison, 23 Utah 79, 63 Pac. Rep. 819; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91.

[1] Comp. Laws, 1907, Sec. 1288x19.

reservation in express terms inserted in such conveyance, or may be separately conveyed.[2]

"Water rights shall be transferred by deeds in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, and such deeds shall be recorded in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated. Every deed of water right so recorded shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees, and lien holders shall be deemed to purchase and take with notice.[3]

"Every deed of water right within this State hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration of the same water right or any portion thereof where his own deed shall be first duly recorded."[4]

All water appropriated for irrigation from works constructed or controlled by the United States shall be appurtenant to specified lands; provided, that if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land, the said right may be severed from the land and simultaneously transferred, and become appurtenant to another tract.[5]

§ 2068. **Artesian wells.**—By the Act approved March 11, 1911,[1] the State board of land commissioners was authorized and directed to conduct experiments in sinking wells for the purpose of obtaining subterranean waters for culinary, domestic, and irrigation purposes on arid lands within the State. Such wells shall be located in locali-

2 Comp. Laws of Utah, 1907, Sec. 1288x32.

See Bear Lake Irr. Co. v. Ogden City, 8 Utah 494, 33 Pac. Rep. 135; Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Fisher v. Bountiful City, 21 Utah 29, 59 Pac. Rep. 520; Fayter v. North, 30 Utah 156, 83 Pac. Rep. 742, 6 L. R. A., N. S., 410.

For transfer by shares of stock, see George v. Robison, 23 Utah 79, 63 Pac. Rep. 819; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91.

3 Comp. Laws of Utah, 1907, Sec. 1288x33.

4 Comp. Laws of Utah, 1907, Sec. 1288x34.

5 Comp. Laws, 1907, Sec. 1288x31.

1 Laws, 1911, Chap. 65, p. 89, repealing Laws, 1909, Chap. 40, p. 44.

ties where the surrounding land is adapted for "dry farming," and not more than two wells shall be located in any one county. Such wells may be driven on State or private land, and if on private land a right of way must be granted to the well by the owner. Whenever it is necessary to install machinery for lifting the water from such wells, the board is authorized and empowered to make such installation, and to make all rules necessary to lease said wells to the responsible bidder who will agree to furnish the water to the users thereof at the lowest price per gallon for a period not to exceed five years.

It must be noted that the State of Utah has no law for the prevention of the waste of water from artesian wells.

§ 2069. **State conservation commission.**—By the Act approved March 22, 1909,[1] a commission to be known as the Utah State Conservation Commission was created, to consist of not less than three members, citizens of the State, over the age of 21 years, to serve without pay, and of which commission the Governor shall be chairman. It is made the duty of said commission, among other things, "to inquire whether the waters of any stream or other source of water supply situated within the State can be wholly utilized for irrigation on lands lying under that source of supply, and if not, whether such waters can be used for purposes other than irrigation which are more beneficial to the public good."[2] It is also made the duty to place before the legislative and executive departments of the United States, including the National Reclamation Service, data and facts showing the great value of the arid lands in Utah when subjected to irrigation, and facts and information for the guidance of the legislative and executive departments of the United States in establishing dams, reservoirs, and irrigation systems for the reclamation of arid lands in the State.

§ 2070. **Irrigation district law.**—As we stated in a previous section, the early Territory of Utah adopted a crude irrigation district law, but this law not proving satisfactory, it was afterward repealed. However, the Territory of Utah had the honor of having adopted the first irrigation district law many years before the district

1 Laws, 1909, Chap. 103, p. 224, Secs. 1-6, as amended, Laws, 1911, p. 270.

2 Laws, 1909, p. 224, Sec. 3, as amended, Laws, 1911, p. 270.

law of California or the "Wright Act" was enacted by the legislature of that State.[1] It was not until the Act approved March 22, 1909,[2] that the legislature of Utah enacted an irrigation district law, the principal features of which are based upon the "Wright Act," as the same was afterward amended and adjudicated by the legislature and court of California.[3]

The Act provides that whenever a majority of the land owners in any district desire to provide for the irrigation of the same, upon petition to the board of county commissioners setting forth the complete facts, and "signed by a majority of the land owners within said proposed district, and who shall also be the owners in the aggregate of a majority of the whole number of acres belonging to the land owners within the said proposed district, and accompanied by a bond in double the probable cost for organization, it is made the duty of the board of commissioners to define the boundaries of the said proposed district, not including therein any land which will not be benefited by the proposed system. The commissioners by a further order shall call an election to determine whether such district shall be organized, and for the election of its board of directors.[4] At such election and all elections held under the provisions of the Act, all persons shall be entitled to vote who are land owners of agricultural lands within said district, and corporations so owning lands shall be considered persons.[5] The board of directors, after organization, is given the usual powers to acquire property, to make contracts, to sue and be sued.[6] The board is also authorized to call an election for the issuance of bonds.[7] It is also made the duty of the board of directors, on or before the first day of September of each year, to determine the amount of money required to

1 See Sec. 1401.

For the general discussion of irrigation district laws, see Chap. 70, Secs. 1388-1432.

2 Laws, 1909, pp. 144-168, Secs. 1-56, as amended, Laws, 1911, p. 70.

3 The Utah irrigation statute was upheld by the Supreme Court of that State in a well-considered opinion written by Mr. Justice Frick, in the case of Lundberg v. Green River Irr. Dist., —— Utah ——, 119 Pac. Rep. 1039.

4 Laws, 1909, p. 144, Secs. 1-3.

5 For the conduct of elections and the organization of districts, see Laws, 1909, p. 146, Secs. 4, 5, as amended, Laws, 1911, pp. 70, 71, and Laws, 1909, pp. 148-150, Secs. 6-11.

6 Laws, 1909, p. 151, Secs. 12-14, as amended by laws, 1911, p. 73.

7 Laws, 1909, p. 153, Sec. 15, as amended, Laws, 1911, p. 74; for the sale and payment of bonds, see Laws, 1909, p. 155, Secs. 16, 17.

meet the maintenance, operating, and current expenses for the ensuing year, and to certify the same to the county commissioners. The assessment, levy and collection of this amount is made the duty of the regular county officers; "provided, that in no case shall any land be taxed for irrigation purposes under this Act which from any natural cause can not be irrigated or is incapable of cultivation.[8]

For the construction of the works bids may be taken by the board and contracts let and claims paid by warrant therefor. "The work shall be done under the direction and to the satisfaction of the engineer in charge, and be approved by the board."[9] Rights of way are granted over all State lands, and the right of condemnation for the same for rights of way over private lands.[10] Tolls and charges may be made for the purpose of defraying expenses in addition to the assessments provided for as above.[11]

In the diversion of water vested rights must not be interfered with;[12] and in its distribution, in times of scarcity, it is made the duty of the board to distribute all the available water upon certain or alternate days to different localities, as they may in their judgment think best for the interests of all parties concerned.[13] Provisions are made for the changing of boundaries of districts, the exclusion of land, division, and dissolution of the districts;[14] also for the confirmation of all proceedings by the Court.[15]

§ 2071. The Carey Act in Utah.—Utah is one of the States to which the provisions of the Carey Act apply, and by Act of the legislature it has provided for the acceptance of the provisions thereof and for operations thereunder.[1]

By the Act of Congress of April 4, 1910,[2] the provisions of the Act were extended to the Uinta Indian Reservation, the payment of $1.25 per acre to be paid to the Government for the lands so pat-

8 Laws, 1909, pp. 156-158, Secs. 18-22.

9 Laws, 1909, p. 158, Secs. 23, 24.

10 Laws, 1909, p. 160, Sec. 26.

11 Laws, 1909, p. 159, Sec. 25.

12 Laws, 1909, p. 160, Sec. 30.

13 Laws, 1909, p. 160, Sec. 29.

14 Laws, 1909, p. 161, Secs. 31-49.

15 Laws, 1909, Secs. 50-54.

1 Comp. Laws, 1907, Secs. 2372-2388, as amended, Laws, 1909, Chap. 31, p. 29, and Laws, 1911, Chap. 102, p. 141.

For the general discussion of the Carey Act, see Chap. 66, Secs. 1312-1336.

2 Public 114, Stats. of the U. S., 1909-1910, p. 285.

ented, for the benefit of the Indians. These provisions were also accepted by the State.[3]

The provisions of the Utah statute relative to the operation of the Act do not differ materially from the provisions of other States for the same purpose. The selection, management, and disposal of the land is vested in the State board of land commissioners.[4] In order to take advantage of the Act the usual application must be made by the contracting party to the board, and the same, after examination, must be accepted or rejected by the board.[5] In the contract with the constructing company, in the discretion of the board, it may provide that the sale to a settler of a tract of land with a permanent water right shall include a *pro rata* interest in the reservoir and irrigation works equal to the proportion of the tract of land purchased by him bears to the entire tract to be reclaimed by said system, and that upon full payment of the purchase price of the said land and water right, capital stock of the corporation representing such interest shall be transferred to such settler, if the said irrigation system shall be constructed by a corporation, or if by a person or company then such interest shall be conveyed to the settler.[6] All contracts must also state that the construction of the works shall begin within six months and shall be prosecuted diligently and continuously to completion, and that the cessation of work under a contract for a period of six months shall forfeit to the State all rights under said contract and the penal sum named in the bond, provided that no property or right which has vested in the contractor at the date of the contract shall be forfeited.[7]

Any citizen of the United States or a person having declared his intention, over the age of 21 years, may make application for the land. A contract for a water right must accompany the application, and also the sum of 25 cents per acre. The price fixed for the land is not to exceed $1 per acre, except where the same is located within the Uinta Indian Reservation, in which case it shall not exceed $2.25 per acre, and of which the board must pay the sum of $1.25 to the Government.[8] All money received by the board from

[3] Laws, 1911, p. 141.

[4] Comp. Laws, 1907, Sec. 2373.

[5] Comp. Laws, 1907, Secs. 2374-2378.

[6] Comp. Laws, 1907, Sec. 2379.

[7] Comp. Laws, 1907, Sec. 2380, as amended, Laws, 1909, p. 29, and Sec. 2381.

[8] Comp. Laws, 1907, Sec. 2382, as amended, Laws, 1911, p. 141.

the sale of such lands shall be deposited with the State Treasurer to the credit of the reclamation fund, and shall be available for the payment of the expenses of the board in carrying out the provisions of the Act.[9]

It is provided that the water rights to all lands acquired under the provisions of the Act shall attach to and become appurtenant to the land. The usual lien in favor of the contractor is provided for.[10]

§ 2072. Provisions in aid of the National Reclamation Act.—A right of way is granted for all ditches, tunnels, and telephone transmission lines constructed by the authority of the United States.[1] All lands belonging to the State under National reclamation projects must be sold in conformity to the farm units established by the Government; provided, that the area to be so irrigated shall be determined by due notice by the United States to the State board of land commissioners. After the withdrawal of lands by the United States no application for the purchase of State lands within the limits of such withdrawal shall be accepted, except under the conditions prescribed in the section. Any State lands needed by the United States for irrigation works shall be sold to the United States at the appraised value of such lands.[2]

It is made the duty of county recorders of counties in which water users' associations are organized in conformity with the requirements of the United States, under the Reclamation Act,[3] to provide record books of the articles of incorporation and stock subscriptions, and to use such books for recording the same; and the charges for the recording thereof shall be the actual cost of the labor performed, and not for the printed forms or records.[4]

§ 2073. Pollution of waters.—Upon the subject of public nuisances for the pollution of waters it is declared by the statute of Utah that: "Any person who shall either:

"1. Construct or maintain any corral, sheep-pen, stable, pig-pen, chicken-coop, or other offensive yard or outhouse where waste or

9 Comp. Laws, 1907, Sec. 2383, as amended, Laws, 1911, p. 142.

10 Comp. Laws, 1907, Sec. 2385.

1 Comp. Laws, 1907, Sec. 2364x.

2 Comp. Laws, 1907, Sec. 2336x.

3 For water users' associations, see Secs. 1281-1286.

4 Comp. Laws, 1907, Sec. 632x3.

drainage therefrom shall flow directly into the waters of any stream, well, or spring of water used for domestic purposes; or,

"2. Deposit, pile, unload, or leave any manure heap, offensive rubbish, or carcass of any dead animal where waste or drainage therefrom will flow directly into any waters of any stream, well, or spring of water used for domestic purposes; or,

"3. Dip or wash any sheep in a stream in close proximity to any stream used by the inhabitants of any municipality; or,

"4. Construct or maintain any corral, yard, or vat to be used for the purpose of shearing or dipping sheep, within twelve miles of any municipality, where the refuse would naturally find its way into any stream used by the inhabitants of the municipality for domestic purposes; or,

"5. Establish and maintain any corral, camp, or bedding place for the purpose of keeping cattle, horses, sheep, or hogs within seven miles of any municipality, where the refuse or filth will naturally find its way into any stream used by the inhabitants, shall be guilty of a misdemeanor." [1]

The befouling of the waters of a canal from which a number of persons obtain water for irrigation, domestic and other purposes, so as to render it unfit for use, creates a public nuisance, and the right to maintain it can not be gained by prescription.[2]

§ 2074. Criminal statutes.—It is made a misdemeanor to in any way interfere with, injure, destroy, or remove any dam, headgate, weir, or other applicance; [1] so, also, the obstruction of any right of way for canals; [2] so, the failure to construct headgates and measuring devices; [3] so, the beginning of the construction of any dam over five feet in height before the plans shall have been submitted to and approved by the State engineer; [4] so, also, the refusal or neglect to comply with the requirements of the State engineer.[5]

Every person who wilfully and maliciously cuts, breaks, or de-

1 Comp. Laws, 1907, Sec. 4274.

See, also, People v. McCune, 14 Utah 151, 46 Pac. Rep. 658, 35 L. R. A. 396; People v. Burtleson, 14 Utah 258, 47 Pac. Rep. 87.

2 North Point etc. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Crane v. Winsor, 2 Utah 248.

1 Comp. Laws, 1907, Sec. 1288x35, and Sec. 4487x26.

2 Comp. Laws, 1907, Sec. 1288x36.

3 Comp. Laws, 1907, Sec. 1288x26.

4 Comp. Laws, 1907, Sec. 1268.

5 Comp. Laws, 1907, Sec. 1270.

stroys any dam, canal, flume, aqueduct, levee, embankment, reservoir, or other structure erected to create hydraulic power, or to drain or reclaim swamp or marsh land, or to conduct water for mining, manufacturing, reclamation, or agricultural purposes, or for the supply of municipalities; or makes or causes to be made any aperture in such works, is punishable by a fine not exceeding $500, or by imprisonment in the State prison not exceeding two years, or both.[6]

The larceny of water is made a misdemeanor.[7]

§ 2075. **Riparian rights in Utah.**—The common law of riparian rights as to the use and flow of the waters of the natural streams has been abrogated in the State of Utah, both by statute and the decisions of the courts. By statute it is provided that: "Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this State."[1] By Court decision in an early Territorial case it was held that: "Riparian rights have never been recognized in this Territory."[2]

6 Comp Laws, 1907, Sec. 4434.

7 Comp. Laws, 1907, Secs. 4372, 4450.

1 Comp. Laws, 1907, Sec. 1288x20.

2 Stowell v. Johnson, 7 Utah 215, 26 Pac. Rep. 290.

See, also, Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Cole v. Richards Irr. Co., 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962; Nash v. Clark, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953; affirmed, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676.

CHAPTER 103.

WASHINGTON.

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§ 2076. Particular features of the State.—The State of Washington is somewhat similar to Oregon in climate and topography. The Cascade Range of mountains, which trends in a direction nearly north and south at a distance of about one hundred and fifty miles from the ocean, forms the most conspicuous feature of surface relief. This range divides the State into two great parts, differing greatly in climate, soil, rainfall, and, therefore, in agricultural possibilities. On the western side of the range the annual precipitation is heavy, and a dense forest covers the mountains and smaller hills, while upon the eastern side the rainfall is much less, the lands arid, and the natural vegetation comparatively scanty. The great plains of the Columbia form naturally a most striking feature of arid lands. These extend from the foothills of the Cascade Range eastward to the mountains of Idaho, and from the border of British Columbia southward across the State. The supply of water is large, and

found in the Columbia River and its numerous tributaries, the largest of which are the Snake and the Yakima Rivers. Here is found the famous Yakima Basin, a region that has attracted so much attention of late.

The climate of the State differs greatly in the different portions, depending upon the proximity to the sea and the altitude. In the Columbia River Basin the characteristics are dry, hot summers and moderately cold winters, with a snowfall varying from a few inches to several feet. At times both extremes of heat and cold are experienced. In the Yakima Valley, however, the temperature seldom ever goes to zero. The cropping season is long, and seldom disturbed by either late frosts in the spring or early frosts in the fall.

In addition to the supply of surface water in the State of Washington, there are many artesian basins in the State, from which a large quantity of water is supplied for all beneficial purposes.[1]

§ 2077. **Irrigation in the State.**—In many portions of the State of Washington crops can be raised without irrigation. In other portions of the State the climate is decidedly arid, and here, unless it may be by the scientific methods of dry farming, crops can not be raised without irrigation. Since the first edition of this work was published in 1894, there has been great development in the State of Washington in the reclamation of arid lands. It was somewhat late in coming, but since it started the progress has been wonderful. The first recorded claim to water in the Yakima Valley was dated February 21, and filed February 23, 1876. "In fact, the beginnings of the larger canal systems in operation today and the real awakening to the importance and possibilities of irrigation in this State date back only about fifteen or sixteen years."[1] One of the causes of this delay was the fact that it required a large amount of capital

1 See Reconnoissance in Southeastern Washington, by I. C. Russell, Water-Supply Paper No. 4, U. S. Geological Survey; Surface Water Supply of the North Pacific Coast Drainage, by J. C. Stevens, Robert Follansbee, and E. C. La Rue, district hydrographers, 1907, Water-Supply and Irrigation Paper No. 214, U. S. Geological Survey; Surface Water Supply of the United States, Part 12, North Pacific Coast, by J. C. Stevens, E. C. La Rue, and F. F. Henshaw, 1911, Water-Supply Paper No. 272, U. S. Geological Survey.

1 Irrigation in the Yakima Valley, Washington, by S. O. Jayne, 1907, Office of Experiment Stations, Bulletin No. 188, U. S. Dept. of Agriculture.

to construct the irrigation works of any considerable capacity. To accomplish the watering of the higher lands it has been necessary to build immense reservoirs for the impounding of the waters, to tunnel mountains in the construction of canals in order to obtain the proper grade, and to overcome many other obstacles requiring great engineering skill. Owing to these conditions the settlers naturally passed by these lands, and sought others where the water could be diverted at less expense. But during the last ten years, according to the last census report, there has been no dearth of settlers in that State, the increase of population for the last decade being 120 per cent.

According to the last report of the Bureau of Statistics and Immigration of the State of Washington, of 1910, it is said: "It is quite within the range of possibilities that the products of the irrigated lands of Washington will in time exceed in annual value the present output from our combined timber and cereal-producing areas. Inasmuch as the forest and grain products aggregate not less than $100,000,000 in value each year, this statement might, at first thought, be viewed as one born of undue enthusiasm. Regarded in the light of facts, however, it would appear conservative. Careful authorities have estimated that the total irrigable lands of the State exceed 2,000,000 acres in area, of which not more than 25 per cent have thus far been reclaimed. With this entire area productive, to secure a yield of $100,000,000 in value annually would require only an average of $50 per acre—an amount far below the returns from lands now irrigated, which have reached the producing stage."[2]

[2] For authorities upon the subject in the State of Washington, see Report of the Bureau of Statistics and Immigration of the State of Washington, 1910; Irrigation in the Yakima Valley, by S. O. Jayne, 1907, Office of Experiment Stations, Bulletin No. 188, U. S. Dept. of Agriculture; Irrigation Investigations in the Yakima Valley, under the direction of Elwood Mead, 1905, by O. L. Waller, *Id.*, Bulletin No. 158, Separate No. 4; Use of Water in Irrigation in Washington, by O. L. Waller, *Id.*, Bulletin No. 119, Separate No. 4; Use of Water in Irrigation in Yakima Valley, by O. L. Waller, 1900, *Id.*, Bulletin No. 104, Separate No. 4; A Reconnoissance in Southeastern Washington, by I. C. Russell, 1897, Water-Supply Paper No. 4, U. S. Geological Survey; Surface Water Supply of the North Pacific Coast Drainage, by J. C. Stevens, Robert Follansbee, and E. C. La Rue, 1907, Water-Supply Paper No. 214, U. S. Geological Survey.

According to the Census Report of 1910 the total number of farms irrigated in the State of Washington in 1909 was 7,405, against 3,513 in 1899, an increase of 3,892, or 110.8 per cent.

The total acreage in 1909 was 334,378 acres, against 135,470 acres in 1899, an increase of 198,908 acres, or 146.8 per cent. The total acreage which all enterprises were capable of supplying with water in 1910 amounted to 470,514 acres. The total acreage included in enterprises completed or under construction in 1910 was 817,032 acres.

The acreage irrigated in 1909, classified by type of enterprises, is given as follows: Under the United States Reclamation Service, 55,690 acres; under the United States Indian Service, 35,000 acres; under co-operative enterprises, 81,122 acres; under commercial enterprises, 66,911 acres, and under individual and partnership enterprises, 95,655 acres.

§ 2078. Criticism of the Washington laws.—As slow as the State of Washington has been to take up the work of irrigation and the reclamation of its arid lands, the legislature has been even slower in enacting efficient laws for the control, appropriation, and distribution of the waters within its boundaries. However, by the later legislation the most of the subjects pertaining to irrigation and the reclamation of lands have been covered, with the exception of provisions for the office of a State engineer, and for a strong centralized control of the waters and their appropriation and distribution. However, that such a water code is promised in the near future is seen by the fact that at the last session of the legislature one was partially considered and passed over for the consideration of the next legislature.[1]

[1] See Laws, 1911, p. 658, House Bill No. 284. Under the proposed law it is provided that: "Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise." For the purposes of the Act the State is divided into two water divisions, over each of which there shall be appointed by the governor a superintendent, who must be a civil and hydraulic engineer. A State hydraulic engineer is also provided for, who, with the two division superintendents, constitute the board of water commissioners. The proposed proceedings for the determination of existing rights differ somewhat from that in other States adopting the law of State control. They are to be instituted by one or more claimants to any body of water by a petition to the board, whereupon it is made the duty of the superintendent of the di-

The methods of appropriation of water within the State may be considered antiquated in these times of water or irrigation codes. There is no central office where one can go to find out the stream flow of any stream in the State or the amount of the appropriations therefrom. The office of the State engineer should be created, if for no other purpose than that of making and keeping the records of stream measurements and the appropriations from streams. Future appropriations of water should also be made by application to the State engineer. But as far as the adjudication of existing rights are concerned, we believe that the right theory is followed in leaving it entirely to the courts. And it is to be hoped that the new water code, if adopted, will not depart from this system. The infringing upon the prerogative of the judiciary by creating a board of engineers to try and determine existing water rights, in the first instance, we never did believe in, and it does not always result in good. By giving such a board or the State engineer judicial authority it combines two departments of the government

vision to prepare a full statement and file the same with the Superior Court of the proper county, upon which the judge shall direct summons to be issued and served against all interested parties, who, before the return day, must file a statement of their claims to, or interest in the water involved. Upon the completion of the service of summons, the Court is to make an order referring said proceedings to the board as referees to take testimony, investigate the facts, and report its findings to the Court. A full hearing must then be had before the board, and its report filed with the clerk of the court. If no exceptions are filed to the report, the Court shall enter a decree adjudicating the rights of the parties in conformity with such report. If exceptions are filed, the Court shall proceed with the action as in a case in equity, and may, if necessary, refer the case back to the board for further evidence. In all cases the final decree is to be made by the Court. The final determination is by the Court, while the administrative officers take part in the proceedings in the nature of referees to take the testimony and report to the Court. The time of the Court is thus saved for other duties, and at the same time those in direct charge are given an important part in the proceedings.

The proposed method of appropriation of water follows the method of the other codes upon the subject. It must be made by an application to the State hydraulic engineer, and the usual proceedings are proposed. The distribution of the water is to be under the direct supervision of water masters, who in turn are to be under the direction of the superintendents of their respective divisions.

We have made a careful examination of the proposed bill and believe that it is one of the best that could be adopted under the circumstances and conditions existing in the State.

in one—the executive and judiciary—and thus avoids the check of one department upon the other. The power should be conferred upon the State engineer and the board to execute the laws in their departments, and it should remain in the courts to decide all questions, in the first instance, as to existing rights.

Outside of the needed water code, the State of Washington has adopted many laws which tend toward the general welfare of the State in the reclamation of its arid lands. The irrigation district law [2] provisions for the operation of the Carey Act,[3] and also provisions in aid of the National Reclamation Act,[4] have all been enacted; and although Washington was originally one of the States which adhered to the strict construction of the common law of riparian rights, provisions of the statute provide that these rights may be condemned, except as to the use of so much of the water as is actually needed and used by the riparian owner.[5]

§ 2079. State constitutional provisions.—Article XXI, Section 1, of the constitution of the State of Washington provides:

"The use of the waters of this State for irrigation, mining, and manufacturing purposes shall be deemed a public use." [1]

On the subject of eminent domain, the constitution provides in Article I, Section 16, as follows:

"Private property shall not be taken for private use except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.

2 See Sec. 2091.

3 See Sec. 2092.

4 See Sec. 2090.

5 See Sec. 2082.

1 Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; State *ex rel.* Tacoma Industrial Co. v. White R. Pr. Co., 39 Wash. 648, 82 Pac. Rep. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987; Kalez v. Spokane Valley etc. Co., 42 Wash. 43, 84 Pac. Rep. 395.

See, also, State *ex rel.* Golden Valley Irr. Co. v. Superior Court, —— Wash. ——, 122 Pac. Rep. 19.

Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." [2]

§ 2080. **Appropriation of water—Right and method of.**—Upon the subject of the right to appropriate water it is provided by statute:

"The right to the use of water in any lake, pond, or flowing spring in this State, or the right to the use of water flowing in any river, stream, or ravine of this State for irrigation, mining, or manufacturing purposes, or for supplying cities, towns, or villages with water, or for waterworks, may be acquired by appropriation, and as between appropriators, the first in time is the first in right.[1]

2 Long v. Billings, 7 Wash. 267, 34 Pac. Rep. 936; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

1 Remington & Ballinger's Ann. Codes and Statutes of Washington, 1910, Sec. 6316. Hereinafter cited as R. & B. Codes.

Upon the subject of appropriation of water in the State of Washington, see, also, Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Miller v. Wheeler, 54 Wash. 429, 103 Pac. Rep. 641, 23 L. R. A., N. S., 1065; State *ex rel.* Olding v. Stampfly, —— Wash. ——, 125 Pac. Rep. 148; Thomas v. Spencer, —— Wash. ——, 125 Pac. Rep. 361; Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. Rep. 27; Thorpe v. Tenem D. Co., 1 Wash. 566, 20 Pac. Rep. 588; Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875; Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; Matheson v. Ward, 24 Wash. 407, 64 Pac. Rep. 520, 85 Am. St. Rep. 955; Crook v. Hewitt, 4 Wash. 749, 31 Pac. Rep. 28; Winsor v. Hanson, 40 Wash. 423, 82 Pac. Rep. 710; New Whatcom v. Fairhaven etc. Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Madison v. Spokane etc. Co., 40 Wash. 414, 82 Pac. Rep. 718, 6 L. R. A., N. S., 257; Meyer v. Tacoma etc. Co., 8 Wash. 144, 35 Pac. Rep. 601; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280; Wintermute v. Tacoma etc. Co., 3 Wash. 727, 29 Pac. Rep. 444; Everett Water Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617; Northport Brewing Co. v. Perrot, 22 Wash. 243, 60 Pac. Rep. 403; Spring Hill Irr. Co. v. Lake Irr. Co., 42 Wash. 379, 85 Pac. Rep. 6; Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091.

See, also, Avery v. Johnson, 59 Wash. 332, 109 Pac. Rep. 1028, 1 Water and Min. Cas. Ann. 531.

"Any person, corporation, or association of persons is entitled to take from the natural streams or lakes in this State water for the purpose of irrigation and mining, not theretofore appropriated or subject to rights existing at the time of the adoption of the constitution of this State, subject to the conditions and regulations imposed by law: Provided, that the use of water shall be deemed a public use, and subject to condemnation as may from time to time be provided for by the legislature of this State.[2]

"All persons who claim, own, or hold possessory right or title to any land, or parcel of land or mining claim within the boundaries of the State of Washington, when such lands, mining claims, or any part of the same are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream not otherwise appropriated for the purposes of mining and irrigation, to the full extent of the soil for agricultural purposes.[3]

"Any person who owns or has the possessory right to lands in the vicinity of any natural stream or lake, not abutting such stream or lake, may take water from such stream or lake if there be any surplus or unappropriated water in such stream or lake."[4]

As the State of Washington has not yet adopted a water or irrigation code, as the same is known in many of the other States, especially where the laws of State control have been adopted, the method of the appropriation of water is based upon what might be termed the California method, which in turn is based upon the custom of the early miners in that State. A notice of appropriation must be posted by the appropriator in a conspicuous place at the point of

2 R. & B. Codes, Sec. 6325; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36.

3 R. & B. Codes, Sec. 6326; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Hollett v. Davis, 54 Wash. 326, 103 Pac. Rep. 423; 1 Water and Min. Cas. Ann. 415; State *ex rel.* Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893; Weed v. Goodwin, 36 Wash. 31, 78 Pac. Rep. 36; Dickey v. Maddux, 48 Wash. 411, 93 Pac. Rep. 1090; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Crook v. Hewitt, 4 Wash. 749, 31 Pac. Rep. 28; Rigney v. Tacoma Land & W. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735; Geddis v. Parish, 1 Wash. 587, 21 Pac. Rep. 314.

4 R. & B. Codes, Sec. 6331.

intended storage or diversion, stating therein: "1. That such appropriator claims the water lying, being, or flowing to the extent of one cubic foot per second of time, or some multiple or some fractional portion thereof; 2. The purpose for which said water is appropriated, and the place or places, as near as may be, of intended use; 3. The means by which it is intended to store or divert the same; 4. A copy of the notice must, within ten days after it is posted, be filed for record in the office of the county auditor in which it is posted."[5] The notice of appropriation must be recorded by the county auditor, who must keep a special book for that purpose.[6]

The appropriator must begin the construction of his works within three months after the posting of the notice, if it is intended to store the water, and within six months if it is intended to divert the water; "such works must be diligently and continuously prosecuted to completion, unless temporarily interrupted by the elements." By a strict compliance with these rules the rights relate back to the time the notice was posted, but a failure to comply therewith deprives the appropriator of the right to the use of the water as against a subsequent appropriator who faithfully complies with the same.[7]

The right to the use of water acquired by appropriation may be transferred, like other property, by deed.[8] And all vested rights to the use of water are recognized.[9] The use may be changed to any other purpose, and the right shall relate back to the original appropriation.[10]

Ditches constructed for the utilization of waste, seepage, or spring water are governed by the same laws as those constructed to utilize the waters from the natural streams: Provided that the person upon whose lands the seepage or spring waters first rise shall have

[5] R. & B. Codes, Sec. 6317.

[6] R. & B. Codes, Sec. 6321.

See, also, Offield v. Ish, 21 Wash. 277, 57 Pac. Rep. 809; Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308; Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; New Whatcom v. Fairhaven etc. Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280; Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Desmond v. Sander, 46 Wash. 58, 89 Pac. Rep. 179.

[7] R. & B. Codes, Secs. 6318, 6319.

[8] R. & B. Codes, Sec. 6321; Wold v. May, 10 Wash. 157, 38 Pac. Rep. 875; Still v. Palouse Irr. & Pr. Co., 64 Wash. 606, 117 Pac. Rep. 466.

[9] R. & B. Codes, Secs. 6322, 6323.

[10] R. & B. Codes, Sec. 6324.

For rights by prescription, see Kiser v. Douglas County, —— Wash. ——, 126 Pac. Rep. 622; Allen v. Roseburg, —— Wash. ——, 126 Pac. Rep. 900.

a prior right to such waters, if capable of being used upon his lands. Priority is given to the lands first so watered.[11]

§ 2081. **Ditches and canals and rights of way therefor.**—The right is given by the power of eminent domain to condemn rights of way for ditches, canals, or reservoirs, and special provisions provided therefor.[1] The right to use the natural streams as a means of conducting appropriated water is also allowed, due allowance being made for seepage and evaporation.[2] Pumps may be used to raise water from the natural sources of supply, and rights of way condemned to conduct the same to the place of use.[3] Rights of way are also granted from artesian wells.[4]

All persons, associations, and corporations entitled to the use of water, may condemn the right of way for their ditches and canals as specially provided.[5] But the rights so granted are only extended to ditches constructed for irrigation and for the working of mines.[6]

The proceedings as set forth in the statutes must be followed in actions for condemnation of rights of way. In the assessment of damages the value of the land so taken is the only issue.[7] The number of ditches on the same tract is limited, and the shortest route must be selected.[8] A right of way to extend the heads of ditches may be acquired in this manner.[9]

Every person, association, or corporation hereafter constructing any ditch or canal, shall, within 90 days after the construction, file with the county clerk of the proper county a map and statement showing the full details of such works.[10] The owners of all ditches and canals must keep the same in repair so as not to injure the prop-

11 R. & B. Codes, Secs. 6393, 6394; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155, 123 Am. St. Rep. 910; Church v. State, —— Wash. ——, 117 Pac. Rep. 711.

1 R. & B. Codes, Secs. 6327-6329, 6332; White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 Pac. Rep. 497; Miller v. Baker, —— Wash. ——, 122 Pac. Rep. 604.

2 R. & B. Codes, Sec. 6337.

3 R. & B. Codes, Sec. 6338.

4 R. & B. Codes, Sec. 6342.

5 R. & B. Codes, Secs. 6359-6381.

6 R. & B. Codes, Secs. 6326, 6368.

7 R. & B. Codes, Secs. 6359, 6360.

8 R. & B. Codes, Secs. 6364, 6365.

9 R. & B. Codes, Sec. 6366.

10 R. & B. Codes, Sec. 6367.

See, also, State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 653.

erty of others.[11] Proper bridges must be constructed at the expense of the owners.[12] Headgates must be constructed and maintained.[13]

Owners of all ditches are made liable for damages resulting through neglect or refusal to comply with the provisions of the statute.[14]

By an Act of 1911,[15] it is provided that the owners of all ditches and canals must maintain the same in good condition, in order to deliver the water when needed.[16]

§ 2082. **The condemnation of riparian rights.**—Riparian rights as they exist at common law, being recognized as an obstruction to the full development of the State, provisions are made for the condemnation of the same, reserving the right of the riparian owner to the use of a sufficient quantity of water running by his land as he may actually need and use for irrigation of his lands. The right to condemn water rights is only extended to riparian rights, and is not intended to allow water to be taken from any person that is used by such person himself for irrigation, or that is needed for that purpose by any such person.[1] A petition must be filed in the superior court by any person seeking to condemn such rights, a day set for the hearing, and notice of the same published and posted. All persons owning such rights may appear and contest, and all persons failing to appear shall be deemed to have waived all rights of every kind whatsoever as against the petitioners. The court is to determine the rights of the respective parties and appoint appraisers to assess the value and report to the court. If objections are made to the report the court may order a reappraisement, or the court may set the case for trial and have the damages assessed by a jury.[2]

§ 2083. **Distribution and the apportionment of water—Standard of measurement.**—"If at any time any ditch from which water

11 R. & B. Codes, Secs. 6344, 6363.

12 R. & B. Codes, Secs. 6345, 6402.

13 R. & B. Codes, Sec. 6347.

14 R. & B. Codes, Sec. 6348.

15 Laws, 1911, Chap. 117, Sec. 26.

16 Dalton v. Selah W. Users' Assn., —— Wash. ——, 122 Pac. Rep. 4.

1 R. & B. Codes, Sec. 6382.

See, also, Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650; State *ex rel.* Liberty etc. Co. v. Superior Court, 47 Wash. 310, 91 Pac. Rep. 968; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Nesalhous v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032.

2 R. & B. Codes, Secs. 6368-6379.

is or shall be drawn for irrigation shall not be entitled to the full supply of water from the natural stream or lake which supplies the same with water actually received into and carried by such ditch shall be divided among all the consumers of water from such ditch, as well as the owners, shareholders, and stockholders thereof, as the parties purchasing water therefrom, and the parties taking water partly under and by virtue of holding shares and partly by purchasing the same, shall each receive his share *pro rata*, according to the amount he (in cases in which several consume water jointly) shall then be entitled to, so that owners and purchasers shall not suffer from a deficiency rising from the cause aforesaid, each in proportion to the amount of water which he should have received in case no such deficiency of water had occurred."[1] It is made unlawful for any person to take more than his share of the water from any source.[2]

For the purpose of the distribution of the water each county in the State is constituted an irrigation district, and for each of said districts a commissioner may be appointed by the board of county commissioners; provided, that twelve freeholders of any county who are irrigating lands in said county shall petition the board for such appointment. It is made the duty of the commissioner, when called upon by two or more owners of ditches in his district, to divide the water in the natural streams and lakes among the several ditches according to their respective rights. It is also made the duty of the commissioner to keep a register of priorities, taken from decrees of courts, "or where such priorities are not established by decrees, from any other legal source from which he can obtain the same, arranging and numbering the same in consecutive order, according to the dates of each respective right." In times of emergency, the commissioner may employ assistants.[3]

The unit of measure of water for irrigation, mining, milling, and mechanical purposes in this State shall be a cubic foot of water per second of time.[4]

[1] R. & B. Codes, Sec. 6341.

[2] R. & B. Codes, Sec. 6346.

[3] R. & B. Codes, Secs. 6350-6357. See, also, Secs. 6333, 6334, 6336.

[4] R. & B. Codes, Sec. 6315; Longmire v. Smith, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308.

§ 2084. **Rights of corporations.**—Corporations, associations, or firms may be organized for the purpose of constructing irrigation works and for the purpose of conducting water to the place of use, and for furnishing water to persons for the irrigation of their lands.[1] "Such corporation, person, association, or firm shall be deemed to be a public carrier, and shall at all times be subject to the regulations prescribed for said ditch by the legislature from time to time."[2]

Companies may also be organized for the purpose of supplying water to cities and towns and the inhabitants thereof.[3]

§ 2085. **Water rates.**—By the Act approved March 18, 1911,[1] providing for the creation of a Public Service Commission and fixing its powers and duties, the jurisdiction to fix water rates for all water or rights sold was placed with that commission. Such rates may be fixed by the commission upon its own motion or upon complaint of any party interested.

§ 2086. **Reservoir rights.**—Reservoirs may be constructed for the storage of waters; and the beds of natural streams used to conduct the water to the place of use, upon the appointment of a commissioner by the court upon petition, to regulate and adjust the several headgates of the ditches taking water from the streams. Such commissioner shall possess such theoretical and practical knowledge of the science of hydraulics as will enable him to supervise the construction and operation of measuring devices. Said commissioner is to be paid by the county for his services at a rate of not more than $7 per day for each day so employed.[1] Said commissioner may, with the consent of the superior court appointing him, employ assistants when necessary.

1 R. & B. Codes, Sec. 6380.

2 R. & B. Codes, Sec. 6381.

A public service corporation can not require as a precedent to furnishing water, the compliance by the consumers of oppressive and unjust regulations. Laws, 1911, Chap. 117, Sec. 26.

See, also, Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; State *ex rel.* Shropshire, 51 Wash. 386, 99 Pac. Rep. 3; Lombard v. Schlotfeldt, —— Wash. ——, 123 Pac. Rep. 787; Ulrich v. Pateros W. D. Co., —— Wash. ——, 121 Pac. Rep. 818.

3 For the rights and powers of such companies, see R. & B. Codes, Secs. 9504-9510.

1 Laws, 1911, p. 538; see, also, pp. 545, 571.

1 R. & B. Codes, Secs. 6398-6401.

By the Act approved March 17, 1911,[2] the right was granted to all persons or companies to construct and maintain dams and works incident thereto over, upon, and across the beds of the rivers of the State, in connection with power and irrigation purposes. All dams and works must be completed within five years after the commencement of construction work upon the same. The right of navigation, or the vested rights of private parties must not be interfered with.

§ 2087. **Artesian wells—The regulation of the use from.**—It is made unlawful for any person, firm, corporation, or company having possession or control of any artesian well within the State to permit water to flow or escape therefrom between the first day of October in any year and the first day of April next ensuing; provided, that this shall only apply to sections and communities wherein the use of water for the purpose of irrigation is necessary or customary; and, provided further, that between the dates above mentioned the water from such wells may be taken for household, stock, and domestic purposes only. It is also made a duty to cap such wells between such dates; provided, however, it is lawful to insert a one-half inch stop and waste cock in the piping of such well and to use water therefrom for household, stock, or domestic purposes, but not otherwise.

Any person violating the above provisions is deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $200 for each and every such offense, and the further sum of $200 for each ten days during which such violation shall continue.

And, again, whenever any person shall fail to comply with the above provisions, any person, firm, corporation, or company lawfully in the possession of land adjacent to or in the vicinity or neighborhood of such well and within five miles thereof, may enter upon the land upon which such well is situated, and cap such well, and shut in and secure the escape of the water therefrom, and the necessary expenses for so doing shall constitute a lien upon such well and a sufficient quantity of land surrounding the same for the convenient use and operation thereof, which lien may be foreclosed in a civil action.[1]

[2] Laws, 1911, p. 436.

[1] R. & B. Codes, Secs. 6404-6407; State v. Tiffany, 44 Wash. 602, 87 Pac. Rep. 932.

§ 2088. The adjudication of existing rights.—The adjudication of existing water rights, both as between ditches and canals, or as between the consumers thereunder, is left, where it should be, entirely with the courts. The proceedings for the adjudication of the rights to water as between the different ditches taking the water from the same source of supply are largely the same as those in Colorado. Any one or more persons, associations, or corporations interested as owners of any ditch or canal in any water district, may present to the superior court of any county a "motion, petition, or application" in writing, moving or praying the said court to adjudicate the priorities of right to the use of water between the several ditches or canals in the district. The court without unnecessary delay must set a day for such hearing. Notice of such hearing must be published and also posted, and served on every person, association, or corporation, having interests in such waters. The court at the time set must hear the evidence of the respective parties and the arguments of counsel, and make and cause to be entered a decree determining and establishing the several priorities, and the amount in cubic feet per second to which each ditch is entitled, and such other description as may be necessary. The court, in making the decree, shall number the several ditches and canals in the water district in consecutive order according to the priority of appropriation of water, as nearly as may be, and shall further number consecutively the several appropriations of water, beginning with the oldest, without respect to the ditches. Upon the payment of a reasonable fee, to be fixed by the court, a certificate, under the seal of the court, is issued to the ditch owners showing their respective rights; and the holder of such certificate shall exhibit the same to the water commissioner when he commences the exercise of his duties.[1]

§ 2089. Improvement of streams for logging purposes.—The industry of cutting timber and floating logs to market is an important one in the State of Washington. It is therefore provided:

"It shall be lawful for any person or company interested in logging to make such improvements on any stream used for logging

[1] R. & B. Codes, Secs. 6384-6397. See, also, for the statutory adjudication of water rights, Chap. 79, Secs. 1567-1584. For the adjudication of rights in Colorado, see Secs. 1790-1793.

within the State of Washington as may be necessary to carry on said logging business; that such improvements may consist in clearing out obstructions and straightening the channel by cutting across sand or gravel bars, and that side dams and sheer booms may be used in making such improvements."[1]

§ 2090. Provisions in aid of the National Reclamation Act.—The United States is granted the right to exercise the power of eminent domain to acquire the right to the use of any water, to acquire or extinguish any rights, and to acquire any lands or other property for the construction, operation, repairs, maintenance, or control of any plant, constructed under the provisions of the National Reclamation Act.[1] The right to the use of natural or artificial water courses for the conducting of water is also given. Whenever any official of the United States duly authorized shall notify the commissioner of public lands of the State pursuant to the provisions of the National Reclamation Act, that the United States intends to make examinations or surveys for the utilization of specified waters, the waters so described shall not be thereafter subject to appropriation under any law of the State for a period of one year. But such notice shall not affect vested rights. If the Secretary of the Interior shall, before the expiration of said period of one year, certify in writing that the project contemplated is feasible and that investigation will be made in detail, such waters shall not be subject to appropriation for a further period of three years; provided, that if the certificates are not filed within said periods, such waters are open to appropriation. Appropriation of such waters may be made by the United States in the same manner and to the same extent as though such appropriation is made by a private person. The title to the beds and shores of any navigable stream or lake utilized by the construction of such works shall vest in the United States, to the extent necessary for the maintenance, operation, and control of such reservoir or other irrigation works. Reservation of the State lands

[1] R. & B. Codes, Sec. 7099; Berryman v. East Hoquiam Boom & Logging Co., —— Wash. ——, 124 Pac. Rep. 130; Brisky v. Leavenworth Logging etc. Co., —— Wash. ——, 123 Pac. Rep. 519; Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199; Munroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. Rep. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905.

[1] For full discussion of this Act, see Chap. 65, Secs. 1235-1286.

necessary for such works and rights of way is made. It is also provided that the lands of the State under such a project shall be sold in conformity to the classification of the farm units by the United States.

Provisions are made for the incorporation of water users' associations, which associations shall be exempt from the payment of any incorporation and annual franchise tax.[2]

§ 2091. Irrigation district law.—The State of Washington is one of the States that has adopted the irrigation district law,[1] following that of California.[2]

It is provided that whenever fifty or a majority of holders of title or evidence of title holding land susceptible of one mode of irrigation from a common source, and by the same system of works, desire to provide for irrigation of the same, they may present a petition to the board of county commissioners of the county in which the lands or a greater portion thereof are situated for the organization of such a district.[3] The organization of the district and the election of the officers of the same must be proceeded with in conformity with the statute and similar to the proceedings in California, discussed in a previous portion of this work.[4] The usual powers are granted the board to make contracts and to make all necessary rules and regulations for the conduct of the affairs of the district not in conflict with the statute.[5] The board is also given the power to acquire, "either by purchase or condemnation, all lands and waters and other property necessary for the project."[6] Money may be borrowed and bonds issued for the payment of the same upon the usual election held for that purpose.[7] All of the real property within the district

2 R. & B. Codes, Secs. 6408-6415.

1 For full discussion of this law, see Chap. 70, Secs. 1386-1432.

2 See R. & B. Codes, Secs. 6416-6512.

3 Board of Directors Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. Rep. 367; Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. Rep. 773; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; State *ex rel.* Witherop v. Brown, 19 Wash. 383, 53 Pac. Rep. 548.

4 See Secs. 1410-1414.

5 Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301.

6 R. & B. Codes, Secs. 6426, 6427.

7 R. & B. Codes, Secs. 6430, 6431.

See, also, Abbott v. Gaches, 20 Wash. 517, 56 Pac. Rep. 28; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; Rothchild Bros. & Rollinger, 32 Wash. 307, 73 Pac. Rep. 369.

may be assessed for the purposes of the district, and a certain amount of tax fixed and collected.[8] Navigation is protected and the vested rights of private property.[9] The boundaries of the district may be changed, and lands added,[10] or excluded.[11] The election precincts of such district may be also changed.[12] Special proceedings are provided for the confirmation of all acts by the court.[13] Proceedings are also provided for the disorganization of districts by the directors of the district,[14] and for the dissolution of districts by the county commissioners.[15]

§ 2092. **The Carey Act in Washington.**—The State of Washington comes within the Carey Act and has accepted the provisions thereof.[1] "The selection, management, and disposal of said lands shall be vested in the commissioner of public lands of the State of Washington,"[2] instead of some board as is the case in the most of the other States. In dealing with this official the usual proceedings must be had as has been discussed in the previous part of this work.[3] After notice that the land is open for settlement, any citizen of the United States, or any person having declared his intention (excepting married women not the heads of families) over the age of 21 years may make application. Said application must be accompanied with the usual water right contract and the sum of $1 per acre for the land applied for. The price of the land is fixed much higher than it is in most of the States, being fixed under each project at a uniform price of not less than $10 per acre, one-tenth to be paid at the time of entry and the remainder in nine equal instalments, with interest at 6 per cent per annum, provided that the settler may make full payment at any time upon or after making final proof. The final proof of reclamation, settlement, and occupation must be made within ten years from the date of the notice that

8 R. & B. Codes, Secs. 6433-6448; Rothchild Bros. v. Rollinger, *supra*.

9 R. & B. Codes, Secs. 4210, 4211.

10 R. & B. Codes, Secs. 6462-6483.

11 R. & B. Codes, Secs. 6475-6484.

12 R. & B. Codes, Secs. 6485-6487; Percival v. Cowychee etc. Dist., 15 Wash. 480, 46 Pac. Rep. 1035.

13 R. & B. Codes, Secs. 6489-6494; Board of Directors Middle Kittitas Irr. Dist. v. Peterson, *supra*.

14 R. & B. Codes, Secs. 6495-6499.

15 R. & B. Codes, Secs. 6500-6512.

1 R. & B. Codes, Secs. 6705-6743. See, also, Howlett v. Cheetham, 17 Wash. 626, 50 Pac. Rep. 522.

2 R. & B. Codes, Sec. 6707.

3 For full discussion of the Carey Act, see Chap. 67, Secs. 1312-1336.

the company is prepared to furnish him with the water.[4] The usual lien is given the contracting company for the payment of the water right.

§ 2093. **Reclamation of State lands by the State.**—The commissioner of the public lands of the State of Washington is also authorized and empowered to receive and file proposals and to enter into contracts for the construction of irrigation works to reclaim any and all lands granted to the State for any and all purposes and uses. The proceedings for the entering upon contracts are very much the same as those under the Carey Act in the State, but with the elimination of the interests of the General Government. Any person, company, or association, or corporation desiring to construct ditches or other irrigation works for the reclamation of said lands, may present a proposal for the same to the commissioner of public lands.[1] No contract shall be made which requires a greater time than three years for the construction of the works, and such additional time as may be granted by the commissioner not to exceed two years. The lands under such projects are sold for the price, and in accordance with the general law provided for the sale of State lands, and whenever an application is made to the commissioner for the purchase of any of the lands under a project, the application shall be accompanied by a sworn statement that the applicant is ready and willing to enter into a contract with the constructing company for his water right. And in case of the sale of the lands to such party the commissioner shall not issue a contract therefor until there shall have been filed in his office a certified copy of a contract for a perpetual water right with the contracting company. The same lien is given the constructing company upon the lands and water right for the payment of the water right, which lien may be foreclosed.[2]

§ 2094. **The pollution of waters.**—The pollution of a water supply is made a misdemeanor;[1] also any person who shall place or cause to be placed within any watershed from which any city or municipal corporation of any adjoining State obtains its water supply, any substance which, either by itself or in connection with other matter, will corrupt, pollute, or impair the quality of said water

4 R. & B. Codes, Secs. 6717-6720.
1 R. & B. Codes, Secs. 6729-6733.
2 R. & B. Codes, Secs. 6737, 6738.
1 R. & B. Codes, Secs. 2542, 2543.

supply, shall be deemed guilty of a misdemeanor and upon conviction thereof be punished by fine in any sum not exceeding $500.[2]

For the protection of the water furnished to the inhabitants of the towns and cities of the State of Washington such towns and cities are given jurisdiction over the water supply so used. The pollution of such waters is made a misdemeanor and subject to a fine of not exceeding $500. Where a nuisance is maintained, proceedings are provided for its abatement at the cost of the party so maintaining it. It is made the duty of the health officers to file complaints in the proper court against parties so polluting the waters; and an injunction may also be issued.[3]

§ 2095. **Criminal statutes.**—It is made a misdemeanor to steal water, or to tamper unlawfully with any irrigation appliances. The use of water through any such structure or structures, unlawfully taking water, is made *prima facie* evidence of the guilt of the person so taking it. The penalty for the above is a fine of not less than $25 nor more than $100, or to be imprisoned in the county jail not exceeding six months, or both.[1]

It also is made a misdemeanor for any person to take through the irrigating ditch more water than is absolutely necessary for his purposes.[2] Any person wilfully failing or refusing to place and keep in repair a necessary headgate and measuring box is guilty of a misdemeanor.[3] Permitting water to waste from artesian wells is a misdemeanor.[4]

§ 2096. **Riparian rights in Washington.**—Upon the subject of riparian rights, the statute of Washington provides:

"All persons who claim, own, or hold possessory right or title to any land or parcel of land or mining claim within the boundaries of the State of Washington, when such lands, mining claims, or any parts of the same are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream not other-

2 R. & B. Codes, Sec. 7823.
3 R. & B. Codes, Secs. 7990-7994.
1 R. & B. Codes, Secs. 2657, 2658, 6346, 6383, 6383c, 6396, 6397; State v. Tiffany, 44 Wash. 602, 87 Pac. Rep. 932.
2 R. & B. Codes, Sec. 6346.
3 R. & B. Codes, Secs. 6395, 6402.
4 R. & B. Codes, Secs. 6404-6407. See, also, for artesian wells, Sec. 2087.

wise appropriated for the purpose of mining and irrigation, to the full extent of the soil for agricultural purposes."

It will be seen from the above section that, while riparian rights to the flow of a natural stream are, in a measure, protected, the right of a riparian proprietor to the undiminished flow of a stream is limited to such a quantity of the water not otherwise appropriated, to the amount necessary for the irrigation of his lands. And the phrase "not otherwise appropriated" must be construed to refer to the amount remaining in the stream at the date of his settlement, and then only to the extent of his needs.[1] And, in this connection, it may be said that the right of a riparian proprietor to the undiminished flow of a stream past his lands, without use, as allowed under the old common law may be considered abrogated.

1 Kendall v. Joyce, 48 Wash. 489, 93 Pac. Rep. 1091; Nielson v. Sponer, 46 Wash. 14, 89 Pac. Rep. 155.

See, also, Benton v. Johncox, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; Crook v. Hewitt, 4 Wash. 749, 31 Pac. Rep. 28; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; New Whatcom v. Fairhaven etc. Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190; Geddis v. Parrish, 1 Wash. 587, 21 Pac. Rep. 314; Gose v. Blalock, 21 Wash. 75, 57 Pac. Rep. 342; Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Kalama etc. Co. v. Kalama Driving Co., 48 Wash. 612, 94 Pac. Rep. 469, 22 L. R. A., N. S., 641, 125 Am. St. Rep. 948; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Nesalhouse v. Walker, 45 Wash. 621, 88 Pac. Rep. 1032; Miller v. Baker, —— Wash. ——, 122 Pac. Rep. 604; Still v. Palouse Irr. & Pr. Co., 64 Wash. 606, 117 Pac. Rep. 466; Menthow Cattle Co. v. Williams, 64 Wash. 457, 117 Pac. Rep. 239.

CHAPTER 104.

WYOMING.

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§ 2097. **Particular features of the State.**—Wyoming lies within the Great Plains and Rocky Mountain regions. It has an area of 97,890 square miles, or 62,645,120 acres. The continental divide runs diagonally across the State, which with other minor divides forms the boundaries of four natural water divisions tributary to four different drainage basins. The North Platte, Powder, and Yellowstone Rivers are tributary to the Missouri River; the Snake River flows into the Columbia; the Bear River flows into Great Salt Lake, and the Green River flows into the Colorado River. The altitude of the State is high, and varies from 3,000 to 14,000 feet, with a mean altitude of about 6,000 feet, and probably less than one per cent is under 4,000 feet. About one-sixth of the area of the State is agricultural land, exclusive of grazing areas, while another sixth is reserved as National Forest reserves. Owing to the wide range of altitudes of the different portions of the State the climate is varied to a considerable extent. And the character of the agriculture and of the crops produced is governed by this fact. In all portions of the State pastoral industries flourish, and in many portions there is farming by irrigation. In many portions of the State where the altitude is from 3,000 to 4,500 feet above the sea level many varieties of both fruit and vegetables are grown successfully, as well as hay and grain. In some portions the soil is especially adapted to the raising of sugar beets, and the number of acres devoted to this crop is increasing annually. At the higher altitudes, however, killing frosts sometimes occur in May and September, so that the raising of hay or alfalfa, grain, and the hardy fruits only is attempted.

The water supply of the State is large, to be found in the rivers above named and their tributaries, and, besides this there are many perennial springs of notable size. The mean annual precipitation for the State, as obtained from the reports of the United States Weather Bureau for the past 37 years, is 14.17 inches.

§ 2098. **Irrigation in the State.**—Outside of the natural forage, and the crops that are raised under modern scientific methods of dry farming, very little is grown in the State of Wyoming without irrigation. As a general thing no dependence can be placed upon non-irrigated crops. Land in this State, as in the greater portion of the arid region, has little value for agricultural purposes without water. But the arable lands within the State being almost boundless, agri-

cultural development has been restrained in the past, and is now being restrained, only by the uncertainty of securing water for the irrigation of crops. Since the first edition of this work was written, twenty years ago, the irrigation development in this State has rapidly progressed. According to the secretary of the State board of control, under date of November 21, 1910, there were actually under irrigation, or certificates for water rights had been issued for 1,286,607.32 acres.[1] A great number of large irrigation enterprises have been projected, and many completed to full operation by private parties and corporations, and by private corporations working in conjunction with the State and National Governments, under the provisions of the Carey Act.[2] Many small projects have also been carried through to completion, while the Government is in process of active construction of what is known as the Shoshone Project, near Cody, under the provisions of the National Reclamation Act.[3]

Within the last few years Wyoming has entered the reservoir stage of her irrigation development. The great reservoirs already constructed and those planned have to do with the storing of the water of the streams of considerable size, where the summer flow is not sufficient for all of the water users depending upon the same source of supply. Where the water is being stored upon the upper reaches of a river, it not only furnishes a supply for the irrigation of the lands in the immediate vicinity, but also a considerable portion

1 See Biennial Report of the State Engineer of Wyoming, 1909-1910, pp. 31, 48.

See, also, Irrigation in Wyoming, by Clarence T. Johnston, 1909, Office of Experiment Stations, Bulletin No. 205, U. S. Dept. of Agriculture; Use of Water in Irrigation at Wheatland, Wyo., by Clarence T. Johnston, Report of Irrigation Investigations for 1900, No. 3, Office of Experiment Stations, Bulletin No. 104, U. S. Dept. of Agriculture; Duty of Water in Wyoming, by Clarence T. Johnston, Office of Experiment Stations, Bulletin No. 86, U. S. Dept. of Agriculture; Water Right Problems of Bear River, by Clarence T. Johnston and Joseph A. Brockons, 1899, Office of Experiment Stations, Bulletin No. 70, U. S. Dept. of Agriculture; Small Reservoirs in Wyoming, Montana, and South Dakota, by F. C. Herrmann, 1907, Office of Experiment Stations, Bulletin No. 179, U. S. Dept. of Agriculture; Irrigation in Wyoming, by Clarence T. Johnston, state engineer, 1909, Office of Experiment Stations, Bulletin No. 205, U. S. Dept. of Agriculture.

2 For the Carey Act, and full discussion of its provisions, see Chap. 67, Secs. 1312-1336.

For the Carey Act in Wyoming, see Sec. 2124.

3 For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

For the National Reclamation Act in Wyoming, see Sec. 2126.

of the water so used finds its way back into the stream, and it is then used by the irrigators below. The water of the stream thus does double service.[4] And in a number of instances the water rights of those living along the lower reaches of the rivers are of more value today than they were before the water was stored along their upper portions, for the reason that the late summer flow has been increased.

According to the census report for 1910, the total number of farms irrigated in 1909 was 6,297, against 3,721, in 1899, an increase of 2,576 or 69.2 per cent.

The total acreage irrigated in 1909 was 1,133,302 acres, against 605,878 acres in 1899, an increase of 527,424 acres or 87.1 per cent. The total acreage which all enterprises were capable of irrigating in 1910 was 1,639,510 acres. The acreage included in enterprises completed or under construction in 1910 was 2,224,298 acres.

The acreage irrigated in 1909 classified by type of enterprise, is reported as follows: Under the United States Reclamation Service, 12,905 acres; under the United States Indian Service, 4,270 acres; under the Carey Act, 86,252 acres; under irrigation districts, 11,800 acres; by co-operative enterprises, 116,317 acres; by commercial enterprises, 87,935 acres; by individual and partnership enterprises, 813,823 acres.

§ 2099. Criticism of the Wyoming laws.—As will be readily seen from the following sections of this chapter, the basis of the Wyoming constitution and laws governing the use of water for irrigation and other beneficial uses is pre-eminently that of State control or the administration by the State.[1]

By its constitutional provisions adopted in 1890, followed by the Act of the legislature of the new State of 1891, a speedy and final solution of many of the troubles which formerly beset the irrigators of the State of Wyoming was found. The law has stood the test of time and has been largely followed in other States adopting the system of State control, notably Nebraska, Nevada, Oregon, and Utah. In preparing this law, the law of Colorado was followed to a considerable extent, with one notable difference. The adjudication of

[4] For the storage of water, see Secs. 837-846, 2110.

[1] For the laws of State control, or State administration, see Chap. [illegible], Secs. 1337-1367.

water rights was left in the first instance to the board of control instead of to the courts, as is the case in Colorado. Advantage was taken of the experience of other States, and much that was best was incorporated from other irrigating countries. The law is unique in this, that the State does not necessarily wait for controversies and losses to arise, but of its own motion steps in and ascertains how much water is available for irrigation, who are the claimants to this water, and then, knowing these fundamental facts, gives the use of the water to the proper persons, and employs its own agents to see that the distribution is made. In the State of Wyoming, at least, there will no longer be the ludicrous spectacle of learned judges solemnly decreeing the right to from two to ten times the amount of water flowing in the stream, or in fact amounts so great that the channel of the stream could not possibly carry them, thus practically leaving the questions at stake as unsettled as before.

From a study of the law it is very apparent that the State engineer and board of control hold the most important offices in that State so far as its agricultural interests are concerned, and by a wise and skillful exercise of the functions intrusted to them can bring about great changes for the better in the development of the agricultural resources of the State. The State engineer is also the president of the board of control. Objection may be made by some that there is too great a centralization of power in one man. But this is answered by the provision for appeal to the courts by any party feeling himself aggrieved, and by the provision that when the case shall be finally decided the right of the prevailing party relates back to the first step taken by him to secure his water rights. Thus his rights are not jeopardized by the delays often attendant upon court proceedings. The law provides that the priority of the claimant's rights shall be the basis for the determination of his right to use the water. The law also provides for the adjudication of his claim, which when made entitles the claimant to a certificate of appropriation to the water, stating the amount of water he is entitled to, the land it is intended to irrigate, and the number of his priority. And now for the first time he has a deed to the water, which is even more important and valuable than the deed to his land, from the fact that his land would be absolutely worthless without the water.

By Act of the legislature of 1907, the irrigation district law was adopted, largely taken from that of California, with two notable ex-

ceptions, only the lands that are benefited may be included within the district; and, with the law of State control ever in mind, the State engineer is required to pass upon the feasibility of the plans for the district before such district can be organized.[2]

Taking it all in all, we regard the irrigation and water laws of Wyoming as comprehensive and efficient as those of any of our States. The law of State control having been adopted when the population of the State was sparse, all the water rights existing prior to its passage having been adjudicated, and the stream measurement having been practically completed, and new water rights having to be acquired under the administration of the State, it gives a basis to work upon. No new appropriation can be legally made where the water flow of the stream from which it is attempted has been exhausted by previous appropriations. Another good feature of the working of the law is that it makes an accessible record of all appropriations and vested water rights within the State. As the population of certain localities becomes more dense, and the more intensive farming becomes general, the State irrigation district law will undoubtedly be taken advantage of to a greater extent than it is at present.

Probably the greatest evidence of the satisfaction that the working of the Wyoming law is giving is the fact that comparatively few cases involving water rights have ever reached the courts, and especially the State Supreme Court.

§ 2100. State constitutional provisions.—The admission of Wyoming as a State on July 10, 1890, was calculated to work great changes in its irrigation law. In the constitution of the State, adopted by the people in the fall of 1889, and ratified by Congress on the admission to statehood, it was provided that all waters were the property of the State; that there should be a board of control, consisting of the State engineer and superintendents of water divisions, to have control of the appropriation, distribution, and diversion of all waters, subject to review by the courts; that priority of appropriation gives the better right, and that the State shall be divided into four water districts by the legislature. This was the beginning of the present simple but effective irrigation laws of

2 For the irrigation district law of Wyoming, see Sec. 2125. For the irrigation district laws, see Secs. 1386-1432.

Wyoming, which will be discussed in the subsequent portion of this chapter.

The constitutional provisions referred to were as follows:

Article I, Section 31, provides: "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channel, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved."[1]

Section 32 provides: "Private property shall not be taken for private use, unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes, nor in any case without due compensation."[2]

Article VIII, Sections 1 to 5, provide:

"Sec. 1. The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State.[3]

"Sec. 2. There shall be constituted a board of control, to be composed of the State engineer and superintendents of water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State and of their appropriation, distribution, and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the State.[4]

"Sec. 3. Priority of appropriations for beneficial uses shall give the better right. No appropriation shall be denied, except when such denial is demanded by public interest.[5]

[1] For the construction of the above section, see Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

[2] See Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994; Gustin v. Harting, —— Wyo. ——, 121 Pac. Rep. 522.

[3] See Farm Inv. Co. v. Carpenter, *supra;* Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Chicago etc. R. Co. v. McPhillamey, —— Wyo. ——, 118 Pac. Rep. 682.

See, also, the Act of 1911, Laws, 1911, Chap. 43, p. 57, authorizing the attorney general of the State to take steps to protect Wyoming rights upon interstate streams.

[4] See cases cited *supra.*

[5] See cases cited *supra;* Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep 845, 71 Am. St. Rep. 914; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

"Sec. 4. The legislature shall by law divide the State into four (4) water divisions, and provide for the appointment of superintendents thereof.

"Sec. 5. There shall be a State engineer, who shall be appointed by the Governor of the State and confirmed by the Senate; he shall hold his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the State and of the officers connected with its distribution. No person shall be appointed to the position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position." [6]

Article XIII, Section 5, provides:

"Sec. 5. Municipal corporations shall have the same right as individuals to acquire rights by prior appropriation and otherwise to the use of water for domestic and municipal purposes, and the legislature shall provide by law for the exercise upon the part of incorporated cities, towns, and villages of the right of eminent domain for the purpose of acquiring from prior appropriators upon the payment of just compensation, such water as may be necessary for the well being thereof and for domestic uses." [7]

§ 2101. Water right defined—Preferred uses defined—Change to preferred use.—By the Act of the legislature of the State of Wyoming of 1909,[1] embodied in the Compiled Statutes of Wyoming, 1910, as Sections 724, 725, 726, there was enacted the following:

"724. A water right is the right to use the water of the State, when such use has been acquired by the beneficial application of water under the laws of the State relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the basis, the measure, and limit of the right to use water at all times, not exceeding in any case, the statutory limit of volume. Water being always the property of the State, rights to its use shall attach to the land for irrigation, or to any other purpose or object for which acquired in accordance with the

[6] See Farm Inv. Co. v. Carpenter, supra.

[7] See Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

[1] Laws, 1909, Chap. 68, Secs. 1-3.

beneficial use made and for which the right receives public recognition, under the law and the administration provided thereby. Water rights can not be detached from the lands, place, or purpose for which they are acquired, without loss of priority.

"725. Water rights are hereby defined as follows, according to use: Preferred uses shall include rights for domestic and transportation purposes; existing rights not preferred, may be condemned to supply water for such preferred uses in accordance with the provisions of the law relating to condemnation of property for public and semi-public purposes. Such domestic and transportation purposes shall include the following: First, water for drinking purposes, both for man and beast; second, water for municipal purposes; third, water for the use of steam engines and for general railway use; fourth, water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), and for steam and hot water heating plants. The use of water for irrigation shall be superior and preferred to any use where turbine or impulse water wheels are installed for power purposes.

"726. Where it can be shown to the board of control under the provisions hereof, that a preferred use is to be made, the procedure for the change of such use shall embrace a public notice, and inspection and hearing if necessary by and before the proper division superintendent, a report of such superintendent to the board of control and an order by said board. If the change of use is approved, just compensation shall be paid and under the direction of the board, proper instruments shall be drawn and recorded."[2]

The State engineer in his last report in referring to the above Act, says: "All who have studied this legislation agree that it represents the most important action of the law makers of the State, since the original statute was enacted in 1891."[3] No case seems to have been decided at this writing as to the constitutionality of the various sections of this Act, and especially as to the provisions of the last section above quoted. But it seems to us to provide for the taking of private property both without due process of law, and without provisions for just compensation; and, therefore, coming within constitutional inhibitions. Although the State may own the title to the water, as provided by Article VIII, Section 1, of the

[2] Secs. 724-726, Comp. Stats., 1910.

[3] Biennial Report of the State Engineer of Wyoming, 1909-1910, p. 17.

State constitution,[4] it can not be contended for a moment, but that the right to the use of the water as acquired by any person, under the laws of the State, is a valuable property right, from which he can not be devested without due process of law and then only upon the payment of just compensation.[5]

§ 2102. **Administrative officers—Board of control and powers and duties thereof.**—Under the provisions of Article VIII, Section 2, of the State constitution,[1] there is constituted a board of control composed of the State engineer and the superintendents of the four water divisions of the State. The office of the board is with the State engineer, and it shall hold two meetings each year. And, as provided by the section of the constitution above referred to, the powers of said board are, under such regulations as may be prescribed by law, to have the supervision of the waters of the State and of their appropriation, distribution, and diversion, and of the various officers connected therewith,[2] its decisions to be subject to review by the courts. The State engineer shall be *ex officio* president of said board, and shall have the right to vote on all questions coming before it, and a majority of all the members shall constitute a quorum to transact business.[3] The board is also given the authority, with power of removal, to appoint a secretary, whose duties are the usual ones appertaining to such an office.[4] One of the duties assigned to the board was the determination of priorities of the right to the use of the public waters of the State, which determination should begin on the streams most used for irrigation, and be continued as rapidly as possible, until all the claims for appropriation then on record shall have been adjudicated.[5]

§ 2103. **Administrative officers—State engineer and his powers and duties.**—Sections 149 to 157 of the Compiled Statutes of Wyo-

4 See Sec. 2100.

5 For the acquisition of rights by virtue of the right of eminent domain, see Chap. 55, Secs. 1059-1098.

1 See Sec. 2100.

2 See Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

3 Sec. 761, Comp. Stats., 1910.

4 Sec. 762, Comp. Stats., 1910.

5 Secs. 763, 764, Comp. Stats., 1910. See, also, cases cited *supra*.

For the determination of water rights by the board of control, see Secs. 2111-2114.

ming, 1910,[1] provide for the duties of the State engineer.[2] Before entering upon his duties, he shall take the oath prescribed by the constitution, and enter into a bond to the State in the penal sum of $5,000 and conditioned for the faithful discharge of his duties. His salary is fixed at $3,500 per annum, and he shall keep his office at the State capital in the capitol building.[3]

His duties are defined as follows: "The State engineer shall make, or cause to be made, measurements and calculations of the discharge of streams, from which water shall be taken for beneficial purposes, commencing such work upon those streams as are most used for irrigation, or other beneficial purposes. He shall collect facts, and make surveys to determine the most suitable location for construction of works for utilizing the water of the State, and to ascertain the location of the lands best suited for irrigation. He shall examine reservoir sites and shall, in his reports, embody all the facts ascertained by such surveys and examinations, including, wherever practicable, estimates of the cost of the proposed irrigation works, and of the improvement of reservoir sites. He shall become conversant with the waterways of the State, and the needs of the State as to irrigation matters, and in his reports to the Governor he shall make such suggestions as to the amendment of existing laws, or the enactment of new laws, as his information and experience shall suggest, and he shall keep in his office full and proper records of his work, observations, and calculations, all of which shall be the property of the State.[4]

"The State engineer shall prepare and render to the Governor, biennially, and oftener if required, full and true reports of his work, touching all matters and duties devolving upon him by virtue of his office, which report shall be delivered to the Governor on or before the 30th of November, of the year preceding the regular session of the legislature."[5]

The statute also provides that the State engineer shall have the power to employ an assistant engineer, at an expense of not to

1 The references to the statutes in the succeeding sections of this chapter will be to this volume unless otherwise indicated.

2 The office of State engineer is provided for in the constitution; see previous section, No. 2102. See, also, the duties of the board of control, of which the State engineer is president, Sec. 2102.

3 Secs. 149-151, Comp. Stats., 1910.

4 Sec. 152, Comp. Stats., 1910.

5 Sec. 155, Comp. Stats., 1910.

exceed $1,500 per annum, and to employ a deputy engineer, at an expense not to exceed $1,800 per annum. The duty of these officers is to act under the direction of the State engineer.[6] The State engineer and his assistants are entitled to traveling expenses, when away from their office on State business.[7] For the services performed by the office of the State engineer a system of fees is established. These fees are payable in advance, and are to be paid by him into the general fund of the State treasury as by law provided.[8]

§ 2104. **Administrative officers—Superintendents of water divisions and their duties.**—According to the provisions of Article VIII, Section 4, of the State constitution,[1] the legislature divided the State into four water divisions and defined the boundaries thereof.[2] The legislature also provided for the appointment of one superintendent for each water division, by the Governor with the consent of the senate; such superintendents to hold office for the term of four years; each superintendent to receive a salary of $1,500 per annum and actual traveling expenses.[3] A superintendent must be competent to fill the position, and the statute provides that the State engineer shall, from time to time, conduct examinations for candidates for such positions, and a list of those who qualify shall be filed with the Governor. "The examination shall consist of questions relative to the irrigation law and its administration, the measurement of flowing water, evaporation, seepage, and common alkalies, drainage, and the hydrographic features of the water division in which the candidate may reside."[4] The duty of a division superintendent is to have control over the water commissioners of his division; he shall also, under the direction of the State engineer, execute the laws relative to the distribution of water in accordance with the rights of priorities of appropriation, and perform such other functions as may be assigned to him by the State engineer. A superintendent may make such supplementary regulations as are

6 Sec. 153, Comp. Stats., 1910.
7 Sec. 154, Comp. Stats., 1910.
8 Secs. 156, 157, Comp. Stats., 1910.
1 See Sec. 2100.
2 Sec. 753, Comp. Stats., 1910.
See, also, State *ex rel.* Hamilton v. Grant, 14 Wyo. 41, 81 Pac. Rep. 795, 1 L. R. A., N. S., 588.
3 Secs. 754, 759, Comp. Stats., 1910.
4 Sec. 754, Comp. Stats., 1910.
See, also, Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; State *ex rel.* Hamilton v. Grant, 14 Wyo. 41, 81 Pac. Rep. 795, 1 L. R. A., N. S., 588.

necessary to enforce the general laws, relative to the distribution of water.[5] Parties dissatisfied with the decision of a superintendent may appeal from such decision to the State engineer, by filing with the engineer a copy of the order or regulation complained of, and a statement of the manner in which the same injuriously affects their interests. The engineer shall, after due notice, hear whatever testimony may be brought forward by the petitioner, either orally or by affidavit and, through the division superintendent, shall have power to suspend, amend, or confirm the order complained of.[6]

§ 2105. **Administrative officers—Commissioners of water districts and their duties.**—The statute provides that the board of control shall divide the State into water districts, from time to time as the necessity arises, said districts to be so constituted as to secure the best protection to the claimants for water, and the most economical supervision on the part of the State.[1] There shall also be appointed by the Governor, one water commissioner for each district, who shall be selected from the persons recommended by the superintendent of the water division in which such district is situated.[2] It is made the duty of a water commissioner to divide the water of the natural stream or streams of his district among the several ditches and reservoirs taking water therefrom, according to the prior rights of each, respectively. He is also given the power to shut and fasten, under the direction of the division superintendent, the headgates of ditches, whenever it is necessary to do so, by reason of the prior rights of others. He shall also as near as may be, divide, regulate, and control the use of the water of all streams within his district as will prevent the waste of water, or its use in excess of the volume to which any appropriator is lawfully entitled. Any person who may be injured by the action of any water commissioner, or by his failure to act, is given the right of appeal to the division superintendent, and for his decision he may appeal to the State engineer. And, from the decision of the State engineer an appeal may be had to the district court of the proper county.[3] It

5 Secs. 755, 756, Comp. Stats., 1910. See, also, cases cited *supra*.

6 Sec. 757, Comp. Stats., 1910.

1 Sec. 799, Comp. Stats., 1910. See, also, Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661.

2 Sec. 800, Comp. Stats., 1910.

3 Secs. 801, 802, Comp. Stats., 1910. See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661.

is also required that all water commissioners shall make reports, whenever called upon to do so by the division superintendents, upon the following subjects: The amount of water actually coming into the district to supply ditches, canals, and reservoirs; whether such supply is on the increase or decrease; what ditches, canals, and reservoirs are at that time without their proper supply, and any other and further information as the division superintendent of that division may require.[4] A water commissioner is also given the power, in cases of emergency, to employ suitable assistants to aid him in the discharge of his duties.[5] He is also given the power to arrest parties unlawfully interfering with any works, and to make complaint against the party so arrested.[6]

§ 2106. **The appropriation of water—Applications.**—Any person, association, or corporation hereafter intending to acquire the right to the beneficial use of the public water of the State of Wyoming shall, before commencing the construction, enlargement, or extension of any ditch, canal, or other distributing works, or performing any work in connection with said construction, or proposed appropriation, make an application to the State engineer for a permit to make such appropriation. The contents of such applications have been sufficiently discussed in previous sections of this work in the chapter on State administrative laws, or State control,[1] and it is further provided that any person who shall wilfully divert or use water to the detriment of others without compliance with law shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be fined in a sum not exceeding $100 or imprisoned in the county jail for a term not exceeding six months, or both such fine and imprisonment; and the possession or use of water, except when a right of use is acquired in accordance with law, shall be deemed *prima facie* evidence of the guilt of the person using it.[2] It is made the duty of the State engineer to file such application, and to

4 Sec. 758, Comp. Stats., 1910.

5 Sec. 804, Comp. Stats., 1910.

6 Sec. 818, Comp. Stats., 1910.

1 For State administrative laws, see Secs. 1337-1367.

2 Sec. 727, Comp. Stats., 1910.

See, also, Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

The appropriation of water within the State of Wyoming must be in accordance with its statutes. Morris v. Bean, 159 Fed. Rep. 651, 86 C. C. A.

ascertain if it contains all the facts necessary, and as required by law. If it does not, it must be returned for amendment. All applications which comply with the provisions of the statute, shall be recorded in a suitable book kept for that purpose. Each application for a permit to appropriate water must be accompanied with maps, plats, and plans, as provided by the statute, and giving full data as to the proposed works. If these are not complete, the State engineer may require additional ones to be furnished.[3]

§ 2107. **The appropriation of water—Approval or rejection of applications.**—It is made the duty of the State engineer to approve all applications made in proper form, which contemplate the application of water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. "But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the State engineer to reject such application and refuse to issue the permit asked for." If the application is approved, the applicant may proceed with the construction of the necessary works, and to perfect the proposed appropriation. If the application is refused, no further steps may be taken. Before acting upon the application the State engineer may require additional information. If it is proposed to divert more than 25 cubic feet of water per second, or to reclaim more than 1,000 acres of land, he may require a statement. In case of incorporated companies, he may require the submission of the articles of incorporation, the names and residences of its directors and officers, and the amount of its authorized and paid-up capital. If the applicant is not an incorporated company, he may require a showing as to the names of the parties, and a showing as to their financial ability to carry out the proposed work.[1] In his endorsement of approval on any application, the State engineer shall require that actual construction work shall begin within one

519; affirming *Id.*, 146 Fed. Rep. 423; aff'd, 221 U. S. 485, 55 L. Ed. 82, 31 Sup. Ct. Rep. 703.

See, also, Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

[3] Secs. 734-737, Comp. Stats., 1910.

[1] Secs. 728-731, Comp. Stats., 1910.

See, also, Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

year from the date of such approval, and that the construction shall be completed within a period of five years from such date. He may limit the applicant to a less period of time for the completion of the work. He shall also have the authority, for good cause shown, to extend the time for the completion of the works.[2]

§ 2108. **The appropriation of water—Appeals.**—Any applicant feeling himself aggrieved by the endorsement made by the State engineer upon his application may, in writing, in an informal manner and without pleadings of any character, appeal within sixty days of the date of such endorsement, and serve notice thereof to the applicant, to the board of control, for an examination and reversal of any such action of the State engineer. Upon receipt of such appeal, the secretary of the board shall notify its members, and a date must be fixed when such appeal shall be heard. Parties interested must be notified of such hearing and may appear and may be heard.

An appeal may also be taken from the order of determination of the board of control in the case to the district court in which the greatest use of water is proposed to be made under the application. Such appeal must be taken within six months of the date of the action of the board. The procedure in such appeals must be in conformity to the provisions of Sections 780 to 788, and Section 798, hereinafter discussed under appeals from orders adjudicating rights.[1] The attorney general of the State shall, in such cases, represent the State board of control.[2]

§ 2109. **The appropriation of water—Certificate—Priority—Use of water.**—Upon it being made to appear to the satisfaction of the board of control that any appropriation has been perfected in accordance with such application, and the endorsement thereof by the State engineer, it is made the duty of the board of control, by the hand of its president, attested under the seal of the secretary, to send to the county clerk a certificate of the same character as that described in Section 778, hereinafter discussed under the

2 Sec. 732, Comp. Stats., 1910.
1 See Sec. 2114.
2 Sec. 733, Comp. Stats., 1910.

adjudication of water rights,[1] which certificate shall be recorded in the office of the county clerk.[2]

The priority of such appropriation shall date from the filing of the application in the engineer's office.[3]

Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes, irrespective of the carrying capacity of the ditch, and all the balance of the water not so appropriated shall be allowed to run in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby; and in case the owner or owners of any such works shall fail to use the water therefrom during any five successive years, they shall be considered to have abandoned the same, and shall forfeit all rights thereto, and the water formerly appropriated by them may again be appropriated for irrigation and other beneficial purposes; neither shall the owner of such ditch have any right to receive from others any royalty for the use of water carried thereby, but every such owner or owners having a surplus of water and furnishing the same to others from any ditch, canal, or reservoir shall be considered common carriers and shall be subject to the same laws that govern common carriers.[4]

Those entitled to the use of water are given the right to rotate in the use as between themselves, when such rotation can be made without injury to prior rights.[5]

Appropriators are required to construct and maintain head-gates and measuring devices. Upon a refusal of the appropriator to comply with this provision, the water commissioner is authorized to shut the ditch, and no water will be permitted to run therein until the order is complied with.[6]

Legal Standard for the Measurement of Water.—"A cubic foot of water per second of time shall be the legal standard for the measurement of water in this State, both for the purpose of determining

1 See Secs. 2111-2114.

2 Sec. 738, Comp. Stats., 1910; Board of Commrs. Fremont Co. v. Perkins, 5 Wyo. 168, 38 Pac. Rep. 915; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

3 Sec. 739, Comp. Stats., 1910; Whalon v. North Platte etc. Co., *supra*.

4 Sec. 741, Comp. Stats., 1910; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

5 Sec. 806, Comp. Stats., 1910.

6 Sec. 740, Comp. Stats., 1910.

the flow of water in natural streams, and for the purpose of distributing water therefrom."[7]

And, where the appropriation is for irrigation, no allotment shall exceed one cubic foot per second for each seventy acres of land.[8]

§ 2110. **Reservoir permits—Appropriation of water furnished by reservoirs.**—Any person, corporation, association, or organization, of any nature whatsoever, intending to store, for a beneficial use, any of the unappropriated waters of the State of Wyoming, shall, before commencing any works for such purpose, make an application to the State engineer for a permit to construct a reservoir. The form of such application and the procedure thereunder is similar to that prescribed for the construction of other works, and discussed in a preceding section;[1] provided, that an enumeration of any lands proposed to be irrigated under this chapter shall not be required under the primary permit, but must be enumerated under the secondary permit, which is provided for as follows: The party proposing to apply to a beneficial use the water stored in any such reservoir shall file with the State engineer an application for permit, to be known as the secondary permit, in compliance with the provisions of Sections 727 to 737, inclusive.[2] The said application shall refer to such reservoir for a supply of water, and must be accompanied with documentary evidence that the applicant has entered into an agreement with the owner of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in the application. When the beneficial use of the water has been completed, a final certificate of appropriation shall be issued, and shall refer both to the ditch described in the secondary permit and the reservoir described in the primary permit.[3] Whenever the owner of a reservoir shall desire the use of the bed of the stream, for the purpose of carrying stored water, he shall notify the water commissioner of the district, giving the date when it is proposed to discharge water from such reservoir, its volume in acre feet, and the names of the persons

7 Sec. 742, Comp. Stats., 1910.
8 Sec. 777, Comp. Stats., 1910.
1 See Sec. 2109; Secs. 727-737, Comp. Stats., 1910.
2 See Sec. 2106.
3 Sec. 744, Comp. Stats., 1910.

and ditches entitled to its use. The water commissioners shall then close, or so adjust the headgates of all ditches, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled.[4]

Provisions are made for the appointment by the State engineer of an assistant engineer, whenever the same shall be necessary for the protection of the various interests involved. The State engineer must estimate the cost of such superintendence, which amount must be paid at once to the State engineer by those undertaking the work. A failure to comply with these provisions subjects the permit to cancellation.[5]

The use of water stored under the provisions of this chapter may be acquired on such terms as shall be agreed upon by and between the parties in interest.[6] The priority of right to store or impound water shall date from the filing of the application in the State engineer's office.[7]

The owners of reservoirs shall be liable for all damage arising from leakage or overflow of the waters therefrom, or by floods caused by the breaking of embankments of such reservoirs.[8]

§ 2111. The determination of existing rights—Notice and statement of claim.—The board shall prepare a notice setting forth the date when the engineer will begin a measurement of any particular stream and the ditches diverting the waters therefrom, and a place and date when the superintendent of that division shall begin the taking of testimony as to the rights of the parties taking water therefrom. Provisions are made for the publication of the notice and adjournments. It is also the duty of the superintendent to mail to each party having a recorded claim to the waters of said stream a similar notice, and he shall in addition thereto enclose with said notice a blank form on which the claimants shall present in writing all the particulars concerning the appropriation; the said statement to include the following: "The name and postoffice address of the claimant. The nature of the use on which the claim for appropria-

4 Sec. 745, Comp. Stats., 1910.
5 Secs. 746-748, Comp. Stats., 1910.
6 Sec. 749, Comp. Stats., 1910.
7 Sec. 750, Comp. Stats., 1910.
8 Sec. 751, Comp. Stats., 1910.

See, also, Howell v. Big Horn etc. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596.

See, also, for damages from reservoirs, Secs. 1670-1672.

tion is based. The time of the commencement of such use, and if distributing works are required. The date of beginning the survey. The date of beginning of construction. The date when completed. The date of beginning and completion of enlargements. The dimensions of the ditch as originally constructed and as enlarged. The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation the amount of land reclaimed the first year; the amount in subsequent years, with the dates of reclamation, and the amount of land such ditch is capable of irrigating. The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the appropriation and the rank of priority claimed." Each of said claimants is required to certify to his statements under oath.[1]

Whenever the State board of control shall proceed to adjudicate and determine the rights of the various claimants to the use of water upon any stream, it is made the duty of all claimants to appear and submit proof of their respective appropriations, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his appropriations shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream embraced in such proceedings, and shall be held to have forfeited all rights to the use of said stream theretofore claimed by him. Provided, that any person claiming such rights, upon whom no notice was served other than by the publication in the newspaper, may, within one year after the entry of the order of the board, have the same opened and be permitted to give proof of his appropriation, upon giving notice to the other parties interested.[2]

Upon the date named in the notice provided for as above, the division superintendent shall begin the taking of said testimony, and shall continue until said testimony shall be completed; provided, that adjournments may be taken of the hearing from time to time, for good cause. In taking proofs of appropriation under permits issued after the stream has been adjudicated, the superintendent may authorize the water commissioner to take such proofs, and forward the same to the division superintendent. Upon the completion of the taking of the evidence by the division superin-

[1] Secs. 765-769, Comp. Stats., 1910. [2] Sec. 794, Comp. Stats., 1910.

tendent, it shall be his duty to at once give notice in one issue of a newspaper of general circulation in the county, and by registered mail to the various claimants, that upon a certain day and place named in the notice, all of said evidence shall be open to the inspection of the various claimants, and the superintendent shall keep the said evidence open to inspection not less than one day and not more than five days.[3]

It is also made the duty of the State engineer to proceed at the time specified in the notice to the parties on said stream, to be adjudicated, to make an examination of said stream, and the works diverting water therefrom, the said examination to include the measurement of the discharge of the said stream, and of the carrying capacity of the various ditches and canals diverting therefrom; an examination of the irrigated lands, and an approximate measurement of the lands irrigated, or susceptible of irrigation from said ditches, which observation and measurements shall be reduced to writing, and made a matter of record in his office. A plat of the lands and stream must also be made.[4]

§ 2112. The determination of existing rights—Contests—Transmission of evidence.—Should any person, corporation, or association of persons desire to contest the rights of any one who has submitted his evidence as in the last section provided, he shall, within 15 days after the testimony so taken was opened to public inspection, in writing, notify the superintendent of the division, stating with reasonable certainty the grounds of the proposed contest, which statement shall be verified; and the said superintendent shall notify the said contestant and the one whose rights are contested to appear before him at such convenient place as the superintendent shall designate in said notice. The superintendent shall fix the place and time, both as to the day and hour, for the hearing of the said contest, not less than 30 nor more than 60 days from the date of the service of notice; the said notice to be served and returned in the same manner as summons issued out of the district court. The superintendent must hear the testimony in the case, and the said hearing may be adjourned from time to time. He has the power to issue subpoenas and compel the attendance of

[3] Secs. 770, 771, Comp. Stats., 1910. [4] Sec. 776, Comp. Stats., 1910.

witnesses. The evidence on such proceedings shall be confined to the subjects enumerated in the notice of contest. The superintendent shall require a deposit of $8 per day from each party, the successful party to receive back his deposit after the determination of the contest.[1]

Upon the completion of the evidence in the original hearing, and that taken in all contests, it is made the duty of the superintendent to transmit the same to the office of the board of control, in person or by registered mail.[2]

Whenever the rights to the use of the waters of any stream have been adjudicated, and it shall appear by the records that it had not been at one and the same time, any person who may desire to contest the claims or rights of other persons shall proceed in the manner provided as above; provided, that contests may not be entered into except between appropriators who were not parties to the same adjudication in the original hearings. The evidence in such contests must be sent to the board of control, which is given the power to cancel any old certificate and to issue new ones, if necessary as the result of such contest.[3]

§ 2113. The determination of existing rights—Order determining priorities—Certificates of right.—At the first regular meeting of the board of control, after the completion of the measurement by the State engineer, and the return of the evidence by the division superintendent, it is made the duty of the board to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to use the waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use. Each appropriation shall be determined by its priority and amount, by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purposes; provided, that such appropriator shall at no time be entitled to the use of more water than he shall make a beneficial application of on the lands for which the appropriation was made. Pro-

1 Secs. 772-774, Comp. Stats., 1910.
2 Sec. 775, Comp. Stats., 1910.
3 Secs. 795, 796, Comp. Stats., 1910.

vided, that no allotment shall exceed one cubic foot per second for each seventy acres of land.[1]

The final orders or decrees of the board of control as to the determination of rights shall be conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream, subject, however, to the provisions of law for rehearings in such proceedings, and for the reopening of the orders and decrees therein and for appeals from such orders or decrees.[2]

After the respective rights have been determined, it is made the duty of the secretary of the board of control to issue to each person, association, or corporation a certificate of his right, to be signed by the State engineer as president of the board, and attested under seal by the secretary, setting forth the name and postoffice address of the appropriator, the priority date and number of such appropriation, the amount of water appropriated, and, if such appropriation be for irrigation, a description of the legal subdivisions of the land to which said water is to be applied. Such certificate is to be transmitted to the county clerk of the county in which the appropriation is made, for record, and thereafter to be transmitted to the appropriator.[3]

After any final order of the board of control, adjudicating the priorities upon any stream, any party interested therein may, within one year thereafter, apply for a rehearing for reasons to be stated in the application. Notice of such rehearing must be served on the adverse parties. Upon such hearing, the board is given the authority to modify or alter the original order as shall appear to be just and proper.[4]

§ 2114. The determination of existing rights—Appeal to the courts.—Any party or number of parties acting jointly, who may feel themselves aggrieved by the determination of the board of control, may appeal from the decision of the board to the district court of the county in which the stream involved in such determination

1 Sec. 777, Comp. Stats., 1910.
See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.
2 Sec. 793, Comp. Stats., 1910.
3 Sec. 778, Comp. Stats., 1910.
See, also, Farm Inv. Co. v. Carpenter, *supra;* Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.
4 Secs. 788, 789, Comp. Stats., 1910.

may be situated. All persons joining in the appeal shall be joined as appellants, and all persons having interests adverse to the parties appealing, or either of them, shall be joined as appellees.[1] The party appealing shall, within 60 days of the determination of the board, file in the district court a notice in writing stating that such party or parties appeal to such district court from the determination and order of the board of control; and, upon filing of such notice, the appeal shall be deemed to have been taken; provided, however, that the party appealing shall, within the sixty days mentioned, enter into an undertaking, to be approved by the district court, and to be given to all the parties in the said suit or proceeding, other than the parties appealing, and to be in such an amount as the court shall fix, conditioned that the parties without unnecessary delay will prosecute their appeal, and will pay all costs and damages, which the parties to whom the undertaking is given, or either, or any of them, may sustain in consequence of such appeal.[2]

Upon the filing of the notice of appeal, and the approval of the bond, the clerk of the district court shall transmit to the board of control a notice to the effect that the appeal has been perfected, which notice shall be entered of record by the secretary of the board, and the appellant shall cause a certified copy thereof to be served on each of the appellees, in the same manner as is provided for the serving of a summons in the district court. The appellant shall also, within six months after the appeal is perfected, file in the office of the clerk of the district court a certified transcript of the order made by the board, and a certified copy of all of the records of the board relating to such determination, and a certified copy of all the evidence offered before the board, together with the petition setting out the cause of complaint of the party appealing, to which petition all parties joined as appellees shall be served with notice by the issuance of summons out of the office of the clerk of the district court.[3]

All proceedings on appeal shall be conducted according to the provisions of the code of civil procedure, and the practice of ap-

1 Sec. 779, Comp. Stats., 1910.

See, also, Daley v. Anderson, 7 Wyo. 1, 48 Pac. Rep. 839, 75 Am. St. Rep. 870.

2 Sec. 780, Comp. Stats., 1910; Daley v. Anderson, *supra*.

3 Secs. 781, 782, Comp. Stats., 1910; Daley v. Anderson, *supra*.

peals from the district court of the State to the supreme court; provided, that the practice on appeal in the district court, as to pleadings necessary to be filed and the admission of evidence upon the trial, shall be the same as is now or may hereafter be provided for by law regulating appeals from the justice court. In other words, the case is to be tried *de novo*.[4]

It is made the duty of the clerk of the court, immediately upon the entry of any judgment, order, or decree by the district court, to transmit a certified copy of the same to the board of control. The same must be immediately entered upon the records, and the State engineer shall forthwith issue to the superintendent of the water division, instructions in compliance with the said judgment, order, or decree, and in execution thereof.[5]

The party defeated on appeal must pay the costs thereof. During the pendency of an appeal, the division of the water from the stream involved shall be made in accordance with the order of the board of control. Proceedings under the order of the board of control may be stayed by filing a stay bond in the district court, conditioned for the payment of all damages caused by not enforcing such order.[6] An appeal may, of course, be had from the judgment of the district court to the supreme court of the State under the usual proceedings provided by the statute. All appeals, both in the district and supreme courts, are to be advanced to the head of the docket for the trial or hearing of civil cases.[7]

It is made the duty of the clerks of the several district courts in the State, upon the rendering of judgment by the respective courts in each and every case wherein is involved, in any way, any question affecting the title to any water rights, irrigating, or water system of any kind whatever, to forthwith forward to the board of control a certified copy of such judgment.[8]

§ 2115. **The ownership of irrigation works.**—Unless the owners of irrigation works make a record as provided by the statute, or have a record thereof made in some other manner, showing the relative ownership of each interested party in such works, "said interests shall be established by the ratio between the water right of each water user to the total rights adjudicated under such irri-

4 Sec. 783, Comp. Stats., 1910.
5 Sec. 784, Comp. Stats., 1910.
6 Secs. 783-786, Comp. Stats., 1910.
7 Sec. 787, Comp. Stats., 1910.
8 Sec. 797, Comp. Stats., 1910.

gation works." The relative interests of joint owners shall, therefore, be fixed by the issuance of the final certificate of appropriation as the same appears of record on February 20, 1907, or as shall hereafter be recorded in the office of the board of control and in the offices of the respective county clerks, "and no action for the recovery of the title to such irrigation works can be brought after ten years from the date when the final certificates of appropriation have been recorded in the office of said county clerk." Provided, that during such ten years the interested water users, as mentioned in the final certificates of appropriation, or their successors, have had continuous, open, adverse, and undisputed possession of such irrigation works. And every conveyance of such works shall hereafter be executed and acknowledged in the same manner as a conveyance of real estate, and recorded as provided, "and any such conveyance which shall not be made in conformity with the provisions of this chapter shall be null and void as against subsequent purchasers thereof in good faith and for a valuable consideration."[1] Affidavits of interest may be made by the respective parties, which affidavits shall be *prima facie* evidence of the facts therein stated in any courts of the United States.[2]

Any transfer made to a purchaser in good faith and for a valuable consideration, of any irrigation works after the expiration of ten years from the filing of the affidavit above described, shall vest in the grantee an absolute title in fee simple, free from the claims of any person whatsoever, to the extent of such irrigation works as are claimed in such affidavit, unless before the expiration of said ten years any other party claiming an interest in such irrigation works has filed in the office of the county clerk an affidavit as mentioned in Section 808.[3] Any one falsely swearing to such an affidavit is guilty of perjury.[4]

Where the ownership of any irrigation work is disputed, an action in equity may be brought in the proper court, for the determination of the respective rights of the interested parties. "Provided, that the provisions of this chapter shall not be construed to relate to water rights, or in any way to conflict with the laws governing the same."[5]

1 Sec. 807, Comp. Stats., 1910.
2 Secs. 808, 809, Comp. Stats., 1910.
3 See *supra*.
4 Sec. 811, Comp. Stats., 1910.
5 Sec. 812, Comp. Stats., 1910.

§ 2116. Ditches and the care of.—It is made the duty of the owner or owners of any ditch for irrigation, or other purposes, to carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others.[1] And, for the purpose of maintaining its works, all mutual corporations and associations are given the power to levy and collect assessments; provided, that any company or association shall have the right to close the headgate and refuse water to all such stockholders, owners, or members who fail or refuse to pay said assessments after ten days' notice thereof, in writing.[2]

The prior vested rights of any mill or ditch owner, or other person, to the use of any such water course are to be preserved.[3] When any such ditch shall be constructed over any public road, it must be bridged by the owner within three days thereafter; otherwise it is made the duty of the county commissioners to bridge the same, at the cost of the owners.[4] Ditch owners are not permitted to dam the waters of any stream or ditch, so as to overflow any public road, or undermine any walls of road embankments, or bridges, and are liable to punishment for so doing, and are also liable to damages.[5] It is made the duty of the owners of such a ditch, at the point where the water is diverted from the natural channel, to construct "some fit and proper obstruction whereby all fish will be prevented from entering said ditch or canal." Any person violating this provision shall be adjudged guilty of a misdemeanor.[6]

The interference with any headgate or water box, or the cutting or breaking down, or the opening of any gate, bank, embankment, or side of any ditch, canal, reservoir, flume, tunnel, or feeder, without authority, is made a misdemeanor, to be punished, upon con-

1 Sec. 813, Comp. Laws., 1910.

See, also, Big Goose etc. Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955; Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596; Chicago etc. Co. v. McPhillamey, —— Wyo. ——, 118 Pac. Rep. 682.

2 Sec. 820, Comp. Stats., 1910.

3 Secs. 814, 821, Comp. Stats., 1910.

See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

4 Sec. 815, Comp. Stats., 1910.

See, also, Sec. 2567, Comp. Stats., 1910.

5 Secs. 2575, 2576, Comp. Stats., 1910.

6 Sec. 816, Comp. Stats., 1910.

See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

viction, by fine or imprisonment, or both.[7] And, for this purpose, the water commissioners are given the power to arrest any person so violating the law, and to prefer a complaint before the proper justice of the peace against the party so arrested.[8]

§ 2117. The organization of ditch companies.—In 1884 an Act of the legislature was passed for the incorporation of ditch companies, which provides that whenever three or more persons associate to form a company for the purposes of constructing a ditch or ditches for the purpose of irrigating lands, or for other useful purposes, they shall in their certificates specify as follows: "The stream or streams from which the water is to be taken, the point or place on said stream at or near which the water is to be taken out, the line of said ditch as near as may be, and the use to which said water is intended to be applied." A right of way is given to the ditch company, provided that the lines proposed shall not interfere with any other ditch whose rights are prior. Nor shall the water of any stream be diverted from its natural channel by such a company to the injury of prior rights. Every ditch corporation is required to keep its ditch in good condition. Whenever it is necessary to cross any mining claim with a ditch, the ditch company must flume the ditch so far as necessary to protect such claim from injury from the water from said ditch; provided, that in all cases where the ditch has priority of right, the owners of such claim shall be compelled to protect themselves from damages and shall be liable for all injuries to the ditch.[1]

The stock of all ditch companies is made assessable, for the purpose of maintaining the property, and the payment of all necessary expenses.[2]

§ 2118. Partnership ditches — Maintenance—Disagreements.—In cases of partnership ditches, if a co-owner fails to perform his share of the work to properly maintain a ditch, the others may,

7 Secs. 817, 819, Comp. Stats., 1910. See, also, Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661.

8 Sec. 818, Comp. Stats., 1910.

1 Secs. 4009-4011, Comp. Stats., 1911. See, also, Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Howell v. Big Horn etc. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596.

2 Sec. 820, Comp. Stats., 1910.

after ten days' notice, perform such work, and recover therefor from such person or persons so failing in any court having jurisdiction of the matter.[1] Also, if such owner fails to pay such share within 30 days after receiving a statement thereof, an itemized sworn statement may be filed with the county clerk, and thereby become a lien on the interest in such ditch of the owner in default, which lien may be enforced in the same manner as is provided by law for the enforcement of mechanics' and builders' liens.[2]

Where two or more joint owners in irrigation works, not incorporated, are unable to agree relative to the division or distribution of water, any such owner may apply to the water commissioner of the district, who may then take exclusive charge of such works for the purpose of dividing the water therefrom in accordance with the rights established. The payment for the services of the commissioner must be made by such parties; and any payment not made for such services, after written demand has been made therefor, shall be a lien upon any land or other property owned by an interested water user refusing to pay, and may be recovered by the water commissioner in any court of competent jurisdiction.[3]

§ 2119. **Dams—Inspection of, for protection.**—For the protection from the breakage of dams, the following provisions were enacted: Duplicate plans for any dam across the channel of a running stream, above five feet in height, or of any other dam intended to retain water above ten feet in height, shall be submitted to the State engineer for his approval, and it shall be unlawful to construct such dam until the said plans are approved.[1] The State engineer is also given the authority to examine and inspect, during construction, any dam, or any ditch, canal, or other work carrying over 50 cubic feet of water per second, and at the time of such inspection he may order the parties constructing the same to make any addition or alteration which he may consider necessary for

[1] Sec. 822, Comp. Stats., 1910; Mau v. Stoner, 14 Wyo. 183, 83 Pac. Rep. 218, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466.

[2] Sec. 823, Comp. Stats., 1910; Mau v. Stoner, 12 Wyo. 478, 76 Pac. Rep. 584.

[3] Sec. 824, Comp. Stats., 1910.

[1] Sec. 825, Comp. Stats., 1910.

the security of the work or the safety of any person or persons residing on or owning land in the vicinity of such works.[2]

After such works are constructed, should any person, residing or owning lands in the neighborhood, apply to the State engineer in writing, desiring an inspection of such works, the engineer may order such inspection. Before doing so, he may require the applicant to make a deposit of a sufficient sum to pay the expenses of such inspection. In case the application appears to the engineer to have been justified, he may require the owner to pay such expenses.[3]

§ 2120. **Floating logs and timber upon streams.**—Any person or company desiring to float logs, timber, or lumber, down or upon any stream in the State shall, before commencing operations, apply to the State engineer for a permit. Before such permit is granted, the engineer shall require that a bond shall be given to the State, in such sum as he may deem sufficient, conditioned for the conducting of said drive without delay and for the protection of the owners of irrigating ditches and property along the stream whereon said drive is to be made. Any one violating the provisions of this section shall, on conviction, be fined or imprisoned, or both.[1]

§ 2121. **Irrigation engineers and qualifications.**—By the Act of 1907,[1] it was provided that all engineers and surveyors who shall hereafter perform any field work preliminary to the preparation of an application for permit to use the water of the State, or who shall make any surveys or do engineering work relative to the utilization or use of water, shall satisfy a board, to be known as the board of examining engineers, who shall consist of the State engineer and two engineers of thorough training and experience, to be appointed by the Governor, and serve without compensation, that they belong to one or more of the following classes:

1. Land surveyor. (Examination, plane surveying.)
2. Topographic engineer. (Examination, plane surveying and topographic surveying.)
3. Hydraulic and hydrographic engineer. (Examination, plane surveying and hydraulics.)

2 Sec. 826, Comp. Stats., 1910; Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596.

3 Sec. 827, Comp. Stats., 1910; Howell v. Big Horn etc. Co., *supra*.

1 Sec. 828, Comp. Stats., 1910.

1 Laws, 1907, Chap. 86, Sec. 28.

4. Construction and designing engineer. (Examination, plane surveying, design of irrigation works and structures, and computation of earth work.)

5. Administrative irrigation engineer. (Examination, plane surveying, hydraulics, construction work, irrigation law, and practice.)

In case the board is satisfied as to the standing of any applicant, it shall issue a license, upon payment of a fee of $5. The license may be revoked for good cause shown. The State engineer is authorized to refuse to accept any and all work of those who do not avail themselves of the benefit of the Act.[2]

§ 2122. **Recovery for labor and supplies—Bond—Liens.**—By the Act of the legislature of 1909,[1] it is provided that whenever any ditch or canal company shall contract with any persons, or company, for the construction of its works, the owner of such works shall take from the party so contracting to construct the same a bond in some guarantee or surety company, conditioned that such contractor will pay or cause to be paid all laborers, and persons who supply such contractor with material, provisions, or goods of any kind; and if any such ditch or canal company fail to take such bond, such company, or other owners shall be liable to the full extent of such debts. All persons to whom any debt of the kind mentioned in the Act is due shall severally have a right of action on said bond, upon complying with the provisions of the Act.[2]

Every person furnishing labor, material, or supplies in carrying on the work of construction, whose demand has not been paid, may deliver to the owner of such works a verified statement of account, and thereupon such owner shall retain out of the subsequent payments to the contractor the amount of such unpaid account. It is then made the duty of such owner to furnish the contractor a copy of such statement; and, if the contractor shall not, within ten days after the receipt thereof, give the owner written notice that the claim is disputed, the owner shall be justified in paying the same and charging the same to the contractor. Such claimant may then recover in an action at law such amount. This right is given in addition to the right of action upon the bond, as above described.[3]

2 Sec. 874, Comp. Stats., 1910.
1 Laws, 1909, Chap. 78, Secs. 1-3.
2 Sec. 3823, Comp. Stats., 1910.
3 Secs. 3824, 3825, Comp. Stats., 1910.

§ 2123. Condemnation proceedings.—"Every person, association of persons, company, or corporation," or municipal corporation, who shall, in the course of their business, require "a way of necessity" for reservoirs, ditches, power transmission lines, or other such works, on or across the lands of others, "for agricultural, mining, milling, domestic, electric power transmission, municipal, or sanitary purposes," are given the power to make the necessary surveys, and thereafter to condemn private property for the purposes named. The statute provides for complete procedure for the condemnation of such rights, which must be strictly followed.[1]

Under Article XIII, Section 5, of the State constitution, cities and towns may condemn water rights for domestic and municipal purposes.[2] The right is also given the board of control to change the right of the use of water from one use to some preferred use enumerated by the statute.[3]

§ 2124. Carey Act lands and rights, and procedure therefor.—Wyoming was one of the States designated to receive the benefits under the Carey Act.[1] The legislature of the State by the Act of 1895 [2] accepted the grant and the provisions of the law of Congress as specified in the Act.[3] The selection, management, and disposal of the said land is vested in the State board of land commissioners.[4] The statute provides for the procedure for the acquisition of such lands, which procedure may be supplemented by rules of the board, not in conflict with law.[5]

The person, company of persons, association, or incorporated company making application to the board for the selection of lands by the State shall have filed with the State engineer an application for

1 Secs. 3874-3889, Comp. Stats., 1910. See, also, Laws, 1911, Chap. 94, p. 138.

See, also, for right of eminent domain, Chap. 55, Secs. 1059-1098.

See, also, Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Sterritt v. Young, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994.

2 See Sec. 2100.

3 See Secs. 724-726, Comp. Stats., 1910.

See, also, Sec. 2101.

1 For the Carey Act and the discussion thereunder, see Chap. 67, Secs. 1312-1336.

2 Laws, 1895, Chap. 38, Sec. 1.

3 Sec. 661, Comp. Stats., 1910.

4 Sec. 662, Comp. Stats., 1910.

5 Secs. 662-696, Comp. Stats., 1910.

a permit to appropriate water for the reclamation of such lands. The application and procedure under the same are the same as for other appropriations of water, discussed in previous sections.[6] Before there can be an approval of the board, the whole matter must be submitted to the State engineer, for a complete report thereon, including the feasibility of the proposed project in all its phases. On receipt of the report of the State engineer, the commissioner of public lands shall place the request and proposal, with the engineer's report thereon, before the board for its consideration. In case of approval the board shall instruct the commissioner of public lands to file in the local land office a request for the withdrawal of the lands described in the proposal.[7]

The final proof of the settler upon these lands "shall embrace evidence that he has a perpetual water right for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof; that he has been an actual settler thereon, or has been for three years prior to the date of making his final proof a settler in the colony or settlement in the immediate vicinity thereof, and has cultivated and irrigated not less than twenty acres of said land."[8]

§ 2125. **Irrigation district law.**—The policy of the legislature of Wyoming having been entirely in the direction of State control, or State administrative laws, governing the acquisition of the right to use water, and its distribution, it was not until the Act of the legislature of 1907 that the irrigation district law was adopted, which law is better adapted to thickly settled communities.[1] In this State, as in other States adopting the irrigation district law, the Act was largely taken from the California law as amended, and as tested by the decisions of the Supreme Court of that State and by the Supreme Court of the United States.[2] There are, however, two very important distinctions, and these are, only lands that are to be benefited by such expenditure may be included within a dis-

6 See Secs. 1312-1336.

7 Secs. 669-671, Comp. Stats., 1910.

8 Sec. 678, Comp. Stats., 1910.

1 Laws, 1907, Chap. 72, Secs. 1-45; Secs. 829-873, Comp. Stats., 1910; Sec. 829, as amended, Laws, 1911, Chap. 99, p. 139.

2 For the discussion of the irrigation district law, see Chap. 70, Secs. 1386-1432.

trict, and the State engineer is required to pass upon the feasibility of the plans for the district, after which they are submitted to the county commissioners of the county in which the district is located. By this provision the rights of the State, the general public, and the bondholders are protected.

The last section of the Act is notable, in that the provisions of the chapter shall not apply to or affect lands which have been or may hereafter be segregated under the provisions of the Carey Act, "nor to lands and the owners thereof situated under and susceptible of irrigation from any system of reservoirs, ditches, or canals for which water right permits have been granted, or shall hereafter be granted, by the State engineer to persons or corporations who propose the construction of reservoirs, ditches, or canals for the irrigation of lands susceptible of irrigation therefrom. And every irrigation district organized under the provisions of this chapter shall in all things be subject to the provisions of the statutes of this State relative to the acquisition, appropriation, use, and distribution of water and all rights thereto: *Provided,* that the water users and land owners under any irrigation system constructed by any person, company, or corporation, in conformity with the laws of the State, may, after such works have reverted to them through the operation of water right contracts, organize under the provisions of this chapter."[3]

§ 2126. **Provisions in aid of the National Reclamation Act.**—A right of way is granted over State lands for ditches and other works constructed under the authority of the United States.[1]

§ 2127. **Prohibiting the pollution of waters.**—Any person depositing in any river, creek, bay, pond, canal, ditch, lake, stream, or other waters any offensive matter or substance whatever shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than $10 nor more than $50. The discharging of sawdust into such water is also subject to the same penalty.[1] It is made the duty of the sheriff or coroner of any county, or a police officer of a city or town, to abate such nuisance,

[3] Sec. 873, Comp. Stats., 1910.
[1] Comp. Stats., 1910, Sec. 3890.
[1] Wyo. Comp. Stats., 1910, Secs. 5965-5967.

the expenses for abating the same to be assessed to the party committing it.[2]

§ 2128. **Criminal statutes.**—Any person who knowingly falsely states his or her ownership in irrigation works, under oath, in the statements required as to such ownership, is guilty of perjury.[1] It is made a misdemeanor not to make fit and proper construction at the intakes of canals to prevent fish from passing therein.[2] The unlawful interference with headgates and the destruction of any irrigation works is made a misdemeanor.[3] Power is given the water commissioners to make arrests, and to make complaints before the proper courts.[4]

§ 2129. **Riparian rights in State.**—The doctrine of riparian rights in the State of Wyoming may be considered to have been wholly abrogated by the general theory of the law governing waters within the State, and as expressed in the constitution, statutes, and court decisions, although there is no express provision to that effect.[1]

2 Wyo. Comp. Stats., 1910, Sec. 5966.

1 Comp. Stats., 1910, Sec. 811.

2 Comp. Stats., 1910, Sec. 816.

3 Comp. Stats., 1910, Secs. 817-819. In the prosecution for unlawful interfering with the headgate of an irrigation ditch, contrary to the above section of the statute, making the one who willfully interferes with any headgate without authority, guilty of a misdemeanor, questions of the ownership of the ditch and headgate held immaterial. Hamp v. State, —— Wyo. ——, 118 Pac. Rep. 653.

4 Comp. Stats., 1910, Sec. 818.

1 See Moyer v. Preston, 6 Wyo. 308, 44 Pac. Rep. 845, 71 Am. St. Rep. 914; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

See, also, for the provisions of the constitution, Sec. 2100.

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